**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Metropolitan Edison Company : M-2009-2092222

Request For Proposal Process :

For Energy Efficiency And :

Demand Response Consulting :

Services :

Pennsylvania Electric Company : M-2009-2112952

Request For Proposal Process :

For Energy Efficiency And :

Demand Response Consulting :

Services :

Pennsylvania Power Company : M-2009-2112956

Request For Proposal Process :

For Energy Efficiency And :

Demand Response Consulting :

Services :

**RECOMMENDED DECISION**

Before

Dennis J. Buckley

Administrative Law Judge

INTRODUCTION

This Decision recommends that the Pennsylvania Public Utility Commission (Commission) approve the Petition of Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company (the FirstEnergy Companies or Companies) for Approval of modifications to their Energy Efficiency and Conservation Plans (EE&C Plans). The Companies have filed a black-lined version of the modified EE&C Plans (the First Amended Plans).

PROCEDURAL HISTORY

On February 18, 2011, the FirstEnergy Companies petitioned the Commission for amendment of Commission Orders approving the FirstEnergy Companies’ EE&C Plans and for approval of the Companies’ First Amended EE&C Plans. The filing took the form of a Main Petition and an Expedited Petition. This Recommended Decision is applicable to the Main Petition proceeding, the Expedited Petition having been considered and resolved by the Commission at its public meeting of March 17, 2011.[[1]](#footnote-1)

On March 10, 2011, the Office of Consumer Advocate (OCA) filed an Answer to the Main Petition which requested the opportunity to address changes in the Companies’ EE&C Plans.

Also on March 10, 2011, the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, and the Penn Power Users Group (collectively, MEIUG, *et al*.) filed Joint Answers in this proceeding requesting the opportunity for full review of the proposed changes and opposing expedited implementation of any changes to the Companies’ EE&C Plans.

On April 5, 2011, the Secretary of the Commission issued a letter stating that the Commission recognizes the need to resolve this proceeding (i.e. the Main Petition) in a timely fashion, consistent with due process. The Secretarial letter directed the Office of Administrative Law Judge (OALJ) to proceed in this matter with a view towards the issuance of a Recommended Decision with Exceptions due no later than ten (10) days after the issuance of the Recommended Decision. Reply Exceptions will not be accepted.

On April 11, 2011, this matter was assigned to the undersigned. The earliest practicable hearing date for a prehearing conference was April 29, 2011, and by Hearing Notice

dated April 11, 2011, an Initial Prehearing Conference was scheduled for that date at the Harrisburg, Pennsylvania office of the Commission.

Pursuant to a Prehearing Conference Order issued April 13, 2011, prehearing memoranda were filed by the Companies, the OCA, the Office of Small Business Advocate (OSBA), and by MEIUG, *et al*.[[2]](#footnote-2) on April 27, 2011.

A prehearing conference in this case was held on Friday, April 29, 2011. Counsel for FirstEnergy, the OCA, the OSBA and MEIUG, *et al*. appeared at that prehearing conference. A litigation schedule was established. There was no request for a public input hearing.

On June 28, 2011, a hearing was held at the Commission’s office in Harrisburg, Pennsylvania. The FirstEnergy Companies were represented by Kathy J. Kolich, Esquire, John F. Povilaitis, Esquire, and Carrie M. Dunn, Esquire. The FirstEnergy Companies presented the testimony of George L. Fitzpatrick, Managing Director, Black & Veatch Corporation, and Charles V. Fullem, FirstEnergy’s Director of Rates and Regulatory Affairs-Pennsylvania. The following exhibits were made a part of the record: Met-Ed, Penelec and Penn Power Statement No. 1 (Direct Testimony of George L. Fitzpatrick); Met-Ed, Penelec and Penn Power Statement No. 1-R (Rebuttal Testimony of George L. Fitzpatrick); Met-Ed, Penelec and Penn Power Statement No. 2 (Direct Testimony of Charles V. Fullem with Exhibits CVF-1 and CVF-2); Met-Ed, Penelec and Penn Power Exhibit 1 (Joint Petition); Met-Ed, Penelec and Penn Power Exhibit 2 (Amended Plans); Met-Ed, Penelec and Penn Power Supplemental Exhibit CVF-1. The OCA was represented by Tanya McCloskey, Esquire.[[3]](#footnote-3) MEIUG *et al*. were represented by Vasilikia Karandrikas, Esquire, Charis Mincavage, Esquire, and Carl J. Zwick, Esquire.[[4]](#footnote-4) MEIUG *et al*.

presented the testimony of Todd Hammaker, a Project Engineering Associate at Appleton Papers Inc., and of Mark Chasse, a Senior Engineer with East Penn Manufacturing Company. The following exhibits were made a part of the record: MEIUG *et al*. Statement No-1 (Direct Testimony of Todd Hammaker, with Exhibit TH-1); MEIUG *et al*. Statement No. 1-S (Surrebuttal Testimony of Todd Hammaker); MEIUG *et al*. Statement No-2 (Direct Testimony of Mark Chasse, with Exhibits MC-1 and MC-2); MEIUG *et al*. Statement No. 2-S (Surrebuttal Testimony of Mark Chasse); MEIUG *et al*. Cross Examination Exhibit 1 (a series of slides from the Companies’ Act 129 EE&C Plan Shareholder Meeting Presentation); MEIUG *et al*. Cross Examination Exhibit 2 (the Companies’ response to MEIUG *et al*. Interrogatory Set I, No. 5); MEIUG *et al*. Cross Examination Exhibit 3 (the Companies’ response to MEIUG Interrogatory Set I, No. 6); MEIUG *et al*. Cross Examination Exhibit 4 (the Companies’ response to MEIUG Interrogatory Set I, No. 7); MEIUG *et al*. Cross Examination Exhibit 5 (the Companies’ response to MEIUG Interrogatory Set I, No. 9); MEIUG *et al*. Cross Examination Exhibit 6 (the Companies’ response to MEIUG Interrogatory Set I, No. 14); MEIUG *et al*. Cross Examination Exhibit 7 (the Companies’ response to MEIUG Interrogatory Set I, No. 17); MEIUG *et al*. Cross Examination Exhibit 8 (the Companies’ response to MEIUG Interrogatory Set I, No. 13). A hearing transcript of 192 pages was compiled.

Main Briefs were filed by the Companies, the OCA and MEIUG *et al*. on July 12, 2011. Reply Briefs were filed by the Companies, the OCA, and the MEIUG *et al*. on July 20, 2011.

FINDINGS OF FACT

1. On February 18, 2011, the FirstEnergy Companies submitted a Petition to amend their EE&C Plan by seeking certain modifications to programs in all three customer classes: residential, small commercial and industrial, and large commercial and industrial.

2. Under the proposed modifications, the only customer class that has an increase in budgeted costs from those proposed in the original EE&C Plan is the Large Commercial and Industrial (Large C&I) sector.

3. The proposed modifications are necessary in order for the Companies to achieve their statutory energy efficiency and conservation requirements. N.T. at 34-35.

4. The saving projections included in the Companies' Current Plans are overstated by approximately 11%. Companies’ Statement No. 1 at 7.

5. Certain programs are performing at energy or demand savings levels below projections due to the downturn in the economy, updates to the Technical Resource Manual (TRM), and customer participation levels. Companies’ Statement No. 1 at 8.

6. The Large C&I Programs are exceeding participation level expectations. Companies’ Statement No. 1, at 8. However, the Large C&I class has the smallest percentage of total EE&C Plan costs as a percentage of customer class revenues. N.T. at 43-44.

7. As of February 2011, and on the basis of total energy efficiency costs as compared to total revenues, the percentage for Large C&I customers in the Met-Ed service area was about 6.76 percent. N.T. at 44.

8. As of February 2011, and on the basis of total energy efficiency costs as compared to total revenues, the percentage for Small C&I customers in the Met-Ed service area was about 11.4 percent. N.T. at 44.

9. As of February 2011, and on the basis of total energy efficiency costs as compared to total revenues, the percentage for Large C&I customers in the Penelec service area was about 8 percent. N.T. at 44.

10. Many of the residential and Small C&I EE&C programs are under-performing. Companies’ Statement No. 1 at 13.

11. As of February 2011, and on the basis of total energy efficiency costs as compared to total revenues, the percentage for Small C&I customers in the Penelec service area was about 14.1 percent. N.T. at 44.

12. As of February 2011, and on the basis of total energy efficiency costs as compared to total revenues, the percentage for Large C&I customers in the Penn Power service area was about 13.7 percent. N.T. at 45.

13. As of February 2011, and on the basis of total energy efficiency costs as compared to total revenues, the percentage for Small C&I customers in the Penn Power service area was about 13.01 percent. N.T. at 45.

14. The existing funds for the residential and Small C&I EE&C programs must be shifted from various under-performing programs within a customer sector either: (1) to program and measures within that sector that have proven to be more effective, (2) to new programs or measures within that sector; or (3) to programs and measures within that sector to increase incentives. Companies’ Statement No. 1 at 8-9.

15. The Companies’ have proposed administrative changes that either correct or clarify the current EE&C Plans. Companies’ Statement No. 1 at 19-20.

16. The Companies have combined several under-performing programs with more effective programs with similar characteristics. Companies’ Statement No. 1 at 11-13.

17. The Companies’ amended EE&C Plans have restated all incentive levels as ranges, providing the Companies with the flexibility to change incentive levels within those ranges as market conditions warrant without further Commission approval, provided that the program budgets do not exceed those approved by the Commission. Companies’ Statement No. 1 at 17-20.

18. The Companies’ have proposed changing their Large C&I Programs by increasing the funding for the Large C&I Equipment Programs and Demand Response Programs, with an additional $4.5 million in funding for Met-Ed; $4 million for Penelec; and $400,000 for Penn Power, with the budget adjustments being broken out between the peak demand reduction

program and the Large C&I Equipment Program. The additional funding is necessary for the Companies to meet their post-2011 Act 129 EE&C Plan targets. Companies’ Statement No. 1 at 9-11.

19. The Companies’ proposed changes do not cause the Large C&I Sector to carry a disproportionate share of the Companies’ Act 129 Compliance Costs.

20. Under the amended EE&C Plans, while all customers must pay a portion of the EE&C plan costs, all customers are not required or in a position to actually participate in a program to the same degree.

21. Each Company included in its Original Plan a contingency that would allow them to "[s]hift resources to higher performing programs that may have been under funded."

22. Under the amended EE&C Plans, the Companies have changed the incentive structures and incentive levels for the Large and Small C&I lighting component of their respective equipment programs from a $/Watt basis to a $0.05/kWh basis. Companies’ Statement No. 1 at 14-15.

23. Changing to a $/kWh incentive structure provides more consistency and a better correlation between the incentive paid and the energy savings contributed by the customer, and offers more predictability for purposes of managing the program budgets. Companies’ Statement No. 1 at 15.

24. The Companies propose two revisions to the Companies’ Energy Efficiency and Conservation Charge (EEC-C) Rider: (1) that the text for the Penn Power Energy Rider be updated to reflect Penn Power's entrance into the Pennsylvania, New Jersey and Maryland Interconnection, LLC (PJM); and (2) that the Commission approve the changes to

Met-Ed, Penelec, and Penn Power's EEC-C charges effective October 1, 2011, in accordance with the updated revenue requirements associated with each Company's Amended EE&C Plan. Companies’ Statement 2 at 7-9.

25. The changes that Met-Ed, Penelec, and Penn Power propose to their EEC-C charges are below the mandated 2% cap limit. Companies’ Statement 2 at 9.

26. If the Companies’ Large C&I program budgets are not increased as the amended Plans recommend, then the Companies will not achieve their 2013 Act 129 targets. N.T. at 115.

27. No overall budget increase is needed for the Residential, Government, and Small C&I programs. Companies’ Statement No. 1 at 12-13.

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) (*Lansberry*). 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).

In the instant case, the Companies bear the burden of proving by a preponderance of evidence that the proposed modifications to their EE&C Plans are reasonable and designed to achieve the required reductions in consumption in a cost-effective manner within the meaning of Act 129, 66 Pa. C.S. § 2806(b). Act 129 requires that an EDC’s plan reduce electric consumption by at least 1% of its expected consumption for June 1, 2009, through May 31, 2010, adjusted for weather and extraordinary loads. This 1% reduction was to be accomplished by May 31, 2011. 66 Pa. C.S. § 2806.1(c)(1). By May 31, 2013, the total annual weather normalized consumption is to be reduced by a minimum of 3%. 66 Pa. C.S. § 2806.1(c)(2).

Also, by May 31, 2013, peak demand is to be reduced 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).

The Act permits an electric distribution company (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).

On February 18, 2011, the Companies filed a Joint Petition for approval of changes to the Companies' EE&C Plans then in effect. In the course of this proceeding, the Companies presented the testimony of George L. Fitzpatrick, Managing Director, Black & Veatch Corporation, and of Charles V. Fullem, FirstEnergy’s Director of Rates and Regulatory Affairs-Pennsylvania. That testimony, supported by the various exhibits received into the record, fully supports the changes proposed by the Companies to their EE&C Plans. In their Main Brief, the Companies provided a comprehensive summary of the reasons for the submission of the proposed changes to the Plans and a comprehensive summary of the changes. I incorporate those summaries, below.

**Description of the Proposed Changes**

The Companies' Petition cited three reasons that support the proposed changes to the current EE&C Plan. First, the decision of the State Wide Evaluator (SWE) and the Commission’s Bureau of Conservation Economics and Energy Planning (CEEP) that Act 129 savings projections should be calculated at the retail level for compliance purposes, and at the system generation level for TRC purposes, resulted in the Companies’ savings projections in the Current EE&C Plans to be overstated by approximately 11%. That is because the current plans assume an 11% transmission and distribution loss factor that was used to gross up all EE&C program savings to reflect savings at the system generation level. Second, certain programs are performing at energy or demand savings levels below projections due to the downturn in the economy, updates to the TRM and unexpected low customer participation levels. Third, programs such as the C&I Equipment Programs, were exceeding participation level expectations such that current funding was fully committed, requiring suspension of the programs until additional funding was approved by the Commission. Companies’ Main Brief at 3-4.

The projected changes in savings levels are primarily based on the loss factor adjustment, updates to the TRM and customer participation levels. Program changes are based on either an increase in budgets for Large C&I programs or a shift in funds from under-performing programs or components of programs. Nevertheless, the overall budget remains within statutory spending caps and affected programs continue to pass the Total Resource Cost (TRC) Test on an individual and portfolio basis. Companies’ Main Brief at 4.

Specific proposed program changes are as follows:

Large C&I Programs - The Companies propose an additional $4.5 million in funding for Met-Ed, $4 million for Penelec and $400,000 for Penn Power. These budget increases are necessary in order to make up the aforementioned 11% loss factor savings deficit and add funds to the Large C&I Equipment Programs – programs where all Met-Ed and Penelec funds are already fully committed and for Penn Power are expected to be fully committed in Plan Year 3. The Industrial Motors and Variable Speed Drive Program was consolidated into the Large C&I Equipment Program to leverage the success of the Equipment Program and raise customer awareness of the incentives available for industrial motors. In addition, the consolidation creates marketing and accounting synergies. A change in the incentive structure and incentive level of the lighting component of the Large C&I Equipment Program is also proposed. The Companies moved, effective March 1, 2011, from an incentive paid on a $/Watt basis to a $/kWh basis which provides more consistency and a better correlation between the incentive paid and the energy savings contributed by the customer, as well as more predictability in managing program budgets. The Companies also established, effective March 1, 2011, an incentive range, not to exceed $0.09/kWh for the lighting measure, with the initial incentive set at $0.05/kWh. In the event the Commission does not

approve the use of a range for this incentive or the incentive level that has been established, a rebate true up mechanism will be adopted. Companies’ Main Brief at 5.

Small C&I Programs - Proposed changes include: (1) including Small C&I customers in the peak load reduction program; (2) adjusting the incentive level and incentive structure for the Small C&I lighting measure to match the proposed changes to the Large C&I Equipment Program for Large C&I customers; (3) adding a new direct install component to the Equipment Program to target strip malls, small grocery stores and certain restaurants to optimize savings; (4) combining the Energy Audit and Technical Assessment Program with the Small C&I Equipment Program to provide customers with a more effective introduction to the Equipment Program and to create marketing/accounting synergies that streamline program administration; and (5) adding a new conservation kit to the Small C&I Equipment Program through opt-in distribution, initially offering CFL bulbs to test market acceptance and to achieve increased market penetration with the intent to add measures as market conditions warrant. All of these changes are funded by shifting funds from existing Small C&I customer program budgets. No party challenged any of these proposed changes to the Small C&I programs either through testimony or during the evidentiary hearing. Companies’ Main Brief at 5‑6.

Residential Programs - Proposed changes include: (1) consolidating the Residential Whole Building Comprehensive Program with the Home Energy Audit and Outreach Program; (2) adding a new Behavioral Modification Program to induce savings through dissemination of benchmark usage data and tips for reducing consumption; (3) increasing incentives for air conditioner and heat pump tune-ups from $25 to a not-to-exceed $60 in order to increase customer participation; (4) setting incentives for CFLs at a range of $0.75 to $1.50/bulb and a not-to-exceed level of $2.50/bulb for specialty bulbs in order to increase market penetration in the CFL market, (5) adding Energy Conservation kits for multi-family residential and master-metered facilities to increase CFL market penetration and generate interest in efficiency measures among multi-family tenants; and (6) replacing the Pump and Motor Single Speed incentive with a variable speed pool pump incentive up to $200 per pump to maximize savings. To fund these changes, funds from under-performing programs such as the New Home Construction program, the Appliance Turn-In Program and the Energy Efficient HVAC Equipment Program have been shifted to the Home Energy Audit and Outreach Program and the Multi-Family Building Program.[[5]](#footnote-5)

Government Program Changes - Increased funds were proposed to raise incentive ranges to levels consistent with those offered to Large and Small C&I customers in order to generate or renew interest in these offerings. This program change was the subject of the Expedited Petition previously approved by the Commission. Companies’ Main Brief at 7.

Other Changes - The Companies have also proposed editorial changes for purposes of clarifying or correcting the Current EE&C Plans, and changes to streamline administration of certain programs. Companies’ Main Brief at 7.

Changes to the EEC-C Rider - The Companies proposed changes to the EEC-C Riders that serve as the cost recovery mechanism for approved measures. These riders are financed by the customer sector that receives the direct energy and conservation benefits of the measure. All customer rider charges are changing to reflect revised sales and revenue collection projections, however only the Large C&I rider charge is increasing as a result of increases in program budgets. Companies’ Main Brief at 7.

Act 129 requires each EDC within the Commonwealth of Pennsylvania to reduce by May 31, 2013, energy consumption by 3%, and peak demand by 4.5%, calculated based on summer, 2012 demands. The changes included in the Amended EE&C Plans are necessary in order to put the Companies in a position to achieve their 2013 statutory EE&C requirements. The Companies’ EEC-C riders, which recover EE&C plan costs

from customers have been recalculated to reflect reconciliation amounts and to reflect an increase in spending on programs benefitting Large C&I customers. The proposed rate changes assume an October 1, 2011 effective date. Companies’ Main Brief at 8.

**Consideration and Resolution of the Issues Presented**

The Companies presented substantial evidence that demonstrates: (1) the need for each proposed program change; (2) that each program affected by the proposed changes, along with the amended portfolio of programs as a whole, passes the TRC test; (3) that the budget for the programs included in the Amended EE&C Plans remains below the 2% spending cap as required by Act 129; and (4) that the proposed changes to the EEC-C rider charges are calculated consistent with the riders as approved by the Commission as part of their approval of the Current EE&C Plans. The modifications to the EE&C Plans presented by the Companies are unopposed except by MEIUG *et al*., which argues: that the Companies have failed to meet the “preponderance of the evidence standard,” that Large C&I customers are being inappropriately burdened by the proposed modifications, that many Large C&I customers are unable to take advantage of the Companies’ programs, and that the Companies’ incentive range proposal is unjust and unreasonable. MEIUG *et al*. also argues that the Small C&I and Residential classes’ participation in the Companies’ EE&C programs must be “revitalized.”

The OCA and MEIUG *et al*. actively participated in this proceeding, though the OCA presented no direct testimony, relying in part on the testimony of the Companies’ witnesses. Unfortunately, the direct testimony presented by MEIUG *et al*. was so limited and unqualified as to be without any probative value. As the Companies’ accurately state in their Main Brief:

[T]he evidence presented by MEIUG et al was limited to how the changes to Large C&I programs would affect two specific customers, with a recommendation to focus the Companies’ efforts on customer sectors other than the Large C&I sector. This recommendation was made by two non-expert witnesses with no experience in designing or evaluating energy efficiency programs or measures; no experience in designing or evaluating peak demand reduction programs or measures; and no experience in

designing or evaluating comprehensive EE&C program portfolios

. . . and who had read neither Act 129 nor the entire Amended EE&C Plans of any of the Companies.

Companies’ Main Brief at 9, footnotes omitted.

**MEIUG *et al*.’s Positions**

Given the foregoing, one of the difficulties that I have in assessing MEIUG *et al*.’s positions vis-à-vis the proposed changes is the lack of competent evidence to support their arguments. MEIUG *et al*. asserts: “As a threshold matter, MEIUG/PICA’s witnesses have been utterly forthright that the purpose of their testimony is to provide the Commission with information regarding the potential impact of the Companies’ proposal on Large C&I customers, *as seen through the eyes of two Large C&I customers*.” MEIUG *et al*. Reply Brief at 17 (emphasis added). I simply cannot accept the testimony of Mr. Hammaker, a Project Engineering Associate at Appleton Papers Inc., or of Mr. Chasse, a Senior Engineer with East Penn Manufacturing Company, as representative of the whole Large C&I customer class. As counsel for MEIUG et al. concedes, the testimony of these witnesses is limited to the view of their individual companies. At hearing, Mr. Hammaker stated that he was testifying only with regard to the potential effect of Penelec’s plan on Appleton Paper, and he stated that he was not authorized to represent other industrial customers or how they might be affected by the proposed modifications. N.T. at 148-149. Mr. Chasse testified only with regard to the potential effect of Met Ed’s plan on East Penn Manufacturing at its Lyon Station plant, and he stated that he was not authorized to represent other industrial customers or how they might be affected by the proposed modifications. N.T. at 194. Having reviewed their testimony, the impression I had at

hearing remains unaltered: the views expressed in their testimony are uniquely those of these two gentlemen. They were not qualified to speak for the entire Large C&I class, nor were they presented to so testify.

The Companies, on the other hand, presented evidence through the testimony of competent witnesses supported by extensive documentary evidence. The evidence presented by the Companies meets the burden set forth in *Lansberry* “by a preponderance of the evidence,” standard, given the short time the Plans have been in operation and the assumptions and projections that the Companies must necessarily make in anticipation of meeting the 2013 targets.

MEIUG *et al*., however, contends that the Companies have failed to prove through a preponderance of the evidence that the proposed increases for the Large C&I class are just and reasonable. MEIUG *et al*. Main Brief at 16; MEIUG *et al*. Reply Brief at 3-7. MEIUG *et al*. offers the following illustration is support of its contention:

According to Mr. Fitzpatrick, certain programs are exceeding the Companies’ expectations while others are falling short of expectations. Importantly, however, several of the programs, including Residential and Small C&I programs, are currently listed at a progress level of 0%. Witness Fitzpatrick explained that the absence of data reflects the fact that the Companies’ evaluation process takes several months to assess the savings impact of such programs. In other words, progress may have been made with respect to residential and Small C&I customers participating in these programs, however, the Companies do not yet have all the data available for review. Mr. Fitzpatrick’s testimony underscores the lack of record evidence regarding the Companies’ current progress in meeting their Act 129 goals and raises the very real risk that the Companies’ requested budget increases for their Large C&I customers may be premature, particularly without knowing the full level of participation in certain programs by other customer classes.

MEIUG *et al*. Reply Brief at 5, footnotes omitted.

I am not persuaded by MEIUG *et al*.’s analysis. While MEIUG *et al*. tries to rely on the Companies’ own witness to discredit the Companies’ position, Mr. Fitzpatrick’s candor with respect to available data reflects positively on his own credibility as a witness and inspires confidence in the representations the Companies’ make in explaining why they are proposing modifications to their Plans and the methodology employed. Clearly, the Companies *are* making progress in meeting their Act 129 goals. Given that the Plans have only been in existence for approximately two years, it is not a negative reflection on the Companies—or on the credibility of their witnesses’ testimony—that changes to the Plans are needed to meet 2013 goals and that some of those changes may have to be based in some instances on limited data. What MEIUG *et al*. appear to be asking for in this proceeding is a level of proof beyond a preponderance of the evidence that the modifications proposed with respect to the existing Plans, generally, and with respect to the Large C&I class, specifically, are just, balanced and reasonable. That is not the applicable legal standard. Through testimony and documentary evidence, the Companies have shown that their proposed modifications to their EE&C Plans are just and reasonable and strike an appropriate balance among customer classes based not only on projections but upon the Companies’ verifiable experience with the Plans, to date.

The core of MEIUG *et al*.’s argument, though by no means their only argument, is that the Companies’ interpretation of Act 129 is misguided, resulting in amended EE&C Plans that inappropriately require Large C&I customers to carry a disproportionate share of the burden of meeting the Companies’ Act 129 goals. MEIUG *et al*. Main Brief at 20-21; MEIUG *et al*. Reply Brief at 7. While MEIUG *et al*. contend that the Companies’ requested budget increases are “inappropriately skewed,” towards Large C&I customers, that contention does not refute the Companies’ testimony of record which establishes that the increases are reasonable and well-balanced. MEIUG *et al*. claims that the proposed budget increases are excessive and unfair to the Large C&I class. MEIUG *et al*. Reply Brief at 12. However, MEIUG *et al*. failed to present the testimony of any qualified witness to support that contention. MEIUG *et al*. presented testimony describing how the increase in the EEC-C charge may affect one Large C&I customer in Penelec’s service territory, and one Large C&I customer in Met-Ed’s service territory. The

rebuttal testimony of the Companies’ witness, Mr. Fitzpatrick, cogently addresses both the limitations of the testimony of MEIUG *et al*.’s witnesses and their proposed solutions to the challenges faced by the Companies:

Because neither Industrial Witness provided any specific details in support of his recommendation, it is difficult to assess their recommendations. Nevertheless, looking at the recommendations at face value, it appears that the Industrial Witnesses believe that by simply allocating more money to programs it will automatically increase the targeted savings levels. The success of an EE&C program is not solely a function of how many dollars are allocated to it. Rather, one must look at the popularity of the program and how much energy and/or peak demand reduction can realistically be achieved . . . . By allocating additional funds for the large C&I equipment program, the Companies are assured of having additional savings, simply by fulfilling what is already in the pipeline. In contrast, because none of the residential and small C&I programs are fully subscribed, funding is still available for future participants. If the Companies adopted the recommendation of the Industrial Witnesses and focused their efforts on residential/small C&I programs instead, there is no assurance, as there is in the large C&I equipment program, of achieving additional savings beyond that forecasted [sic] in the Original Plans.

Companies’ Statement No. 1-R at 4.

Unquestionably, the level of contributions of the Large C&I class will increase as a consequence of the proposed modifications to the EE&C Plans. However, the proposed increases are not “skewed.” The Companies propose an additional $4.5 million in funding for Met-Ed, $4 million for Penelec and $400,000 for Penn Power. I agree with the Companies that these budget increases are necessary in order to make up the 11% loss factor savings deficit and to add funds to the Large C&I Equipment Programs. Those programs currently have all Met-Ed and Penelec funds fully committed and, for Penn Power, expected to be fully committed in Plan Year 3.

The net effect of the lack of an evidentiary record to support MEIUG *et al*.’s arguments is to render those arguments more in the nature of apprehensions at the prospect of a cost increase rather than calculations based on facts. Had MEIUG *et al*. presented evidence in the form of, say, a statistically reliable study of the prospective impact of the proposed funding increases for the majority—or at least a representative sample—of the members of the Large C&I class, then there may have been at least some benchmark against which relative impacts could be measured, or at least argued. But that was not done. While no cost increase is ever desirable, the statutory mandates of Act 129 must be funded and complied with. The Companies’ proposed modifications achieve that goal in a just and reasonable manner as established by the unrefuted evidence of record.

MEIUG *et al*. complain that many of the largest C&I customers may never be able to recapture the funds they are remitting via the EEC-C rider. MEIUG Reply Brief at 12. Again, MEIUG *et al*. relies on the testimony of its two witnesses to support this contention as applicable to an entire customer class, as well as the argument that increases in costs are harmful to competitiveness, growth and long-term viability to all members of that class, particularly during an economic recession. MEIUG *et al*. Reply Brief at 13. MEIUG *et al*. seek to extrapolate from the testimony of two witnesses support for propositions affecting the entire Large C&I class. And once again, the MEIUG *et al*. witnesses are, by their own admission, not competent to offer such testimony. Indeed, Mr. Chasse, in response to one of my questions, remarked that his firm’s business has actually gotten a little better with the downturn in the economy because their business is selling replacement vehicle batteries. N.T. at 215. This does not support an argument for financial hardship across the class because of the proposed funding increases.

This “economic impact” line of argument leads to yet another contention by MEIUG *et al*, that by approving the Companies’ proposed EEC-C rates, the Commission would countenance a violation of the policy of promoting economic growth through just and reasonable electricity pricing. MEIUG *et al*. Main Brief at 34-36. MEIUG *et al*. invoke that policy as it is expressed in the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801, et seq. (the Competition Act), specifically at 66 Pa. C.S. §§ 2802(7). In the first instance, while the Competition Act and Act 129 are not mutually exclusive in any sense, the context of the provision upon which MEIUG relies is different from the context of the current proceeding. The Competition Act focused on the transition to competitive electric generation. Act 129 focuses on load reduction and energy efficiency. The policy of promoting economic growth, which is articulated in a section of the Code that predates Act 129, is not a guarantee that businesses will be completely shielded from economic impacts associated with developments in the electric industry or further statutory mandates. Further, the proposed change in funding contribution to the EE&C Plans from the Large C&I class is neither unjust nor unreasonable. There has been no showing that approval of the modifications to their EE&C Plans requested by the Companies will violate the policy of promoting economic growth.

Finally, MEIUG *et al*. contend that the Companies’ incentive range proposal lacks sufficient detail to assess its justness and reasonableness and must be rejected. MEIUG *et al*. Reply Brief at 21. This contention is undeveloped and without merit. As noted, above, the Companies moved, effective March 1, 2011, from an incentive paid on a $/Watt basis to a $/kWh basis which provides more consistency and a better correlation between the incentive paid and the energy savings contributed by the customer, as well as more predictability in managing program budgets. The Companies also established effective March 1, 2011, an incentive range, not to exceed $0.09/kWh for the lighting measure, with the initial incentive set at $0.05/kWh. MEIUG *et al*. assert that the Companies have not sufficiently defined the incentive range proposal, so neither the parties nor the Commission can evaluate whether the proposal will be administered by the Companies in an even-handed manner. MEIUG *et al*. Reply Brief at 23. This assertion by MEIUG *et al*. is not supported by evidence and appears to have been raised for the first time at the briefing stage of this proceeding. MEIUG *et al*. does not make it clear why evaluation of the proposal is empirically not possible. For their part, the Companies’ state that they had to implement changes to the incentive structure because otherwise funding for the Large C&I Equipment Programs would have been prematurely exhausted and a significant portion of the approved funding for the Small C&I Equipment Programs will be committed at levels that would jeopardize the Companies’ ability to meet their Act 129 targets within the 2% spending cap. Companies’ Main Brief at 26.

**The OCA’s Position**

The OCA supports the Companies’ proposed Plan changes for the Residential class but takes no position with respect to funding from other customer classes. OCA Main Brief at 3. The OCA is opposed to the recommendation of MEIUG *et al*. witness Chasse that the Companies should increase energy efficiency and conservation measures as well as the budget of Residential customers. OCA Main Brief at 3-4, citing MEIUG *et al*. Statement 1 at 9. The OCA supports maintaining current Residential budget levels while targeting funds in an efficient manner; i.e. shifting funds from under-performing Residential programs to other programs or components of programs for residential customers. OCA Main Brief at 3-4. The OCA has modified its initial position with respect to the discretion to be afforded to the Companies in making future changes to their Plans in the form of authority to change rebate levels and credits without first having to file a petition with the Commission. Having participated in this proceeding and after reviewing the Companies’ testimony and responses, the OCA submits that the level of ranges proposed by the Companies is reasonable provided that the Companies apply those ranges in a timely and even-handed manner and through a defined process. OCA Main Brief at 4-5. The OCA also submits that modifications in rebate levels within the ranges should be presented in the context of the Commission-approved stakeholder process. OCA Main Brief at 4, 9.

In its Reply Brief, the OCA takes up MEIUG *et al*.’s proposition that the proposed modifications to the Plans are “in appropriately skewed toward the Large C&I class,” particularly the contention by MEIUG *et al*., on brief, that the Companies’ proposed modifications exploit the Large C&I class to compensate for the “apathy” of the Small C&I and Residential classes. The OCA responds stating that any suggestion of “apathy” is unfounded and unsupported. OCA Reply Brief at 1. The OCA points out that the Residential class already bears and will continue to bear the majority of Plan costs. OCA Reply Brief at 2, citing Companies’ Exhibit 2, Appendix G, Tables 2 and 5, and Companies’ Exhibit CVF-1 Supplemental.

The OCA’s positions are well-taken. Although the OCA did not present a witness of its own, the OCA relies on the testimony of the Companies’ witness, Mr. Fitzpatrick, to support its basic contention:

In this proceeding, FirstEnergy Companies’ witness George Fitzpatrick testified that increasing the Residential budget would be ineffective in achieving the additional necessary savings. Companies’ Statement 1-R at 4. With regard to Large C&I, however, Mr. Fitzpatrick testified that there was more demand for efficiency measures than could be met within the existing budget. Companies’ St. 1-R at 4. Mr. Fitzpatrick also explained in his testimony that increasing funds for Residential programs in order to spur energy reductions would not be a practical approach. Id. at 3. The OCA submits that the Commission directive that measures be ‘tailored to usage and to the potential for savings’ is reflected in the Companies’ proposed modifications to the Residential EE&C Plans. MEIUG et al.’s suggestions to the contrary are without merit.

OCA Reply Brief at 3-4.

I am persuaded by the OCA’s argument to recommend that the Companies should be directed by the Commission to continue to use the Large C&I stakeholder process to ensure that future changes are applied prospectively and in an even-handed manner.

**Conclusion**

The changes to the EE&C Plans proposed by the Companies in their Petition are supported by substantial evidence of record and are reasonable and necessary for the Companies to meet their Act 129 obligations. The Companies have established, by a preponderance of the evidence, that the proposed changes, including proposed funding increases, are just, reasonable and appropriately balanced among customer classes within the meaning of Section 2806.1(a)(5). None of the proposed program changes, other than some of those that affect the Large C&I customers of Metropolitan Edison Company and Pennsylvania Electric Company were challenged in this proceeding. Moreover, MEIUG *et al*.'s request to reject the proposed changes to the Large C&I customer programs is not supported and should be denied. Accordingly, the Commission should approve the proposed changes included in the Amended EE&C Plans, along with the changes to the EEC-C Rider charges, as filed. Finally, I recommend that the Commission direct the Companies to continue to use the Large C&I stakeholder process to ensure that further changes are applied prospectively and in an even-handed manner.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding.

2. Pursuant to 66 Pa. C.S. §332(a), the burden of proof in this proceeding is upon the Petitioners, Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company.

3. The Petitioners, Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company, have met their burden of proof in this proceeding. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990).

4. Act 129 requires Commission jurisdictional electric companies to reduce consumption by three percent (3%) and their peak demand by at least 4.5 percent by May 31, 2013. Act 129 does not require utilities to hit target amounts by customer class.

5. The Amended EE&C Plans meet the requirements of Act 129. The Amended Plans include a variety of EE&C measures and will apply the measures equitably to all customer classes pursuant to 66 Pa. C.S. §2806.1(a)(5).

6. The Amended EE&C Plans are cost-effective, passing the Total Resource Cost Test on both an individual program and total portfolio basis, and will provide a diverse cross-section of alternatives and reasonable mix of programs that should benefit consumers of all rate sectors as required by 66 Pa.C.S. §2806.1(b)(1)(i)(I).

7. The changes that Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company propose to their EEC-C charges are below the mandated 2% cap limit as required by 66 Pa. C.S. § 2806.1(g).

8. The Amended EE&C Plans enable Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company to meet and exceed the post-2011 Act 129 consumption and peak demand reduction targets based on currently available information, including current TRM savings values.

9. The Amended EE&C Plans are designed so that the estimated costs of implementing the Amended EE&C Plans are just and reasonable, are fairly allocated, and will be recovered from the customer sector receiving the direct benefit of such measures.

10. The Amended Plans achieve the most energy savings per expenditure through the most cost effective use of resources as required by the Commission's Order in *Energy Efficiency and Conservation Program*, Docket No. M-2008-2069887 (Order entered January 16, 2009).

11. Penn Power's Industrial Class EEC-C should be based on the customer's PJM Peak Load Contribution consistent with the Commission's Order in *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 (Order entered October 28, 2009).

12. The Company's proposal to modify their current EE&C Plans and increase spending is consistent with the Commission's Orders in *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 (Order entered January 28, 2010) and *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 (Order entered February 26, 2010).

13. The First Amended Plans submitted by Penn Power, Met-Ed, and Penelec meet the requirements of Section 2806.1(a), (b) and (c) of the Pennsylvania Public Utility Code.

ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the Joint Petition for Consolidation of Proceedings and Approval of Energy Efficiency and Conservation Plans of Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company is hereby granted and approved.

2. That the “Main Petition,” filed on February 18, 2011, by Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company at Docket Nos. M-2009-2092222, M-2009-2112952, and M-2009-2112956 be granted.

3. That Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company's proposed EEC-C charges, as amended by Supplemental Exhibit CVF-1 attached to the direct testimony of Charles V. Fullem, become effective as of October 1, 2011.

4. That Pennsylvania Power Company's EEC-Charge for the Industrial Class shall be charged based on a customer's PJM Peak Load Contribution, as is currently being implemented by Metropolitan Edison Company and by Pennsylvania Electric Company.

5. That Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company continue to use the Large C&I stakeholder process to ensure that future changes are applied prospectively and in an even-handed manner.

6. That the proceedings at Docket Nos. M-2009-2092222, M-2009-2112952 and M-2009-2112956 be marked closed.

Date: November 30, 2011

Dennis J. Buckley

Administrative Law Judge

1. On March 18, 2011, the Commission entered an Order with respect to the Companies’ *Joint Petition for Expedited Approval of Amendments to the Residential HVAC Program and Governmental & Institutional Components of the C&I Equipment Programs*. [↑](#footnote-ref-1)
2. On April 14, the Commission’s Office of Trial Staff (OTS, now the Commission’s Bureau of Investigations and Enforcement) filed a letter stating that the OTS would not be participating in these expedited proceedings as an active party but stating that as these dockets may remain active for a number of years, the OTS was not withdrawing its appearance at this time. [↑](#footnote-ref-2)
3. By letter dated June 1, 2011, the OCA stated that it would not be filing testimony in this case. [↑](#footnote-ref-3)
4. Attorney Zwick subsequently withdrew his appearance from the case. [↑](#footnote-ref-4)
5. No party challenged any of these proposed changes to the Residential Programs either through testimony or during the evidentiary hearing. Companies’ Main Brief at 6-7. In fact, the position of the OCA is that the Companies’ proposed modifications to the Residential Programs, within the existing Residential budget, are reasonable. OCA Main Brief at 5. [↑](#footnote-ref-5)