

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held February 22, 2024

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Joint Petition of Metropolitan Edison	M-2020-3020820
Company, Pennsylvania Electric Company,	M-2020-3020821
Pennsylvania Power Company and West	M-2020-3020822
Penn Power Company for Consolidation of	M-2020-3020823
Proceedings and Approval of a Minor	
Change to Act 129 Phase IV Energy	
Efficiency and Conservation Plan	

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a Joint Petition for Reconsideration from Staff Action (Joint Petition) filed by Metropolitan Edison Company (Met Ed), Pennsylvania Electric Company (Penelec), Pennsylvania Power Company (Penn Power), and West Penn Power

Company (West Penn) (collectively, FirstEnergy, or the Company¹) on August 21, 2023, relative to the above-captioned proceeding. The Staff Action for which reconsideration is sought is a Secretarial Letter issued on August 11, 2023 (*August 2023 Secretarial Letter*), which denied and dismissed FirstEnergy's Petition for Approval of a Minor Change (Proposed Plan Modification) to its Act 129 Phase IV Energy Efficiency and Conservation (EE&C) Plan (Phase IV Plan, or Plan).² The Pennsylvania State University (PSU) filed an Answer in Support of the Petition (Answer) on August 31, 2023. For the reasons set forth herein, we will grant the Joint Petition; rescind the *August 2023 Secretarial Letter*; and approve the Proposed Plan Modification, consistent with the discussion in this Opinion and Order.

I. Background and Procedural History

On October 15, 2008, Act 129 of 2008 (Act 129 or Act) was signed into law with an effective date of November 14, 2008. Among other requirements, Act 129 directed the Commission to adopt an EE&C Program, under which each of the Commonwealth's largest electric distribution companies (EDCs) was required to implement a cost-effective EE&C plan to reduce energy consumption and demand. Specifically, Act 129 required each EDC with at least 100,000 customers to adopt an EE&C plan to reduce energy demand and consumption within its service territory.

¹ At the time of initiation of the instant proceeding, FirstEnergy consisted of four separate companies: Met Ed, Penelec, Penn Power, and West Penn Power. However, these companies have since been merged into a single entity, known as FirstEnergy Pennsylvania Electric Company. *See, Joint Application of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, West Penn Power Company, Keystone Appalachian Transmission Company, Mid-Atlantic Interstate Transmission, LLC, and FirstEnergy Pennsylvania Electric Company, et.al.*, Docket Nos. A-2023-3038771, *et. al* (Final order entered December 7, 2023).

² Because the instant Joint Petition challenges the action taken in the *August 2023 Secretarial Letter* and was filed within twenty (20) days of the issuance of the Secretarial Letter, we shall regard the Joint Petition as a Petition for Reconsideration from Staff Action pursuant to 52 Pa. Code § 5.44(a).

Initially, Act 129 required each affected EDC to adopt an EE&C 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. The Act also required the Commission to develop and adopt an EE&C Program by January 15, 2009, and to set out specific issues the EE&C Program must address. 66 Pa. C.S. § 2806.1(a).

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 was to 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 directed the Commission to evaluate the costs and benefits of the Commission's EE&C Program and of the EDCs' approved EE&C plans by November 30, 2013, and every five years thereafter. The Act provided that the Commission must adopt additional incremental reductions in consumption and peak demand if it determines that the benefits of the EE&C Program exceed its costs.

Consistent with the above, on August 3, 2012, the Commission issued an Implementation Order at Docket Nos. M-2012-2289411 and M-2008-2069887 (*Phase II Implementation Order*), which established required standards for Phase II EDC EE&C plans (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 the EDCs' Phase II EE&C plans. Within the *Phase II Implementation Order*, the Commission tentatively adopted EDC-specific consumption reduction targets to be met by May 31, 2016. The Commission subsequently approved a Phase II EE&C Plan (and, in some cases, modifications to the plan) for each affected EDC.

The Commission also subsequently issued an Implementation Order on June 19, 2015, at Docket No. M-2014-2424864 (*Phase III Implementation Order*) for Phase III of the EE&C Program. The Commission determined in its *Phase III Implementation Order* that additional reductions in consumption and peak demand were cost-effective and therefore prescribed reductions in consumption and peak demand targets to be met by May 31, 2021. The Commission subsequently approved a Phase III EE&C Plan (and, in some cases, modifications to the plan) for each affected EDC.

On June 18, 2020, the Commission issued an Implementation Order at Docket No. M-2020-3015228 (*Phase IV Implementation Order*) establishing the required incremental reductions in consumption and peak demand, and standards that each Phase IV plan was to meet, and providing guidance on the procedures to be followed for submittal, review, and approval of all aspects of EE&C plans for the period from June 1, 2021 through May 31, 2026. The *Phase IV Implementation Order* directed EDCs to file Phase IV EE&C plans by November 30, 2020.

On November 30, 2020, FirstEnergy timely filed a Petition requesting approval of its Phase IV Plan at the above-captioned dockets. (Phase IV Plan Proceeding). FirstEnergy's Phase IV Plan included a broad portfolio of energy efficiency and energy education programs and initiatives designed to meet the goals established by Act 129 and the Commission's *Phase IV Implementation Order*, as well as other important policy goals and objectives.

Also on November 30, 2020, FirstEnergy filed a *Joint Petition for Consolidation of Proceedings and Approval of Energy Efficiency and Conservation Plans Phase IV of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company*. The matter was assigned to Administrative Law Judges (ALJs) Mark A. Hoyer and Emily I. DeVoe.

On February 16, 2021, FirstEnergy, the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), the Community Action Association of Pennsylvania (CAAP), the Industrials,³ and PSU filed a Joint Petition for Full Settlement of All Issues (Joint Settlement) related to First Energy's Phase IV Plan.

On March 2, 2021, ALJs Hoyer and DeVoe issued an Order Certifying the Record to the Commission (*Certification Order*).⁴

On March 25, 2021, the Commission entered an Opinion and Order in this proceeding, which: (1) granted the Joint Petition for Full Settlement of All Issues, thereby approving the Joint Settlement, without modification; and (2) granted FirstEnergy's Petition requesting approval of its Phase IV Plan, which thereby approved the Phase IV Plan, as modified by the terms of the Joint Settlement. *See, Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Consolidation of Proceedings and Approval of Act 129 Phase IV Energy Efficiency and Conservation Plan*, Docket Nos. M-2020-3020820, *et al.* (Opinion and Order entered March 25, 2021)(*March 2021 Order*).

On July 7, 2023, FirstEnergy filed its Proposed Plan Modification wherein it requested to modify its current Phase IV Plan. Specifically, through the Proposed Plan

³ The Industrials included the Met-Ed Industrial Users Group (MEIUG), the Penelec Industrial Customer Alliance (PICA), and the West Penn Power Industrial Intervenors (WPPII).

⁴ Pages 5 through 10 of the *Certification Order* provided the complete list of documents that comprised the evidentiary record, which was certified to the Commission for consideration and disposition, in accordance with the *Phase IV Implementation Order*.

Modification, the Company sought approval of a single “minor” change to the programs contained in its Phase IV Plan in accordance with the Commission’s expedited review process as set forth in *Energy Efficiency and Conservation Program*, Docket No. M-2008-2069887 (Final Order entered June 10, 2011) (*Minor Plan Change Order*).

In accordance with the *Minor Plan Change Order*, comments regarding the Proposed Plan Modification were due within fifteen days, or by July 22, 2023. Reply comments were due within twenty-five days, or by August 1, 2023. No comments were timely filed⁵ and no hearings were held.

On August 11, 2023, the Commission issued the *August 2023 Secretarial Letter*, wherein Commission Staff denied FirstEnergy’s Proposed Plan Modification.

As previously noted, on August 21, 2023, FirstEnergy filed the instant Joint Petition. On August 31, 2023, PSU filed its Answer requesting that the Company’s Joint Petition be granted.⁶

II. Legal Standards

A. Approval of Petitions to Amend an EE&C Plan

We have previously held that a petition to amend a Commission-approved Act 129 EE&C Plan is a petition to amend a Commission Order, pursuant to our Regulations at 52 Pa. Code §§ 5.41 and 5.572. *Minor Plan Change Order* at 14. While such a petition may raise any matter designed to convince us that we should exercise our

⁵ We note that PSU filed Comments on August 10, 2023. However, as these Comments were untimely filed, we will not consider them.

⁶ As PSU’s Answer was timely filed, we shall consider the arguments contained therein.

discretion to amend or rescind a prior order, at the same time “[p]arties . . . , cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them.” *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (Order entered December 17, 1982) (*Duick*) (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. 1935)). Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission. *Duick* at 559.

B. Petitions for Reconsideration from Staff Action

Petitions for Reconsideration from Staff Action are governed by Section 5.44(a) of the Commission’s Rules of Administrative Practice and Procedure, which provides the following:

Actions taken by staff, other than a presiding officer, under authority delegated by the Commission, will be deemed to be the final action of the Commission unless reconsideration is sought from the Commission within 20 days after service of notice of the action, unless a different time-period is specified in this chapter or in the act.

52 Pa. Code § 5.44(a).

The Pennsylvania Public Utility Code (Code), 66 Pa. C.S., establishes a party’s right to seek relief following the issuance of our final decisions pursuant to Subsection 703(f), relating to rehearing, as well as Subsection 703(g), relating to the rescission and amendment of orders. 66 Pa. C.S. § 703(f) and § 703(g). Such requests for relief must be consistent with Section 5.572 of our Regulations, *supra*, relating to petitions for relief following the issuance of a final decision. 52 Pa. Code § 5.572.

Because the Petition for Reconsideration from Staff Action in this case constitutes a Petition to Amend an EE&C Plan, we shall apply the standards set forth in *Duick, supra*.

With respect to the burden of proof, 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, 602 (Pa. Cmwlth. 1990). Additionally, in considering the appeal from Staff Action, we note that Section 332(a) of the Code, 66 Pa. C.S. § 332(a), provides that the party seeking affirmative relief from the Commission has the burden of proof. In this proceeding, FirstEnergy is the party seeking affirmative relief from the Commission. Therefore, FirstEnergy is the party with the burden of proof. *See, Application of 610 Hauling, LLC, t/a College Hunks Hauling Junk, for the right to begin to transport, as a common carrier, by motor vehicle, household goods in use, from points in the counties of Chester, Delaware, Montgomery, Philadelphia, and Bucks, to points in Pennsylvania*, Docket Nos. A-2012-2334103 and A-8915269 (Opinion and Order entered November 5, 2015), citing *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950) (*Se-Ling Hosiery*).

In *Se-Ling Hosiery, supra*, the Pennsylvania Supreme Court held that the term “burden of proof” means a duty to establish a fact by a preponderance of the evidence. The term “preponderance of the evidence” means that one party has presented evidence that is more convincing, by even the slightest degree, than the evidence presented by the opposing party. Additionally, the Commission must ensure that the decision is supported by substantial evidence in the record. The Pennsylvania appellate courts have defined substantial evidence to mean such relevant evidence that a reasonable mind may accept as adequate to support a conclusion; more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Application of 610 Hauling, LLC, t/a College Hunks Hauling Junk, supra*, citing *Norfolk & Western*

Railway Co. v. Pa. PUC, 413 A.2d 1037 (Pa. 1980); *Murphy v. Pa. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

III. Discussion

At the outset, we note that any issue we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. 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).

A. FirstEnergy's Proposed Plan Modification

In its Proposed Plan Modification, FirstEnergy explained that, at present, Section 1.6 of its Phase IV Plan states that for the measures offered under the Plan, the Company assumes that it “retain[s] all Phase IV Plan program Capacity Rights to support [its] offered EE [energy efficiency] resources and to ensure no double counting of EE resources by third parties.” However, the Company proposed a single minor change to its Plan wherein it would change the conditions of its EE&C measures that have capacity rights associated with them that can be bid into the PJM Interconnection, LLC (PJM) Forward Capacity Market (FCM). More specifically, the Company requested permission to add a footnote to Section 1.6 of the Phase IV Plan to enable commercial and industrial customers who had existing contracts with third party demand response service providers (providers) that were executed before June 1, 2021, *i.e.* the start of Phase IV of Act 129, to have the option of retaining the PJM capacity rights associated with those EE&C projects. FirstEnergy asserted that for customers to retain those capacity rights under the Proposed Plan Modification, their project applications must: (1) be submitted to the Company after the effective date of the Commission’s Order approving the Proposed

Plan Modification; and (2) provide proof of the relevant contract with a provider. Proposed Plan Modification at 2-3.

According to the Company, this proposed change would allow customers with such preexisting contracts to participate in the Phase IV Plan programs without potentially impairing their existing contractual relationships with their providers. The Company reasoned that customers with such contracts may be reluctant to participate in the Phase IV Plan programs because, to do so, they must relinquish their PJM capacity rights associated with their EE&C measures to receive incentives from the Company. FirstEnergy further claimed that if those customers did participate in the Phase IV Plan, they may be concerned about breaching their contracts with the providers, given that those contracts may require the providers to bid the PJM capacity rights associated with the customers' EE&C measures. The Company insisted that by implementing the Proposed Plan Modification, FirstEnergy would increase the potential participants in the Phase IV Plan programs without negatively affecting the Company's ability to meet all its required savings and peak demand reduction (PDR) targets. Additionally, FirstEnergy asserted that it will still retain the PJM capacity rights associated with EE&C measures implemented by customers that are not entered into the above-referenced contracts, or who choose to decline the option that the Proposed Plan Modification affords. Further, FirstEnergy stressed that it has been, and will continue to, comply with its obligation to bid a portion of the projected PDRs associated with its EE&C measures into the PJM FCM. Proposed Plan Modification at 3-4.

FirstEnergy attached, as Appendix A, a black-lined amended page to its Phase IV Plan indicating the proposed addition of the footnote under Section 1.6.

B. August 2023 Secretarial Letter⁷

In the *August 2023 Secretarial Letter*, Commission Staff found that the Proposed Plan Modification is not in the best interest of FirstEnergy's customers. According to Commission Staff, the Company's Proposed Plan Modification is discriminatory because it would prevent commercial and industrial customers without existing contracts with third-party demand response service providers from having the option to retain PJM capacity rights associated with EE&C projects. Commission Staff also found that FirstEnergy failed to provide sufficient rationale, or to file sufficient documentation to support its Proposed Plan Modification, in accordance with the requirements set forth in the *Minor Plan Change Order*. Additionally, Commission Staff found that the Proposed Plan Modification was not compliant with the *Phase IV Implementation Order*. Therefore, Commission Staff concluded that FirstEnergy failed to meet its burden of proof such that its Proposed Plan Modification should be denied. *August 2023 Secretarial Letter* at 2-3.

⁷ In the *Minor Plan Change Order*, the Commission delegated its authority to review, approve, or disapprove minor EE&C Plan changes to Commission Staff, with assistance from staff of the Law Bureau. The *Minor Plan Change Order* directed Staff to issue a Secretarial Letter approving, denying, or transferring to the Office of Administrative Law Judge (OALJ) for hearings, some, or all of a petition's proposed minor plan changes. *Minor Plan Change Order* at 18-19. Namely, the Commission delegated its authority to staff of the Bureau of Conservation, Economics and Energy Planning, with assistance from staff of the Bureau of Fixed Utility Services and the Law Bureau. See, *Id.* at 22. In a Final Procedural Order entered on August 11, 2011, at Docket No. M-2008-2071852, the Commission transferred the staff and functions of the Bureaus of Fixed Utility Services and Conservation, Economics and Energy Planning to the Bureau of Technical Utility Services (TUS). See, *Implementation of Act 129 of 2008 Organization of Bureaus and Offices, Final Procedural Order* at 4.

C. FirstEnergy's Joint Petition

In its Joint Petition, FirstEnergy stresses that its Proposed Plan Modification consisted of a single, minor EE&C Plan change that was not opposed by any party. Therefore, FirstEnergy argues, Commission Staff has erroneously denied the Proposed Plan Modification. First, the Company submits that its Proposed Plan Modification is just, reasonable, and in the best interest of its customers. FirstEnergy restates its argument that its proposal will allow commercial and industrial customers who have existing contracts with third party demand response service providers that were executed before June 1, 2021, to participate in the Company's Phase IV Plan programs without potentially impairing their existing contractual relationships with these providers. FirstEnergy insists that this will expand the number of participants in FirstEnergy's Phase IV programs, without negatively affecting FirstEnergy's ability to meet all of its required savings and PDR targets. FirstEnergy posits that this will result in a benefit to the Company, the Company's customers, and the Commonwealth as a whole. Joint Petition at 2, 8.

FirstEnergy reinforces that commercial and industrial customers with the existing contracts outlined above may be reluctant or unable to participate in the Phase IV Plan programs because, to do so, they must relinquish their PJM capacity rights associated with their EE&C measures to be eligible to receive incentives from the Companies. FirstEnergy remains of the opinion that absent the Proposed Plan Modification, if those customers did participate in the Phase IV Plan, they may be concerned about breaching their contracts with the providers, given that those contracts may require the providers to bid the capacity rights associated with the customers' EE&C measures into the PJM FCM. In the Company's view, Commission Staff's decision to deny the Proposed Plan Modification will prohibit FirstEnergy from removing unnecessary barriers that prevent customers from participating in the Phase IV EE&C programs in the way they did in previous phases of Act 129. Joint Petition at 6, 7.

Next, FirstEnergy contends that contrary to the findings of Commission Staff, the Company complied with the *Minor Plan Change Order* by providing “sufficient documentation” to support the Proposed Plan Modification, including citing to Section 1.6 of the Phase IV Plan, quoting the current language under this section, and providing “black-line pages” outlining the proposed change and an explanation of how the proposed change will affect the current Plan. FirstEnergy stresses that it explained that the Proposed Plan Modification will not increase the overall costs to any customer class and that it will have no impact on any budget, savings, or Total Resource Cost (TRC) Test figures that the Company outlined in its Phase IV Plan. According to FirstEnergy, although Commission Staff noted in the *August 2023 Secretarial Letter* that the Company’s proposed change will not negatively affect its ability to meet its savings targets, Commission Staff failed to mention that the Proposed Plan Modification will have no impact on the overall costs to any customer class or any budget or TRC Test figures in the Phase IV Plan. Joint Petition at 3, 8-9.

Additionally, FirstEnergy disputes the finding of Commission Staff that the Company’s Proposed Plan Modification does not comply with the Commission’s *Phase IV Implementation Order*. Namely, FirstEnergy submits that the *Phase IV Implementation Order* did not mandate that EDCs retain *all* of the capacity rights associated with commercial and industrial customers’ EE&C projects in Phase IV. Instead, FirstEnergy argues, the *Phase IV Implementation Order* simply required EDCs to bid a portion of the projected PDRs associated with their EE&C measures into the PJM FCM. FirstEnergy continues that it will still retain the PJM capacity rights associated with EE&C measures implemented by customers who are not entered into the contracts described above, as well as those associated with eligible customers who choose to decline the option set forth in the Proposed Plan Modification. In addition, FirstEnergy restates that it has been, and will continue to, comply with its obligation to bid a portion of the projected PDRs associated with its EE&C measures into the PJM FCM. Joint Petition at 3, 10-11.

Lastly, FirstEnergy disputes Commission Staff’s finding that the Proposed Plan Modification is discriminatory. FirstEnergy submits that under Section 1502 of the Code, only “unreasonable” discrimination in service is prohibited. FirstEnergy insists that its Proposed Plan Modification is not unreasonably discriminatory. To the contrary, FirstEnergy provides that there are well supported and justifiable reasons for treating commercial and industrial customers with preexisting contracts differently from those without such contracts. Joint Petition at 3, 11-12.

As an alternative to its primary position above, FirstEnergy requests that to the extent that the Commission finds the evidence supporting the Company’s Proposed Plan Modification to be lacking, then the Commission refer this matter to the OALJ so that an evidentiary record can be developed. FirstEnergy submits that this outcome would be preferable to having its Proposed Plan Modification, and its Joint Petition, denied outright. Joint Petition at 12-13.

D. PSU’s Answer

In its Answer, PSU submits that the Commission should grant the Company’s request for reconsideration and approve the Proposed Plan Modification. According to PSU, Commission Staff’s decision in the *August 2023 Secretarial Letter* to deny FirstEnergy’s Proposed Plan Modification runs contrary to the fundamental purposes of Act 129. In addition, PSU highlights FirstEnergy’s observation that, to date, no party has filed any comments in opposition to the proposed changes. Answer at 1-2.

First, PSU states its agreement with FirstEnergy that the Proposed Plan Modification represents a minor change that does not result in unreasonable discrimination. Rather, PSU submits that this modification would result in *less* discrimination. According to PSU, Section 1.6 of FirstEnergy’s Phase IV Plan already makes a discriminatory distinction because, as this section currently is written, entities

whose projects have capacity rights that can be assigned to FirstEnergy are eligible to participate in the Phase IV Plan. In contrast, PSU continues, FirstEnergy has currently deemed ineligible those projects without capacity rights that can be assigned to the Company, because they were previously assigned to a third party. As such, PSU argues that the Proposed Plan Modification prevents the “original discrimination” of the current Phase IV EE&C Plan from being retroactive, which will encourage more participation in the Plan’s programs. For this reason, PSU insists that the Proposed Plan Modification will reduce the discrimination already inherent in FirstEnergy’s implementation of the current Plan. Answer at 3-4.

Next, PSU submits that the Proposed Plan Modification is just and reasonable because it is consistent with the efficiency and conservation purposes the Pennsylvania Legislature set forth in Act 129. In this regard, PSU argues that FirstEnergy’s proposal clarifies that projects for which capacity rights have been assigned to a provider prior to the beginning of the Phase IV EE&C Plan Phase can still participate in the Plan. PSU restates that this will allow more entities to be eligible to participate in the Plan, resulting in more energy efficiency and conservation. Namely, PSU argues, the Proposed Plan Modification promotes the General Assembly’s intent that institutes of higher education, including PSU, participate in EE&C plans and achieve energy savings. Answer at 5 (citing 66 Pa. C.S. § 2806.1(b)(1)(B)).

PSU also concurs with FirstEnergy’s position that Commission Staff erroneously determined that the Proposed Plan Modification is not compliant with the *Phase IV Implementation Order*. PSU argues, *inter alia*, that the Commission left it to the discretion of the EDCs to determine the amount of capacity rights to acquire and bid into the PJM FCM. PSU proffers that allowing entities to submit projects for participation in the Phase IV Plan where capacity rights were assigned to a third-party provider prior to the current Plan’s implementation is consistent with the discretion the Commission expressly gave EDCs. Answer at 6-7. PSU stresses that FirstEnergy

confirmed that the Proposed Plan Modification will not impact the Company's ability to comply with the *Phase IV Implementation Order's* requirement for bidding projected PDRs into the PJM FCM. *Id.* at 7 (citing Proposed Plan Modification at 4; Joint Petition at 11).

For the above reasons, PSU requests that the Commission grant FirstEnergy's Joint Petition and rescind the *August 2023 Secretarial Letter*. In the alternative, PSU states that it would not oppose referring this matter to the OALJ. Answer at 7-8.

E. Disposition

As discussed above, in the *August 2023 Secretarial Letter*, Commission Staff denied the Proposed Plan Modification, finding that: (1) First Energy failed to provide sufficient rationale to support the Proposed Plan Modification, or to show that it was just and reasonable; (2) FirstEnergy failed to comply with the *Minor Plan Change Order*; (3) the Proposed Plan Modification was discriminatory; and (4) FirstEnergy failed to comply with the *Phase IV Implementation Order*. *August 2023 Secretarial Letter* at 2-3. On review, we disagree with the findings of Commission Staff. Accordingly, we shall grant the Joint Petition and rescind the *August 2023 Secretarial Letter*, consistent with the following discussion.

As an initial matter, we note that pursuant to the requirements of the *Minor Plan Change Order*, FirstEnergy served copies of its Proposed Plan Modification on the OCA, the OSBA, I&E, and all other parties that were parties of record in its Phase IV Plan Proceeding. In addition, FirstEnergy posted a copy of its Proposed Plan Modification on its website. *See*, Proposed Plan Modification at 4-5 (citing *Minor Plan Change Order* at 18). Thus, stakeholders representing a wide range of interests had an opportunity to review FirstEnergy's filing and to provide any comments in opposition,

thereto. However, as FirstEnergy and PSU each observed, the Proposed Plan Modification was uncontested. We specifically highlight that none of the OSBA, the Industrials, or any of the commercial and industrial customers in FirstEnergy's service territory filed comments in opposition. In our view, the lack of opposition to the Proposed Plan Modification lends support to a finding that it is just and reasonable.

In addition to the requirement, *supra*, that an EDC provide notice to I&E, the statutory advocates, and to all parties of record, the Commission required the following of EDCs when proposing a minor change to an EE&C Plan:

The filing must clearly state that it is to be reviewed under the expedited review process for approving proposed minor changes to an EDC's Act 129 EE&C Plan. EDCs are directed to file sufficient documentation to support the proposed minor EE&C Plan change, to include, but not limited to, the affected pages of the plan, a redlined version of the affected pages, and an explanation of how the proposed minor changes affect the previously approved plan.

Minor Plan Change Order at 18. On review of FirstEnergy's Proposed Plan Modification, we note that FirstEnergy identified Section 1.6 of the Phase IV Plan as the section it proposed to modify, quoted the paragraph in Section 1.6 to which it proposed to place a footnote outlining its proposed change, and attached, as Appendix A, a black-line version of the affected pages. *See*, Proposed Plan Modification; Joint Petition at 8.

FirstEnergy explained how the Proposed Plan Modification would affect its current Plan, noting that its proposal would enable commercial and industrial customers who have existing contracts with third party demand response service providers that were executed before June 1, 2021, to have the option of retaining the PJM capacity rights associated with EE&C projects. FirstEnergy also explained the procedure for eligible customers to elect this option, specifying that to retain those capacity rights under the Proposed Plan Modification, the project applications of eligible customers must: (1) be

submitted to the Company after the effective date of the Commission's Order approving the Proposed Plan Modification; and (2) provide proof of the relevant contract with the third party demand response service providers. Proposed Plan Modification at 3; *See also*, Joint Petition at 9.

FirstEnergy further explained the reason for its Proposed Plan Modification. The Company noted, *inter alia*, that under its current Plan, commercial and industrial customers that are entered into the contracts noted above may be reluctant to participate in the Phase IV Plan programs because, to do so, they must relinquish the PJM capacity rights associated with their EE&C measures to receive incentives from FirstEnergy. Thus, FirstEnergy explained that under its Proposed Plan Modification, such customers would now be able to participate in the Plan without potentially impairing their existing contractual relationships with their demand response service providers. Proposed Plan Modification at 3.

Furthermore, FirstEnergy specified that its Proposed Plan Modification would not increase the overall costs to any customer class, nor would it have any effect on any budget, savings targets, or TRC figures set forth in the Company's Plan. *See*, Proposed Plan Modification at 1-2; Joint Petition at 9. Accordingly, we disagree with Commission Staff that FirstEnergy failed to provide sufficient documentation to support its Proposed Plan Modification.

As to the finding of Commission Staff that the Proposed Plan Modification should be denied on the basis that it is discriminatory, we note the following provision of the Code:

No public utility shall, as to service, make or grant any **unreasonable preference or advantage** to any person, corporation, or municipal corporation, or subject any person,

corporation, or municipal corporation to any **unreasonable** prejudice or disadvantage. No public utility shall establish or maintain any **unreasonable** difference as to service, either as between localities or as between classes of service, but this section does not prohibit the establishment of reasonable classifications of service.

66 Pa. C.S. § 1502 (emphasis added). Thus, as FirstEnergy and PSU each note, only *unreasonable* discrimination is prohibited under the Code.

In this present proceeding, we find that FirstEnergy has provided valid reasons for treating its commercial and industrial customers who have preexisting contracts with third party demand response service providers differently from those without such contracts. For example, we note the observation of PSU that absent the footnote FirstEnergy proposes to add to its Plan, projects with capacity rights that can be assigned to First Energy are eligible, while First Energy has found ineligible those projects without capacity rights that can be assigned to the Company, because they were previously assigned to a third party. In short, as currently written, the Plan retroactively penalizes via ineligibility for the EE&C Plan projects where contractual decisions were made that did not impact eligibility at that time. Accordingly, certain of FirstEnergy's customers are currently barred from participating in the Company's Phase IV EE&C programs in the way they did in prior phases of Act 129, resulting in fewer energy efficiency and conservation efforts. PSU Answer at 4; *see also*, Joint Petition at 7.

In contrast, FirstEnergy's Proposed Plan Modification will permit more projects and entities to participate in the EE&C Plan, while requiring entities to provide proof of the relevant contract with the third-party demand response service providers. As a result, this will remove unnecessary barriers to achieving energy savings. *See*, Joint Petition at 7; PSU Answer at 5. We further note that given the lack of opposition to the

Proposed Plan Modification, it is clear that there have been no allegations of undue discrimination raised by the statutory advocates, I&E, or any of the stakeholders in First Energy's service territory.

Moreover, we find that in making its Proposed Plan Modification, FirstEnergy has not circumvented the requirements set forth in the *Phase IV Implementation Order*. As previously discussed, the Proposed Plan Modification will not increase the costs to any customer class, nor will it inhibit the Company from meeting the savings targets set forth in its Plan and approved in our *March 2021 Order*. Additionally, we note that the *Phase IV Implementation Order* states the following, in pertinent part:

For Phase IV of Act 129, EDCs shall nominate a **portion** of the projected PDR in their EE&C Plans into PJM's FCM. We reiterate that this requirement is for a **portion** of the planned PDR and **EDCs have the flexibility to make a business decision regarding the appropriate amount based on the mix of program measures** in its Phase IV EE&C Plan.

Phase IV Implementation Order at 70 (emphasis added). Therefore, nothing in the *Phase IV Implementation Order* states that EDCs must retain 100% of the capacity rights associated with the EE&C projects of its commercial and industrial customers in Phase IV. Rather, as PSU observed, allowing entities to submit projects for participation in the Phase IV Plan where capacity rights were assigned to a third-party demand response provider prior to the current Plan's implementation is consistent with the above discretion the Commission expressly afforded to EDCs. *See*, Answer at 6-7.

Before concluding this section, we note that in our *March 2021 Order*, we explained, as follows:

FirstEnergy states in its Plan that the [Company] plan[s] to offer a portion of their [PDR]s into PJM's FCM from the

portfolio of programs and measures that are eligible for PJM. FirstEnergy explains that the Companies will base their actual offer values on their experience evaluating programs for PJM capacity market participation, taking into account capacity ownership rights, Evaluation, Measurement and Verification (EM&V) results and costs, changing PJM market rules, and other variables to balance the risk and cost of capacity market participation with the anticipated revenue.

March 2021 Order at 23. FirstEnergy has represented that its Proposed Plan Modification will not affect its ability to comply with the requirements set forth in the Phase IV Implementation Order, and, by extension, the *March 2021 Order*, that it bid a portion of its projected PDRs into the PJM FCM. *See*, Joint Petition at 10-11. We further note that no party has alleged that FirstEnergy will not adhere to this requirement.

In view of the above, we find that the Proposed Plan Modification is in the public interest, will result in more energy efficiency, and will not inhibit FirstEnergy's ability to comply with its Phase IV obligations. Accordingly, we shall grant the Joint Petition, rescind the *August 2023 Secretarial Letter*, and approve the Proposed Plan Modification.

IV. Conclusion

For the reasons set forth above, we shall grant the Joint Petition, rescind the *August 2023 Secretarial Letter*, and approve FirstEnergy's Proposed Plan Modification, consistent with this Opinion and Order; **THEREFORE**,

IT IS ORDERED:

1. That the Joint Petition for Reconsideration of Staff Action, filed by Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power

Company, and West Penn Power Company on August 21, 2023, is granted, consistent with this Opinion and Order.

2. That the Secretarial Letter issued on August 11, 2023, at Docket Nos. M-2020-3020820, M-2020-3020821, M-2020-3020822, and M-2020-3020823, is rescinded, consistent with this Opinion and Order.

3. That the Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of Changes to their Phase IV Act 129 Energy Efficiency and Conservation Plan, filed on July 7, 2023, is granted.

4. That a copy of this Opinion and Order be served on all of the parties of record.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: February 22, 2024

ORDER ENTERED: February 22, 2024