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January 14, 2013

Via Electronic Filing
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Joint Reply Comments of Demand Response Providers: Comverge, Inc., EnerNOC, Inc., and Johnson Controls, Inc., to Pennsylvania PUC Tentative Order of November 30, 2013 with regard to the above-referenced matter.

Sincerely,

Jeffrey J. Norton

JJN/jls
Enclosure

cc: Megan Good at megagood@pa.gov
Kriss Brown at kribrown@pa.gov

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

JOINT REPLY COMMENTS OF DEMAND RESPONSE PROVIDERS COMVERGE, INC. ENERNOC, INC. AND JOHNSON CONTROLS, INC. TO PENNSYLVANIA PUC TENTATIVE ORDER OF NOVEMBER 30, 2013

Pursuant to the procedural schedule set forth in the Pennsylvania Public Utility Commission's ("Commission" or "PUC") November 14, 2013 Tentative Order and the notice published on November 30, 2013 in the Pennsylvania Bulletin in the above-referenced matter ("Tentative Order"), Comverge, Inc. ("Comverge"), EnerNOC, Inc. ("EnerNOC"), and Johnson Controls, Inc. ("JCI") (collectively "the DR Providers") respectfully submit these Reply Comments to the Tentative Order in the above-captioned dockets. Specifically, these Reply Comments respond to other interested parties' ("Commenters")[1] initial comments regarding the following: (1) the Energy Efficiency and Conservation ("EE&C") Program Statewide Evaluator's ("SWE") Amended Demand Response Study; (2) the proposed demand response program ("DR Program") methodology for future phases of Act 129 implementation; and (3) the potential implementation of a demand response potential study and a wholesale price suppression study.

[1] The Commenters include: Electric Power Generation Association ("EPGA"); Industrial Energy Consumers of Pennsylvania ("ICG"); PPL Electric Utilities ("PPL"); Office of the Consumer Advocate ("OCA"); PennFuture Group; the FirstEnergy Companies; Energy Association of Pennsylvania ("EAP"); and PECO Energy Company ("PECO").

I. INTRODUCTION

The Commenters' opposition to the modifications proposed for the Act 129 DR Programs in this proceeding is unwarranted. The Commenters' opposition is not about the Act 129 DR Programs *per se*. Instead, the opposition focuses on how the Act 129 DR Programs will be funded and the DR Programs' effect on market prices. Act 129 sets clear goals and mandates specific funding mechanisms. The Commenters have mounted a baseless attack on both of these.

The primary goals of the changes legislated in Act 129 were reigning in electricity prices and giving customers key tools to manage their electricity costs. The DR Programs are funded by a legislated surcharge on retail customer bills. Act 129 has been effective on all fronts: adequate funds have been and continue to be raised without undue burden on customers; electricity prices have come under control; and consumers have several tools, including the DR Programs and energy efficiency programs mandated by the Act, to help reduce their electric bills.

The Commenters' opposition is really a collateral attack on Act 129 itself. The large generator members of the EPGA expressly oppose lowering energy prices for consumers and are deeply opposed to the competitive threat that DR presents to their business. The large industrial customers in the ICG state that they simply do not want to pay for these programs. The root of the electric utilities' opposition is their financial interest and resentment over the statutory mandate that the programs be executed by third party suppliers. All of these points of view were considered in the passage of Act 129 and the final legislation represents the General Assembly's careful balancing of these varied interests. Therefore, the correct decisions in this docket should be clear to the Commission. The Commission should extend the DR Programs and invoke more robust reduction goals notwithstanding these contentions.

The DR Programs can be cost-effective. While the SWE determined they were not under the previously prescribed methodology, the SWE concluded that if the cost-effectiveness study is done the right way, consistent with industry standards, then the DR Programs should be cost-effective. That is the compelling policy point – the DR programs would be cost effective if the cost analysis is done according to industry standards, as the new recommendations would do.

Continuing the Act 129 DR Programs is important not only because to do so would be consistent with the law but also because these programs provide significant benefits. The Act 129 DR Programs bring energy savings to electric distribution company ("EDC") customers, increase energy efficiency and conservation, improve reliability, reduce power plant pollutant emissions, help avoid brownouts and blackouts, and reduce the wholesale price of electricity. The Commission should weigh these benefits against the Commenters' vested interest in ending the Act 129 DR Programs. Following that assessment, the clear choice for the Commission should be continuation of the Act 129 DR Programs.

The Commission has the legal authority to include DR Programs and demand response compliance targets in the Act 129 EE&C Program. DR Programs are eligible for continued inclusion in EE&C plans because demand response resources are: (1) designed to enable customers to contribute to energy load reduction during times of peak demand, and (2) yield both peak demand savings and annual energy savings. Demand response resources also play a vital role in keeping the grid stable. Act 129 sets an initial peak demand reduction target, and permits the Commission to require additional reductions in peak demand by May 2017. Accordingly, the DR Programs, and the methodology used to analyze the cost effectiveness of those programs, can and should be continued with modifications to conform more closely to industry standards and to achieve even more robust and cost-effective reductions in peak consumption going forward.

The fact that ratepayers may bear costs, such as the cost of installing direct load control ("DLC") equipment under the SWE's proposed program modifications, does not result in the resource being "subsidized." There is no factual or policy basis for characterizing an expenditure that assists in meeting the energy needs of utility customers as a "subsidy" merely because the cost of the measure is recovered from those same utility ratepayers (all of whom are eligible to participate in Act 129 programs). Additionally, Act 129 resource participation in PJM capacity markets – regardless of the source of funding – is consistent with Federal Energy Regulatory Commission ("FERC") policy and would enhance competition in those markets. Such participation would obviously not be unconstitutional and the cases cited by EPGA claiming otherwise are wholly inapposite, as discussed in detail below.

Notwithstanding the suggestions of some commenters, the Act 129 DR Programs most certainly are not duplicative of PJM's Emergency Load Reduction Program ("ELRP") and do not "compete" or "interfere" with PJM programs. Demand resources have been utilized in both programs, each of which has a different purpose. Further, under the SWE's proposal, the payment structure will not be incentive enough for customers to leave the PJM ELRP, thus avoiding a scenario in which Act 129 programs and the PJM ELRP are in direct competition.

Peak demand reductions from any future DLC Programs should be offered into PJM's base residual auction ("BRA"), with the DLC Program offers being made by the Conservation Service Providers ("CSPs") – not the EDCs, in accordance with Act 129, and should be market-driven. If the Commission prohibited this capacity from being offered into the BRA, the supply of capacity in PJM markets would be reduced, thereby driving up prices, thereby creating a windfall that would accrue to the benefit of generation resource owners, at the expense of all EDC ratepayers.

To the extent demand response resources displace generation resources cleared in PJM wholesale markets, it is because those demand response resources provide capacity at a lower cost. This is the economically efficient outcome. Thus, demand response resources will help, rather than harm, Pennsylvania's economy. For this reason, it is important that the DR Resources created by the Act 129 DLC program be offered into the BRA. The policy arguments made against offering these resources into PJM's capacity markets appear to emanate from a more basic opposition to DR as a legitimate capacity resource that is suitable to participate in these markets. Such a view is plainly inconsistent with FERC rules and the view of PJM itself that DR is crucial to maintaining reliability.

Accordingly, the DR Providers submit that the claims of those opposed to the continued inclusion of DR in the Act 129 programs be rejected. The Act 129 Program can and should be modified to achieve the required reductions in consumption in a cost-effective manner. This can and should be done promptly. If the utilities are to meet reduction goals by the May 31, 2017 statutory deadline, the utilities will have to have their DR Programs fully installed and operational by June 1, 2016.

II. DR PROVIDERS' JOINT REPLY COMMENTS

A. DR Programs are Permitted to Continue to be Included Under Act 129

The Commenters' suggestions that the Commission does not have the legal authority to continue to include DR Programs and DR compliance targets in the Act 129 EE&C Program are incorrect. The EAP argues that the statute and the results of the Amended DR Study mandate that future demand reduction programs are not required or justified under Act 129.[2] The FirstEnergy Companies argue that Act 129 prohibits future peak demand reduction targets

[2] EAP Comments, p. 5-7.

because the Commission did not act by the deadline set forth in the statute.[3] PPL and FirstEnergy argue that since the SWE found that the Phase I peak demand reduction programs were not cost-effective, Act 129 constrains the Commission from ordering further studies on the benefits of any future peak DR Programs and ordering new peak demand reduction targets as a result of these studies.[4] These claims are all incorrect.

First, the notion that the Commission did not "act" by November 30, 2013 is plainly incorrect. The Act does not describe the precise nature of the "action" needed by the Commission to satisfy this deadline; the actions taken by the Commission (the Secretarial Letter of May 17, 2013 releasing the SWE's DR Study, the Secretarial Letter of November 1, 2013 releasing the SWE's Amended DR Study, and the Tentative Order entered November 14, 2013) satisfied the statutory requirement for action. Tellingly, none of the commenters making this serious accusation that the Commission failed to satisfy a statutory deadline provide any legal analysis or support for their claim.

Moreover, the Commission's legal authority to include DR Programs in EE&C plans is clear. Each EDC, with at least 100,000 customers, is required to adopt and implement cost-effective energy EE&C plans to reduce energy demand and consumption within their service territories.[5] Act 129 authorizes energy efficiency and demand reduction programs on a going forward basis and permits the Commission to require incremental reductions in consumption.[6] Further, DR Programs are thus eligible for continued inclusion in EE&C plans because demand

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3 FirstEnergy Comments, p. 4-7.

4 PPL Comments, p. 23-28; FirstEnergy Comments, p. 4-7. *See also* EPGA Comments, p. 3-6.

5 66 Pa. C.S. § 2806.1(a).

6 66 Pa. C.S. § 2806.1(c)(3) which provides that, based on a review to be concluded by November 30, 2013, and every five years thereafter, if "the commission determines that the benefits of the program exceed the costs, the commission shall adopt additional incremental reductions in consumption."

response resources are: (1) designed to enable customers to contribute to energy load reduction during times of peak demand, and (2) yield both peak demand savings and annual energy savings.

Thus, the suggestion that the Commission is precluded from acting on peak demand targets by virtue of an alleged failure to act by the required date, November 30, 2013, is simply not supportable.

B. Additional DR Programs and Targets are Permissible

The alleged lack of a peak demand target[7] does not create a blanket prohibition on DR Programs. Act 129 set an initial peak demand reduction target[8] and permits the Commission to require additional reductions in peak demand to be achieved by May 2017.[9]

These targets are measured against the EDC's annual system peak demand.[10] But, contrary to suggestions otherwise,[11] the target for reductions in annual system peak demand should not be equated solely with continued existence of DR Programs or DR compliance targets in an EE&C plan. Each energy efficiency or demand reduction program in the EE&C plan

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7 *See* FirstEnergy Comments, p. 4-7. The EPGA also argues that the Commission went beyond the statutory requirements in developing additional benefits of certain DR Programs. EPGA Comments, p. 3-6.

8 66 Pa. C.S. § 2806.1(d)(1).

9 66 Pa. C.S. § 2806.1(d)(2), which provides that, based on a review to be concluded by November 30, 2013, if "the commission determines that the benefits of the plans exceed the costs, the commission shall set additional incremental requirements for reduction in peak demand for the 100 hours of greatest demand or an alternative reduction approved by the commission."

10 The use of an alternative methodology is not contrary to Act 129. *Cf.* EPGA Comments, p. 3-6. The initial/current methodology uses the top 100 hours of greatest demand. But, the Commission has latitude to identify an alternative reduction methodology for DR programs in Pennsylvania. 66 Pa. C.S. § 2806.1(d)(2). In fact, FirstEnergy (and others) have advocated for the use of an alternative methodology by the Commission. *See* FirstEnergy Comments, p. 13-15; PECO Comments, p. 13-14; EAP Comments, p. 7-8 .

11 *See* FirstEnergy Comments, p. 1-7, 14-15.

contributes to the EDC's ability to meet, or exceed, the peak demand reduction[12] and other targets,[13] as required by the Commission under Act 129. It would be both absurd and discriminatory to exclude DR Programs that produce annual energy savings from EE&C plans when other programs that also produce annual energy savings are included in EE&C plans.

Further, the Amended SWE Report does not propose to prohibit the inclusion of DR Programs in any EE&C plan. Under Act 129, the Commission is given the explicit authority to direct an EDC to modify any part of an EE&C plan so that the programs or measures will achieve the required reductions in consumption in a cost-effective manner.[14] Contrary to the suggestion of the EPGA,[15] there is simply no statutory mandate to abolish an energy efficiency or demand reduction program when modification is possible. This is especially true for demand response resources, which play a vital role in keeping the grid stable when it is most constrained. The Amended SWE Report assessed, *inter alia*, the cost-effectiveness of the Phase I peak demand reduction program. But, that Report does not suggest that DR Programs cannot be modified by the Commission; in fact it states just the opposite. To be clear, DR Programs can and should be modified to achieve the required reductions in consumption in a cost-effective manner. Such modifications are discussed in greater detail below and in the Joint Comments of the DR Providers filed previously in this docket.

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12 66 Pa. C.S. §§ 2806.1(d)(1), (2).

13 66 Pa. C.S. § 2806.1(c)(3).

14 *See* 66 Pa. C.S. § 2806.1(b)(2), (3). *See also* footnote 10, *supra*, regarding the Commission's discretion in selecting the evaluation methodology.

15 EPGA Comments, p. 4-5.

C. The Arguments that Act 129 DR Programs May Not Constitutionally Participate in Wholesale Markets is Wrong as a Matter of Law

The EPGA takes the position that allowing "ratepayer financed" demand response resources to compete in wholesale electricity markets would be unconstitutional.[16] This assertion is grossly misleading and fundamentally flawed.

EPGA's underlying assumption is its assertion – without any explanation – that Act 129 demand resources are somehow "subsidized" by EDC ratepayers. It then alleges that it would be both unconstitutional and inappropriate from a policy standpoint for such "subsidized" demand response resources to be offered into the PJM capacity market.[17] Presumably, EPGA believes that EDC ratepayers ultimately bearing costs, such as the cost of installing DLC equipment, results in the resource being "subsidized."

EPGA's allegations of material harm to competition in the capacity market by "ratepayer financed resources"[18] have already been rejected by FERC. In 2011, FERC determined that the existence of subsidies or ratepayer financing does not affect the ability of a resource to participate in wholesale capacity markets.[19] This determination directly contradicts EPGA's position in this proceeding. EPGA has not presented any arguments credibly suggesting that Act 129 demand response resources will alter the clearing price for capacity in an anti-competitive way. In fact, in the states surrounding Pennsylvania, several utilities (even utilities that are

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16 EPGA Comments, p. 2, 8-11, 15.

17 EPGA Comments, p. 6-11.

18 *See* EPGA Comments, p. 8-11 where EPGA suggests that the participation of ratepayer financed DR in the wholesale capacity markets would materially injure those markets by impairing forward-looking generation investment signals.

19 *See PJM Interconnection, L.L.C.,* 137 FERC ¶ 61,145, at P 133 (2011) ("... a resource that has cleared an RPM auction at a price above its offer floor is needed and considered a competitive resource and should be permitted to participate in the auction without an offer floor regardless of whether it also receives a subsidy."); *PJM Interconnection, L.L.C.,* 135 FERC ¶ 61,022, at P 177 (2011) ("... even if discriminatory subsidies are being received, if the resource is needed . . . then it is a competitive resource and should be permitted to participate in the auction regardless of whether it also receives a subsidy.").

affiliates of some Pennsylvania EDCs) or their representatives currently offer state-mandated demand response capacity into PJM's Reliability Pricing Model ("RPM") market.[20]

Uneconomic market activity based on supply-side market power most commonly results from limited competition inside a constrained delivery area. Delivery constraints limit competition by impairing competitors' access to particular areas. Thus, providing demand response resources through Act 129 would potentially mitigate, not enhance, supply-side market power, by adding capacity in potentially constrained areas. This additional competition will reduce electricity prices paid by consumers.

Clearing prices are established in PJM's capacity auctions[21] and are determined by the interaction of supply and demand for capacity.[22] PJM develops its demand curve based on its estimates of peak demand during the delivery year and its projected availability of capacity resources, including new and existing generating facilities, energy efficiency resources, and demand response resources. Under FERC guidelines, DR providers and others can offer their capacity in PJM's capacity auctions, including the BRA. Offers are based on the marginal costs of making those resources available in the particular delivery year. The price offered by the final resource that meets PJM's zonal demand forecast establishes the price – the clearing price – paid

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[20] For example, see BG&E electric service rates and tariff, Rider 15, Demand Response Service, page 94c. http://www.bge.com/myaccount/billsrates/ratestariffs/electricservice/pages/electric-services-rates-and-tariffs.aspx.

[21] "PJM's capacity market, known as the Reliability Pricing Model (RPM), procures capacity resources for future demand in the region. PJM's capacity market provides forward pricing signals to encourage retention of existing resources and development of new resources in the PJM region. ... The RPM is a series of auctions for a delivery year in the future. ... ."*See* http://www.pjm.com/about-pjm/learning-center/markets-and-operations/rpm-capacity-market.aspx?faq=%7B33AC7E69-C730-489F-974A-EE7FD2FB9858%7D. Those auctions are conducted under FERC-approved market rules. *See, e.g., PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,062 (2012) (PJM secures capacity commitments through its capacity market, known as the RPM, on a forward-looking basis to meet the expected peak load demands of its system).

[22] *See* PJM Press Release dated May 23, 2013 entitled "PJM Capacity Auction Attracts Record Amount Of New Generation And Imported Capacity," which is available at: http://www.pjm.com/~/media/about-pjm/newsroom/2013-releases/20130524-pjm-capacity-auction.ashx.

to all resources in that PJM zone. Therefore, it is not relevant to the economically efficient operation of the capacity market if the creation of the demand response resource (or, indeed, any capacity resource) was supported by retail customers (*e.g.,* via self-supply), revenue collected by EDCs from ratepayers, grants, tax incentives, or otherwise.

In a vain attempt to support its position, EPGA cites two cases decided by separate United States District Courts in 2013.[23] However, the cases cited by EPGA cannot be reasonably construed as applicable; they certainly do not stand for the position that it is illegal or unconstitutional for ratepayer-funded resources to participate in wholesale electricity markets (including PJM's capacity markets). In each of these cases, the States (by an order of the Maryland Public Service Commission[24] and by legislation in New Jersey[25]) each mandated that their electric distribution companies enter into contracts to purchase the output of electric generation that would be constructed at their behest and to pass on the cost of purchasing such output at specified prices. In each case, therefore, the state commission attempted to set the ultimate price that the public utilities were required to pay the developer of the electric generating facilities for the energy and capacity produced by those facilities.[26]

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[23] EPGA Comments, p. 9, *citing PPL Energyplus, LLC v. Nazarian*, 2013 U.S. Dist. LEXIS 140210 (D. Md. Sept. 30, 2013) and *PPL Energyplus, LLC v. Hanna*, 2013 U.S. Dist. LEXIS 147273 (D. N.J. Oct. 11, 2013).

[24] The Maryland Public Service Commission order, issued April 12, 2012, required Maryland-based public utilities to enter into long-term power supply contracts with CPV Maryland, LLC, a developer chosen by the Public Service Commission to build a gas-fired power plant in Maryland. *See In re Whether New Generating Facilities are Needed to Meet Long-Term Demand for Standard Offer Service*, No. 9214, Request for Proposals for Generation Capacity Resources Under Long-Term Contract (M.P.S.C. Dec. 29, 2010).

[25] The Long-Term Capacity Pilot Project Act, commonly known as LCAPP, required New Jersey-based public utilities to enter into long-term contracts with developers selected by the New Jersey Board of Public Utilities. *See* S. 2381, 214th Leg. (N.J. 2011).

[26] *See PPL Energyplus, LLC v. Nazarian*, 2013 U.S. Dist. LEXIS 140210 at 71 ("In exchange for building and operating the generation resource, the PSC offered the selected supplier a long-term contract for differences with three Maryland EDCs, which would provide the supplier with a guaranteed revenue stream based upon the supplier's wholesale energy and capacity sales into the PJM Markets.");*PPL Energyplus, LLC v. Hanna*, 2013 U.S. Dist. LEXIS 147273 at 92 ("payment of the SOCA price is made only if the LCAPP generators successfully sell and deliver wholesale capacity to PJM.").

In both cases, PPL's generating and marketing companies (and others) argued that the pricing mechanisms were unconstitutional because they infringed on FERC's exclusive authority to regulate the wholesale sale of electricity in interstate commerce. The District Courts concluded, respectively, that the efforts by Maryland and New Jersey were field preempted by the Federal Power Act (which sets the fields of wholesale energy and capacity sales as within the exclusive jurisdiction of FERC[27]) and therefore, violated the Supremacy Clause of the United States Constitution.[28] Neither of these cases discuss nor offer even any inference of a constitutional prohibition on ratepayer-funded demand response resource participation in wholesale electricity markets. The issue was not the ratepayer funding but the attempt by the state commissions to dictate the prices, terms and conditions at which the utilities, and, in turn, ratepayers would have to pay.

Here, EPGA takes the position that use of "ratepayer financed" demand response in the wholesale energy markets is "tantamount to the activities" held unconstitutional by the District Courts. This is not the case with the Act 129 DR Program, and it is most certainly not the case with respect to the SWE proposal that EDCs offer capacity from their Act 129 DR Program residential DLC into the PJM capacity market on behalf of those customers.

There is no similarity between: (1) the SWE proposal, pursuant to which the Commission will merely direct the EDCs to offer a by-product of its conservation program into a competitive market where the price will be set by auction so that the ratepayers receive full value for their

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27 *See* Federal Power Act § 201(a), 16 U.S.C. § 824(a).

28 The Supremacy Clause of the United States Constitution renders federal law "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. The Supremacy Clause empowers Congress to preempt or supersede state or local law, either expressly through explicit statutory language or impliedly through field or conflict preemption. *See Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983) (Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose).

dollar, and (2) the state-mandated wholesale rate-setting activities in the Maryland and New Jersey cases.

Moreover, there is no similarity between the cost recovery Pennsylvania EDC's have available with respect to Act 129 DR Programs and the state-mandated wholesale rate-setting held to be unconstitutional in those cases. Pennsylvania law permits the EDC's to recover from ratepayers all reasonable and prudent costs incurred in the provision or management of their EE&C plans.[29] The "reasonable and prudent" standard is prolific in the Public Utility Code,[30] and does not mandate a specific price or guarantee full recovery of all costs. This is typical of the cost-recovery standards applicable to electric generating capacity owned and operated by EDCs in other jurisdictions. The logical extension of EPGA's argument – that ratepayer financed capacity resources may not be offered into FERC-jurisdictional capacity markets – would result in the forced divestiture of vertically integrated generating resources in those markets and would be inconsistent with nearly a century of industry practice and any prior interpretation of FERC's

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[29] Specifically, Act 129 allows all EDCs to recover, on a full and current basis from customers, through a reconcilable adjustment clause under 66 Pa. C.S. § 1307, all reasonable and prudent costs incurred in the provision or management of its plan. Act 129 also requires that each EDC's plan include a proposed cost-recovery tariff mechanism, in accordance with 66 Pa. C.S. § 1307 (relating to sliding scale of rates; adjustments), to fund all measures and to ensure a full and current recovery of prudent and reasonable costs, including administrative costs, as approved by the Commission.

[30] *See, e.g.,* 66 Pa. C.S. § 517(d) (Conversion of electric generating units fueled by oil or natural gas); 66 Pa. C.S. § 520(c) (Power of commission to order cancellation or modification of construction of electric generating units); 66 Pa. C.S. § 521(f) (Retirement of electric generating units); 66 Pa. C.S. § 528(e) (Use of foreign coal by qualifying facilities); 66 Pa. C.S. § 530(d)(2) (Clean Air Act implementation plans); 66 Pa. C.S. § 1301 (Rates to be just and reasonable); 66 Pa. C.S. § 1318 (Determination of just and reasonable gas cost rates); 66 Pa. C.S. § 1319(a)(2) (Financing of energy supply alternatives); 66 Pa. C.S. § 1327(a)(4) (Acquisition of water and sewer utilities); 66 Pa. C.S. § 1353(a) (Distribution system improvement charge); and 66 Pa. C.S. § 2807(f)(7) (Smart meter deployment).

In addition to the above, the Commission's regulations permit default service providers to recover reasonable and prudent costs for the following: (1) electricity generated by an alternative energy system and delivered to the default service provider's customers; (2) alternative energy credits purchased and used within the same reporting period for compliance purposes; (3) alternative energy credits purchased in one reporting year and banked for use in one of two later reporting years; and (4) alternative energy credits purchased in the true-up period to satisfy compliance obligations. 52 Pa. Code § 75.68. The Commission's regulations also require default service providers to identify a competitive procurement process for acquiring alternative energy credits. 52 Pa. Code § 75.68(b).

jurisdiction under the Federal Power Act. EPGA's baseless arguments concerning the "unconstitutionality" of offering Act 129 DR into wholesale capacity auctions must be rejected.

D. The Peak Demand Reductions from any Future DLC Programs should be Offered into the BRA

Apart from the forgoing baseless legal argument, some of the Commenters argue as a matter of policy that the Act 129 DR Programs are anti-competitive and should not be able to participate in PJM wholesale markets because they are "paid for" by ratepayers.[31]

EPGA appears to argue that Act 129 DR Program capacity should not be bid into the PJM BRA because it is "subsidized."[32] However, a prohibition would actually result in "subsidies" to the generators' shareholders – not the EDC, its customers, or anyone else. The Act 129 DR Programs result in first level benefits by reducing the EDC's energy costs during periods of peak demand. In doing so, the Act 129 DR Programs create capacity resources. Prohibiting this capacity from being offered into the BRA would reduce the supply of capacity in the PJM auction, thereby driving up prices paid to generators. This windfall would accrue to the benefit of those owning generation resources. This windfall would ultimately be paid for by end-use customers.

More to the point, the Act 129 DR Program is not "subsidized" by ratepayers in any way.[33] In fact, the Act 129 DR Program is a virtuous conservation effort facilitated by the state program the cost of which is ultimately born by EDC customers, pursuant to statute.

By the IGC's and EPGA's logic, any resource that is funded by the EDC's collection of revenue from ratepayers, or otherwise pursuant to a state program, would be unfairly subsidized.

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31 EPGA Comments at 8; PPL Comments at 26; First Energy Comments at 12-13.

32 EPGA Comments, p. 6-11.

33 The EPGA makes no effort to explain, or identify, the amount of the alleged "subsidy" in terms of dollars.

This is ridiculous because it would mean that no vertically integrated utility should be allowed to sell capacity or energy in PJM or any other FERC-regulated wholesale markets. The Act 129 Programs and products should continue to be offered and the individual customers should be given the opportunity to make their own decisions as to whether they are worthwhile, cost effective and sustainable.

In a related argument, PPL argues that it is neither practical nor prudent for EDCs to offer DLC, or any other EE&C program capacity, into the PJM BRA.[34] As stated in their initial comments, the DR Providers agree that the EDC should not be making those offers. The burden associated with those offers should rest with the CSPs.

The DR Providers believe that the peak demand reductions from any future DLC Programs should be offered into the BRA and the DLC Program offers should be made by the CSPs rather than the EDCs, in accordance with Act 129, and should be a function of the market. The logic is discussed more fully below. Offering a DLC program into the BRA achieves the same result as allowing a C&I customer to participate in both PJM's ELRP program and the Act 129 DR Program.

E. Demand Response Resources Created by Act 129 Will Not Have a Negative Economic Impact; the Impact Will Actually be Positive on Pennsylvania's Economy

EPGA's allegation that the Act 129 DR Programs will cause economic harm to the Commonwealth is completely incorrect and speculative and should be disregarded. EPGA contends that demand response resources will push generation resources out of the wholesale capacity markets.[35] Specifically, EPGA argues that each megawatt of capacity from a demand

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34 PPL Comments, p. 19, 28-31.

35 EPGA Comments, p. 11-15.

response resource that clears the PJM-administered capacity auction displaces a megawatt of other capacity that otherwise would clear the market.[36] EPGA argues further that the displacement of capacity from generation resources will have a negative economic impact in the Commonwealth. It is true that PJM can rely on demand response resources instead of generation resources. However, in order for PJM to rely on demand response resources, those resources must be offered into the capacity market at a price low enough to be competitive against generation resources. If EPGA and its members are truly interested in maintaining competitive resources in Pennsylvania, they will always have the right to invest in those resources, making them more efficient, more competitive and extending their useful life.

Indeed, rather than hurting the Commonwealth, there is strong evidence that lower cost capacity from demand response resources boosts Pennsylvania's economy. Demand response is a crucial tool in moving to a smarter grid that is more flexible while improving reliability on the grid. Demand response also helps to keep electricity costs low for all consumers. By strategically reducing electricity consumption, demand response can allow lower reserve margins in PJM and help shave peak demand.[37] This leads to economic savings for all Pennsylvanians. For example, a 2007 study by the Brattle Group reported that a five percent decrease in peak demand in the United States would yield $3 billion savings in electricity costs each year.[38] In PJM alone, the

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36 *Id.* at 11.

37 http://theenergycollective.com/adamjames/221876/demand-response-cuts-need-new-generation-pjm.

38 Faruqui, Ahmed, Ryan Hledik, Sam Newell, and Johannes Pfeifenberger. (2007). "The Power of Five Percent: How Dynamic Pricing Can Save $35 Billion in Electricity Costs." The Brattle Group. It is available at: http://www.smartgrid.gov/sites/default/files/doc/files/The_Power_Five_Percent_How_Dynamic_Pricing_Can_Save_35_Billi_200709.pdf

savings related to demand response have been estimated to be $275 million per year,[39] a portion of which would redound to the benefit of the Commonwealth.

F. Act 129 DR Programs will Complement PJM's DR Programs

The DR Providers strongly disagree with the statements that the Act 129 DR Programs are duplicative of PJM's ELRP, or will "compete" or "interfere" with PJM programs.[40] To the contrary, demand response is an integral part of PJM's markets for capacity,[41] energy,[42] day-ahead scheduling reserves ("DASR"),[43] synchronized reserves,[44] and regulation markets.[45]

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39 http://www.pjm.com/~/media/documents/presentations/pjm-value-proposition.ashx.

40 ICG Comments, p. 5-8; PPL Comments, p. 23-28; FirstEnergy, p. 10-13.

41 http://www.pjm.com/markets-and-operations/demand-response.aspx . Under the RPM, demand resources can offer demand response as a forward capacity resource. Under this model, demand response providers can submit offers to provide a demand reduction as a capacity resource in the forward RPM auctions. If these demand response offers are cleared in the RPM auction, the demand response provider will be committed to provide the cleared demand response amount as capacity during the delivery year and will receive the capacity resource clearing price for this service. http://www.pjm.com/markets-and-operations/demand-response/dr-capacity-market.aspx

42 http://www.pjm.com/markets-and-operations/demand-response.aspx PJM's Economic Load Response program enables demand resources to voluntarily respond to PJM locational marginal prices ("LMP") by reducing consumption and receiving a payment for the reduction. Using the day-ahead alternative, qualified market participants may offer to reduce the load they draw from the PJM system in advance of real-time operations and receive payments based on day-ahead LMP for the reductions. The economic program provides access to the wholesale market to end-use customers through Curtailment Service Providers to curtail consumption when PJM LMPs reach a level where it makes economic sense. http://www.pjm.com/markets-and-operations/demand-response/dr-energy-market.aspx

43 http://www.pjm.com/markets-and-operations/demand-response.aspx. PJM implemented the DASR market on June 1, 2008. DASR is a market-based mechanism to procure supplemental, 30-minute reserves on the PJM system. The market is intended to provide a pricing method and price signals that can encourage generation and demand resources to provide day-ahead scheduling reserves. http://www.pjm.com/markets-and-operations/demand-response/dr-da-scheduling.aspx

44 http://www.pjm.com/markets-and-operations/demand-response.aspx. The PJM Synchronized Reserve Market provides PJM members with a market-based system for the purchase and sale of the synchronized reserve ancillary service. Demand resources that choose to participate in the Synchronized Reserve Market must be capable of dependably providing a response within 10 minutes and must have the appropriate metering infrastructure in place to verify their response and compliance with reliability requirements and market rules. Synchronized reserve service supplies electricity if the grid has an unexpected need for more power on short notice. The power output of generating units supplying synchronized reserve can be increased quickly to supply the needed energy to balance supply and demand; demand resources also can offer to supply synchronized reserve by reducing their energy use on short notice. http://www.pjm.com/markets-and-operations/demand-response/dr-synchro-reserve-mkt.aspx

45 http://www.pjm.com/markets-and-operations/demand-response.aspx. PJM added the capability of accepting demand reduction offers in the Regulation Market in 2006. Regulation service corrects for short-term changes in electricity use that might affect the stability of the power system. It helps match generation and load and

Demand response can compete equally with generation in these markets.[46] As acknowledged by some Commenters, the Act 129 DR Programs are separate and distinct from the PJM ELRP. The two programs have completely different goals, yet both allow customers to conserve energy and reduce peak load. If demand response programs continue to be developed in Pennsylvania, they can be utilized for the purposes of Act 129, but will also make the PJM wholesale markets more efficient, effectively allowing electricity consumers a larger return on their Act 129 investment than they would otherwise earn.

The PJM ELRP program was not in any way developed to allow Pennsylvania consumers to manage their electricity costs. Rather, the ELRP was designed to ensure system reliability across the PJM footprint. PJM explains the ELRP as follows:

> Emergency demand response primarily represents a mandatory commitment (referred to as Load Management Resources ... AND Demand Resources "DR") to reduce load or only consume electricity up to a certain level when PJM needs assistance to maintain reliability under supply shortage or expected emergency operations conditions. This is considered a mandatory commitment to which penalties will be applied for non-compliance. The CSP's resources must be available to respond to PJM's request to reduce load where the availability depends on the product.[47]

The Act 129 DR Program is focused on conservation and economics specifically for Pennsylvania electricity customers. There is no justifiable reason why both programs could not be offered to all customers. Customers then have options to choose and might participate in one, the other, both or neither of the programs.

The two programs may easily co-exist and be offered with dual participation to all customers. The fact that some large commercial and industrial customers prefer to participate

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adjusts generation output to maintain the desired frequency. http://www.pjm.com/markets-and-operations/demand-response/dr-regulation-market.aspx

46 http://www.pjm.com/markets-and-operations/demand-response.aspx.

47 http://www.pjm.com/~/media/markets-ops/dsr/end-use-customer-fact-sheet.ashx.

only in PJM markets does not justify taking the benefits of the Act 129 DR Programs away from other customers who would participate in both, as the ICG suggests.[48] Notwithstanding the foregoing, some parties are concerned that the Act 129 peak demand reduction programs will interfere with existing competitive market programs.[49] The ICG attempts to show that the Act 129 DR Program interferes with the competition between a peak shaving strategy and a PJM ELRP participation strategy.[50] But this concern is misplaced. Demand response programs can respond to both reliability emergencies and peak load reduction directives. It is possible that a customer: (1) may wish to participate in both, or (2) may only wish to curtail demand in one program (such as a reliability emergency), but not wish to curtail under the other program (such as a peak load reduction directive). ICG's argument ignores the fact that different structures and incentives will appeal to different customers. Demand response programs are not "one size fits all," and the ability to choose between structures and incentives will enhance participation in reliability programs and energy efficiency and demand reduction programs. Accordingly, the choices valued by a majority of customers[51] should not be abrogated in their entirety in favor of a PJM ELRP-only strategy; nor should customers be forced to make an either/or decision.

In the Tentative Order, the Commission explained dual participation with Act 129 as follows:

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48 ICG Comments at 5-8. In its Comments, the ICG questions whether DR Programs for Large Commercial and Industrial ("C&I") customers should be adopted for future phases of the Commission's Act 129 EE&C Program because demand response incentives and other price signals are already available to Large C&I customers. The ICG submits that the Act 129 DR Program "will likely compete" with PJM's ELRP and may provide additional compensation for load curtailment activities that would be undertaken based on incentives and market signals that are already in place.

49 FirstEnergy Comments, p. 10-13; EPGA Comments, p. 6-11.

50 ICG Comments at 6.

51 SWE Report survey results shows over 2/3 of customers participate in both Act 129 DR and PJM programs., p. 29.

> The SWE recognizes that, in Phase I, many commercial and industrial customers participated in the Act 129 DR programs, as well as PJM's ELRP. Because there is a limited amount of load any given customer can reduce, the SWE noted that if PJM has already secured capacity from a customer, that customer's participation in an EDC's Act 129 LC program may offer little or no additional value. The SWE notes, however, that it is possible that a customer may not have enrolled in the PJM program if the revenue stream from the Act 129 LC program was not available. Based on the SWE's attribution surveys regarding the Phase I programs, this was frequently the case. Notwithstanding these Phase I findings, SWE recommends that the Commission carefully consider such dual participation when implementing any future LC programs. Specifically, the SWE notes that the Commission should ensure that such future LC programs provide incremental value to the competitive markets already in place.
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> . . .
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> Regarding participation in the SWE's prospective DR model, those commercial and industrial customers enrolled in PJM's ELRP would not be eligible to participate in the Act 129 DR programs. Additionally, those commercial and industrial customers who do participate would receive approximately the same incentive per MWh curtailed as received in Phase I, but would also receive an upfront payment for its capacity commitment. The SWE assumes a payment structure that would not be incentive enough for customers to leave the PJM ELRP, thus avoiding a scenario in which Act 129 programs and the PJM ELRP are in direct competition.[52]

As stated in the DR Providers' initial comments, there are numerous analogous situations in which consumers can simultaneously receive benefits from dual incentive programs. For example, a taxpayer may receive both federal and state income tax deductions for the same item. With certain renewable energy projects, such as solar projects, a developer may receive multiple incentives from multiple sources, including federal grants, state grants, utility rebates, accelerated depreciation, and no-interest loans and renewable energy credits. Such incentives work together and can be the determining factor for a customer. There is simply no justifiable reason why the Commission should put constraints on dual participation.

Another reason to permit dual participation is that the Act 129 DR Program is solely for Pennsylvania stakeholders; thus assuring that some of the benefits will accrue to Pennsylvania

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[52] PUC Tentative Order at 31-33. (*Emphasis added*).

ratepayers. Moreover, if dual participation were not allowed and if the Act 129 DR Programs were designed to pay less than the PJM ELRP, no rational customer would ever choose to participate in the Act 129 DR Programs. The converse is true as well.

In an attachment to their initial comments, the DR Providers referred to the New York market where the New York Independent System Operator ("NYISO") operates emergency and economic programs, very similar to PJM's. Simultaneously, ConEd, the EDC serving New York City and surrounding areas, offers contingency and peak reduction programs layered on top of the NYISO programs. This demonstrates that EDC retail programs and wholesale market programs offered by the ISO can co-exist, offer different products, and do not adversely impact the competitive market for each.[53] The New York situation highlights how Federal and State programs can complement, rather than compete with each other. Notable also is the fact that there has been no suggestion, let alone a judicial finding, that the ratepayer-funded ConEd DR programs impinge impermissibly on Federal wholesale rate setting authority.

PECO points out that residential and small commercial and industrial ("C&I") customers cannot directly participate in PJM's demand response markets because of PJM requirements for minimum demand reductions of at least 100 kW. While there are allowances in PJM's ELRP that attempt to help overcome this barrier, the simple fact is that from the perspective of an individual residential or small C&I customer, demand response technology is not likely to be cost effective for that single customer. This is exactly why the state programs are so essential. The individual customers do not see directly the benefit of avoided transmission and distribution costs; nor do they see the effect they have on other customers' electricity price. The entirety of the customer base benefits from demand response program participation by a few.

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[53] See DR Providers' Comments, at 12, footnote 21 citing recent ConEd filing as Attachment 1 to the DR Providers' Comments.

G. The Act 129 DR Programs Can and Should be Improved

For the reasons set forth in the DR Providers' initial comments, the DR Providers believe that the Act 129 Programs can be modified to achieve the required reductions in consumption in a cost-effective manner. These improvements are set forth in the Commission's Tentative Order and include improvements to both residential and C&I programs. OCA and PECO support most of the Commission's proposed changes to the residential/mass market DLC programs with a few suggested improvements.[54] The DR Providers agree and welcome the support for those programs, but also believe the C&I programs should be included moving forward.

H. Adequate Time Exists for the Implementation of Modifications to the Act 129 DR Programs

It is crucial that the Commission provide the EDC's with adequate time to implement modifications to their DR Programs. FirstEnergy contends that there are practical challenges to implementing future peak demand reduction programs.[55] Specifically, FirstEnergy notes that: (1) budgets are not available and would need to be established to develop and implement any peak demand reduction programs;[56] and (2) there is not adequate time to implement any "new" peak demand reduction programs.[57]

PECO believes it is essential that the Commission provide customers, CSPs, and EDCs with adequate time to comment on future findings and develop plans to implement any additional requirements well in advance of the Act 129 peak demand reduction statutory deadline of May 31, 2017. PECO believes that it must have a Commission-approved plan in place by June 1, 2015. The Commission should also ensure that all stakeholders are given a full opportunity to

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54 OCA Comments, p. 8-10; PECO Comments p. 5-10.

55 FirstEnergy Comments, p. 7-9.

56 FirstEnergy Comments, p. 7-8.

57 FirstEnergy Comments, p. 9.

participate in the design of any demand response studies and to address any conclusions regarding peak load reduction requirements before such requirements are finalized.

PECO proposed the following Schedule:

- August 1, 2014 - Release SWE Demand Response Study and Phase III Tentative Implementation Order on Phase III
- September 12, 2014 - Tentative Order Comments due
- September 26, 2014 - Tentative Order Reply Comments due
- November 3, 2014 - Final Phase III Implementation Order
- February 2, 2015 - EDCs File Phase III Plans
- June 1, 2015 - Anticipated Commission rulings on Phase III Plans
- June 1, 2016 - Commencement of Phase III Programs

The DR Providers submit that this proposed schedule may not be aggressive enough. For the EDCs to meet their DR Program goals by the statutory deadline of May 31, 2017, the Phase III programs must be fully operational by June 1, 2016. It is not clear that the EDCs can receive a Phase III ruling on its plan only one year earlier, bid the work out, and have DR Programs built and implemented by June 1, 2016. The DR Providers suggest that the Commission should rule on the Phase III plans no later than February 1, 2015 and adjust the schedule in advance of that as necessary to meet that goal. Most notably, based on the PECO proposed schedule, the more aggressive schedule would appear to require that the SWE DR study and Phase III order be moved to perhaps a June or July 2014 deadline.

III. CONCLUSION

The DR Providers appreciate the opportunity to respond to the initial comments of other stakeholders on the SWE's Amended Demand Response Study, the proposed demand response program methodology for future phases of Act 129, and the implementation of demand response potential and wholesale price suppression studies. The DR Providers, with only few exceptions, support the recommendations of the SWE. The DR Providers look forward to working cooperatively with the Commission, the EDCs and other interested stakeholders in this proceeding to develop a new load reduction program that provides cost-effective solutions to electricity customers in Pennsylvania.

[Signature appears on next page]

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