Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
Tel: 215.963.5000
Fax: 215.963.5001
www.morganlewis.com

Morgan Lewis
COUNSELORS AT LAW

Thomas P. Gadsden
Partner
215.963.5234
tgadsden@MorganLewis.com

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

June 25, 2012

VIA EXPRESS MAIL

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Energy Efficiency & Conservation Program,
Docket Nos. M-2012-2289411 & M-2008-2069887

Dear Secretary Chiavetta:

Pursuant to the Commission's Tentative Implementation Order entered May 11, 2012 in the above referenced dockets, enclosed please find an original and three (3) copies of the **Comments of PECO Energy Company**.

As instructed, the comments have been also filed electronically in Word format with Megan Good (megagood@pa.gov) and Kriss Brown (kribrown@pa.gov).

Very truly yours,
TPGadsden
Thomas P. Gadsden

TPG/tp
Enclosures

c: Per Certificate of Service

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JUN 25 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Energy Efficiency and Conservation Program	: :	**Docket Nos. M-2012-2289411 M-2008-2069887**

PECO ENERGY COMPANY'S COMMENTS ON THE COMMISSION'S MAY 11, 2012 TENTATIVE IMPLEMENTATION ORDER

INTRODUCTION

Pursuant to the May 11, 2012 Tentative Implementation Order ("Tentative Order") entered by the Pennsylvania Public Utility Commission ("Commission") in the above-referenced docket, PECO Energy Company ("PECO" or the "Company") hereby submits its comments on the Tentative Order's Act 129 Phase Two proposals. PECO supports the continuation of an energy efficiency and conservation program ("EE&C Program" or "Program") in Pennsylvania, as the Program plays an important role in the Commonwealth's energy future and has attracted participation by many of PECO's customers during the first phase of Act 129 ("Phase One"). However, PECO respectfully recommends that the Commission focus on establishing cost-effective, prudent and reasonably achievable energy consumption reduction targets for the Phase Two EE&C Program, consistent with the Act and in recognition of the financial impact of the Program on customers.[1]

[1] *See, e.g.*, 66 Pa.C.S. 2806.1 (a) ("The commission shall . . . adopt an energy efficiency and conservation program to require electric distribution companies to adopt and implement cost-effective energy efficiency and conservation plans . . ."); *see also* 66 Pa.C.S. 2806.1(b)(i)(H) ("The plan shall include a proposed cost-recovery tariff mechanism . . . to fund the energy efficiency and conservation measures and to ensure full and current recovery of the prudent and reasonable costs of the plan . . .").

I. BACKGROUND

Act 129 of 2008 required Pennsylvania electric distribution companies ("EDCs") with at least 100,000 customers to develop EE&C plans designed to achieve retail energy consumption savings of at least 1% by May 31, 2011 and at least 3% by May 31, 2013. The Act also required EDCs with at least 100,000 customers to develop plans, as part of their EE&C plans, to achieve peak demand savings over the 100 highest hours of demand of at least 4.5% by May 31, 2013.

In accordance with Act 129 and the Commission's EE&C Program Implementation Orders, PECO prepared and submitted its EE&C plan on July 1, 2009. PECO's plan was subsequently reviewed and approved by the Commission in an Order entered October 28, 2009 at Docket No. M-2009-2093215.

Act 129 also directs the Commission to evaluate the costs and benefits of the Phase One Program consumption reductions by November 30, 2013. If the consumption reduction benefits of the EE&C Program are found to exceed their costs, the Commission must adopt additional incremental consumption reduction requirements.[2]

In addition, the Act directs the Commission to evaluate the costs and benefits of the Phase One peak demand reductions by November 30, 2013. If these reductions are found to be cost effective, the Commission must establish additional peak demand reductions.[3] The Commission may establish these reductions for the 100 hours of greatest demand, as specified for Phase One, "or an alternative reduction approved by the commission" to be measured against the EDCs' peak demands over the period June 1, 2011 through May 31, 2012.[4] These additional peak demand reductions are to be accomplished no later than May 31, 2017.

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[2] 66 Pa.C.S. § 2806.1(c)(3).

[3] 66 Pa.C.S. § 2806.1(d)(2).

[4] *Id.*

In the Tentative Order, the Commission presents its evaluation of the Phase One EE&C Program. Based on that analysis and the results of a market potential study conducted by the Statewide Evaluator ("SWE"), the Commission concludes that a Phase Two EE&C Program is warranted and proposes "to adopt additional required incremental reductions in consumption for another program term."[5]

While PECO supports the Commission's adoption of a Phase Two EE&C Program, PECO recommends that: 1) the Program should not include EDC-specific consumption reduction targets, as there is no basis for them in Act 129 and because they are not consistent with the Commission's rulemaking authority as part of the Phase Two process; 2) as currently envisioned by the Tentative Order, peak demand reductions, if required by the Commission, will be unattainable unless adequate funding is made available in Phase Two Program budgets; 3) EDCs should not be made subject to penalties for failure to meet carve-outs for the Government, Educational and Non-Profit ("GEN-P") and Low-Income sectors that are not mandated by Act 129; and 4) on-bill financing programs should not be considered by the Commission, as financing programs are best left to competitive marketplace. PECO's specific comments on these and other issues addressed in the Tentative Order are provided below.

[5] Tent. Order at 8.

II. PECO'S COMMENTS

1. The Commission should implement Statewide Consumption Reduction Targets Consistent with Act 129 and with the Commission's appropriate Rulemaking Authority, and recognizing that the Program has a financial impact on customers.

a. Act 129 explicitly refers to statewide energy consumption and peak demand reduction requirements. The Commission should not deviate from the clear intent of the Act by setting EDC-specific targets.

In the Tentative Order, the Commission proposes a three-year term for the Phase Two Program that would operate from June 1, 2013 to May 31, 2016.[6] PECO does not object to a three-year program term. However, PECO believes the EDC-specific consumption reduction targets – ranging from a low of 1.6% for West Penn Power to a high of 2.9% for PECO – are inconsistent with the Act and the Commission's appropriate rulemaking authority.

The plain language of Act 129 refers to an "Energy efficiency and conservation program"[7] which imposes consumption and demand reduction requirements on all Pennsylvania EDCs, and sets forth a fixed range of potential penalties for non-compliance for all Pennsylvania EDCs. For example:

- for all EDCs, a minimum of 10% of the required statewide consumption reductions in 66 Pa.C.S. § 2806.1(c) and (d) must come from the government, educational and non-profit sector;[8]
- all EDC plans must include specific energy efficiency measures for households at or below 150% of the federal poverty income guidelines;[9]
- all EDC plans are barred from using more than 2% of funding for experimental equipment or devices;[10]

[6] In selecting a three-year term, the Commission stated that "[a] major consideration in our selection of the three-year length of [the] program is the contingency of dealing with a potential peak demand reduction target that will need to be accomplished by May 31, 2017." Tent. Order at 10.

[7] 66 Pa.C.S. § 2806.1.

[8] 66 Pa.C.S. § 2806.1 (b)(1)(i)(B).

[9] 66 Pa.C.S. § 2806.1 (b)(1)(i)(G).

[10] 66 Pa.C.S. § 2806.1 (b)(1)(i)(H)(iii).

- all EDC plans are capped at spending no more than 2% of their total annual revenue as of December 31, 2006;[11]

- the Act's original consumption and peak demand reduction goals set forth in sections (c) and (d) were statewide, and there are no explicit provisions for a different method of setting reduction goals;[12] and

- the penalties set forth in the Act of not less than $1 million and not to exceed $20 million for failure to achieve the Act's statewide reduction requirements are generally applicable and not EDC-specific.[13]

The Commission proposes to address the differences among EDCs' 2006 revenues by varying each EDC's reduction targets. However, if this was the intent of the General Assembly, it could have specifically provided for such variances in EE&C targets in the plain language of the Act. It did not.

It is a well-settled rule of administrative law that "an administrative agency may exercise only those powers which the legislature has conferred by clear and unmistakable language."[14] It is also well-settled that a statute's plain language offers the best indication of the General Assembly's intent in enacting the statute.[15] Indeed, the general rule of statutory construction in

[11] 66 Pa.C.S. § 2806.1 (g).

[12] Contrast this with the Act's discussion of the top 100 hours requirement for peak demand reductions, where it explicitly provides that, if Phase One reductions are determined to be cost effective, "the commission shall set additional incremental requirements for reduction in peak demand for the 100 hours of greatest demand ***or an alternative reduction approved by the commission.***" 66 Pa.C.S. § 2806.1(d)(2) (emphasis added).

[13] 66 Pa.C.S. § 2806.1 (f)(2)(i)

[14] *Pennsylvania Nat'l Guard v. Workmen's Compensation Appeal Board*, 63 Pa. Cmwlth. 1, 3; 437 A.2d 494, 495 (1981), *rev'd on other grounds*, 510 Pa. 348, 508 A.2d 292 (1986); *see also Feingold v. Bell of Pa.*, 477 Pa 1, 8, 383 A.2d 791, 794 (1977) ("[T]he PUC is a creature of statute, it has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication.").

[15] *Martin v. DOT, Bureau of Driver Licensing*, 588 Pa. 429, 438, 905 A.2d 438, 443 (2006) ("The object of interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. The statute's plain language generally offers the best indication of legislative intent.").

Pennsylvania is that the inclusion of a specific matter in a statute implies the exclusion of other matters.[16]

The language of Act 129 clearly and explicitly refers to energy consumption and peak demand reduction goals that are to be applied to all EDCs. The Commission should not deviate from this clear intent and should instead set uniform percentage reduction targets for all EDCs, as it contemplated in its March 1, 2012 Secretarial Letter.[17]

b. By imposing individual consumption reductions on EDCs, the Commission is acting in an adjudicatory function, instead of the rulemaking function that is appropriate in this proceeding.

Setting individual, EDC-specific consumption reduction targets is also inconsistent with the Commission's appropriate rulemaking authority. This proceeding is a rulemaking. While the Commission, as an administrative agency, has the power to implement binding policy either through rulemaking or through an adjudicatory process,[18] it cannot, under the guise of a rulemaking, establish specific rules or specific requirements for only one party, person, or class of persons.

When an "order affects only a party to the proceeding . . . and when only a party to a proceeding is governed . . . the result is an adjudication, not a rulemaking."[19] For an adjudicatory decision to be legally valid, it must be supported with the appropriate proceedings and protections. As the Commonwealth Court noted in the case of *Redmond v. Commonwealth of Pennsylvania Milk Marketing Board*:

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[16] *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1223 (Pa. 2002).

[17] *See Act 129 Energy Efficiency and Conservation Program Phase Two*, Docket No. M-2012-2289411, March 1, 2012 Secretarial Letter at 5 ("Another option would be to set uniform percentage reduction targets across EDCs and vary funding under the 2% revenue cap.").

[18] *DEP v. Cumberland Coal Resources, L.P.*, 29 A.3d 414, 424 (Pa. Cmwlth. 2011).

[19] *See Bell Atlantic-Pa, Inc. v. Pa. Public Utility Comm'n*, 763 A.2d 440, 467-468 (Pa. Cmwlth. 2000).

> We do not think that an administrative agency can, under the guise of designating a decision as legislative, do something that the legislature itself could not do. The legislature can, of course, through legislative enactment, adopt "regulations," which is what the legislature does all the time except that we call them laws. The distinguishing characteristic of our law is quite similar to the definition given to regulation in the Administrative Agency Law. It is an enactment of general application, not an enactment of specific application. . . . We note that special legislation in Pennsylvania relating to single particular municipal corporations occurs by specific constitutional provisions. . . . ***On the other hand the judicial function in our government is the function where rights are determined which affect specific persons or specific classes of persons . . . .***[20]

The Commission's setting of individual, EDC-specific energy reduction targets is adjudicatory in nature, and is not appropriate in this rulemaking proceeding. Accordingly, for this reason also, PECO recommends that the Commission establish statewide energy consumption reduction targets, consistent with its Secretarial Letter.

c. Imposing individual consumption reductions on EDCs does not take into consideration the financial impact of the Program on Pennsylvania's customers, and the changes in energy markets since Act 129 was enacted.

The Tentative Order states that the varying, EDC-specific targets are based on, among other things, "available funding."[21] Indeed, the proposed 2.9% consumption reduction target for PECO, and the EDC-specific targets for each EDC, is based on the expenditure of the full 2% spending cap in each year of the Phase Two Program. However, in enacting Act 129, the General Assembly was abundantly clear that the 2% was not a target, but instead an amount that "shall not" be exceeded.[22]

PECO respectfully submits that the Commission should be mindful that the EE&C Program is funded from a surcharge on customer bills and, therefore, the targets should be cost-

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[20] *Redmond v. Com. of Pa. Milk Marketing Bd.*, 363 A.2d 840, 843 (Pa. Cmwlth 1976) (emphasis added).

[21] Tent. Order at 13.

[22] *See* 66 Pa.C.S. § 2806.1.(g):

> LIMITATION ON COSTS.- The 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. (capitalization in original) (emphasis added).

effective and have a sound basis in the plain language of the Act. Moreover, once EDCs have cost-effectively achieved the appropriate consumption reduction target, any excess funds should be returned to customers and the surcharge accordingly adjusted.

Finally, PECO agrees with Chairman Powelson's statement at the outset of this proceeding that, since the passage of Act 129:

> we are fortunate to enjoy low energy prices throughout the Commonwealth – a dramatic change from the historically high natural gas and electricity prices that were in place in 2008 when the Act was passed. . . . ***It is essential, however, that any future Act 129 programs are effective uses of consumers' money.***[23]

As noted by the Chairman, market conditions have changed significantly since the enactment of Act 129. The approach to addressing energy efficiency (and peak load reduction measures) should reflect this dramatic change. PECO accordingly recommends that the Commission's approach should not be to exhaust customer funds under the limit explicitly envisioned in the Act, but to utilize those funds cost-effectively and prudently. In light of tough economic times, this approach would reduce the burden on all customers who are subject to the EE&C surcharge and would avoid the potential for subsidizing a small percentage of participating customers.[24] Appropriately structured statewide consumption targets can accomplish this goal.

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[23] *Secretarial Letter Seeking Comments on Planning Issues for Act 129 Energy Efficiency and Conservation Programs after May 31, 2013*, Docket No. M-2012-2289411, March 1, 2012, Statement of Chairman Robert F. Powelson (emphasis added).

[24] During Phase One, PECO experienced overall customer participation of 26% in its EE&C programs outside of the compact fluorescent lamp program.

d. The Commission and the Statewide Evaluator have already determined a statewide consumption reduction target.

Based on the SWE's market potential study, the Commission has already determined what it believes to be a cost-effective statewide consumption target for a three-year program within the Act's 2% cost cap. As the Commission stated on page seven of the Tentative Order:

> Based on the spending cap of 2% of 2006 annual revenues for annual program spending and using the previously established load forecasts, the potential study concludes that continuing electric energy efficiency programs in a phase II of Act 129 will continue to be cost-effective for Pennsylvania ratepayers. ***The statewide estimated program potential electricity savings . . . amounts to 3,313,247 MWh on a cumulative annual basis by 2016 (a 2.3% reduction in projected 2010 baseline MWh sales).***[25]

Accordingly, PECO recommends that the Commission's determination of an appropriate statewide target should begin with the SWE's estimated statewide program potential electricity savings and be adjusted as may be appropriate for reservations of funds for potential demand reduction programs as set forth below. PECO believes this course is required by the explicit language and intent of Act 129 and the Commission's proper rulemaking authority, and will result in an appropriate recognition of the financial impact of the Program on customers.[26]

2. If the Commission does not adopt statewide targets as envisioned by the Act, it should recognize that the SWE's analysis does not correctly reflect PECO's projected acquisition costs to achieve incremental reductions in consumption.

For PECO, the SWE proposed a 2.9% consumption reduction target – the highest among all EDCs in Pennsylvania. This proposed PECO-specific reduction target is flawed. *The SWE's analysis underestimates the projected acquisition costs expected to be incurred by* PECO to achieve incremental reductions in consumption. The SWE's calculation simply divides

[25] Tent. Order at 7 (emphasis added).

[26] Indeed, the SWE's 2.3% statewide target is a starting point for downward adjustments to the target that take into account the ability for EDCs to cost-effectively achieve the reductions (including potential DR reductions), recognize that low-hanging fruit such as CFLs has been picked, and recognize that more comprehensive measures which have a higher acquisition cost may be desired by stakeholders.

PECO's 2% revenue spend cap by the SWE's projected acquisition cost of $227.55 per MWh to arrive at an energy consumption reduction target. The SWE's analysis, however, limits PECO's ability to incorporate comprehensive programs that would include the broad range of synergistic measures necessary to meaningfully and reliably improve a home or building's energy resource utilization. Indeed, PECO estimates that the implementation of a Phase Two EE&C plan with a balanced portfolio of energy efficiency measures would cost approximately $275.00 per MWh.[27]

While PECO continues to believe there should be one uniform consumption reduction target for all EDCs, PECO recommends that if the Commission requires EDC-specific reductions that PECO's Phase Two consumption reduction requirement be modified to 1.63% to account for: (1) higher acquisition costs to implement measures that achieve deeper savings; and (2) the reduction of budget dollars available to attain energy savings given the likely need to allocate funds for peak demand reduction programs.[28]

3. The Commission should reallocate funding from energy consumption reductions to Demand Response programs to continue Direct Load Control measures so they do not "go dark" and for the potential implementation of peak demand reduction requirements.

The Tentative Order noted that the Commission will not receive the SWE's findings on the cost-effectiveness of the current demand reduction ("DR") programs until the end of 2012. Accordingly, the Commission declines to establish any peak demand reduction targets for the proposed three-year Phase Two Plan period based on its interpretation that Act 129 requires it to determine the cost-effectiveness of current DR programs before proposing additional peak

[27] PECO's projected acquisition cost of $275.00 per MWh is based on an extrapolation of data from Phase One and incorporation of additional costs to achieve deeper savings. PECO then compared its acquisition costs with those of EDCs in New England and New York that offer comprehensive energy efficiency portfolios and confirmed that the $275.00 figure was in the lower end of ranges of acquisition costs for those utilities.

[28] To arrive at the 1.63% target, PECO divided 2% of its annual revenue less the $80 million reserved for DR and DLC programs (based on Phase One costs) by its acquisition cost, i.e. ($256,185,476 - $80,000,000)/$275.00 = 640,675 MWh or 1.63%.

demand reduction targets.[29] PECO's concerns with the Tentative Order's current proposal, which devotes the entire amount under the 2% spending cap to energy consumption reductions, are that: 1) it does not reserve any funds for existing direct load control ("DLC") programs; and 2) it does not reserve any funds to enable the peak load reductions that will have to be accomplished by May 31, 2017 should the Commission subsequently determine that peak load reduction programs are warranted. Accordingly, PECO makes the following recommendations.

a. Funds should be reserved to continue DLC programs in Phase Two.

Although the Commission has concluded that it does not have the authority to propose any DR program targets until a determination of their cost-effectiveness is complete, the Commission nonetheless encourages EDCs, CSPs and other stakeholders to consider continuing interim DR programs, such as DLC. DLC programs, in particular, have been very successful. However, without any funding from the 2% spending cap provided under Act 129 these programs cannot be sustained.

The Tentative Order's current approach of not providing Act 129 funding for DLC, and thus causing the programs to "go dark", will create the potential for customer confusion, stranded capital assets (*e.g.*, the DLC switches) and increased costs resulting from stopping and restarting the DLC programs in Phase Three. To avoid this outcome, PECO would likely need to reserve $15 million per year (*i.e.*, $45 million during Phase Two) to retain a DLC market presence, to continue running the DLC program, and to maintain conservation service provider ("CSP") and customer confidence in the program.

PECO expects that other EDCs with DLC programs will face similar problems if no Act 129 funding is provided for DLC programs. Accordingly, PECO recommends that the

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[29] Tent. Order at 15.

Commission should explicitly reserve funding for DLC programs from Phase Two Program funds.

b. Funding should be made available within the 2% spending cap to prepare for a potential DR target *to* be achieved by May 31, 2017.

To successfully meet the May 31, 2017 Phase Three deadline for any additional peak DR targets, EDCs will have to design and substantially implement the program during Phase Two, as the reductions would need to occur in the summer of 2016, the first quarter of Phase Three. Accordingly, funds are required to prepare for that potential. Based on its Phase One experience with DR programs, PECO estimates that it would likely need to reserve some $35 million of its Phase Two budget for Phase Three DR reductions. The Tentative Order makes no provision for this potential and instead allocates the entire 2% revenue cap to energy consumption reductions.

The Commission should correct this oversight. If the Commission ultimately determines that DR will not be included in Phase Three, the overall EE&C expenditures should be reduced, with the unused funds returned to customers consistent with the Commission's proposed handling of any Phase One program over-collections.[30]

4. The Government, Educational and Non-Profit Sector carve-out target should not subject EDCs to penalties as the Act does not provide for such penalties. In addition, financing should be provided by financial institutions, not EDCs.

The Tentative Order proposes to maintain the existing 10% carve-out of overall consumption reduction requirements for the GEN-P sector. In addition, the Tentative Order states that EDCs that fail to meet the GEN-P carve-out will not be assessed penalties under Act 129, as it does not provide for penalties for the carve-out,[31] but will be subject to the

[30] Tent. Order at 64 ("[T]he Commission does not believe it to be sound policy to continue spending [budget monies from one program in another] when those monies should be refunded back to the appropriate ratepayers.").

[31] The Commission reasons that Section 2806.1(f) prescribes penalties for failing to achieve the EE&C Program consumption reductions required under subsections (c) or (d) and that the GEN-P carve-out is established under subsection (b). Tent. Order at 19.

Commission's general enforcement authority under Section 3301(a) of the Public Utility Code ("Code").

While PECO supports continuing the GEN-P carve-out at the 10% target, which is consistent with the plain language of Act 129, it disagrees with the Commission's conclusion that EDCs can be made subject to penalties for failure to meet the carve-out under the Code's general enforcement provisions. Act 129 expressly limits penalties to an EDC's failure to submit an EE&C plan and, as the Commission observes, an EDC's failure to achieve the required consumption or peak demand reductions.[32] While failing to include the GEN-P carve-out may provide a basis for rejection of an EDC's proposed Phase Two Plan, it does not trigger Section 3301(a) civil penalties which are limited to an EDC's failure to perform a duty imposed by the Code.[33]

With regard to other GEN-P matters, PECO supports the Commission's recommendation that EDCs develop strategies targeting multi-family housing units. However, PECO opposes the Commission's proposal to establish a working group to explore on-bill financing programs for GEN-P sector projects as on-bill financing should not be required and a working group to address the same is unnecessary.

As a threshold matter, such a requirement is inconsistent with the Commission's direction in its Retail Markets proceeding that EDC default service be "plain vanilla." Moreover, requiring EDCs to perform a non-core business function and to act as banking institutions would present challenges relating to the evaluation of credit risks, recourse in the event of customer default on the loans, and the tracking of customers who move from an EDC's service territory

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[32] *See* 66 Pa.C.S. §2806.1(f).

[33] *See* Pa. C.S. §3301(a) (conferring remedial and enforcement powers on the Commission for a public utility's failure to perform a duty enjoined upon it by the Code).

prior to satisfaction of the loan. In addition, requiring EDCs to offer on-bill financing would increase both the cost and the complexity of EE&C programs. For example, implementation of on-bill financing would require expensive billing system changes. Based on its experience during Phase One, PECO believes that there are financial institutions and other financial vehicles in the marketplace (such as energy service companies) that are better equipped to assist customers with financing that may be required to implement energy efficiency measures.

5. **The plain language of the Act requires that Low-Income measures be targeted for households at or below 150% of the Federal poverty income guidelines in proportion to that sector's share of the total energy usage in the EDC's service territory. The Commission should maintain the Act's requirement and should not impose a specific percentage reduction mandate.**

The Act requires EDCs to include in their plans a number of energy efficiency measures targeted for households at or below 150% of the Federal poverty income guidelines ("FPIG") in proportion to that sector's share of the total energy usage in the EDC's service territory.[34] In the Tentative Order, the Commission not only proposes to continue this requirement, but also would establish a specific percentage carve-out for low-income customers. In particular, the Commission recommends that Phase Two plans provide for EDCs to obtain a minimum of 4.5% of their overall energy consumption reduction requirements from the low-income sector.

Act 129 clearly states that it is the number of measures proportionate to low-income households' share of the total energy usage in the EDC's service territory that is to be considered by the Commission, not a specific percentage of total consumption reductions, as in the GEN-P sector.[35] In addition, the proposed 4.5% target is based on average historic portfolio savings from the low-income sector for Phase One plans instead of projected savings ratios that would be

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[34] 66 Pa.C.S. § 2806.1(b)(1)(i)(G).

[35] *Id.*; *See also 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*, Opinion and Order, Docket No. M-2009-2093215 at 38-39 (Order entered October 28, 2009)

reasonably achievable in subsequent phases. Therefore, PECO recommends that the Commission, in its final Order, retain the low-income measures requirement in its current form as stated in the Act.

The Commission's conclusion that failure by an EDC to meet the low-income sector requirement would, like its conclusion for the GEN-P carve out, subject that EDC to the penalties contained in Section 3301(a) is also inconsistent with Act 129. As previously explained, Act 129 expressly limits penalties to an EDC's failure to submit an EE&C plan and an EDC's failure to achieve required consumption or peak demand reductions.[36] Therefore, the Commission should conclude that failure to meet any low-income carve-out will not trigger Section 3301(a) civil penalties.

6. Accumulated Phase One Savings in Excess of Reduction Requirements should be permitted to be applied against Phase Two targets.

The Commission proposes that EDCs be allowed to apply any excess savings during Phase One against their Phase Two consumption reduction targets. PECO supports this recommendation.

7. Transition Issues with Respect to Phase Two Plans

a. Phase Two Planning Timeline – The Plan template instructions and Technical Reference Manual should be issued no later than the Final Order.

In the Tentative Order, the Commission adopts the planning timeline proposed in its March 1, 2012 Secretarial Letter. Although PECO will not object to the Commission's proposed schedule for approval of Phase Two plans, PECO submits that the Commission should issue the EE&C plan template instructions and the 2013 Technical Reference Manual ("TRM") no later than the final Order – *i.e.*, by August 2, 2012. This will provide EDCs with valuable

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[36] *See* 66 Pa.C.S. §2806.1(f).

information, including deemed savings of specific measures and guidance on how to evaluate cost-effectiveness, which are integral to the development of Phase Two plans. If this information is not available during the plan development phase, it could delay implementation of programs and measures and increase administrative costs to comply with subsequent Commission requirements.

b. Updating Frequency of the Technical Reference Manual – The TRM should be updated commensurate with the EE&C Program Term.

The Commission also proposes to continue the annual TRM updating process, with a final revised TRM due by December 31 for use effective June 1 of the following year. The Commission reasons that the TRM should contain the most-up-to-date information regarding deemed savings values and assumptions to assist the Commission's evaluation of programs and to address changes in standards, codes and regulations adopted through the course of a program year.

PECO recommends that the Commission adopt a TRM update schedule commensurate with the length of the EE&C Program term. In other words, under PECO's proposal, the final TRM effective June 1, 2013 would not be revised until December 31, 2015 and would become effective June 1 of 2016 in preparation for the beginning of Phase Three. This will provide consistent assumptions and deemed savings values during the life of the Phase Two plans. Synchronizing the TRM updating frequency with the length of the Phase Two Program will also provide certainty to EDCs from a compliance standpoint and will minimize the need for plan modifications in response to changing deemed savings values and assumptions.

c. **The Process to make recommendations for plan modifications can be improved while preserving the Commission's approval authority and appropriate Due Process.**

Recommended changes to an EDC's Phase One plan were originally required to be presented to and approved by the Commission. However, the Commission subsequently adopted an expedited review process for minor EE&C plan changes.[37] PECO believes that the decision to delegate authority to approve minor EE&C Plan changes to the Commission Staff has been beneficial to customers and an important tool in facilitating implementation of Phase One plans. PECO therefore supports the Commission's tentative decision to retain the expedited review process for Phase Two plans.

Under the expedited approval process, an EDC proposes minor changes to its EE&C plan and interested parties may submit comments within 15 days of the filing, with reply comments due ten days later. Within 35 days after the EDC's filing, Commission Staff must issue a *Secretarial* Letter approving, denying, or transferring to the Office of Administrative Law Judge for hearings, some or all of the proposed minor changes, along with an explanation of its decision.

Prior to making a minor change filing, PECO has proactively shared potential modifications with stakeholders and, where appropriate, has refined them through a collaborative dialogue. Based on its Phase One plan experience, PECO believes that the expedited review process can be further streamlined to provide more flexibility to adjust plans to changing conditions while preserving due process. Accordingly, PECO recommends that the following additional changes be eligible for expedited review during Phase Two:

[37] *See Energy Efficiency and Conservation Program*, Final Order, Docket No. M-2008-2069887, at 18-20 (Order entered on June 9, 2011) ("Minor Plan Change Order").

1. A change in vendors for existing programs that will continue during Phase Two plans; and
2. Elimination of programs that are not viable due to market conditions.

In addition, in order to minimize delays in implementing minor EE&C Plan changes, PECO believes that all minor changes should become effective on 15 calendar days' notice unless an objection is filed during the notice period. The notice period would commence with the EDC's filing of the proposed minor changes with the Commission. In the event an objection is filed, the comments procedure and timelines under the existing expedited process would apply.

PECO's proposed revisions will preserve the rights of interested parties to challenge EE&C Plan modifications, while at the same time eliminating the time and expense of a comment period for changes to which no party has any objection. In short, PECO believes that the 15-day notice period, which will not begin to run until PECO has already reviewed proposed modifications with interested stakeholders, will be sufficient for parties to determine whether a minor change presents any concerns.

d. Procedures to Require Competitive Bidding and Approval of Contracts – Existing CSP contracts should not be required to be re-bid.

As the Commission observes in the Tentative Order, Act 129 requires the Commission to establish procedures requiring EDCs to competitively bid all contracts with CSPs. The Commission proposes to allow EDCs to proceed with competitive solicitation procedures or standard form CSP contracts without re-filing them for Commission approval. However, the Tentative Order would require EDCs to again competitively bid all CSP contracts for Phase Two programs, regardless of whether the EDC has an existing contract with a CSP to provide the same services that will be provided in Phase Two. PECO asks the Commission to reconsider this requirement because the re-bidding of CSP contracts would only increase administrative costs and could impede a seamless transition to Phase Two. For example, the Commission's proposal may require PECO to replace its existing tracking system, which would require additional expenditures of customer funds to design, build, test, and populate a new system.

e. Application of Excess Phase One Budget Dollars – PECO supports refunds of over-collections to the appropriate rate class.

As discussed above, the Commission proposes to allow EDCs to spend their full Phase Two budget even if accrued excess savings from Phase One programs are applied to reduce consumption reduction requirements for Phase Two. The Commission also proposes that EDCs be allowed to continue Phase One spending through the course of Phase One, even if they have already attained their consumption reduction targets. Upon expiration of Phase One budget spending on May 31, 2013, the Commission recommends that its Bureau of Audits reconcile Phase One funds collected with expenditures and direct EDCs to refund all over-collections to the appropriate rate class. PECO supports refunds of over-collections to the appropriate rate class.

f. Cost Recovery Tariff Mechanism – The existing Mechanism should be maintained.

As the Commission notes in the Tentative Order, EDCs are entitled to recover the costs of their EE&C plans through a Section 1307 reconcilable rate mechanism. PECO's Phase One Plan and revenues will be reconciled once at the end of the three-year Phase One plan on May 31, 2013. Rather than continue the existing reconciliation process, the Commission proposes a standardized methodology, pursuant to Section 1307(e) of the Code, under which Phase Two Plan rates would be adjusted and reconciled annually to reflect over- or under collection balances, plus interest at the legal rate of six percent.

PECO disagrees with the Commission's proposal to change the existing reconciliation process, particularly in light of the difficulty in projecting expenditures necessary to implement future energy efficiency measures. The existing mechanism has benefited customers through simplified cost recovery, with a levelized rate over the term of Phase One. PECO recommends that, in its final Order, the Commission retain the same reconciliation mechanism for Phase Two plans.

Regardless of the type of cost recovery mechanism selected by the Commission, the 2% annual spending cap as proposed by the Commission would limit EDCs from spending more than 2% of 2006 revenues in any given plan year on their EE&C plan. The Commission's proposal could be problematic if a Phase Two Plan requires spending in excess of the 2% in a particular program year to achieve the savings targets. PECO thus believes that the Commission should clarify that the total spending cap is applied over the entire length of the Phase Two plan rather than to each plan year. This will provide full and current cost recovery to EDCs while also ensuring that EDCs are not exposed to penalties for exceeding the spending cap.

III. CONCLUSION

PECO appreciates the opportunity to comment on the Tentative Implementation Order and requests that the Commission consider and adopt the foregoing recommendations in developing the final Order. PECO looks forward to continuing to work with the Commission and other stakeholders as the evaluation of the Phase One EE&C Program and the transition to a Phase Two Program progresses.

Respectfully submitted,

TP Gadsden

Anthony E. Gay, Esquire
Associate General Counsel
PA Atty. I.D. No. 74624
Exelon Business Services Company
2301 Market Street, S23-1
Philadelphia, Pennsylvania 19101
anthony.gay@exeloncorp.com
215.841.4635
215.568.3389 (fax)

Thomas P. Gadsden (Pa. No. 28478)
Anthony C. DeCusatis (Pa. No. 25700)
Brooke E. Leach (Pa. No. 204918)
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
215.963.5234
215.963.5001(fax)
E-mail: tgadsden@morganlewis.com

Counsel for PECO Energy Company

Dated: June 25, 2012

ORIGIN ID: REDA (215) 963-5317
MAILROOM
MORGAN LEWIS & BOCKIUS LLP
1701 MARKET STREET

PHILADELPHIA, PA 19103
UNITED STATES US

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