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September 4, 2012

VIA ECF AND OVERNIGHT DELIVERY

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

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

Dear Secretary Chiavetta:

Enclosed for filing in the above-captioned matter are the original **Motion of PECO Energy Company for Leave to File a Petition for Reconsideration** (“Motion”) and the original Petition for Reconsideration that accompanies the Motion as Appendix A thereto.

As indicated on the attached Certificate of Service, copies of the Motion and accompanying Petition for Reconsideration have been served via electronic mail and overnight delivery upon the statutory parties and via first class mail to all other parties who submitted Comments and/or Reply Comments to the Commission’s Tentative Implementation Order.

Sincerely,



Thomas P. Gadsden

TPG/tp
Enclosures

c: Per Certificate of Service

Almaty Beijing Boston Brussels Chicago Dallas Frankfurt Harrisburg Houston Irvine London Los Angeles Miami
Moscow New York Palo Alto Paris Philadelphia Pittsburgh Princeton San Francisco Tokyo Washington Wilmington

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**ENERGY EFFICIENCY AND
CONSERVATION PROGRAM**

**: DOCKET NOS. M-2012-2289411
: M-2008-2069887**

CERTIFICATE OF SERVICE

I hereby certify that I have this date served true and correct copies of the **Motion of PECO Energy Company for Leave to File a Petition for Reconsideration and PECO's Petition for Reconsideration** upon the individuals listed below, as provided in 52 Pa. Code § 1.54 (relating to service by a participant):

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September 4, 2012

Counsel for PECO Energy Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ENERGY EFFICIENCY AND CONSERVATION PROGRAM : **DOCKET NOS. M-2012-2289411**
: **M-2008-2069887**

**PECO ENERGY COMPANY'S MOTION FOR LEAVE
TO FILE A PETITION FOR RECONSIDERATION**

Pursuant to 52 Pa.C.S. § 1.91, PECO Energy Company ("PECO" or the "Company") requests that the Pennsylvania Public Utility Commission (the "Commission") grant it leave to file a Petition for Reconsideration of the Commission's Order entered August 3, 2012 ("*Phase II Implementation Order*") beyond the fifteen-day period specified in 52 Pa.C.S. § 5.572(c) and accept for filing PECO's Petition for Reconsideration submitted as Appendix A to this Motion.¹ In support of this Motion, PECO states as follows:

1. This Motion is being filed as a courtesy to the Commission to provide the Commission the opportunity to reconsider issues that, absent acceptance of PECO's late-filed Petition for Reconsideration, will be the subject of a Petition for Review of the *Phase II Implementation Order* that PECO must file with the Commonwealth Court of Pennsylvania no later than September 4, 2012 in order to preserve its appeal rights. *See* Pa.R.A.P. 1511-1512, 1701(b)(c).

2. Additionally, PECO believes the Commission may wish to accept its late-filed Petition for Reconsideration in light of the Commission's decision at its August 30, 2012 public meeting to grant the Petitions for Reconsideration of the *Phase II Implementation Order* filed by

¹ Exhibit 1 to PECO's Petition for Reconsideration is the form of Opinion and Order that PECO requests the Commission to enter. The form of Opinion and Order submitted in Exhibit 1 includes appropriate provisions granting both this Motion and PECO's Petition for Reconsideration. Accordingly, a separate form Order specific to this Motion is not being provided.

PPL Electric Utilities Corporation (“PPL”) and the FirstEnergy Companies (“FirstEnergy”).² See Opinion and Order entered August 30, 2012 at the above-referenced dockets (“*PPL/FirstEnergy Order*”). However, as explained below, only by granting PECO’s Petition for Reconsideration and entering an Opinion and Order in the form provided by PECO no later than September 4, 2012 would the Commission have reasonable assurance that it would retain jurisdiction to reconsider the issues raised by PECO’s Petition. Unless this Motion is granted and an appropriate Commission Opinion and Order expressly granting reconsideration is entered on September 4, 2012, there is a material risk that a Petition for Review filed by PECO on September 4, 2012 (the last day of the appeal period) would lodge jurisdiction in the Commonwealth Court and foreclose further consideration of this matter by the Commission.

3. Rule 1701 of the Pennsylvania Rules of Appellate Procedure provides, in relevant part, as follows:

Rule 1701. Effect of Appeal Generally

(a) **General rule.** Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter.

(b) **Authority of a trial court or agency after appeal.** After an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may: . . .

(3) Grant reconsideration of the order which is the subject of the appeal or petition, if:

(i) an application for reconsideration of the order is filed in the trial court or other government unit within the time provided or prescribed by law; and

² The FirstEnergy Companies consist of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company.

(ii) an order expressly granting reconsideration of such prior order is filed in the trial court or other government unit within the time prescribed by these rules for the filing of a notice of appeal or petition for review of a quasijudicial order with respect to such order, or within any shorter time provided or prescribed by law for the granting of reconsideration.

A timely order granting reconsideration under this paragraph shall render inoperative any such notice of appeal or petition for review of a quasijudicial order theretofore or thereafter filed or docketed with respect to the prior order. The petitioning party shall and any party may file a praecipe with the prothonotary of any court in which such an inoperative notice or petition is filed or docketed and the prothonotary shall note on the docket that such notice or petition has been stricken under this rule. Where a timely order of reconsideration is entered under this paragraph, the time for filing a notice of appeal or petition for review begins to run anew after the entry of the decision on reconsideration, whether or not that decision amounts to a reaffirmation of the prior determination of the trial court or other government unit.

4. Under the current state of Pennsylvania law, it is not clear that the Commonwealth Court would consider the *PPL/FirstEnergy Order* sufficient to satisfy the requirement of Rule 1701(b)(3)(ii) for “an order expressly granting reconsideration of such prior order” with respect to issues other than those raised by PPL and FirstEnergy. *See Barasch v. Pa. P.U.C.*, 478 A.2d 901,903 (Pa. Cmwlth. 1984) (holding that, if reconsideration is granted as to issues that are “clear and distinct” and “not so sizable in magnitude or prominence” as to preclude judicial review of the rest of an order, the “staying effect of 1701(b)(3)” operates only with respect to the specific issues being reconsidered). *See also City of Lancaster v. Pa. P.U.C.*, 769 A.2d 567 (Pa. Cmwlth. 2001) and R. Darlington, *et al.*, *Pennsylvania Appellate Practice*, Vol. 20A at 205.

5. PECO’s attached Petition for Reconsideration identifies the issues that it is asking the Commission to reconsider and that, absent timely and effective reconsideration, will be

reviewed by the Commonwealth Court pursuant to PECO's Petition for Review to that Court. The issues raised by PECO are broader than those presented for reconsideration by the PPL and FirstEnergy Petitions. Consequently, in order to assure that its appeal rights are preserved, PECO must file a Petition for Review with the Commonwealth Court on September 4, 2012. However, if the Commission would like to have the opportunity to reconsider those issues, it should grant this Motion, accept for filing PECO's Petition for Reconsideration, and, on September 4, 2012, enter an Opinion and Order in the form provided as Exhibit 1 to PECO's Petition for Reconsideration. If all of that occurs and the Commonwealth Court agrees that the Commission's order granting PECO's Petition is a timely-filed "order expressly granting reconsideration" that conforms to the requirements of Rule 1701(b)(3)(ii), then the Commission would, as permitted by Rule 1701(b), retain jurisdiction to reconsider the *Phase II Implementation Order*.³

6. As previously mentioned, this Motion, the accompanying Petition for Reconsideration and proposed Opinion and Order are being filed as a courtesy to the Commission to afford it the opportunity to reconsider the issues PECO intends to raise on appeal. PECO believes that granting this Motion and the accompanying Petition for Reconsideration could help to achieve a reasonable resolution of the issues that concern PECO, particularly in light of the Commission's decision granting reconsideration of the *Phase II Implementation Order* pursuant to the PPL and FirstEnergy Petitions.

WHEREFORE, for the reasons set forth above, the Commission should: (1) grant this Motion and accept for filing out of time PECO's Petition for Reconsideration that accompanies

³ Under these circumstances, an appeal would be rendered inoperative upon the Commonwealth Court's acceptance of an appropriate praecipe. See Pa.R.A.P. 1701(b)(3), *supra*.

this Motion; and (2) no later than September 4, 2012, enter an Opinion and Order in the form provided as Exhibit 1 to PECO's Petition for Reconsideration.

Respectfully submitted,

Handwritten signature of T.P. Gadsden in black ink, written over a horizontal line.

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Dated: September 4, 2012

APPENDIX A

**PECO ENERGY COMPANY'S
PETITION FOR RECONSIDERATION
OF THE *PHASE II IMPLEMENTATION ORDER*
(DOCKET NOS. M-2012-228941 AND
M-2008-2069887)**

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**ENERGY EFFICIENCY AND
CONSERVATION PROGRAM**

**: DOCKET NOS. M-2012-2289411
: M-2008-2069887**

**PETITION FOR RECONSIDERATION
OF PECO ENERGY COMPANY**

Pursuant to 52 Pa.C.S. §§ 5.572 and 1.91, PECO Energy Company (“PECO” or the “Company”) petitions the Pennsylvania Public Utility Commission (the “Commission”) to reconsider its Order entered August 3, 2012 in the above-captioned proceedings (“*Phase II Implementation Order*”) with respect to the matters set forth in Section III, below, and to enter an Opinion and Order on Reconsideration in the form attached hereto as Exhibit 1. Section I of this Petition summarizes the relevant background and history of this case and, in so doing, provides the legal and factual context for the significant problems with the *Phase II Implementation Order* that, in PECO’s view, were not addressed or were not adequately considered by the Commission and, therefore, merit granting this Petition. In Section II, PECO summarizes the criteria that the Commission has historically applied in exercising its discretion to grant reconsideration. In Section III, PECO sets forth the matters decided by the *Phase II Implementation Order* that PECO is requesting the Commission to reconsider and explains why reconsideration is appropriate and, indeed, necessary. In so doing, PECO provides an issue-specific analysis of what it perceives to be the fundamental defects in the *Phase II Implementation Order*. Section IV sets forth PECO’s prayer for relief.

I. INTRODUCTION AND BACKGROUND

A. Pennsylvania's Energy Efficiency and Conservation Program

1. On October 15, 2008, Governor Edward G. Rendell signed into law House Bill No. 2200 ("Act 129"), which added Section 2806.1 to the Pennsylvania Public Utility Code.¹ Act 129 required Pennsylvania EDCs to file energy efficiency and conservation ("EE&C") plans by July 1, 2009 containing the plan elements specified in Section 2806.1(b) ("Phase I EE&C Program").² 66 Pa.C.S. § 2806.1(b). Additionally, Sections 2806.1(c) and (d) required that EDCs' Phase I EE&C plans be designed: (1) to reduce retail energy consumption by a minimum of 1% by May 31, 2011 and a minimum of 3% by May 31, 2013; and (2) to reduce peak demand, measured by reference to the 100 highest hours of demand, by a minimum of 4.5% no later than May 31, 2013. 66 Pa.C.S. §§ 2806.1(c) and (d).

2. The EE&C plan filing requirements set forth in Section 2806.1(b) include provisions mandating that Phase I energy savings be derived from certain customer segments. Specifically, a minimum of 10% of an EDC's consumption reductions must be obtained from the governmental, educational and non-profit ("GEN-P") sector. 66 Pa. C.S. § 2806.1(b)(1)(i)(B). In addition, each EDC's plan must include specific energy efficiency measures for households with income at or below 150% of the Federal Poverty Income Guidelines ("low-income households") that are proportionate to such households' share of the total energy usage in the EDC's service territory. *Id.* at § 2806.1(b)(1)(i)(G).

¹ Hereafter, all section references are to the Pennsylvania Public Utility Code unless otherwise noted.

² 66 Pa. C.S. § 2806.1(l) exempts EDCs with fewer than 100,000 customers from this requirement.

3. Section 2806.1(f)(2)(i) requires the Commission to impose “penalties” of not less than \$1 million and not more than \$20 million on any EDC that fails to achieve the consumption and/or peak demand reduction targets imposed under Sections 2806.1(c) and (d).

4. In compliance with Section 2806.1 and the Commission’s Order entered January 15, 2009 at Docket No. M-2008-20698878, which implemented the terms of that section, PECO prepared and submitted its EE&C plan for the Phase I EE&C Program on July 1, 2009. The Commission approved PECO’s Phase I Plan, with modifications, on October 28, 2009, and further revisions were adopted in various subsequent orders.³

5. Act 129 also requires the Commission, by November 30, 2013, to evaluate the costs and benefits of the Phase I EE&C Program and, if the benefits of the Program are found to exceed their costs, to adopt “additional required incremental reductions in consumption” and “additional incremental requirements for reduction in peak demand.” 66 Pa. C.S. §§ 2806.1(c)(3) and (d)(2). Additionally, Section 2806.1(d)(2) provides that, if the Commission imposes additional requirements for an incremental reduction in peak demand, the reduction “shall be accomplished no later than May 31, 2017.”

B. The Commission’s Evaluation of the Cost-Effectiveness of the Phase I EE&C Program

6. The Commission retained a Statewide Evaluator (“SWE”) to conduct market potential and baseline studies in order to comply with the requirements for cost-benefit analyses imposed by Sections 2806.1(c)(3) and (d)(2). On May 8 and 10, 2012, respectively, the Commission publicly released the SWE’s Baseline Studies and Market Potential Study. *See*

³ *See, e.g., Petition of PECO Energy Company for Approval of its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of its Compact Fluorescent Lamp Program*, Docket No. M-2009-2093215 (Order entered Feb. 17, 2010); *Petition of PECO Energy Company for Approval of its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of its Compact Fluorescent Lamp Program*, Docket No. M-2009-2093215 (Order entered Jan. 27, 2011).

Order at 11-12. Based on those studies and the Commission's interpretation of the program cost cap imposed by Section 2806.1(g),⁴ the SWE concluded that "instituting a second phase of Act 129 electric energy efficiency programs will be cost-effective for Pennsylvania ratepayers." *Id.* at 12. Additionally, the SWE estimated that the statewide potential for cumulative annual energy savings would amount to 2.3% relative to projected 2010 baseline megawatt-hour ("MWh") sales based on a statewide average cost to achieve such energy savings of \$221.39 per MWh.⁵ *Id.* at 12-13, 18.

7. On May 11, 2012, the Commission issued a Tentative Implementation Order at Docket Nos. M-2012-2289411 and M-2008-2069887 outlining its proposed standards for a Phase II EE&C Program. Based on the SWE's recommendations in its Market Potential Study, the Commission proposed to adopt additional required incremental reductions in consumption that vary by EDC. Numerous parties, including PECO, filed comments and reply comments in response to the Tentative Implementation Order.

8. Although the Commission solicited the comments of interested parties, no hearings were held in these proceedings, no testimony or other evidence was taken, no briefs were permitted, and no recommended decision was issued. The Commission did not issue proposed regulations for comment nor did it present its proposals for implementing a Phase II EE&C Program to the Independent Regulatory Review Commission ("IRRC") or to the applicable standing committees of the Pennsylvania House and Senate for review.

⁴ 66 Pa. C.S. §2806.1(g) provides that "[t]he total cost of any plan required under this section shall not exceed 2% of the [EDC's] total annual revenue as of December 31, 2006."

⁵ In the Commission's Orders and in the SWE reports, the cost to achieve consumption reductions is referred to as the "acquisition cost."

9. On August 3, 2012, the Commission entered the *Phase II Implementation Order*. In that Order, the Commission did not make a definitive finding that the benefits of the Phase I EE&C Program exceeded its costs, which Section 2806.1(c)(3) requires as a condition precedent to authorizing the Commission to establish energy efficiency targets for the period June 1, 2013 through May 31, 2016 (“Phase II”). See *Phase II Implementation Order*, p. 13. Nonetheless, the Commission opined, based on its review of the SWE’s studies, that “the benefits of a Phase II Act 129 program will exceed the costs” and adopted “additional required incremental reductions in consumption for another EE&C Program term.” *Id.* Accordingly, the Commission issued directives that Pennsylvania EDCs implement Phase II EE&C plans, including EDC-specific targets for reducing energy consumption and the designation of required sources for where such energy consumption reductions must occur.

10. As previously explained, the Commission adopted the energy efficiency targets recommended by the SWE, which it deemed to be “credible” by reference to “national trends in energy efficiency programs, Pennsylvania-specific circumstances and forward-looking cost estimates.” *Phase II Implementation Order* at 14. At the same time, the Commission reserved the right to “update” its Technical Reference Manual (“TRM”) on an annual basis over the entire term of Phase II (*id.* at 75), despite the fact that changes in the TRM could directly affect EDCs’ ability to achieve their designated consumption reduction targets. Specifically, the TRM sets forth the energy savings values the Commission ascribes to various efficiency measures and provides the assumptions the Commission will accept for purposes of evaluating, measuring and verifying energy efficiency initiatives, including the Total Resource Cost (“TRC”) test. As explained by a number of parties that submitted comments, by reserving the right to modify the TRM, the Commission would be requiring EDCs to hit a “moving target.” Nonetheless, the

Commission reserved that authority while declining to provide EDCs the right to challenge future TRM revisions or, in the alternative, to challenge previously established consumption reduction targets in light of such TRM revisions.⁶ Indeed, the Commission did not issue the most recent changes to the TRC test until August 30, 2012, and there has not been sufficient time to evaluate the implications of even those changes. *See 2012 PA Total Resource Cost (TRC) Test*, Docket No. M-2012-2300653 (August, 30, 2012). Moreover, in the absence of such evidence, it seems clear that the definitive finding required by Section 2806.1(c)(3) cannot be made.

C. The Commission's Adoption of EDC-Specific Consumption Reduction Targets

11. In the *Phase II Implementation Order*, the Commission declined to establish an independently-determined state-wide Phase II energy efficiency target applicable to all EDCs, which would have conformed to the program structure expressly authorized by the legislature for Phase I. *See* 66 Pa.C.S. §§ 2806.1(c) and (d). Instead, using data from the SWE's Market Potential Study and Baseline Studies, the Commission developed Phase II consumption reduction targets that varied from EDC to EDC based on maximum permitted funding levels and projected acquisition costs *Id.* at 14-23. Under this approach, the Commission set a Phase II consumption reduction target for PECO of 2.9%. *Id.* at 24.

12. The *Phase II Implementation Order* departs from the statutorily prescribed program design in another important respect. In Phase I, a statewide consumption reduction

⁶ In lieu of addressing the EDCs' concerns, the Commission asserted that the 25% "adjustment factor" the SWE included in its estimated "acquisition costs" is sufficient to compensate for uncertainties created by the prospect of future changes in the TRM. *Id.* at 20. While PECO is sympathetic to the Commission's effort to address the uncertainties created by this process, there is no evidence, let alone "substantial evidence," that the 25% "adjustment factor" would adequately account for the range of potential TRM changes that the Commission might approve in the future.

target was established and EDCs were required to hit that target without exceeding their spending “cap” imposed by Section 2806.1(g). In the *Phase II Implementation Order*, the Commission made each EDC’s “target” a function of the amount of money available under its “cap” while, at the same time, mandating that each EDC keep expending money on energy efficiency programs even after the “targets” had been satisfied. *Id.* at 25-26. In short, the Commission converted a “not to exceed” value into a “not less than” expenditure level.

D. The Commission’s Exclusion of Peak Demand Reduction Requirements from Phase II

13. The Commission declined to establish a further peak demand reduction (“DR”) target to be achieved by May 31, 2017. The Commission’s rationale was that Section 2806.1(d)(2) authorizes the Commission to impose further peak DR targets only if it finds that the existing DR program is cost-effective and the SWE’s final report on the cost-effectiveness of existing DR programs and recommendations for further required reductions will not be available until the first quarter of 2013. *Id.* at 33. However, the Commission reserved the right to impose further peak DR targets which, when established, would have to be achieved by the statutory deadline of May 31, 2017 to avoid the imposition of penalties. *See* 66 Pa.C.S. § 2806.1(d)(2).

14. Although the Commission deferred a decision on the cost-effectiveness of the statewide peak DR program, it held that **specific** DR programs that are shown to be cost-effective may be continued as part of an EDC’s Act 129 peak reduction programs:

The Commission, however, does recognize that the EDCs and residential electric customers in particular have made significant strides in the implementation of residential curtailment measures, such as direct load control programs. Therefore, to minimize customer confusion or adverse customer reaction, EDCs may continue, *under the Act 129 EE&C Program*, residential demand response curtailment measures, such as direct load control programs, that will be cost effective if continued. Such specific

measures, if continued, could be viewed as providing the interim demand response program suggested by some parties until the Commission determines whether or not there is a cost-effective Act 129 peak demand reduction program design. The Commission will not, however, set any reduction goals for an EDC choosing to voluntarily continue any DR programs.

Id. at 42 (emphasis added).

15. Notwithstanding its determination that cost-effective DR programs may continue “under the Act 129 EE&C Program” for the duration of Phase II, the Commission did not allocate any portion of the allowable spending under the “cap” to such programs for Phase II, nor did it acknowledge that continued spending would be necessary to maintain those programs, even on an interim basis, during the Phase II period. As numerous parties, including PECO, explained in their comments, deferring a decision on the overall cost-effectiveness of statewide DR programs should not result in eliminating Act 129 funding for specific, existing DR programs that are demonstrated to be cost-effective, including residential direct load control measures.

16. In light of its decision not to include a peak DR target in the Phase II EE&C Program, the Commission allocated the entire amount of each EDC’s allowable spending under the 2% revenue cap to energy consumption reductions. *Phase II Implementation Order* at 41. The Commission recognized that excluding peak DR reduction targets from the Phase II EE&C Program may lead to customer confusion and stranded costs associated with program investment to date. *Id.* at 42.

17. Additionally, if the Commission, in the future, establishes peak DR targets based on its determination that further DR programs would be cost-effective, EDCs would have to reduce their peak demands by the targeted levels during the summer of 2016. This timeframe is dictated by the statutory deadline for achieving Commission-mandated peak DR reductions (May

31, 2017) and the fact that the period of peak demand (from which the targeted savings would have to be measured) occurs during the summer months, which the Commission directed should be the focus of EDCs' peak demand reduction measures. *See Energy Efficiency and Conservation Program*, Docket No. M-2008-2069887 (January 16, 2009) ("The Commission agrees with PECO and PPL that the 100 hours of highest demand for the annual system peak demand determination should be limited to the months of June, July, August and September.") As a consequence, as several parties, including PECO, explained, in order for peak demand reductions to be achieved during the summer of 2016, all of the programs and associated infrastructure needed to achieve those reductions must be in place well **before** the summer of 2016 (i.e., during the Phase II period). And, if those programs and associated infrastructure must be in place, they need to be funded with dollars that EDCs are authorized to spend below the statutory "cap." However, the Commission, over the objections of PECO and others, ignored the implications of the *Phase II Implementation Order* and allocated 100% of permissible funding under the statutory "cap" to consumption reduction programs, leaving none for peak DR programs.⁷

E. The Commission's Imposition of Penalties for Failure to Obtain Consumption Reductions from Specific Customer Segments

18. The Commission directed EDCs to maintain the existing 10% carve-out of overall consumption reduction requirements for the GEN-P sector. The Commission, however, determined that EDCs that fail to meet the GEN-P carve-out could not be assessed penalties

⁷ The defects in the *Phase II Implementation Order* would not be cured by adopting the Commission's suggestion that EDCs petition the Commission to recover the cost of maintaining existing DR programs under Section 1319. *Phase II Implementation Order*, p. 43. An alternative funding mechanism under Section 1319 would be an unlawful end-run around the mandatory spending cap imposed by Section 2806.1(g). Moreover, even if the applicable DR programs could lawfully be funded outside the spending sources authorized by Section 2806.1, so doing could disqualify the resulting demand reductions from counting toward a peak demand reduction "target" subsequently established by the Commission under Section 2806.1(d).

under Act 129. More specifically, the Commission correctly concluded that Section 2806.1(f) only authorized it to impose penalties for an EDC's failure to achieve overall Act 129 consumption reduction and peak DR requirements under Sections 2806.1(c) and (d) (i.e., there is no authority to impose penalties for an EDC's inability to derive those reductions from specific sources such as GEN-P). Despite holding that Section 2806.1 did not authorize penalties for failure to achieve specific "carve-outs," the Commission concluded that it could, nonetheless, impose penalties under its general enforcement and penalty authority purportedly derived from Section 3301(a).⁸

19. In addition to continuing the existing statutory requirement that an EE&C plan's portfolio of measures include a proportionate number of low-income measures, the Commission, *sua sponte*, adopted a requirement that each EDC's Phase II EE&C plan must obtain a minimum of 4.5% of its consumption reduction requirements from the low-income sector. Like the GEN-P carve-out, the Commission determined that any failure to meet such 4.5% low-income carve-out would be subject to penalties under Section 3301(a). Neither the separate low-income consumption targets nor the Commission's purported authority to impose penalties upon EDCs for failing to meet that target is authorized by the Public Utility Code.

II. LEGAL STANDARD FOR RECONSIDERATION

20. In *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553 (1985), the Commission furnished the following guidance on the criteria it would consider in deciding requests for reconsideration:

⁸ 66 Pa. C.S. § 3301(a) confers remedial and enforcement powers on the Commission for a public utility's failure to perform a duty enjoined upon it by the Pennsylvania Public Utility Code.

A petition for reconsideration, under the provisions of 66 Pa C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein it was said that “[p]arties . . ., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them. . . .” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

III. REQUEST FOR RECONSIDERATION

21. This Petition presents for the Commission’s consideration new issues, new perspectives, and new or additional arguments that the Commission either did not focus upon in the *Phase II Implementation Order* or which the Commission overlooked. Accordingly, reconsideration is necessary and appropriate and should be granted because the process by which the *Phase II Implementation Order* was adopted was legally flawed, as explained in subsections a. and b., below, and because the Commission erred in how it resolved a number of specific issues, as explained in subsections c. through h., below.

a. The *Phase II Implementation Order* purports to establish industry-wide “binding norms” and, therefore, under Pennsylvania law, is a “regulation.” See *Depart. of Envir. Res. v. Rushton Mining Co.*, 139 Pa. Cmwlth. 648; 591 A.2d 1168 (1991); *Pa. Human Relations Comm’n v. Norristown Area School Dist.*, 473 Pa. 334, 374 A.2d 671 (1977). The Commission has attempted to adopt such industry-wide binding norms without adhering to the procedural requirements of the Commonwealth Documents Law (45 P.S. §§1102-1208; 45 Pa.C.S Chapters 5, 7 and 9) and the Regulatory Review Act (71 P.S. §§745.1-745.15). See Paragraph 8, *supra*,

and the cases cited above. Accordingly, the Commission should grant reconsideration to redress this legal deficiency by initiating a rulemaking and complying with the formal requirements of the Commonwealth Documents Law and the Regulatory Review Act as the basis for establishing “binding norms” to implement a possible Phase II EE&C Program if, as Section 2806.1(c)(3) requires, the Commission definitively finds that the benefits of the Phase I consumption reduction program exceeded its costs.

b. The *Phase II Implementation Order*, even if viewed as an “adjudication,” is defective because, as to various mandatory provisions of that Order, PECO and other EDCs were not provided notice and a meaningful opportunity to be heard in the manner required by the Administrative Agency Law, 2 Pa.C.S. § 504, Pennsylvania appellate court precedent, and principles of due process. See Paragraph 8, *supra*. This overarching defect was not remedied by the opportunity for an “evidentiary hearing” regarding EDCs’ consumption reduction targets that was afforded by the *Phase II Implementation Order*. See *id.* at 30-31. Accordingly, if the Commission determines that company-by-company adjudications should be the procedural vehicle for establishing “binding norms” for implementing a Phase II EE&C Program, then the Commission should grant reconsideration to address the defects in the legal process it employed to adopt the *Phase II Implementation Order* by authorizing evidentiary hearings on all of the substantive issues identified in this Petition.

c. The Commission established EDC-specific consumption reduction targets based on a formula that makes such targets a function of each EDC’s permissible funding and its projected acquisition cost. The Commission should reconsider this approach to establishing consumption reductions targets because it converts the “cap” on permissible spending set forth in

Section 2806.1(g) from a “not to exceed” amount to a “not less than” expenditure mandate in contravention of the plain language of Section 2806.1(g) and all accepted rules of statutory construction. *See* Paragraphs 11-12, *supra*.

d. The *Phase II Implementation Order* states that EDCs should expend all available resources up to the statutory 2% revenue cap imposed by Section 2806.1(g). *Phase II Implementation Order*, pp. 25-26. The Commission should reconsider this provision because it conflicts with the language and structure of the operative energy efficiency provisions added to the Public Utility Code by Act 129 which, as previously explained, establish a “not to exceed” amount and do not mandate that all available funds must be expended on consumption reduction. *See* Paragraph 12, *supra*.

e. The Commission declined to adopt a uniform statewide consumption reduction target because, in its view, a single statewide target would purportedly impose unreasonable burdens upon certain EDCs and would allegedly frustrate the intent of Act 129. The Commission should reconsider this decision because it is contrary to the language and structure of Section 2806.1 and is not supported by substantial evidence. *See* Paragraphs 1 and 6-9, *supra*. *See also* 66 Pa.C.S. § 2806.1(c).

f. The Commission failed to recognize that an appropriate level of Phase II funding must be expended to continue existing, cost-effective DLC programs and to achieve subsequently mandated incremental peak demand reduction targets. *See Phase II Implementation Order*, p. 43. As a consequence, and contrary to the Commission’s assumption, PECO’s entire authorized funding amount under the “cap” cannot be dedicated to energy consumption reduction programs while, at the same time, PECO maintains its DLC and other DR

programs during Phase II. This defect is not remedied by the Commission's suggestion that EDCs may petition for cost recovery under Section 1319. Employing such an alternative funding scheme would be an unlawful attempt to evade the spending cap imposed by Section 2806.1(g) and could disqualify resulting demand reductions from being counted toward a subsequently established peak demand reduction "target." Accordingly, the Commission should reconsider its decision to require all permissible EDC funding to be dedicated solely to consumption reduction and to provide no Act 129 funding in Phase II for any demand reduction programs. *See* Paragraphs 13-17, *supra*.

g. The *Phase II Implementation Order* requires EDCs to achieve energy savings from specific customer segments and imposes penalties for an EDCs' failure to achieve such subsidiary "targets." *See* Paragraphs 18-19, *supra*. Neither Section 2806.1(b) nor any other provision of the Public Utility Code furnishes the requisite authority to impose such requirements in the form the Commission has mandated, and neither Section 2806.1(f) nor Section 3301(a) furnishes the requisite authority to impose "penalties" for an EDC's failure to achieve such unauthorized subsidiary "targets." Additionally, the Commission purported to impose such requirements without providing PECO a reasonable opportunity to present evidence or argument, which contravenes the Administrative Agency Law, 2 Pa.C.S. § 504, Pennsylvania appellate court precedent and principles of due process. *See* Paragraph 8, *supra*. As a consequence, the Commission should grant reconsideration to address the legal issues raised by its unauthorized imposition of such requirements and penalties.

h. The Commission reserved the right to make changes in the TRM during the Phase II EE&C Program (*Phase II Implementation Order*, p. 75) and, having done so,

improperly denied PECO and other EDCs the right to challenge future modifications to the TRM that could impair an EDC's ability to meet its consumption reduction target or, in the alternative, the right to challenge those consumption reduction targets in the future based on subsequent modifications to the TRM. *See* Paragraph 10, *supra*. Thus, the *Phase II Implementation Order* creates a "moving target" and would impose penalties on EDCs for their inability to hit that target. The Commission's decision contravenes accepted precepts of due process and violates the principle of fundamental fairness that, under Pennsylvania law, must be observed in all administrative decisions. *See Pittsburgh v. Pa. P.U.C.*, 171 Pa. Super. 391, 395, 90 A.2d 850, 852 (1952) ("[A]dministrative action cannot violate the fundamental principles of fairness any more than it can impinge on any constitutional right.").

IV. CONCLUSION

For the reasons set forth above, the Commission should: (1) grant reconsideration of the *Phase II Implementation Order* with respect to the issues identified in this Petition and all subsidiary and related issues reasonably subsumed by or inferred from such identified issues; and (2) enter an Opinion and Order on Reconsideration in the form attached as Exhibit 1 to this Petition.

Respectfully submitted,



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Dated: September 4, 2012

EXHIBIT 1

**PROPOSED OPINION AND ORDER
GRANTING PECO ENERGY COMPANY'S (PECO)
MOTION FOR LEAVE TO FILE A PETITION FOR RECONSIDERATION
AND GRANTING PECO'S
PETITION FOR RECONSIDERATION
OF THE *PHASE II IMPLEMENTATION ORDER*
(DOCKET NOS. M-2012-228941 AND
M-2008-2069887)**

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 1705-3265**

September 4, 2012

Energy Efficiency and Conservation Program

Docket No. M-2012-2289411
M-2008-2069887

OPINION AND ORDER

Before the Commission for consideration and disposition are a Motion for Leave to File a Petition for Reconsideration and an accompanying Petition for Reconsideration filed by PECO Energy Company (“PECO” or the “Company”). In its Motion, PECO requests that the Commission grant it leave to file its Petition for Reconsideration of the Commission’s Order entered August 3, 2012 in the above-referenced proceeding (“*Phase II Implementation Order*”) beyond the fifteen-day period specified in 52 Pa.C.S. § 5.572(c) and accept for filing PECO’s Petition for Reconsideration submitted as Appendix A to its Motion. In its Petition for Reconsideration, PECO requests that the Commission grant reconsideration of the issues set forth in Section III of that Petition. As explained below, the Commission hereby grants both PECO’s Motion for Leave and Petition for Reconsideration.

A. PECO’s Motion for Leave

In its Motion, PECO avers that it is requesting leave to file a Petition for Reconsideration out of time as a courtesy to the Commission in order to provide the Commission the opportunity to reconsider issues that, absent acceptance and granting of PECO’s late-filed Petition for Reconsideration, will be the subject of a Petition for Review of the *Phase II Implementation Order* that PECO must file with the Commonwealth Court of Pennsylvania no later than

September 4, 2012 in order to preserve its appeal rights. In support of those averments, PECO cites Pa.R.A.P. 1511-1512 and 1701(b)(c). PECO further avers that it believes the Commission may wish to accept its late-filed Petition for Reconsideration in light of the Commission's decision to grant the Petitions for Reconsideration of the *Phase II Implementation Order* filed by PPL Electric Utilities Corporation ("PPL") and the FirstEnergy Companies ("FirstEnergy").¹ See Opinion and Order entered August 30, 2012 at the above-referenced dockets ("*PPL/FirstEnergy Order*").

The short time available to consider PECO's Motion and Petition is dictated by Rule 1701 of the Pennsylvania Rules of Appellate Procedure, Pa.R.A.P. 1701, which divests the Commission of jurisdiction to reconsider a prior order if: (1) the Commission has not entered "an order expressly granting reconsideration of such prior order" within the time prescribed for filing a Petition for Review; and (2) a timely Petition for Review of such order is filed. Today is the last day for filing a Petition for Review of the *Phase II Implementation Order*, and PECO has averred that it intends to file such a Petition for Review with the Commonwealth Court.

As previously noted, on August 30, 2012, the *PPL/FirstEnergy Order* was entered granting PPL's and FirstEnergy's Petitions for Reconsideration. PECO avers in its Motion, and its Petition for Reconsideration confirms, that PECO seeks to raise issues that are broader than those identified in the PPL and FirstEnergy Petitions for Reconsideration. Therefore, as PECO has also explained in its Motion:

Under the current state of Pennsylvania law, it is not clear that the Commonwealth Court would consider the *PPL/FirstEnergy Order* sufficient to satisfy the requirement of Rule 1701(b)(3)(ii) for "an order expressly granting reconsideration of such prior order" with

¹ The FirstEnergy Companies consist of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company.

respect to issues other than those raised by PPL and FirstEnergy. *See Barasch v. Pa. P.U.C.*, 478 A.2d 901,903 (Pa. Cmwlth. 1984) (holding that, if reconsideration is granted as to issues that are “clear and distinct” and “not so sizable in magnitude or prominence” as to preclude judicial review of the rest of an order, the “staying effect of 1701(b)(3)” operates only with respect to the specific issues being reconsidered). *See also City of Lancaster v. Pa. P.U.C.*, 769 A.2d 567 (Pa. Cmwlth. 2001) and R. Darlington, *et al.*, *Pennsylvania Appellate Practice*, Vol. 20A at 205.

Upon review of the authorities cited by PECO, it appears that there is a risk this Commission could be divested of jurisdiction to reconsider the issues identified in PECO’s Petition for Reconsideration upon PECO’s filing of a Petition for Review unless we enter an order expressly granting reconsideration of those issues today. The Commission desires to retain jurisdiction to reconsider those issues on the merits rather than have the *Phase II Implementation Order* proceed directly to appellate review. Accordingly, it is in the public interest to grant PECO’s Motion for Leave pursuant to 52 Pa. Code 1.91 and accept for filing PECO’s Petition for Reconsideration.

B. PECO’s Petition for Reconsideration

Pursuant to Rule 1701(b)(3) of the Pennsylvania Rules of Appellate Procedure, in order to retain jurisdiction of a case that is, or may be, appealed to the Commonwealth Court, the Commission must grant reconsideration within the time prescribed by those rules for filing a Petition for Review of the applicable order. As explained in the *PPL/FirstEnergy Order*, the period within which the Commission must act to preserve its jurisdiction is September 4, 2012. Accordingly, we shall grant reconsideration, within the meaning of Pa.R.A.P. 1701(b)(3)(ii), pending review of, and consideration on, the merits of PECO’s Petition for Reconsideration.

As we also noted in the *PPL/FirstEnergy Order*, the Parties are reminded that Petitions for Reconsideration do not act as a supersedeas. Consequently, the Parties are expected to

comply with all directives set forth in the *Phase II Implementation Order* entered on August 3, 2012, unless and until the Commission directs otherwise; **THEREFORE,**

IT IS ORDERED:

(1) That PECO's Motion for Leave to File a Petition for Reconsideration is granted;

(2) That PECO's Petition for Reconsideration accompanying its Motion for Leave is accepted for filing and, therefore, shall be deemed filed with the Secretary on September 4, 2012; and

(3) That PECO's Petition for Reconsideration is granted, pending further review of, and consideration on, the merits.

BY THE COMMISSION

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: September 4, 2012

ORDER ENTERED: September 4, 2012