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| **PENNSYLVANIA****PUBLIC UTILITY COMMISSION****Harrisburg, PA 17105-3265** |
| Public Meeting held December 5, 2012 |
| Commissioners Present:Robert F. Powelson, ChairmanJohn F. Coleman, Jr., Vice ChairmanWayne E. GardnerJames H. CawleyPamela A. Witmer |
| Petition of PECO Energy Company for an Evidentiary Hearing on the Energy Efficiency Benchmarks Established for the Period June 1, 2013 through May 31, 2016  | Docket No. P-2012-2320334  |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition of PECO Energy Company (PECO or Company) for an Evidentiary Hearing on the Energy Efficiency Benchmarks Established for the Period June 1, 2013 through May 31, 2016 (Benchmark Petition), filed on August 20, 2012. In accordance with the Commission’s Order in *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411 and M-2008-2069887 (Order entered August 3, 2012) (*Phase II Implementation Order*), Administrative Law Judge (ALJ) Elizabeth H. Barnes certified the record in this proceeding on November 2, 2012. For the reasons fully delineated herein below, *inter alia*, we reaffirm PECO’s 2.9% energy reduction target for the applicable period.

# I. Background

On October 15, 2008, House Bill 2200 was signed into law as Act 129 with an effective date of November 14, 2008. Among other requirements, Act 129 directed that Energy Efficiency and Conservation (EE&C) Programs be developed by each of the Commonwealth’s largest electric distribution companies (EDCs) and be approved by the Commission. Specifically, Act 129 required each EDC with at least 100,000 customers to adopt a plan to reduce energy demand and consumption within its service territory. Initially, the Act required each affected EDC to adopt a plan to reduce electric consumption by at least one percent of its expected consumption for June 1, 2009 through May 31, 2010, by May 31, 2011. By May 31, 2013, the total annual weather-normalized consumption was to be reduced by a minimum of three percent. Also, by May 31, 2013, peak demand was to be reduced by a minimum of four-and-a-half percent of each EDC’s annual system peak demand in the 100 hours of highest demand, measured against the EDC’s peak demand during the period of June 1, 2007 through May 31, 2008.

On January 15, 2009, the Commission adopted an Implementation Order at Docket No. M-2008-2069887 (*Phase I Implementation Order*) which established the standards each plan must meet, and which provided guidance on the procedures to be followed for submittal, review and approval of all aspects of the EE&C plans. The Commission subsequently approved an EE&C plan (and, in some cases, modifications to the plan) for each affected EDC.

Another requirement of Act 129 directs the Commission to evaluate the costs and benefits of the adopted EE&C Program by November 30, 2013, and every five years thereafter. The Act provides that the Commission must adopt additional incremental reductions in consumption and peak demand if the benefits of the EE&C Program exceed its costs. In accordance with that directive, the Commission issued a Secretarial Letter on March 1, 2012, at Docket No. M-2012-2289411 seeking comments on several issues related to the design and implementation of any future phase of the EE&C Program, and whether additional incremental consumption and peak demand reduction targets would be adopted. On May 10, 2012, in response to the comments received pursuant to the Secretarial Letter, the Commission issued a Tentative Implementation Order (*Phase II* *Tentative Implementation Order*) to begin the process of evaluating the costs and benefits of the initial EE&C Plans and the possible establishment of new reduction targets. In the *Phase II* *Tentative Implementation Order*, the Commission found that the benefits of a Phase II Act 129 Program will exceed the costs. Therefore, the Commission proposed the adoption of additional required incremental reductions in consumption for another program term and sought additional comments on its specific proposals.

Subsequently, in response to the comments filed pursuant to the *Phase II* *Tentative Implementation Order*, on August 2, 2012, the Commission adopted the *Phase II Implementation Order* that established the standards each plan must meet (including the additional incremental reductions in consumption that each EDC must meet) and provided guidance on the procedures to be followed for submittal, review and approval of all aspects of EDC EE&C plans. Within the *Phase II Implementation Order*, the Commission tentatively adopted EDC-specific consumption reduction targets as set forth in Table 1 in Section A.2.c.1 of that Order. The targets varied from a high of 2.9% for PECO to a low of 1.6% for West Penn Power Company. The *Phase II Implementation Order* provided that these targets would become final for any covered EDC that did not petition the Commission for an evidentiary hearing by August 20, 2012.

On August 20, 2012, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company (FirstEnergy) filed Petitions for Reconsideration and Clarification of the *Phase II Implementation Order.* Also, on August 20, 2012, PPL Electric Utilities Corporation (PPL) filed a Petition for Reconsideration of the *Phase II Implementation Order*. On August 30, 2012, the Commission granted the Petitions filed by FirstEnergy and PPL pending further review of, and consideration on, the merits. The Office of Consumer Advocate (OCA) filed separate Answers to the FirstEnergy and PPL Petitions on August 30, 2012, and on the same date, the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) filed a Response to PPL’s Petition.

On September 4, 2012, PECO filed a Motion for Leave to File a Motion for Reconsideration and a Petition for Reconsideration of the *Phase II Implementation Order.* On September 13, 2012, the Commission adopted an Order granting PECO’s Motion for Leave to File a Motion for Reconsideration. On September 19, 2012, the Clean Air Council and the Sierra Club (CAC/SC) filed an Answer to PECO’s Petition for Reconsideration.

By Reconsideration Order entered September 27, 2012, at Docket Nos.
M-2012-2289411 and M-2008-2069887 (*Phase II Reconsideration Order*), the Commission denied the Petitions for Reconsideration and Clarification filed by FirstEnergy and the Petitions for Reconsideration filed by PPL and PECO.

# II. Procedural History

The *Phase II Implementation Order* provided that, if an EDC filed a petition for an evidentiary hearing on the EDC-specific consumption reduction targets, the matter would be referred to the Office of Administrative Law Judge (OALJ) for hearings with the record being certified to the Commission by November 2, 2012. *Phase II Implementation Order* at 120. As noted, *supra*, PECO filed its Benchmark Petition on August 20, 2012, and the matter was assigned to the OALJ with a certified record deadline of November 2, 2012. PECO indicated that the Petition was served upon the statutory parties and all other parties that submitted Comments or Reply Comments at Docket M-2012-2289411. PECO M.B. at 4. On August 30, 2012, the OCA filed a notice of Intervention. On September 5, 2012, PECO filed its direct testimony in support of the Benchmark Petition.

An Initial Prehearing Conference was held on September 10, 2012. Seven petitions to intervene by the following Intervenors were granted by a Scheduling Orderdated September 13, 2012 (*Scheduling Order*), including: (1) the Community Action Association of Pennsylvania; (2) CAUSE-PA; (3) CAC/SC; (4) Comverge, Inc.; (5) Citizens for Pennsylvania’s Future (PennFuture); (6) Duquesne Light Company (Duquesne); and (7) the Philadelphia Area Industrial Energy Users Group (PAIEUG).

On September 28, 2012, PECO filed a Motion *in Limine* to Exclude from the Record Portions of the Direct Testimony of PennFuture’s Witness Glenn Reed (Motion). PennFuture filed a Response to PECO’s Motion on October 1, 2012 (Response). The merits of the Motion and Response are addressed, *infra*.

On October 3, 2012, a hearing was held in Harrisburg. All of the Intervenors were present and participated through counsel. In addition, PECO, the OCA and the Statewide Evaluator (SWE) were present and represented by counsel.[[1]](#footnote-1) Statements and/or Exhibits submitted by Duquesne, the SWE, PennFuture, PECO and CAC/SC were admitted into the record.

Main Briefs were filed on October 19, 2012, by PECO, the OCA, CAC/SC, Comverge, Duquesne, and PennFuture. Reply Briefs were filed on October 30 and 31, 2012, by PECO, CAC/SC, Comverge and PennFuture.

By Order Certifying the Record dated November 2, 2012, the ALJ provided a history of this proceeding; delineated the transcripts, statements and exhibits admitted into the record; and certified the record to the Commission for our consideration and disposition.

# III. Discussion

## Legal Standards

The *Phase II* *Implementation Order* tentatively established a three-year consumption reduction target for PECO of 2.9%, or 1,125,851 MWh. *Phase II* *Implementation Order* at 24. In this proceeding, the Company contests that target. The *Phase II Implementation Order* stated that “[i]f an EDC desires to contest the facts the Commission relied upon in adopting the consumption requirements” the EDCs had until August 20, 2012, to file a petition for an evidentiary hearing on its specific target. *Id.*
at 31. Consequently, the scope of this proceeding is narrow and limited to this single issue.

The Company has the burden of proof in accordance with 66 Pa. C.S.
§ 332(a). *Implementation Order* at 31. Courts have held that “[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. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied,* 529 Pa. 654, 602 A.2d 863 (1992). That is, the Company’s evidence must be more convincing, by even the smallest amount, than that presented by the other Parties. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission’s decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC,* 489 Pa. 109, 413 A.2d 1037 (1980).

We note that any issue that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*,

625 A.2d 741 (Pa. Cmwlth. 1993); *see also* *generally*, *University of Pennsylvania v.*

*Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

## PECO’s Motion *in Limine*

**1. PECO’s Motion**

As indicated, *supra*, PECO filed a Motion to exclude from the record portions of the direct testimony of PennFuture witness Glenn Reed. PECO sought to exclude specific portions of Mr. Reed’s testimony that addressed the acquisition costs for PECO’s Phase II EE&C Plan as determined by the Commission in the *Phase II Implementation Order*. Motion at 1. PECO avers that in the *Phase II Implementation Order*, the Commission made it clear that only the EDCs were being granted the right to contest their specific consumption reduction targets by filing a petition for evidentiary hearing and that other parties seeking to participate must do so by filing petitions for intervention. PECO opines that the scope of the evidentiary hearing would be defined by the EDC’s petition and the intervenors would only be able to address those issues raised by the EDC. *Id.* at 2. PECO submits that it sought an evidentiary hearing to address whether its Phase II reduction targets are overstated because: (1) the Commission failed to allocate Phase II funds for ongoing and future demand reduction programs; and (2) the Commission failed to use PECO’s current revenue and exclude revenue collected on behalf of EGSs in determining an appropriate Phase II funding level. *Id.* at 3. PECO argues that, by seeking to re-litigate the acquisition costs that the Commission established in the *Phase II Implementation Order*, PennFuture is attempting to interject an issue that is outside of this proceeding. *Id.* at 8.

**2. PennFuture’s Response**

In its Response to PECO’s Motion, PennFuture explains that the EDC-specific consumption targets were based on a formula that makes the targets a function of: (1) two percent of an EDC’s total revenue; and (2) the projected acquisition costs for an EDC to achieve reductions in consumption. PennFuture avers that it is not raising new issues in discussing the acquisition costs, but is simply using facts to respond to PECO’s direct testimony. PennFuture states that its direct testimony addresses acquisition costs because assumptions used to inform Phase II acquisition costs directly relate to PECO’s savings goal and whether that goal is conservative. PennFuture submits that the issue of whether PECO’s Phase II goal is conservative directly correlates to whether PECO can meet its 2.9% goal and continue offering demand response (DR) programs. Response
at 4. PennFuture argues that PECO is challenging its targets and PennFuture should be able to present evidence that the acquisition costs are conservative to rebut this challenge. *Id.* at 5.

**3. Disposition**

In essence, PECO’s Motion challenges the relevance of the testimony by Mr. Reed related to the SWE’s energy savings acquisition cost in the current proceeding. The Pennsylvania Rules of Evidence defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Pa. R.E. 401. As such, the question is whether the evidence presented by Mr. Reed will be of consequence to the determination of the issues raised by PECO in its Benchmark Petition.

We begin with a review of the relevant portion of PECO’s Petition. In its Petition, PECO asserted that the Commission established Phase II consumption reduction targets based on a formula that makes those targets a function of: (1) an EDC’s total revenues up to the limit imposed by Section 2806.1(g), 66 Pa. C.S. § 2806.1(g); and (2) the projected acquisition cost, expressed in dollars per MWh, for an EDC to achieve reductions in consumption. Benchmark Petition at 4. PECO further asserted in its Petition that, if a portion of the allowable spending is allocated for DR, the spending available under the statutory spending cap for consumption reduction is reduced and, as a result, the consumption reduction target must be lowered as well. PECO avers that, since its request will impact PECO’s consumption reduction target, it is a proper subject for the evidentiary hearing. *Id.* at 8. Finally, PECO stated in its Petition that it will present evidence showing the recalculation of its consumption target using the same formula the Commission employed to tentatively determine PECO’s consumption reduction target. *Id.* at 8.

Based on the above referenced portions of PECO’s Benchmark Petition, it was PECO who put the formula for determining its consumption reduction target at issue in the present proceeding. While PECO accepts the formula and the underlying cost assumptions that the Commission tentatively adopted, it put those assumptions at issue when it asserted that it could not meet the tentatively adopted 2.9% consumption reduction requirement and continue its DR programs within the statutory spending limit.

Turning now to the testimony at issue, we find it significant that, while the testimony challenged the acquisition cost assumptions the Commission relied upon, it did not advocate for the rejection of those cost assumptions or propose other acquisition costs. In fact, Mr. Reed clearly stated that the purpose of his testimony was to “show that PECO will be able to meet its Phase II consumption reduction target of 2.9% and continue its existing direct load control (DLC) program in Phase II.” PennFuture St.
No. 1 at Answer to Question No. 13. Mr. Reed goes on to state that his testimony “will also show that there is no need to set aside any portion of PECO’s Phase II Act 129 funding for demand reduction programs in the summer of 2016.” *Id*. Furthermore, we find it significant that Mr. Reed’s opinion testimony relates only to whether PECO can continue its DLC program and meet the 2.9% consumption reduction target or whether PECO should be permitted to spend Phase II budget dollars on a potential Phase III DR program. *Id*. at Answer to Question No. 42.

Based on the forgoing, we find that Mr. Reed’s testimony regarding the acquisition costs is relevant as it has a tendency to make the fact that PECO can meet the 2.9% consumption reduction requirement and continue its DLC program within the statutory spending limit more or less probable than it would be without that testimony. As such, we will deny PECO’s Motion *in Limine*.

## Allocation of Phase II Funds for Demand Response Programs

The Commission has excluded demand reduction targets and corresponding demand reduction programs from the EDCs’ Phase II EE&C Plans. In the *Phase II Implementation Order*, the Commission explained that our interpretation of Section 2806.1(d)(2) of Act 129, 66 Pa. C.S. § 2806.1(d)(2), is that, in order for the Commission to prescribe specific peak demand reduction targets for subsequent phases of Act 129, the DR programs must be proven to be cost-effective. *Phase II Implementation Order* at 32. Therefore, in order to determine the cost-effectiveness of current and potential future DR programs, the Commission has directed the SWE to complete a DR study.[[2]](#footnote-2) *Id*. Because the Commission will not receive information on the cost-effectiveness of the EDCs’ current DR programs until the end of 2012, the Commission did not set any peak demand reduction targets for the Phase II EE&C program period in the *Phase II Implementation Order*. *Id*. at 33.

While demand reduction targets have not been established for Phase II, the Commission recognizes 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 if these programs were interrupted, we stated in the *Phase II Implementation Order* that the EDCs may continue, under the Act 129 EE&C Program, residential DR curtailment measures, such as direct load control programs, that will be cost effective, if continued. We noted that such specific measures, if continued, could be viewed as providing an interim DR program until the Commission determines whether or not there is a cost-effective Act 129 peak demand reduction program design. *Id.* at 42. We also noted that EDCs seeking to establish new, or continue existing, load management programs that are prudent and cost-effective are free to file a petition with the Commission for approval of such programs under 66 Pa. C.S. § 1505(b) (related to the Commission’s authority to order conservation and load management programs). We explained that all prudent and reasonable costs incurred with such programs are recoverable in accordance with 66 Pa. C.S. § 1319 (related to the recovery of conservation or load management program costs). *Phase II Implementation Order* at 43.

### PECO’s Proposal

In its Benchmark Petition, PECO submits that 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. PECO avers that eliminating these DR programs would lead to customer confusion; would produce stranded costs that impose burdens on customers without attendant benefits; and would make it materially harder, if not impossible, to implement DR programs to meet the May 31, 2017 demand reduction requirements imposed by 66 Pa. C.S. § 2806.1(d)(2). Benchmark Petition at 5. Accordingly, PECO proposes to allocate $12 million per year, or $36 million over the three-year duration of Phase II, to sustain its existing direct load control (DLC) measures for residential and small commercial customers.[[3]](#footnote-3) PECO M.B. at 8. PECO also proposes to allocate approximately $17.4 million of its total Phase II funds to prepare for DR programs that must be in place before the summer of 2016 to meet the Act 129 demand reduction target by the May 31, 2017 statutory deadline. *Id.* at 12.

PECO explains that, in developing the Company’s 2.9% consumption savings target for Phase II, the Commission assumed that all of the funding resources available would be used exclusively for the energy efficiency (EE) program. PECO M.B. at 7. Under the Act 129 two percent spending cap, the total dollars available to be spent by PECO over the three years of Phase II is $256,185,476. PECO St. 1 at 8. The SWE has estimated the acquisition costs of energy savings for PECO of $227.55/MWh which results in a consumption savings target of 1,125,851 MWh or a 2.9% reduction target. *Phase II Implementation Order* at 24; PECO St. 1 at 8. PECO avers that, if a portion of Phase II spending is allocated for DR measures, then the funds available under the statutory spending cap for consumption reduction measures is reduced and, as a result, the Phase II consumption reduction target for PECO must be lowered as well. *Id*. at 7-8. PECO estimates that the combination of the $36 million to continue the Mass Market DLC Program and the $17.4 million to prepare for the May 2017 demand reduction requirements would reduce its Phase II consumption reduction target from 2.9% to 2.3%. PECO M.B. at 14; PECO Exh. FJJ-7.

### Parties’ Positions and PECO’s Responses

The OCA, CAC/SC and PennFuture argue that PECO has not met its burden of proof that the reallocation of funds from Phase II EE programs to DR programs is warranted. The OCA agrees with PECO that its Mass Market DLC Program demonstrates significant benefits to customers and supports the Company’s proposal to continue the Mass Market DLC Program. However, the OCA does not agree that the Company needs to reduce its Phase II budget by $36 million, thereby lowering its EE reduction goals in order to continue the Mass Market DLC Program. OCA M.B. at 5.

The OCA and PennFuture aver that the SWE overestimated the acquisition costs of the Phase II EE savings. The OCA submits that a number of Commenters to the *Phase II Tentative Implementation Order* called into question the need for a twenty-five percent adder to the actual cost data from Phase I programs that was utilized in the SWE’s Market Potential Study. The OCA notes that the Commenters pointed to acquisition costs in other states with similar levels of market maturity, which are significantly lower than those used to set the savings targets in Pennsylvania. OCA M.B. at 6. The OCA and PennFuture point to the testimony of PennFuture witness Glen Reed in the instant proceeding which states that the SWE did not provide any data to support the twenty-five percent markup of program costs for Phase II. OCA M.B. at 6-7; PennFuture M.B. at 8.

Comverge points out that, in the *Phase II Implementation Order*, the Commission considered and rejected arguments that the costs used to determine PECO’s Phase II consumption target are inflated. Comverge states that the Commission found that the SWE’s findings and conclusions in the Market Potential Study were based on national trends in energy efficiency programs, Pennsylvania-specific circumstances and forward-looking cost estimates. Comverge argues, *inter alia*, that PECO did not challenge the Commission’s acquisition cost finding in this evidentiary hearing proceeding and PennFuture should not be able to revisit this issue as part of this limited proceeding. Comverge M.B. at 10.

The OCA and PennFuture note that Mr. Reed’s testimony also addresses a number of issues with the SWE’s Market Potential Study that resulted in the SWE underestimating PECO’s achievable energy savings from Phase II. Mr. Reed testified, *inter alia*, that the Market PenetrationStudy made“simplifying assumptions” regarding the implementation rates for conservation measures for the residential and commercial sectors that lead to an underestimation of savings. PennFuture St. No. 1, Answer to Question No. 24. Mr. Reed also testified that the Market Penetration Study does not accurately reflect the potential lighting savings from those lamp categories that are excluded from the federal lighting standards established under the Energy Independence and Security Act of 2007. *Id.* The OCA and PennFuture argue that, since the SWE overestimated relevant acquisition costs and underestimated the achievable energy savings, PECO should be able to achieve its Phase II energy savings goals and continue its DLC program within PECO’s budget. OCA M.B. at 8; Penn Future M.B.
at 10.

The OCA, CAC/SC and PennFuture also note that PECO has achieved its Phase I targets significantly under budget and has significant carryover credits available to apply to its Phase II energy reduction targets. CAC/SC explains that, in implementing Phase I, PECO has consistently come “way under” budget and PECO is projected to hit its Phase I energy efficiency targets using about seventy percent of its budget. CAC/SE M.B. at 7. CAC/SC and PennFuture explain that PECO is projected to save an extra 83,000 MWh over and above its target for Phase I. CAC/SC and PennFuture submit that the *Phase II Implementation Order* allows PECO to apply this surplus savings to Phase II, which translates to a budget savings of roughly $19 million. CAC/SC M.B. at 8; PennFuture M.B. at 11. CAC/SC projects that. in the remaining time in Phase I, PECO could secure even more credits toward Phase II by expending some or all of the $99 million of the unspent Phase I budget to achieve further energy reductions. CAC/SC M.B. at 8. CAC/SC avers that the $36 million PECO is requesting to continue the Mass Market DLC Program into Phase II easily fits within the funds likely to be available to PECO during Phase II. *Id.*

In response to the arguments that the Mass Market DLC Program and the ramp-up for the May 2017 DR target could be funded by using excess Phase II resources, PECO avers that the plain language of the *Phase II Implementation Order* does not leave room for Phase II funds to be used for DR programs. Citing pages 26 and 29 of the *Phase II Implementation Order,* PECO explainsthat the Commission has directed the EDCs to spend the full amount of funding resources available under the Act 129 spending cap on EE measures in each program year of Phase II, even after they achieve their spending target. PECO opines that, even if PECO’s Phase II consumption reduction target were satisfied, in part, by energy savings achieved during Phase I, any unused Phase II budget may not be directed to PECO’s Mass Market DLC Program, or any other DR measure. PECO M.B. at 9. In addition, PECO submits that neither the *Phase II Implementation Order* nor any other Commission pronouncement grants EDCs permission to start spending Phase III funds during Phase II and be assured that those funds may be recovered from customers. PECO R.B. at 7.

CAC/SC argues that, even if some small portion of PECO’s DLC could not be funded by the “surplus and cushion” available to PECO in Phase II, the *Phase II Implementation Order* already provides a pathway for PECO to recover the costs of such voluntary activities under 66 Pa. C.S. §§ 1319 and 1505(b). CAC/SC M.B. at 9. However, PECO questions whether demand reductions achieved by a separately-funded program would count toward a DR target that is subsequently established under Act 129. PECO also avers that a separate funding approach would unlawfully circumvent the Act 129 statutory cap, which the legislature intended to limit the impact of EE&C measures on customers’ bills. PECO M.B. at 6.

CAC/SC states that, although PECO is requesting Phase II to ramp up for the May 2017 demand reduction targets, PECO testified that it did not know what demand response targets may be included in a potential Phase III or even whether such targets would be included at all. Therefore, CAC/SC argues that, “folding” funding for a program that may or may not exist, three or more years out, into Phase II is unwarranted and PECO has not carried its burden to establish otherwise. CAC/SC M.B. at 10-11.

### Disposition

#### (a) Preparation for the May 2017 Demand Reduction Targets

As discussed, *supra*, our interpretation of 66 Pa. C.S. § 2806.1(d)(2), is that, in order for the Commission to prescribe specific peak demand reduction targets for subsequent phases of Act 129, the DR programs must be proven to be cost-effective. *Phase II Implementation Order* at 32. Consequently, in the *Phase II Implementation Order*, the Commission stated that it will not: (1) establish Phase II peak DR targets; (2) propose any specific peak DR program design; or (3) require the continuation of ongoing residential or commercial DR programs until DR programs are proven to be cost-effective. *Id.* at 32-33, 40*.*  Since it is not known at this time whether the Commission will establish peak DR targets and approve peak DR plans beyond the current Phase I EDC plans and programs, we find that PECO may not carve out any funds from its Phase II budget to prepare for indeterminate DR programs, if doing so means that PECO cannot meet its mandatory 2.9% Energy Efficiency target. We appreciate PECO’s concerns regarding its need to prepare for potential DR programs. However, based on our experience in developing the Phase I programs, we believe there will be more than ample time for the Commission, the EDCs and their stakeholders to develop DR programs, if such programs are deemed to be cost-effective going forward.

#### (b) Continuation of PECO’s Mass Market DLC Program

As discussed, *supra,* the *Phase II Implementation Order* provides that EDCs may continue cost-effective residential DR curtailment measures, such as direct load control programs, under the Act 129 EE&C Program. However, the *Phase II Implementation Order* makes it clear that the Commission will not set any DR goals for an EDC choosing tocontinuevoluntarily any DR programs. *Id.* at 42. We declined to set additional incremental peak demand reduction targets in Phase II because we do not have adequate information to determine that the peak demand reduction program is cost-effective. *See Phase II Implementation Order* at 32-42. We did, however, adopt additional incremental consumption reductions as we found that the benefits of such a program will exceed its costs. *Id*. at 13.

PECO has failed to demonstrate that it could meet its 2.9% consumption reduction target and continue its DLC Program. In fact, PECO argued that its consumption reduction target must be reduced so that it could continue the DLC Program and only presented evidence supporting that position. While PennFuture argued and presented testimony asserting that PECO can meet the 2.9% target and continue the DLC Program, we find that testimony to be speculative and decline to adopt its position. As we have determined that the Phase II consumption reduction program is cost-effective, we will decline to subordinate the funding of this cost-effective program for funding of any peak reduction program for which the Commission has not made a cost-effectiveness determination nor set additional peak demand reduction requirements.

In the *Phase II Implementation Order,* the Commission stated that it “encourages CSPs and all stakeholders to review the cost-effectiveness of particular demand response measures and their potential applicability to Pennsylvania electric customers *outside the realm of the Act 129 EE&C Program*” (emphasis added*). Phase II Implementation Order* at 42-43. As discussed, *supra*, the Commission also noted that EDCs seeking to establish new, or continue existing, load management programs that are prudent and cost-effective are free to file a petition with the Commission for approval of such programs under 66 Pa. C.S. § 1505(b) and that all prudent and reasonable costs incurred with such programs are recoverable in accordance with 66 Pa. C.S. § 1319. *Id.* Consequently, we have identified a potential means for PECO to continue its Mass Market DLC Program outside of its Phase II EE program.

We do not agree with PECO’s argument that utilizing a separate funding approach to continue a DR program would unlawfully circumvent the Act 129 spending cap. The spending cap established under 66 Pa. C.S. § 2806.1(g) applies to “[t]he total cost of any plan *required under this section*” (emphasis supplied). Since the Commission did not set additional incremental peak demand reduction targets for Phase II, any DR program, that is proven to be cost-effective, could be administered outside the realm of Act 129 and the two percent spending cap. Therefore, the costs of such programs would be potentially eligible for recovery under 66 Pa. C.S. §§ 1319 and 1505, which are outside the scope of Act 129.

## Revenue Baseline

The 2.9% EE reduction target established for PECO is based on the full two percent of PECO’s annual revenues being spent for the EE program in each year of Phase II. In establishing the EDC targets for Phase II, the Commission is utilizing the maximum funding available under 66 Pa. C.S. § 2806.1(g) which states in pertinent part as follows:

**(g) Limitation on Costs –** The total cost of any plan required under this section shall not exceed 2% of the electric distribution company’s total annual revenue as of December 31, 2006.

### PECO’s Proposal

PECO argues that Section 2806.1(g) sets the outer limit of EDC spending that is permitted under Act 129 but does not mandate that the Commission direct the EDCs to spend every dollar up to the two percent limit. PECO avers that there is nothing in Act 129 that limits the Commission’s authority or discretion to employ a funding level below the two percent limit. PECO states that the Commission must acknowledge and exercise its discretion to set a funding level that is not only below the two percent limit, but is reasonable based on the revenue levels that PECO is likely to achieve during the period that a consumption target must be met. PECO submits that its 2006 revenue was billed during a pre-recession period when electric prices were much different from what they are today. PECO notes that the decline in energy prices since 2006, and in particular 2008, when Act 129 became law, has resulted in EE&C surcharges becoming a significantly higher portion of customers’ total electric bill revenue. PECO recommends that its revenue for the twelve months ending December 31, 2011, would be a more reasonable baseline. PECO M.B. at 15-16.

PECO also recommends that the “total annual revenue” used to calculate the two percent limit not include revenue that the EDCs collect on behalf of electric generation suppliers (EGSs). PECO submits that 66 Pa. C.S. § 2806.1(m) defines “electric distribution total revenue” as “[a]mounts paid to the electric distribution company for generation, transmission, distribution and surcharges by retail customers.” PECO argues that the plain language of Section 2806.1(m) makes it clear that the amounts paid to an EDC for generation encompass only those payments customers make for generation service that the EDC furnishes. PECO M.B. at 17.

PECO estimates that the combined effect of utilizing 2011 base year revenues and excluding EGS revenues would reduce the current 2.9% target by one percent to 1.9%. PECO M.B. at 14-15. Adding PECO’s two proposed DR adjustments, discussed, *supra*, to the two proposed revenue adjustments would result in a net overall Phase II target of 1.3%. PECO Exh. FJJ-8.

### Parties’ Positions and PECO’s Responses

Duquesne believes that it can achieve its Phase II target of a two percent (2.0%) consumption reduction with the allowable spending level set at two percent of its 2006 annual revenues, including EGS generation revenues collected by Duquesne. However, Duquesne requests that, if the Commission excludes revenue collected by EDCs from its shopping customers in establishing the Phase II targets, this treatment of EGS revenue be consistent for all Pennsylvania EDCs. Duquesne M.B. at 9.

PennFuture submits that the Commission already considered and rejected PECO’s argument regarding the exclusion of EGS revenue in the *Phase I Implementation Order*. PennFuture avers that, if the Commission were to reinterpret already defined terms, it would create confusion and uncertainty in matters which had previously been settled. PennFuture M.B. at 15-17. The OCA and PennFuture also aver that the use of 2006 annual revenue is statutorily mandated by the plain language of Section 2806.1(g) and the Commission has no power to change the calculation period specified by the General Assembly. OCA M.B. at 12-14; PennFuture M.B. at 17.

CAC/SC argues that PECO’s two revenue arguments are completely out of place in this proceeding. CAC/SC points to page 31 of the *Phase II Implementation Order* and submits that evidentiary petitions were solely to contest the facts the Commission relied upon in adopting the consumption reduction targets and the scope of this proceeding will be narrow and limited to the consumption reduction issue. CAC/SC states that PECO’s argument that the Commission failed to apply a novel legal test in determining the appropriate spending cap does not address the facts that the Commission relied upon and therefore is extraneous to this proceeding. CAC/SC R.B. at 11.

CAC/SC also argues that PECO provided no real evidence that the spending cap is unreasonable. CAC/SC submits that PECO simply argues that 2006 revenues were higher than current revenues and current electric prices are somewhat lower than they were in 2006, but PECO fails to flesh out those assertions with concrete numbers. CAC/SC avers that PECO also fails to offer evidence as to either what revenues or electric prices will be during the period that the consumption reduction targets must be met. CAC/SC states “[c]ertainly, the spending cap is higher than PECO appears to desire, but this in and of itself is not evidence carrying PECO’s burden.”
*Id*. at 12.

PennFuture notes that the adjustment to the revenue baseline proposed by PECO would reduce PECO’s available annual spending for Phase II from $84.5 million to $55.2 million. PennFuture argues that PECO’s proposals would have devastating practical impacts on the Commonwealth’s efforts to promote energy conservation. PennFuture M.B. at 18.

In response to the arguments of the OCA, PennFuture and CAC/SC, PECO submits that the Parties have tried to create a legal issue where none exists. PECO argues that the parties have chosen to focus on the benefits that a subset of PECO customers would realize if EE&C spending were set at the outer limit set by Act 129 and simply ignore the underlying rationale for the legislature’s imposition of a spending limit. PECO opines that the legislature recognized that the benefits that some customers would receive from an EE&C program must be balanced against the financial impact of increased rates that must be borne by all customers, including those that will not receive any benefits from even the best designed EE&C plan. PECO states that, to that end, Section 2806.1(g) was added to the Public Utility Code to set the farthest limit of permissible EDC spending. PECO R.B. at 11. PECO explains that the Commission’s error was to convert a “not to exceed” value into a “not less than” expenditure level, and in so doing, gave no consideration to the rate impact of its decision. *Id.* at 12.

PECO objects to CAC/SC “interjection” for the first time in its Main Brief that PECO’s position on EGS billings amounts to a legal issue and is therefore beyond the scope of this proceeding. PECO cites four opportunities that CAC/SC could have opposed PECO’s position prior to, or during the evidentiary hearing in this case. *Id*.
at 13. In addition, PECO notes that, under the ALJ’s Scheduling Order, CAC/SC should have presented its objection within twenty-four hours of the evidentiary hearing in this case. PECO argues that, because CAC/SC violated the Scheduling Order, it cannot raise its objection at this late date. *Id*.

PECO disagrees with CAC/SC’s argument that the exclusion of EGS revenue is not a factual issue that is appropriate for this proceeding. PECO submits that the Commission’s decision to include EGS billing in the EDC revenue in the Phase I spending cap was based on a factual determination that, without EGS billings, the spending limit for some EDCs that experienced significant shopping would be too low to meet the Phase I three percent target. *Id.* at 13-14.

PECO also opposes the reliance on the *Phase I Implementation Order* as a justification for including EGS revenue in the Phase II calculations. PECO explains that, in Phase I, the consumption target was set at three percent by statute for all EDCs and each EDC had to have sufficient revenue to meet that target. PECO notes that, in Phase II, the Commission has established EDC-specific targets that are a function of the available funding and, therefore, if the spending cap is reduced, the consumption target is proportionally reduced as well. PECO concludes that the Commission’s concern about adequate funds for EDCs with a large number of shopping customers is no longer an issue. *Id*. at 14-15.

### Disposition

As an initial matter, we do not agree with PECO that Act 129 permits the Commission to utilize a time period other than calendar year 2006 to establish a spending cap. Section 2806.1(g) states that the “[t]otal revenue of *any plan* *required under this section* shall not exceed 2% of the electric distribution company’s total annual revenue as of December 2006” (emphasis added). Since the provisions of Act 129 that address Phase II, and subsequent phases, are set forth in the same section of the Act (Section 2806.1), we find that the funding limit for Phase II, as well as any subsequent EE&C plans, must utilize the 2006 base year.

We also do not agree with PECO that we should exclude the revenues EDCs collect on behalf of EGSs from the “total annual revenues” utilized to calculate the spending cap under Section 2806.1(g). All EDC customers, both shopping and default service customers, are eligible to participate in the EE&C programs and receive the benefits of those programs.[[4]](#footnote-4) Since the scope of customers eligible to participate in the EE&C programs are shopping and default service customers, we believe that excluding the energy component of the revenue from shopping customers will inappropriately constrain the funding available for EE&C Plans.

We concur with PECO that Section 2806.1(g) sets the limit of EDC spending that is permitted under Act 129 but does not mandate that the Commission direct the EDCs to spend every dollar up to the two percent limit. However, while PECO has made a variety of arguments why the Commission should reduce the ceiling applied to its Phase II costs, it has not demonstrated in this proceeding how the changes in the limitation on costs or its Phase II target are necessary to bring its Phase II plan into compliance with 66 Pa. C.S. § 2806.1(c)(3). Section 2806.1(c)(3) states as follows:

(3) By November 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.

As reflected in the *Phase II Implementation Order,* based on the spending cap of two percent of 2006 annual revenues for program spending and previously established load forecasts, the SWE’s Electric Energy Efficiency Potential for Pennsylvania Final Report and the SWE’s Market Potential Study, the Commission found that continuing EE programs for Phase II will be cost-effective for Pennsylvania ratepayers. *Phase II Implementation Order* at 13. While PECO would prefer that its Phase II target be reduced, it has failed to demonstrate that implementing an EE program to meet the 2.9% energy consumption reduction would not result in benefits to all PECO customers that exceed program costs borne by those customers, as required by Section 2806.1(c)(3). Therefore, we shall not reduce PECO’s Phase II targets at this juncture.

Furthermore, the Commission finds that PECO failed to meet its burden of showing that the EE target is not reasonably obtainable within the Section 2806.1(g) cost limitation. PECO failed to demonstrate by a preponderance of the competent credible evidence that the lower target it proposed was any more reasonably obtainable when this lower target was based on the same market potential data the Commission relied upon in setting the Phase II EE targets. In fact, all PECO did to arrive at the new lower target was to reduce its own spending limit. As such, we find PECO’s argument that the Commission inappropriately developed the Phase II targets utilizing the Section 2806.1(g) cost limit is without merit. Therefore, based on the record evidence and PECO’s failure to meet its burden, we shall adopt the Phase II funding limits and targets for PECO as set forth in the *Phase II Implementation Order* at 24.

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# IV. Conclusion

For the reasons set forth, *supra*, we will deny PECO’s Motion. In addition, we find that: (1) PECO’s three-year, EE reduction target established in the *Phase II Implementation Order* shall remain at2.9 %; (2) the available funds for the Phase II EE program shall be capped at two percent of PECO’s 2006 annual revenue, consistent with the *Phase I Implementation Order* at 32-36; and (3) that PECO shall not allocate Phase II funds for DR programs, including its Mass Market DLC Program, unless it can show that it can fund such programs while meeting the 2.9% EE reduction target and show that the programs are cost-effective. PECO may present evidence that it can fund such DR programs while meeting the 2.9% EE reduction target and that such DR programs are cost-effective as part of the Commission’s pending investigation into its Phase II EE&C Plan.

**THEREFORE,**

**IT IS ORDERED:**

1. That the Motion *in Limine* to Exclude from the Record Portions of the Direct Testimony of Citizens for Pennsylvania’s Future’s Witness Glenn Reed filed by PECO Energy Company on September 28, 2012, is denied.
2. That the three-year, 2.9% energy efficiency Phase II reduction target established for PECO Energy Company in the Commission’s Order in *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411 and M-2008-2069887 entered August 3, 2012, is reaffirmed.
3. That the funds available for PECO Energy Company’s Phase II energy efficiency program established pursuant to the Commission’s Order in *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411 and M-2008-2069887 entered August 3, 2012, shall remain at not more than two percent of PECO’s annual revenue for the period ending December 31, 2006, consistent with the Commission’s Order in *Energy Efficiency and Conservation Program*, Docket No. M-2008-2069887 entered January 16, 2009.
4. That, unless directed by a subsequent Order of the Commission, PECO Energy Company shall not utilize funds allocated for the Phase II energy efficiency program for any demand reduction program administered after May 31, 2013.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: December 5, 2012

ORDER ENTERED: December 6, 2012

1. The SWE was represented by the Commission’s Law Bureau. [↑](#footnote-ref-1)
2. *See Energy Efficiency and Conservation,* Secretarial Letter, (March 4, 2011 Secretarial Letter) at Docket No. M-2008-2069887, served March 4, 2011. [↑](#footnote-ref-2)
3. These measures are collectively known as the Mass Market DLC Program which provides customer incentive payments for allowing PECO to control their central air conditioning. PECO submits that applying the Total Resource Test Cost (TRC) to this program yields a benefit/cost ratio of 2.38. PECO M.B. at 7. [↑](#footnote-ref-3)
4. We also note that benefits associated with shopping customers’ participation in EE programs are reflected in the TRC analysis and that the surcharges to recover the costs of EE&C programs are applicable to both shopping and default service customers. [↑](#footnote-ref-4)