**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

 Public Meeting held October 22, 2009

Commissioners Present:

 James H. Cawley, Chairman

 Tyrone J. Christy, Vice Chairman, Statement

 Kim Pizzingrilli, Statement

 Wayne E. Gardner

 Robert F. Powelson, Statements

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| Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company for Consolidation of Proceedings and Approval of Energy Efficiency and Conservation Plans | Docket Nos. M-2009-2092222, M-2009-2112952 and M-2009-2112956 |

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**OPINION AND ORDER**

**BY THE COMMISSION:**

# I. Introduction

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Joint Petition (Joint Petition) of Metropolitan Edison Company (Met Ed), Pennsylvania Electric Company (Penelec) and Pennsylvania Power Company (Penn Power) (collectively, FirstEnergy or the Companies) for Consolidation of Proceedings and Approval of Energy Efficiency and Conservation Plans (Plans[[1]](#footnote-2)), filed on July 1, 2009. By Order Certifying the Record, dated September 22, 2009, Administrative Law Judge (ALJ) David A. Salapa certified the record in this matter to us for consideration and disposition.

# II. Background

## A. Act 129

Governor Edward G. Rendell signed Act 129 of 2008 (Act or Act 129) into law on October 15, 2008. The Act took effect thirty days thereafter on November 14, 2008. Act 129 has several goals including reducing energy consumption and demand. Among other things, the Act amended the Public Utility Code (Code), 66 Pa. C.S. §§ 101 *et seq*., to require the Commission to develop and adopt an Energy Efficiency and Conservation Program (EE&C Program) by January 15, 2009. The Commission’s EE&C Program is to include the following:

(1) A procedure for approving energy efficiency and conservation (EE&C) plans submitted by electric distribution companies (EDCs).

(2) A process to evaluate and verify the results of each plan and the program as a whole.

(3) A process to analyze the costs and benefits of each plan in accordance with a total resource cost test (TRC Test).

(4) A process to analyze how the program as a whole and each plan will enable the electric distribution companies to meet or exceed the Act’s consumption reduction requirements.

(5) Standards to ensure that each plan uses a variety of measures that are applied equitably to all customer classes.

(6) A process through which recommendations can be made for the employment of additional consumption reduction measures.

(7) A procedure to require and approve the competitive bidding of all contracts with conservation service providers (CSPs).

(8) A procedure through which the Commission will review and modify, if necessary, all contracts with CSPs prior to execution.

(9) A procedure to ensure compliance with the requirements of Sections 2806.1(c) and (d) of the Code, 66 Pa. C.S. §§ 2806.1(c) and (d).

(10) A requirement for the participation of CSPs in the implementation of all or part of a plan.

(11) A cost recovery mechanism to ensure that measures approved are financed by the customer class that directly receives the energy and conservation benefits.

66 Pa. C.S. § 2806.1(a)(1)-(11).

On October 21, 2008, the Commission issued a Secretarial Letter seeking comments on each of the individual aspects of the EE&C Program outlined in 66 Pa. C.S. § 2806.1(a)(1)-(11). Pursuant to an October 29, 2008 Secretarial Letter at Docket No. M-00061984, comments were due November 3, 2008. In addition, the Commission held a special *en banc* hearing on alternative energy, energy conservation and efficiency, and demand side response on November 19, 2008. Comments in reply to those comments expressed at the *en banc* hearing were due no later than December 1, 2008.

On November 26, 2008, the Commission circulated a draft staff proposal and further questions relative to the Act 129 implementation plan. Comments on the draft proposal were due December 8, 2008. An EE&C Program stakeholder meeting was held on December 10, 2008. Reply comments were due by December 19, 2008.

By Opinion and Order entered January 16, 2009, at Docket No. M-2008-2069887, *In re: Energy Efficiency and Conservation Program*  (*Implementation Order*), the Commission established the standards that EE&C plans must meet and provided guidance on the procedures to be followed for submittal, review and approval of all aspects of EDC plans.

On January 30, 2009, the Energy Association of Pennsylvania (Energy Association) filed a Petition for Clarification and Reconsideration of the *Implementation Order*. On February 2, 2009, the Industrial Energy Consumers of Pennsylvania (IECPA) filed a Petition for Clarification of the *Implementation Order.* By Opinion and Order entered June 2, 2009, at Docket No. M-2008-2069887 (*Reconsideration Order*) the Energy Association’s Petition was denied and IECPA’s was granted. In the *Reconsideration Order*, the Commission declined to extend the peak load reduction compliance period to the summer of 2013, (June 1, 2013 through September 30, 2013), as requested by the Energy Association. The Commission also declined to adopt the Energy Association’s request that the Commission measure only an EDC’s capability to reduce peak demand, as opposed to an actual reduction of peak demand. Finally, the Commission granted the IECPA’s request to allow all parties, not just the EDCs, an opportunity to submit reply briefs in the plan approval proceedings.

Act 129 establishes a requirement for the participation of CSPs in the implementation of all or part of a plan. 66 Pa. C.S. § 2806.1(a)(10). The Commission was required to establish, by March 1, 2009, a registry of approved persons qualified to provide conservation services to all classes of customers. 66 Pa. C.S. § 2806.2(a). The Commission instituted a process at Docket No. M-2008-2074154 to establish the qualification requirements CSPs must meet to be included on the registry. On December 22, 2008, the Commission entered an order tentatively establishing the CSP Registry (*Tentative Order)*. The *Tentative Order* was to become final unless adverse comments were received on or before January 2, 2009. Adverse comments were timely received.

By Opinion and Order entered February 5, 2009, at Docket No.
M-2008-2074154, *In re: Implementation of Act 129 of 2008 Phase 2 – Registry of Conservation Service Providers* (*Final CSP Order*), the Commission established the minimum experience and qualification requirements each CSP must meet to be included in the CSP registry.

In the *Implementation Order,* at 13, the Commission stated that it would utilize the Technical Reference Manual (TRM) to help fulfill the evaluation process requirements contained in the Act. The TRM was previously adopted by the Commission in the Alternative Energy Portfolio Standards Act proceedings at Docket No. M‑00051865. The Commission noted, however, that the TRM may need to be updated and expanded to fulfill the requirements of Act 129. The Commission stated that it would update and expand the TRM at Docket No. M-00051865 to provide for additional energy efficient technologies. On February 20, 2009, the Commission issued a Secretarial Letter seeking comments on a proposed TRM update. Following the receipt of comments and reply comments, and a meeting with interested stakeholders, the Commission, on June 1, 2009, entered its Opinion and Order at Docket No. M-00051865 (*TRM Order*) adopting the 2009 version of the TRM.

The *Implementation Order,* at 14, also noted that the Act requires that the Commission’s EE&C Program include an analysis of the costs and benefits of each EDC’s plan, in accordance with a TRC Test approved by the Commission. 66 Pa. C.S. § 2806.1(a)(3). The Act requires an EDC to demonstrate that its plan is cost-effective using the TRC Test, and that the plan provides a diverse cross section of alternatives for customers of all rate classes. 66 Pa. C.S. § 2806.1(b)(1)(i)(I). The Act defines a “total resource cost test” as “a standard test that is met if, over the effective life of each plan not to exceed 15 years, the net present value of the avoided monetary cost of supplying electricity is greater than the net present value of the monetary cost of energy efficiency conservation measures.” 66 Pa. C.S. § 2806.1(m).

The Commission stated in the *Implementation Order* that the TRC Test set forth in *The California Standard Practice Manual – Economic Analysis of Demand-Side Programs and Projects,* July 2002,[[2]](#footnote-3) (*California Manual*) provides a starting point, but acknowledged that modifications might be necessary to meet any unique requirements of Act 129 and Pennsylvania’s electric industry. The Commission therefore instituted a separate proceeding at Docket No. M-2009-2108601 to review the *California Manual.* On May 29, 2009, the Commission circulated a TRC Test proposal and requested comments relative to TRC testing in Pennsylvania. By Opinion and Order entered June 23, 2009, at Docket No. M-2009-2108601 *In re: Implementation of Act 129 of 2008 – Total Resource Cost (TRC) Test* (*TRC Test Order*), the Commission set forth the nature of the TRC Test to be used in Pennsylvania.

Finally, on April 21, 2009, the Commission issued a Request for Proposals, seeking an Act 129 Statewide Evaluator to assist in evaluating the EDCs’ EE&C programs. At its Public Meeting of June 25, 2009, the Commission selected GDS Associates Inc. Engineers and Consultants as the Act 129 Statewide Evaluator.

## B. The Companies

Met Ed is a wholly-owned subsidiary of FirstEnergy. It provides service to about 547,000 electric utility customers in eastern Pennsylvania. It owns the transmission facilities in its service territory, which are under the operational control of PJM Interconnection, LLC (PJM) as the regional transmission organization (RTO). FirstEnergy St. 1 at 4.

Penelec is also a wholly-owned subsidiary of FirstEnergy. It provides service to about 588,000 electric utility customers in western Pennsylvania. It owns the transmission facilities in its service territory, which are under the operational control of PJM. FirstEnergy St. 1 at 4.

Penn Power is a wholly-owned subsidiary of Ohio Edison Company, which is, in turn, a wholly-owned subsidiary of FirstEnergy. It provides service to about 159,000 electric utility customers in western Pennsylvania. Several years ago, Penn Power sold its transmission facilities to American Transmission System, Inc., a wholly-owned subsidiary of FirstEnergy Corp. These transmission facilities are under the operational control of the Midwest Independent Transmission System Operator, Inc. (MISO) as the RTO. FirstEnergy St. 1 at 4-5. Penn Power, however, has announced that it intends to join PJM in 2011. OCA St. 1 at 42.

# III. Procedural History

As stated above, FirstEnergy filed the Joint Petition on July 1, 2009, requesting Commission approval of the Plans as well as authorization to implement the proposed cost recovery mechanism. FirstEnergy also requested, *inter alia*, consolidation of the Plans for review and approval. Joint Petition at ¶¶ 8, 13, 37 and 38.

On July 13, 2009, FirstEnergy filed a Petition for a Protective Order Covering the Production of Confidential Material. By Order dated July 16, 2009, ALJ Salapa granted this Petition.

 On July 29, 2009, ALJ Salapa conducted a Prehearing Conference. ALJ Salapa subsequently issued Prehearing Order #2, which, *inter alia*, consolidated the EE&C Plans of Met Ed, Penelec and Penn Power for purposes of hearing and decision.

On July 31, 2009, FirstEnergy filed EE&C Plan supplements “in accordance with” the *TRC Test Order.* When the Commission issued the *TRC Test Order* in late June 2009, it noted that time constraints might prevent EDCs from filing EE&C plans conforming with the TRC Test as set forth in that Order. The Commission stated that it would allow EE&C Plan amendments to be filed as of right prior to August 1, 2009. Amendments after that date would be at the discretion of the presiding officer or by leave of the Commission. *TRC Test Order* at 6. According to FirstEnergy, the July 31, 2009 supplements incorporated relevant TRC Test items that could not be incorporated in the July 1, 2009 filings.

A Notice published in the *Pennsylvania Bulletin* on July 25, 2009, stated that the deadline for filing answers along with comments and recommendations addressing the Plan was August 14, 2009. The following Parties filed Notices of Intervention or Petitions to Intervene, which were not contested: the Office of Consumer Advocate (OCA); the Office of Trial Staff (OTS); the Office of Small Business Advocate (OSBA); the Department of Environmental Protection (DEP); the Met-Ed Industrial Users Group (MEIUG), the Penelec Industrial Customer Alliance (PICA) and the Penn Power Users Group (PPUG) (collectively, MEIUG *et al*.);[[3]](#footnote-4) Field Diagnostic Services, Inc. (FDSI);[[4]](#footnote-5) Direct Energy Business, LLC (Direct Energy);[[5]](#footnote-6) the Association of Community Organizations for Reform Now (ACORN);[[6]](#footnote-7) and Rep. Camille “Bud” George (Rep. George).[[7]](#footnote-8)

FirstEnergy contested the Petition to Intervene filed by UGI Utilities, Inc., - Gas Div., UGI Penn Natural Gas, Inc. and UGI Central Penn Gas, Inc. (collectively, UGI Distribution Companies)[[8]](#footnote-9) on the ground that the UGI Distribution Companies sought to pursue the issue of fuel substitution in this proceeding. By Order issued July 31, 2009, ALJ Salapa permitted the UGI Distribution Companies to intervene in this case on the ground that those companies are customers of FirstEnergy, but the ALJ stated that the issue of fuel substitution is beyond the scope of the instant proceeding.

FirstEnergy also contested the Petitions to Intervene filed by Peoples Natural Gas Company d/b/a Dominion Peoples (Dominion Peoples);[[9]](#footnote-10) National Fuel Gas Distribution Corporation (NFG);[[10]](#footnote-11) Constellation New Energy, Inc. (Constellation);[[11]](#footnote-12) and EnerNOC, Inc. (EnerNOC).[[12]](#footnote-13) In part, FirstEnergy argued that these Petitions were not timely filed. By Order dated August 7, 2009, ALJ Salapa permitted these companies to intervene because the challenged Petitions were filed prior to the date specified in Prehearing Order #1 for filing answers, comments or recommendations. Again, the ALJ made clear that the issue of fuel substitution is beyond the scope of this proceeding.

In addition, FirstEnergy contested intervention requests filed by Comperio Energy LLC, d/b/a ClearChoice Energy (ClearChoice);[[13]](#footnote-14) and The E Cubed Company, LLC (E Cubed). FirstEnergy argued that there was no indication that either ClearChoice or E Cubed was represented by counsel as required for corporations by Commission regulations. 52 Pa. Code §§ 1.21-1.23. ALJ Salapa agreed. Order dated July 31, 2009. He also noted that no certificate of service was attached to the letter of E Cubed requesting intervention. The ALJ dismissed both intervention requests, but he stated that both ClearChoice and E Cubed could file new Petitions to Intervene in compliance with the Commission’s Rules of Practice and Procedure regarding attorney representation and certificates of service. ClearChoice subsequently filed a Petition to Amend its Petition to Intervene, in order to designate counsel. By Order dated August 7, 2009, the ALJ granted ClearChoice’s Petition to Intervene.

Finally, FirstEnergy contested the Petition to Intervene filed by Columbia Gas of Pennsylvania, Inc., on the ground that said Petition was not timely filed. In an Initial Decision issued on September 1, 2009, ALJ Salapa agreed with FirstEnergy.

ALJ Robert P. Meehan held Public Input hearings at Mars, Pennsylvania on July 30, 2009. ALJ Salapa held Public Input hearings at Hollidaysburg, Pennsylvania on July 31, 2009 and Wyomissing, Pennsylvania on August 4, 2009.

Comments on FirstEnergy’s EE&C Plans were submitted by the OCA; the OTS; the DEP; EnerNOC; MEIUG, *et al*.; E Cubed; Envinity, Inc. (Envinity);[[14]](#footnote-15) Affordable Energy Now, LLC (Affordable Energy);[[15]](#footnote-16) Keystone Energy Efficiency Alliance (KEEA);[[16]](#footnote-17) PA Home Energy;[[17]](#footnote-18) and the National Association of Energy Service Companies (NAESCO).[[18]](#footnote-19)

ALJ Salapa held evidentiary hearings at Harrisburg, Pennsylvania on August 31, 2009. By Order dated September 10, 2009, ALJ Salapa granted requests to admit late-filed exhibits.

Main Briefs were filed on or about September 11, 2009, by FirstEnergy; the OCA; the OSBA; the OTS; the DEP; ClearChoice; EnerNOC; FDSI; MEIUG, *et al.*; ACORN; Rep. George; and the UGI Distribution Companies, Peoples and NFG (collectively, the NGDCs).

Reply Briefs were filed on or about September 21, 2009, by FirstEnergy; the OCA; the OSBA; the OTS; ClearChoice; EnerNOC; the NGDCs; and MEIUG, *et al*. In addition, *Amicus Curiae* Independent Oil and Gas Association of Pennsylvania (IOGA) submitted a Reply Brief.

Also on September 21, 2009, FirstEnergy filed revised EE&C Plans.[[19]](#footnote-20) On September 25, 2009, the Companies filed replacement pages due to formatting and printing errors on the corresponding pages in the September 21, 2009 Plans.

On September 22, 2009, ALJ Salapa certified the record to the Commission for consideration and disposition.

# IV. Description of the Plans

## A. Requirements of Act 129

Act 129 requires that an EDC with 100,000 or more customers adopt an EE&C plan, subject to approval by the Commission, to reduce electric consumption by at least 1% of its expected consumption for the period June 1, 2009, through May 31, 2010, adjusted for weather and extraordinary loads. This 1% reduction is to be accomplished by May 31, 2011. 66 Pa. C.S. § 2806.1(c)(1). Further, by May 31, 2013, the EDC is required to reduce its total annual weather-normalized consumption by a minimum of 3%. 66 Pa. C.S. § 2806.1(c)(2). Also, by May 31, 2013, the EDC is required to reduce its peak demand by a minimum of 4.5% of the EDC’s annual system peak demand in the 100 hours of highest demand, measured against the EDC’s peak demand during the period of June 1, 2007, through May 31, 2008. 66 Pa. C.S. § 2806.1(d)(1).

Act 129 also establishes the following plan requirements:

(1) The plan shall include specific proposals to implement energy efficiency and conservation measures to achieve or exceed the required reductions in consumption.

(2) A minimum of ten percent of the required reductions in consumption shall be obtained from units of federal, state and local government, including municipalities, school districts, institutions of higher education and nonprofit entities.

(3) The plan shall explain how quality assurance (QA) and performance will be measured, verified and evaluated.

(4) The plan shall state the manner in which the plan will achieve the requirements of the program and will achieve or exceed the required reductions in consumption.

(5) The plan shall include a contract with one or more conservation service providers selected by competitive bid to implement the plan or a portion of the plan.

(6) The plan shall include estimates of the cost of implementation of the energy efficiency and conservation measures in the plans.

(7) The plan shall include specific energy efficiency measures for households at or below 150 percent of the federal poverty income guidelines. The number of measures shall be proportionate to those households’ share of the total energy usage in the service territory. The EDC shall coordinate these measures with other programs administered by the Commission or another federal or state agency. The expenditures of an EDC under this clause shall be in addition to those made under the Commission’s Regulations at 52 Pa. Code Chapter 58.

(8) The plan shall include a proposed cost-recovery mechanism to fund the EE&C measures and to ensure full and current recovery of the prudent and reasonable costs of the plan, including administrative costs.

(9) The EDC shall demonstrate that the plan is cost-effective, using a TRC Test approved by the Commission, and provides a diverse cross section of alternatives for customers of all rate classes.

(10) The plan shall require an annual independent evaluation of its cost-effectiveness and a full review of the results of each five-year plan and, to the extent practical, how the plan will be adjusted on a going-forward basis as a result of the evaluation.

(11) The plan shall include an analysis of the EDC’s administrative costs.

66 Pa. C.S. § 2806.1(b)(1)(i)(A)-(K).

The Act permits an EDC to recover, on a full and current basis from customers, all reasonable and prudent costs incurred in the provision or management of an EE&C plan. The costs, however, are limited to 2% of the EDC’s total annual revenue as of December 11, 2006. 66 Pa. C.S. § 2806.1(g) and (k). The Act also provides that the Commission is to recover its costs of implementing the EE&C Program from EDCs. 66 Pa. C.S. § 2806.1(h).

## B. The Plans

FirstEnergy states that it has coordinated its EE&C development efforts across its three Pennsylvania operating companies to achieve cost efficiencies and to offer a consistent set of programs to customers served by the three companies. Met Ed’s July 1, 2009 Plan at 1. As a result, FirstEnergy’s three Plans are similar, but not identical. To the extent that the Plans are similar, this Opinion and Order will consider them together and refer to them as the Plans. To the extent that the Plans are different, this Opinion and Order will consider them separately and refer to a specific company’s plan.

As stated previously, FirstEnergy has revised the Plans several times. Although FirstEnergy believes the Plans filed July 1, 2009, complied with the requirements of Act 129, it made changes to reflect the *TRC Test Order* as well as suggestions offered by the other Parties to the instant litigation. FirstEnergy’s cover letter to July 31, 2009 Plans; FirstEnergy MB at 2.

As amended, the FirstEnergy Plans offer a suite of programs for all residential customers, low-income residential customers, commercial and industrial (C&I) customers, and government and institutional customers. Programs for residential customers include: a home energy audit program; a residential appliance turn-in program; a residential heating, ventilating and air conditioning (HVAC) program; a residential energy efficiency products program; a residential new construction program; a residential whole building program; a program for tenants in certain multi-family buildings; and a residential direct load control program. Programs specifically intended for low-income residential customers include additional WARM[[20]](#footnote-21) program funding and targeted marketing. Programs for commercial and industrial customers include: an energy audit and technology assessment program; an equipment program; an industrial motors and variable speed drives program; a demand response program; and a performance contracting program. With regard to governmental and institutional customers, programs include: a federal facilities program; a municipal street lighting program; a municipal lighting program; and local and county government energy audits. FirstEnergy MB at 10-13.

FirstEnergy would implement these programs in three stages beginning shortly after the Commission approves the Plans. First, the Companies will conduct an awareness and education campaign. Second, the Companies will conduct an energy audit phase. Finally, the Company will implement a suite of programs and measures to achieve the reductions required by the Act. FirstEnergy MB at 9.

In terms of data reporting and tracking, a Request for Information was issued in May 2009 to gather information on available “packaged” applications in the marketplace. Upon completion of its evaluation of the responses and additional information-gathering activities, the Companies will develop a Request for Proposal. In addition, the Companies intend to retain an evaluation, monitoring and verification contractor to identify issues that may require mid-course correction, gauge progress toward goals and measure satisfaction with programs. FirstEnergy’s September 21, 2009 Plans at § 6.2.

The Plans include budgets for implementing the Companies’ EE&C Plans. *See* FirstEnergy’s September 21, 2009 Plans at Appendix G, Tables 3, 6A-6C. The Companies would recover these costs through an Energy Efficiency and Conservation Charge (EEC-C) Rider, which is calculated separately for residential, commercial and industrial customers for each company. The EEC-C Rider would be a kilowatt-hour rate that is expected to be constant during the entire period covered by the Plans (November 1, 2009, through May 31, 2013). “However, upon determination that the EEC-C rates would result in material over- or under-collections of recoverable costs incurred or expected to be incurred . . . the Company may request that the Commission approve interim revisions to the EEC-C rates.” Met Ed’s September 21, 2009 Plan at 25. A reconciliation of costs and revenues would occur at the end of the forty-three month period. The EEC-C Rider would appear as a separate line item on customers’ bills. *See* FirstEnergy’s September 21, 2009 Plans at Appendix H.

# V. Discussion

In Commission proceedings, the proponent of a rule or order bears the burden of proof. 66 Pa. C.S. § 332(a). To satisfy that burden, the proponent of a rule or order must prove each element of its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990). A preponderance of the evidence is established by presenting evidence that is more convincing, by even the smallest amount, than that presented by the other parties to the case. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission’s decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC,* 489 Pa. 109, 413 A.2d 1037 (1980).

We note that any issue that we do not specifically address herein has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. [Consolidated Rail Corporation v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) see also, generally, [University of Pennsyl­vania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

## A. Act 129 Conservation and Demand Reduction Requirements

### 1. Overall Conservation Requirements

The *Implementation Order*, at 8, noted that both the 1% consumption reduction, to be met by May 31, 2011, and the 3% consumption reduction, to be met by May 31, 2013, are to be measured against the EDC’s expected consumption as forecasted by the Commission for the period June 1, 2009, through May 31, 2010. 66 Pa. C.S.
§ 2806.1(c)(1). Each EDC that was required to file an EE&C plan was required to file its consumption forecast for the period June 1, 2009, through May 31, 2010, by February 9, 2009.

In *Energy Consumption and Peak Demand Reduction Targets,* Docket No. M-2008-2069887 (Order entered March 30, 2009) (*Reduction Target Order*), the Commission approved the forecasts of Met Ed, Penelec and Penn Power of 14,865,036 MWh, 14,399,289 MWh and 4,772,937 MWh, respectively, and in turn approved their respective 1% reduction targets of 148,650 MWh, 143,993 MWh and 47,729 MWh as of May 31, 2011. The *Reduction Target Order* also approved the 3% reduction targets of Met Ed, Penelec and Penn Power of 445,951 MWh, 431,979 MWh and 143,188 MWh, respectively, as of May 31, 2013.

The Plan must include specific proposals to achieve or exceed these required reductions in consumption. 66 Pa. C.S. § 2806.1(b)(1)(i)(A) . The Commission is required to analyze how the program and individual plans will enable the EDC to meet or exceed the required reductions in consumption. 66 Pa. C.S. § 2806.1(a)(4). The Commission is also required to develop procedures to ensure compliance with these requirements. 66 Pa. C.S. § 2806.1(a)(9).

#### a. 2011 Requirements

##### (1) Positions of the Parties

The Plans of Met Ed, Penelec and Penn Power propose total energy savings of 177,911 MWh, 174,588 MWh and 57,164 MWh, respectively, by the end of Program Year 2010 (May 31, 2011). Met Ed’s September 21, 2009 Plan at 20, Penelec’s September 21, 2009 Plan at 19, and Penn Power’s September 21, 2009 Plan at 19.

No Parties filed any objections to the 2011 total energy savings projections. However, DEP raises an issue that should be considered at the outset, in terms of how energy savings are calculated.

DEP objects to FirstEnergy’s Plans to the extent they take credit for energy usage reductions that will be accomplished through the use of federal or state funds. DEP notes that two laws were recently enacted that fund energy conservation programs in Pennsylvania: Pennsylvania’s Alternative Energy Investment Act, 73 P.S. §§ 1649.101‑1649.711 (Act 1) and the federal American Recovery and Reinvestment Act (ARRA). According to DEP, each Plan “jeopardizes the Commonwealth’s ability to obtain future funding under ARRA and thwarts the very purpose of Act 1 and Act 129 by using tax dollars to subsidize EDC EEC Plans.” DEP St. 1 at 5; DEP MB at 13-14.

FirstEnergy notes that it prepared its Plans in accordance with the Commission’s *TRC Test Order*, which specifically addressed this issue. If the Commission would now adopt DEP’s position, FirstEnergy asserts, “it is quite likely that the Companies would not be able to meet the prescribed savings targets in Act 129.” FirstEnergy MB at 38. FirstEnergy also contends that there is no record support for DEP’s assertion that the Plans would jeopardize the Commonwealth’s ability to obtain future federal funding. To the contrary, FirstEnergy notes that the record contains guidelines for ARRA funding applications, which specifically authorize the use of ARRA funds to supplement other funds made available to customers. FirstEnergy Cross Exam. Exh. 3 at 23 and FirstEnergy Cross Exam. Exh. 4 at 10.

FDSI supports FirstEnergy’s approach. FDSI contends that DEP’s “artificial limitation on the use of funding would only tend to hinder customer participation in First Energy’s Act 129 energy efficiency programs: a counter-productive result.” FDSI MB at 18.

##### (2) Disposition

In determining whether an EDC may take credit for all energy savings for measures that also are funded in part by ARRA and/or Act 1, we note that Act 129 specifically provides, in pertinent part, that an EE&C measure may be funded “in whole or in part” by the EDC. 66 Pa. C.S. § 2806.1(m). Neither Act 1 nor Act 129 provides that it is mutually exclusive of the other. In implementing ARRA, the U.S. Department of Energy (DOE) clearly contemplated that ARRA funds could be used in conjunction with other funding. We shall not accept DEP’s proposition to pro-rate or otherwise distribute the energy savings from EE&C projects that receive funding from state or federal sources outside an EDC’s respective Act 129 plan.

Even if a particular measure is funded in part by ARRA and/or Act 1, so long as a portion of the measure is attributable to Act 129, an EDC may take credit for all the energy savings attributable to that measure. We addressed this very issue in our *TRC Test Order*, finding that:

EDCs will be able to fully include a measure’s benefits in the TRC Test if any portion of the measure is attributable to Act 129. For the purposes of TRC testing, if the end-use customer is a recipient of an incentive/rebate from an Act 129 program, even if the customer is also a recipient of an Act 1 incentive or rebate for the same equipment or service, we conclude that the entire savings of that equipment or service can also be claimed by the EDC for TRC testing purposes.

*TRC Test Order* at 25. We remain convinced that the public interest will best be served by taking advantage of all the incentives or rebates available. Rather than pit one government program against another, the programs should complement each other and, optimally, produce a greater saving than the programs would generate working in isolation.

We did not, however, expressly mention ARRA funding when we said that an EDC could fully include the benefits of an Act 129 EE&C measure that is also partially funded by Act 1 funds. To the extent that the ARRA funded benefits are consistent with the rationale underlying our decision relative to Act 1, we expressly provided that ARRA incentive payments should be considered benefits in TRC testing. *TRC Test Order* at 23. Furthermore, since Act 129 funding is fixed, any additional funds, whether from Act 1, ARRA, or elsewhere, will be used to supplement, not replace, funds from the EDC. The decision not to require pro-ration of benefits clearly does not violate the guidelines for ARRA funding. We find that this result is a necessary, reasonable, consistent and logical application of the express provisions of our *TRC Test Order*.

Further, given that FirstEnergy has developed its Plans based on the Commission’s express decision in the *TRC Test Order*, changing the attribution of energy savings from these projects could seriously compromise the ability of FirstEnergy to comply with its EE&C goals. Additionally, the cost and complexity of pro-rating the energy savings among multiple programs would be cost-prohibitive and non-productive. We see no reason to change that determination.

Accordingly, FirstEnergy will be able to fully include a measure’s energy savings and demand reductions if any portion of the measure is attributable to Act 129. For the purposes of Act 129 energy savings and demand reduction requirements and any other or ancillary aspect of Act 129 evaluations, if the end-use customer is a recipient of an incentive/rebate from an Act 129 program, even if the customer is also a recipient of an Act 1 incentive or rebate or ARRA funding for the same equipment or service, we conclude that the entire savings of that equipment or service can also be claimed by the Companies for Act 129 compliance.

Reviewing FirstEnergy’s Plans on this basis, we find that the Plans project total energy savings that will meet or exceed the 2011 targets set forth in the *Reduction Target Order.* Nevertheless, for the reasons set forth below, we will require the Companies to recalculate the projected energy savings and resubmit the Plans in accordance with this Opinion and Order.

#### b. 2013 Requirements

##### (1) Positions of the Parties

Total energy savings expected at the end of Program Year 2012 (May 31, 2013) total 457,929 MWh, 449,609 MWh and 146,721 MWh for Met Ed, Penelec and Penn Power, respectively. Met Ed’s September 21, 2009 Plan at 20, Penelec’s September 21, 2009 Plan at 19, and Penn Power’s September 21, 2009 Plan at 19.

No Parties filed any objections to the 2013 total energy savings projections.

##### (2) Disposition

We find that the Plans project total energy savings that will meet or exceed the 2013 targets set forth in the *Reduction Target Order.* Nevertheless, for the reasons set forth below, we will require the Companies to recalculate the projected energy savings and resubmit the Plans in accordance with this Opinion and Order.

### 2. Overall Demand Reduction Requirements

The *Implementation Order*, at 9, noted that the 4.5% reduction in peak demand, to be met by May 31, 2013, is to be measured against the EDC’s historical peak load for the period June 1, 2007, through May 31, 2008. 66 Pa. C.S. § 2806.1(d). To be in compliance with this directive, each EDC must demonstrate that its Plan produces demand savings during the 100 hours of highest demand for the period June 1, 2012, through September 30, 2012, equal to at least 4.5% of the average of the 100 highest peak hours during the period from June 1, 2007, to September 30, 2007*. Implementation Order* at 29. *See also, Reconsideration Order* at 4-8.

Each EDC that was required to file an EE&C plan was required to file, by February 9, 2009, certain peak load data for the period June 1, 2007, through May 31, 2008. In the *Reduction Target Order*, the Commission approved the calculations of Met Ed, Penelec and Penn Power of their average historical peak loads for the top 100 hours as 2,644 MW, 2,395 MW and 980 MW, respectively, and their respective proposed 4.5% reductions of 119 MW, 108 MW and 44 MW as of May 31, 2013.

The Plans must include specific proposals to meet or exceed this required reduction in consumption. 66 Pa. C.S. § 2806.1(b)(1)(i)(A) . The Commission is required to analyze how the program and individual plans will enable the EDC to meet or exceed the required reduction in consumption. 66 Pa. C.S. § 2806.1(a)(4). The Commission is also required to develop procedures to ensure compliance with this requirement. 66 Pa. C.S. § 2806.1(a)(9).

#### a. Positions of the Parties

The Plans of Met Ed, Penelec and Penn Power project peak demand savings of 126.6 MW, 110.7 MW and 46.0 MW, respectively, by May 31, 2013. Met Ed’s September 21, 2009 Plan at 20, Penelec’s September 21, 2009 Plan at 19, and Penn Power’s September 21, 2009 Plan at 19.

No Parties filed any objections to the Companies’ conservation and demand reduction projections.

#### b. Disposition

We find that the Plans project total energy savings that will meet or exceed the 4.5% peak demand reduction target by September 30, 2012, as mandated by the Act and the *Implementation Order.* Nevertheless, for the reasons set forth below, we will require the Companies to recalculate the projected energy savings and resubmit the Plans in accordance with this Opinion and Order.

### 3. Requirements for a Variety of Programs Equitably Distributed

The Commission’s EE&C Program must include “standards to ensure that each plan includes a variety of energy efficiency and conservation measures and will provide the measures equitably to all classes of customers.” 66 Pa. C.S.
§ 2806.1(a)(5). Each EDC is required to demonstrate that its plan “provides a diverse cross section of alternatives for customers of all rate classes.” 66 Pa. C.S.
§ 2806.1(b)(1)(i)(I).

#### a. Positions of the Parties

The Companies’ Plans contain nineteen different programs distributed across all customer classes. The Companies assert that they have provided at least one energy efficiency program and one demand response program for each class in accordance with the Commission’s *Implementation Order*, and in fact, they offer multiple programs for each customer class, with the exception of low-income customers as discussed below. *See* FirstEnergy’s September 21, 2009 Plans at Tables 4a, b and c.

The OCA reviewed the required Budget and Parity Analysis found in PUC Table 5 of the Companies’ Plans and the information following PUC Table 5 in evaluating whether the portfolio proposed by the Companies achieved a reasonable and equitable balance. The OCA conducted this review keeping in mind the specific requirements of the Act for low-income customers and government/non-profit customers, as well as the requirement in the Act for the Plans to be cost-effective under the TRC Test. The OCA compiled information from the Companies’ Initial Plans for spending, revenues and consumption by class for each Company. OCA MB at 17.

|  |
| --- |
| **MET-ED****Plan Spending As Compared To Revenues By Class** |
|  | Revenue by Class | Class Revenue % of Total | EE&C Plan Budget | Increase in Spending | % of Total Plan |
| Residential | 543,000,000 | 43.7% | 16,917,339 | 3.1% | 70.2% |
| Commercial | 293,000,000 | 23.6% | 2,991,204 | 1% | 18.8% |
| Industrial | 406,000,000 | 32.7% | 1,300,046 | 0.3% | 11.0% |
| **Consumption Reduction By Class** |
|  | mWh by class | % of total usage | mWh saved per plan | % of Commission goal |
| Residential | 5,255,025 | 38.2% | 241,124 | 54.96% |
| Commercial | 2,832,960 | 20.6% | 172,306 | 39.27% |
| Industrial | 5,657,535 | 41.2% | 31,548 | 7.19% |
| \*For purposes of this chart, all of the government/non-profit consumption reductions have been attributed to the Commercial class.See Met-Ed’s Initial Plan at PUC Table 5; PUC Table 2; FirstEnergy St. 3, Exh. 4, page 3. See also FirstEnergy Petition at 12. |
| **Total Bill Impact Of Proposed EEC-C** |
|  | Average kWh Usage | Dollar Increase | % Increase Total Bill |
| RS | 910 | 3.21 | 2.95% |
| GSVF (volunteer fire) | 3290 | 11.60 | 3.12% |
| GS-S | 470 | 0.89 | 1.55% |
| GS-M | 8400 | 15.87 | 1.99% |
| GP | 520000 | 233.81 | 0.56% |
| TP | 6050000 | 2720.32 | 0.58% |

See OCA St. 1 at 41; OCA Cross Exam Exh. 1.[[21]](#footnote-22)

For Met-Ed, as the above tables illustrate, over 70% of the total Plan budget was to be spent on residential programs that produce a cost/benefit ratio of 2.08 (excluding programs for low-income residential customers, which have a cost/benefit ratio of 2.48). Much of that spending was related to the Residential Direct Load Control Program. The OCA contended that the Initial Plan included spending for the Residential Direct Load Control Program that would not occur during the period covered by that Plan. The OCA recommended that Met-Ed consider redirecting some of the funding that was incorrectly included in the Residential Direct Load Control Program budget to achieve a better balance and better targeting of the efficiency dollars. OCA MB at 18.

**PENELEC**

**Plan Spending As Compared To Revenues By Class**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Revenue by Class | Class Revenue % of Total | EE&C Plan Budget | Increase in Spending | % of Total Plan |
| Residential | 438,000,000 | 38.1% | 14,991,244 | 3.4% | 67.16% |
| Commercial | 358,000,000 | 31.2% | 3,110,446 | 0.9% | 20.1% |
| Industrial | 353,000,000 | 30.7% | 1,502,097 | 0.4% | 12.7% |

**Consumption Reduction By Class**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | mWh by class | % of total usage | mWh saved per plan | % of Commission goal |
| Residential | 4,313,618 | 31.1% | 219,298 | 50.8% |
| Commercial | 3,653,546 | 26.4% | 183,556 | 42.5% |
| Industrial | 5,889,237 | 42.5% | 39,928 | 9.2% |
| \*For purposes of this chart, all of the government/non-profit consumption reductions have been attributed to the Commercial class See Penelec’s Initial Plan at PUC Table 5; PUC Table 2; FirstEnergy St. 3, Exh. 4, page 3. See also FirstEnergy Petition at 12 |

**Total Bill Impact Of Proposed EEC-C**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Average kWh Usage | Dollar Increase | % Increase Total Bill |
| RS | 730 | 2.76 | 3.62% |
| GSVF (volunteer fire) | 1700 | 6.44 | 3.86% |
| GS-S | 440 | 0.62 | 1.45% |
| GS-M | 8800 | 12.47 | 1.86% |
| GP | 431500 | 206.71 | 0.82% |
| LP | 5125000 | 2455.08 | 0.83% |

See OCA St. 1 at 41; OCA Cross Exam Exh. 1.

For Penelec, as the above tables illustrate, over 67% of the total Plan budget was to be spent on residential programs that produce a cost/benefit ratio of 2.07 (excluding programs for low-income residential customers, which have a cost/benefit ratio of 2.49). Much of that spending was related to the Residential Direct Load Control Program. Again, the OCA contended that the Initial Plan included spending for the Residential Direct Load Control Program that would not occur during the period covered by that Plan. The OCA recommended that Penelec consider redirecting some of the funding that was incorrectly included in the Residential Direct Load Control Program budget to achieve a better balance and better targeting of the efficiency dollars. OCA MB at 19.

**PENN POWER**

**Plan Spending As Compared To Revenues By Class**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Revenue by Class | Class Revenue % of Total | EE&C Plan Budget | Increase in Spending | % of Total Plan |
| Residential | 137,000,000 | 41.0% | 3,316,668 | 2.4% | 51.79% |
| Commercial | 99,000,000 | 29.8% | 983,920 | 1.0% | 20.3% |
| Industrial | 97,000,000 | 29.2% | 588,682 | 0.6% | 27.9% |
| **Consumption Reduction By Class** |
|  | mWh by class | % of total usage | mWh saved per plan | % of Commission goal |
| Residential | 1,617,204 | 34.6% | 67,086 | 46.9% |
| Commercial | 1,282,701 | 27.4% | 64,190 | 44.8% |
| Industrial | 1,778,405 | 38.0% | 13,088 | 9.1% |
| \*For purposes of this chart, all of the government/non-profit consumption reductions have been attributed to the Commercial class See Penn Power’s Initial Plan at PUC Table 5; PUC Table 2; St. 3, FirstEnergy Exh. 4, page 3. See also FirstEnergy Petition at 12. |
| **Total Bill Impact Of Proposed EEC-C** |
|  | Average kWh Usage | Dollar Increase | % Increase Total Bill |
| RS | 870 | 1.95 | 1.48% |
| GSVF (volunteer fire) | 2400 | 5.36 | 1.54% |
| GS | 2250 | 2.59 | 1.32% |
| GM | 58200 | 67.04 | 1.33% |
| GT | 2772000 | 2943.32 | 1.18% |

See OCA St. 1 at 42; OCA Cross Exam Exh. 1.

For Penn Power, as the above tables illustrate, nearly 52% of the total Plan budget was to be spent on residential programs that produce a cost/benefit ratio of 1.95 (excluding programs for low-income households, which have a cost/benefit ratio of 2.05). Much of that spending, though, was related to the Residential Direct Load Control Program. Again, the OCA contended that the Initial Plan included spending for the Residential Direct Load Control Program that would not occur during the period covered by that Plan. The OCA recommended that Penn Power consider redirecting some of the funding that was incorrectly included in the Residential Direct Load Control Program budget to achieve a better balance and better targeting of the efficiency dollars. OCA MB at 20.

The Companies accepted the adjustment of OCA witness Hill (with minor modifications) and removed from their budgets the costs associated with the Residential Direct Load Control Program from the years 2014 to 2024. OCA St. 1 at 31; FirstEnergy St. 2-R at 4-5. The Companies have reduced the budget for Residential Direct Load Costs for the Plan period by approximately $12 million for Met Ed, approximately $12.5 million for Penelec and approximately $1 million for Penn Power. FirstEnergy St.
 2-R at 4-5. The Companies state that the funds have been reallocated for additional low-income programs; enhanced evaluation, measurement and verification processes; and a contingency reserve for unforeseen events that may arise during the period in which the Plans are in effect. FirstEnergy RB at 3.

#### b. Disposition

We conclude that the Companies’ Plans meet the requirement of the Act to provide a variety of measures to all customer classes in an equitable manner. The record evidence shows that the Plans contain nineteen different programs distributed across all customer classes. The Companies have provided at least one energy efficiency program and one demand response program for each class in accordance with the Commission’s *Implementation Order*. Further, we find that the reallocation of funds by the Companies sufficiently addresses the concerns outlined by the OCA concerning the Residential Direct Load Control Program. Therefore, we conclude that the Companies’ Plans comply with the provisions of 66 Pa. C.S.§ 2806.1(a)(5).

### 4. Ten Percent Government/Non-Profit Requirement

The Act requires that “a minimum of 10% of the required reductions in consumption . . . shall be obtained from units of federal, state and local government, including municipalities, school districts, institutions of higher education and nonprofit entities.” 66 Pa. C.S. § 2806.1(b)(1)(i)(B).

#### a. Positions of the Parties

Each of the Companies’ Plans includes programs to address the requirement that a minimum of 10% of the reductions in consumption come from governmental and non-profit entities. Included in the Plans is PUC Table 2: Summary of Portfolio Energy and Demand Savings, which shows that the Companies anticipate their Plans will exceed the targeted goals for the government/non-profit sector for 2011 and 2013. FirstEnergy’s September 21, 2009 Plans at Appendix G, Table 2.

Programs for the governmental/non-profit sector include the following: (1) the Federal Facilities Program, which involves a feasibility study to identify energy savings opportunities and provides for the implementation of measures through a CSP; (2) the Street Lighting Program, which is offered to municipalities for the conversion of street lights to high pressure sodium; (3) the Traffic Signal Program, which enables the conversion of traffic signals to LED technology; (4) the Governmental Buildings and Schools Program, which provides diagnostic assistance and technical support from a CSP as well as rebates for high efficiency measures; and (5) the County and Local Buildings (including schools) Audit Program, which provides free audits to increase energy savings from the sector.

 The OCA concludes that the Companies’ Plans will meet the minimum requirements for the government/non-profit sector. In its Main Brief, the OCA notes:

 Met-Ed forecasts that from the government/non-profit sector it will save 21,403 MWh out of its required 2011 MWh reduction target of 148,650 MWh, and it will save 51,255 MWh out of its required 2013 MWH reduction target of 438,718 MWh. *See,* Met-Ed EE&C Plan at PUC Table 2, page 18. Penelec forecasts that from the government/non-profit sector it will save 22,026 MWh out of its required 2011 MWh reduction target of 143,993 MWh, and it will save 51,594 MWh out of its required 2013 MWH reduction target of 431,979 MWh. *See*, Penelec EE&C Plan at PUC Table 2, page 18. Penn Power forecasts that from the government/non-profit sector it will save 7,277 MWh out of its required 2011 MWh reduction target of 47,729 MWh, and it will save 16,741 MWh out of its required 2013 MWh reduction target of 143,188 MWh. *See*, Penn Power EE&C Plan at PUC Table 2, page 18. Based on the Tables and descriptions provided in the FirstEnergy Companies’ filings, the Companies will meet the consumption reduction targets required by Act 129. *See,* FirstEnergy Companies EE&C Plans at PUC Table 2, page 18.

OCA MB at 21-22.

 The DEP does not claim that the Companies’ Plans fail to meet the 10% goal for the government/non-profit sector.[[22]](#footnote-23) Instead, the DEP advocates for a whole building efficiency program for the government/non-profit sector, asserting that relying solely on prescriptive rebates is not in the public interest. DEP MB at 6. The DEP’s witness Guttman provided testimony concerning the shortcomings of prescriptive rebate programs and recommending that EDCs utilize the Pennsylvania Department of General Services program for energy service company projects. DEP St. 1 at 12-16.

The Companies note in their Reply Brief “﻿[n]o party challenges the Companies’ determination of the Companies’ 10% government/non-profit levels required under Act 129.” FirstEnergy RB at 9. In response to the DEP’s arguments, the Companies assert that the DEP falsely assumes that the Companies’ proposed rebate and lighting replacement programs will “impair[] a government entity’s ability to obtain significant long term energy consumption reductions through guaranteed energy savings contracts provided by energy service companies.” FirstEnergy RB at 10 (quoting DEP MB at 14). The Companies emphasize that there is no “impairment” because the Plans do not require governments/non-profits to participate in any of the Companies’ program offerings. Moreover, FirstEnergy contends that the Plans include a “whole building” approach for the government/non-profit sector. FirstEnergy RB at 10-11. FirstEnergy’s witness Fitzpatrick testified:

The Companies have proposed a C/I Performance Contracting Program that is available to Government and Institutional and Non-Profit facilities. Also, the Companies’ plan includes payment for building audits for Federal, State, Local, Institutional and Non-Profit facilities. The C/I Performance Contracting Plan – or channel coupled with the building audit and our C/I Equipment Program – gives our Federal, State, Local, Institutional and Non-Profit facilities the flexibility to take a whole building approach advocated by the DEP.

FirstEnergy St. 2-R at 16-17.

#### b. Disposition

The Plans include programs for the government/non-profit sector that are anticipated to exceed the 10% reduction requirement. There is no serious challenge to this aspect of the Plans. The DEP’s criticism of prescriptive rebate programs is unpersuasive as it failed to demonstrate how FirstEnergy could meet its mandated targets without such programs. In addition, the DEP failed to acknowledge that FirstEnergy’s Plans in fact offer a whole-building approach. We see no reason to modify the Plans with respect to the government/non-profit sector.

### 5. Low-income Program Requirements

Act 129 provides:

The plan shall include specific energy efficiency measures for households at or below 150% of the federal poverty income guidelines. The number of measures shall be proportionate to those households’ share of the total energy usage in the service territory. The electric distribution company shall coordinate measures under this clause with other programs administered by the commission or another federal or state agency. The expenditures of an electric distribution company under this clause shall be in addition to expenditures made under Pa. Code Ch. 58 (relating to residential low income usage reduction programs).

66 Pa. C.S. § 2806.1(b)(1)(i)(G).

#### a. Positions of the Parties

Using Penelec as an example,FirstEnergy’s Plans propose a total of nineteen energy efficiency and conservation and demand response programs, of which one is targeted to residential low-income customers. Penelec’s September 21, 2009 Plan at 3-6. The program targeted to low-income customers is the Low Income Sector Program (WARM Plus). *Id*. at 57-59.

The OCA questions whether FirstEnergy’s Plans meet the low-income requirements of the Act. OCA MB at 22. Initially, the OCA questions whether FirstEnergy correctly calculated the low-income households’ share of total energy usage. The OCA notes that FirstEnergy initially calculated the low-income customers’ share of total energy usage and the average usage of these customers using billing data. OCA MB at 23. Based on this data, usage by low-income customers accounted for 3.2% of total energy usage at Met Ed, 4.0% at Penelec and 3.5% at Penn Power. OCA MB at 24 (citing OCA Cross Exh. 2; FirstEnergy Exhs. GLF-4, GLF-5). The OCA points out that, at the hearing, FirstEnergy provided updated estimates of the low-income customers’ share of total energy usage using census data. Based on this data, low-income customers accounted for 5.5% of energy usage at Met Ed, 7.2% at Penelec and 7.1% at Penn Power. *Id.* The OCA argues that FirstEnergy should be required to use the census data to calculate the percentage of low-income energy usage in the Companies’ service territories. OCA MB at 24.

The OCA further asserts that the Companies have incorrectly calculated the low-income savings by including savings from their existing low-income usage program (the WARM program). The OCA states that the energy savings from the existing WARM funds are not Act 129 programs and should not be attributed to the Companies’ low-income obligations under Act 129. OCA MB at 25. The OCA also submits that the Companies have attempted to assign a share of savings from the other residential programs to the low-income requirements, based on the assumption that low-income customers will participate in the same manner as other residential customers. The OCA asserts that the low-income customers may not participate in these programs at the same rate as the other residential customers. OCA MB at 25.

Rep. George argued that the Plans are deficient because they underfund the low-income sector program and the only budget allocation for the low-income sector is an enhancement to existing WARM services. George MB at 8 (citing FirstEnergy St. 2). Rep. George also stated that the Plans must provide additional measures with dedicated funding, that a share of the other residential programs should be allocated to the low-income sector, and that the Companies should provide financial assistance to help low-income customers participate. George MB at 9-10.

ACORN asserts that the Companies have not provided sufficient information to determine how FirstEnergy determined the low-income targets and whether the Plans include a “number of measures” proportionate to the low-income households’ share of total energy usage. ACORN MB at 10. ACORN went on to assert that the Plans do not provide assurance that the low-income programs will be coordinated with other federal, state and Commission programs. ACORN MB at 18. ACORN also questions whether the low-income program expenditures will be in addition to the existing low-income usage reduction program (LIURP). ACORN MB at 16. ACORN states that the Plans may allow some households with incomes exceeding 150% of the federal poverty income guidelines (FPIG) to participate in the low-income programs. ACORN asserts that low-income energy savings should only be counted from households with incomes at or below 150% FPIG. ACORN MB at 15.

Initially, FirstEnergy asserted that there were at least nine programs that low-income households can participate in that are not part of the existing WARM program. FirstEnergy MB at 24. The Companies later filed revised plans which included changes to its low-income program, now referred to as the WARM Plus program. FirstEnergy asserts that the WARM Plus program will include additional eligible customers. In addition, participants will receive additional compact fluorescent lamps and power strips not included in the current WARM program. FirstEnergy also has a program for tenants in multi-family buildings served by the Pennsylvania Housing Finance Authority (PHFA). FirstEnergy asserts that this program will target low-income communities. FirstEnergy states that the program costs will be tracked through appropriate residential, commercial/industrial or government programs. Penelec’s September 21, 2009 Plan at 3-5. FirstEnergy further states that low-income customers are eligible to participate in other residential programs and will be tracked and reported to support assessments of equitable treatment of low-income customers. *Id*. at 4. FirstEnergy asserts that the WARM Plus program marketing activities will be coordinated with other Act 129 programs; the Companies’ programs; other state low-income programs, such as the Customer Assistance Program (CAP); the Department of Public Welfare; PHFA; gas utilities; the Department of Community and Economic Development’s Weatherization Assistance Program; the NGDC LIURP program; and community-based organization initiatives. Penelec’s September 21, 2009 Plan at 58.

#### b. Disposition

66 Pa. C.S. § 2806.1(b)(1)(i)(G) reads in pertinent part as follows:

(G) The plan shall include specific energy efficiency measures[[23]](#footnote-24) for households at or below 150% of the Federal poverty income guidelines. The number of measures shall be proportionate to those households’ share of the total energy usage[[24]](#footnote-25) in the service territory.

Despite the complicated exercise in statutory construction that has been undertaken by some Parties to explain this provision, the express language is quite clear. Its implementation, however, is another matter.

According to Section 2806.1(b)(1)(i)(G), the number of energy efficiency measures that must be dedicated to low-income customers is calculated by first determining the percentage of total energy usage that is attributable to the low-income customer group. This percentage is the percentage of the Act 129 Plan’s total energy efficiency measures that must be dedicated to low-income customers. In other words, if an EDC’s plan contains forty measures, and the low-income customer group’s share of total energy usage for the service territory is 5%, then the plan must have two measures dedicated to increasing energy efficiency for low-income customers.

While the term “energy efficiency and conservation measures” is defined at Section 2806.1(m), there is no information as to how measures should be quantified for apportionment to the low-income customer group. There also is no indication about the time frame for implementation of this requirement over the life of the EDC’s plan.

Full implementation of Section 2806.1(b)(1)(i)(G) will take some time. The usage data referred to in the Act is not readily available. At this time, EDCs do not maintain information on energy usage by customer income level that can be used to determine the share of total energy usage in the service territory that is attributed to low-income customers. As such, we are forced to use estimates and the tools at hand in order to achieve the goals of Act 129. Currently, the best way to evaluate a Plan’s compliance with this requirement is to review the method used by the EDC to calculate the low-income customer share for reasonableness and any census or other demographic data used in the calculation for relevance and reliability.

Therefore, to ensure EDCs will be able to meet this requirement, the Commission will convene a working group that will be charged with developing implementation standards for compliance with Section 2806.1(b)(1)(i)(G). The working group will be composed of representatives from EDCs, consumer advocates, community-based organizations and other interested parties. Specifically, the working group will be charged with identifying the standardized data to be used to determine the proper proportion for low-income households. If necessary, the working group may address other matters that require clarification before the annual reconciliation process. The group shall provide its recommendations to the Commission no later than February 16, 2010.

The Companies’ Plans have one of nineteen programs (or 5.3% of total programs) that specifically target low-income customers. Although this figure is slightly lower than each Company’s estimate of total energy use attributable to low-income customers in FirstEnergy’s service territory, eight other residential programs will be monitored for equitable participation of low-income customers. On this basis, we find that the Companies’ Plans include a “number of measures” proportionate to the low-income households’ share of total energy usage at this time.

The Companies state that low-income customers are eligible to participate in other residential programs and their participation will be tracked and reported. *See* Penelec’s September 21, 2009 Plan at 4. To aid this Commission in ensuring compliance with Act 129, the Companies are directed to track instances in which low-income customers participate in residential and other programs that are not specifically directed toward low-income customers. This information shall be included in the Companies’ annual report to the Commission.

We note, however, that the Commission agrees with the OCA that the energy savings from existing WARM funds are not derived from Act 129 programs and should not be attributed to the Companies’ low-income energy efficiency and demand reduction obligations under Act 129. The Act requires that any Act 129 expenditures “shall be in addition to” existing funding for low-income usage reduction programs. OCA RB at 6, n. 3. Act 129 clearly excludes existing LIURP funds from Act 129 funding obligations of the EDCs. Consistent with the treatment of LIURP funds in the Act, we believe that the energy savings from the existing LIURP program should also be excluded from Act 129 energy savings. 66 Pa. C.S. § 2806.1(b)(1)(i)(G). To this extent, we reject the calculations in the Plans and direct FirstEnergy to file revised Plans in accordance with this finding within sixty (60) days of entry of this Opinion and Order.

### 6. Issues Relating to Individual Conservation and Demand Reduction Programs

In the course of this proceeding, several Parties raised issues concerning the specifics of certain programs contained in the Plan. Although all issues have been considered, we will address only those which may have a significant and meaningful impact on the design and effectiveness of a particular program or its components. We begin by discussing specific issues (if any) raised by the Parties concerning programs targeted toward residential, commercial and industrial customers. We then discuss generic issues that affect multiple programs proposed by FirstEnergy, regardless of customer class.

#### a. Residential

The Parties raised no issues specific to FirstEnergy’s residential programs which are not addressed elsewhere in this Opinion and Order.

#### b. Commercial

The Parties raised no issues specific to FirstEnergy’s commercial programs which are not addressed elsewhere in this Opinion and Order.

#### c. Industrial

The Parties raised no issues specific to FirstEnergy’s industrial programs which are not addressed elsewhere in this Opinion and Order.

#### d. Generic Issues

##### (1) Fuel Switching

###### (A) Positions of the Parties

The NGDCs and IOGA argue that the Plans do not consider fuel switching implications appropriately in light of the goals of Act 129. NGDC MB at 11; IOGA RB at 4-10*.* The NGDCs submit that the Plans are structured so as to permit the payment of incentives for efficient electric equipment even if the customer is currently utilizing natural gas. FirstEnergy’s Exh. No. 1, NGDC Cross Exam. Exh. No.1; Tr. at 215. The NGDCs repeatedly argue that the Plans inappropriately encourage fuel switching from natural gas to electric, but not from electric to natural gas.

The NGDCs aver that the Plans ignore the potential that fuel substitution has for helping the Companies reach or exceed their Act 129 reduction goals. In fact, they contend, by encouraging fuel switching from natural gas to electric, the Plans may result in an overall *increase* in electric usage by customers, contrary to the purpose of Act 129. NGDC St. 1 at 16-25.

The NGDCs recommend that:

1. The FirstEnergy Companies should offer incentives for energy efficient natural gas space heating and water heating applications under their Residential Rebates for HVAC and Solar Programs, Residential Energy Efficient Products Programs, and the Non-Residential C/I Equipment Programs (rebates).

2. The FirstEnergy Companies should offer incentives for efficient Combined Heat & Power (CHP) applications for larger customers.

NGDC St. 1 at 28.

If these programs are not included in the Plans, the NGDCs request that the Commission require the Companies to amend their Plans to prohibit the payment of incentives where fuel switching from natural gas to electric would result, unless the Companies provide natural gas rebate parity. NGDC MB at 7. The NGDCs also believe that the Companies should be directed to report to the Commission, in their quarterly and annual reports, the number of customers that receive an incentive payment for a high efficiency electric appliance or equipment where: (1) the customer switched from a natural gas appliance to a high efficiency electric appliance or equipment; (2) the Companies paid a rebate for a new home in which electric heating was installed although natural gas service was readily available; and (3) a customer switched from a lower efficiency electric appliance or equipment to a high efficiency electric appliance or equipment although natural gas service was available to that customer. *Id*.

The DEP states that the Plans (in particular the residential heat pump rebate, the residential and commercial/industrial water heater rebates, and potentially, the residential whole home program) have the potential to unintentionally promote fuel switching from a combustion appliance to an electric appliance or equipment. The DEP submits that such a result controverts the purpose of Act 129 and must be prohibited. The DEP recommends that customers be required to apply for these rebates and identify the type of fuel source currently being used. Only customers who currently use electric appliances or equipment should qualify for the rebates. DEP MB at 7-8.

The Companies oppose these proposals. The Companies state that the NGDCs have not alleged, or provided any evidence to demonstrate, that the Companies will be unable to meet their required reductions in energy consumption and peak demand without the inclusion of fuel switching programs. FirstEnergy MB at 54. The Companies submit that the Commission’s express exclusion of fuel switching from the TRM, *TRM Order* at 9, and its postponement of discussion of such matters until a future fuel switching working group is convened should preclude the NGDCs from proposing such issues in connection with EE&C plans, particularly in proceedings such as this where the Companies have not proposed any fuel switching programs in their Plans. FirstEnergy MB at 55.

###### (B) Disposition

 The NGDCs and IOGA have urged us to require EDCs to utilize switching from the use of electric power to natural gas as an energy efficiency or demand reduction measure. We note that some EDCs have included such measures as part of their EE&C plans. *See, e.g., Petition of PECO Energy Company for Approval of its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of its Compact Fluorescent Lamp Program,* Docket No. M-2009-2093215. The NGDCs argue that this is contemplated by Act 129 and should be part of EDC plans. We have addressed this issue before, as discussed below, but we believe a look at Act 129 is in order.

 Act 129 does not expressly address switching between electric power and natural gas, however, it does define “Energy efficiency and conservation measures” as:

(1) Technologies, management practices or other measures employed by retail customers that reduce electricity consumption or demand if all of the following apply:

(i) The technology, practice or other measure is installed on or after the effective date of this section at the location of a retail customer.

(ii) The technology, practice or other measure reduces consumption of energy or peak load by the retail customer.

(iii) The cost of the acquisition or installation of the measure is directly incurred in whole or in part by the electric distribution company.

(2) Energy efficiency and conservation measures shall include solar or solar photovoltaic panels, energy efficient windows and doors, energy efficient lighting, including exit sign retrofit, high bay fluorescent retrofit and pedestrian and traffic signal conversion, geothermal heating, insulation, air sealing, reflective roof coatings, energy efficient heating and cooling equipment or systems and energy efficient appliances and other technologies, practices or measures approved by the commission.

 66 Pa. C.S. § 2806.1(m). Although the definition does not mention natural gas *per se*, we believe it is reasonable to assume that some uses of gas may be energy efficient.

 We addressed this issue in our *TRM Order,* when we stated at page 9:

The Commission recognizes that fuel switching is a complicated topic that will require additional time and effort to fully address. As the TRM will provide vital guidance to EDCs in developing their EE&C plans, which are due to be filed by July 1, 2009, there is not enough time to convene a working group to address all the related issues, fuel switching will not be included in this TRM. The Commission will convene a fuel switching working group in the near future to identify, research and address issues related to fuel switching. Depending on the outcome of this working group, fuel switching may be incorporated into a future version of the TRM.

We initiated the fuel switching working group at that time and directed that it report back to us with recommendations by June 1, 2010. *TRM Order* at 19. The fuel switching working group will need time to develop and make its recommendations. Still, we recognize the interest in this issue. Accordingly, to expedite the resolution of this issue, we direct the fuel switching working group to submit its report by March 31, 2010.

Moreover, in regard to the NGDCs’ and the DEP’s concerns related to the potential to unintentionally promote fuel switching from a combustion appliance or equipment to an electric appliance or equipment, we find their arguments to be speculative and unconvincing. As these plans develop over time, we will review their progress. Nevertheless, we find merit in the NGDCs’ suggestion that relevant data be collected. We therefore direct that FirstEnergy track appropriate data, in coordination with the Statewide Evaluator, including at least the following: (1) type of appliance or equipment being replaced; (2) the availability of natural gas at the customer’s location or immediate area; and (3) whether electric appliances or equipment were installed in areas where natural gas is available. This information, as well as other data obtained through the Statewide Evaluator, will be helpful to the fuel switching working group as it studies market potential and the potential impacts of EE&C Plans.

##### (2) Distributed Generation

###### (A) Positions of the Parties

 The DEP submits that FirstEnergy’s Commercial and Industrial Demand Response Program has the potential to indirectly address peak demand through the increased use of distributed generation. In other words, the DEP is concerned that customers will reduce their consumption of electricity from the grid during peak periods simply by resorting to other sources of power, such as back-up generators. DEP MB at 8.

The DEP avers that using distributed generation to reduce peak demand is not permitted under Act 129. The DEP states that the definitions of both “energy efficiency and conservation measures” and “peak demand” indicate that the only acceptable strategies to reduce peak demand are to reduce overall consumption or shift consumption to non-peak hours. “Energy efficiency and conservation measures” is defined in relevant part as “the technology, practice or other measure [that] *reduces consumption of energy* or peak load by the retail customer.” 66 Pa. C.S. § 2806.1(m) (emphasis added). “Peak demand” is defined as “[t]he highest *electrical requirement* during a specified period.” *Id*. (emphasis added). The DEP submits that, when these definitions are read together, it is clear that reducing the consumption of electricity during the highest specified period simply cannot occur by generating electricity with a behind-the-meter source (other than solar energy, which is specifically listed as an energy efficiency and conservation measure). DEP MB at 8.

The DEP also states that grid demand reduction that is merely replaced by higher emitting distributed generation has negative air impacts and is an unacceptable strategy for Pennsylvania. The DEP states that, because those resources will be deployed when ozone levels are the highest, the detrimental impact to human health could be quite significant and should be avoided. DEP MB at 10.

 The Companies state that the DEP bases its position on an intricate discussion of the shortfalls of the DEP’s regulations concerning emissions released by backup generators. The Companies state that this is not the forum in which to fix Pennsylvania’s environmental regulations. Moreover, the Companies contend that their Plans should not be held hostage due to such regulatory deficiencies. FirstEnergy RB at 19.

###### (B) Disposition

We find that Act 129 does not eliminate distributed generation for use in meeting energy consumption and demand reduction goals. Rather, Act 129 is silent with respect to the use of distributed energy resources. The Act does not dictate how EDCs must meet the reduction goals, only that they must. The Act appropriately leaves these matters to the discretion of the EDCs, pursuant to the Commission’s review.

The definition of “peak demand” explicitly states that, for an EDC, “the term shall mean the sum of the metered consumption for all retail customers over that period.” 66 Pa. C.S. § 2806.1(m). It is undeniable that the use of distributed energy resources during peak hours will reduce a company’s metered consumption during those periods. Because on-site generation is generally located “behind the meter,” distributed energy resources also reduce the metered consumption of the retail customer, which is one of the qualifying factors for “energy efficiency and conservation measures,” as defined by the Act.

Program administrators will be required to comply with all federal, state and local requirements relating to distributed generation. Under this approach, a distributed generation program can reduce peak demand in full compliance with both Act 129 and current Commonwealth regulations.

Moreover, back-up generators can be an effective type of demand response programming. Back-up generation is a low cost piece in achieving demand reduction, so long as the units operate within the terms of their permits.

Thus, the Commission should support a strategy of targeting eligible C&I customers who have existing backup generation resources, or are interested in having grid-connected generating units installed at their facilities, in order to realize energy savings and peak demand reductions. Since Act 129 does not dictate how EDCs must meet these goals, and appropriately leaves these matters to the discretion of the EDCs pursuant to the Commission’s review, we only encourage the EDCs to be cognizant of this issue. For these reasons, we conclude that the proposal to restrict the dispatch of distributed energy resources is unreasonable and should be rejected.

### 7. Proposals for Improvement of EDC Plan

The Commission’s EE&C Program must include “procedures to make recommendations as to additional measures that will enable an electric distribution company to improve its plan and exceed the required reductions in consumption.” 66 Pa. C.S. § 2806.1(a)(6). We begin by discussing specific proposals (if any) for improving specific programs targeted toward residential, commercial and industrial customers. We then discuss generic issues that affect multiple programs proposed by FirstEnergy, regardless of customer class.

#### a. Residential

##### (1) Incentives for Residential Furnace Fan Replacement in the Residential Whole Building Program

###### (A) Positions of the Parties

 The OCA identified the absence of measures for residential furnace fans as a gap in the program portfolio. OCA St. 1 at 24. OCA witness Hill testified:

For residential markets we identified the absence of residential furnace fans as an important missing element at the measure level. The ACEEE Pennsylvania energy efficiency potential study released in 2009 identifies that savings associated with the replacement of existing Permanent Split Capacitor furnace fans with ones that meet or exceed the minimum Electric Commutating Motor standards could meet 6% of the electric energy savings potential identified in the study for Pennsylvania.

OCA St. 1 at 24. Consequently, the OCA recommends that the Companies include an incentive for residential furnace fan replacement in the Residential Whole Building Program. OCA MB at 31.

The Companies acted upon the OCA’s suggestion by including a rebate for residential furnace fan replacement in the Plans submitted on September 21, 2009. FirstEnergy RB at 4.

###### (B) Disposition

At the OCA’s suggestion, the Companies have added a rebate for residential furnace fan replacement to their Plans. We note that the rebate was added to the Residential Energy Efficiency HVAC Equipment Program instead of the suggested Residential Whole Building program. Nevertheless, we believe this change adequately addresses the OCA’s concern, and we see no reason to further modify the Companies’ Plans regarding rebates for residential furnace fans.

##### (2) Statewide Whole Home Performance Program

###### (A) Positions of the Parties

 The DEP advocates for implementation of a statewide whole home performance program, stating that the absence of such a program is not in the public interest. The DEP argues that:

First Energy’s Residential Home Building Comprehensive Program is a promising start but more than installation of unidentified “low cost measures” and rebates must be provided. See EEC plan at 50 – 51.

DEP MB at 10-11. The DEP’s witness Guttman provided testimony supporting the value of a whole house program, advocating for statewide standards in program design, proposing a specific program design and offering to facilitate and participate in development of a statewide Home Performance Program. DEP St. 1 at 17-21.

 The Companies argue against the DEP’s position because the DEP has not provided evidence demonstrating that adoption of the suggestion would produce better results or be more cost effective than the Companies’ Plans. FirstEnergy RB at 20-22.

###### (B) Disposition

 The DEP’s witness Guttman, together with the DEP’s Main Brief, present a clear explanation of a whole house program, including the benefits that could be gained from a uniform statewide program. The statewide program idea presented by the DEP is in accordance with the request by Chairman Cawley and Commissioner Gardner in their joint statement issued in conjunction with the *Implementation Order*. However, in the absence of a coordinated statewide program effort, we cannot require FirstEnergy to modify its Plans to include a program that will not be implemented by all EDCs. Also, although these Act 129 programs are being run by a number of EDCs, not all EDCs are required to implement the Act. Therefore, it would be impractical for a statewide program to be overlaid on EDCs which combined do not serve the entire state.

In this regard, we commend FirstEnergy for coordinating its EE&C development efforts across its three Pennsylvania operating companies to achieve cost efficiencies and consistencies in the programs offered by its three companies. We encourage Met Ed, Penelec, and Penn Power to monitor and, where possible, work with other EDCs to develop greater statewide consistency in their whole house and rebate programs to take advantage of efficiencies in marketing and shared vendors.

#### b. Commercial

##### (1) Positions of the Parties

The OCA contends that there are gaps in the Companies’ Plans. To fill these gaps, the OCA proposes three improvements in the Commercial portion of the Plans. The OCA asks that the Companies be directed to explore implementation of the suggested improvements during the first stakeholder meeting. OCA MB at 31-33.

 Specifically, the OCA notes that the Plans do not include a program for new commercial and industrial construction. The OCA argues that such a program might not seem to have much potential in the short term, due to the state of the economy, but could give rise to “large energy savings” if and when construction increases during the period covered by the Plans. OCA MB at 31.

 Second, the OCA notes that the Plans do not include any specific measure geared toward agricultural customers. The OCA contends that there are technologies that could reduce the amount of energy that EDCs provide to farms. “For example, energy measures such as variable speed milk transfer and pre-cooling systems are specific to the unique needs of dairy farmers.” OCA MB at 32. The OCA argues that the rural nature of the FirstEnergy Companies’ service territory warrants a program tailored to the farm community.

Third, the OCA notes that the Plans do not include any initiatives targeted toward “high-value market subsets” such as supermarkets or data centers:

For instance, a bundled package of, *inter alia,* refrigeration equipment, efficient specialty lighting fixtures, high efficiency evaporator fans, compressors and defrosting controllers for freezers could be offered to the supermarket subset. Additionally, there are considerable energy efficiency options existing for data centers and servers of all sizes, including but not limited to efficient uninterruptible power supply systems, virtual desktop infrastructure that uses less energy than standard PCs and laptops, optimized HVAC systems, and reclaiming heat from larger data centers for use in preheating supply air going to other parts of the building.

OCA MB at 32. The OCA recommends that FirstEnergy add one or possibly three programs that target specific high value customer or market subsets. OCA St. 1 at 29-31.

 The Companies request that the Commission reject the OCA’s proposed improvements. In their Reply Brief, the Companies claim that the OCA’s analysis of the Original Plans indicates that the suggested changes are not needed to reach their Act 129 EE&C targets. The Companies also note that the OCA did not provide evidence that the suggestions would be cost effective under the TRC Test or that the suggestions would enhance the Plans. FirstEnergy RB at 22.

##### (2) Disposition

 With regard to the three proposed improvements in FirstEnergy’s Commercial program, the OCA’s Main Brief concluded “the FirstEnergy Companies should be directed to explore implementation of these programs during the first meeting of an ongoing stakeholder process” OCA MB at 33. We agree, and will require the Companies to discuss the OCA’s proposals during the on-going stakeholder process (discussed below).

#### c. Industrial

##### (1) Positions of the Parties

FDSI submits that the HVAC programs proposed by FirstEnergy would benefit from the following improvements: (1) including a separate HVAC program for commercial and industrial customers, with a CSP or sub-CSP directly responsible for the delivery and execution of an HVAC efficiency program; (2) providing financial incentives for HVAC-specific diagnostic testing and promoting reliance on automated systems for diagnostics; and (3) establishing guidelines to ensure that HVAC tune-ups and other measures are performed in accordance with appropriate protocols and procedures. FDSI MB at 6-16.

The Companies expressed concern that FDSI’s proposal might increase Plan costs without improving results. FirstEnergy MB at 28. In addition, the Companies argue that FDSI failed to demonstrate that its suggestions will improve the Plans’ results. Accordingly, the Commission has no basis on which it should adopt the suggestions. FirstEnergy RB at 23.

##### (2) Disposition

The Companies have demonstrated that their Plans comply with the TRC Test while costs remain below the cap set forth in Act 129. FDSI, in contrast, has neither demonstrated nor quantified how its suggestions would improve the Plans put forth by the Companies. FirstEnergy’s witness Fitzpatrick testified that the Companies have included small commercial HVAC tune-up programs in their Plans. FirstEnergy St. 2-R at 6. Our review of the Plans, however, does not find support for this statement. We direct the Companies to address this discrepancy in their revised Plans, to clearly state whether the Plans include small commercial HVAC tune-up programs.

#### d. Generic Issues

##### (1) Continuing Stakeholder Process

###### (A) Positions of the Parties

 As stated previously, FirstEnergy used a stakeholder process in developing its Plans. The OCA recommended that the Commission direct the Companies to:

Initiate and maintain an ongoing stakeholder collaborative process to address and adaptively manage the programs to address the specific concerns identified in this proceeding and future issues that will arise as program design and implementation continues.

OCA St. 1 at 4.

 The DEP comments that “active participation by stakeholders and oversight by the Commission will be necessary to ensure high quality performance of the [EE&C] Plan” and further states “to accomplish this goal, [FirstEnergy’s EE&C] Plan should contain a clearly defined stakeholder involvement process.” DEP MB at 12.

The DEP’s witness Guttman testified:

Yes, the Department strongly encourages the EDCs to continue to involve the Stakeholders groups, particularly in the first 2 years of program implementation. The EDCs should provide monthly reports to the Stakeholders, including (but not limited to) performance assessments, program implementation status, CSP contract status, and any program modifications being considered. The Stakeholders should have the opportunity to review and provide comment on all aspects of the EEC program, and the EDCs should be required to consider said comments and recommendations.

DEP St. 1 at 30.

The OCA argues that the stakeholder process should include a broad array of participants, including but not limited to local governments, chambers of commerce and environmental advocates. According to the OCA:

Additional stakeholders will provide additional resources and information to assist the Companies in meeting the requirements of Act 129. Also, the more stakeholders involved in the processes, the more voices there will be to reach customers and encourage their participation in the Companies’ programs.

OCA MB at 44.

The Companies’ witness Fitzpatrick testified “Both the Companies and I believe that [the stakeholder] process should continue, perhaps with quarterly meetings held among the Companies and the parties to these proceedings.” FirstEnergy’s St. 2-R at 5. FirstEnergy, however, contends that the stakeholder process should be limited to the Companies and the Parties to this proceeding, primarily because this would provide “reasonable assurance that confidential information exchanged in future stakeholder meetings will continue to be protected under the Commission’s Protective Order in this proceeding.” FirstEnergy’s MB at 27.

###### (B) Disposition

In their Main Brief, the Companies indicate their agreement in principle to formalizing their commitment to an ongoing stakeholder process. The Companies there state that stakeholder meetings should be held quarterly and should be limited to the Companies and the Parties to these proceedings. FirstEnergy MB at 27. In their Reply Brief, the Companies further emphasized their commitment to quarterly meetings. The Companies there state “the Companies have every intention of meeting quarterly with the parties to this proceeding to discuss the status of programs, potential changes to those programs, and potential new programs, [consequently,] the Commission should allow the Revised Plans to be implemented as filed.” FirstEnergy RB at 24.

 Using a collaborative process during the development of the Plan was beneficial for the Companies and other interested parties. Similarly, we believe the use of a collaborative process during the implementation of the Plan will be beneficial for expeditiously identifying and resolving issues that arise during the period covered by the Plan. For these reasons, we find merit in the recommendation for an on-going stakeholder process.

We reject FirstEnergy’s argument that this process should be restricted to the Parties to this proceeding. We find merit in the OCA’s argument that this process should be open to a broad range of persons and entities. We note in this regard that several persons and entities who were not Parties to this proceeding submitted comments on the Plans or testified at the public input hearings. The stakeholder process therefore should be open to all who wish to participate.

We commend the Companies’ commitment to meet with stakeholders quarterly and we encourage them to fulfill this commitment. Nevertheless, consistent with our decisions in other Act 129 EE&C Plan proceedings, we will only require that the Companies meet with stakeholders as needed, but no less than twice annually, until May 31, 2013, unless otherwise ordered by the Commission.

We are mindful that the Companies bear the risk of penalties in the event of non-compliance with the mandates of Act 129. We will not micro-manage the Companies’ compliance efforts. Therefore, although we encourage the Companies to be open and responsive to any issues that other stakeholders bring to these discussions that may lead to improvements in the efficiency and cost effectiveness of their EE&C Plans, we make clear that the Companies shall ultimately be responsible for all aspects of the on-going stakeholder process, except as explicitly set forth herein.

##### (2) Hiring the Unemployed and Reducing the Use of Space Heaters

###### (A) Positions of the Parties

ACORN recommends that FirstEnergy adopt two proposals similar to ones proposed by PECO Energy Company in its EE&C Plan. In regard to these two proposals, ACORN witness Phillips testified:

I am a witness in PECO Energy’s Act 129 proceeding, and I would like to bring to First Energy’s attention two innovative and, in my opinion, farsighted aspects of PECO’s Plan.

• Recruitment Strategies: PECO is including in its RFP process for Conservation Service Providers a criteria favoring providers who recruit and hire unemployed and low income workers. PECO’s Plan states:

In addition, PECO will encourage in its RFP process that bidding CSPs investigate opportunities to hire low income, unemployed workers through various programs throughout the State, such as the Pennsylvania Employment, Advancement and Retention Network and Philadelphia Workforce Development Corporation. PECO will include an additional scoring category in its RFP evaluation process for those CSPs that have a plan to utilize the services of welfare-to-work employment agencies, or hire unemployed workers.

This strategy will enable PECO not only to provide energy efficiency services to low income households, but it may enable members of those households to acquire good paying, solid jobs that will help them rise up out of poverty. I encourage First Energy to include a similar approach in its Plan. Additionally, First Energy may want to include language that favors Conservation Service Providers that seek out and hire unemployed building construction personnel who have relevant skill sets and who are suffering from the economic downturn.

• Space Heaters: PECO’s Plan proposes to use PECO’s Act 129 Low Income Program as a means to focus on the problem of inefficient, dangerous space heaters in use by low income households. In its Plan, PECO proposes to “increase emphasis on repair or replacement of non-working gas heating units to remove electric space heaters from use, and address the high percentage of supplemental electric heating that may be due to many factors, including inoperable central heating systems.

I strongly support this measure and encourage First Energy to include a similar strategy in its Act 129 Plan. Supplemental electric heating units are wasteful of energy and are extremely dangerous to the families and neighborhoods in which they are used. Nearly every winter, somewhere in the state, a household containing ACORN constituents is struck by tragedy when an electric space heater causes a fire that destroys a home and kills people. First Energy could help alleviate this problem by including language similar to that which PECO has in its Plan.

ACORN St. 1 at 9-11.

The Companies oppose ACORN’s suggestions because ACORN has not provided evidence or demonstrated that adoption of the suggestions would produce better results or be more cost effective than the Companies’ Plans. FirstEnergy RB at 20-22.

###### (B) Disposition

 ACORN recommends that the Commission mandate special attention for organizations that recruit and employ unemployed or low-income workers. According to ACORN, such a mandate would enhance benefits to the low-income population as contemplated by Act 129.

Act 129 does not mandate that the conservation service provider bidding process include evaluation criteria regarding a willingness to employ low-income and unemployed workers. On the other hand, there is nothing in the Act that would prohibit an EDC from actively seeking to employ unemployed or low-income people, assuming there is no issue with the qualifications or experience of the successful candidates. Mandating such a standard, however, would present a number of difficulties, not the least of which involves whether the Commission has jurisdiction over the hiring practices of EDC contractors. In addition, the definitions of “low-income” and “unemployed” would be at issue. Finally, it would be difficult to impossible for the Commission to enforce a standard involving private and subjective information. For these reasons, the Commission will not require EDCs to hire low-income or unemployed workers.

ACORN commends PECO Energy Company’s proposal to focus on the removal of electric space heaters from use and encourages the adoption of such a plan by all companies subject to Act 129. The Commission need not micro-manage each plan to see that the use of space heaters is reduced in the Commonwealth. We believe other measures in the Act 129 Plan offer sufficient incentives for people to reduce their use of space heaters and to switch to more economical, safe and energy efficient means of heating their homes and businesses. For these reasons, the Commission will not direct the Companies to implement space heater specific programs.

##### (3) Expediting the Deployment of Smart Meters and Time of Use Rates

###### (A) Positions of the Parties

 The DEP’s witness Guttman postulated that early deployment of smart meters and implementation of time of use rates are key to successful EE&C programs. Ms. Guttman further testified that the Companies’ EE&C Plans do not contain a proposal for the deployment of smart meters. She asserted that the Companies should be required to deploy smart meters at a faster rate. DEP St. 1 at 25-28.

 The Companies argue against the DEP’s recommendations stating that the deployment of smart meters is addressed in a separate proceeding. The Companies also assert that the submitted Plans satisfy the Act 129 EE&C requirements. FirstEnergy MB at 30-31.

###### (B) Disposition

 The DEP’s testimony contains general statements regarding the value of smart meter deployment coincidental with implementation of time of use based rate plans. The DEP, however, has not provided evidence showing that early deployment of smart meters would improve the Companies’ Plans. Furthermore, the DEP has not demonstrated the cost effectiveness of early smart meter deployment. The Companies are correct that smart meter deployment is addressed in a separate proceeding at *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009). For all of these reasons, we will not order FirstEnergy to revise its Plans to incorporate the DEP’s recommendation.

## B. Cost Issues

### 1. Plan Cost Issues

Each EE&C plan must include an analysis of the EDC’s administrative costs, 66 Pa. C.S. § 2806.1(b)(1)(i)(K), as well as an estimate of the total cost of implementing the measures in the plan. 66 Pa. C.S. § 2806.1(b)(1)(i)(F). The total cost of the plan cannot exceed 2% of the EDC’s total annual revenue as of December 31, 2006. 66 Pa. C.S. § 2806.1(g). In addition, Act 129 states “no more than 2% of funds available to implement a plan under this subsection shall be allocated for experimental equipment or devices.” 66 Pa. C.S. § 2806.1(b)(1)(iii).

#### a. The Two Percent Cost Cap

##### (1) Positions of the Parties

Section 2806.1(g) of Act 129 states the total cost of any EE&C Plan may not exceed 2% of the EDC’s total annual revenues as of December 31, 2006. Additionally, this section of the Act provides that the 2% provision shall not apply to the cost of residential low-income usage reduction programs established under Chapter 58 of the Commission’s Regulations. 52 Pa. Code §§ 58.1 *et seq.* The Act defines an EDC’s total annual revenue as amounts paid to the EDC for generation, transmission, distribution and surcharges by retail customers. 66 Pa. C.S. § 2806.1(m).

In the *Implementation Order*, we concluded that “[w]ith regard to the two percent limitation provision of the Act, we agree with PPL Electric that this limitation on the ‘total cost of any plan’ should be interpreted as an annual amount, rather than an amount for the full term of the Plan.” *Implementation Order* at 34. FirstEnergy has relied on the Commission’s determination regarding the allowable total cost and accordingly has constructed its Plans using $24.9 million for Met Ed, $22.9 million for Penelec and $6.7 million for Penn Power as an annual cost for each year of the Plans’ four years. FirstEnergy Exh.RIP-5*.* Therefore, for the four-year duration of each plan, the total 2% cost caps for the Companies are as follows: Met Ed $99,467,568; Penelec $91,898,976; and Penn Power $26,639,136. FirstEnergy St. 3-R at 9-10; FirstEnergy RB at 3.

MEIUG *et al.* asserts that FirstEnergy's Proposed EE&C Plans violate the Act by utilizing 2% of 2006 revenue as an annual total cost in lieu of constructing a proposed budget for the term of the Plan to be only 2% of 2006 revenue. MEIUG *et al.* MB at 15. In other words, MEIUG *et al*. asserts that an EDC is permitted to recover from its customers a sum equal to 2% of its 2006 annual revenue over the life of the EE&C Plan to implement and administer that Plan. MEIUG *et al.* MB at 15.

In support of its position, MEIUG *et al.* explains that the plain language of Act 129 provides that “[t]he total cost of any [EE&C] plan required under this section shall not exceed 2% of the electric distribution company's total annual revenue as of December 31, 2006.” 66 Pa. C.S. § 2806.1(g). MEIUG *et al*. further states that the Commission recognized this clear limitation in the *Implementation Order* when it noted that “[t]he Act dictates that the total cost of any plan must not exceed 2% of the EDC's total annual revenue as of December 31, 2006, excluding Low-Income Usage Reduction Programs established under 52 Pa. Code § 58 (relating to residential Low Income Usage Reduction Programs).” MEIUG *et al.* MB at 15 (quoting the *Implementation Order*

at 32)*.*

MEIUG *et al.* acknowledges that the Commission, in its *Implementation Order*, interpreted this limitation on the total cost of any plan as an annual amount, rather than an amount for the full period covered by the Plans. *Implementation Order* at 32-33. MEIUG *et al.* asserts that, in an attempt to explain this expanded interpretation, the Commission continued by stating:

Since the statutory limitation in this subsection is computed based on annual revenues as of December 31, 2006, we believe it is reasonable to require that the resulting allowable cost figure be applied on an annual basis as well. In addition, we note that the plans are subject to annual review and annual cost recovery under the Act, 66 Pa. C.S. §§ 2806.1(h) and (k). Finally, based upon the information presented in the comments and experience in other states, it appears that the statutory goals for consumption and demand savings are not likely to be achievable if the two percent limit was read as applicable to the entire multi-year EE&C program.

MEIUG *et al.* MB at 14 (quoting the *Implementation Order* at 34).

Despite the Commission's interpretation in the *Implementation Order*, MEIUG *et al.* also asserts that the language of the Act is clear and unambiguous. The plain language of the statute does not allow for Commission discretion or interpretation. Moreover, the plain language of a statute cannot be ignored and must be given effect. 1 Pa. C.S. § 1921(a). The Commission’s reliance on additional purported indicia of statutory intent is unnecessary in this situation. MEIUG *et al.* MB at 14 (citing 1 Pa. C.S. § 1921(b) and *Pennsylvania Power Co. v. Pa. PUC,* 932 A.2d 300, 306 (Cmwlth. Ct. 2007)).

MEIUG *et al.* also states that the *Implementation Order* was not an adjudication subject to appeal. MEIUG *et al.* states that it has raised this legal argument simply to preserve the right to appeal the *Implementation Order’s* interpretation at a later date, if necessary, and MEIUG *et al.* does not advocate that the Commission reject FirstEnergy’s Plans on this basis. MEIUG *et al.* MB at 15; RB at 14.

##### (2) Disposition

 The Commission previously addressed this issue in the *Implementation Order.* Therein, the Commission stated the following in this regard:

With regard to the two percent limitation provision of the Act, we agree with PPL that this limitation on the “total cost of any plan” should be interpreted as an annual amount, rather than an amount for the full five‑year period. Since the statutory limitation in this subsection is computed based on annual revenues as of December 31, 2006, we believe it is reasonable to require that the resulting allowable cost figure be applied on an annual basis as well. In addition, we note that the plans are subject to annual review and annual cost recovery under the Act, 66 Pa. C.S. §§ 2806.1(h) and (k). Finally, based upon the information presented in the comments and experience in other states, it appears that the statutory goals for consumption and demand savings are not likely to be achievable if the two percent limit was read as applicable to the entire multi-year EE&C program.

*Implementation Order* at 34 (footnotes omitted).

 This Commission’s rationale for interpreting the 2% cost limitation as an annual amount, as outlined in the *Implementation Order*, points out the ambiguousness of this section. Therefore, we may consider the consequences of a particular interpretation to determine the intent of the General Assembly. *See* 1 Pa. C.S. § 1921(c). The evidence contained in each of the EE&C plan proceedings provides substantial support for our previous conclusion that the statutory goals for consumption and demand savings are not achievable if the 2% limit applied to the entire multi‑year EE&C program. The evidence of record shows that FirstEnergy’s Plans each just meet or slightly exceed the statutory consumption and demand targets with budgets that spend almost (or, in Penn Power’s case, more than[[25]](#footnote-26)) the entire 2% annual cost cap. As the Plans cover four years, the Commission would have to reduce the planned expenditures by about three‑fourths of the current amount if we were to adopt a 2% cap for an entire multi‑year EE&C plan. Such a reduction in spending would result in a corresponding reduction in consumption and demand energy savings, making it impossible for the EDCs to meet the statutorily imposed consumption and demand targets, unless FirstEnergy’s shareholders contribute what amounts to almost three‑fourths of the necessary funding to avoid a penalty of up to $20,000,000. Such a result could raise an unconstitutional taking issue. The Commission does not believe that the General Assembly intended such a result. As such, it is clear to this Commission that the intent of the General Assembly was that each plan would be able to meet the mandated energy reduction targets within the legislatively imposed spending limits.

 Furthermore, as the General Assembly declared in the preamble of Act 129, “[i]t is in the public interest to adopt energy efficiency and conservation measures and to implement energy procurement requirements designed to ensure that electricity obtained reduces the possibility of electric price instability, promotes economic growth and ensures affordable and available electric service to all residents.” As FirstEnergy’s EE&C Plans are required to be in the public interest, the costs of such Plans must be borne by the public as a whole. As such, the Commission stands by its interpretation of the 2% cap propounded in the *Implementation Order*: that Section 2806.1(g) of the Act must be interpreted as an annual cost limit, not a multi‑year plan cost limit.

#### b. The Cost of the Statewide Evaluator

##### (1) Positions of the Parties

FirstEnergy has proposed the implementation of an Energy Efficiency and Conservation Charge (EEC-C) Rider for each of the three Companies. FirstEnergy St. 3 at 3. These EEC-C Riders have been designed to recover each Company’s estimated share of the Statewide Evaluator cost. The Companies, however, have not included the Statewide Evaluator costs in the final determination of the 2% limitation. FirstEnergy St. 3 at 9.

FirstEnergy argues that the Statewide Evaluator expense is not a cost of the Companies’ individual EE&C Plans, but rather a cost of the overall Commission EE&C Program. The Act states that the Commission may recover the costs of implementing its EE&C Program from the EDCs. 66 Pa. C.S. § 2806(h). Reasonable estimates of these costs are not available but it is FirstEnergy’s understanding that these costs will be allocated to each EDC on a time and materials basis. FirstEnergy contends that, because the Companies do not have the ability to manage these costs and do not know the exact magnitude of the costs, they should not be required to include these costs as part of their EE&C Plans. FirstEnergy St. 3 at 8-9; FirstEnergy MB at 42. Therefore, it is FirstEnergy’s view that the cost of the Statewide Evaluator are not part of their Plans’ costs and should not be subject to the 2% spending limitation previously discussed.

The OTS maintains that FirstEnergy erred in excluding the Statewide Evaluator cost from its 2% spending cap. OTS MB at 18; OTS St. 1 at 23-25. The OTS states that the only cost exclusion from the 2% maximum is the cost of LIURP programs. OTS St. 1 at 25. Therefore, the OTS argues that the cost of the Statewide Evaluator is an ongoing Plan cost that should be included within the 2% cap. OTS MB at 19.

The OTS also asserts that FirstEnergy’s proposed treatment of the Statewide Evaluator cost as extraneous and unrelated to its statutory duties is contrary to the requirements of the Act. OTS RB at 7. Specifically, the OTS states the Act requires that each EE&C plan shall require an annual independent evaluation of its cost effectiveness and a full review of the results of each five-year plan. OTS RB at 7; 66 Pa. C.S. § 2806.1(b)(1)(i)(J). This requirement, according to the OTS, places a duty on each EDC to arrange for annual and five-year independent reviews. OTS RB at 8; OTS MB at 20.

The OTS also notes that the Act provides that an EDC can recover all prudent and reasonable costs related to the provision of its EE&C Plan, subject to the 2% spending cap. The Commission’s *Implementation Order* maintains that such recoverable costs would include capital expenditures and related administrative costs. *Implementation Order* at 32-33*;* OTS MB at 17; OTS St. 1 at 23-25.

The OCA states that, pursuant to Section 2806.1(g) of the Act, the cost of the Statewide Evaluator represents a necessary core cost of evaluating the Companies’ Plans and must be included under the 2% spending cap. OCA MB at 41; OCA St. 1 at 39. The OCA submits that FirstEnergy’s reading of the statute is incorrect. The OCA posits that the Statewide Evaluator expense is a necessary component of the measurement, evaluation and verification needed to ensure that the Plan complies with Act 129. OCA RB at 9. The OCA notes that Section 2806.1(a)(2) of the Act, 66 Pa. C.S. § 2806.1(a)(2), charges the Commission with establishing an evaluation process “including a process to monitor and verify data collection, quality assurance and results of each plan and the program.” Evaluation of each plan is required and therefore must be considered a necessary compliance element of FirstEnergy’s Plan. OCA RB at 9.

MEIUG *et al.* supports the position taken by the OTS and the OCA on this issue. “If the General Assembly intended to allow a separate surcharge for the costs of the Statewide Evaluator, it would have included this in Act 129.” MEIUG *et al.* MB at 22. MEIUG *et al.* argues that all costs of the Companies relating to Act 129, including consultants as well as the Statewide Evaluator, are subject to the 2% cap. *Id.*

##### (2) Disposition

 Upon review of the record and the positions of the Parties, we find that FirstEnergy’s plan to recover the cost of the Statewide Evaluator outside the 2% cap is reasonable. The Act requires the Commission to establish an evaluation process that monitors and verifies data collection, quality assurance and the results of each EDC’s EE&C plan as well as the program as a whole, in accordance with the TRC Test. While the Act requires each EDC’s plan to explain how quality assurance and performance will be measured, verified and evaluated, it requires the Commission to monitor and verify EDC data collection, quality assurance processes and performance measures, by customer class. 66 Pa. C.S. § 2806.1(a). This evaluation is to be conducted every year, as each EDC must submit an annual report by July 15th, documenting the effectiveness of its plan, energy savings measurement and verification, an evaluation of the cost effectiveness of expenditures and any other information the Commission requires. 66 Pa. C.S. § 2806.1(i). Each EDC must also identify necessary adjustments to its plan based on the results of the annual and five-year reviews. 66 Pa. C.S. § 2806.1(b)(2).

 The Act further requires that, by November 30, 2013, and every five years thereafter, the Commission must evaluate the costs and benefits of the program as a whole as well as the costs and benefits of the individual EE&C plans submitted by the EDCs to the Commission. This evaluation applies to reductions in consumption as well as reductions in peak demand and it must be consistent with the TRC Test. If the benefits of the program exceed the costs, the Commission must adopt additional required incremental reductions in consumption. 66 Pa. C.S. § 2806.1(c)(3), (d)(2).

 In order to audit program results and to confirm the specific energy reduction target requirements specified in the Act, the Commission retained the services of a Statewide Evaluator who will monitor and verify EDC data collection, quality assurance processes and performance measures, by customer class as required by Section 2806.1(a)(2) and (3). Section 2806.1(h) of Act 129 states that the Commission shall recover from the EDCs its costs of implementing the overall EE&C program. 66 Pa. C.S. § 2806.1(h). The cost of the Statewide Evaluator falls into this category.

 The cost of the individual EDC’s plans is limited by the Act to 2% of the EDC’s total annual revenue as of December 31, 2006. 66 Pa. C.S. § 2806.1(g). However, the Statewide Evaluator expense, while necessary to the implementation of the overall program administered by the Commission, is not a cost component of the FirstEnergy Companies’ individual plans. Since the FirstEnergy Companies have no control over the level of this expense, it is appropriate that the FirstEnergy Companies not be required to include the cost of the Statewide Evaluator within the 2% limitation on the cost of their individual plans.

 Furthermore, Section 2806.1(k)(1) states that each EDC shall recover all reasonable and prudent costs incurred in the provision or management of its EE&C plan on a full and current basis through a reconcilable surcharge. Therefore, the cost recovery of the Statewide Evaluator should be included in the reconcilable surcharge that will be used to recover those costs of the FirstEnergy Companies’ individual EEC-C Riders.

We conclude that the expense related to the Statewide Evaluator is not a cost component of the FirstEnergy Companies’ individual plans. Rather, it is a cost component of the overall program instituted by the Commission. Accordingly, we find that Met Ed’s, Penelec’s or Penn Power’s cost recovery for their respective shares of the cost for the Statewide Evaluator will not be subject to the 2% cap on the cost of the individual EE&C Plans.

#### c. Consumer Education Outreach Costs

##### (1) Positions of the Parties

In the Petition, the Companies state that they will conduct a consumer awareness and education campaign. For Penn Power, this campaign will focus on informing customers about opportunities to participate in EE&C programs. For Met Ed and Penelec, this campaign will make people aware of the transition to market-based rates in 2011 and the opportunities for customers to take advantage of EE&C programs to help mitigate the effects of potential increases in customer bills. A share of the first year marketing campaign is included in the Companies’ Plans. In addition, the Companies will utilize the Consumer Education Program approved by the Commission in *Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company Consumer Education Plan for 2008-2012 Submitted in Compliance with May 10, 2007, Final Order at Docket No. M-00061957 (entered on May 17, 2007)*, Docket Nos. M-2008-2032261 *et al.* (Order entered August 25, 2008), to educate customers about the programs. Petition at 9.

The OCA objects to this aspect of the Companies’ Plans. The OCA argues that the costs of implementing a consumer education program are costs of implementing the Plans. As a result, they should be funded by monies collected pursuant to the Act 129 cost recovery mechanism, subject to the 2% cap. Under FirstEnergy’s approach, in contrast, the Companies would collect consumer education costs outside of the 2% cap. OCA MB at 42.

##### (2) Disposition

To the extent that an EDC educates consumers about its EE&C Plan, those costs are marketing expenses that should be included in the Companies’ Act 129 Plans. These costs are subject to the 2% cap.

For Penn Power, the consumer education program focuses entirely on the Company’s EE&C Plan. As a result, we direct this Company to include all of the costs of its consumer education program in the costs of implementing Act 129. For Met Ed and Penelec, the consumer education campaign serves a dual purpose: it increases consumer awareness about the transition to market-based rates and it educates consumers about the availability of EE&C programs. As a result, only a portion of these costs are properly attributed to the implementation Act 129 Plans. We direct these Companies to track these expenses proportionally for reporting and reconciliation purposes.

#### d. Compliance with the Two Percent Cap

##### (1) Positions of the Parties

Having determined the method of calculating the 2% cap, and the costs that are and are not subject to that cap, we consider whether the Companies’ Plans comply with that cap. We begin by noting that the Companies propose a levelized cost recovery mechanism. That is, the Companies propose an EEC-C Rider that will remain in place for the entire life of the Plans. This charge will generate revenues that exceed Plan costs in some years, but are less than Plan costs in other years. FirstEnergy alleges that the costs of the Plans, over the life of the Plan, do not exceed the 2% cap, which is calculated based on 2% of the Companies’ revenues as of December 31, 2006, multiplied by four (due to the four-year life of the Plans). No Party has objected to this aspect of the Plans.

We also note that FirstEnergy’s September 21, 2009 Plans made significant changes to the Companies’ proposed cost and revenue data. One of these changes was that the Companies calculated the cap using four complete years (i.e., forty-eight months) in lieu of the forty-three months originally employed by the Companies. FirstEnergy RB at 2-3.

Chart 1 below shows Plan costs, exclusive of common costs. Chart 2 below shows common costs. Finally, Chart 3 below shows Plan costs including common costs. As shown on that chart, Total Plan costs for Penn Power are above the 2% cap.

**Chart 1 – Plan Costs Exclusive of Common Costs:**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Met Ed** | **Penelec** | **Penn Power** |
| **2006 Revenue** | $1,243,344,716 | $1,148,737,096 | $332,989,436 |
| 2% Annual Cap[[26]](#footnote-27) | $24,866,894 | $22,974,742 | $6,659,789 |
| Program Cap[[27]](#footnote-28) | $99,467,577 | $91,898,968 | $26,639,155 |
| Cost Claim per *Initial Plan[[28]](#footnote-29)* | $86,340,593 | $79,985,575 | $22,948,545 |
| Cost Claim per *September 21, 2009 Plan[[29]](#footnote-30)* | **$83,095,457** | **$74,620,602** | **$24,994,734** |
| Change in Cost | ($3,245,136) | ($5,364,9763) | $2,046,189 |

**Chart 2 – Common Costs:**

|  |  |  |  |
| --- | --- | --- | --- |
| **Table 6B:** | **Met Ed** | **Penelec** | **Penn Power** |
| **Common Costs** | Original | Revised | Original | Revised | Original | Revised |
| Residential (Including Low-Income) | $480,873 | $11,646,384 | $387,037 | $11,075,136 | $56,738 | $1,199,295 |
| C&I Small | $87,422 | $3,532,975 | $76,131 | $3,911,066 | $12,945 | $436,273 |
| C&I Large | $41,185 | $1,192,761 | $41,192 | $2,292,163 | $16,477 | $658,898 |
| Government/ Non-Profit | Governmental is served as part of C&I Small and C&I Large rate classes |
|  |  |  |  |  |  |  |
| **Totals** | $609,480 | $16,372,121 | $504,360 | $17,278,366 | $86,160 | $2,294,466 |
| **Increase from Initial Plan to September 21, 2009 Plan** |  | $15,717,641 |  | $16,744,006 |  | $2,208,306 |

**Chart 3 – Plan Cost and Common Costs:**

|  |  |  |  |
| --- | --- | --- | --- |
| **Cost Summary** | **Met Ed** | **Penelec** | **Penn Power** |
| Plan Costs[[30]](#footnote-31) | $83,095,457 | $74,620,602 | $24,994,734 |
| Common Costs[[31]](#footnote-32) | $16,372,120 | $17,278,366 | $2,294,466 |
|  |  |  |  |
| **Total Plan and Common Costs** | $99,467,577 | $91,898,968 | $27,289,200 |
| **Cap from Chart 1** | $99,467,577 | $91,898,968 | $26,639,155 |
| **Below (Above) Cap** | $0 | $0 | ($650,045) |

##### (2) Disposition

The Commission approves the Companies’ proposed levelized cost recovery plan, except where modified in other sections of this Opinion and Order. By way of further explanation of our decision, each EE&C plan covers four years. Section 2806.1(g) of Act 129, states that “[t]he total cost of any plan required under this section shall not exceed 2% of the electric distribution company’s total annual revenue as of December 31, 2006.” 66 Pa. C.S. § 2806.1(g). As the EE&C Plans cover four years and the 2% of total annual revenues can reasonably be interpreted as an annual cost limit, the “total cost” of any four year plan cannot exceed the aggregate of the four annual 2% limit amounts. The contrary interpretation would not be reasonable because it would either not allow sufficient funds to accomplish the objectives of the Act or would require EDC shareholders to fund the majority of the funding.

 Section 2806.1(k) of Act 129 directs that the EDCs “shall recover on a full and current basis from customers, through a reconcilable adjustment clause under Section 1307, all reasonable and prudent costs incurred in the provision or management of a plan provided under this section.” 66 Pa. C.S. § 2806.1(k). This section directs that the EDCs are to recover the total reasonable and prudent costs of a four-year plan, which is of course limited by Section 2806.1(g). While this section mentions recovery on a full and current basis (probably to preclude long-term deferral of EDC cost recovery), we note that the EDC will be receiving some funds early, as complete reconciliation will occur at the end of the four-year plan period. At that time, the Commission will direct what the amount of refunds or collections for over/under recovery will be and the period in which the reconciliation will occur.

Furthermore, Section 1307(e)(3) of the Code permits the Commission, for good cause, to extend the time period under which EDCs refund or collect over/under collections for an annual automatic adjustment clause. See 66 Pa. C.S. § 1307(e)(3). The Commission finds that there is sufficient good cause in the record and in the structure of Act 129 for a levelized cost recovery. All stakeholders supported the levelized cost recovery as it would prevent rate volatility. The delay only involves a minor one, or two-year delay. Such levelized rates are in accordance with common ratemaking principles and tools, such as cost normalization.

That being said, the Plans of Met Ed and Penelec comply with the 2% cap as defined by the Act. The Plan of Penn Power, in contrast, does not appear to comply with the 2% cap as defined by the Act. However, in Section V.B.4.g. below, we disallow the Companies’ proposed contingency reserve. The removal of the contingency reserve from Penn Power’s total cost may bring Penn Power’s Plan into compliance with the 2% cap as defined by the Act. The Companies are specifically directed to address this issue in their revised Plans, and we will address this topic further in our Opinion and Order on the revised Plans.

### 2. Cost Effectiveness/Cost-Benefit Issues

Each EDC must demonstrate that the plan is cost effective using a TRC Test approved by the Commission. 66 Pa. C.S. § 2806.1(b)(1)(i)(I). In addition, the Commission’s EE&C Program must include an analysis of the cost and benefit of each plan, in accordance with a the TRC Test approved by the Commission. 66 Pa. C.S. § 2806.1(a)(3).

 In its *Implementation Order*, the Commission addressed the TRC Test and its role in the design of the EDC’s EE&C plans as follows:

The Commission directs that EDCs evaluate the cost effectiveness of each of its energy efficiency or demand reduction programs using the TRC test to be set forth in the version of the *California Manual* adopted by this Commission. The TRC test will take into account the combined effects of a program on both participating and non‑participating customers based on the costs incurred by the EDC and participating customers. In addition, the Commission expects the benefits calculated in the TRC test will include the avoided supply costs, such as the reduction in transmission, distribution, generation and capacity costs valued at marginal cost for the periods when there is a consumption reduction. The avoided supply costs should be calculated using net program savings, savings net of changes in energy use that would have happened in the absence of the program. The persistence of savings over time should also be considered in the net savings.

The Commission further expects that the costs calculated in this test will include the program costs paid by the utility and the participants, plus the increase in supply costs for the periods in which consumption is increased. Thus, for example, all equipment, installation, operation and maintenance costs, cost of removal (less salvage value), and administrative costs, regardless of who pays for them, should be included.

*Implementation Order* at 15.

 The particular requirements and testing constraints for the EDCs’ application of the TRC Test to their respective EE&C Plans are set forth in the Commission’s *TRC Test Order.* Also, it must be verified that the FirstEnergy Companies’ EE&C Plans pass the TRC Test with a total plan cost benefit ratio greater than 1.0. *Implementation Order* at 16.

#### a. Positions of the Parties

The Companies have included cost effectiveness/cost benefit analyses in each of their EE&C Plans. The analyses include explanations and demonstrations of how their respective Plans will be cost effective as defined by the TRC Test. Each Plan includes a description of the methodology employed as well as tables detailing the cost-effectiveness of the specific programs in each plan by customer class and for each Plan as a whole. FirstEnergy’s September 21, 2009 Plans at § 8.1. No Parties challenged the overall TRC or disputed the Companies’ analyses.

#### b. Disposition

 The FirstEnergy Companies used the Commission’s *TRC Test Order* as a guide to their cost effectiveness calculations. The Companies made one slight change in that they used a moving average rather than a twelve-month strip price for the PJM futures prices traded on NYMEX. However, this discrepancy causes no significant difference in the calculation of avoided cost. Met Ed’s September 21, 2009 Plan at 114‑115; Penelec’s September 21, 2009 Plan at 111-112; Penn Power’s September 21, 2009 Plan at 107-108. The calculations in the Plans show cost-benefit ratios for Met Ed, Penelec, and Penn Power of 2.40, 2.32, and 2.08, respectively. Met Ed’s September 21,2009 Plan at 19; Penelec’s September 21, 2009 Plan at 18; Penn Power’s September 21, 2009 Plan at 18. As such, we conclude that FirstEnergy’s cost effectiveness tests should be accepted.

 The creation of the cost effectiveness analyses using the Commission-approved TRC Test required the use of many assumptions regarding current and future energy prices. Given that such forecasting is very assumption dependent, the intention of the *TRC Test Order* was to ensure that all EDCs were using the same basic methodology to calculate the costs and benefits of their EE&C plans in order to eliminate potential discrepancies in calculations across companies. As stated previously, the Companies used marginal deviations from the *TRC Test Order* methodology to more accurately reflect the circumstances affecting their particular plans. Since these deviations did not lead to material differences in the resulting cost effectiveness analysis, we find that the TRC analyses in the Companies’ Plans should be approved. Furthermore, any such differences may be resolved by the Stakeholder Group as prescribed by the *TRC Test Order*:

Many issues involved in the EE&C plans, program implementation, and operation of the TRC test will be ongoing. As will be seen, several specific issues are identified below which will require additional consideration and discussion. Accordingly, we have determined to convene a stakeholder group to address these issues, as well as future issues which will undoubtedly arise as the plans move forward. A future Secretarial letter will announce details of the stakeholder group.

*TRC Test Order* at 7.

Furthermore, in the *TRC Test Order*, we directed that a stakeholder group be convened by Commission staff to address various issues arising in the TRC Test process. One such issue is whether to make adjustments to gross energy savings through the use of a net-to-gross (NTG) ratio. Three common factors, among others, addressed through the NTG are “free riders,” “take-back effect” and “spillover effect,” sometimes referred to as “free drivers.” The concept of free riders is that a number of customers may take advantage of rebates or cost savings available through conservation programs even though they would have installed the efficient equipment on their own, without any incentive from the company. Since there is no specific data available for Act 129 programs, the Commission determined that there would be no NTG adjustment made for the first year of program implementation. The Commission also proposed that the EDCs be directed to study the degree to which these factors that affect the NTG adjustment are present, and such studies would be coordinated and overseen by the Statewide Evaluator. Specifically, we direct that the TRC working group review the assumptions regarding penetration rates, rebate levels, and free ridership associated with compact fluorescent lamp (CFL) programs.

Finally, we note that the Companies’ Plans state:

Standard reports will be provided as necessary and required. The format and content will be consistent with that defined by the Commission. The Company currently anticipates that such reports will include at a minimum:

* The number of customer applications;
* Annualized rebates by program, utility, and operating company;
* Installed measures summary;
* Annualized impacts summary by measure type and by program;
* Program participation overview;
* Impacts versus goals; and
* Rebates versus budget.

Met Ed’s September 21, 2009 Plan at 101.

Considering this commitment, requiring FirstEnergy to provide an updated TRC analysis as part of the annual reporting process is not an unreasonable request and we direct the Companies to do so. These annual TRC analyses will facilitate appropriate Plan modifications in a more timely manner.

### 3. Cost Allocation Issues

With regard to cost allocation, the Commission’s EE&C Program is required to “ensure that measures approved are financed by the same customer class that will receive the direct energy and conservation benefits.” 66 Pa. C.S. § 2806.1(a)(11). The Parties addressed this issue in the context of cost recovery. As a result, cost allocation will be addressed below.

### 4. Cost Recovery Issues

Act 129 provides that an EDC “shall recover on a full and current basis from customers, through a reconcilable adjustment clause under Section 1307, all reasonable and prudent costs incurred in the provision or management of [an EE&C] plan.” 66 Pa. C.S. § 2806.1(k). The Act also states:

The plan shall include a proposed cost-recovery tariff mechanism, in accordance with Section 1307 (relating to sliding scale or rates; adjustments), to fund the energy efficiency and conservation measures and to ensure full and current recovery of the prudent and reasonable costs of the plan, including administrative costs, as approved by the commission.

66 Pa. C.S. § 2806.1(b)(1)(i)(H).

With regard to cost recovery allocation, the Commission’s EE&C Program is required to “ensure that measures approved are financed by the same customer class that will receive the direct energy and conservation benefits.” 66 Pa. C.S. § 2806.1(a)(11).

The Companies’ Plans call for three customer classes: residential, commercial and industrial each with a separately calculated recovery rate. FirstEnergy St. 3 at 3. The cost recovery rates are based upon a price per kilowatt-hour (kWh) and will be billed on that basis. To support its price per kWh recovery methodology, FirstEnergy states that a significant portion of the EE&C Plan measures focus on the goal of reduced energy consumption. Therefore, recovery on a kWh basis is appropriate for all classes. FirstEnergy St. 3-R at 8; FirstEnergy MB at 47.

#### a. Customer Class Allocations

##### (1) Government/Non-profit Costs

###### (A) Positions of the Parties

The OSBA notes that the Companies have proposed energy efficiency programs for four “portfolios” of customers: residential (including low-income), Small C&I, Large C&I and Government/Non-Profit. The OSBA observes that the costs associated with the programs for the Government/Non-Profit customers are, in turn, reassigned to the Small C&I and Large C&I categories[[32]](#footnote-33) for cost recovery. The Small C&I and Large C&I categories each account for a number of different customer classes in the Companies’ tariffs. OSBA St. 1 at 3.

The OSBA objects to the Companies’ inclusion of Government/Non-Profit expense into the cost allocation for the Small C&I category. According to the OSBA, the Companies do not offer any information about the relative size of the Government/Non-Profit customers included within the Small C&I group. OSBA MB at 15. Therefore, asserts the OSBA, it is possible that Small C&I customers will be unduly burdened with paying for the energy conservation targets for government and non-profit entities. The OSBA argues that combining the Government/Non-Profit customers with Small C&I customers for cost recovery purposes appears to be in conflict with 66 Pa. C.S.
§ 2806.1(b)(1)(i)(B), which treats the Government/Non-Profit group as a separate class that must produce an explicitly mandated share of the reduced consumption. Therefore, the OSBA recommends that Government/Non-Profit customers be treated as a separate class for cost recovery purposes. OSBA MB at 15.

In its rebuttal testimony, the Companies assert that their initial proposed cost assignments by customer class are reasonable and are based on the measures proposed therein. FirstEnergy states that the reconciliation statements provided in its annual Section 1307(e) proceedings will provide the basis to re-forecast customer rate class expenditures over the remainder of the Companies’ EE&C Plans and, if necessary, provide the basis for any interim EEC-C rate adjustments by rate class. FirstEnergy suggests that the statutory annual 1307(e) hearings will provide all interested stakeholders with an opportunity to address their concerns regarding any Company-proposed revisions to customer rate class allocations. FirstEnergy St. 3-R at 8.

###### (B) Disposition

 Section 2806.1(a)(11) of the Act requires EE&C measures to be financed by the same customer class that receives the direct energy and conservation benefits of those measures. If a utility did not have a separate rate class that only included units of government, school districts, institutions of higher education and non-profit entities prior to the effective date of Act 129, we do not believe the General Assembly intended to mandate that the utility re-write its tariff to create such a rate class. Such an undertaking would impose costs on utilities (and their ratepayers) without enhancing energy efficiency or reducing energy consumption. A more reasonable interpretation of Section 2806.1(a)(11) is that the costs of measures benefitting governments, school districts, institutions of higher education and non-profit entities must be assigned in a reasonable manner to the rate class(es) in which those customers are embedded.

In this regard, we note that the Act also requires specific treatment of low-income customers, *see* 66 Pa. C.S. § 2806.1(b)(1)(i)(G), but no Party has suggested, nor do we require, that low-income customers who are part of the Residential class be separated from that class for purposes of cost recovery. As the costs to implement EE&C programs for low-income customers will be borne by the entire Residential class, so is it reasonable to require that the costs to implement programs for Government/Non-Profit customers be borne by the specific class in which those customers reside.

Based on the facts in this case, we find that the Companies’ initial proposed cost assignments by customer classes are not reasonable. We note, for example, that Appendix H of Penn Power’s revised filing clarifies that for purposes of cost recovery the “Residential Customer Class” is comprised of Rate Schedules RS; RS Optional Controlled Service Rider; RH; RH Water Heating Option; WH; and GS Special Provision for Volunteer Fire Companies, Non-Profit Senior Citizen Centers, Non-Profit Rescue Squads, and Non-Profit Ambulance Services. The “Commercial Customer Class” is comprised of Rate Schedules GS, GS Special Rule GSDS, GS Optional Controlled Service Rider, PNP, GM, GM Optional Controlled Service Rider, PLS, SV, SVD, SM, OH With Cooling Capabilities, OH Without Cooling Capabilities, and WH Non-Residential. The “Industrial Commercial Class” is comprised of Rate Schedules GP and GT.

We are not persuaded that FirstEnergy has complied with Section 2806.1(a)(11) where the residential customer class includes customers currently receiving service under tariffs that only apply to certain non-profit entities, whereas the costs of programs for such entities are assigned to the commercial customer class. We therefore direct FirstEnergy to establish a separate cost recovery group for Government/Non-Profit customers, as required by the Act within sixty days of the entry of this Opinion and Order.

##### (2) kWh Energy Charge Versus a kW Demand Charge for Large C&I Customers

###### (A) Positions of the Parties

MEIUG *et al.* states that a kWh energy charge for large industrials is unfair and unreasonable. This approach, according to MEIUG *et al.,* will assign a greater cost burden on an EDC’s largest customers, regardless of the actual benefit received through energy efficiency and demand reduction programs designed for their class. MEIUG *et al.* MB at 18; Tr at 168. MEIUG *et al.* also believe that the result of a kWh approach for this customer class is an inequitable intra-class distribution of costs, wherein the largest and most efficient customers will essentially be subsidizing the EE&C program benefits provided to other, smaller members of the class. MEIUG *et al.* MB at 18; Tr at 170.

MEIUG *et al.* notes that the Companies have acknowledged the kWh energy cost recovery approach will disproportionately assign costs to its largest customers simply by reason of their energy-intensive characteristics. This, according to MEIUG *et al.*,is an inequitable situation that should be corrected. MEIUG *et al.* MB at 19; Tr at 168-171. MEIUG *et al.* contends that as a matter of policy either a pure customer charge approach or a blended rate mechanism combining demand charges and customer charges is best to pursue cost assignment in the context of this proceeding. MEIUG *et al.* MB at 19. Further, MEIUG *et al.* asserts that, because the costs of the EE&C Plans are allocated based on customer class, the implementation of a per kW demand charge for the Large C&I category will not impact the cost allocation to other customer classes. MEIUG *et al.* MB at 20. Lastly, as clarified at the evidentiary hearing, FirstEnergy’s witness agreed that there is nothing preventing the implementation of a kW-based demand charge mechanism for recovering EE&C Plan costs from the Large C&I customers. MEIUG *et al.* at 20; Tr. at 171.

FirstEnergy states that the Companies’ initial cost assignments are reasonable and are based upon the measures proposed within its Plans. FirstEnergy has agreed to file customer class specific 1307(e) reconciliation statements annually to address the cumulative over/under collections of the EE&C charges on a customer class basis. The Companies also state that it is premature to address the issue at this time. FirstEnergy Statement No. 3-R at 7-8.

In its Reply Brief, FirstEnergy notes that MEIUG *et al.* did not submit written testimony on this issue and, thus, its argument is lacking record evidence. FirstEnergy RB at 32. The Companies assert that, since no such testimony was filed, FirstEnergy had no opportunity to challenge the assertions of MEIUG *et al.* or to present rebuttal testimony. Thus, FirstEnergy asserts that the rate design modifications proposed by MEIUG *et al.* should be summarily rejected by the Commission and the rate design proposed by FirstEnergy should be adopted. FirstEnergy RB at 32.

###### (B) Disposition

We have carefully reviewed the record on this issue as established by the Parties and find that the Companies’ proposed kWh recovery methodology, as it pertains to Large C&I customers, should be rejected. FirstEnergy’s own witness admitted at the hearing that the largest industrial customers would pay the most under FirstEnergy’s proposed recovery mechanism simply by reason of their energy-intensive characteristics. Tr. 168.

We believe the Companies should recover their EE&C Plan costs for the Large C&I customers utilizing a demand charge. In its Answer and Comments to the Joint Petition at 33, MEIUG *et al.* stated:

Assuming that a per kW demand charge is implemented, however, an EDC must clearly identify how a customer’s kW demand is determined: whether by Peak Load Contribution (“PLC”) (essentially, the customer’s PJM capacity obligation), the customer’s monthly peak demand, or some other demand identifier. The PJM PLC is determined based on the customer’s electricity demand during the five PJM peaks during the prior year. Using the PLC to determine responsibility for any kW surcharge to collect EE&C costs from Large C&I customers would encourage all Large C&I customers to engage in efficiency and demand control measures during the five PJM peaks, which would further help the EDC to obtain the required reductions under Act 129. In addition, because PLC are determined once annually, a demand charge based on PLC will provide a consistent charge to customers and constant, reliable recovery to EDCs.

Upon further review, MEIUG *et al.,* concluded that the PJM PLC “may not necessarily provide the most beneficial result for Large C&I customers for all EDCs, particularly summer-peaking utilities such as Met Ed.” MEIUG *et al.* MB at 20, n. 16. MEIUG *et al.,* simply asked that the Companies analyze the most favorable approach for calculating customer demand for purposes of a demand charge and employ the result that produces the most just and reasonable result for the industrial class.

With regard to Met Ed and Penelec, the Commission is persuaded by the arguments offered in the Answer and Comments of MEIUG *et al.* The argument for MEIUG *et al.*’s change of position is obviously based on self-interest and we are not persuaded. The Commission believes that utilizing the PLC would encourage Large C&I customers to engage in efficiency and load control measures that would further the energy and demand reduction goals of Act 129. The Commission will, therefore, direct Met Ed and Penelec to adopt an EE&C Plan demand charge based on a customer’s PJM Peak Load Contribution as the cost recovery mechanism for its Large C&I customers. We further direct Penn Power to adopt a comparable cost recovery mechanism when it joins PJM. In the meantime, Penn Power’s demand charge shall be based on the monthly kW used by Large C&I customers, or a PLC equivalent should such determinant become available in the future in the MISO markets.

#### b. Cost Recovery through a Separate Surcharge or Within Distribution Rates

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##### (1) Positions of the Parties

FirstEnergy has proposed three separate surcharges for each of its distribution companies, which are proposed to be a separate line item surcharge, to recover costs of the EE&C Plans. FirstEnergy MB at 41. FirstEnergy believes that a separate line item provides transparencies, is consistent with the implementation of recent cost recovery rider charges, and increases the customer’s awareness of the energy efficiency and conservation plans. FirstEnergy MB at 41; FirstEnergy Exh. RIP-3 at 1-3. The three surcharges (residential, commercial and industrial) are comprised of two principal components: the EECc or “current cost” component and the “E” factor or reconciliation component. The Current Cost component includes:

EEC Exp1-Commission-approved costs incurred for EE&C measures targeted to that customer class during the computational period, plus allocated computational period indirect costs incurred associated with all three FirstEnergy EE&C Programs;

EEC Exp2-Allocated portion of incremental administrative start-up costs incurred by FirstEnergy through October 31, 2009 representing development of the Companies’ Programs;[[33]](#footnote-34) and

EEC Exp3-Allocated portion of the FirstEnergy statewide evaluator contract cost which shall not be included within the Act’s 2% cap.

FirstEnergy has developed its residential, commercial and industrial surcharges on a cents per kWh basis and all three surcharges will be reconciled annually. FirstEnergy St. 3 at 11.

The OSBA concurs that the recovery of Plan costs should be accomplished with a separate surcharge on each customer’s bill. OSBA St. 1 at 7. In support of its position, the OSBA states that the costs associated with the conservation program are subsidies to a subset of customers not distribution costs; the costs allocated to small C&I customers is significant; customers will see the proposed surcharge as an increase in current distribution rates perhaps unrelated to FirstEnergy’s Plan; and a separate surcharge will help FirstEnergy’s communication efforts and will provide customers with a better understanding of the reason for the charge. OSBA St. 1 at 9-10; OSBA MB at 15.

MEIUG *et al.* agrees with the Company and the OSBA. MEIUG *et al.* argues that separating the EEC-C from distribution charges will provide clarity and transparency, and will eliminate confusion with respect to the services for which customers are paying each month. MEIUG *et al.* MB at 20-21.

The OCA believes that the EE&C costs should be included for cost recovery purposes within the existing distribution charges, as opposed to listing a separate line item on the bill. The OCA witness asserts that, while there are potential educational and transparency benefits to calling out the cost of energy efficiency programs as a line item on a customer’s bill, there are other, possibly more effective, ways of communicating this information. The OCA asserts that the Companies should provide effective marketing to inform customers about the conservation programs. The OCA suggests that a brochure giving information on the Companies’ energy efficiency programs could be included with the bill. OCA St. 1 at 40; OCA MB at 39-40.

##### (2) Disposition

Consistent with the current Commission-approved approach regarding Section 1307(e) cost recovery mechanisms, such as the Universal Service Funding Mechanism (“USFM”) and the Universal Service Program Long Term Evaluator, FirstEnergy’s EE&C Plan costs should be recovered in the distribution rate on customers’ bills. The Electricity Generation Customer Choice and Competition Act (*Competition Act*) states that:

There are certain public purpose costs, including programs for low-income assistance, energy conservation and others, which have been implemented and supported by public utilities’ bundled rates. The public purpose is to be promoted by continuing universal service and energy conservation policies, protections and services, and full recovery of such costs is to be permitted through a nonbypassable rate mechanism.

66 Pa. C.S. § 2802(17).

Our Regulations concerning billing format, 52 Pa. Code § 54.4(b)(3), and billing information, 52 Pa. Code § 56.15, are consistent with this section of the *Competition Act*. Past practice recognizes distribution rates as the appropriate vehicle to incorporate rolled up cost-centers or to recover the costs of providing service that is not otherwise classified as transmission or generation. We find that the costs associated with an EE&C program is such a cost and, therefore, should be included within the Companies’ distribution rates. Accordingly, we agree with the OCA and direct the Companies to incorporate recovery of their approved EE&C costs as an addition to their currently approved distribution rates.

We will, however, make an exception for both the commercial and industrial customer classes. We are persuaded by the reasoning of the OSBA that the EE&C program costs are material and may result in a significant rate increase. Commercial and industrial customers will likely (albeit incorrectly) view this as a distribution rate increase if the charge is buried in the distribution rate. In the current economic environment, the itemization and identification of costs is increasingly critical for sophisticated business operators. Therefore, we will approve the Companies’ proposal to list its EEC-C Rider as a separate line item on commercial and industrial customers’ bills.

#### c. Interest on Over/Under Collections

##### (1) Positions of the Parties

FirstEnergy’s Plans do not provide for the payment of interest on over/under collections of Plan costs. FirstEnergy believes that the payment of interest is not appropriate because the Plans call for levelized EEC-C rates over the life of the Plans, but the costs of implementing the Plans vary significantly from year to year. FirstEnergy St. 3-R at 6.

The OTS recommends that the Commission modify the Companies’ Plans to allow for non-recoverable (as a Plan cost) interest charges of 8% for over-collections and 6% for under-collections. The OTS submits that this proposal is consistent with Commission practice, Commission Regulations and the Code. The OTS further maintains that these interest costs should be excluded from the Company’s total allowable EE&C Plan costs and should not be recovered in any future proceeding. OTS MB at 22-23. The OTS also states that notwithstanding the violation of prudent regulatory standards, wherein the recovery of Plan costs would be matched to actual Plan expenses, the no-interest proposal here is more egregious because it provides the Companies with an opportunity to earn interest income from a large amount of ratepayer provided funds. OTS MB at 29.

The OCA supports FirstEnergy’s proposal that no interest be charged on any over/under collection of Plan costs. OCA MB at 38. The OCA asserts that the 2% spending cap contained in the Act does not contemplate interest charges. FirstEnergy should not impose interest on the over/under collections of its cost recovery mechanism, particularly if such interest would result in customers paying more than the 2% cost cap allowed by the Act. OCA MB at 38.

##### (2) Disposition

Act 129 does not address whether over/under collections are subject to interest. The *Implementation Order* and case law also are silent on this issue. The Act does require recovery of “all reasonable and prudent costs incurred in the provision or management of a plan under this section” on a full and current basis through a reconcilable adjustment clause under Section 1307 of the Code. 66 Pa. C.S. § 2806.1(k)(1). With no statutory directive or case law requirement to impose interest, we conclude that over/under collections are not subject to interest.

#### d. Interest Associated with the Recovery of Start-up Costs

##### (1) Positions of the Parties

FirstEnergy has proposed to collect interest on administrative start-up costs through the EEC-C Riders. Specifically, FirstEnergy proposes amortizing the start-up costs for each of the Companies, with interest compounded at the legal rate of 6%, 41 P.S.§ 202, over the seven-month period ending May 31, 2010. FirstEnergy St. 3 at 7-8. FirstEnergy believes that the accrual of interest on the incremental initial startup costs incurred through October 31, 2009, is appropriate since these costs are being realized by the Companies prior to the date on which they can start recovery under their respective EEC-C Riders. FirstEnergy St. 3-R at 4; FirstEnergy MB at 43. FirstEnergy asserts that the proposed methodology for interest computation is consistent with the cost recovery of startup costs for other Section 1307(e) mechanisms proposed by the Companies and agreed-to by the parties in other proceedings before the Commission. FirstEnergy MB at 43.

The OTS does not oppose the imposition of interest on these start-up costs. However, the OTS does oppose the use of compound interest. In lieu of compound interest, the OTS recommends simple interest. This is consistent with the OTS’ recommendation regarding the collection of interest on over/under collections of Plan costs. OTS MB at 21-22.

The OCA does not oppose FirstEnergy’s proposal to recover its administrative start-up costs if the total amounts recovered do not exceed the 2% cap imposed by Act 129. However, the OCA does object to the recovery of interest on these costs. The OCA believes that it is unreasonable to charge interest on this one cost component, without crediting customers with interest on over-collections in the early years of the Companies’ Plans. It is the OCA’s position that interest should not be paid or collected on any portion of these charges. OCA MB at 38.

##### (2) Disposition

After careful consideration of the record developed on this issue, we have determined that it is appropriate to deny recovery of interest on FirstEnergy’s start-up costs. We agree with the OCA that it is unreasonable to charge interest on this one cost component without also crediting customers with interest on over-collections in the early years of the Companies’ Plans. Consequently, we also shall deny the recommendation of the OTS to apply simple interest to the amortization of FirstEnergy’s start-up costs.

#### e. Required Bidding of Met Ed and Penelec’s Demand Response Measures into PJM’s Reliability Pricing Model Auction

##### (1) Positions of the Parties

Beginning with the Auction conducted in May 2009, PJM has modified its RPM auction process to allow for the inclusion of energy efficiency and demand response resources. Qualifying energy efficiency and demand response resources can now bid into the PJM auctions as a capacity resource and, if cleared, receive capacity payments. OCA St. 1 at 42-43. The OCA submits that Met Ed and Penelec[[34]](#footnote-35) should be directed to explore this option and to bid their qualifying resources into the auctions. The OCA asserts that capacity payments can provide significant value that should then be credited to all customers through the cost recovery mechanism to offset the costs that customers must bear under the Act. The OCA agrees that Met Ed and Penelec should recover the reasonable costs of participation in the PJM RPM auction, and that the savings credited to ratepayers as a result of their participation should be reduced accordingly. OCA MB at 38-39.

FirstEnergy states that curtailment service providers should install and manage residential demand response programs and reflect the benefit of the PJM RPM auction in their bids. FirstEnergy St. 2-R at 7. FirstEnergy further argues that, to the extent the Commission requires that they aggregate demand-side resources and participate in the PJM RPM auction, any potential savings must be passed on to customers net of all costs to the Companies for such participation. FirstEnergy St. 2-R at 8. FirstEnergy has committed to pay the customers RPM capacity payments less administrative and credit requirement costs to implement such programs. FirstEnergy estimated that approximately 15% of the total RPM capacity payments received will be retained to cover its administrative and credit requirement costs. FirstEnergy St. 2-R at 7; FirstEnergy RB at 28, 29.

##### (2) Disposition

We agree with the OCA’s recommendation and believe it should be incumbent upon Met Ed and Penelec (and Penn Power, when it joins PJM) to bid their demand response measures into the PJM RPM. We expect these Companies to take full advantage of savings made available from PJM programs. As noted above, FirstEnergy supports the OCA’s recommendation. FirstEnergy should be commended for showing a willingness to avail itself and its ratepayers of the possible capacity payments from PJM’s RPM program.

#### f. EE&C Plans and Rate Base Proceedings

##### (1) Positions of the Parties

The OTS submits that all capital assets (and associated depreciation) funded by EE&C revenues should be excluded from base rates and not included in any future rate base claim. OTS MB at 34. FirstEnergy contends that the OTS’ recommendation is unnecessary because FirstEnergy’s witness stated “All Energy Efficiency and Conservation Plan costs and revenues included in the Companies’ EEC-C Riders will be excluded from distribution base rate treatment and subject to Commission review and audit.” FirstEnergy St. 3-R at 6; FirstEnergy RB at 45.

##### (2) Disposition

We concur with the OTS’ recommendation. By this Opinion and Order, we clarify that capital costs recovered by the Companies through the EEC-C rider will not be included in future rate case proceedings.

#### g. Contingency Reserve

##### (1) Positions of the Parties

As stated previously, in response to the OCA’s comments that costs associated with the Residential Direct Load Control Programs included amounts that would not be incurred during the period covered by the Plan, the Companies’ September 21, 2009 Plans reduced the budget for that Program by approximately $12 million for Met- Ed; approximately $12.5 million for Penelec; and approximately $1 million for Penn Power. These funds were reallocated for: (1) additional low-income programs; (2) enhanced evaluation, measurement and verification (“EM&V”) processes; and (3) a contingency reserve for unforeseen events that may arise during the period in which the Plans are in effect. FirstEnergy RB at 3.

FirstEnergy’s September 21, 2009 Plans provided supplemental details regarding revised spending levels for its EE&C Plans. FirstEnergy RB at 3. Absent from FirstEnergy’s data, however, is the amount proposed to be set aside in a contingency reserve for unforeseen events.

##### (2) Disposition

We realize that the vast majority of all administrative and common costs are estimated. However, we do not agree with assessing ratepayers for contingencies that the Companies have characterized as unforeseen. It is our considered opinion that the inclusion of unmeasurable, unforeseen costs within rates to be recovered from ratepayers is unjust and unreasonable. Moreover, permitting FirstEnergy to have such a fund would undermine our holding in Section V.D.4. below that an EDC cannot shift program funds within a customer class, or between customer classes without prior Commission approval. Accordingly, we will disallow the proposed contingency reserve and order the Companies to revise their Plans, and the accompanying cost recovery mechanism, to remove the contingency reserve from the estimated cost of the Plans and the calculation of the recovery rate developed herein.

## C. Conservation Service Provider Issues

The Commission’s EE&C Program must include a requirement for the participation of conservation service providers in the implementation of all or part of a plan. 66 Pa. C.S. § 2806.1(a)(10). The Commission is required to establish procedures requiring EDCs to competitively bid all contracts with conservation service providers. 66 Pa. C.S. § 2806.1(a)(7). The Commission is also required to establish procedures to review all proposed contracts with conservation service providers prior to the execution of the contract. 66 Pa. C.S. § 2806.1(a)(8). The Commission has the authority to order the modification of a contract to ensure that plans meet consumption reduction requirements.

Consequently, each EDC must include in its plan a contract with one or more conservation service providers selected by competitive bid to implement all or part of the plan as approved by the Commission. 66 Pa. C.S. § 2806.1(b)(1)(i)(E). The *Implementation Order*, at 25*,* noted that, due to the aggressive design and implementation schedule set forth in Act 129, EDCs were not expected to have all bids for and contracts with conservation service providers completed by the July 1, 2009 plan filing. However, the Commission stated that each filed plan was expected to include at least one contract with a conservation service provider. The *Implementation Order* established the criteria that the Commission will use in approving request for proposals (RFP) procedures and standard form contracts for conservation service providers. *Implementation Order* at 25.

In the instant case, much unnecessary confusion has been caused by the use of the abbreviation “CSP.” This is because “CSP” stands for two distinct terms. A “CSP” under Act 129 is a “conservation service provider,” which is:

An entity that provides information and technical assistance on measures to enable a person to increase energy efficiency or reduce energy consumption and that has no direct or indirect ownership, partnership or other affiliated interest with an electric distribution company.

66 Pa. C.S. § 2806.1(m).

A “CSP” under PJM demand response programs, in contrast, is a “curtailment service provider.” We take judicial notice of PJM’s website pursuant to 52 Pa. Code § 5.408(a), which explains this term:[[35]](#footnote-36)

PJM’s Economic Load Response program enables demand resources to voluntarily respond to PJM locational marginal prices (LMP) by reducing consumption and receiving a payment for the reduction.

\* \* \*

The economic program provides access to the wholesale market to end-use customers through CSPs to curtail consumption when PJM LMPs reach a level where it makes economic sense.

To reduce confusion, this section will refrain from using the abbreviation “CSP.”

Considering that Met Ed and Penelec are located in PJM, but Penn Power is not, the Companies’ Plans are different with regard to conservation service providers and curtailment service providers. This section will begin by addressing those issues that pertain to all FirstEnergy Companies. The issues that pertain only to Met Ed and Penelec are then discussed. Finally, this section will discuss the issues that pertain only to Penn Power.

### 1. Issues Pertaining to all FirstEnergy Companies

#### a. Contract for Services with at Least One Conservation Service Provider Selected Through an RFP Process

##### (1) Positions of the Parties

 By Secretarial Letter dated April 27, 2009, the Commission approved FirstEnergy’s proposed standard form contract with conservation service providers. That letter also requires FirstEnergy to submit for Commission approval any future contract with a conservation service provider that is materially different from the approved standard form contract.

In Section 4.3.1 of its Plans, FirstEnergy states that Black & Veatch (a conservation service provider listed on the Commission’s conservation service provider registry) was hired as the lead consultant supporting development of the Plans. This agreement was the result of a Commission-approved RFP process. Appendix C of the Plans presents the signed agreement between FirstEnergy and Black & Veatch, as well as a copy of the standardized conservation service provider contract approved by the Commission.

 FirstEnergy expects to contract with additional conservation service providers. FirstEnergy submits that it will contract with one or more program manager conservation service providers to implement the portfolio of programs. FirstEnergy’s September 21, 2009 Plans at § 4.3.2. FirstEnergy anticipates that joint RFPs will be issued for conservation service providers to support the implementation of programs, including, but not limited to, commercial and industrial sector program managers. The Plans provide that actual contracts will be based on proposals submitted in response to FirstEnergy’s solicitations. FirstEnergy’s Plans at § 4.3.3. FirstEnergy submits that it will request Commission staff review of any future conservation service provider contracts that are materially different in form from the standard contract. FirstEnergy’s Plans at § 4.3.1.

##### (2) Disposition

We conclude that FirstEnergy’s Plans comply with 66 Pa. C.S. § 2806.1(b)(1)(i)(E) in that they include at least one contract with a conservation service provider selected by competitive bid to implement all or part of the Plans as approved by the Commission. The Plans also are consistent with the Secretarial Letter approving FirstEnergy’s standard form contract. With regard to future contracts with conservation service providers, the Companies are reminded that the *Implementation Order,* at 24-27, sets forth the Commission’s procedure regarding the competitive bidding and approval of contracts with conservation service providers.

#### b. Length of the Demand Response Program

##### (1) Positions of the Parties

Under the proposed demand response program (which pertains to commercial and industrial customers), the Companies will make incentive payments for two years. EnerNOC objects, arguing that this time period may not provide sufficient certainty to participate in the proposed program. Consequently, EnerNOC argues that the Plans should be modified to extend the “ramp-up” period of the program and to permit contracts to extend beyond the life of the Plans (May 31, 2013). EnerNOC MB at 7, 13‑14 and 18-19.

 MEIUG *et al*. disagrees with EnerNOC’s statement that the General Assembly intended that FirstEnergy’s Plans, in their current state, will be extended. MEIUG *et al*. RB at 9. MEIUG *et al*. notes that the General Assembly balanced the interests of EDCs with the interests of ratepayers by setting two distinct peak reduction goals. Citing Section 2806.1(d)(2), MEIUG *et al.* contends that the General Assembly created a formal review of demand response program costs and benefits after the first deadline of May 31, 2013, before the Commission potentially sets a second goal for peak demand reduction to be achieved by May 31, 2017. MEIUG *et al*. MB at 10.

 FirstEnergy states that the Companies have a limited budget that is subject to the constraints of Act 129. This budget limits the available funds to be spent only during the period June 1, 2009, through May 31, 2013. FirstEnergy contends that, in order to comply with Act 129 and remain within the 2% spending limitation, the summer of 2011 and the summer of 2012 are critical to meet the intent of the Act. FirstEnergy asserts that it is not reasonable to expend resources to attempt to begin demand response programs prior to the summer of 2011 since demand response during the summer of 2010 would not count toward the Act 129 target. 66 Pa. C.S. § 2806.1(d). Thus, it would be premature to make the commitment that EnerNOC requests at this time. FirstEnergy St. 2-R at 13; FirstEnergy MB at 51-53; FirstEnergy RB at 34.

##### (2) Disposition

 Upon review of the record, we conclude that FirstEnergy is correct. EnerNOC’s proposal for contracts that extend beyond May 31, 2013, contravenes the statute because the Act limits the spending of funds for the Plans to the Plan period, which ends May 31, 2013. The time period of the commercial and industrial demand response program in FirstEnergy’s Plans is consistent with the provisions of Section 2806.1(d).

Moreover, EnerNOC did not cite any record evidence to support the assertions in its briefs. EnerNOC made assertions in its briefs based on its experience, EnerNOC MB at 13, but EnerNOC failed to sponsor any witness to testify to that experience. We will not require FirstEnergy to modify its Plans based on EnerNOC’s unsubstantiated assertions. Nevertheless, if the Companies’ proposed demand response programs do not obtain the expected levels of participation, we expect that the tracking and reporting mechanisms in the Plans will detect that fact, and the Companies will timely seek Commission approval of necessary changes in the Plans, consistent with this Opinion and Order.

We note, however, that FirstEnergy has suggested that the conservation service provider issues raised by EnerNOC, ClearChoice, and MEIUG *et al.* be vetted during the stakeholder process. FirstEnergy RB at 40. We encourage FirstEnergy to do so and to seek Commission approval of any resulting changes in the Plans, consistent with this Opinion and Order.

### 2. Issues Pertaining only to Met Ed and Penelec

#### a. Met Ed and Penelec as Curtailment Service Providers

##### (1) Positions of the Parties

Met Ed and Penelec propose the selection of curtailment service providers to secure and manage demand response programs. FirstEnergy RB at 3; FirstEnergy St. 3-R at 8. Specifically, these curtailment service providers will register load for commercial, industrial and government sector customers for Met Ed’s and Penelec’s demand response programs. Met Ed’s September 21, 2009 Plan at 73; Penelec’s September 21, 2009 Plan at 70.

 In addition, Met Ed and Penelec propose to act as curtailment service providers themselves. Met Ed’s September 21, 2009 Plan at 78; Penelec’s September 21, 2009 Plan at 75. FirstEnergy explains as follows:

Both Met-Ed’s and Penelec’s Plans clearly state that Met-Ed and Penelec, acting as a [curtailment service provider] within the PJM program, will fill the gap between the total MWs needed for compliance with Act 129, less the amount expected from the Voluntary Load Reduction Program, less the amount committed by [curtailment service provider’s] registration under the ‘Commercial Industrial Demand Response Program-[Curtailment Service Provider] Mandatory’ program the Mandatory Load Reduction Program. Witness Parish testified that Met Ed and Penelec are offered as an alternative to the development of a competitive [curtailment service provider] demand program, essentially as a contingency plan, to ensure that Met Ed and Penelec are able to secure the level of demand reduction needed in the event that the ‘Commercial Industrial Demand Response Program-[Curtailment Service Provider] Mandatory’ program does not result in the MWs needed.

FirstEnergy St. 2-R at 9-10; FirstEnergy MB at 49-50

 EnerNOC notes that Act 129 does not allow an EDC to act as a conservation service provider. EnerNOC MB at 6. EnerNOC posits that, as the definition of a conservation service provider excludes any entity that has a “direct or indirect ownership, partnership or other affiliated interest with an electric distribution company,” EDCs are precluded from acting as conservation service providers. EnerNOC MB at 6-7.

ClearChoice also objects to the proposal for Met Ed and Penelec to act as curtailment service providers, claiming that the program will have an adverse impact on competition among curtailment service providers. ClearChoice notes that Met Ed and Penelec would pay customers 100% of the payment they receive from the PJM demand response programs, plus an additional fixed payment per kW. ClearChoice St. 1 at 6. In contrast, ClearChoice and other existing curtailment service providers typically retain a share of the payment from PJM to cover their overhead, risk of customer non-performance, and return on risk capital. *Id*. at 7. ClearChoice argues that it cannot compete with an EDC offering the same PJM programs, where the EDC pays out in excess of 100% of the proceeds it receives from PJM. ClearChoice St. 1 at 7.

 FirstEnergy disputes ClearChoice’s position that the Companies’ proposal is anti-competitive. Nevertheless, Met Ed and Penelec revised their Initial Plans to reduce the payments that Met Ed and Penelec, acting as curtailment service providers, will make to customers. Met Ed and Penelec will retain a portion of these proceeds to cover administrative and other costs, and pass the remainder (estimated to be approximately 85% of PJM’s payment) on to customers. FirstEnergy St. 2-R at 11.

ClearChoice commended Met Ed and Penelec for clarifying their demand response programs. ClearChoice indicated its willingness to work with Met Ed and Penelec so that: (1) their demand response programs are implemented in a way that will allow ClearChoice the opportunity to work with these Companies as a curtailment service provider; and (2) any marketing of these Companies’ curtailment service provider program is competitively neutral. ClearChoice RB at 6.

##### (2) Disposition

We find the proposal for Met Ed and Penelec to act as curtailment service providers within their demand response programs is reasonable and in compliance with Act 129, and we will approve it. In our view, it is reasonable for the Companies to stand ready to achieve their demand response goals in the event that third party curtailment service providers do not contract with Met Ed or Penelec for the required load necessary to be in compliance with Act 129. We note, in this regard, that Met Ed and Penelec revised their Plans to reduce the payments made to customers. As a result, we find the proposal is not anti-competitive.

Moreover, in the Plans before us, Penelec and Met Ed merely seek to implement a portion of their own demand response programs. In doing so, they would fulfill the function of a “curtailment service provider.” We do not believe the statutory definition of a “conservation service provider” serves as a bar to this proposal. We therefore reject the objections of EnerNOC and ClearChoice.

We will, however, require FirstEnergy to track the amount it receives in payments from PJM, the amounts it retains for administrative and other costs, the amounts passed on to customers, and the actual administrative, marketing and credit costs associated with this program. This data shall be included in the Companies’ annual reports so that the Commission may verify the Companies’ estimate that customers would receive approximately 85% of PJM’s payments. This data will also help the Commission ensure that the Companies are not recovering these costs twice (i.e., from PJM’s payments and from Act 129 funds).

#### b. Caps on the Amount of Demand Reduction that can be Provided by a Single Curtailment Service Provider

##### (1) Positions of the Parties

ClearChoice asserts that no single curtailment service provider should have more than 50% of the demand reduction required under the Plan of either Met Ed or Penelec. ClearChoice St. No 1 at 11. ClearChoice believes that this limitation is analogous to the load caps on default generation service and that it would ensure that multiple providers can participate. ClearChoice St. No 1 at 11; ClearChoice MB at 17.

 Met Ed and Penelec assert that they are obligated to meet the requirements of Act 129. They are concerned that ClearChoice’s proposal would increase the risk that they would not be able to meet their reduction goals. In addition, they are concerned that the proposal would increase the cost of the program. Met Ed and Penelec have both indicated that they will contract with at least two curtailment service providers in their respective demand response programs should the registration process result in an oversubscription. FirstEnergy St. 2-R at 12; FirstEnergy MB at 50-51.

##### (2) Disposition

 We agree with FirstEnergy that there should be no limit to the amount of load reduction that can be assigned by contract to any single curtailment service provider. Act 129 requires an EDC’s EE&C plan to state the manner in which the plan will meet or exceed the required reductions in consumption and peak demand. 66 Pa. C.S.
§ 2806.1(b)(1)(i)(D). FirstEnergy believes that the Plans of Met Ed and Penelec will enable those Companies to meet or exceed the targeted peak demand reductions required by Act 129. FirstEnergy MB at 15. Limitations on the amount of MWs under contract to any one curtailment service provider would result in unnecessary increased risk that the EDC will not meet its targets. Accordingly, ClearChoice’s proposal to cap the amount of demand reduction that any one curtailment service provider can provide is denied.

#### c. The “First Come First Served” Approach

##### (1) Positions of the Parties

 Met Ed and Penelec plan to enter into agreements with curtailment service providers on a “first come first served” basis. Specifically, Met Ed and Penelec will issue a notice to all curtailment service providers requesting the number of MWs that could be provided in 2011/2012 and 2012/2013. Met Ed and Penelec would then select curtailment service providers for their demand response programs using date stamped responses dated no earlier than three days after the notice was mailed. To the extent that the registered MWs with the same date stamp exceed the MWs required, Met Ed and Penelec will offer such curtailment service providers a pro-rata share of the MWs so offered and date-stamped on the same day. FirstEnergy St. 2-R at 12; FirstEnergy MB at 51.

 EnerNOC opposes FirstEnergy’s “first come first served” approach, suggesting that it presents serious challenges that threaten successful implementation of the demand response program. EnerNOC asserts that the use of a single conservation service provider, selected through a competitive RFP approach, would reduce the risks of program failure. EnerNOC MB at 12. EnerNOC argues that a single approved conservation service provider for the Companies’ programs should be the entity responsible to all large commercial and industrial customers in the service territories, whether these customers are acting as their own conservation service providers or have existing relationships with another conservation service provider. EnerNOC RB at 4.

 ClearChoice disagrees with EnerNOC’s position. ClearChoice RB at 6. ClearChoice, like MEIUG *et al.,* supports Met Ed and Penelec’s demand response programs so long as the opportunities for them to participate in the programs and the PJM program are given on a fair, reasonable and non-discriminatory basis. ClearChoice RB at 6; MEIUG *et al.* RB at 6. MEIUG *et al.* supports FirstEnergy’s “first come first-served” approach because it will provide an opportunity for all curtailment service providers to offer reduction commitments and receive incentives through their curtailment service providers, if applicable, for this performance. MEIUG *et al.* MB at 10; RB at 12.

 FirstEnergy maintains that its proposed approach is rational, fair, and competitively neutral. It also asserts that there is no legitimate basis for forcing Met Ed and Penelec to use an RFP proposal instead of the “first come first served” approach. FirstEnergy RB at 35. FirstEnergy states that all qualifying curtailment service providers will have the option to register available MWs and each curtailment service provider will have the same performance requirements. FirstEnergy RB at 35.

##### (2) Disposition

 Upon review and consideration of Met Ed and Penelec’s Plans, we conclude that the “first come first served” approach proposed by FirstEnergy is reasonable and in compliance with Act 129, so long as all curtailment service providers have the opportunity to participate in the FirstEnergy programs and the PJM program on a fair, reasonable and non-discriminatory basis. We note that EnerNOC’s single conservation service provider model is not supported by any record evidence. Accordingly, we reject EnerNOC’s single conservation service provider model. We expect that continuing participation in the stakeholder process will ensure that an even playing field is maintained for these demand response programs.

#### d. Increasing the Incentives in the Demand Response Program to Obtain Expected Participation Levels

##### (1) Positions of the Parties

 Met Ed and Penelec proposed a quarterly payment of $6.88 per kW, or $27.52 per kW-year in their Initial Plans. In the Plans filed September 21, 2009, Met Ed and Penelec state that pricing will be based on fixed payments of $9.50 per contracted kW of peak load reduction per quarter and possible decrements (or performance penalties) for peak load reductions below contracted levels for the season. Met Ed’s September 21, 2009 Plan at 75; Penelec’s September 21, 2009 Plan at 71.

 EnerNOC submits that the quarterly incentive payment offered by Met Ed and Penelec for the demand response programs will be substantially lower than necessary to attract customers willing to deliver fifty or more hours of curtailable load, particularly when those customers have an opportunity to participate in the PJM Emergency Demand Response Program. EnerNOC argues that, in such circumstances, a substantial incentive is needed to achieve participation levels. EnerNOC suggests that the Commission examine the appropriateness of the incentive level of the curtailment programs, relative to those in PPL and PECO programs. EnerNOC MB at 14-15.

##### (2) Disposition

 EnerNOC did not cite any record evidence to support the assertions in its briefs. We will not require FirstEnergy to modify the incentives in its Plans based on EnerNOC’s unsubstantiated assertions. Nevertheless, if the incentives in the Plan are not adequate to obtain the expected levels of participation, we expect that the tracking and reporting mechanisms in the Plans will detect that fact and Met Ed and/or Penelec will timely seek Commission approval of necessary changes in its Plan, consistent with this Opinion and Order.

#### e. Marketing the Demand Response Program

##### (1) Positions of the Parties

 ClearChoice states that the marketing of Met Ed’s and Penelec’s demand response programs should be competitively neutral so as not to prefer the use of one curtailment service provider over another. ClearChoice asserts that, under Met Ed’s and Penelec’s program designs, it is inevitable that ratepayer funding under Act 129 will be used to subsidize marketing of the demand response program for the benefit of Met Ed’s and Penelec’s own programs to the detriment of all other curtailment service providers competing for customers in the FirstEnergy service territory. ClearChoice recommends that all customer information used by FirstEnergy to market its own program should also be provided to third party curtailment service providers offering the PJM program. ClearChoice MB at 12-13; ClearChoice RB at 6.

 MEIUG *et al.* supports the demand response programs of Met Ed and Penelec, but would require these Companies to implement measures to accommodate all large commercial and industrial customers and to allow participation in the demand response programs to more than just one or two curtailment service providers. MEIUG *et al*. MB at 4-5. MEIUG *et al*. observes that PJM’s website lists approximately 76 curtailment service providers. MEIUG *et al*. wants assurance that any customer who is under a long-term contract with a curtailment service provider can participate in Met Ed’s and Penelec’s demand response programs.  *Id*. at 10. To ensure that all customers have an opportunity to participate in the program, MEIUG *et al*. recommends that FirstEnergy establish a set date and price at which curtailment commitment offers will be submitted by curtailment service providers and FirstEnergy should, to the extent possible, enter into contracts with every curtailment service provider that meets these requirements. *Id.* at 12.

 The Companies state that they will provide the same information and the same program structures to all curtailment service providers and that no preferential treatment will be provided to any specific curtailment service provider. FirstEnergy RB at 37.

##### (2) Disposition

As stated above, we conclude that the “first come first served” approach proposed by FirstEnergy is reasonable and in compliance with Act 129, so long as all curtailment service providers have the opportunity to participate in both the FirstEnergy demand response programs and the PJM program on a fair, reasonable and non-discriminatory basis. The Companies state that they will provide the same information to all curtailment service providers and those customers who plan to act as their own curtailment service providers and we believe that it is in FirstEnergy’s best interest to do so.

In addition, the Commission expects that the Companies will demonstrate a commitment to fair and non-discriminatory treatment as between third-party curtailment service providers and the Companies acting as curtailment service providers. For example, incentives and company program cost subsidies for equipment, marketing, and administrative support must be comparable whether Met Ed and/or Penelec is acting as a curtailment service provider or is contracting with a third-party curtailment service provider. The Commission reserves the right to revisit this issue if the evidence indicates that the Plans effectively discourage participation by third party curtailment service providers and/or unduly favor Met Ed and/or Penelec.

#### f. Credit Requirements

##### (1) Positions of the Parties

The demand response programs of both Met Ed and Penelec contain the following credit requirements:

The Curtailment Service Provider (“CSP”) or its Guarantor will be deemed creditworthy upon meeting the following requirements:

 a. the CSP has a minimum senior unsecured debt rating (or, if unavailable, corporate issuer) from one of the following rating agencies of at least “BBB-“ from S&P, “Baa3” from Moody’s, or “BBB-“ from Fitch

 b. If the CSP does not meet the creditworthiness requirement, the CSP will need to post a parent guaranty from a guarantor that meets the credit requirement as stated above, or a Letter of Credit from a bank with an S&P credit rating of A or Moody’s credit rating of Aa2, or Cash deposit to meet the customer’s default obligation under the curtailment program.

FirstEnergy Ex. GLF-2 at 2 and 13.

EnerNOC supports these credit requirements. According to EnerNOC, “to not have credit requirements to insure against a case of non-performance would not be a ‘prudent or reasonable’ business decision on the EDC’s part.” EnerNOC MB at 16.

ClearChoice disagrees with EnerNOC’s position. ClearChoice RB at 6. ClearChoice states that PJM’s economic program is a voluntary program with no credit requirements or penalties for nonperformance. ClearChoice RB at 7. ClearChoice believes that the credit requirements proposed by Met Ed and Penelec create a barrier to entry that would severely limit the number of curtailment service providers able to participate. ClearChoice RB at 7.

 ClearChoice suggests that the way to promote participation by demand response resources is to eliminate barriers to entry (such as credit requirements) and to minimize performance penalties. ClearChoice RB at 8. ClearChoice proposes that non-performance penalties can be assigned by the curtailment service provider to FirstEnergy for billing purposes similar to Purchase of Receivables (“POR”) Programs agreed-to under EDC Default Service Plans. ClearChoice states that the POR programs have been successful and that they are a low cost alternative that can significantly mitigate the credit risks to Met Ed and Penelec. ClearChoice RB at 10.

 MEIUG *et al*. opposes the credit requirements proposed by Met Ed and Penelec. MEIUG *et al.* is primarily concerned that as many industrial customers as possible participate in the program. MEIUG *et al.* considers the credit requirements exclusory and unnecessary. MEIUG *et al.* RB at 6.

 FirstEnergy believes that prudence dictates against adopting ClearChoice’s recommendation to relax the credit rules, at least without some assurance from the Commission that, if small businesses fail to perform or are unable to pay participants, Met Ed and/or Penelec would not be penalized. FirstEnergy RB at 39.

##### (2) Disposition

We will reject the proposed credit requirements because the Companies failed to carry their burden of proving they are reasonable. The proposed credit requirements were inserted into the Plans by way of written rebuttal testimony introduced at the hearing on August 31, 2009. The Companies’ witnesses explained that the Plans were being modified to establish credit requirements, but failed to provide any substantial justification for this change. The Companies’ witnesses failed to establish the need for credit requirements considering that there are penalties in the Plans and considering PJM’s existing requirements for curtailment service providers.

Based on the record in this case, we will reject the proposed credit requirements. This holding, however, is without prejudice to the Companies’ right to propose credit requirements in the revised Plans, so long as the Companies provide adequate justification for these requirements.

#### g. Quota for Disadvantaged Businesses

##### (1) Positions of the Parties

 The Commission’s *Implementation Order* sets forth a procedure for proposing and reviewing an EDC’s conservation service provider bidding process. Among the criteria listed therein is one to: “[e]ncourage efforts to acquire bids from ‘disadvantaged businesses’ (*i.e.*, minority-owned, women-owned, persons-with-disability-owned, small companies, companies located in Enterprise Zones, and similar entities) consistent with the Commission’s Policy Statements at 52 Pa. Code §§ 69.804, 69.807 and 69.808.” *Implementation Order* at 25-26.

ClearChoice asserts that FirstEnergy has not indicated how it will encourage participation by disadvantaged businesses in its demand response program. ClearChoice also argues that requiring curtailment service providers to post collateral or provide third party guarantees will significantly impede disadvantaged businesses. ClearChoice recommends that 25% of demand response load be set aside for contracts with disadvantaged businesses, with the proviso that disadvantaged businesses will not have to post collateral or provide third party guarantees to participate in the program. ClearChoice MB at 13-14.

EnerNOC opposes ClearChoice’s recommendation. In EnerNOC’s opinion, setting aside any percentage of a program to a company that ultimately admits that it will not be able to make payment on penalties for non-performance would not be a prudent or reasonable business decision on the EDC’s behalf. EnerNOC RB at 12.

FirstEnergy disagrees with ClearChoice’s recommendation. FirstEnergy states that it maintains a proactive supplier diversity program as an extension of its commitment to promote diversity at every level of the organization. FirstEnergy further states that its diversity program provides opportunity for all manner of disadvantaged businesses in accordance with the Commission’s Policy Statement at 52 Pa. Code
§§ 69.804, 69.807 and 69.808. FirstEnergy believes that it would not be prudent to adopt ClearChoice’s recommendation without some assurance from the Commission that, if such small businesses fail to perform or to pay participants, Met Ed and/or Penelec would not be penalized. FirstEnergy RB at 39.

##### (2) Disposition

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As noted above, we made it clear in our *Implementation Order* that EDCs shall encourage participation in bidding from disadvantaged businesses, consistent with the Commission’s Policy Statement. However, the Commission did not require a quota for disadvantaged businesses. Furthermore, FirstEnergy already has a proactive supplier diversity program for disadvantaged businesses. From our review of the record, we find no justification for ClearChoice’s disadvantaged business quota proposal. Accordingly, we shall reject it.

### 3. Issues Pertaining only to Penn Power

#### a. Penn Power’s Proposal to Use Electricity Generation Suppliers

##### (1) Positions of the Parties

 To implement its demand response program, Penn Power intends to enter into agreements with Electricity Generation Suppliers (EGSs) selected on a “first come first served” basis, up to the contracted MW of peak load reductions for annual performance periods. Penn Power states that it will use the PJM protocol for Economic Load Response to measure implementation of the program – unless and until MISO adopts a demand response program. Penn Power’s September 21, 2009 Plan at 71-75.

 EnerNOC submits that the use of curtailment service providers, rather than EGSs, would increase the likelihood of successful implementation of Penn Power’s demand response program. EnerNOC argues that EGSs want to sell customers energy whereas curtailment service providers look for ways to encourage customers to use less energy and get an incentive for doing so. As such, the goals of an EGS are diametrically opposed to those of a curtailment service provider. EnerNOC MB at 17.

 FirstEnergy responds that, since Penn Power is currently a member of MISO, which does not recognize the concept of a curtailment service provider, EnerNOC’s suggestion is impossible to pursue. FirstEnergy MB at 51. If Penn Power joins PJM, FirstEnergy asserts that Penn Power will consider modifying its demand response program to mirror those of Met Ed and Penelec. FirstEnergy MB at 52.

##### (2) Disposition

We will reject Penn Power’s proposal to use only EGSs to implement its demand response program. This Commission favors an inclusive policy regarding the types of entities that can serve as demand response providers. The fact that MISO does not recognize the concept of a curtailment service provider does not explain why Penn Power’s program cannot be open to a wide spectrum of conservation service providers, as that term is defined in Act 129. We will therefore direct Penn Power to revise its Plan to make its demand response program open to conservation service providers.[[36]](#footnote-37)

## D. Implementation and Evaluation Issues

### 1. Implementation Issues

An EDC’s plan shall state the manner in which the plan will achieve the requirements of the Commission’s Program and will achieve or exceed the required reductions in consumption under subsections (c) and (d). 66 Pa. C.S.
§ 2806.1(b)(1)(i)(D).

Procedures to ensure compliance with consumption reduction requirements are set forth in the *Implementation Order*. The Commission will assess the program as a whole and the individual EDC’s plan for effectiveness in meeting or exceeding the Act’s mandatory savings through the initial review process. In addition, the Commission will assess the program and individual plan effectiveness during the annual report review process. *Implementation Order* at 27-31.

#### a. Positions of the Parties

 The Companies’ Program Management and Implementation Strategies are contained in Section 4 of their respective Plans. This section states that the Companies will assume overall administration and oversight of the Plans but will contract with consultants, trade allies and conservation service providers to implement certain parts of the Plans.

The Parties raised no implementation issues which are not addressed elsewhere in this Opinion and Order.

#### b. Disposition

On the basis of our review of the record, we shall approve the implementation and management strategies contained in Section 4 of the respective Plans, having found them to be reasonable and in compliance with Act 129.

### 2. Quality Assurance Issues

The Commission’s EE&C Program is to include an evaluation process, including a process to monitor and verify data collection, quality assurance and the results of each plan and the program. 66 Pa. C.S. § 2806.1(a)(2). Consistent with this requirement, each EDC’s Plan is to “explain how quality assurance and performance will be measured, verified and evaluated.” 66 Pa. C.S. § 2806(b)(1)(i)(C). Each EDC is also required to submit an annual report to the Commission relating to the results of its EE&C Plan. 66 Pa. C.S. § 2806.1(i)(1).

#### a. Positions of the Parties

Section 6 of the Plans outlines the Companies’ strategies for quality assurance and evaluation, measurement and verification. This section addresses, *inter alia*, the Companies’ overall approach to quality assurance and quality control; the procedures for measure and project installation verification, quality assurance and control, and savings documentation; the procedures for collecting and addressing participating customer, contractor and trade ally feedback; the Companies’ planned market and process evaluations; and strategies for coordinating with the Statewide Evaluator. FirstEnergy posits that no Party has challenged the quality assurance portion of the Plans. It also notes that the Companies have proposed no amendments to the quality assurance portions of the Plan. FirstEnergy MB at 52.

The Parties raised no quality assurance issues which are not addressed elsewhere in this Opinion and Order.[[37]](#footnote-38)

#### b. Disposition

On the basis of our review of the record, we shall approve the quality assurance provisions contained in Section 6 of the respective Plans, having found them to be reasonable and in compliance with Act 129.

### 3. Monitoring and Reporting Issues

As stated above, the Commission’s EE&C Program is to include an evaluation process, including a process to monitor and verify data collection, quality assurance and the results of each plan and the program. 66 Pa. C.S. § 2806.1(a)(2). Consistent with this requirement, each EDC’s Plan is to “explain how quality assurance and performance will be measured, verified and evaluated.” 66 Pa. C.S.
§ 2806(b)(1)(i)(C). Each EDC is also required to submit an annual report to the Commission relating to the results of its EE&C Plan.[[38]](#footnote-39) 66 Pa. C.S. § 2806.1(i)(1).

#### a. Positions of the Parties

The Plans state “the Company is in the process of assessing potential reporting and tracking systems. Regardless of the system ultimately selected, it will have the ability to monitor the progress of the various programs being offered.” Met Ed’s September 21, 2009 Plan at 101. *See also*, Penelec’s September 21, 2009 Plan at 98 and Penn Power’s September 21, 2009 Plan at 94. FirstEnergy expects to have a system in place by November 1, 2009. *Id*. The Companies state that reports will be provided as required by the Commission. FirstEnergy’s September 21, 2009 Plans at Section 5.1.

FirstEnergy introduced testimony further explaining its monitoring and reporting process. According to FirstEnergy’s witness Fitzpatrick, the Statewide Evaluator will work closely with the Companies and stakeholders over the term of the Plan, and the Companies will hold quarterly stakeholder meetings to review measures and make any mid-course corrections that are warranted. FirstEnergy St. 2-R at 19.

The OSBA recommends that the EE&C Plans be subjected to a thorough review each year and adjustments be made each year on a going-forward basis. OSBA MB at 18-19. The OSBA argues that this proposal is consistent with the *Implementation Order*, which stated at page 38:

 We will require each subject EDC to develop a reconcilable adjustment clause tariff mechanism in accordance with 66 Pa. C.S. § 1307 and include this mechanism in its EE&C plan . . . . [T]he tariff mechanism will be subject to an annual review and reconciliation in accordance with 66 Pa. C.S. § 1307(e). The annual review and reconciliation for each EDC’s cost recovery mechanism will occur pursuant to a public hearing, if required due to petitions filed by interveners, and will include an evaluation of the reasonableness of all program costs and their allocation to the applicable customer classes. Such annual review and reconciliation will be scheduled to coincide with our review of the annual report on the EDC’s plan submitted in accordance with 66 Pa. C.S. § 2806.1(i), and all calculations and supporting cost documentation shall be provided at the time that report is filed.

The OSBA also argues that its proposal is consistent with the Act’s provisions requiring the evaluation of EE&C plans. The OSBA asserts that, in order to evaluate the cost effectiveness of an EE&C plan, as required by 66 Pa. C.S. § 2806.1(a), as well as to determine the costs for the plan, Act 129 requires an annual independent evaluation of its cost-effectiveness. OSBA MB at 19-20 (citing 66 Pa. C.S.
§ 2806.1(b)(1)(i)(J)). The OSBA concludes that the annual reconciliation proceeding should include a “full vetting” of the Plans. OSBA RB at 3-6.

 FirstEnergy asserts that it has incorporated such a concept in its Plan. The Companies state that they will file annual reconciliation statements in accordance with Section 1307(e) detailing revenues and expenditures to date by customer class. These customer class-specific reconciliation statements will address any cumulative over/under collections and will provide further information as to any revisions to the budget forecast for the remainder of the Plan period by customer class. FirstEnergy asserts that the annual 1307(e) hearings will provide all interested parties with an opportunity to address their concerns regarding customer class cost allocations. FirstEnergy RB at 31-32.

#### b. Disposition

The September 21, 2009 Plans state that the Companies are still in the process of developing their tracking and reporting systems, which are expected to be in place by November 1, 2009. The Companies are directed to provide the Commission with an update on these systems in their revised Plans. We will address this topic further based on the information in the revised Plans.

With regard to the OSBA’s request for “a full vetting” of the EE&C Plans in the annual reconciliation process, the Commission believes that this issue is adequately addressed in the *Implementation Order*. First, regarding approved plans, the Commission will permit EDCs and other interested stakeholders, as well as the statutory advocates, to propose plan changes in conjunction with the EDC’s annual report filing required by the Act at 66 Pa. C.S. § 2086.1(i)(1). The Commission will establish a deadline for the filing of annual reports by the EDCs following approval of the EDCs’ plans. These annual reports are to be served on the OCA, the OSBA and the OTS. The Commission also will post the annual reports on a web page dedicated to the EE&C program. The Commission and any interested party can make a recommendation for plan improvement or object to an EDC’s proposed plan revision within thirty days of the annual report filing. EDCs will have twenty days to file changes or the matter will be referred to an ALJ for hearings and a recommended decision. The Commission notes that, in addition to the above-described process, the Commission retains its statutory authority to conduct investigations and initiate statutory and regulatory compliance proceedings against jurisdictional utilities. *Implementation Order* at 23-24.

Second, consistent with the *Implementation Order*, we required each subject EDC to develop a reconcilable adjustment clause tariff mechanism in accordance with 66 Pa. C.S. § 1307 and to include this mechanism in its EE&C plan. Such a mechanism shall be designed to recover, on a full and current basis from each customer class, all prudent and reasonable EE&C costs that have been assigned to each class as directed. When the EE&C plans to be offered by EDCs will benefit both shopping and non-shopping customers, the cost recovery mechanism shall be non-bypassable and shall be structured such that it will not affect the EDC’s price to compare. The mechanism shall be set forth in the EDC’s tariff, accompanied by a full and clear explanation as to its operation and applicability to each customer class. The tariff mechanism will be subject to an annual review and reconciliation in accordance with 66 Pa. C.S. § 1307(e). The annual review and reconciliation for each EDC’s cost recovery mechanism will occur pursuant to a public hearing, if required due to petitions filed by intervenors, and will include an evaluation of the reasonableness of all program costs and their allocation to the applicable customer classes. Such annual review and reconciliation will be scheduled to coincide with our review of the annual report on the EDC’s plan submitted in accordance with 66 Pa. C.S. § 2806.1(i), and all calculations and supporting documentation shall be provided at the time the report is filed. *Implementation Order* at 37-38. Therefore, the Commission will not make requirements above and beyond those already stipulated in the *Implementation Order* regarding the issues raised by the OSBA at this time. However, it is the Commission’s intention to provide each of the EDCs with a Secretarial letter identifying issues that the Commission would like to see addressed as well as data the Commission needs to perform its review. That Secretarial letter will be in the nature of minimum requirements that may be expanded by each EDC and the stakeholder group, as appropriate.

### 4. Evaluation Issues

As stated above, the Commission’s EE&C Program is to include an evaluation process, including a process to monitor and verify data collection, quality assurance and the results of each plan and the program. 66 Pa. C.S. § 2806.1(a)(2). Consistent with this requirement, each EDC’s Plan must require an annual independent evaluation of its cost-effectiveness as well as a full review of each five-year plan. To the extent possible, the Plan must also state how it will be adjusted on a going-forward basis as a result of the evaluation. 66 Pa. C.S. § 2806.1(b)(1)(i)(J).

#### a. Positions of the Parties

FirstEnergy’s evaluation strategies are contained in Section 6 of the Companies’ Plans. According to this Section, the Companies intend to retain an evaluation, monitoring and verification contractor. This contractor will identify issues that may require mid-course correction, will gauge progress toward goals and will measure satisfaction with programs. FirstEnergy’s September 21, 2009 Plans at § 6.2. In addition, FirstEnergy will conduct semi-annual and annual process evaluations to evaluate progress towards achieving goals and identifying issues requiring mid-course corrections. The Companies will propose any major changes they believe are required in their annual reports to the Commission. *Id*. at § 1.5.

 The OCA notes that the Companies’ accounting for an evaluation budget is not clearly presented in the Plans. Also, the OCA argues that the budgeting and planning for other evaluation activities is not fully developed. The OCA asserts that there is insufficient information to determine the reasonableness of the proposed expenditures. The OCA believes that FirstEnergy should be directed to provide more detail in its accounting of its evaluation budget. OCA St. 1 at 35-36; OCA MB at 43-44.

The DEP expresses concern regarding the evaluation provisions in the Companies’ EE&C Plans. The DEP asserts that the Companies’ evaluation, measurement and verification Plan should be rigorous, continual and open. The DEP also recommends that the Commission establish criteria clarifying the types of plan changes that require Commission approval. The DEP recommends that no program should be eliminated without Commission approval, and any shifting of money from one customer class to another should require Commission approval. The DEP further recommends that no more than 10% of the annual budget for a customer class can be shifted within the same customer class without Commission approval. DEP MB at 12.

FirstEnergy disagrees with the DEP’s concerns regarding its evaluation process. FirstEnergy states that it has adhered to the Commission’s TRM whenever available for a measure and the Companies intend to employ evaluation, measurement and verification protocols that will continually and accurately collect and catalog program results. FirstEnergy insists that the openness of the evaluation, measurement and verification process has been assured as a result of the Commission’s use of a Statewide Evaluator that will work closely with the EDCs and the continuation of stakeholder meetings started during the development of the EE&C plans. FirstEnergy St. 2-R at 19; FirstEnergy MB at 53.

#### b. Disposition

Regarding the OCA’s concerns about the adequacy of the budgetary and other information in the Plans pertaining to evaluation activities, we direct FirstEnergy to provide more detailed information in the revised Plan that is due within sixty days of entry of this Opinion and Order. We will address this topic further based on the information in the revised Plans.

Regarding the DEP’s concerns about plan adjustments outside the annual review process, we find that an EDC cannot shift program funds within a customer class, or between customer classes without prior Commission approval. Doing so would constitute a modification of the EDC’s approved plan. The General Assembly authorized the Commission, not the EDC, to make decisions in regard to modifying an approved Act 129 plan.

Section 2806.1(b)(2) expressly states that the “Commission shall direct” an EDC to modify or terminate any part of its approved plan if, after an adequate period for implementation, “the Commission determines that an energy efficiency or conservation measure will not achieve the required reductions in consumption in a cost-effective manner.” 66 Pa. C.S. § 2806.1(b)(2). Section 2806.1(b)(3) sets forth the action an EDC is required to take in response to a Commission directive to modify or terminate part of the approved plan. Specifically, the EDC is required to submit a revised plan describing the actions to be taken, to offer substitute measures, or to increase the availability of existing measures in the plan to achieve the reductions in consumption. 66 Pa. C.S. § 2806.1(b)(3).

Because FirstEnergy’s Act 129 Plan will be approved by Commission order, procedures for rescission and amendment of Commission orders must be followed to amend that order and to assure due process for all affected parties. *See* 66 Pa. C.S. § 703(g) (relating to fixing of hearing: rescission and amendment of orders). Accordingly, if any Company believes that it is necessary to modify its Act 129 Plan, that Company may file a petition requesting that the Commission rescind and amend its prior order approving the Plan. *See* 52 Pa. Code §§ 5.41 (relating to petitions generally) and 5.572 (relating to petitions for relief).

The EDC’s petition should explain the specific reasons supporting its requested modifications to its approved Plan, i.e., the shifting of funds between programs or customer classes, the discontinuation of a program, etc. The petition should also contain a request to modify its cost recovery mechanism. Evidence supporting the modification of the Plan and the cost recovery mechanism shall be submitted with the petition. The petition shall be served on all parties participating in the EDC’s Act 129 Plan proceeding. If the EDC believes that the need for modification of its plan is immediate, the EDC can request expedited consideration of its petition.

## E. Other Issues

### 1. Projects Installed Between July 1, 2009, and Commission Approval of the Plans

#### a. Positions of the Parties

FDSI submits that the Commission should allow FirstEnergy to “grandfather proposed and existing projects for customers that install or commit to install qualifying equipment or services under its EE&C Plans between July 1, 2009, and Commission approval of the Plans.” FDSI MB at 17. FDSI posits that Act 129 permits such treatment because “energy efficiency and conservation measures” are defined in the Act as those installed on or after the Act’s effective date. 66 Pa. C.S. § 2806.1(m). FDSI further asserts that the inclusion of such projects would improve FirstEnergy’s ability to meet its energy efficiency and consumption targets. Moreover, according to FDSI, grandfathering such projects would allow customers to take advantage of programs and incentives, such as the ARRA, that may be available between the date the Plans were filed and the date of the Commission’s approval. FDSI MB at 17.

 FirstEnergy did not address FDSI’s grandfathering proposal in its Main or Reply Briefs.

#### b. Disposition

 We see no need to grant FDSI’s recommendation. FirstEnergy has not requested credit for projects that customers installed, or committed to install, between July 1, 2009, and the date that the Commission approves the Plans. Even without such credit, FirstEnergy projects that it will meet the required conservation and demand reduction requirements. Consequently, we will not require the Companies to modify their Plans in accordance with FDSI’s recommendation.

# VI. Conclusion

For the reasons set forth above, we will grant in part and deny in part the Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company for Consolidation of Proceedings and Approval of Energy Efficiency and Conservation Plans, consistent with this Opinion and Order. Pursuant to Section 2806.1(e)(2)(ii) of the Act, the Companies shall file with this Commission and serve on all Parties of record in this proceeding a revised Energy Efficiency and Conservation Plan consistent with the modifications directed in this Opinion and Order, within sixty days of the entry of this Opinion and Order. 66 Pa. C.S. § 2806.1(e)(2)(ii). Interested parties will have ten days to file comments on the revised portions of the Plans, with reply comments due ten days thereafter. The Commission will approve or reject the revised Plans at a public meeting within sixty days of the date of filing of the revised Plans. See *Implementation Order* at 12-13. The Companies are permitted to implement any portion of their Plans that was approved without modification by this Opinion and Order; **THEREFORE;**

**IT IS ORDERED:**

1. That the Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company for Consolidation of Proceedings and Approval of Energy Efficiency and Conservation Plans is granted in part and denied in part, consistent with this Opinion and Order.

2. That Metropolitan Edison Company’s Energy Efficiency and Conservation Plan, as filed on September 21, 2009, is approved in part and rejected in part, consistent with this Opinion and Order.

3. That Metropolitan Edison Company shall file with this Commission and serve on all Parties of record in this proceeding a revised Energy Efficiency and Conservation Plan consistent with the modifications directed in this Opinion and Order, within sixty days of the entry of this Opinion and Order. Interested parties will have ten days to file comments on the revised portions of the Energy Efficiency and Conservation Plan, with reply comments due ten days thereafter. The Commission will approve or reject the revised portions of the Energy Efficiency and Conservation Plan at a public meeting within sixty days of the date of filing the revised Plan.

4. That Metropolitan Edison Company shall submit with its revised Energy Efficiency and Conservation Plan a revised cost recovery mechanism and appropriate tariffs, consistent with the modifications directed in this Opinion and Order.

5. That Metropolitan Edison Company is permitted to implement any portion of its Energy Efficiency and Conservation Plan that was approved without modification by this Opinion and Order.

6. That Metropolitan Edison Company shall meet with stakeholders as needed, but no less than twice annually, until May 31, 2013, unless otherwise ordered by the Commission, for a collaborative exchange concerning the implementation of its Energy Efficiency and Conservation Plan.

7. That Metropolitan Edison Company will not include capital costs recovered through the EEC-C rider in future rate case proceedings.

8. That Metropolitan Edison Company shall bid qualifying energy efficiency and demand response resources into the PJM RPM Auction and credit customers for the value received in the cost recovery mechanism, less administrative and credit requirement costs.

9. That Metropolitan Edison Company shall provide an updated TRC analysis of its Energy Efficiency and Conservation Plan as part of its annual report to the Commission.

10. That Metropolitan Edison Company shall track appropriate data regarding fuel switching, in coordination with the Statewide Evaluator, including at least the following: (1) type of appliance or equipment being replaced; (2) the availability of natural gas at the customer’s location or immediate area; and, (3) whether electric appliances or equipment were installed in areas where natural gas is available.

11. That Pennsylvania Electric Company’s Energy Efficiency and Conservation Plan, as filed on September 21, 2009, is approved in part and rejected in part, consistent with this Opinion and Order.

12. That Pennsylvania Electric Company shall file with this Commission and serve on all Parties of record in this proceeding a revised Energy Efficiency and Conservation Plan consistent with the modifications directed in this Opinion and Order, within sixty days of the entry of this Opinion and Order. Interested parties will have ten days to file comments on the revised portions of the Energy Efficiency and Conservation Plan, with reply comments due ten days thereafter. The Commission will approve or reject the revised portions of the Energy Efficiency and Conservation Plan at a public meeting within sixty days of the date of filing the revised Plan.

13. That Pennsylvania Electric Company shall submit with its revised Energy Efficiency and Conservation Plan a revised cost recovery mechanism and appropriate tariffs, consistent with the modifications directed in this Opinion and Order.

14. That Pennsylvania Electric Company is permitted to implement any portion of its Energy Efficiency and Conservation Plan that was approved without modification by this Opinion and Order.

15. That Pennsylvania Electric Company shall meet with stakeholders as needed, but no less than twice annually, until May 31, 2013, unless otherwise ordered by the Commission, for a collaborative exchange concerning the implementation of its Energy Efficiency and Conservation Plan.

16. That Pennsylvania Electric Company will not include capital costs recovered through the EEC-C rider in future rate case proceedings.

17. That Pennsylvania Electric Company shall bid qualifying energy efficiency and demand response resources into the PJM RPM Auction and credit customers for the value received in the cost recovery mechanism, less administrative and credit requirement costs.

18. That Pennsylvania Electric Company shall provide an updated TRC analysis of its Energy Efficiency and Conservation Plan as part of its annual report to the Commission.

19. That Pennsylvania Electric Company shall track appropriate data regarding fuel switching, in coordination with the Statewide Evaluator, including at least the following: (1) type of appliance or equipment being replaced; (2) the availability of natural gas at the customer’s location or immediate area; and, (3) whether electric appliances or equipment were installed in areas where natural gas is available.

20. That Pennsylvania Power Company’s Energy Efficiency and Conservation Plan, as filed on September 21, 2009, is approved in part and rejected in part, consistent with this Opinion and Order.

21. That Pennsylvania Power Company shall file with this Commission and serve on all Parties of record in this proceeding a revised Energy Efficiency and Conservation Plan consistent with the modifications directed in this Opinion and Order, within sixty days of the entry of this Opinion and Order. Interested parties will have ten days to file comments on the revised portions of the Energy Efficiency and Conservation Plan, with reply comments due ten days thereafter. The Commission will approve or reject the revised portions of the Energy Efficiency and Conservation Plan at a public meeting within sixty days of the date of filing the revised Plan.

22. That Pennsylvania Power Company shall submit with its revised Energy Efficiency and Conservation Plan a revised cost recovery mechanism and appropriate tariffs, consistent with the modifications directed in this Opinion and Order.

23. That Pennsylvania Power Company is permitted to implement any portion of its Energy Efficiency and Conservation Plan that was approved without modification by this Opinion and Order.

24. That Pennsylvania Power Company shall meet with stakeholders as needed, but no less than twice annually, until May 31, 2013, unless otherwise ordered by the Commission, for a collaborative exchange concerning the implementation of its Energy Efficiency and Conservation Plan.

25. That Pennsylvania Power Company will not include capital costs recovered through the EEC-C rider in future rate case proceedings.

26. That Pennsylvania Power Company shall provide an updated TRC analysis of its Energy Efficiency and Conservation Plan as part of its annual report to the Commission.

27. That Pennsylvania Power Company shall track appropriate data regarding fuel switching, in coordination with the Statewide Evaluator, including at least the following: (1) type of appliance or equipment being replaced; (2) the availability of natural gas at the customer’s location or immediate area; and, (3) whether electric appliances or equipment were installed in areas where natural gas is available.

28. That, upon joining PJM, the Pennsylvania Power Company shall bid qualifying energy efficiency and demand response resources into the PJM RPM Auction and credit customers for the value received in the cost recovery mechanism, less administrative and credit requirement costs.

29. That any directive, requirement, disposition or the like contained in the body of this Opinion and Order that is not the subject of an individual Ordering Paragraph, shall have the full force and effect as if fully contained in this part.

30. That the Commission Staff is directed to convene a Working Group, composed of affected EDC representatives, consumer advocates, community-based organizations and other interested parties, to identify the standardized data to be used in determining the proper proportion for low-income households and clarify other matters affecting the annual reconciliation process.

31. That the Working Group referenced above shall provide its recommendations to the Commission no later than February 16, 2010.

32. That Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company each participate in the working group referenced above.

33. That the Commission’s Working Group convened to address fuel switching issues shall include, as part of its report to the Commission due by March 31, 2010, the fuel switching issues raised in this proceeding.

34. That a copy of this Opinion and Order be served on Steven Pincus, Assistant General Counsel for the PJM Interconnection, LLC and on the Senior Manager of Resource Adequacy for the Midwest Independent Transmission System Operator, Inc.



 **BY THE COMMISSION,**

 James J. McNulty

 Secretary

(SEAL)

ORDER ADOPTED: October 22, 2009

ORDER ENTERED: October 28, 2009

1. As noted herein, the plans filed on July 1, 2009, were modified on several occasions. The term “Plans” will be used to refer to the Plans as amended to date. The July 1, 2009 plans will be referred to as the Initial Plans. All other plans will be referred to by the date they were filed. [↑](#footnote-ref-2)
2. This manual can be found at: <http://www.clarkstrategicpartners.net/files/calif_standard_practice_manual.pdf>. [↑](#footnote-ref-3)
3. MEIUG, PICA and PPUG are *ad hoc* associations of energy-intensive commercial and industrial customers receiving electric service in FirstEnergy’s service territories. MEIUG, *et al.,* Joint Petition to Intervene at ¶ 3. [↑](#footnote-ref-4)
4. FDSI develops “monitoring and diagnostic solutions for the HVAC industry that are generated from proprietary technologies, services and products that deliver front-line decision support for technicians, contractors, end-users and other stakeholders.” FDSI Petition to Intervene at ¶ 4. [↑](#footnote-ref-5)
5. Direct Energy is an electric generation supplier (EGS) licensed to provide retail electricity supply and related services to commercial, industrial and governmental customers in Pennsylvania. Direct Energy Petition to Intervene at ¶ 1. [↑](#footnote-ref-6)
6. ACORN is “an advocacy and membership organization whose mission is to advocate on behalf of low and lower income persons on numerous consumer issues, including access to and affordability of utility service.” ACORN Petition to Intervene at ¶ 7. [↑](#footnote-ref-7)
7. Rep. George is a customer of FirstEnergy. In addition, Rep. George’s district office receives electric service from FirstEnergy. Rep. George Petition to Intervene at ¶ 7. [↑](#footnote-ref-8)
8. The UGI Distribution Companies provide natural gas distribution services in the FirstEnergy territories. UGI Distribution Companies Petition to Intervene at ¶¶ 3-5. [↑](#footnote-ref-9)
9. Dominion Peoples is a regulated utility providing natural gas service in FirstEnergy’s service territories. Dominion Peoples Petition to Intervene at ¶ 3. [↑](#footnote-ref-10)
10. NFG is a natural gas distribution company whose service territory overlaps the service territories of Penelec and Penn Power. In addition, NFG is a customer of Penelec and Penn Power. Order Granting Petitions to Intervene at 3. [↑](#footnote-ref-11)
11. Constellation is a licensed EGS in FirstEnergy’s service territories. Constellation Petition to Intervene at ¶ 5. [↑](#footnote-ref-12)
12. EnerNOC is an energy services provider operating in Pennsylvania. EnerNOC Petition to Intervene at ¶ 1. [↑](#footnote-ref-13)
13. ClearChoice is a registered CSP providing curtailment services in the Met Ed and Penelec service territories. ClearChoice Petition to Intervene at ¶ 3. [↑](#footnote-ref-14)
14. Envinity states that it is “a sustainable design, construction and energy company.” Envinity Comments at 1. [↑](#footnote-ref-15)
15. Affordable Energy states that it is an “energy efficiency company” located in Hanover, York County. Affordable Energy Comments at 1. [↑](#footnote-ref-16)
16. KEEA is a statewide network of sixty-five organizations and energy service providers focused on assisting residential and commercial customers reduce energy usage and energy bills. KEEA Comments at 1. [↑](#footnote-ref-17)
17. PA Home Energy is a residential energy efficiency program for new and existing homes, funded by the West Penn Power Sustainable Energy Fund, and managed by Performance Systems Development. PA Home Energy Comments at 1. [↑](#footnote-ref-18)
18. NAESCO’s members are involved in the design, manufacture, financing and installation of energy efficiency and renewable energy equipment, as well as the provision of energy efficiency and renewable energy services in the private and public sectors. NAESCO Comments at 1. [↑](#footnote-ref-19)
19. In the *Implementation Order*, at 12, we stated that an EDC filing an EE&C Plan would have ten days from the submission of briefs to file a revised plan, reply comments, or both. The *Reconsideration Order*, at 11, clarified that all parties could file reply briefs, but it did not deprive the EDCs of the opportunity to file a revised plan within ten days after the parties file main briefs. [↑](#footnote-ref-20)
20. WARM is FirstEnergy’s Low Income Usage Reduction Program (LIURP). Met Ed’s September 21, 2009 Plan at 14. [↑](#footnote-ref-21)
21. The proposed EEC-C rate was modified in the Companies’ Rebuttal testimony provided at the evidentiary hearings. As a result, the bill impact will be slightly different than those shown here. As Companies’ witness Parrish testified, the rates would “change slightly based on my exhibit RIP-5.” Tr. at 163. The overall magnitude of the increases would not change in any significant manner. [↑](#footnote-ref-22)
22. We note that the OSBA argues that the government/non-profit sector should be treated as a separate class for rate recovery purposes. OSBA MB at 8. This issue will be addressed in Section V.B.4.a.(1) below. [↑](#footnote-ref-23)
23. The term “energy efficiency measure” is not separately defined, but the term “energy efficiency and conservation measures” is defined at 66 Pa. C.S.
§ 2806.1(m). [↑](#footnote-ref-24)
24. Absent a specific definition, “energy usage” may be construed to mean “electric usage” for Act 129 purposes. [↑](#footnote-ref-25)
25. *See* Section V.B.1.d. below. [↑](#footnote-ref-26)
26. FirstEnergy’s September 21, 2009 Plans at 3, FirstEnergyTable 3. [↑](#footnote-ref-27)
27. FirstEnergy RB at 3. [↑](#footnote-ref-28)
28. FirstEnergy Exh. RIP-4 at 1-3, line 2; Exh. RIP-5 at 1-3, line 4 (exclusive of common costs from Table 6c). [↑](#footnote-ref-29)
29. FirstEnergy’s September 21, 2009 Plans at Appendix H (exclusive of common costs from Table 6B). [↑](#footnote-ref-30)
30. *Id*. [↑](#footnote-ref-31)
31. FirstEnergy’s September 21, 2009 Plans at Table 6B. [↑](#footnote-ref-32)
32. The “Small C&I” category discussed by the OSBA is the “Commercial Customer Class” as stated in the Plans. The “Large C&I” category discussed by the OSBA is the “Industrial Customer Class” as stated in the Plans. *See* FirstEnergy’s September 21, 2009 Plans Appendix H at 1. [↑](#footnote-ref-33)
33. As defined by the Act, all costs incurred to implement EE&C Plans are subject to the two percent cost limitation. 66 Pa. C.S. § 2806.1(h). [↑](#footnote-ref-34)
34. Penn Power is not currently a member of PJM, but has announced that it intends to join PJM. [↑](#footnote-ref-35)
35. <http://www.pjm.com/markets-and-operations/demand-response/dr-energy-market.aspx> [↑](#footnote-ref-36)
36. We take judicial notice, pursuant to 52 Pa. Code § 5.408(a), that on October 2, 2009, MISO filed proposed tariff revisions with the Federal Energy Regulatory Commission relating to Aggregators of Retail Customers. [↑](#footnote-ref-37)
37. The DEP addresses the continuing stakeholder process, which was discussed above in Section V.A.7.d.(1). [↑](#footnote-ref-38)
38. We reiterate that this annual report shall include an updated TRC analysis. See Section V.B.2, above. [↑](#footnote-ref-39)