BEFORE THE
PENNSYLVANIA PUBLIC UTILITIES COMMISSION

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

ANSWER OF CLEAN AIR COUNCIL AND THE SIERRA CLUB IN RESPONSE TO THE PETITION OF PECO ENERGY COMPANY FOR RECONSIDERATION

I. INTRODUCTION

On August 3, 2012, the Pennsylvania Public Utility Commission (the "Commission") entered its Implementation Order ("Order") for Phase II of the Act 129 Energy Efficiency and Conservation ("EE&C") Programs.[1] In that Order, the Commission determined that the Phase I EE&C programs were cost-effective and set forth energy consumption reduction targets for each Electric Distribution Company ("EDC") to meet in Phase II of the program. The Order also contained other requirements and guidelines for Phase II EE&C programs. On September 4, 2012, PECO Energy Company ("PECO") filed motion for leave to file an untimely Petition for Reconsideration ("Petition") of the August 3rd Order. The Commission granted reconsideration that same day.

PECO's Petition argues variously that the Commission applied the wrong procedure in promulgating the Implementation Order, that, despite participating in multiple rounds of comments, PECO was denied a significant opportunity to provide input into the Implementation Order's creation, and that the Implementation Order is

[1] Act 129 is codified at 66 Pa. Code § 2806.1.

improper for its failure to incorporate potential, future program requirements that the Commission has not yet created. PECO is wrong on all points; the Implementation Order should stand unchanged.

II. STATEMENT OF STANDING

The Clean Air Council (the "Council") and the Sierra Club ("Sierra Club") have standing, both individually and collectively, to file this answer to PECO's petition in accordance with 52 Pa. Code § 5.61(e)(2). The Council is a non-profit advocacy organization dedicated to the public interest, specifically, protecting everyone's right to breathe clean air. The Council has 4,598 members across Pennsylvania, a significant portion of which live in areas under PECO's electricity distribution jurisdiction. These members are directly affected by PECO's requirements promulgated by PUC as part of Phase II of Act 129, which have an impact on utility rates, the availability and quality of EE&C programs, and the air quality resulting from electricity generation.

Sierra Club is a national non-profit environmental organization whose mission is to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's resources and ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. The Sierra Club currently has 23,705 members in Pennsylvania, some of whom live in PECO territory and receive electric distribution services from PECO. These members have a strong interest in both the success of energy efficiency programs and in protecting wild places and their ambient environment from the effects of air, water, and other pollution from electrical generation. Thus, these members are directly affected by requirements placed on PECO by the PUC

pursuant to Phase II implementation of Act 129, and the impact of those requirements on utility rates, environmental impacts from electrical generation, and the availability of EE&C programs.

The Council and Sierra Club have been active participants in the Commission's establishment of the Implementation Order for Phase II of Act 129, including (1) response to the Commission's March 1, 2012 Secretarial Letter, (2) written comments and reply comments in response to the Commission's May 10, 2012 Tentative Implementation Order, and (3) participation in the Commission's June 4, 2012 Act 129 stakeholders meeting. Now, upon PECO's challenge to the Commission's Final Implementation Order, the Council and Sierra Club seek to continue their participation as stakeholders in the Commission's newly promulgated Phase II targets. Given that the Commission's potential reconsideration of issues raised by PECO's Petition would have a direct and substantial effect on the Council and Sierra Club's members, the Council and Sierra Club file this timely answer.[2]

III. SUBSTANTIVE ARGUMENTS

A. The Commission Promulgated the Implementation Order in a Manner Inclusive of Comments and Submissions from EDCs Including PECO

Although PECO alleges that the Commission did not follow proper procedure in the formulation and adoption of the August 3 Order, PECO had significant and multiple opportunities to present its concerns to the Commission.

Act 129 requires the Commission to "adopt an energy efficiency and conservation program . . . to implement cost-effective energy efficiency . . ." 66 Pa. Code § 2806.1(a). Further, the Commission is required to "evaluate the costs and benefits of the program"

[2] Under 52 Pa. Code § 5.61(a), answers must be filed within 20 days. PECO's Petition for Reconsideration was filed with the Commission on September 4, 2012.

and of the "approved energy efficiency and conservation plans" submitted by EDCs. *Id.* at § 2806.1(c)(3). If the Commission finds that "the benefits of the program exceed the costs," then it is required to "adopt additional required incremental reductions in consumption." *Id.*

Here, this is precisely what occurred. The Implementation Order was issued after multiple rounds of public comment, with the Commission soliciting responses on key questions concerning program design, and employing all the benefit of data from the May 2012 Market Potential Study as well as End-Use and Market Saturation Studies it commissioned the Statewide Evaluator ("SWE") to produce. The Implementation Order further makes clear that energy efficiency benefits exceed costs; accordingly, the Commission adopted additional required incremental reductions for Phase II. *See Schuylkill Twp. v. Pennsylvania Builders Ass'n*, 607 Pa. 377, 385 (Pa. 2010) (courts must give "substantial deference to an agency's interpretation of a statute the agency 'is charged with implementing and enforcing.'") (citing *Commonwealth, Office of Administration v. Pennsylvania Labor Relations Board*, 591 Pa. 176, 916 n. 11 (Pa. 2007)); *see also Cherry v. Pennsylvania Higher Education Assistance Agency*, 537 Pa. 186 (Pa. 1994) ("An interpretation by the agency charged with a statute's implementation is accorded great weight and will be overturned only if such a construction is clearly erroneous.").

PECO additionally argues that, whatever procedure was employed by the Commission, PECO was denied an opportunity to fully articulate its views. In fact, PECO had multiple opportunities to inform the Commission of its views and to submit relevant information, and it took full advantage of these opportunities. The Commission

specifically sought public comment—including comment from PECO and other EDCs—in March of 2012 on numerous topics related to a potential Phase II, including program length, inclusion of demand response, funding, sector carve-outs, and phase transition issues, among others. *See* PUC Secretarial Letter, Act 129 Energy Efficiency and Conservation Program Phase Two Docket No. M-2012-2289411 (March 1, 2012). Further, the Commission issued proposed regulations in the form of a Tentative Order on May 10, 2012, and a comment period on this Tentative Order was open from that date until June 25, 2010. PECO itself filed comments and reply comments on this Tentative Order (as noted in its Petition). Further, the Implementation Order itself was adopted at a public meeting of the Commission on August 3, 2012. As such, PECO's petition should be denied.

B. <u>The Commission Adequately and Properly Assessed that the Benefits of EE&C Programs Outweigh Their Costs</u>

PECO argues that the Commission failed to "definitively" make a finding that the benefits of Phase I EE&C programs outweigh the costs, and that such a finding is required by statute. Petition at 12. However, in so doing, PECO misreads Act 129, and mischaracterizes the Implementation Order.

Act 129 states as follows:

> By November 30, 2013, and every five years thereafter, the commission shall evaluate the costs and benefits of the program established under subsection (a) and of approved energy efficiency and conservation plans submitted to the program. The evaluation shall be consistent with a total resource cost test or a cost-benefit analysis determined by the commission. If the commission determines that the benefits of the program exceed the costs, the commission shall adopt additional required incremental reductions in consumption.

66 Pa. Code § 2806.1(c)(3). Contrary to PECO's claims, the statute neither contains the requirement for an official finding, nor the word "definitive,"[3] Instead, the Commission has assessed the available potential for additional energy efficiency gains in each EDC territory, analyzed acquisition costs, administrative costs, and achieved savings from current and approved EE&C programs, adjusted those past costs upward to account for changing energy-savings baselines and market saturation, and applied these projected costs to the estimates of available efficiency potential. In doing so, the Commission has estimated that an additional Phase of energy efficiency programs will not only be cost-effective, but resoundingly so. Such an analysis meets and exceeds the statutory requirements.

PECO's argument fails because it is, at heart, a plea for a *pro forma* "official" declaration of cost-efficacy. No such *pro forma* requirement exists. In addition, the Commission made great effort to examine Phase I's costs and benefits, ultimately finding that Phase I would in fact be cost-effective. The Commission based its Phase II Implementation Order on the SWE's findings of Phase II cost efficacy, which in turn were based on a thorough evaluation of Phase I EE&C programs' cost efficacy. Indeed, the Commission has ample evidence from both the SWE study and the quarterly and annual reports from the EDCs to determine that energy efficiency measures are cost-effective. Moreover, Phase I is not yet fully complete, so a "definitive" finding of the sort demanded by PECO would preclude the Commission from setting Phase II targets until *after* Phase I was complete. This would only lead to gaps between phases, yielding unnecessary customer confusion and expense in contravention of the purpose behind Act 129. PECO's petition should accordingly be denied.

[3] Nor is it particularly clear what a "definitive" finding of cost-efficacy would look like.

C. PECO Misreads the Implementation Order in Regards to Updates to the Technical Reference Manual

PECO claims that the Implementation Order requires EDCs to hit a moving consumption reduction target, by calling for annual updates to the Technical Resource Manual ("TRM"). Petition at 14-15. However, PECO is simply incorrect. The reduction targets under the Implementation Order do not "move," contrary to PECO's mismatched metaphor. Instead, the TRM adjustment process ensures that technological advances and new information are accounted for, so that the target remains appropriate in the midst of changing conditions.

Moreover, there is, in fact, nothing in the Implementation Order which would preclude EDCs from challenging any proposed future TRM changes. Nor has past practice indicated any problems with updates to the TRM: in Phase I, when TRM changes were adopted that impacted an EDC's ability to meet a consumption reduction target with its adopted EE&C plan, the EDC would petition the Commission to update its EE&C plan to expand or scale back, as appropriate, programs impacted by the TRM modifications. This process ensures that the predetermined EDC savings target remains achievable, and that ratepayer funds are being invested in real, rather than fictitious, energy savings.

Furthermore, in the Implementation Order, the Commission adopted Phase II consumption reduction targets that were conservative, and that explicitly assumed a 25% increase in efficiency acquisition costs compared to Phase I. Implementation Order at 19. This margin of safety for EDCs incorporates uncertainty about future acquisition costs, including TRM revisions that decrease deemed savings for certain measures, into the EDC Phase II targets.

D. The Implementation Order's EDC-Specific Consumption Reduction Targets Are Entirely Consistent with Act 129

PECO complains that the Commission erred by setting EDC-specific consumption reduction targets. Petition at 13. PECO's claims are groundless. There is no language in Act 129 that requires any targets set by the Commission after May 31, 2013 to be uniform among all EDCs, and PECO fails to cite any language in Act 129 that would preclude the Commission's EDC-specific approach. There are also significant data presented in the SWE reports and appendices that demonstrate differences among EDCs in available funding, energy efficiency program saturation, and avoided costs. Because of these differences, the assignment of differing targets among EDCs by the Commission is both fair and necessary to ensure that funds collected from ratepayers are used to achieve maximum cost-effective savings. In the absence of contrary statutory language, the Commission's reasonable interpretation of Act 129 controls. *See Schuylkill*, 607 Pa. at 385 (courts must give "substantial deference to an agency's interpretation of a statute the agency 'is charged with implementing and enforcing.'") (citing *Commonwealth, Office of Administration v. Pennsylvania Labor Relations Board*, 591 Pa. 176, 190 n. 11 (Pa. 2007)); *see also Cherry*, 537 Pa. 186, 188 (Pa. 1994) ("An interpretation by the agency charged with a statute's implementation is accorded great weight and will be overturned only if such a construction is clearly erroneous.").

E. The Implementation Order Employs a Permissible and Appropriate Cost Cap

PECO argues that the Commission improperly set reduction targets based on allowable spending, instead of some other number PECO would prefer. Petition at 12-13.

However, the Implementation Order selects an entirely proper set of reduction targets that is entirely consistent with the language of Act 129, which reads in pertinent part:

> 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. The provisions of this paragraph shall not apply to the cost of low-income usage reduction programs established under 52 Pa. Code Ch. 58 (relating to residential low income usage reduction programs).

66 Pa. Code § 2806.1(g). Thus, Act 129 requires that the cost of reduction plans be less than ***or equal to*** 2% of the EDC's revenue as of December 31, 2006. Thus, there is no conflict between the targets that the Commission set and the plain language of this section, as the Implementation Order sets the cost cap for each EDC in Phase II at equal to 2% of 2006 total revenue.

PECO's arguments to the contrary are inapposite. PECO complains that the Implementation Order somehow turns a "not to exceed" cap to a "not less than" mandate, while failing to explain how the Commission's election of a cost cap at the top of the range allowable somehow impermissibly exceeds that range. Put another way, PECO appears to be arguing that the Commission's 2% cost cap exceeds the 2% cost cap in the statute. Yet, two is not greater than two. The Commission's understanding and implementation of Act 129 is reasonable, and should stand. *Schuylkill*, 607 Pa. at 385; *Cherry*, 537 Pa. 186.[4]

[4] Furthermore, the Commission protected the best interest of the ratepayers when it made Phase II targets a function of allowable spending. Because all spending on energy efficiency programs is required by statute to generate more benefits than costs, it is in the best interest of the Commonwealth to maximize spending on energy efficiency, up to the 2% cap allowed by law. PECO's argument requires targets, and therefore realized energy efficiency benefits, to be lowered. If the Commission used PECO's logic and did not set Phase II targets based on maximum allowable spending, one of two scenarios would result. In scenario A, the EDC easily attains a lower target without spending the full 2% allotment. Less money is spent, but less efficiency is achieved. Since all spending in this program is required to generate benefits that exceed costs, the Commonwealth is worse off than it otherwise could have been. In scenario B, the EDC attains a lower target, but still spends its full 2% allotment as allowed by law. In this case, the Pennsylvania ratepayer has overpaid for less efficiency. While scenario B is worse, neither scenario is optimal. The Commission has

F. The Commission Appropriately Allocated Energy Efficiency Funds to Energy Efficiency

PECO argues that EDCs should be allowed to allocate funding to continue cost-effective demand response programs, and that such funding allocation should result in a corresponding lowering of consumption reduction targets. Petition at 13-14. However, this would improperly divert resources from energy efficiency measures to instead be applied towards demand response program goals that do not yet exist. PECO argues, essentially, that it should be able to shortchange energy efficiency programs now against the possibility of shortchanging demand response programs later. This is unnecessary. PECO is not precluded from planning for potential demand response program goals—the Implementation Order provides ample cushions and flexibility to ensure EDCs can meet their targets.

First, the Commission is allowing carry-over from Phase I (*see* Implementation Order at 58-59), which means that EDCs—especially PECO—will almost certainly have no trouble meeting their EE&C targets thanks to their prior program success. This frees up resources that can be used to continue demand response programs.

Second, EDCs like PECO are free to pursue reimbursement under Section 1319, as the Commission encourages, as a fully viable avenue to recoup the cost of maintaining demand response programs through Phase II. *See* 66 Pa. Code § 1319(a) (allowing recovery of "prudent and reasonable costs associated with the development, management, financing and operation" of "conservation or load management program[s]"); *see also*,

---

avoided both by setting Phase II targets as high as they can be given available funding, achievable efficiency potential, and the best available projections of acquisition costs.

Implementation Order at 43. Thus, the concerns that PECO raises are adequately addressed in the Implementation Order. PECO's petition should be denied.[5]

G. The Implementation Order Adequately Addresses Any Perceived Need for a "Ramp Up" to a Potential Future Phase III

PECO argues that it will be unable to meet expected 2017 Phase III demand response targets unless it is allowed to spend money on ramp-up of summer 2016 demand response programs during Phase II. Petition at 8-9. There are two fatal problems with this argument. First, PECO cannot assert that it cannot meet a target which does not yet exist. If and when the Commission sets this target, it is expected to account for the challenges EDCs will face with lead time and available funding, and set a target that is reasonable and achievable under these circumstances; the Commission is fully capable of adjusting demand targets for 2017 in light of the dormancy of the demand response program during Phase II. Second, the Commission has established a precedent for allowing Phase I spending on administrative, contracting, and marketing costs related to Phase II ramp-up during the time period when Phase I is still in effect. Implementation Order at 114. This is a reasonable policy, and should be continued in the transition from

[5] In response to the Tentative Implementation Order, Clean Air Council and Sierra Club did submit comments in support of continuation of demand response programs. However, this support was predicated on the expectation that further spending on demand response programs would be accompanied by peak demand reduction targets and penalties for underperformance. It would be irresponsible to allow an EDC to spend any portion of ratepayer funds on programs for which there is no accountability or guarantee of performance. In the event that the Commission does reverse itself and allocate some funding to demand response programs at the expense of consumption reduction programs, the following limitations should apply: 1) payments should be limited to those already participating in the program; 2) no new participants should be added until enforceable targets and non-performance penalties are applied to DR programs; 3) the incentive payments to the participants should not be increased above current levels; 4) EDCs must be required to report on continuing costs and benefits of the DLC programs; and 5) if the continuing programs cease to be cost-effective, they must be discontinued, and any remaining funding re-allocated to consumption reduction programs. In the event of such a re-allocation, consumption reduction targets should be restored by an amount equal to the restored funding divided by the average efficiency acquisition cost.

Phase II to Phase III. Such a continuation would obviate PECO's claimed need to spend Phase II funds on Phase III ramp-up.

H. The Implementation Order Employs Permissible and Appropriate Carve-Out Requirements and Penalties

PECO argues that the Commission may not impose penalties for failure to meet the two carve-outs (for public sector and low-income customers) specified in the Implementation Order. Petition at 14. However, this ignores the requirements of Act 129. Again, as with other objections raised by PECO, there is no language in Act 129 supporting PECO's position; here there is nothing suggesting that PUC is precluded from incorporating carve-outs as part of its plan. To the contrary, sections (c) and (d) incorporate the Commission's discretion to include carve-outs in subsequent phases of Act 129. *See* 66 Pa. Code § 2806.1(c)(3); *id.* at § 2806.1(d)(2); *see also id.* at § 2806.1(f)(2) (applying penalties to EDCs that "fail to achieve the reductions in consumption under subsection (c) or (d)"). Indeed, if carve-out targets may be set under the Commission's Act 129 discretion, penalties are also required, or the targets would be meaningless. PECO's interpretation thus involves reading the carve-outs completely out of the statute, which is contrary to basic canons of statutory interpretation. The Commission's approach and implementation of Act 129 is reasonable, and not clearly erroneous, and thus should stand. *Schuylkill*, 607 Pa. at 385; *Cherry*, 537 Pa. 186. PECO's petition should be denied.

IV. CONCLUSION

For the foregoing reasons, the Implementation Order was properly promulgated, and the Commission should reaffirm its August 3 Order and deny PECO's petition.

Respectfully Submitted,

Date: September 19, 2012

/s/ Joseph O. Minott
Joseph Otis Minott, Esq.
PA Attorney #36463
Clean Air Council
135 S. 19th Street
Suite 300
Philadelphia, PA 19103
Telephone: 215.567.4004
Fax: 215.567.5791
Email: joe_minott@cleanair.org

Attorney for Clean Air Council

BEFORE THE
PENNSYLVANIA PUBLIC UTILITIES COMMISSION

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

ANSWER OF CLEAN AIR COUNCIL AND THE SIERRA CLUB IN RESPONSE TO THE PETITION OF PECO ENERGY COMPANY FOR RECONSIDERATION

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Tanya S. McClaskey, Esq.
Jennedy S. Johnson, Esq.
Office of Consumer Advocate
Forum Place, 5th floor
555 Walnut Street
Harrisburg, PA 17101-1923

Johnnie E. Simms, Esq.
Bureau of Investigation and Enforcement
PA Public Utility Commission
400 North Street, Second Floor West
P.O Box 3265
Harrisburg, PA 17105-3265

Steven Gray, Esq.
Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

Anthony E. Gay, Esq.
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101-8699

Kathy J. Kolich, Esq.
FirstEnergy Service Company
76 Main Street
Akron, OH 44308

Paul E. Russell, Esq.
Office of General Counsel
PPL Services Corp.
2 North Ninth Street
Allentown, PA 18106

Pamela C Polacek, Esq.
Teresa Schmittberger, Esq.
McNees Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166

Andrew S. Tubbs, Esq.
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101

David B. MacGregor, Esq.
Post & Schell, PC
Four Penn Center
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103-2808

Matthew J. Agen, Esq.
Post & Schell, P.C.
607 14th Street NW
Washington, DC 20005

Donna M. J. Clark, Esq.
Vice President & General Counsel
Energy Association of Pennsylvania
800 North Third Street, Suite 205
Harrisburg, PA 17102

Kriss Brown, Esq.
Shaun A. Sparks, Esq.
Krsytle J. Sacavage, Esq.
Law Bureau- PA Public Utility Commission
400 North Street, Third Floor
P.O Box 3265
Harrisburg, PA 17105-32365

Thomas P. Gadsden, Esq.
Morgan Lewis & Bockius LLP
1701 Market St.
Philadelphia, PA 19103

Dated: September 19, 2012

/s/ Joseph O. Minott
Joseph O. Minott, Esq.
Pa. I.D. 36463
135 S. 19th St., Suite 300
Philadelphia, PA 19103
(215) 567-4004

Attorney for Clean Air Council