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May 12, 2020

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor (Filing Room)
Harrisburg, Pennsylvania 17105

Re: Petition to Intervene and Answer in Opposition of The Sustainable Energy Fund of Central Eastern Pennsylvania to the Petition of the Industrial Energy Consumers of Pennsylvania to Suspend Implementation of the Act of 129 Phase IV Requirements and for Other Relief, Docket No. P-2020-3019562

Dear Secretary Chiavetta:

Please find enclosed for filing the Answer of the Sustainable Energy Fund of Central Eastern Pennsylvania, in the above-referenced proceeding. Pursuant to the COVID-19 Suspension Emergency Order dated March 20, 2020 and ratified March 26, 2020, the Answer is filed and served electronically. This answer has been served upon the parties IECPA identified in its initial filing dated April 22, 2020.

If you have any questions concerning this filing, please direct them to me. Thank you for your time and attention to this matter.

Respectfully Submitted,

Judith D. Cassel
Micah R. Bucy
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Counsel for The Sustainable Energy Fund of Central Eastern Pennsylvania

Enclosure(s)
cc: Per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Energy and Efficiency Conservation Program	: : : :	Docket No. P-2020-3019562

THE SUSTAINABLE ENERGY FUND OF CENTRAL EASTERN PENNSYLVANIA'S PETITION TO INTERVENE IN AND ANSWER IN OPPOSITION TO THE INDUSTRIAL ENERGY CONSUMERS OF PENNSYLVANIA'S PETITION TO SUSPEND IMPLEMENTATION OF ACT 129 PHASE IV REQUIREMENTS

The Sustainable Energy Fund of Central Eastern Pennsylvania ("SEF") is in receipt of the Industrial Energy Consumers of Pennsylvania's ("IECPA") Petition to Suspend Implementation of the Act 129 Phase IV Requirements and for Other Relief ("Petition"). The SEF does not agree with IECPA's proposal to suspend implementation of Phase IV and therefore, pursuant to 52 Pa. Code §§ 5.71, 5.61, SEF hereby files a Petition to Intervene and an Answer in Opposition to the Petition.

I. <u>SEF Petition To Intervene</u>

1. On April 22, 2020, the Industrial Energy Consumers of Pennsylvania ("IECPA") filed a Petition to Suspend Implementation of Act 129 Phase IV Requirements ("Phase IV Requirements") and for other relief. Specifically, IECPA requested, among other things, to suspend implementation of Phase IV for 270 days, extend Phase III for 270 days, and waive, for the remainder of Phase III, all penalties EDCs can be assessed for failing to achieve energy savings targets.

2. SEF is a, non-profit sustainable energy organization created by a settlement during electric deregulation approved by the Commission and originally funded by ratepayers. SEF assists energy users in overcoming financial, educational and regulatory barriers to a sustainable energy future. Further SEF is dedicated to providing environmentally sound, safe, affordable, and reliable energy to Pennsylvania businesses, municipalities, non-profits, and ratepayers. SEF has participated in Phase I, Phase II, and Phase III of the Commission's implementation of Act 129, and SEF filed comments on April 27, 2020 to the Commission's Phase IV Tentative Implementation. The Petition would impact SEF's stakeholders by reducing and delaying the benefits of energy consumption and energy savings opportunities arising out of the Phase IV Requirements. SEF opposes IECPA's Petition for the reasons below. *See infra*., Section II.

3. The names and address of SEF attorneys are:

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4. To date, the interests of SEF are not represented by any party of record as IECPA, the Office of Consumer Advocate, and the Industrial Customers each support delaying the implementation of Act 129's Phase IV. Thus, SEF satisfies the requirements for standing pursuant to 52 Pa. Code §5.72, and respectfully requests the Commission grant this petition to intervene and the following Answer in Opposition to IECPA's Petition.

II. SEF Answer To IECPA's Petition

SEF opposes IECPA's petition to delay implementation of Act 129's Phase IV by 270 days, or until February 25, 2022, and waive all penalties to which EDCs are subject to under 66 Pa.C.S. § 2806.1(f). IECPA's proposal to extend Phase III without increasing target savings while waiving all penalties associated with achieving target savings for *nine* months and suspending Phase IV for the same amount of time serves as an escape hatch for EDCs to abandon all efforts of energy efficiency those ninth months, if not more. Should the Commission determine to delay the implementation of Phase IV (which SEF opposes), no delay should be greater than the duration of Governor Wolf's Emergency Declaration, or at most the 90-day delay that the Commission provided for in its Emergency Order. Nor should Phase III target savings, and penalties for failing to attain the target savings receive be waived. 66 Pa.C.S. §2806.1(f).[1]

Undoubtedly much has changed since the Tentative Implementation Order ("Tentative Order") was issued by the Commission on March 12, 2020 and it is right that the Commission and stakeholders consider the global health emergency when devising Phase IV but it should not be used to thwart, entirely, the legislature's intent in enacting Act 129 which is to reduce energy consumption.

[1] Pursuant to 66 Pa.C.S. § 2806.1(l), only EDCs with more than 100,000 customers are subject to the requirements of Act 129. Only those qualified EDCs are required to create an Energy Efficiency and Conservation Pan ("EE&C Plan") designed to meet energy savings targets and only qualified EDCs are subject to penalties of § 2806.1(f). And while IECPA, an association of energy-intensive industrial consumers, certainly has standing as an industry stakeholder and will be bound by any Commission action related to Act 129's Phase IV, its interest is distinct from that of an EDC legally required to abide by Act 129 and it is not clear that IECPA has the requisite interest as to when Phase IV is implemented to request the extension of Phase III, suspension of the implementation of Phase IV, and waiving of penalties under § 2806.1(f).

a. <u>The Commission Should Not Grant IECPA's Request To Suspend Implementation Of Phase IV For 270 Days Or Extend Phase III For 270 Days</u>

As a result of the COVID-19 pandemic, IECPA argues that the Statewide Evaluator's ("SWE") reports are "no longer valid or relevant" and that the prudent course of action is to delay implementation to allow for a better understanding of the long-term economic effects by having the SWE conduct a re-evaluation of the industry. Petition 2—4. IECPA also asserts that the Commission has the statutory authority to suspend the implementation of Phase IV because the Act only requires the Commission to evaluate the costs and benefits every five years, 66 Pa.C.S. § 2806.1(c)(3), and because the Commission can shorten or extend the time by which EDCs are required to file new EE&C Plans. Id. at § 2806.1(b)(1)(ii). Petition, 4—5.

If IECPA's relief is granted, then in theory Phase IV would begin February 26, 2022. But IECPA's Petition seeks to "re-evaluate Phase IV goals" and impliedly suggests such re-evaluation would be accomplished by having the SWE update its studies that IECPA contends are "no longer valid or relevant". Petition at 4, 14. If the Commission grants IECPA's Petition, it will be effectively delaying implementation of Phase IV for the requested 270 days *plus* the amount of time it takes the SWE to "re-evaluate the Phase IV goals" which necessarily would include a re-evaluation of the underlying assumptions giving rise to the Phase IV goals. In essence, granting this Petition would bring Act 129 to a screeching halt for the foreseeable future.

IECPA proposes to extend Phase III for 270 days and "mandate" that current and planned Phase III activities restart as soon as is feasible given the COVID-19 pandemic. Petition, 7—8, 11. The idea being that an extension of Phase III will not stop the momentum of EE&C Plans. IECPA asserts that the Commission has the power to extend Phase III because it is not obligated to evaluate the EDC's progress until 2023. Petition, 4—5. SEF agrees with IECPA that EDCs should return to pursuing current and planned projects as soon as it is safe to do so and believes all stakeholders should come together to brainstorm creative solutions to continue the momentum of Phase III during the run-up to Phase IV. But IECPA's proposal to extend Phase III is problematic because it ignores the budgetary constraints that limits EDCs spending on Act 129 programs to 2% of each EDC's annual revenue as of December 31, 2006. 66 Pa.C.S. §2806.1(g). Because §2806.1(g) places a limit on an EDC's total plan costs, any funds expended during an extension of Phase III would count towards that EDC's Phase III plan. And although EDCs may not yet be approaching the budgetary constraints of § 2806.1(g), if EDCs pursued their EE&C Plans during IECPA's proposed nine month extension of Phase III in earnest it is possible §2806.1(g) could become relevant and in turn may subject EDCs to the penalties found at § 2806.1(f).

b. Act 129 Does Not Permit The Waiver Of Its Penalty Provisions

Section 2806.1(f) includes a mandatory penalty provision in the event an EDC fails to comply with the Act. IECPA's Petition seeks to have these penalties waived for the duration of Phase III, presumably whether its request to extend Phase III is granted or denied. Petition, 11—13. As discussed above, SEF does not believe Phase IV should be delayed because it is not practical to extend Phase III because of the budgetary constraints and the result is that the momentum of Act 129's Phase III is stopped in its tracks.

Although IECPA's Petition does not justify its proposal to waive penalties in response to EDCs budgetary limitations under § 2806.1(g), such a proposal must be rejected for that reason. Section 2806.1(f) imposes mandatory penalties on EDCs should they fail to meet the requirements of Act 129. These penalties are not discretionary: an EDC that fails to file an Act 129 Plan "shall be subject to a penalty of $100,000 per day until the plan is filed", § 2806.1(f)(1)(i), an EDC "shall be subject to a civil penalty" of $1,000,000—$20,000,000 if it fails to achieve the Act 129 targets established by the Commission. § 2806.1(f)(2)(i), and if an EDC fails to achieve the targets established by the Commission, then responsibility to attain those savings targets "shall be transferred" to the Commission. § 2806.1(f)(2)(ii). Noticeably absent from this statutory language is discretion to waive the penalties found at § 2806.1(f), and therefore, whether Phase III is extended or not, the Commission lacks authority under Act 129 to grant IECPA's request.

c. <u>If Phase IV Is To Be Suspended And Phase III To Be Extended It Should Be For No More Than 90 Days</u>

SEF, like IECPA recognizes and understands that the COVID-19 pandemic has brought new business challenges, but delaying Phase IV for 270 days is a disproportionate action to an uncertain and unforeseeable future. The Commission proactively planned for interruptions caused by the COVID-19 pandemic by issuing its Emergency Order, Docket No. M-2020-3019262,[2] that authorizes a 90-day extension for regulatory or statutory deadlines. If the Commission deems it prudent to delay implementation of Phase IV and to extend Phase III it should do so by no more than the 90 days its previously issued in its Emergency Order.

SEF does not believe such a suspension of Phase IV and extension of Phase III is warranted at this time because Governor Wolf has initiated a phased re-opening of the state which will result in a greater number of businesses operating, more people working, and an increase in energy consumption. On May 8, 2020, Governor Wolf initiated the phased re-opening of 24 counties across the state and announced an additional 13 counties are set to re-open within the next week. While this phased re-opening will not be a return to business as usual pre-COVID-19 pandemic, businesses are permitted to re-open which means furloughed employees will begin to return to work, businesses will be hiring, and energy consumption will increase. SEF agrees that COVID-19 should be a consideration during the finalization and implementation of Phase IV, but an

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[2] The Emergency Order indicates that the Commission may suspend, extend, or otherwise alter deadlines, but it does not permit the Commission to waive statutory obligations such as those found §2806.1(f).

appropriate response must remain flexible and proportionate to the challenges the industry faces. Since the filing of IECPA's Petition, new circumstances—the phased re-opening of the state—have arisen and these deserve due consideration. For this reason SEF believes that if any delay/extension is to be granted, it should be for no more than 90 days, which will allow the industry stakeholders a more flexible approach to responding to this health pandemic than putting a hard-stop on the momentum achieved during Phase III.

WHEREFORE, for the aforementioned reasons SEF respectfully requests that the Pennsylvania Public Utility Commission deny IECPA's Petition to suspend implementation of Phase IV for 270 days, extend Phase III by 270 days, and waive the statutory penalties for the remainder of Phase III. In the alternative, if the Commission does suspend implementation of Phase IV and extend Phase III, then it should only do so for a period of no more than 90 days.

Respectfully submitted,

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Counsel for The Sustainable Energy Fund of Central Eastern Pennsylvania

Date: May 12, 2020

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Energy and Efficiency Conservation Program	: : : :	Docket No. P-2020-3019562

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party) and the Commission's March 26, 2020 COVID-19 Suspension Emergency Order.

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Date: May 12, 2020