

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Metropolitan Edison Company,	:	
Pennsylvania Electric Company, Pennsylvania	:	P-2012-2320450
Power Company and West Penn Power Company	:	P-2012-2320468
For an Evidentiary Hearing on the Energy	:	P-2012-2320480
Efficiency Benchmarks Established for the Period	:	P-2012-2320484
June 1, 2013 through May 31, 2016	:	

**CLEAN AIR COUNCIL AND SIERRA CLUB'S
BRIEF IN OPPOSITION TO THE FIRSTENERGY COMPANIES'
PETITION FOR EVIDENTIARY HEARING**

Date: November 2, 2012

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Clean Air Council (“Council”) and the Pennsylvania Chapter of the Sierra Club (“Sierra Club”) (collectively, “Intervenors”), on behalf of their respective members and the public interest, oppose Metropolitan Edison Company’s, Pennsylvania Electric Company’s, Pennsylvania Power Company’s, and West Penn Power Company’s (collectively, “the FirstEnergy Companies” or “FirstEnergy”) Petition for Evidentiary Hearing and the FirstEnergy Companies’ accordant attempts to revise downward their energy efficiency targets as part of the Phase II Implementation Order issued by the Pennsylvania Public Utility Commission (the “Commission” or the “PUC”) under Act 129.

The targets specified for the FirstEnergy Companies in the Implementation Order are achievable and provide the FirstEnergy Companies with more than an adequate buffer. The FirstEnergy Companies have failed to carry their burden to demonstrate otherwise, and have instead ignored their own prior experience in Phase I and relied on unsupported assumptions to argue that the spending allocations under Phase II are inadequate, despite being 25% higher than the FirstEnergy Companies’ actual cost per megawatt-hour of reductions in Phase I.

Accordingly, the Phase II Implementation Order should remain unchanged, and the FirstEnergy Companies petition should be denied.

I. BACKGROUND

A. The Public Utility Commission’s Phase II Implementation Order

On August 3, 2012, the PUC issued its Implementation Order, setting forth the requirements for Phase II implementation of Act 129, Pennsylvania’s energy efficiency law.¹ *See generally Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411 and M-2008-2069887 (Final Order entered August 3, 2012) (“Implementation Order”). This Implementation Order sets the follow-up to the first phase of implementation of Act 129, called “Phase I,” and builds upon and incorporates gains made during that Phase. In the Implementation Order, the Commission set an energy efficiency reduction target for the FirstEnergy Companies as follows:

EDC	Three-Year Program Acquisition Cost (\$/MWh)	Three-Year % of 2009/10 Forecast Reductions	Three-Year MWh Value of 2009/10 Forecast Reductions
Met-Ed	\$220.87	2.3	337,753
Penelec	\$216.19	2.2	318,813
Penn Power	\$209.20	2.0	95,502
West Penn	\$209.42	1.6	337,533

Implementation Order at 24, tbl. 1. These acquisition costs were calculated from the EDCs’ historical acquisition costs from Phase I with a “25% adjustment factor . . . used to account for future uncertainties when establishing program goals.” *Id.* at 19.

In addition, the Implementation Order observed that “it is very important that cost-effective Act 129 Phase I programs continue until the beginning of Phase II programs,” to avoid

¹ Act 129 is codified at 66 Pa. C.S. § 2806.1.

“disruptive gaps in programs that could create confusion to customers, retailers and contractors, resulting in harm to the existing market transformation achievements of Act 129.” *Id.* at 60. As a result, the Implementation Order specifically allows EDCs to “credit all of those savings above the three percent Phase I target towards Phase II targets” going forward. *Id.* at 58.

As a further part of the Implementation Order, the Commission established a narrow pathway for EDCs like the FirstEnergy Companies “to contest the facts the Commission relied upon in adopting the consumption reduction requirements” in the Implementation Order, by filing “a petition requesting an evidentiary hearing on its specific consumption reduction target. *Id.* at 31. The Commission went on to state that “[t]he scope of any such proceeding will be narrow and limited to the consumption reduction requirement issue.” *Id.*

B. Procedural History

On August 20, 2012, the FirstEnergy Companies jointly petitioned the Commission for an evidentiary hearing concerning the Implementation Order, initiating this proceeding.

In their Petition, the FirstEnergy Companies stated that they were not “certain if they can achieve [the] energy efficiency benchmarks” and that they submitted their petition “in order to preserve their rights to challenge” these reduction targets. Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for an Evidentiary Hearing on the Energy Efficiency Benchmarks Established for the Period June 1, 2013 through May 31, 2016 (“FirstEnergy Companies Petition”) at 3.

On August 30, 2012, Intervenors petitioned for intervention into this docket; intervention was subsequently granted on September 18, 2012 in the scheduling order in these consolidated dockets.

On September 28, 2012, the FirstEnergy Companies filed testimony in this docket in support of their Petition for Evidentiary Hearing, and filed rebuttal testimony on October 18, 2012. On October 19, 2012 the FirstEnergy Companies made their testifying witness, Edward C. Miller, available for cross-examination.

In the FirstEnergy Companies' testimony, they made it clear that they sought dramatically "lower" energy reduction targets. Direct Testimony of Edward C. Miller ("FirstEnergy Testimony") at 2; *id.* at Exhibit ECM-3.

On October 29, 2012, owing to disruptions caused by Hurricane Sandy, an extension was granted for submission of briefing until November 2, 2012.

II. ARGUMENT

The FirstEnergy Companies have failed to carry their burden of proof in arguing that the reduction targets in the Implementation Order must be revised. Instead, they have proposed new reduction targets supported by hypothetical discussions of potential mechanisms, without providing actual data-based information. Such conjecture is not evidence sufficient to support the FirstEnergy Companies' claims. To the contrary, the evidence indicates that the energy efficiency targets set in the Implementation Order are indeed achievable, and thus the FirstEnergy Companies' Petition should be denied.

A. Standard of Review

A party seeking a rule or order from the Public Utility Commission bears the burden of proof. 66 Pa. C.S. § 332(a); *see also* Implementation Order at 31 ("The EDC contesting the consumption reduction requirement shall have the burden of proof"). As such, a "litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible."

Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Com'n, 578 A.2d 600, 602 (Pa. Cmwlth. 1990) (denying petition where based only on substantial evidence). If a party upon whom the burden of proof is placed fails to carry that burden, denial of the relief requested is necessary. *See, e.g., Warwick Water Works, Inc. v. Pennsylvania Public Utility Com'n*, 699 A.2d 770, 774-75 (Pa. Cmwlth. 1997).

B. The FirstEnergy Companies Have Failed to Present Any Evidence Sufficient to Carry Their Burden in Showing that the Acquisition Costs in the Implementation Order Are Too Low and that therefore the Reduction Targets Are Too High

The evidence presented by the FirstEnergy Companies consists almost entirely of hypothetical mechanisms by which FirstEnergy *might* have higher acquisition costs in Phase II than in Phase I, but no real evidence as to what those increased costs will be, or showing that the 25% cushion provided by the Implementation Order is and will be inadequate. In addition, FirstEnergy's arguments stemming from its rates charged to retail customers are unsupported and indeed contradicted by the evidence in the record.

1. The FirstEnergy Companies' Testimony Consists of Hypothetical Situations, Not Relevant Evidence

The FirstEnergy Companies rely on descriptions of possible mechanisms for why they might experience higher acquisition costs than adopted by the Implementation Order, but they do not provide data as to the impact of such mechanism, nor actual *evidence* that such mechanisms are actually driving or will drive trends in acquisition costs in Phase II.

For example, FirstEnergy submitted testimony arguing that some of the FirstEnergy Companies have rural service territories that may lead to increased acquisition costs relative to electric distribution companies ("EDCs") with more urban service territories. FirstEnergy Companies Petition for Evidentiary Hearing October 19, 2012 Hearing Transcript ("FirstEnergy

Hearing”) at 36:17-23. But when asked if this hypothetical phenomenon of increased acquisition costs actually occurred during Phase I, the FirstEnergy Companies’ witness responded “I don’t have the analysis” and speculated that “if we looked at” certain programs, the effect would likely be seen. *Id.* at 37:6-15. Further, the FirstEnergy Companies testified that they had not done any such analysis to ascertain numerically what impact, if any, having a rural service territory had on acquisition costs in Phase I. Nor have the FirstEnergy Companies submitted any evidence as to what, if any, increased costs would be traceable to rural service territories in Phase II, aside from bald statements that “I would say that it’s safe to say that *if we looked* . . . the programs would cost more.” *Id.* at 26:10-15 (emphasis added). Thus, the FirstEnergy Companies are merely proposing a potential mechanism whereby costs in Phase II might increase, but fail to provide evidence as to whether or not that mechanism will impact their ability to achieve the reduction targets, or even whether the mechanism will have any significant impacts at all.²

Similarly, the FirstEnergy Companies submitted testimony on realization rates experienced by FirstEnergy during Phase I. *See* FirstEnergy Testimony at 12-13. The FirstEnergy companies claim that in Phase II, “the variability in the realization rates can increase and realization rates can drop,” leading to increased costs. *Id.* at 13. But the FirstEnergy Companies’ witness admitted that this was speculative, and that FirstEnergy “cannot say what those realization rates [for Phase II] are at this moment.” FirstEnergy Hearing at 39:18-21. Again, speculation is not evidence.

² It is worth noting that the EDCs with urban service territories, such as PECO, actually experienced *higher* acquisition costs in Phase I than did the FirstEnergy Companies. *See* Implementation Order at 24, tbl. 1 (Phase II acquisition costs calculated from Phase I costs experienced by each EDC with a 25% increase added as a buffer). Thus, not only is there no evidence supporting FirstEnergy’s hypothesis that rural service territories necessitate higher acquisition costs, the experience of the EDCs in Phase I indicates rather the opposite.

Likewise, the FirstEnergy Companies suggest that EDC customers with facilities in two or more EDC service territories may be unwilling to opt into energy efficiency programs in those service territories with lower rates, specifically discussing West Penn and PECO. Rebuttal Testimony of Edward C. Miller (“FirstEnergy Rebuttal Testimony”) at 13-14. However, the FirstEnergy Companies testified that they “can’t speak to the split out . . . can’t speak to that exact break out” of the number of customers in West Penn’s service territory that might actually be in this situation. FirstEnergy Hearing at 51:24-52:1. Nor did the FirstEnergy Companies provide any data on, or even a single example of, any such customers that actually did fail to participate in an Act 129 energy efficiency program in one territory in favor of participation in another territory.³ Once again, FirstEnergy has provided mere speculation, not evidence.

Similarly, the FirstEnergy Companies suggest that future changes to the TRM will require lower reduction targets than the Implementation Order provides. However, FirstEnergy testified that it had no idea what those future TRM changes might entail. *See* FirstEnergy Hearing at 54:6-8 (“I can’t give you an exact calculation or approximate calculation of what the impact of the 2014 TRM change would be.”); *id.* at 54:21-25 (FirstEnergy “could not give you what the impact on savings would be for the 2015 TRM”). Nonetheless, the FirstEnergy Companies speculate that the impact would be 10% per year. *See* FirstEnergy Testimony at 21-22 (suggesting that “it’s not unrealistic” for the 2013, 2014, and 2015 TRM updates to impact savings by 10% each). However, even assuming, *arguendo*, that this hypothesis is evidence, the FirstEnergy Companies apply it incorrectly. Suggesting a 10% impact on savings with each

³ Even on redirect, the FirstEnergy Companies were unable to do more than name a single customer who might be in the hypothetical situation, and instead speculated, improbably, that “the list is ultimately endless in terms of chain accounts,” without being able to provide actual numbers. *Id.* at 59:1-7. But FirstEnergy did not provide evidence that this single company had avoided program participation because of West Penn’s relatively lower rates.

TRM update, the FirstEnergy Companies suggest that the “increase in acquisition costs needs to be at least 30%, rather than 25%” to cover these TRM changes. *Id.* at 22. But this wrongly assumes that TRM changes in year three of Phase II would retroactively undo savings banked in years one and two—even if the TRM updates happened just as FirstEnergy suggests they might, the total impact to the Phase II program would of course be less than the cumulative total of the changes, since reductions occur continuously over the program.⁴

The FirstEnergy Companies have thus failed to explain how their desired new reduction targets are calculated, or to present evidence supporting either them or the contention that their reduction targets must be changed at all. Their petition should, accordingly, be denied. *Samuel J. Lansberry, Inc.*, 578 A.2d at 602; *Warwick Water Works*, 699 A.2d at 774-75.

2. The FirstEnergy Companies’ Arguments and Testimony Concerning Their Rates Undercut the Case for Changes to the Implementation Order

In addition, the FirstEnergy Companies testify repeatedly about potential impacts they claim stem from the FirstEnergy Companies’ relatively lower rates and lower cost caps as compared with some other EDCs in Pennsylvania. However, this testimony is both speculative and contradictory, and, rather than supporting FirstEnergy’s claims that its reduction targets should be changed, tends to demonstrate that the targets in the Implementation Order are achievable.

First, the FirstEnergy Companies’ testimony appears to argue that, because the rates charged by certain (but not all) of the Companies for electricity are below average statewide

⁴ In other words, since FirstEnergy conjectures that the total impact on savings from potential TRM changes will be 10% in year one of Phase II, 20% in year two, and 30% in year three, the total impact is roughly 20%—well-within the 25% buffer provided for by the Implementation Order. Thus, even if FirstEnergy’s conjecture regarding unknown future TRM changes were accurate and more than hypothesis, it would actually be evidence that the buffer is more than adequate.

rates, acquisition costs for the Companies should be increased by 17%. *See* FirstEnergy Testimony at 23 (“Based on the difference in average retail rates between the Companies and the other Pennsylvania EDCs, the Companies collectively would need an average increase of approximately 17% in acquisition costs . . .”); FirstEnergy Rebuttal Testimony at 14 (listing retail rates for Pennsylvania EDCs); FirstEnergy Hearing at 43:5-19 (explaining that the 17% figure comes from comparing the FirstEnergy Companies’ rates to other EDCs, and noting that Met-Ed’s rates are “at approximately the statewide rate”). FirstEnergy thus appears to be arguing that, because the rates for some of its Companies are lower than statewide averages, its acquisition costs must be increased on a linear, one-to-one basis to compensate, 17% for 17%. FirstEnergy Testimony at 23. This relies on a couple of dubious assumptions: that rates are the *only* factor in a customer’s determination as to whether or not s/he will take part in an efficiency program (in that a dollar less in rates must be offset in a dollar more in incentive payments), and that the entirety of costs comprising the acquisition cost for FirstEnergy comes from incentive payments.⁵

The FirstEnergy Companies present no evidence that the former is true, and they have admitted in testimony that the latter is false. *See* FirstEnergy Hearing at 52:4-11 (testifying that incentive payments were only 60% of program costs in Phase I); *see also id.* at 53 (testifying that the “vast majority” of the remaining 40% comes from “the promotion and delivery of the programs”—costs that are not likely to vary linearly with retail electricity rates). Thus, the FirstEnergy Companies are merely asserting that acquisition costs will be higher because some

⁵ Unless FirstEnergy contends that increases in the need to incentivize customers also requires increases in administrative overhead in managing and providing the programs, which FirstEnergy does not.

FirstEnergy Company rates are lower, without actually providing any evidence to back up that assertion.⁶

Second, and related, FirstEnergy's attempts to argue that its acquisition costs will be high because its rates are low is contradicted by FirstEnergy's actual experience in Phase I. Despite having low rates, the FirstEnergy Companies were able to achieve Act 129 reduction targets at very low acquisition costs relative to other EDCs. *See* Implementation Order at 24, tbl. 1 (showing Phase II acquisition costs, calculated by taking Phase I costs for each company and increasing them by 25%). The evidence shows that, while FirstEnergy may claim that low rates impact its ability to achieve reduction targets at low acquisition costs, this is not actually what has happened.

Third, the relatively lower rates charged by the FirstEnergy Companies are already folded into the reduction targets in the Implementation Order. The reduction targets were, broadly speaking, calculated by taking the historical acquisition costs from Phase I for each EDC, adding a 25% buffer, and then determining the total number of megawatt-hours that could be "purchased" at that calculated acquisition costs under the Act 129 cost cap. *See generally*, Implementation Order. Since that cost cap is keyed to revenues (*see* 66 Pa. C.S. § 2806.1(g), setting the cost cap as "2% of the electric distribution company's total annual revenue as of December 31, 2006"), and revenues are impacted by the rates charged (*see* FirstEnergy Hearing at 49:20-25 ("revenue for an EDC" is in part "determined by the rates that the EDC is able to charge")), having lower revenues ultimately corresponds to having lower reduction requirements.

⁶ Indeed, despite the fact that customer incomes would seem to be an important component in determining to what degree electrical rates would incentivize customers to participate in energy efficiency programs, the FirstEnergy Companies did not consider such data in preparing their testimony. *See* FirstEnergy Hearing at 55:23-56:3 ("[T]he incomes of residential customers in the First Energy Companies' service territories" was "not information that was relied upon in preparation of [FirstEnergy's] testimony or [] rebuttal testimony").

Which is, in fact, largely borne out in the relatively low percentage reductions in the Implementation Order for the FirstEnergy Companies with the lowest rates. *See* Implementation Order at 24, tbl. 1.

The FirstEnergy Companies have failed to carry their evidentiary burden in arguing that the acquisition costs specified for them in the Implementation Order are too low, and thus their petition should be denied. *Samuel J. Lansberry, Inc.*, 578 A.2d at 602; *Warwick Water Works*, 699 A.2d at 774-75.

C. The Evidence in the Record and the FirstEnergy Companies' Experience in Phase I Refutes Their Testimony and Confirms that the Phase II Targets Are Achievable

Despite the protestations of the FirstEnergy Companies to the contrary, the evidence in the record demonstrates that the Phase II reduction targets set by the Commission are readily achievable. First, the dollars-per-megawatt-hour acquisition costs calculated for the FirstEnergy Companies are well in-line with acquisition costs experienced in other jurisdictions. *See* Office of the Consumer Advocate's Direct Testimony of Geoffrey Crandall at 7, tbl. 1.⁷ Indeed, the acquisition costs provided for the FirstEnergy Companies in the Phase II Implementation Order are rather higher than those experienced in other jurisdictions, and the acquisition costs requested

⁷ The FirstEnergy Companies attempt to refute this evidence by suggesting that the data from other jurisdictions "has not been shown to be similar" to conditions in Pennsylvania. FirstEnergy Rebuttal Testimony at 4. However, FirstEnergy also testified that it did not know for sure that the cost acquisition data from the other jurisdictions was *not* comparable to situations in Pennsylvania, and that moreover, FirstEnergy had not conducted any survey of the "energy efficiency laws, policies and practices in other states," and had not consulted any such survey in preparation of its testimony or attempted refutation. FirstEnergy Testimony at 44:16-25.

by FirstEnergy in its direct testimony are significantly greater and out of line with those experienced in other jurisdictions.⁸ *Id.*

Moreover, the Phase II acquisition costs in the Implementation Order for the FirstEnergy Companies are based off of the *actual Phase I costs* experienced by FirstEnergy. They are in fact 25% higher than the per-megawatt-hour reduction costs actually—not hypothetically—borne out by the FirstEnergy Companies' Phase I experience.⁹ Implementation Order at 19. Thus, the most concrete and extensive evidence in the record shows that FirstEnergy is entirely capable of hitting its Phase II targets.

Indeed, there is reason to think that the FirstEnergy Companies' acquisition costs in Phase II could *decrease* relative to Phase I. The FirstEnergy Companies testified that they had gained institutional knowledge from their experience in Phase I, and that they know more now than they did four years ago about administering energy efficiency plans under Act 129. FirstEnergy Hearing at 48:7-17. This knowledge about program administration is moreover

⁸ They are also significantly higher than the actual costs experienced by *other EDCs in Pennsylvania* during Phase I. PECO, the EDC with the highest Phase II acquisition cost in the Implementation Order of \$224.71, had an acquisition cost in Phase I of only roughly \$180 per megawatt-hour. *See* Implementation Order at 24, tbl. 1 (removing the 25% buffer from \$224.71 yields \$182.04). But the lowest Phase II acquisition cost for a FirstEnergy Company, Penn Power, is \$209.20 per megawatt-hour. *Id.* Thus, FirstEnergy's arguments the Phase II acquisition costs have "the potential to force the Companies to try to rely on lower cost programs and measures" and to "restrict[] the ability of the Companies to offer more comprehensive and costly programs and measures," like other EDCs have done, ring decidedly hollow. FirstEnergy Testimony at 9.

⁹ According to the FirstEnergy Companies' own testimony, the actual experiences of the FirstEnergy Companies in Phase I are the best if not only basis for determining the accuracy of the Phase II acquisition costs in the Implementation Order. *See* FirstEnergy Rebuttal Testimony at 4 (in order to have a valid "apples to apples comparison," the "savings requirements, time frames for accomplishing the reductions, specific customer sector requirements and other underlying conditions such as customer density and geography" among other things must be similar); FirstEnergy Hearing at 46:5-9 (in order to be "adequate for comparison" an example program "would have to have the same requirements and conditions as are in" the prospective program).

“valuable.” *Id.* at 48:18-20. The FirstEnergy Companies thus have a much better sense now of which approaches work, and which do not, and how to efficiently administer an EE&C program than they did in Phase I, and this is likely to translate to lower acquisition costs in Phase II. But nowhere in the testimony it submits does FirstEnergy address this effect, or provided evidence (as opposed to hypotheticals and speculation) that the acquisition costs for the FirstEnergy Companies have trended upwards and will continue to do so above and beyond the 25% buffer afforded by the Implementation Order. The petition of the FirstEnergy Companies should accordingly be denied.

III. CONCLUSION

For the foregoing reasons, the FirstEnergy Companies have failed to sustain their burden in demonstrating the necessity of alterations to the energy efficiency targets set for them in the Implementation Order. The FirstEnergy Companies’ Petition should accordingly be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of Clean Air Council and Sierra Club's Main Brief in Opposition to Met-Ed, Penelec, PennPower, and WPP Petition for an Evidentiary Hearing upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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