**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

 Public Meeting held October 15, 2009

Commissioners Present:

 James H. Cawley, Chairman

 Tyrone J. Christy, Vice Chairman, Statement

 Kim Pizzingrilli, Statement

 Wayne E. Gardner

 Robert F. Powelson, Statement, Partial Dissent

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| Petition of PECO Energy Company for Approval of its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of its Compact Fluorescent Lamp Program | M-2009-2093215  |

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**OPINION AND ORDER**

**BY THE COMMISSION:**

# Introduction

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition of PECO Energy Company (PECO or Company) for Approval of its Act 129 Energy Efficiency and Conservation Plan (EE&C Plan or Plan) and Expedited Approval of its Compact Fluorescent Lamp Program Energy Efficiency and Conservation Program (Petition), filed on July 1, 2009.

Specifically, PECO requested the Commission to: (1) find that the EE&C Plan satisfies the requirements of 66 Pa. C.S. § 2806.1(b)(1)(i)(A)-(K), including the requirement to provide programs to achieve or exceed the energy savings and demand reductions mandated by Act 129; (2) approve PECO’s proposed compact fluorescent lamp (CFL) program on an expedited basis in order that PECO may build on upcoming national CFL initiatives by the United States Department of Energy and the Environmental Protection Agency to achieve customer energy savings as early as possible; (3) approve tariff provisions to implement the EE&C Plan, including a Section 1307(e) surcharge to recover EE&C Plan costs; and (4) approve the contract between PECO and Global Energy Partners, LLC, a conservation service provider (CSP) working with PECO to develop its EE&C Plan. As explained in the Petition, the EE&C Plan is intended to be a comprehensive package of energy efficiency and demand response measures designed to meet Act 129’s mandated energy savings and peak demand reductions, in compliance with the schedule and cost limitations contained in Act 129. Petition at 1-2.

# Background

Governor Edward G. Rendell signed Act 129 of 2008 (Act or Act 129) into law on October 15, 2008. The Act took effect thirty days thereafter on November 14, 2008. Act 129 has several goals including reducing energy consumption and demand. Among other things, the Act amended the Public Utility Code (Code), 66 Pa. C.S. §§ 101 *et seq*., to require the Commission to develop and adopt an Energy Efficiency and Conservation Program (EE&C Program) by January 15, 2009. The Commission’s EE&C Program is to include the following:

(1) A procedure for approving energy efficiency and conservation (EE&C) plans submitted by electric distribution companies (EDCs).

(2) A process to evaluate and verify the results of each plan and the program as a whole.

(3) A process to analyze the costs and benefits of each plan in accordance with a total resource cost test.

(4) A process to analyze how the program as a whole and each plan will enable the electric distribution companies to meet or exceed the Act’s consumption reduction requirements.

(5) Standards to ensure that each plan uses a variety of measures that are applied equitably to all customer classes.

(6) A process through which recommendations can be made for the employment of additional consumption reduction measures.

(7) A procedure to require and approve the competitive bidding of all contracts with conservation service providers (CSPs).

(8) A procedure through which the Commission will review and modify, if necessary, all contracts with CSPs prior to execution.

(9) A procedure to ensure compliance with the requirements of Sections 2806.1(c) and (d) of the Code, 66 Pa. C.S. §§ 2806.1(c) and (d).

(10) A requirement for the participation of CSPs in the implementation of all or part of a plan.

(11) A cost recovery mechanism to ensure that measures approved are financed by the customer class that directly receives the energy and conservation benefits.

66 Pa. C.S. § 2806.1(a)(1)-(11).

On October 21, 2008, the Commission issued a Secretarial Letter seeking comments on each of the individual aspects of the EE&C Program outlined in 66 Pa. C.S. § 2806.1(a)(1)-(11). Pursuant to an October 29, 2008 Secretarial Letter at Docket No. M-00061984, comments were due November 3, 2008. In addition, the Commission held a special *en banc* hearing on alternative energy, energy conservation and efficiency, and demand side response on November 19, 2008. Comments in reply to those comments expressed at the *en banc* hearing were due no later than December 1, 2008.

On November 26, 2008, the Commission circulated a draft staff proposal and further questions relative to the Act 129 implementation plan. Comments on the draft proposal were due December 8, 2008. An EE&C Program stakeholder meeting was held on December 10, 2008. Reply comments were due by December 19, 2008.

By Opinion and Order entered January 16, 2009, at Docket No. M-2008-2069887, *In re: Energy Efficiency and Conservation Program*  (*Implementation Order*), the Commission established the standards that EE&C plans must meet and provided guidance on the procedures to be followed for submittal, review and approval of all aspects of EDC plans.

On January 30, 2009, the Energy Association of Pennsylvania (Energy Association) filed a Petition for Clarification and Reconsideration of the *Implementation Order*. On February 2, 2009, the Industrial Energy Consumers of Pennsylvania (IECPA) filed a Petition for Clarification of the *Implementation Order.* By Opinion and Order entered June 2, 2009, at Docket No. M-2008-2069887 (*Reconsideration Order*) the Energy Association’s Petition was denied and IECPA’s was granted. In the *Reconsideration Order*, the Commission declined to extend the peak load reduction compliance period to the summer of 2013, (June 1, 2013 through September 30, 2013), as requested by the Energy Association. The Commission also declined to adopt the Energy Association’s request that the Commission measure only an EDC’s capability to reduce peak demand, as opposed to an actual reduction of peak demand. Finally, the Commission granted the IECPA’s request to allow all parties, not just the EDCs, an opportunity to submit reply briefs in the plan approval proceedings.

Act 129 establishes a requirement for the participation of CSPs in the implementation of all or part of a plan. 66 Pa. C.S. § 2806.1(a)(10). The Commission was required to establish, by March 1, 2009, a registry of approved persons qualified to provide conservation services to all classes of customers. 66 Pa. C.S. § 2806.2(a). The Commission instituted a process at Docket No. M-2008-2074154 to establish the qualification requirements CSPs must meet to be included on the registry. On December 22, 2008, the Commission entered an order tentatively establishing the CSP Registry (*Tentative Order)*. The *Tentative Order* was to become final unless adverse comments were received on or before January 2, 2009. Adverse comments were timely received.

By Opinion and Order entered February 5, 2009, at Docket No.
M-2008-2074154, *In re: Implementation of Act 129 of 2008 Phase 2 – Registry of Conservation Service Providers* (*Final CSP Order*), the Commission established the minimum experience and qualification requirements each CSP must meet to be included in the CSP registry.

In the *Implementation Order,* at 13, the Commission stated that it would utilize the Technical Reference Manual (TRM) to help fulfill the evaluation process requirements contained in the Act. The TRM was previously adopted by the Commission in the Alternate Energy Portfolio Standards Act proceedings at Docket No. M-00051865. The Commission noted, however, that the TRM may need to be updated and expanded to fulfill the requirements of Act 129. The Commission stated that it would update and expand the TRM at Docket No. M-00051865 to provide for additional energy efficient technologies. On February 20, 2009, the Commission issued a Secretarial Letter seeking comments on a proposed TRM update. Following the receipt of comments and reply comments, and a meeting with interested stakeholders, the Commission, on June 1, 2009, entered its Opinion and Order at Docket No. M-00051865 (*TRM Order*) adopting the 2009 version of the TRM.

The *Implementation Order,* at 14, also noted that the Act requires that the Commission’s EE&C Program include an analysis of the costs and benefits of each EDC’s plan, in accordance with a total resource cost test (TRC Test) approved by the Commission. 66 Pa. C.S. § 2806.1(a)(3). The Act requires an EDC to demonstrate that its plan is cost-effective using the TRC Test, and that the plan provides a diverse cross section of alternatives for customers of all rate classes. 66 Pa. C.S. § 2806.1(b)(1)(i)(I). The Act defines a “total resource cost test” as “a standard test that is met if, over the effective life of each plan not to exceed 15 years, the net present value of the avoided monetary cost of supplying electricity is greater than the net present value of the monetary cost of energy efficiency conservation measures.” 66 Pa. C.S. § 2806.1(m).

The Commission stated in the *Implementation Order* that the TRC Test set forth in *The California Standard Practice Manual – Economic Analysis of Demand-Side Programs and Projects,* July 2002,[[1]](#footnote-2) (*California Manual*) provides a starting point, but acknowledged that modifications might be necessary to meet any unique requirements of Act 129 and Pennsylvania’s electric industry. The Commission therefore instituted a separate proceeding at Docket No. M-2009-2108601 to review the *California Manual.* On May 29, 2009, the Commission circulated a TRC Test proposal and requested comments relative to TRC Testing in Pennsylvania. By Opinion and Order entered June 23, 2009, at Docket No. M-2009-2108601 *In re: Implementation of Act 129 of 2008 – Total Resource Cost (TRC) Test* (*TRC Test Order*), the Commission set forth the nature of the TRC Test to be used in Pennsylvania.

Finally, on April 21, 2009, the Commission issued a Request for Proposals, seeking an Act 129 Statewide Evaluator to assist in evaluating the EDCs’ EE&C programs. At its Public Meeting of June 25, 2009, the Commission selected GDS Associates Inc. Engineers and Consultants as the Act 129 Statewide Evaluator.

# III. Procedural History

As stated *supra*, PECO filed the Petition on July 1, 2009. Included with the Petition were PECO’s direct testimony and associated exhibits. The Petition also was served on the Commission’s Office of Trial Staff (OTS), the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), and other interested entities.

By Notice dated July 2, 2009, a prehearing conference was scheduled for July 27, 2009, and the matter was assigned to ALJ Marlane R. Chestnut (ALJ). Also, on July 2, 2009, the ALJ issued a Prehearing Conference Order which directed the parties to comply with various procedural requirements, contained the litigation and briefing schedule and provided that intervention would be limited to those persons or entities granted party status or with a statutory right of intervention.

 On July 7, 2009, the OCA filed a Notice of Intervention and Public Statement. A Notice of Appearance was filed on July 8, 2009, by OTS. A Notice of Intervention, Public Statement, and Notice of Appearance was filed on July 21, 2009, by the OSBA.

 Petitions to Intervene were filed by the Commonwealth of Pennsylvania, Department of Environmental Protection (DEP) on July 16, 2009; the Philadelphia Area Industrial Energy Users Group (PAIEUG) on July 20, 2009;[[2]](#footnote-3) The Reinvestment Fund (TRF) on July 22, 2009; Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (Action Alliance) (collectively, TURN/AA) on July 23, 2009; Pennsylvania Association of Community Organizations for Reform Now (ACORN) on July 24, 2009; Citizens for Pennsylvania’s Future (PennFuture), Joy Bergey, Christine Knapp, and Henry Rowan (collectively, PennFuture *et al*.), who also filed a Protest on July 24, 2009; the City of Philadelphia (Philadelphia) on July 24, 2009; Field Diagnostics Services, Inc. (FDSI) on July 27, 2009; Direct Energy Business, LLC (Direct Energy) on July 27, 2009; Pennsylvania Representative Mark Cohen on July 30, 2009; EnerNOC, Inc. (EnerNOC) on August 3, 2009; and Constellation NewEnergy, Inc. (Constellation) on August 3, 2009. As none of the various Petitions was opposed, intervention was permitted. [[3]](#footnote-4)

 A notice was published in the *Pennsylvania Bulletin* on July 18, 2009, at 39 Pa.B. 4196, that stated that the deadline for filing answers along with comments and recommendations addressing the EE&C Plan was August 7, 2009. Notice to the public also was provided through published notices in all major newspapers serving PECO’s service territory, issuance of a press release to all major media in the service territory and the posting of the entire filing on the Company’s website.

The prehearing conference was held in Harrisburg on July 27, 2009. Present and participating through counsel were PECO, OTS, OCA, OSBA, PAIEUG, DEP, TRF, TURN/AA, Philadelphia, ACORN, PennFuture *et al*., and FDSI. On July 30, 2009, the ALJ issued a Prehearing Order wherein the Petitions to Intervene were granted, the service list was developed, the schedule directed by the Commission was discussed and other procedural matters were addressed. In response to a Motion for Protective Order made by PECO, the ALJ issued a Protective Order, dated July 30, 2009, governing the use and disclosure of certain proprietary statements and exhibits submitted by PECO.

 The Public Input hearing was held on July 29, 2009, at the Philadelphia Free Library in Philadelphia. Seven customers testified and several statements and exhibits were admitted into the record.

 On July 31, 2009, PECO, OCA, OTS, TRF, PennFuture *et al.,* FDI, ACORN and the City of Philadelphia filed a Joint Petition for Partial Settlement (Joint Petition) asking that the Commission approve on an expedited basis the company’s proposed CFL program. It was represented in the Joint Petition that the remaining parties of record at that time (OSBA, PAIEUG, TURN/AA, Direct Energy and DEP) did not oppose the Joint Petition.

 By Revised Order Certifying Record Regarding the Joint Petition for Partial Settlement dated August 4, 2009, the ALJ certified the record to that point in the proceeding so the Commission could consider the Joint Petition. The certified record contains PECO’s Act 129 filing, including the supplemental testimony and exhibits; the transcripts of the July 27, 2009 prehearing conference and the July 29, 2009 public input hearing, and the statements and exhibits admitted into the record at that hearing.

 At our August 6, 2009 Public Meeting, the Commission tentatively approved the Joint Petition, pending receipt of the comments and answers to the Act 129 Petition on August 7, 2009. By Opinion and Order entered August 18, 2009, we determined that no comments or answers had been filed that were in opposition or would otherwise warrant the delay in the implementation of PECO’s proposed CFL program, and therefore, approved the Joint Petition. In approving the Joint Petition, we reserved the issues relating to the CFL program that were not addressed by the Joint Petition. Specifically, we directed that the issues of the cost recovery mechanism, the actual cost recovery from ratepayers, and any prospective recommendations regarding the CFL program shall continue to be addressed in this proceeding.

 Pursuant to the schedule established by the Commission: answers, comments and/or written testimony were filed and/or served on August 7, 2009, by the OCA, OTS, OSBA Philadelphia, DEP, ACORN, TRF, and FDSI, PennFuture *et al*., EnerNOC, TURN/AA, and PAIEUG. Non-parties who filed Comments included Green Condominium Initiative (GCI), Richard Karton (who had also testified at the public input hearing), Envinity, Inc., PA Home Energy, AFC First Financial Corporation (on behalf of Keystone HELP) and Keystone Energy Efficiency Alliance.

 A hearing on was held on August 18, 2009, in Harrisburg. All parties, except EnerNOC and Constellation, were present and participated through counsel. PECO presented two witnesses, each of whom presented additional oral rejoinder testimony and exhibits, were cross-examined and sponsored their respective statements and exhibits, all of which were admitted into the record. DEP presented one witness, who was cross-examined, and sponsored her statement, which was admitted into the record. Upon the presentation of affidavits regarding the adoption of their respective comments, statements and exhibits, admitted into the record without cross-examination were statements and exhibits of OCA, OTS, OSBA Philadelphia, ACORN, TRF and FDSI. TURN/AA presented an affidavit from TURN’s Executive Director, who adopted the comments previously filed as his testimony. OTS presented two of its witnesses to sponsor his testimony and exhibit. OCA and TRF introduced into the record cross-examination exhibits during the cross-examination of PECO witnesses.

 Main Briefs were filed and served on August 28, 2009, by PECO, OCA, OTS, OSBA, PAIEUG, TURN/AA, TRF, DEP, ACORN, Philadelphia, EnerNOC, FDSI and Representative Cohen. Reply Briefs were filed and served on September 8 or 9, 2009,[[4]](#footnote-5) by PECO, OTS, OSBA, ACORN, the City of Philadelphia, TRF, PAIEUG and EnerNOC.

 The record was closed on September 11, 2009.

By Order Certifying the Record dated September 14, 2009, the ALJ provided a history of the investigation into PECO’s EE&C Plan; delineated the transcripts, statements and exhibits admitted into the record; and certified the record to the Commission for our consideration and disposition.

As discussed more fully, *supra,* on September 22, 2009, PECO filed a Motion to Strike Portions of the Revised Reply Brief of EnerNOC, Inc. On September 29, 2009, EnerNOC filed an Answer to the PECO Motion to Strike Portions of the Revised Reply Brief.

# IV. Description of the Plan

## A. Requirements of Act 129

Act 129 requires that an EDC’s plan reduce electric consumption by at least 1% of its expected consumption for June 1, 2009, through May 31, 2010, adjusted for weather and extraordinary loads. This 1% reduction is to be accomplished by May 31, 2011. 66 Pa. C.S. § 2806.1(c)(1). By May 31, 2013, the total annual weather-normalized consumption is to be reduced by a minimum of 3%. 66 Pa. C.S. § 2806.1(c)(2). Also, by May 31, 2013, peak demand is to be reduced by a minimum of 4½ % of the EDC’s annual system peak demand in the 100 hours of highest demand, measured against the EDC’s peak demand during the period of June 1, 2007 through May 31, 2008. 66 Pa. C.S. § 2806.1(d)(1).

Act 129 also establishes the following plan requirements:

(1) The plan shall include specific proposals to implement energy efficiency and conservation measures to achieve or exceed the required reductions in consumption.

(2) A minimum of ten percent of the required reductions in consumption shall be obtained from units of federal, state and local government, including municipalities, school districts, institutions of higher education, and nonprofit entities.

(3) The plan shall explain how quality assurance (QA) and performance will be measured, verified and evaluated.

(4) The plan shall state the manner in which the plan will achieve the requirements of the program and will achieve or exceed the required reductions in consumption.

(5) The plan shall include a contract with one or more conservation service providers selected by competitive bid to implement the plan or a portion of the plan.

(6) The plan shall include estimates of the cost of implementation of the energy efficiency and conservation measures in the plans.

(7) The plan shall include specific energy efficiency measures for households at or below 150 percent of the federal poverty income guidelines. The number of measures shall be proportionate to those households’ share of the total energy usage in the service territory. The EDC shall coordinate these measures with other programs administered by the Commission or another federal or state agency. The expenditures of an EDC under this clause shall be in addition to those made under the Commission’s Regulations at 52 Pa. Code Chapter 58.

(8) The plan shall include a proposed cost-recovery tariff mechanism to fund the EE&C measures and to ensure full and current recovery of the prudent and reasonable costs of the plan, including administrative costs.

(9) The EDC shall demonstrate that the plan is cost-effective, using a TRC Test approved by the Commission, and provides a diverse cross section of alternatives for customers of all rate classes.

(10) The plan shall require an annual independent evaluation of its cost-effectiveness and a full review of the results of each five-year plan and, to the extent practical, how the plan will be adjusted on a going-forward basis as a result of the evaluation.

(11) The plan shall include an analysis of the EDC’s administrative costs.

66 Pa. C.S. § 2806.1(b)(1)(i)(A)-(K).

The Act permits an EDC to recover, on a full and current basis from customers, all reasonable and prudent costs incurred in the provision or management of an EE&C plan. The costs, however, are limited to 2% of the EDC’s total annual revenue as of December 11, 2006. 66 Pa. C.S. § 2806.1(g) and (k). The Act also provides that the Commission is to recover from EDCs its costs of implementing the EE&C Program. 66 Pa. C.S. § 2806.1(h).

## B. PECO’s EE&C Plan

PECO’s EE&C Plan proposes ten energy efficiency programs and eight demand reduction programs which are estimated to reduce total energy consumption by 1,296 GWh and peak demand by 505 MW at the end of Program Year 2012 (May 31, 2013). These estimated reductions are 110% and 142%, respectively, of the mandated reductions established by Act 129 and the Commission. Petition at 17-19. The Plan includes the following programs:

1. Under the *CFL Initiative*, PECO will make approximately 6.5 million CFLs available to its 1.4 million residential customers through giveaway events and partnerships with retailers and manufacturers to provide discounted bulbs for purchase.
2. The *Residential Low-Income Energy Efficiency Program* will educate income-eligible customers on how to make their homes more energy efficient by providing home energy audits and installing energy efficiency measures, similar to PECO’s Low-Income Usage Reduction Program (LIURP).
3. The *Residential Whole Home Performance (WHP) Program* was designed to help customers improve the energy efficiency of their homes through an energy performance audit, installation of low-cost energy saving measures and rebates for the purchase of additional energy efficiency measures identified through the audit.
4. The *Home Energy Incentives (HEI) Program* was proposed to increase the penetration of ENERGY STAR appliances and other high-efficiency measures through the offer of rebates.
5. The *Residential New Construction Program* will provide financial incentives to builders who incorporate energy efficiency designs, measures and equipment in new and renovated homes.
6. The *Appliance Pickup Program* is designed to induce customers to dispose of working but old and inefficient refrigerators, freezers and room air conditioners.
7. The *Commercial/Industrial Equipment Incentives Program* is designed to improve the efficiency of business facilities by providing customers with financial incentives to install high-efficient equipment.
8. The *Commercial/Industrial New Construction Program* is designed to encourage energy efficiency in the design of new commercial and industrial buildings and buildings that are being reconstructed for commercial and industrial use.
9. The *Government/Public/Non-Profit Facility Energy Savings Program* will encourage the installation of energy efficiency equipment and technology in public buildings and the upgrading of street and traffic lights.
10. The purpose of the *Renewable Resources Program* is intended to increase the number of homes and commercial buildings using renewable resources to offset some or all of the electric or gas use for hot water heating.
11. Under the *Residential Direct Load Control (RDLC) Program,* PECO will remotely control a participating customer’s central air conditioning system and/or hot water heater and cycle the equipment on and off during times of peak demand.
12. The *Residential Super Peak Time of Use (TOU) Program* is designed to provide an incentive to reduce peak demand by charging a higher price for electricity during peak hours offset by a lower price during non-peak hours.
13. The *Commercial & Industrial Direct Load Control Program* is a direct load control program for central air conditioning using a programmable communicating thermostat, allowing PECO to control the temperature setting on the unit.
14. The *Commercial & Industrial Super Peak TOU Program* was proposed to operate in the same fashion as the residential TOU program.
15. Through the *Demand Reduction* (*DR) Aggregator Contracts Program* PECO will contract with one or more curtailment service providers who will recruit customers to provide load reduction resources.
16. The goal of the *Distributed Energy Resources Program* is to obtain energy savings and peak demand reductions from C&I customers who have existing back-up generation resources or who are interested in having grid-connected generating units installed at their facilities.
17. The *Permanent Load Reduction Program* is designed to provide customers with an incentive to permanently shift their electricity usage from peak to off-peak times, or to eliminate some usage altogether.
18. The *Conservation Voltage Reduction (CVR) Program* is designed to lower voltage levels for all customers, within regulatory requirements, to reduce the associated higher voltage energy consumption and demand.

*Id*. at 7-12.

# V. Discussion

In Commission proceedings, the proponent of a rule or order bears the burden of proof. 66 Pa. C.S. § 332(a). To satisfy that burden, the proponent of a rule or order must prove each element of its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990). A preponderance of the evidence is established by presenting evidence that is more convincing, by even the smallest amount, than that presented by the other parties to the case. *Se-Ling Hosiery v. Marqulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission’s decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC,* 489 Pa. 109, 413 A.2d 1037 (1980).

We note that any issue that we do not specifically address herein has been duly considered and will be denied without further discussion. It is well settled that we are 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);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also* see, generally, [University of Pennsyl­vania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

### A. CSP Contract with Global Energy Partners, LLC

As indicated, *supra*, PECO has requested in its Petition that we approve the contract between PECO and Global Energy Partners, LLC, a conservation service provider (CSP) working with PECO to develop its EE&C Plan. In our *Implementation Order*, we delegated to the Commission staff the authority to review and approve contracts between EDCs and CSPs. *Implementation Order* at 40. To that end, the contract between PECO and Global Energy Partners, LLC has been assigned to the Commission staff for its review and will not be addressed in this proceeding. Pursuant to the *Implementation Order*, Staff has forty-five days to review the contract. Staff’s review shall begin upon entry of this Opinion Order because the contract was filed on July 1, 2009, with PECO’s EE&C Plan instead of a separate submission to the Commission and is thus part of a contested proceeding, making *ex parte* rules applicable. Staff’s determination of its review will be communicated in a Secretarial Letter and the determination is appealable to the full Commission within twenty days of its issuance, per 52 Pa. Code § 5.44.

#  B. PECO’s Motion To Strike Portions of the Revised Reply Brief of EnerNOC, Inc.

On September 9, 2009, PAIEUG filed a letter expressing concern regarding EnerNOC’s Reply Brief; specifically, EnerNOC’s extensive discussion of arguments advanced by the PP&L Industrial Customer Alliance in a separate Commission proceeding involving the EE&C Plan of PPL Electric Utilities (PPL). ALJ Chestnut advised counsel on September 10, 2009, that she would be issuing an order striking the portions of EnerNOC’s Reply Brief that address arguments made by a party in another case. The ALJ also permitted EnerNOC to file a revised Reply Brief. On September 11, 2009, EnerNOC filed a revised Reply Brief. The record in this case was subsequently certified to the Commission by ALJ Chestnut as of September 14, 2009.

On September 22, 2009, PECO filed a Motion to Strike Portions of the Revised Reply Brief of EnerNOC, Inc. On September 29, 2009, EnerNOC filed an Answer to the PECO Motion to Strike Portions of the Revised Reply Brief.

**Positions of the Parties**

PECO argues that, although EnerNOC’s Revised Reply Brief no longer contains references to PPLICA’s arguments, it still contains citations to PPL’s EE&C Plan as well as references to the transcript in the PPL EE&C Proceedings on pages 5 and 6.

EnerNOC argues that 52 Pa. Code § 5.431(b) precludes PECO’s Motion to Strike as it was untimely filed after the record was closed.

EnerNOC also submits that it does not claim that any of the specific evidence adduced in the PPL docket is relevant here, because it is questioning whether all utility plans that fail to consider economics of longer term arrangements should be considered prudent. However, EnerNOC does argue that it is properly citing to evidence on the record of an EDC proceeding in the same phase of the greater proceeding to implement Act 129. Therefore, although the record in the PPL proceeding was developed separately at the same time as the record in PECO’s proceeding, EnerNOC believes that the citation to it in EnerNOC’s Reply Brief in the PECO case is proper. EnerNOC views the five EDC EE&C Plan filing proceedings as joint proceedings that are all part of the overarching proceeding to implement Act 129. Therefore, EnerNOC argues that PECO’s due process rights were not violated as all five EDC EE&C proceedings will have full and fair review by the Commission at the same time.

**Disposition**

We find that EnerNOC’s argument that 52 Pa. Code § 5.431(b) precludes PECO’s Motion to Strike as it was untimely filed after the record was closed is without merit. 52 Pa. Code § 5.431(b) states:

After the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion.

52 Pa. Code § 5.431(b). The Motion to Strike is not an addition to the record. Rather than evidence, it is legal argument regarding another party’s brief which is permissible after the record is closed and certified to the Commission.

We are not persuaded by EnerNOC to find that the five proceedings addressing EDC EE&C Plans are joint proceedings that are all part of the overarching proceeding to implement Act 129. The five EDC EE&C proceedings were not consolidated into one proceeding or one hearing. Instead, five separate hearings were held, and the rules of evidence and due process apply to each individual hearing, separate from the others. Under 52 Pa. Code § 5.407, a party may offer a portion of the record in another proceeding as evidence if they provide a true copy of the record in the form of an exhibit or if moved into evidence upon a motion under Section 5.407(a)(2), but this was not done in the instant case. Instead, after the record was closed, EnerNOC attempted to cite to testimony contained in a separate proceeding which was not properly admitted into evidence in the PECO hearing.

Since our regulations at 52 Pa. Code § 5.501(a)(2) require that briefs contain “[r]eference to the pages or record or exhibits where the evidence relied upon by the filing party appears” and given the case law of *Pa. PUC v. Philadelphia Gas Works,* 223 P.U.R. 4th, 421-422, 2003 Pa. PUC LEXIS 13 (2003), we find that portions of EnerNOC’s Revised Reply Brief do indeed make reference in support of its position from transcript testimony in another case. The inclusion of extra-record evidence in a Brief violates the principle of fundamental fairness and violates the due process rights of other parties who have no opportunity to cross examine a witness in a separate hearing. *See Joint Application of Verizon Communications, Inc. and MCI, Inc. For Approval of Agreement and Plan of Merger*, 2006 Pa.PUC LEXIS 22 (2005).

We find that the specific citation to PPL’s EE&C filing and supporting testimony is in violation of PECO’s due process rights as PECO had no opportunity to cross examine the witnesses in the PPL EE&C hearing. Therefore, the following language found on pages 5 and 6 of EnerNOC’s Revised Reply Brief which cites to material not part of the record in this proceeding shall be stricken:

In PPL’s EE&C filing and supporting testimony, it has argued that its current portfolio design contemplates that the Company will need to enter into contracts with CSPs that extend beyond the end of its EE&C plan (May 31, 2013), although those payments are not included in the current portfolio and would likely be structured in the CSP contract, to be contingent on the Commission’s extension of peak load reduction targets and funding beyond the life of their current plan. (PPL EE&C Plan, p. 13 [emphasis added]).

Further, PPL states that if it were limited to contracts that expire on September 12, 2012, which is the compliance date for peak load reductions, they contend that these short-term contracts could be more costly – at approximately $5 million beyond the current portfolio. Id. at 13-14.

As PPL states, “assuming a contract is awarded in late 2009 and demand reduction programs (and associated incentive payments to participants and the CSP) will start gradually in mid-2010, a five (5) to eight (8)-year contract term would extend to 2015-2017.” Id.; see also Tr. At 166. It was confirmed that the total projected costs in each of the extra years will be approximately $5 million - $10 million per year. Tr. At 168.

EnerNOC Rev. RB at 5-6.

Accordingly, for the above-stated reasons, PECO’s petition for relief shall be granted.

## C. Act 129 Conservation and Demand Reduction Requirements

### 1. Overall Conservation Requirements

The *Implementation Order*, at 8, noted that both the 1% consumption reduction, to be met by May 31, 2011, and the 3% consumption reduction, to be met by May 31, 2013, are to be measured against the EDC’s expected consumption as forecasted by the Commission for June 1, 2009, through May 31, 2010. 66 Pa. C.S. §§ 2806.1(c)(1). Each EDC that was required to file an EE&C plan was required to file its consumption forecast for the period of June 1, 2009, through May 31, 2010, by February 9, 2009. *Implementation Order* at 8 and 29.

In *Energy Consumption and Peak Demand Reduction Targets,* Docket No. M-2008-2069887 (Order entered March 30, 2009) (*Reduction Target Order*), the Commission approved PECO’s forecast of 39,386,000 MWh, its proposed 1% reduction of 393,860 MWh as of May 31, 2011, and its proposed 3% reduction of 1,181,580 MWh as of May 31, 2013. *Reduction Target Order* at 3.

The Plan must include specific proposals to achieve or exceed these required reductions in consumption. 66 Pa. C.S. § 2806.1(b)(1)(i)(A). The Commission is required to analyze how the program and individual plans will enable the EDC to achieve or exceed the requirements for reductions in consumption. 66 Pa. C.S.
§ 2806.1(a)(4). The Commission is also required to develop procedures to ensure compliance with these requirements. 66 Pa. C.S. § 2806.1(a)(9).

#### 2011 Requirements

PECO’s Plan proposes total energy savings of 589,042 MWh by the end of Program Year (PY) 2010 (May 31, 2011), which is 150 % of the established goal of 393,860 MWh. PECO St. No. 2 at 17 and 18. PECO avers that this “aggressive” estimate is largely attributable to the early implementation of the CFL initiative which we approved by our Opinion and Order entered on August 18, 2009, at this docket. *Id*. at 17.

# Credit for Co-funded Measures

##### Positions of the Parties

The DEP objects to PECO’s EE&C Plan to the extent that it takes credit for energy usage reductions that are realized from projects supported by State and Federal funds. The DEP submits that the Federal American Recovery and Reinvestment Act of 2009 (ARRA) and Pennsylvania’s Energy Investment Act of 2008[[5]](#footnote-6) (Act 1) were recently enacted laws that provide funds for energy conservation programs in Pennsylvania. DEP St. No. 1 at 5. The DEP explains that the U.S. Department of Energy (DOE) imposes limits on how ARRA funds can be used and requires that States make a written commitment that ARRA funds will not be used to supplant or replace existing projects funded by the state, ratepayers, or other funding. The DEP argues, that unless PECO takes steps to ensure that it does not put any money into an ARRA-funded project, it will likely take credit for energy conservation benefits derived from ARRA funding. The DEP states that this situation could violate Pennsylvania’s commitment to DOE and could cause the Commonwealth to risk the loss of some or all of its ARRA funding. *Id*. at 7-8.

While the DEP “strongly” opposes any program that allows EDCs to take credit for energy usage reductions that are not proportional to EDC funding, the DEP believes that a properly coordinated use of Act 129 and ARRA funds could yield significant benefits to PECO customers. The DEP makes recommendations regarding coordination and communication between programs funded by ARRA and Act 129 that will result in a reasonable sharing of the credit of the resulting energy savings. *Id*. at 8-9.

The DEP takes a similar position with regard to programs funded by Act 1. The DEP argues that “double-dipping” will open both Act 1 and Act 129 programs up to criticism regarding inflated claims and questionable cost-effectiveness. *Id.* at 11.

PECO responds to the DEP’s recommendation for shared energy savings by claiming that PECO’s inclusion of energy savings is “entirely consistent” with the Commission’s *TRC Order*. PECO avers that it would be inconsistent with Act 129 to allow an EDC to include all savings derived from an EE&C program measure in the TRC Test and then not permit the EDC to count the actual savings for compliance purposes. PECO argues, that under 66 Pa. C.S. § 2806.1(a)(3) and the *TRC Order*, the TRC Test approved by the Commission forms the basis for the Commission’s review and approval of an EDC’s EE&C plan. PECO MB at 21, 29-30.

In response to the DEP’s assertion that ARRA funds cannot be used to supplant or replace existing funds, PECO states that no federal funds are being supplanted or replaced by its Act 129 expenditures. PECO points to its Exhibit FJJ-2, Governor’s Assurance and Attachment 3, and avers that the assurance by the Governor, in accordance with ARRA requirements, assures that ARRA funds will be used to expand existing state energy efficiency programs funded by utility customers. PECO MB at 32.

Philadelphia avers that 66 Pa. C.S. § 2806.1(m) defines the “energy efficiency and conservation measures” required to be included in EE&C plans as “measures used by retail customers that reduce electricity consumption or demand if” *inter alia*, “the cost of the acquisition of installation of measures is directly incurred in whole or in part by the electric distribution utility.” Philadelphia argues that nothing in the ARRA prevents PECO ratepayers from using ARRA funds to expand and supplement funds available from EDCs. Philadelphia also argues that the DEP’s position that ARRA funds may be in jeopardy by joint funding of Act 129 EE&C programs has no legal basis. Philadelphia submits that allowing municipalities to make energy efficient investments funded by both Act 129 and other government and private funding will make energy efficiency improvements more affordable and implementation more likely to occur. Philadelphia MB at 22-24.

FDSI adds that, in its experience, imposing such an “artificial” limitation to the use of funding would only tend to hinder customer participation and would be counter-productive to enhancing PECO’s ability to meet the energy consumption targets of Act 129. FDSI MB at 16.

##### Disposition

Although the DEP challenged PECO’s ability to account for the full benefits of co-funded measures, the DEP did not propose specific adjustments to PECO’s energy or peak demand savings estimates or challenge the ability of PECO’s EE&C Plan to meet the energy or demand reductions required under Act 129. However, PECO’s ability to take credit for co-funded measures may impact whether its Plan can reasonably be expected to meet the May 31, 2011, and May 31, 2013, energy reduction requirements and the May 31, 2013, demand reduction requirements.

In determining whether an EDC may take credit for all energy savings for measures that also are funded in part by ARRA and/or Act 1, we note that Act 129 specifically provides, in pertinent part, that an EE&C measure may be funded “in whole or in part” by the EDC. 66 Pa. C.S. § 2806.1(m). Neither Act 1 nor Act 129 provides that it is mutually exclusive of the other. In implementing ARRA, DOE clearly contemplated that ARRA funds could be used in conjunction with other funding. We conclude that this Commission should not accept DEP’s proposition to prorate or otherwise distribute the energy savings from EE&C projects that receive funding from state or federal sources outside an EDC’s respective Act 129 plans.

Even if a particular measure is funded in part by ARRA and/or Act 1, so long as a portion of the measure is attributable to Act 129, an EDC may take credit for all the energy savings attributable to that measure. We addressed this very issue in our *TRC Test Order*, finding that:

EDCs will be able to fully include a measure’s benefits in the TRC test if any portion of the measure is attributable to Act 129. For the purposes of TRC testing, if the end-use customer is a recipient of an incentive/rebate from an Act 129 program, even if the customer is also a recipient of an Act 1 incentive or rebate for the same equipment or service, we conclude that the entire savings of that equipment or service can also be claimed by the EDC for TRC testing purposes.

*TRC Test Oder* at 25. We remain convinced that the public interest will best be served by taking advantage of all the incentives or rebates available. Rather than pit one government program against another, the programs should complement each other and, optimally, produce a greater saving than the programs would generate working in isolation.

We did not, however, expressly mention ARRA funding when we said that an EDC could fully include the benefits of an Act 129 EE&C measure that is also partially funded by Act 1 funds. To the extent that the ARRA funded benefits are consistent with the rationale underlying our decision relative to Act 1, we expressly provided that ARRA incentive payments should be considered benefits in TRC testing. *TRC Test Order* at 23. Furthermore, since Act 129 funding is fixed, any additional funds, whether from Act 1, ARRA, or elsewhere, will be used to supplement, not replace, funds from the EDC. The decision not to require proration of benefits clearly does not violate the guidelines for ARRA funding. We find that this result is a necessary, reasonable, consistent and logical application of the express provisions of our *TRC Test Order*.

Further, given that PECO has developed its Plan based on the Commission’s express decision in the *TRC Test Order*, changing the attribution of energy savings from these projects could seriously compromise the ability of PECO to comply with its EE&C goals. Additionally, the cost and complexity of prorating the energy savings among multiple programs would be cost-prohibitive and non-productive. We see no reason to change that determination.

#### Accordingly, PECO will be able to fully include a measure’s energy savings and demand reductions if any portion of the measure is attributable to Act 129. For the purposes of Act 129 energy savings and demand reduction requirements and any other or ancillary aspect of Act 129 evaluations, if the end-use customer is a recipient of an incentive/rebate from an Act 129 program, even if the customer is also a recipient of an Act 1 incentive or rebate or ARRA funding for the same equipment or service, we conclude that the entire savings of that equipment or service can also be claimed by PECO for Act 129 compliance purposes.

#### 2013 Requirements

PECO projects that the total energy savings that will be realized at the end of PY 2012 (May 31, 2013) will total 1,295,565 MWh, or 110 % of the required consumption reduction of 1,181,580 MWh. PECO St. No. 2 at 18.

With the exception of the DEP’s concerns regarding the extent to which the Plan takes credit for energy usage reductions that are realized from projects supported by state and federal funds, there were no other challenges to PECO’s projected energy savings or the ability for PECO to potentially achieve its proposed targets.

### 2. Overall Demand Reduction Requirements

Act 129 requires that by May 31, 2013, the weather-normalized demand of retail customers of each EDC shall be reduced by a minimum of 4½ % of the annual system peak demand in the 100 hours of peak demand. The *Implementation Order,* at 9, noted that the 4½ % reduction in peak demand is to be measured against the EDC’s historical peak load for June 1, 2007, through May 31, 2008. 66 Pa. C.S. § 2806.1(d). Each EDC that was required to file an EE&C plan must file, by February 9, 2009, certain peak load data for the period June 1, 2007, through May 31, 2008.

In the *Reduction Target Order*, the Commission approved PECO’s calculation of its average historical peak loads for the top 100 hours as 7,899 MW and its proposed 4½ % reduction of 355 MW as of May 31, 2013. *Reduction Target Order* at 5.

The Plan must include specific proposals to achieve or exceed the required reductions in consumption. 66 Pa. C.S. § 2806.1(b)(1)(i)(A) . The Commission is required to analyze how the program and individual plans will enable the EDC to achieve or exceed the requirements for reductions in consumption. 66 Pa. C.S. § 2806.1(a)(4). The Commission also is required to develop procedures to ensure compliance with these requirements. 66 Pa. C.S. § 2806.1(a)(9).

PECO’s eight demand reduction programs are projected to reduce peak demand during PY 2012 (year ending May 31, 2013) by 355.2 MW. Adding the 150.2 MW peak demand reduction that is expected to be realized from the ten energy efficiency programs, PECO projects its total 2013 peak demand reduction to be 505.4 MW; about 42% greater than the minimum 355 MW established in the *Reduction Target Order.* PECO submits that it was important to build a safety cushion into its demand reduction efforts because of the difficulties associated with sustaining the required peak demand savings over time. PECO St. 2 at 19-20.

# Demand Reduction Aggregator Contracts Program

#### Positions of the Parties

#### Through this proceeding, PAIEUG sought and received clarifications regarding how PECO will implement its proposed DR Aggregator Contracts program and how it will account for the resulting demand reductions. Since the DR Aggregator Contracts program represents 150 MW of the total 505.4 MW projected demand reductions from the entire EE&C Plan, we will address this issue here as part of our determination whether the projected demand reductions of the Plan meet the targets required under Act 129.

 In its Plan, PECO provides the following description of the DR Aggregator Contracts program:

In this program, PECO establishes performance contracts with one or more Curtailment Service Providers who will recruit PECO customers and deliver the demand reduction target set in the program. These companies, also referred to as ‘Aggregators,’ sign up a pool of participants and offer the combined load resource to PECO during hours of peak demand coincident with the top 100 peak hours. Several of these aggregator companies currently have end-use customers participating in DR programs being administered by PJM. In the program being considered here, these Curtailment Service Providers are expected to tap their existing clients participating in the PJM market, as well as recruit additional customers, if needed.

PECO Plan Volume II at 171.

As a result of issues and questions raised in PAIEUG’s Answers and Comments and questions raised on cross-examination, PECO provided the following clarifications. Customers will not be restricted to customer service providers (CSPs) that are awarded a contract under PECO’s Plan and PECO will not preclude simultaneous participation in PECO’s Plan and PJM load response programs. Further, customers may receive incentives under both a PJM and PECO program and PECO will only take the demand reduction credit under its EE&C Plan for those demand reductions realized from customers participating in its program. Tr. at 165-167. PECO RB at 13.

#### Disposition

With those clarifications, we will accept the demand reduction and energy savings estimates projected for the DR Aggregator Contracts Program. In approving PECO’s proposed DR Aggregator Contracts program, we wish to clarify that any eligible PJM CSP may participate and that customer load reductions will be selected on a competitive, non-discriminatory basis.

### 3. Requirements for a Variety of Programs Equitably Distributed

The Commission’s EE&C Program must include “standards to ensure that each plan includes a variety of energy efficiency and conservation measures and will provide the measures equitably to all classes of customers.” 66 Pa. C.S.
§ 2806.1(a)(5). Each EDC is required to demonstrate that its plan “provides a diverse cross section of alternatives for customers of all rate classes.” 66 Pa. C.S.
§ 2806.1(b)(1)(i)(i).

In the *Implementation Order*, we recognized that there are clear requirements in the Act regarding proportionate measures for low-income customers (within a residential customer class) as well as for governments, schools, etc. (within a commercial customer class). Beyond those requirements, we found that EDCs should develop EE&C plans to achieve the most energy savings per expenditure. We stated that the driving principle should be the most cost effective use of resources so that benefits can accrue to all customers, even if only by virtue of more reasonable energy market prices. To that end, we concluded that “equitable” does not mean “*pro rata*,” especially when cost effectiveness is factored into the process. We stated that it is entirely possible that the most cost effective energy efficiency and demand response programs may not come proportionally from each customer class. *Implementation Order* at 22.

While the *Implementation Order* did not require a disproportionate distribution of measures among customer classes, we directed that each customer class be offered at least one energy efficiency and one demand response program in the individual EE&C programs. *Id.* at 23.

As described, *supra*, PECO’s EE&C Plan proposes ten energy efficiency programs and eight demand reduction programs which are estimated to reduce total energy consumption by 1,296 GWh and peak demand by 505 MW at the end of Program Year 2012 (May 31, 2013).

**Equitable Distribution of EE&C Plan Programs and Measures**

#### Positions of the Parties

PECO submits that its Plan provides programs that are equitably distributed across customer classes, both on a budgetary and energy saving basis. In its Main Brief, PECO provided the following explanation of how its program budget relates to the total energy savings for the residential, commercial and industrial (C&I) and government/non-profit classes:

For example, 36% of PECO’s energy efficiency and conservation program budget is directed to the residential class and the residential portfolio of programs is expected to produce 29.5% of the total MWh savings under the Plan. With regard to C&I customers, 40% of the budget is directed to the C&I class and the C&I portfolio of programs is expected to produce 34.8% of the total MWh savings under the Plan. Finally, 13% of the budget is directed to the government and non-profit class and the portfolio of programs for that sector is expected to produce 20.3% of the total MWh savings under the Plan. *See* Plan Volume III, Appendix D-4 & D-5

PECO MB at 27.

The OCA considered, *inter alia*, the revenues, the projected EE&C Plan spending, the projected energy consumption and energy savings for the customer classes as well as the Plan’s budgetary constraints and the need for the Plan to pass the TRC Test criteria and opined “that PECO has achieved a portfolio that is balanced and cost-effective.” OCA MB at 12-14.

PAIEUG’s “initial assessment” of PECO’s EE&C Plan is that it appropriately conforms to the initial requirements of the *Implementation Order* by presenting at least one energy efficiency and one demand management program for each customer class. PAIUEG indicates that the multiple energy efficiency and demand reduction programs for C&I customers are of particular importance to its members. PAIEUG states that, although it has some initial concerns that PECO may be skewing too much of its EE&C Plan to the C&I rate classes, it conditionally accepts the cost/benefit and TRC analysis employed by PECO in developing these programs. PAIEUG conditions its acceptance of PECO’s program allocation upon the review of actual performance data developed during the implementation of the Plan and its acceptance could change in the ongoing EE&C Plan review process and future EE&C proceedings. PAIEUG MB at 6–7.

TRF avers that PECO’s EE&C Plan provides a “diverse and robust” list of choices for all customer classes. TRF concludes that the program options, the projected energy savings and demand reductions and the budget expenditures are spread equitably across all customer classes and that PECO’s EE&C Plan is designed to satisfy the requirements of 66 Pa. C.S. § 2806.1(a)(5). TRF MB at 6.

Philadelphia is concerned that the benefits of PECO’s EE&C Plan may not be delivered effectively to all PECO’s customers in the City or to all of its customers in all locations of PECO’s service territory. Philadelphia also claims that PECO has made municipal lighting a distinct customer class and PECO’s EE&C Plan does not contain any demand allocation programs for municipal lighting customers. Therefore, Philadelphia argues that the Plan does not meet the requirements of the *Implementation Order.* Specifically*,* Philadelphia arguesthat EDC EE&C plans offer at least one energy efficiency and one demand management program for each rate class. Philadelphia MB at 10–11. As discussed *infra*, Philadelphia also argues that municipal lighting should not be a separate rate class in PECO’s EE&C Plan.

In its Reply Brief, PECO explains that it did not offer an “extensive” demand reduction program for the municipal lighting class because municipal lighting is used during the night time when overall demand is substantially lower. PECO avers that its EE&C Plan includes incentives to encourage the movement from incandescent to LED traffic lighting that will generate a demand benefit. PECO RB at 5.

#### Disposition

In our *Implementation Order* we stated that the burden is on an EDC to explain and justify its distribution of measures among its customer classes if such distribution is challenged. *Implementation Order* at 23. We agree with PECO’s position that it is not appropriate to include a separate demand management program for the Street Lighting Class because municipal lighting is used during the night time when overall demand is substantially lower. While street lighting may not be a prime source of peak load reduction, we note that PECO Exh.1, Volume III, Appendix D-1 shows that PECO will realize some demand peak reduction for the majority of its street lighting proposals. Consequently, we will not require PECO to implement a specific demand reduction program for street lighting customers at this time.

Philadelphia did not provide any examples or other support for its concern that the benefits of PECO’s EE&C Plan may not be delivered effectively to all PECO’s customers in Philadelphia or to all its customers in all locations of PECO’s service territory. Philadelphia has only presented allegations that are not supported or even clarified by the record. Consequently, it is impossible for us to address them.

We concur with the OCA that, considering the projected revenues, EE&C Plan costs, energy consumption and energy savings for the customer classes as well as the Plan’s budgetary constraints and the need for the Plan to pass the TRC criteria, PECO has proposed a balanced and reasonable portfolio of programs among the customer classes.

In consideration of PAIEUG’s conditional acceptance of PECO’s proposed program distribution, the *Implementation Order* outlines the process under which plan improvements can be proposed following the EDC’s submission of their annual reports required by 66 Pa. C.S. § 2806.1(i)(1). *Implementation Order* at 24.

### 4. Ten Percent Government/Non-Profit Requirement

The Act requires that “a minimum of 10% of the required reductions in consumption . . . shall be obtained from units of federal, state and local government, including municipalities, school districts, institutions of higher education and nonprofit entities.” 66 Pa. C.S. § 2806.1(b)(1)(i)(B).

PECO Statement No. 1 contains a summary of its program measures directed to government and institutional customers. PECO’s Plan proposes to provide educational, financial, and technical assistance to government and non-profit entities to encourage the installation of energy efficient equipment and technology in public buildings, and in the use and upgrading of street and traffic lights. The Plan includes predetermined and custom rebates to help customers reduce the cost of installing energy efficient measures. Government buildings may also qualify for partial reimbursement of “investment grade” audits. PECO St. 1 at 24–25.

PECO projects that these program measures will produce a cumulative energy consumption savings of 216,792 MWh by the end of PY 2012 (May 31, 2013). PECO submits this level of energy savings will exceed the ten 10% or 118,200 MWh required by the Act by 83%. PECO also projects that these program measures will reduce average peak demand by 42.9 MW in PY 2012 and these measures have a budget of approximately $45.8 million. *Id* at 25.

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Although Philadelphia does not expect to be able to take advantage of any of the Plan’s measures for streetlights over the next four years because it has completed the upgrade of all street lights in the City to efficient high pressure sodium streetlights, it has identified several potentially useful measures in the program for the government and non-profit sector, including energy management and lighting control systems, upgraded chiller/heating equipment, and upgrading yellow and green incandescent signals in traffic lights with LED technology. Philadelphia St. No. 1 at 7-8; Philadelphia St. No. 2 at 4-5. Based on Philadelphia’s review of the Plan, it is Philadelphia’s view that the program designed for the government and nonprofit sector is capable of achieving the Act’s requirement for this sector. Philadelphia MB at 12-13.

# Prescriptive Rebate Programs

#### Positions of the Parties

The DEP argues that prescriptive rebate programs, particularly the lighting replacement program, proposed by PECO are an inefficient use of energy conservation dollars and prevent governments from obtaining significant, long lasting energy consumption reductions. The DEP avers that incentives to replace equipment and systems in a piecemeal manner cannot be the most cost-effective solution for long-term energy savings. The DEP also argues that the proposed prescriptive rebate program “fundamentally impairs” a government entity’s ability to obtain long-term, whole-building solutions through guaranteed savings contracts provided by energy savings companies (ESCO). The DEP explains that lighting consumes up to 35% of all electricity in a commercial building and lighting efficiency and control upgrades are usually the most cost-effective measures and typically have a short payback period. The DEP avers that PECO’s proposal to “cherry pick” lighting retrofits alone will make it very difficult for governments to obtain ESCO contracts. DEP St. No. 1 at 13-15.

PECO argues that the DEP’s criticisms are unwarranted and submits its Plan contains a number of features to help the government customer maximize its energy savings. In response to the DEP’s testimony, PECO witness Jiruska testified:

Our plan contains a number of features to help the governmental institutional customer achieve and maximize their energy savings. I'd like to list just a couple. Our program includes partial reimbursement of an investment grade energy audit for a governmental institution that performs that audit and installs the measures as recommended by that audit. That is the first step to a whole-building approach and is absolutely a part of the whole-building approach.

We also include a set of prescriptive measures that can be utilized by the customer, but we also have custom features to our program, so in the event a customer is doing a program but does not fit one of our prescriptive measures, we can then utilize our custom approach and provide incentives for those energy savings.

Tr. at 138. In addition, PECO submits that it is targeting energy service contactors as a channel for the delivery of measures to governmental customers. Further, in response to the DEP’s “lighting only” critique, PECO avers that its Plan provides a wide array of options and customers can use as much or as little of the incentives as they are able. PECO MB at 39.

#### Disposition

We concur with the DEP that a whole-building approach will likely provide greater, longer-term energy savings for individual customers that are willing and able to take that approach. However, we believe the flexibility afforded by the combination of prescriptive and custom measures will enable a greater number of government/non-profit customers to participate at the whole-building level or some other level. The financial support offered for audits as well as the prescriptive and custom measures should enhance the financial incentives and economic viability of whole-building endeavors for those customers willing and able to pursue such projects. For those customers without the means to finance the whole-building endeavors, however, PECO’s approach will allow them to take advantage of those measures they can realistically employ. Accordingly, we decline to require PECO to amend this program component at this time.

# Public and Subsidized Housing Data

#### Positions of the Parties

TURN/AA submits that PECO was unable to provide data on the number and electric usage of commercial customers that operate public and subsidized housing with electric heating systems. TURN/AA avers that public and subsidized housing is designed for low-income households and these buildings could benefit from the EE&C Plan measures for nonprofit entities. TURN/AA recommends that PECO should require its CSPs and other contractors to collect the information necessary to identify customers who operate these buildings so appropriate follow-up and outreach can be conducted. TURN/AA MB at 5–6.

Similarly, ACORN explains the difficulty nonprofit organizations and low-income customers living in multi-family housing will have in understanding how to participate in Act 129 programs. ACORN supports PECO’s efforts to encourage participation in Act 129 and reiterates its request that PECO design a special outreach effort to nonprofit organizations that operate multi-family housing for low-income households. ACORN RB at 5–6.

In response to these recommendations, PECO states that it intends to work with CSPs during the course of the Plan implementation to identify landlords that operate public and subsidized housing so that landlords and their tenants can be “educated and engaged” in taking advantage of appropriate Plan programs and incentives. PECO points to the Implementation and Marketing Strategy of its Low-Income Energy Efficiency Program presented in Section 3.2.2 of its EE&C Plan. PECO RB at 6.

#### Disposition

Reviewing Section 3.2.2 of PECO’s EE&C Plan, we understand why TURN/AA and ACORN raised this issue. While we will accept PECO’s clarification in its Reply Brief that it will make a concerted effort to identify and educate landlords that operate public and subsidized housing, these endeavors were not well delineated in Section 3.2.2. of the Plan. Plan Volume 2 at 35-45. We will not require PECO to make an amendment to its Plan at this time. However, we will entertain recommendations for future amendments if it becomes clear that additional efforts are needed to locate, educate and engage landlords that operate public and subsidized housing.

### 5. Low Income Program Requirements

Act 129 provides:

The plan shall include specific energy efficiency measures for households at or below 150% of the Federal poverty income guidelines. The number of measures shall be proportionate to those households’ share of the total energy usage in the service territory. The electric distribution company shall coordinate measures under this clause with other programs administered by the commission or another Federal or State agency. The expenditures of an electric distribution company under this clause shall be in addition to expenditures made under Pa. Code Ch. 58 (relating to residential low income usage reduction programs).

66 Pa. C.S. § 2806.1(b)1(i)(G).

PECO reports that the number of customers reporting household incomes that are at or below 150 % of the federal poverty income guidelines (FPIG) in 2008 is 275,979. The electric usage of these customers is equal to 1,720,976 MWh, out of a total electric consumption in PECO’s service territory of 40,006,082 MWh in 2008. TURN/AA Exhibit PL-1 (PECO Response to TURN/AA Interrogatories Set I). Based on the data presented in this exhibit, low-income customers consumed about 4.3% of the total consumption in PECO’s service area during 2008.

In order to address these customers, PECO’s Plan includes the Low-Income Energy Efficiency Program. PECO explains that this program is modeled after PECO’s existing LIURP and will provide low-income customers with a variety of energy savings measures, including home energy audits and installation of energy efficiency measures at no charge. While PECO’s Low-Income Energy Efficiency Program targets customers with household incomes at or below 150% FPIG, PECO will also market the program to customers with incomes up to 200% FPIG so that those customers can also utilize benefits available under the ARRA. PECO St. No. 1, at 21. PECO anticipates spending 8% of its Act 129 funds on the Low-Income Energy Efficiency Program or $27.4 million, with resultant savings of 79,660 MWh which is equivalent to 6.15% of the energy savings outlined in the Plan. In addition to the Low-Income Energy Efficiency Program, low-income customers are also eligible for additional measures under PECO’s Home Energy Incentives Program. PECO MB at 28-29.

As discussed, *infra,* the Commission will convene a working group that will be charged with developing implementation standards for deploying proportional energy efficiency and conservation measures to low income customers. Consistent with that endeavor, we encourage PECO to carefully track energy and demand reductions as well as Plan expenditures for customers at or below 150% of the FPIG so that compliance with Act 129 can be determined.

**Energy** **Savings Targets**

**Positions of the Parties**

ACORN and the OCA offer an interpretation of the portion of 66 Pa. C.S. § 2806.1(b)(1)(i)(G) which states “[t]he number of measures shall be proportionate to those households’ share of the total energy usage in the service territory.” They argue that the most effective way to implement this section of the Act is to require that a specific percentage of overall savings be achieved from PECO’s low-income program. ACORN recommends that the energy savings targets for low-income households should be in proportion to their energy usage. Both OCA and ACORN aver a percentage of savings approach would parallel the 10% savings targets for government and non-profit customers required by 66 Pa. C.S. § 2806.1(b)(1)(i)(B). ACORN MB at 5-13; OCA MB at 15-16.

The OCA submits that PECO’s estimate of low-income usage was derived from actual billing data for PECO customers who provided their annual incomes to the Company. OCA MB at 16. PECO acknowledged on cross-examination that its billing system does not contain complete income levels of all its residential customers. Tr. at 150. The OCA recommends that PECO be required to provide further information to verify that its Plan will meet the low-income “set-aside” in the Act. OCA MB at 16.

#### Disposition

According to Section 2806.1(b)(i)(G), the number of energy efficiency measures that must be dedicated to low-income customers is calculated by first determining the percentage of total energy usage that is attributable to the low-income customer group. 66 Pa. C.S. §2806.1(b)(i)(G). This percentage is the percentage of the Act 129 Plan’s total energy efficiency measures that must be dedicated to low-income customers. In other words, if an EDC’s plan contains forty measures, and the low-income customer group’s share of total energy usage for the service territory is 5%, then the plan must have two measures dedicated to increasing energy efficiency for low income customers.

While the term “energy efficiency and conservation measures” is defined at Section 2806.1(m), there is no information as to how “measures” should be quantified for apportionment to the low-income customer group. There also is no indication about the time frame for implementation of this requirement over the five-year life of the EDC’s plan.

In addition to the need to clarify the application of the term “measures,” there is also a need to improve the accuracy of PECO’s estimate of the portion of annual electric consumption by low-income customers. On cross-examination, PECO’s witness, Mr. Jiruska, testified that PECO does not have income information from every customer and consequently used a sample of customers to extrapolate an estimate of annual consumption from low income customers. Further, PECO did not use census data to develop its estimate, as recommended by some of the stakeholders. Tr. at 150-151.

Full implementation of Section 2806.1(b)(1)(i)(G) will take some time. To ensure that we are using reasonably accurate data and that PECO and the other EDCs will be able to meet the requirement for low-income customers, the Commission will convene a working group that will be charged with developing implementation standards for deploying proportional energy efficiency and conservation measures to low-income customers. The working group, , will be composed of representatives from EDCs, consumer advocates, community-based organizations and other interested parties. Specifically, the working group will be charged with identifying the standardized data to be used to determine the proper proportion for low-income households. If necessary, the working group may address other matters that require clarification before the annual reconciliation process. The group shall provide its recommendations to the Commission no later than February 16, 2010.

**Transfer of Funds**

##### Positions of the Parties

TURN/AA and Representative Cohen recommend that the Commission should ensure that funds initially proposed for the Low Income Energy Efficiency Program are protected from any of the possible inter-fund or intra-fund transfers that are allowed under PECO’s Plan. TURN/AA MB at 6. Cohen MB at 9-10.

In its Petition, PECO recognizes that the *Implementation Order* envisions an annual review and adjustment process for EDC programs. However, PECO believes that more flexibility is appropriate in light of both the nature of the programs PECO is seeking to introduce for the first time and the extensive evaluation and data collection measures PECO will have in place from the beginning of Plan implementation. PECO proposes that, for changes within a rate class and changes of less than $20 million between rate classes, it retain the flexibility to redirect funds from underperforming to better performing programs as needed. PECO would discuss these changes with stakeholders and notify the Commission as part of its annual plan reporting. For inter-class changes of more than $20 million over the period of the Plan, PECO would work with its stakeholders to submit a modification to the Plan for Commission approval. PECO Petition at 18-19.

#### Disposition

Issues related to stakeholder participation and Commission approval of Plan modifications were also addressed by the parties as part of their response to implementation and evaluation issues. While we will discuss the implementation and evaluation issues, *infra*, we will address the procedures for Plan modifications here.

We find that an EDC cannot shift program funds within a customer class, or between customer classes without prior Commission approval. Doing so would constitute a modification of the EDC’s approved plan. The General Assembly authorized the Commission, not the EDC, to make decisions in regard to modifying an approved Act 129 Plan.

Section 2806.1(b)(2) expressly states that the “Commission shall direct” an EDC to modify or terminate any part of its approved plan if, after an adequate period for implementation, “the Commission determines that an energy efficiency or conservation measure will not achieve the required reductions in consumption in a cost-effective manner.” 66 Pa. C.S. § 2806(b)(2). Section 2806.1(b)(3) sets forth the action an EDC is required to take in response to a Commission direction to modify or terminate part of the approved plan. Specifically, the EDC is required to submit a revised plan describing the actions to be taken, to offer substitute measures, or to increase the availability of existing measures in the plan to achieve the reductions in consumption. 66 Pa. C.S. § 2806.1(b)(3).

Because the EDC’s Act 129 Plan will be approved by Commission order, procedures for rescission and amendment of Commission orders must be followed to amend that order and to assure due process for all affected parties. See 66 Pa. C.S.  § 703(g) (relating to fixing of hearing: rescission and amendment of orders). Accordingly, if the EDC believes that it is necessary to modify its Act 129 Plan, the EDC may file a petition requesting that the Commission rescind and amend its prior order approving the plan. See 52 Pa. Code §§ 5.41 (relating to petitions generally) and 5.572 (relating to petitions for relief).

The EDC’s petition should explain the specific reasons supporting its requested modifications to its approved plan; i.e., the shifting of funds between programs or customer classes, the discontinuation of a program, etc. The petition should also contain a request to modify its cost recovery mechanism. Evidence supporting the modification of the plan and the cost recovery mechanism shall be submitted with the petition. The petition shall be served on all parties participating in the EDC’s Act 129 Plan proceeding. If the EDC believes that the need for modification of its plan is immediate, the EDC can request expedited consideration of its petition. Accordingly, PECO’s proposed procedures for “mid-course’ corrections set-forth on page 216 of Volume II of its Plan are rejected and shall be redrafted to reflect that all Plan modifications require Commission review and approval.

### 6. Issues Relating to Individual Conservation and Demand Reduction Programs

#### Residential

**Conservation Voltage Reduction**

PECO’s EE&C Plan contains a Conservation Voltage Reduction Program that would affect all PECO customers. PECO proposes to reduce system voltage by 1% resulting in a peak demand reduction of 11.3 MW and annual energy savings of 110,000 MWh. The 1% voltage reduction would be implemented at the substation bus and PECO submits that the substation bus will be monitored to ensure that voltage levels do not fall below regulatory requirements. Plan Volume II at 185.

##### Positions of the Parties

The OCA’s witness Hahn submits that, under normal conditions, a 1% voltage reduction will not have any impacts on customers. He points out that PJM uses temporary 5% voltage reductions as one of its emergency operating procedures during abnormal conditions such as a shortage of operating reserve or insufficient generation. Mr. Hahn is concerned that if PJM calls for a 5% reduction concurrent with PECO’s proposed 1% reduction “ it is possible that voltages may temporarily fall to very low levels, even below the minimum allowed by the Commission.” OCA St. 1 at 18. The OCA recommends that PECO should be directed to perform specific evaluations of the operational aspects of the program and provide that information to the stakeholders and the Commission. If the evaluation does reflect problems with the voltage reduction program, the OCA suggests that the funds allocated to this program should be shifted to other programs that are performing well and are in need of expansion. OCA MB at 18.

##### PECO submits that, consistent with all programs, PECO intends to evaluate the Conservation Voltage Reduction Program to address any operational issues that might arise and if appropriate shift funds away from the program. PECO RB at 9-10.

##### Disposition

#### The Commission’s regulations at 52 Pa. Code § 57.14(b) allow for temporary variations in service voltage (no more than one minute in each instance) of 5% above or below the standard nominal service voltage adopted by the utility. PECO is proposing a 1% reduction in substation bus voltage, which is apparently a permanent alteration of its voltage control equipment, and therefore, may be construed as a change to its standard nominal service voltage.

The OCA’s concern, however, is not the 1% reduction, but the temporary effect that an additional 5% reduction, imposed by PJM during a system-wide load emergency, would have on customer service. For many years, this Commission has recognized voltage reduction as an appropriate response to load emergency situations, albeit of a relatively short duration. We do not expect such a rare occurrence to cause any appreciable harm to PECO’s customers. Nevertheless, since the Conservation Voltage Reduction Program is relatively new to Pennsylvania, we find merit in the OCA’s suggestion regarding program evaluation. We will, therefore, allow the implementation of the Conservation Reduction Voltage Program and direct that PECO provide, as part of its annual evaluation process, an assessment of the impact of this program on customer voltage levels and any mitigation strategies that were implemented.

**Fuel Switching**

PECO’s proposed Home Energy Incentive Program will, *inter alia*, offer rebates to residential customers that replace their electric baseboard and heat pump space heating systems and their electric water heaters to ENERGY STAR High Efficiency gas space heating and hot water heating systems. Plan Volume II at 61-72.

##### Positions of the Parties

The OCA points out that these incentives are expected to contribute 63,000 MWh of electric consumption reductions by removing electric equipment from the home, not by improving the efficiency of electric equipment or the ability to conserve usage from existing equipment. OCA MB at 18. OCA witness Mr. Hahn explained that these types of programs raise numerous public policy concerns, including cross-subsidization. In his testimony, he provided some perspective of the complexity of these concerns:

What is a conservation program for an electric utility becomes a load building program for a gas utility. In the proper application of the TRC test, one would have to include the marginal costs of the incremental gas usage in addition to the benefits of costs avoided by reduced electric usage. It does not appear from PECO’s working papers that such additional costs have been included. To effectively account for these costs, PECO would need to estimate the marginal costs of new gas supplies. Even these costs were estimated, it is difficult to determine which fuel source is actually more efficient at all times. Resolving this issue would likely result in considerable debate. I suspect this issue will change over time as gas prices and electric prices fluctuate. At any point in time, the answer as to which “fuel is more efficient” may change. Furthermore, cross subsidization issues are likely to emerge.

OCA St. 1 at 20. The OCA recommends that this program be further evaluated during the implementation phase to properly identify those situations where incentives for fuel switching would be in both the public and individual customer’s interest. OCA MB at 18.

The DEP states that these fuel switching components of PECO’s Plan “completely controvert” the very purpose of Act 129. The DEP argues that fuel switching is not a conservation measure as defined by the definition of “energy efficiency and conservation measures” set forth in 66 Pa. C.S. § 2806.1(m) (Definitions). The DEP recommends that the Commission reject the fuel switching program outright or address the matter through the TRM workgroup. DEP MB at 8-9.

PECO recommends that the Commission reject DEP’s interpretation of Act 129 as precluding any form of fuel switching. PECO avers that the Act’s definition of “energy efficiency and conservation measure” in 66 Pa. C.S. § 2806.1(m) is expansive, stating that the definition includes specific measures listed as well as “other technologies, practices or measures approved by the Commission.” PECO also submits that these measures can support the transition of low-income and subsidized multi-family housing from baseboard electric heat to gas in conjunction with its low-income and government/public/non-profit programs contained in the Plan. PECO MB at 10.

##### Disposition

Act 129 does not expressly address switching between electric power and natural gas; however, it does state the following in defining “energy efficiency and conservation measures”:

 (1) Technologies, management practices or other measures employed by retail customers that reduce electricity consumption or demand if all of the following apply:

(i) The technology, practice or other measure is installed on or after the effective date of this section at the location of a retail customer.

(ii) The technology, practice or other measure reduces consumption of energy or peak load by the retail customer.

(iii) The cost of the acquisition or installation of the measure is directly incurred in whole or in part by the electric distribution company.

(2) Energy efficiency and conservation measures shall include solar or solar photovoltaic panels, energy efficient windows and doors, energy efficient lighting, including exit sign retrofit, high bay fluorescent retrofit and pedestrian and traffic signal conversion, geothermal heating, insulation, air sealing, reflective roof coatings, energy efficient heating and cooling equipment or systems and energy efficient appliances and other technologies, practices or measures approved by the commission.

 66 Pa. C.S. § 2806.1(m) (Definitions). Although the definition does not mention natural gas, *per se*, we believe it is reasonable to assume that some uses of gas may be energy efficient. Nonetheless, as discussed, *supra*, it is premature to prohibit EDCs from including fuel switching or fuel substitution in their plans at this time.

We addressed this issue in our *TRM Order* where we stated:

The Commission recognizes that fuel switching is a complicated topic that will require additional time and effort to fully address. As the TRM will provide vital guidance to EDCs in developing their EE&C plans, which are due to be filed by July 1, 2009, there is not enough time to convene a working group to address all the related issues, fuel switching will not be included in this TRM. The Commission will convene a fuel switching working group in the near future to identify, research and address issues related [to] fuel switching. Depending on the outcome of this working group, fuel switching may be incorporated into a future version of the TRM.

*TRM Order* at 9.

We initiated the fuel switching working group at that time and directed that it report back to us with recommendations by June 1, 2010. *Id.* at 19. While PECO has proposed fuel switching as a means of achieving its mandated EE&C goals, we are cognizant that PECO has approximately 154,000 electric space heating customers[[6]](#footnote-7) and understand that fuel switching could greatly benefit these customers as PECO transitions from rate caps. Accordingly, we will approve the program components that provide incentives to substitute gas space and water heating appliances for electric appliances pending our evaluation of the working group’s report and recommendations. However, to expedite the resolution of this issue, we direct the working group to submit its report by March 31, 2010.

To assist the working group’s future analysis, we direct PECO to track appropriate data, in coordination with the Statewide Evaluator, including at least the following: (1) type of appliance and equipment being replaced; (2) the availability of natural gas at the customer’s location or immediate area; and (3) whether electric appliances and equipment were installed in areas where natural gas is available.

**Targeting Residential Heating Customers**

##### Positions of the Parties

Representative Cohen avers that PECO could better meet its statutory goals under Act 129 by focusing on customers who may receive significantly higher electric bills when generation rate caps end. Representative Cohen recommends that PECO be directed to “immediately” begin a program to identify the actual heating source for customers served under PECO’s RH tariff. Representative Cohen also recommends that PECO develop target marketing material and supporting information highlighting upcoming increases in customer electric bills and the potential incentive programs available under Act 129. Representative Cohen suggests that PECO use these targeted materials where the cost is not significantly higher than generic materials, like messages on a customer’s bill, email or notices when customers access their accounts on PECO’s website. Cohen MB at 13-19.

In its Reply Brief, PECO agrees that education and outreach are essential concerning the expiration of the generation rate caps and points out that PECO has an extensive plan already approved by the Commission. The Commission adopted PECO’s plan in  *PECO Energy Company Consumer Education Plan for 2008-2012 Submitted in Compliance with May 10, 2007 Final Order* *at Docket No. M-00061957*, Docket No. M-2008-2032274 (Order entered August 7, 2008) (*Consumer Education Plan Final Order*). In addition, PECO submits that, as part of the Joint Petition for Settlement in its default service proceedings, PECO agreed to meet with interested parties to evaluate whether to extend the phase-out period for Rate RH if the average total bill rate increase for calendar year 2011, as compared to the total bill under rates charged in December 2010, exceeds 25%. *See* *Petition of PECO Energy Company for Approval of Its Default Service Program and Rate Mitigation Plan*, Docket No. P-2008-2062739 (Order entered June 2, 2009). In light of these existing initiatives and programs, as well as the incentives of PECO’s Plan that are available to those customers seeking to switch from electric baseboard heating, PECO argues that the Commission should not impose additional obligations for PECO with respect to its Rate RH customers as part of this proceeding. PECO RB at 10-11.

**Disposition**

While we fully appreciate Representative Cohen’s interest in mitigating the potential impact of future rate increases through customer conservation, we concur with PECO that its Consumer Education Plan for 2008-2012 should accomplish the objectives of Representative Cohen’s recommendations. In our Final Order approving PECO’s Consumer Education Plan we stated:

Phase 2 occurs from January 2009 through January 2010 and will focus on PECO’s procurement efforts, the price impact on customers, and ways consumers can mitigate potential price increases – including *energy conservation and efficiency methods.* PECO proposes utilizing earned and paid media, *direct communications*, Web-based communications, and community outreach. Community outreach involves sponsorship and participation in community events to provide education directly to the public.

*Consumer Education Plan Final Order* at 9 (emphasis added). Since we expect PECO will already be undertaking endeavors the same as or similar to those proposed by Representative Cohen as part of its Consumer Education Plan for 2008-2012, we do not think a further amendment to PECO’s EE&C Plan is warranted.

**Renewable Resources Program**

**Positions of the Parties**

PECO proposes a renewable resources program to increase the number of homes and commercial buildings using renewable resources to offset some or all of their electric use or gas use for hot water heating. The program will educate customers about available financial incentives for solar photovoltaic and solar hot water systems and provide rebates for installing such measures. Petition at 9-10.

**Disposition**

We note that PECO’s TRC Test analysis of this program measure yields a benefit/cost ratio of only 0.20. PECO St. 2 at 23. While we want to foster the development of alternate energy sources, we find that the ratio of the benefits to costs for this program indicates that this may not be an effective use of ratepayer funds. Accordingly, we direct PECO to delete this program from its Plan. We do, however, encourage PECO to develop and resubmit another renewable resources program that yields a higher benefit/cost ratio.

**Residential and C&I Super Peak Time of Use (TOU) Rate Programs**

**Positions of the Parties**

PECO has proposed two Super Peak TOU rate programs that are designed to provide financial incentives for default service residential and C&I customers to shift their consumption to lower-cost off-peak hours. Petition at 10-11.

**Disposition**

With the exception of the cost recovery of these rate programs discussed *infra*, we will approve these two rate programs as proposed in the Plan. However, we reserve our approval of cost allocation issues for future proceedings when the TOU rates, costs and rate designs are finalized. In the interim, PECO should track all costs associated with these rate programs.

**Incentive Programs**

In its Plan, PECO proposed a number of incentive programs such as the Home Energy Incentives Program, C&I Equipment Incentive Program, the C&I New Construction Program and the Permanent Load reduction Program. Petition at 7-12.

**Positions of the Parties**

OSBA avers that PECO’s EE&C programs may not properly match the costs of each program with the customers who pay for the program. OSBA argues that specific participants will benefit substantially from these incentives but all customers will be required to pay for them. OSBA MB at 11.

**Disposition**

We will incorporate a review of the appropriateness of the proposed incentives into the annual review process of the Plan. We also recommend that all EDCs work together to develop statewide consistency with regard to rebate levels.

**Statewide Whole Home Performance Program**

PECO has proposed a Whole Home Performance (WHP) program to provide a “big picture” approach to help residential customers view the energy performance of their homes as more than the sum of individual decisions about individual components. Among the many components of the program are ENERGY STAR (HPwES) Audits, the direct installation of low-cost measures and rebates on other measures. The program also provides training of auditors and contractors in the community to provide WHP services. Plan Volume II at 46-54.

##### Positions of the Parties

The DEP submits that PECO’s WHP program is a “model proposal” that could serve as the basis for a statewide program. The DEP states that its “main issue” with PECO’s WHP program is that additional funding was not directly allocated to the program and that it is not available statewide. The DEP avers that absent a statewide approach, a significant amount of ratepayer funds will be wasted in the design, administration and marketing of the programs. DEP MB at 11-12.

PECO argues that given the aggressive conservation goals it must achieve in the short-term, it is very important to get the Plan’s programs into the market as soon as possible. PECO states that it is willing to work with stakeholders and other EDCs, but it does not believe a coordinated statewide approach recommended by DEP is appropriate at this time. PECO MB at 37.

##### Disposition

We concur with PECO that the aggressive time frames established by Act 129 warrant the prompt implementation of the WHP Program. Consequently, we will not direct PECO to modify its WHP program at this time. However, we also concur with the DEP that a great deal of energy savings and implementation efficiencies can likely be achieved if the design, administration and marketing of residential performance programs can be coordinated on a statewide basis. To that end, we encourage the EDCs to work together to develop coordinated programs and to work with the Statewide Evaluator to establish effective statewide management and evaluation reporting standards.

#### Commercial & Industrial

**Distributed Energy Resource Program**

This program will be targeted to PECO’s commercial/industrial customers who either have existing backup generation resources or are interested in installing other types of distributed generation systems at their facilities. These systems would be dispatched by PECO during the top 100-hours of system peak demand each year. In return, participants are provided incentives up to $210/kW for equipment maintenance upgrades and/or installations. The upgrades to existing backup generation systems would be to enhance those systems to meet local air quality standards that would allow for a minimum of 100 hours of run time that coincides with the 100-hour critical peak period. Other types of distributed generation systems might include Combined Heat and Power (CHP), reciprocating engines, fuel cells, etc. PECO Plan Volume II at 175.

##### Positions of the Parties

The DEP opposed this component of PECO’s Plan because it is not permitted under Act 129 and it will have a negative impact on air quality. In its Main Brief, the DEP provides the following explanation why distributed generation is not consistent with Act 129:

The definitions of both “energy efficiency and conservation measures” and “peak demand” indicate that the only acceptable strategies to reduce peak demand is to reduce overall consumption or shift consumption to non-peak hours. “Energy efficiency and conservation measures” is defined in relevant part as “the technology, practice or other measure [that] *reduces consumption of energy* or peak load by the retail customer.” 66 Pa. C.S. § 2806.1(m) (emphasis added). “Peak demand” is defined as “[t]he highest *electrical requirement* during a specified period.” Id. (emphasis added). Taken together, it is clear that reducing consumption of electricity during the highest specified period simply cannot occur by generating electricity with a behind the meter source other than solar energy (as discussed above).

DEP Main Brief at 9-10.

The DEP explains that many of these customer-operated standby generators fall outside the DEP’s regulatory control and are not required to have permits or emission controls. DEP submits that DEP’s regulations were written when emergency generators were used as a source of back-up sources of power, not as distribution generation sources. DEP also submits that these generators will be employed when ozone levels are the highest and the detrimental impact on human health could be quite significant and should be avoided. *Id*. at 10-11.

PAIEUG argues that the DEP has not demonstrated that its air quality standards prohibit the dispatch of distributed generation and PECO’s commercial and industrial customers should not be restricted from utilizing these “properly-permitted” resources as proposed by PECO. PAIEUG avers that it is unreasonable for DEP to attempt to restrict such usage through this proceeding when it has taken no formal steps to do so under its own regulatory authority. PAIEUG MB at 22-23.

In addition to the arguments submitted by PAIEUG, PECO argues that the definition of “energy efficiency and conservation measures” in Act 129 includes measures that reduce consumption of energy orpeak demand and “peak demand” is defined as the highest electrical requirement occurring during a specific period. 66 Pa. C.S. § 2806.1(m). PECO avers that these definitions, considered alone or in concert, simply do not require that any and all peak load reductions be achieved through reducing overall consumption or shifting consumption to non-peak hours as DEP argues in its Main Brief. PECO opines that the use of distributed generation will undeniably reduce peak demand and is therefore an appropriate measure under the Act. PECO RB at 12-13.

##### Disposition

We find that Act 129 does not eliminate distributed generation for use in meeting energy and demand reduction goals. Rather, Act 129 is silent with respect to the use of distributed energy resources The Act does not dictate how EDCs must meet the reduction goals, only that they must. The Act appropriately leaves these matters to the discretion of the EDCs, pursuant to the Commission’s review.

The definition of “peak demand” explicitly states that, for an EDC, “the term shall mean the sum of the metered consumption for all retail customers over that period.” 66 Pa. C.S. § 2806.1(m). It is undeniable that the use of distributed energy resources during peak hours will reduce a company’s metered consumption during those periods. Because on-site generation is generally located “behind the meter,” distributed energy resources also reduce the metered consumption of the retail customer, which is one of the qualifying factors for “energy efficiency and conservation measures,” as defined by the Act.

Program administrators will be required to comply with all Federal, State and Local requirements relating to distributed generation. Therefore, a distributed generation program will reduce peak demand in full compliance with both Act 129 and current Commonwealth regulations. Moreover, PECO’s EE&C Plan is offering incentives for upgrading existing systems to meet local air quality standards. Plan Volume II at 175.

Back-up generators can be an effective type of demand response programming. Back-up generation is a low cost piece in achieving demand reduction. So long as the units operate within the terms of their permits, CSPs should be allowed to call upon these back-up generators in order to achieve the commitments of the Contracted Demand Response Program.

Thus, the Commission supports a strategy of targeting eligible C&I customers who have existing backup generation resources, or are interested in having grid-connected generating units installed at their facilities, in order to realize energy savings and peak demand reductions. Act 129 does not dictate how EDCs must meet these goals, only that they must meet them. Since the Act appropriately leaves these matters to the discretion of the EDCs, pursuant to the Commission’s review, we only encourage the EDCs to be cognizant of this issue. For these reasons, we conclude that the DEP’s proposal to restrict the dispatch of distributed energy resources should be rejected.

**Demand Reduction Aggregator Contracts**

As discussed more fully *supra*, PECO is proposing a DR Aggregator Contracts Program that will establish contracts with CSP’s to recruit PECO customers to deliver demand reductions during PECO’s top 100 peak hours. PECO recognizes that there are some uncertainties with the demand and energy reductions that it has estimated for this program and, if necessary, may have to reduce the number of peak hours delivered by some customers to fifty hours and increase the number of customers participating in the program. Plan Volume II at 171.

##### Positions of the Parties

EnerNOC recommends that the Plan be modified to utilize a fifty-hour target from the onset. EnerNOC avers the fifty-hour target reflects a more realistic assessment of the uncertainty associated with predicting the top 100 peak hours. By reducing the target to fifty hours EnerNOC argues that the CSPs will be in a better position to assure that the hours dispatched will occur during PECO’s peak 100 hours. EnerNOC also argues that it will be less costly for PECO to dispatch more customers for fewer hours. EnerNOC MB at 9.

EnerNOC also recommends that the contracts for demand reductions be extended beyond the “2012/2013 delivery year.” EnerNOC submits that recruiting enabling demand response providers requires up-front investment. EnerNOC argues that, by extending the contract term, these costs can be amortized over a longer period. EnerNOC avers, by lengthening the amortization period, PECO and its CSPs may be able to realize more capacity at a lower cost. EnerNOC MB at 5-6.

##### Disposition

PECO has already included in its Plan the flexibility for PECO and its participating CSPs to recruit customers willing to commit to a fifty-hour target and we do not believe that this portion of the Plan warrants an amendment. However, we will direct PECO to consider any net savings that may be realized by including contracts below 100 hours as it implements this program and to provide flexibility to the CSPs to achieve the 100 hour requirement at the least cost to ratepayers. In approving PECO’s proposed DR Aggregator Contracts program, we wish to clarify that any eligible CSP may participate and that customer load reductions will be selected on a competitive basis. While longer demand reductions may prove to be more cost-effective, we will not direct an EDC to amend its Plan to extend a program beyond the 2013 targets established by the Act at this time. As we evaluate the costs and benefits of all of the proposed program measures over the next few years, we will be in a position to determine if longer demand reduction contracts are in the public interest beyond meeting the requirements of Act 129. Accordingly, EnerNOC’s recommendation regarding the extension of demand reduction contracts will not be adopted at this time.

### 7. Proposals for Improvement of PECO’s Plan

The Commission’s EE&C Program must include “procedures to make recommendations as to additional measures that will enable an electric distribution company to improve its plan and exceed the required reductions in consumption.”

66 Pa. C.S. § 2806.1(a)(6).

1. **Residential**

**HVAC Efficiency – Testing and Incentives**

##### Positions of the Parties

In its direct testimony, FDSI, a heating, ventilation, and air conditioning (HVAC) diagnostic technology and services provider, proposes an expansion of PECO’s programs for residential customers to include diagnosis of home HVAC systems. FDSI contends that, while PECO’s Plan includes comprehensive home energy audits, such audits will include recommendations for more energy-efficiency HVAC equipment but will not include the diagnosis of a residential customer’s existing HVAC equipment and the identification of possible increased efficiencies. FDSI witness Rossi testified that PECO’s proposed audits may miss cost-effective opportunities or “the low hanging fruit” available from HVAC efficiency improvements. FDSI St. No. 1 at 27-28.

PECO states that it did not include a residential HVAC diagnostic program in light of its review of other programs and priorities for residential customers. PECO avers, as with other proposals by parties, FDSI has not specified the costs of its proposal nor suggested what portions of PECO’s Plan should be eliminated in order to include and pay for its additional activities. PECO MB at 38. PECO witness Jiruska testified that PECO would look to work with FDSI in the future “to roll out this sort of program.” Tr. at 144.

##### Disposition

While we concur with FDSI that HVAC efficiency improvements may be a good cost-effective source for residential energy savings, we do not have sufficient information on the costs and savings of such programs to determine which of PECO’s other residential programs should be supplanted at this time in favor of a HVAC diagnostic program. Consequently, we will not direct PECO to amend its Plan. However, as indicated by Mr. Jiruska’s testimony, PECO will explore this opportunity as its EE&C Plan progresses. Further, diagnosis and efficiency improvements of HVAC systems could be among the cost-effective recommendations that result from the energy audits that will be performed under a few of the programs currently proposed in PECO’s EE&C Plan. FDSI and other companies can seek to provide those customers’ HVAC efficiency needs.

#### b. Commercial & Industrial

**Financing Program**

##### Positions of the Parties

TRF urges the Commission to develop a financing plan for its customers in its EEC Plan. TRF witness Sanders recommends that the Commission order PECO to include in its Plan a $10 million contribution to TRF’s Regional Energy Revolving Loan Fund to provide financing to commercial, industrial and institutional customers in PECO’s service territory. TRF St. 1 at 16-17. TRF submits that accompanying the *Implementation Order* was a Joint Statement by Chairman Cawley and Commissioner Gardner that called attention to the need for financing programs to help customers implement the energy efficiency, conservation, and demand reduction measures contained in PECO’s EE&C Plan. TRF points to the following portion of their Joint Statement:

In order to achieve lasting efficiency gains, it may be necessary for some customers to invest significant amounts of capital in their homes, apartments or small businesses – capital they may not have at hand. To eliminate this financial barrier, we strongly encourage EDCs to support, design and implement a statewide program similar to Keystone HELP. Joint Statement of Chairman Cawley and Commissioner Gardner, Implementation Order in Docket No. M-2008-2069887. Joint Statement, p. 1.

TRF MB at 11-12.

TRF avers that combining the participating customer costs and the PECO incentives that the participating customer must pay first before being reimbursed, PECO’s EE&C Plan requires participating customers to invest $544,344,606 of their own money (or borrowed funds) in efficiency, conservation, and demand reduction measures over the four program years of the PECO EE&C Plan. TRF argues that, if customers are unable or unwilling to make this investment, PECO will be unable to achieve its goals.

In response to TRF’s proposal, PECO states:

First, nothing in Act 129 provides that an EDC can – or should – be required to expend additional funds in support of its Plan without any recovery. *See* 66 Pa.C.S. § 2806.1(k) (providing for recovery of *all* reasonable and prudent costs incurred in the provision or management of an Act 129 energy efficiency and conservation plan). Second, as a general matter, the Commission is precluded from directing a utility to make charitable contributions, *see Pennsylvania Pub. Utility Comm’n v. Pennsylvania-American Water Co.*, 231 P.U.R.4th 277 (2004), and TRF is, in fact, simply asking for a grant. TRF St. No. 1, pp. 15-16. Finally, TRF acknowledges that it does not know how many PECO customers may actually require financing. *Id.* at 7.[[7]](#footnote-8)Thus, there is no basis for the Commission to mandate a $10 million contribution from PECO to TRF.

PECO MB at 50-51.

##### Disposition

We concur with TRF that, in order to achieve lasting efficiency gains, it may be necessary for some customers to invest significant amounts of capital in their homes, apartments or businesses and the lack of capital may be a constraint for many utility customers to take full advantage of EE&C Plans. While a number of funding sources exist, additional financing would likely enhance the effectiveness of EDC’s EE&C Plans.

PECO’s Plan has already allocated all of the funds available under the 2% spending limit and implementing a financing program would require adjustments to other proposed program measures. There is not sufficient information on the record as to whether a financing program would be more cost effective that any of the other programs proposed by PECO. Consequently, we are not inclined to direct PECO to amend its Plan to include a financing option at this time. However, we will direct PECO to assess, as part of its annual EE&C Plan reporting, the extent to which implementation of its proposed Plan measures are being affected by the lack of financing sources. This information will help to identify the need for additional financing opportunities in perspective with other energy efficiency program measures.

PECO notes that throughout its Plan, PECO has identified additional resources that are or will be available to customers to finance the costs of increased energy efficiency and demand reduction measures. In addition, consistent with 66 Pa. C.S. § 2806.1(j) and the *TRC Order*, PECO states that it will be publicizing eligible state and federal funding resources. PECO MB at 50.

**Timely Electric Usage Data**

**Positions of the Parties**

Philadelphia requests that PECO provide electricity usage on a timely electronic basis for all of its accounts. In addition, Philadelphia submits that it could benefit from having real-time profiles for all Rate HT (High Tension) accounts and suggests that the PECO eValuator should be available at no charge for all HT accounts. Philadelphia explains that this information would assist its department managers to achieve their energy efficiency targets. Philadelphia St. No. 1 at 10.

In response to Philadelphia’s request, PECO states that it recently filed Smart Meter Technology Procurement and Installation Plan sets the stage for smart meters throughout the City. PECO submits that this will enable Philadelphia to have access to real-time data on electricity usage. PECO MB at 40. PECO explains that its “eValuator” service is an existing value-added service for which customers are billed separately. PECO avers that the costs associated with eValuator are not recovered in rates. PECO RB at 17.

**Disposition**

While providing eValuator to customers as a free service may have been an option that PECO could have included in its Plan, there is no information in the record on the costs and benefits of such an option to assess whether it should have been pursued by PECO or added to the Plan at this time.

PECO ‘s recently filed Smart Meter Technology Procurement and Installation Plan will give Philadelphia access to real-time data on electricity usage which should assist Philadelphia in meeting its energy efficiency objectives. Consequently, PECO’s Plan does not require an amendment to provide real time usage information to its customers.

**HVAC Efficiency – Testing, Incentives and Standards**

**Positions of the Parties**

As discussed *supra*, FDSI, proposes an expansion of PECO’s programs for residential customers to include diagnoses of home HVAC systems. In addition to its recommendations for residential customers, FDSI proposes that the HVAC measures for commercial, industrial and government customers be expanded to include incentives for diagnostic testing . FDSI St. No. 1 at 7-11. FDSI also recommends that PECO’s Plan establish guidelines to ensure that HVAC measures are performed with appropriate protocols and procedures. *Id*. at 11-13.

Consistent with its response to FDSI’s proposal for residential customers, PECO avers, that FDSI has not specified the costs of its proposal nor suggested what portions of PECO’s Plan should be eliminated in order to include and pay for its additional activities. PECO submits that it will be using “industry standards” as it implements the HVAC incentives currently contained in the Plan. However, PECO states it will consider the additional guideline recommendations recommended by FDSI. PECO RB at 17-18.

**Disposition**

While FDSI did provide samples of the costs and savings of HVAC repairs and upgrades (FDSI St. No. 1, Appendix C), the record in this proceeding does not contain sufficient information on the potential costs and savings of FDSI proposed additions to PECO’s HVAC programs to determine which of PECO’s other commercial, industrial and government programs should be supplanted at this time in favor of a HVAC diagnostic programs. Consequently, we will not direct PECO to amend its Plan as recommended by FDSI at this time.

## D. Cost Issues

### Plan Cost Issues

Each EE&C plan must include an analysis of the EDC’s administrative costs, 66 Pa. C.S. § 2806.1(b)(1)(i)(K), as well as an estimate of the total cost of implementing the measures in the plan. 66 Pa. C.S. § 2806.1(b)(1)(i)(F). The total cost of the plan cannot exceed 2% of the EDC’s total annual revenue as of December 31, 2006. 66 Pa. C.S. § 2806.1(g). In addition, Act 129 states “no more than 2% of funds available to implement a plan under this subsection shall be allocated for experimental equipment or devices.” 66 Pa. C.S. § 2806.1(b)(1)(iii). PECO has submitted a four-year program budget of $341.6 million. PECO Exh. 2 at 21.

**Two Percent Cost Limit**

The relevant portion of Section 2806.1(g) of the Act states that “the total cost of any plan required under this section shall not exceed 2% of the electric distribution company’s total annual revenue as of December 31, 2006.” 66 Pa. C.S. § 2806.1(g). As discussed, *infra*, the Commission previously addressed this issue in the *Implementation Order*.

#### Positions of the Parties

PAIEUG raises the issue as to whether the Act 129 provision limiting an EDC’s EE&C plan costs to 2% of 2006 revenues is an annual plan expenditure limit or a total four-year plan expenditure limit. Citing 1 Pa C.S. § 1921(a) and (b), PAIEUG argues that the plain language of the statute does not allow for Commission discretion or interpretation of this amount and the plain language of a statute cannot be ignored and must be given effect. PAIEUG avers that the Commission’s reliance on additional purported indicia of statutory intent is unnecessary in this situation. PAIEUG states that it recognizes that the Commission espoused a differing view in the *Implementation Order*; however, the *Implementation Order* was not an adjudication subject to appeal. PAIEUG submits that it is reiterating this legal argument in this proceeding to preserve its right to appeal on this basis, if necessary. PAIEUG MB at 12-14.

#### Disposition

Specifically, in the *Implementation Order* we stated:

With regard to the two percent limitation provision of the Act, we agree with PPL that this limitation on the “total cost of any plan” should be interpreted as an annual amount, rather than an amount for the full five-year period. Since the statutory limitation in this subsection is computed based on annual revenues as of December 31, 2006, we believe it is reasonable to require that the resulting allowable cost figure be applied on an annual basis as well. In addition, we note that the plans are subject to annual review and annual cost recovery under the Act, 66 Pa. C.S. §§ 2806.1(h) and (k). Finally, based upon the information presented in the comments and experience in other states, it appears that the statutory goals for consumption and demand savings are not likely to be achievable if the two percent limit was read as applicable to the entire multi-year EE&C program.

*Implementation Order* at p. 34 (footnotes omitted).

This Commission’s rationale for interpreting the 2% cost limitation as an annual amount, as outlined in the *Implementation Order*, points out the ambiguousness of this section. Therefore, we may consider the consequences of a particular interpretation to determine the intent of the General Assembly. See 1 Pa. C.S. § 1921(c). The evidence contained in each of the EE&C plan proceedings provides substantial support for our previous conclusion that the statutory goals for consumption and demand savings are not achievable if the 2% limit is applied to the entire multi‑year EE&C program. The evidence of record shows that PECO’s Plan just meets or slightly exceeds the statutory consumption and demand targets with budgets that spend almost the entire 2% annual cost cap. As the Plan covers four years, the Commission would have to reduce the planned expenditures by about three fourths of the current amount if we were to adopt a 2% cap for an entire multi‑year EE&C plan. Such a reduction in spending would result in a corresponding reduction in consumption and demand energy savings, making it impossible for PECO to meet the statutorily imposed consumption and demand targets, unless the PECO shareholders contribute what amounts to almost three fourths of the necessary funding to avoid a penalty of up to $20,000,000. Such a result could raise an unconstitutional taking issue. The Commission does not believe that the General Assembly intended such a result. As such, it is clear to this Commission that the intent of the General Assembly was that each plan would be able to meet the mandated energy reduction targets within the legislatively imposed spending limits.

Furthermore, as the General Assembly declared in the preamble of Act 129, “[i]t is in the public interest to adopt energy efficiency and conservation measures and to implement energy procurement requirements designed to ensure that electricity obtained reduces the possibility of electric price instability, promotes economic growth and ensures affordable and available electric service to all residents.” As the EE&C Plan under review in this proceeding is in the public interest, the costs of such a Plan must be borne by the public as a whole. As such, the Commission stands by its interpretation propounded in the *Implementation Order*: that Section 2806.1(g) of the Act must be interpreted as an annual cost limit, not a multi‑year plan cost limit.

While PAIEUG is challenging the limit on the total cost of EDC EE&C Plans, we will also clarify our position on the EDC’s ability to recover the costs of their respective EE&C Plans on a levelized basis over the four-year duration of their EE&C Plans.

Initially, it must be noted that each EE&C plan covers four years. Section 2806.1(g) of Act 129, states that “[t]he total cost of any plan required under this section shall not exceed 2% of the electric distribution company’s total annual revenue as of December 31, 2006.” 66 Pa. C.S. § 2806.1(g). As the EE&C plans cover four years and the 2% of total annual revenues can reasonably be interpreted as an annual cost limit, the “total cost” of any four year plan cannot exceed the aggregate of the four annual 2% limit amounts. The contrary interpretation would not be reasonable because it would either not allow sufficient funds to accomplish the objectives of the act or would require EDC shareholders to fund the majority of the funding.

Section 2806.1(k) of Act 129 directs that the EDCs “shall recover on a full and current basis from customers, through a reconcilable adjustment clause under section 1307, all reasonable and prudent costs incurred in the provision or management of a plan provided under this section.” 66 Pa. C.S. § 2806.1(k). This section directs that the EDCs are to recover the total reasonable and prudent costs of a four year plan, which is of course limited by Section 2806.1(g). While this section mentions recovery on a full and current basis (probably to preclude long-term deferral of EDC cost recovery), we note that while the EDC will be receiving some funds early, a complete reconciliation will occur at the end of the four year plan period. At that time, the Commission will direct what the amount of refunds or collections for over or under recovery will be, and the period in which the reconciliation will occur.

Furthermore, section 1307(e)(3) of the Public Utility Code permits the Commission, for good cause, to extend the time period under which EDCs refund or collect over or under collections for an annual automatic adjustment clause. See 66 Pa. C.S. § 1307(e)(3). The Commission believes there is sufficient good cause in the record and in the structure of Act 129. All stakeholders supported the levelized cost recovery as it would prevent rate volatility. The delay only involves a minor one, possibly two, year delay. Such levelized rates are in accordance with common ratemaking principles and tools, such as cost normalization.

**Statewide Evaluator Costs**

Act 129 requires the Commission to establish an evaluation process that monitors and verifies data collection, quality assurance and the results of each EDC’s EE&C plan as well as the program as a whole, in accordance with the TRC Test. 66 Pa. C.S. § 2806.1(a)(2). While the Act requires each EDC’s plan to explain how quality assurance and performance will be measured, verified and evaluated,[[8]](#footnote-9) it requires the Commission to monitor and verify EDC data collection, quality assurance processes and performance measures, by customer class. 66 Pa. C.S. § 2806.1(a). This evaluation is to be conducted every year, as each EDC must submit an annual report by July 15th, documenting the effectiveness of its plan, energy savings measurement and verification, an evaluation of the cost effectiveness of expenditures and any other information the Commission requires. 66 Pa. C.S. § 2806.1(i). Each EDC also must identify necessary adjustments to its plan based on the results of the annual and five-year reviews. 66 Pa. C.S. § 2806.1(b)(2).

The Act further requires that, by November 30, 2013, and every five years thereafter, the Commission must evaluate the costs and benefits of the program as a whole as well as the costs and benefits of the individual EE&C plans submitted by the EDCs to the Commission. This evaluation applies to reductions in consumption as well as reductions in peak demand and it must be consistent with the TRC Test. If the benefits of the program exceed the costs, the Commission must adopt additional required incremental reductions in consumption. 66 Pa. C.S. § 2806.1(c)(3) and (d)(2).

In order to audit program results and to confirm the specific energy reduction target requirements specified in Act 129, the Commission retained the services of a statewide evaluator who will monitor and verify EDC data collection, quality assurance processes and performance measures, by customer class as required by Section 2806.1(a)(2) and (3). 66 Pa. C.S. § 2806.1(a)(2) and (3). Section 2806.1(h) of Act 129 states that the Commission shall recover from the EDCs its costs of implementing the overall EE&C program. 66 Pa. C.S. §2806.1(h). The cost of the statewide evaluator falls into this category.

PECO has included $2.5 million for the statewide evaluator in its administrative costs under the 2% cap. Plan Volume II at 196. Plan Volume III, Appendix E-1.

The costsof the individual EDC’s plans are limited by the Act to 2% of the EDC’s total annual revenue as of December 31, 2006. 66 Pa. C.S. §2806.1(g). However, the statewide evaluator expense, while necessary to the implementation of the overall program administered by the Commission, is not a cost component of the EDCs’ individual plans. Since the EDCs have no control over the level of this expense, it is appropriate that the EDCs not be required to include the cost of the statewide evaluator within the 2% limitation on the cost of their individual plans.

Furthermore, Section 2806.1(k)(1) states that each EDC shall recover all reasonable and prudent costs incurred in the provision or management of its EE&C plan on a full and current basis through a reconcilable surcharge. 66 Pa. C.S. § 2806.1(k)(1). Therefore, the cost recovery of the statewide evaluator should be included in the reconcilable surcharge that will be used to recover those costs of the individual EE&C plans.

We conclude that the expense related to the statewide evaluator is not a cost component of the EDCs’ individual plans. Rather, it is a cost component of the overall program instituted by the Commission. Accordingly, we find that PECO’s recovery for its respective share of the statewide evaluator cost will not be subject to the 2% spending cap of its Plan. As PECO’s Plan included an estimate of statewide evaluator expenses as an administrative cost within its Plan, we shall direct PECO to submit a revised cost allocation plan that does not include the statewide evaluator expenses.

**Costs of Residential and C&I Super Peak TOU Rate Programs**

PECO is proposing two super peak time of use (TOU) programs to provide residential and small and medium C&I customers with an incentive to reduce peak demand when PECO experiences super peak demand on its system. Customer enrollment will not begin until after PECO’s rate caps expire at the end of 2010. These programs will be considered part of PECO’s Default Service Plan and program participants must be served by PECO. Consequently, customers that receive service under another generation supplier will not be eligible to participate in these rate programs. Plan Volume II at 153-158 and 165-170. PECO estimates that the costs associated with this program will be about $8.8 million for the residential program and $10.1 million for the C&I program. PECO St. 2 at 21.

As part of our discussion of EE&C Plan cost recovery in our *Implementation Order* we stated:

When the EE&C plans to be offered by EDCs will benefit both shopping and non-shopping customers, the cost recovery mechanism shall be non-bypassable, and structured such that it will not affect the EDC’s price‑to‑compare.

*Implementation Order* at 38. We further clarified the cost recovery from non-shopping customers by stating:

However, it may not be appropriate to subsidize or assign costs for various utility‑offered curtailment or pricing programs across all customers if any such subsidies or incentives are not offered to competitive providers of service, or are used exclusively for or to support utility curtailment or generation supply programs. An EDC may not recover costs under its EE&C plan cost recovery mechanism for any costs which it recovers through its default service program.

*Id.*

While we are not questioning the inclusion of these programs in PECO’s EE&C Plan, we believe it may be inappropriate to include the costs of these programs in PECO’s EE&C Plan budget and Energy Efficiency and Program Costs (EEPC) for all customers when shopping customers (customers of competitive suppliers) will not be able to participate in the program. Unless PECO can provide an explanation of why it should be permitted to deviate from our policy reflected *supra*, we direct PECO to remove the costs associated with the two Super Peak TOU Rate programs from the budgeted Plan costs to be recovered through the EEPC.

As we indicated in our discussion of the TOU programs *supra*, we approve this rate program as part of the Plan but reserve our approval of cost allocation issues for future proceedings when the TOU rates, costs and rate designs are finalized. In the interim, PECO should track all costs associated with this rate program.

### 2. Cost Effectiveness/Cost-Benefit Issues

Each EDC must demonstrate that the plan is cost effective using a TRC Test approved by the Commission. 66 Pa. C.S. § 2806.1(b)(1)(i)(I). In addition, the Commission’s EE&C Program must include an analysis of the cost and benefit of each plan, in accordance with a TRC Test approved by the Commission. 66 Pa. C.S. § 2806.1(a)(3). The Act defines a “total resource cost test” as “[a] standard test that is met if, over the effective life of each plan not to exceed 15 years, the net present value of the avoided monetary costs of supplying electricity is greater than the net present value of the monetary cost of energy efficiency conservation measures. 66 Pa. C.S. § 2806.1(m).

In our *TRC Test Order*, the Commission addressed the nature of the TRC Test to be used to analyze the cost-effectiveness of EDC EE&C Plans. The creation of the cost effectiveness analyses using the Commission-approved TRC Test required the use of many assumptions regarding current and future energy prices. Given that such forecasting is very assumption dependent, the intention of the TRC Test was to ensure that all EDCs were using the same basic methodology to calculate the costs and benefits of their EE&C plans in order to eliminate potential discrepancies in calculations across companies.

In the Amended Filing and accompanying testimony dated July 31, 2009, PECO addressed the major differences between their methodology for calculating the benefits of their EE&C program and that laid out in the Commission’s *TRC Test Order*. The only remaining discrepancy is that PECO used a slightly altered methodology for calculating avoided costs in the third five-year period. PECO used the Energy Information Agency’s (EIA) Annual Energy Outlook natural gas prices and converted this to an electric price rather than using AEO forecasts for PJM prices. PECO St. No. 4-S at 3-6. Since the effects of this difference are *de minimis* and do not compromise the analysis of the Plan’s cost-effectiveness, we accept PECO’s TRC Test analysis as amended. However, for future TRC submissions to the Commission, PECO is directed to comply with the *TRC Test Order* or subsequent modifications to the *TRC Test Order*  adopted by the Commission.

In the *TRC Test Order*, we clarified that an EDC’s EE&C Plan would pass the TRC Test if all of the programs of a Plan, in total, pass the TRC Test (e.g. have a benefit-cost ratio greater than one). *TRC Test Order* at 8. Table 3 of Volume II of PECO’s Plan indicates that the overall benefit-cost ratio for the Plan is 1.76:1. Accordingly, the Plan exceeds the minimum benefit-cost ratio.

**Total Resource Cost Review as Part of Annual Reconciliation**

#### Positions of the Parties

The OSBA avers that PECO has proposed to spend “every penny” up to the maximum allowable expenses prior to having data to evaluate the cost-effectiveness of the proposed programs. The OSBA recommends that the “reasonableness” of PECO’s proposed spending level be reviewed as part of the annual reconciliation. OSBA MB at 13.

PECO points out that the Plan sets forth comprehensive annual reports to the Commission on each of the eighteen proposed programs. PECO states that it expects close scrutiny of its on-going Plan implementation and expenditures by the Commission. PECO RB at 12.

#### Disposition

We note that Section 5.1 of PECO’s Plan indicates that PECO will submit to the Commission three annual evaluation reports and a final report that will, *inter alia*, “demonstrate energy impacts and energy savings in a cost effective manner.” Plan Volume II at 202. Given that we will already be receiving information on the cost-effectiveness of the Plan as part of PECO’s annual reports, requiring PECO to provide a TRC Test analysis as part of the annual reporting process is not an unreasonable request and we direct them to do so. These annual TRC Test analyses will facilitate appropriate Plan modifications in a more timely manner.

### 3. Cost Allocation Issues

With regard to cost recovery, the Commission’s EE&C Program is required to “ensure that measures approved are financed by the same customer class that will receive the direct energy and conservation benefits.” 66 Pa. C.S. § 2806.1(a)(11).

**Allocation of Common Costs**

Table 6B of Volume III, Appendix D-5 of the Plan indicates that, with the exception of certain education and on-line audit costs allocated to residential programs, the remaining $9.8 million of projected “Common Costs” have been allocated evenly across the eighteen Plan components.

#### Positions of the Parties

Citing pages 37-38 of the *Implementation Order*, the OTS submits that costs that impact more than one customer class should be allocated using reasonable and generally accepted cost-of-service principals. OTS witness Yocca argues that the cost allocation used by PECO for common costs is not a recognized cost-of-service methodology used in base rate cases. As an alternative, the OTS recommends that the common costs be allocated to each program based on the total costs of each program net of the common costs allocated under PECO’s methodology. OTS St. 2 at 7-9.

PECO argues that the common costs, such as the costs of PECO’s Plan development, do not vary with the complexity of each program. PECO MB at 44-45.

#### Disposition

PECO’s proposed budget reveals that there is a wide variation in the proposed expenditures from $3.1 million for the Residential New Construction Program to $61.7 million for the Commercial/Industrial Equipment Incentives Program. Petition at 13. Considering this wide variation in program costs, we believe that a more equitable distribution of common costs would result if common costs are recovered as a fixed percentage of program costs, net of common costs. Accordingly, we will adopt the OTS recommendation and direct PECO to modify its allocation of common costs accordingly.

**Separate Rate Class for Government/Non-Profit**

#### Positions of the Parties

The OSBA submits that 66 Pa. C.S. § 2806.1(a)(11) requires that the EE&C plan cost recovery mechanism must be structured to ensure the programs and measures are financed by the same customer class that will receive the direct energy and conservation benefit. The OSBA points out that PECO has assigned the recovery of Plan costs to four different rate class groups; Residential, Small C&I (including government/non-profit customers), Large C&I and Municipal Lighting. The OSBA argues that combining government/nonprofit with Small C&I is in conflict with Section 2806.1(a)(11) and will unduly burden Small C&I customers who will have to pay for the energy conservation targets for government and non-profit. OSBA recommends that government/non-profit be set up as a separate rate class for EE&C Plan cost recovery. OSBA MB at 14.

PECO responds to the OSBA’s recommendation by pointing out that government/non-profit customers are not served under a separate rate classes, but are embedded in the various rate classes in which PECO will be recovering its Plan costs. PECO argues that to cull through each rate class and attempt to identify government/nonprofit customers for the purpose of cost recovery would involve significant administrative and information technology costs and create little benefit. PECO RB at 6.

**Disposition**

We reject the contention that units of government, school districts, institutions of higher education and nonprofit entities must be treated as a separate class for purposes of the cost recovery mechanism. Section 2806.1(a)(10) simply requires energy efficiency/demand reduction measures to be financed by the same customer class that receives the direct energy and conservation benefits of those measures. 66 Pa. C.S. § 2806.1(a)(10). If, as here, prior to the effective date of Act 129, a utility did not have a separate rate class that only included units of government, school districts, institutions of higher education and nonprofit entities, we do not believe the General Assembly intended to mandate that the utility re-write its tariff to create such a rate class. Such an undertaking would impose costs on utilities (and their ratepayers) without enhancing energy efficiency or reducing energy consumption. A more reasonable interpretation of Section 2806.1(a)(10) under these circumstances is that the costs of measures benefitting governments, school districts, institutions of higher education and non-profit entities must be assigned in a reasonable manner to the rate class(es) in which those customers are embedded. We find that PECO assigned the costs associated with government/nonprofit targeted programs in a reasonable manner by assigning such costs to rate schedules that currently include government/school/nonprofit customers.

**Street Lighting as a Rate Class**

PECO proposes to make municipal lighting one of the four rate classes for EE&C Plan cost recovery purposes. This class is made up of Rates AL, TL, SLP, SLS, and SLE. The costs allocated to this class are about $8.3 million (18%) of the $45.8 million Government/Public Facility energy efficiency program. PECO Exh. RAS-2.

**Positions of the Parties**

Philadelphia submits that the surcharge for municipal lighting represents a projected increase in total revenue from the street lighting class of 8.05% compared to between 2.20% and 2.37% for the other customer classes identified in the Plan. Tr. at 197-198. Philadelphia avers that the rate for street lighting in the City is based primarily on a per-unit distribution charge and the increase in the fee proposed in the Plan provides no incentive to conserve energy for street lighting or invest in street lighting technology. Philadelphia MB at 17-19.

Philadelphia points out that PECO’s Plan does not offer the municipal lighting class any demand reduction programs, and therefore, is in violation of the *Implementation Order* (at 23) which requires that each rate class be offered one energy efficiency and one demand response program. Philadelphia recommends that the Commission consider requiring a broader allocation of the costs for municipal lighting programs and eliminating municipal lighting as a separate customer class. *Id* at 20.

In its Reply Brief, PECO explains that it did not offer an “extensive” demand reduction program for the municipal lighting class because municipal lighting is used at night when overall demand is substantially lower. PECO avers that its EE&C Plan includes incentives to encourage the movement from incandescent to LED traffic lighting that will generate a demand benefit. PECO RB at 5.

PECO argues that municipal lighting is appropriately a separate class because the usage characteristics are different than other customer classes. PECO submits that EE&C costs allocated to this class reflect the actual costs of providing the incentives to street lighting. *Id* at 20.

**Disposition**

As discussed *supra*, we concur with PECO’s position that it is not appropriate to include a separate demand management program for the Street Lighting Class because municipal lighting is used during the night time when overall demand is substantially lower. While street lighting may not be a prime source of peak load reduction, we note that PECO Exh. 1, Volume III, Appendix D-1 shows that PECO will realize some demand peak reduction for the majority of its street lighting proposals. Consequently, we will not require PECO to implement a specific demand reduction program for street lighting customers at this time.

While we recognize that the revenue increase resulting from PECO’s Plan will be significantly higher for street lighting customers than for other classes, the costs of the class reflect the actual costs of providing the incentives to street lighting customers. Consistent with 66 Pa. C.S. § 2806.1(a)(11), we are not inclined to spread the costs of the street lighting programs to other rate classes by directing PECO to eliminate the separate municipal lighting class.

### 4. Cost Recovery Issues

PECO proposes to recover the costs of its EE&C Plan through its EEPC that will be established under 66 Pa. C.S. § 1307 and will be reconcilable and non–bypassable. PECO proposes that the EEPC will not be a separate item on customers’ bills and will not be included in the price to compare. PECO explains that customers’ distribution rates will be adjusted by the amount of the charge calculated for each rate class. Plan Volume II at 215.

**Separate Line Item on Customers’ Bills**

#### Positions of the Parties

PAIEUG and OSBA recommend that the EE&C program costs be separate items on customers’ bills. If the Commission is unwilling to make EE&C costs a separate line item for all customer classes, PAIEUG suggests that the Commission at least implement a line item for Large C&I customers. PAIEUG MB at 14-15.

In support of its recommendations, PAIEUG avers a separate line item will provide clarity and transparency of the cost of the EE&C Plan and will eliminate any confusion over the services a customer is paying for each month. PAIEUG argues that a separate line item may actually foster participation by the Large C&I customers once they can assess the specific costs and benefits the EE&C Plan implicates. *Id.* at 15.

The OSBA argues that the costs associated with the conservation programs are not distribution costs; rather, they are subsidies to a subset of customers to encourage participation in conservation programs. The OSBA states that “the Electricity Generation Customer Choice and Competition Act (“Competition Act”) mandates unbundled charges for transmission, distribution and generation and requires that rates and rate structures be set for each service primarily on a cost-of-service study. *Lloyd v. Pennsylvania Public Utility Commission*, 904 A.2d 1010, 1020, *citing* 66 Pa. C.S. §2804(3).” OSBA MB at 15. The OSBA avers that folding the conservation surcharge into the distribution rates would violate this mandate. *Id*. The OSBA’s witness Mr. Knecht testified that a separate charge for conservation is likely to receive a better reception from ratepayers when coupled with communication efforts from PECO to promote its EE&C Plan. OSBA St. 1 at 6. The OSBA concludes that considering the Commonwealth’s well-publicized commitment to conservation, it is unclear why the cost of that commitment should be hidden in distribution rates. OSBA MB at 15.

#### Disposition

Act 129 provides that an EDC “shall recover on a full and current basis from customers, through a reconcilable adjustment clause under Section 1307, all reasonable and prudent costs incurred in the provision or management of [an EE&C] plan.” 66 Pa. C.S. § 2806.1(k). The Act states:

The plan shall include a proposed cost-recovery tariff mechanism, in accordance with Section 1307 (relating to sliding scale or rates; adjustments), to fund the energy efficiency and conservation measures and to ensure full and current recovery of the prudent and reasonable costs of the plan, including administrative costs, as approved by the commission.

66 Pa. C.S. § 2806.1(b)(1)(i)(H).

Consistent with the current Commission-approved approach regarding Section 1307(e) cost recovery mechanisms such as the Universal Service Funding Mechanism and the Universal Service Program Long Term Evaluator, the EE&C program costs should be included in the distribution rate on customers’ bills. The Electricity Generation Customer Choice and Competition Act states:

There are certain public purpose costs, including programs for low-income assistance, energy conservation and others, which have been implemented and supported by public utilities’ bundled rates. The public purpose is to be promoted by continuing universal service and energy conservation policies, protections and services, and full recovery

of such costs is to be permitted through a non-bypassable rate mechanism.

66 Pa. C.S. § 2802(17).

This interpretation is consistent with our regulations concerning billing format, 52 Pa. Code § 54.4(3), and billing information, 52 Pa. Code § 56.15. Past practice recognizes distribution rates as the appropriate vehicle to incorporate rolled up cost-centers or to recover the costs of providing service that is not otherwise classified as transmission or generation. We find that the costs associated with an EE&C program is such a cost and, therefore, should be included within a company’s distribution rate for billing purposes.

We will, however, make an exception for both the Large and Small C&I customer classes. We are persuaded by the reasoning of PAIEUG and OSBA that a separate line delineation of these charges will provide necessary transparency and may foster greater participation by C&I customers. Therefore, we direct PECO to amend its Plan so that the EEPC is not included in distribution rates but presented as a separate line on C&I customers’ bills.

**Cost Recovery on a Demand-Charge Basis**

PECO is proposing that the Energy Efficiency and Conservation Program Costs (EEPC) be recovered on a per kWh basis for residential and small commercial rate classes and on a billing demand basis for Large Commercial and Industrial customers. PECO Exh. RAS-1 (tariff page 34D). Tr. at 202.

#### Positions of the Parties

While PAIEUG supports the recovery of the EEPC from large C&I customers on a demand-charge basis, it initially recommended that PECO utilize the PJM Peak Load Contribution (PLC) instead of PECO’s billing demand. PAIEUG explains that the PLC is based on PJM’s five peaks during the prior year and the rate is established on an annual basis. PAIEUG avers that utilizing the PLC would encourage Large C&I customers to engage in efficiency and load control measures during PJM’s five annual peaks which would “further PECO’s demand reduction goals under Act 129.” PAIEUG MB at 16.

PECO states that, after reviewing PAIUEG’s Main Brief, it analyzed PAIUEG’s proposal and determined that using the PLC would negatively impact the majority of PAIEUG members. PECO submits that “PAIEUG and PECO have discussed this analysis and PECO ‘understands’ that PAIEUG has consented to using the billing demand instead of the PLC for the calculation of the EEPC.” PECO RB at 22.

In a footnote in its Reply Brief, PAIEUG acknowledges that since PECO is a summer-peaking utility, utilizing the PJM PLC will result in unfavorable charges for Large C&I customers. PAIUEG supports PECO’s proposal to use billing demand. PAIEUG RB at 2.

#### Disposition

While PAIEUG appears to have reconsidered its original proposal to use the PJM PLC to recover PECO’s EEPC, we find that PAIEUG’s original proposal is a more effective and predictable cost recovery mechanism. PECO is proposing to use each customer’s individual billing demand which may not be coincident with either PECO’s or PJM’s system peaks. By utilizing the PJM PLC to recover the costs of PECO’s EE&C Plan, economic incentive is provided for Large C&I customers to reduce their demand during system peaks, consistent with PECO’s ACT 129 demand reduction goals. In addition, as confirmed by PECO at the evidentiary hearing, because PLCs are determined annually, an EEPC based on the PJM PLC will provide a more consistent charge to customers, and constant, reliable cost recovery by PECO. Tr. at 203-204. Accordingly, we direct PECO to amend its Plan and proposed tariff to collect its EEPC for Large C&I customers based on each customer’s PJM PLC.

**Interest on Over/Under Collections**

In order to recover the costs of the EE&C Plan on an even basis, PECO is proposing to levelize the EEPC by developing a charge that will recover total budgeted expenditures over a three and one-half year recovery period. PECO proposes to conduct a single true-up of EE&C Plan revenue and expenses after May 31, 2013. PECO submits that, in response to stakeholder input, it is proposing that interest not accrue on any over/ under- collection. PECO St. 3 at 11 and 14.

### Positions of the Parties

 The OCA contends that Plan expenditures will vary, perhaps significantly on a year-by-year basis. To provide more stability for customer rates, the Company is proposing to recover the same levelized amount each year from customers. This will allow the Company the flexibility to spend each year based on program ramp‑up needs, program success and market conditions to maximize Plan implementation without undue volatility in customer rates. The OCA supports this approach to cost recovery, particularly for residential customers to avoid any undue volatility and confusion in rates. OCA St. No. 1 at 13.

The OCA also supports the Company’s proposal not to charge interest on any under/over collections that may occur as a result of the levelized rate recovery. The spending constraints in the Act do not contemplate any interest charges. In other words, the OCA submits that PECO can spend up to $341.9 million, not $341.9 million plus interest. OCA MB at 22.

The OTS does not oppose the proposed levelized rates as this structure will protect ratepayers from rate fluctuations as program costs accelerate and will provide the Company with sufficient funds to finance its proposed programs. However, the OTS maintains that interest must be applied on any over/under collections at the end of the Plan period. The current treatment of interest allows for interest on under collections to be computed at the legal rate of interest, currently 6%, and interest on over collections is calculated at the legal rate of interest plus two 2%. The OTS further maintains that these interest costs should be excluded from the Company’s total allowable recoverable EE&C plan costs, which is not to exceed 2% of 2006 annual revenues. The OTS asserts that the application of an interest component to a cost recovery mechanism pursuant to Section 1307 of the Code is appropriate in this proceeding. The OTS avers that the application of the legal rate of interest and the legal rate of interest plus 2% to under collections and over collection, respectively, is supported by the Code and the Commission’s Regulations. OTS MB at 10-12.

The OTS submits that, although the Plan is designed to spend the entire amount collected from ratepayers, there will be substantial over-collections during the administration of the Plan. The OTS points out that during the first year there will be an over-collection of $59.5 million and a cumulative over collection of approximately $64.8 million in the second year. The OTS avers that in the third year, when there will be an under-collection, PECO still retains $43 million of ratepayer funds. The OTS argues that the cost recovery mechanism cannot be approved without some measure of relief to the ratepayers supplying the funds that can be used to PECO’s benefit. OTS MB at 14-15.

PECO argues that its proposal not to compute interest on over/ under recoveries is both reasonable and consistent with 66 Pa. C.S. § 1307(e). PECO avers that Section 1307(e) does not require the computation of interest and, consistent with the rules of statutory construction, the Company is free to exercise its discretion. PECO also submits that its proposal involves “symmetrical risks” of over/undercollection of Plan expenses. PECO MB at 46-47.

### Disposition

Act 129 does not address whether over/under collections are subject to interest. The *Implementation Order* and case law also are silent on this issue. The Act does require recovery of “all reasonable and prudent costs incurred in the provision or management of a plan under this section” on a full and current basis through a reconcilable adjustment clause under Section 1307 of the Code. 66 Pa. C.S. § 2806.1(k)(1). With no statutory directive or case law requirement to impose interest, we conclude that PECO’s proposal is reasonable and over/under-collections of the EEPC shall not be subject to interest.

**Annual Reconciliations**

### Positions of the Parties

The OSBA submits that PECO’s Plan does not include an annual reconciliation between forecasts and actual incurred costs and revenues until a “single end-of-period true-up” in 2013. The OSBA’s witness Knecht testified that PECO’s estimates are based on educated guesses regarding customer participation. He submits that variations between these estimates and actual costs and participation could expose one or more rate groups to significant rate increases or decreases when PECO conducts its reconciliation at the end of the EE&C Plan. OSBA St. 1 at 5-6.

The OTS makes arguments similar to the OSBA and also points out that Plan programs can be modified or terminated if they are not cost-effective. The OTS avers that, since all projections are based on estimates, an ongoing prudency review is necessary to ensure continued compliance with the directives of the *Implementation Order.* The OTS recommends that, as part of it annual EE&C report to the Commission, PECO should provide a detailed comparison of actual versus budgeted costs and an explanation of any large discrepancies that have occurred. OTS St. 2 at 5-7.

PECO points out that the Plan provides for comprehensive annual reports to the Commission on each of the eighteen proposed programs. PECO states that it expects close scrutiny of its on-going Plan implementation and expenditures by the Commission. PECO RB at 12.

#### Disposition

The Commission believes that the issues described by the OTS and the OSBA are adequately addressed in the *Implementation Order*. First, regarding approved plans, the Commission will permit EDCs and other interested stakeholders, as well as the statutory advocates, to propose plan changes in conjunction with the EDC’s annual report filing required by the Act at 66 Pa. C.S. § 2086.1(i)(1). The Commission will establish a deadline for the filing of annual reports by the EDCs following approval of the EDCs’ plans. These annual reports are to be served on the OCA, the OSBA and the OTS. The Commission also will post the annual reports on a web page dedicated to the EE&C program. The Commission and any interested party can make a recommendation for plan improvement or object to an EDC’s proposed plan revision within thirty days of the annual report filing. EDCs will have twenty days to file changes or the matter will be referred to an ALJ for hearings and a recommended decision. The Commission notes that, in addition to the above-described process, the Commission retains its statutory authority to conduct investigations and initiate statutory and regulatory compliance proceedings against jurisdictional utilities. *Implementation Order* at 23-24.

Second, consistent with the *Implementation Order*, we required each subject EDC to develop a reconcilable adjustment clause tariff mechanism in accordance with 66 Pa. C.S. § 1307 and to include this mechanism in its EE&C plan. Such a mechanism shall be designed to recover, on a full and current basis from each customer class, all prudent and reasonable EE&C costs that have been assigned to each class as directed. When the EE&C plans to be offered by EDCs will benefit both shopping and non-shopping customers, the cost recovery mechanism shall be non-bypassable and shall be structured such that it will not affect the EDC’s price to compare. The mechanism shall be set forth in the EDC’s tariff, accompanied by a full and clear explanation as to its operation and applicability to each customer class. The tariff mechanism will be subject to an annual review and reconciliation in accordance with 66 Pa. C.S. § 1307(e).

The annual review and reconciliation for each EDC’s cost recovery mechanism will occur pursuant to a public hearing, if required due to petitions filed by interveners, and will include an evaluation of the reasonableness of all program costs and their allocation to the applicable customer classes. Such annual review and reconciliation will be scheduled to coincide with our review of the annual report on the EDC’s plan submitted in accordance with 66 Pa. C.S. § 2806.1(i), and all calculations and supporting documentation shall be provided at the time the report is filed. *Implementation Order* at 37-38. Therefore, the Commission will not make requirements above and beyond those already stipulated in the *Implementation Order* regarding the issues raised by the OTS and the OSBA at this time. However, it is the Commission’s intention to provide each of the EDCs with a Secretarial letter identifying issues that the Commission would like to see addressed as well as data the Commission needs to perform its review. That Secretarial letter will be in the nature of minimum requirements which may be expanded by each EDC and the stakeholder group as appropriate.

**Capital Assets Excluded from Rate Base**

### Positions of the Parties

The OTS submits that all capital assets (and associated depreciation) funded by EE&C revenues should be excluded from base rates and not included in any future rate base claim. OTS M.B at 6. In a footnote to its Reply Brief, PECO concurs that capital costs recovered through the EEPC will not be included in future rate case proceedings. PECO RB at 22.

### Disposition

We concur, and by this Opinion and Order we clarify that capital costs recovered by PECO through the EEPC will not be included in future rate case proceedings.

**E. Implementation and Evaluation Issues**

**1. Implementation Issues**

**Plan Adjustments and Stakeholder Participation**

We initially addressed the issue of adjustments to the Plan, *supra*, when we discussed the concerns of TURN/AA and Representative Cohen regarding the potential transfer of program funds away from the proposed Low-Income Energy Efficiency Program. We noted that, in its Petition, PECO recognizes that the *Implementation Order* envisions an annual review and adjustment process for EDC programs. However, PECO believes that more flexibility is appropriate in light of both the nature of the programs PECO is seeking to introduce for the first time and the extensive evaluation and data collection measures PECO will have in place from the beginning of Plan implementation. PECO proposes that, for changes within a rate class and changes of less than $20 million between rate classes, PECO is permitted the flexibility to redirect funds from underperforming to better performing programs as needed. PECO would discuss these changes at quarterly meetings with stakeholders and notify the Commission as part of its annual Plan reporting. For inter-class changes of more than $20 million over the period of the Plan, PECO would work with its stakeholders to submit a modification to the Plan for Commission approval. PECO Petition at 18-19. Plan Volume II at 193.

#### Positions of the Parties

The OCA’s witness Hahn projects that it is “extremely unlikely” that PECO’s Plan will be implemented exactly as initially proposed by PECO and that adjustments and changes are likely to be required over time. He avers that the stakeholder process represents a “suitable” forum for discussing and reaching consensus on these “inevitable” changes. Mr. Hahn recommends that PECO’s commitment to continue the stakeholder process be specifically included in any Plan approval.

OCA St. 1 at 15.

The OCA also submits that PECO’s proposed process provides a “generally reasonable means” to address mid-course corrections but suggests that PECO should still discuss with stakeholders whether any mid-course recovery adjustment would be needed and not limit the discussion to program changes. The OCA witness Hahn recommends that stakeholders and PECO should be permitted to consider mid-course corrections less than $20 million. *Id*. at 16.

The DEP avers that the process by which EDC Plans may be modified was not addressed in the *Implementation Order*. The DEP submits that the EDC Plans contain a variety of ways under which a plan may be modified and suggests that all EDCs use the same measurement and verification protocols and a common criteria for when Plan changes require Commission approval. The DEP makes the following three recommendations:

1. No program can be eliminated without PUC approval
2. Up to 10% of the annual budget for a customer class can be shifted within the same customer class without PUC approval.
3. Any shifting of money from one customer class to another requires PUC approval.

DEP MB at 13-14.

As discussed, *supra*, Representative Cohen recommends that no funds be transferred out of the Low-Income Energy Efficiency program without stakeholder and Commission approval. For all other programs, Representative Cohen recommends that PECO be given the flexibility to transfer up to $20 million between classes over the duration of the Act 129 Plan, but that the Commission should require stakeholder consent and Commission approval for transfers between rate classes of more than $7 million during any fiscal year. Cohen MB at 20.

TRF argues that the value of PECO’s Plan is only as good as its implementation. TRF urges the Commission to amend PECO’s Plan to explicitly require PECO to maintain the active, ongoing involvement of the Stakeholder Group throughout the implementation period. TRF states that this includes quarterly Stakeholder Group meetings and additional communications with stakeholders as appropriate. TRF MB at 16-18. TRF witness Robert Sanders provided a list of implementation issues and topics for which PECO should solicit suggestions and recommendations from the Stakeholder Group, including:

* the draft Requests for Proposals for selecting the Conservation Service Providers (“CSPs”) and contractors that will be implementing the Plan;
* the draft work plans in the CSP contracts;
* monthly CSP reports and other program and Plan implementation reporting;
* any proposed changes to the overall Act 129 Plan, its programs or budgets;
* any proposed changes in the work plans or budgets of the CSP contracts;
* the proposed program promotion materials and program materials (including print, website, radio and television spots) and public education materials about education (including print, website, radio and television spots);
* the proposed evaluation plans, evaluator contract work plans and draft evaluation reports; and,
* any other issues where the expertise and opinions of the stakeholders are valuable.

TRF St. No. 1at. 4-5.

 After receiving clarifications from PECO’s witness on cross-examination, regarding the ability of PECO to shift “unwarranted” costs between customer classes, PAIEUG generally supports PECO's proposal. PAIEUG urges the Commission to adopt the review process proposed by PECO, with the important caveat that the representations made by PECO at the evidentiary hearing be implemented as explicit requirements of this review process. PAIEUG recommends that the Company not be permitted to shift program emphasis or costs absent a specific demand for such shift, and that PECO be required to obtain stakeholder consultation and consent prior to completing any such shift through the quarterly stakeholder collaborative process. PAIEUG MB at 17-21.

#### Disposition

With regard to adjustments to PECO’s Plan, we stated, *supra*, that PECO must petition the Commission to seek approval for any changes to its Plan.

With regard to stakeholder participation, using a collaborative process during the development of the Plan was beneficial for PECO and other interested parties. Similarly, we believe the continued use of a collaborative process during the implementation of the Plan will be beneficial for expeditiously identifying and resolving issues that arise during the period covered by the Plan. To that end, PECO submits that it anticipates continuing to work with stakeholders during the Plan implementation, including conducting quarterly meetings and communicating with stakeholders regarding proposed “reprogramming” of program funds. PECO MB at 49. While we encourage PECO to meet with its stakeholders quarterly as proposed, we will require PECO to meet with stakeholders as needed, but no less than twice a year, until May 31, 2013, unless otherwise ordered by the Commission.

Several parties provided prescriptive topics to be covered in these stakeholder meetings. In the interest of efficiency we believe PECO should be responsible for determining the topics to be covered in stakeholder meetings and all other aspects of the on-going stakeholder process. However, we encourage PECO to be open and responsive to issues of merit that the parties bring to these discussions which may lead to improvements in the efficiency and cost effectiveness of its EE&C Plan.

### 2. Monitoring and Reporting Issues

As stated above, the Commission’s EE&C Program is to include an evaluation process, including a process to monitor and verify data collection, quality assurance and the results of each plan and the program. 66 Pa. C.S. § 2806.1(a)(2). Consistent with this requirement, each EDC’s Plan is to “explain how quality assurance and performance will be measured, verified and evaluated.” 66 Pa. C.S.
§ 2806.1(b)(1)(i)(C). Each EDC is also required to submit an annual report to the Commission relating to the results of its EE&C Plan. 66 Pa. C.S. § 2806.1(i)(1).

With the exception of the recommendation by TURN/AA discussed, *infra*, the other issues related to monitoring and reporting have been addressed in other sections of this Opinion and Order, *supra*.

**Reporting of Low Income Workers**

In its Plan, PECO states that through the RFP Process, bidding CSPs should investigate opportunities to hire low income, unemployed workers through various programs throughout the state. Plan Volume II at 38.

#### Positions of the Parties

Although TURN/AA does not suggest in its Main Brief that the Commission direct PECO to modify its Plan, TURN/AA recommends that PECO provide specific information to assist contractors in taking advantage of incentives such as wage subsidies and tax credits relating to the hiring of Temporary Assistance for Needy Families (TANF) recipients. TURN/AA also suggests that PECO request that its Act 129 contractors provide reports on their recruiting and hiring efforts of low income workers and that this information be provided to stakeholders. TURN/AA MB at 9-10.

PECO objects to the Commission imposing more reporting requirements for these voluntary initiatives. In addition to language in its Plan regarding the RFP process, discussed *supra*, PECO submits that it will report on the results “of these steps” as part of its existing reporting requirements. PECO RB at 26.

#### Disposition

Act 129 does not mandate that the CSP bidding process include evaluation criteria regarding a willingness to employ low income and unemployed workers. On the other hand, there is nothing in the Act that would prohibit an EDC from actively seeking to employ unemployed or low income people, assuming there is no issue with the qualifications or experience of the successful candidates. Mandating or even recommending such a reporting requirement, however, would present a number of difficulties, not the least of which involves whether the Commission has any jurisdiction over the hiring practices of EDC contractors. In addition, the definitions of “low-income” and “unemployed” would be at issue. Finally, it would be difficult to impossible for the Commission to enforce a reporting requirement involving private and subjective information. For these reasons, it is not appropriate for this Commission to take any action on TURN/AA’s recommendation that PECO’s contractors provide reports on their recruiting and hiring efforts of low income workers.

# VI. Conclusion

For the reasons set forth above, we will grant in part and deny in part the Petition of PECO Energy Company for Approval of its Energy Efficiency and Conservation Plan, consistent with this Opinion and Order. Pursuant to Section 2806.1(e)(2)(ii) of the Act, PECO Energy Company shall file with this Commission and serve on all parties of record in this proceeding a revised Energy Efficiency and Conservation Plan consistent with the modifications directed in this Opinion and Order, within sixty (60) days of the date of entry of this Opinion and Order. 66 Pa. C.S. §2806.1(e)(2)(ii). Interested parties will have ten days to file comments on the revised portions of the plan, with reply comments due ten days thereafter. The Commission will approve or reject the revised plan at a public meeting within 60 days of the Company’s filing of its revisions to the Plan. See *Implementation Order* at 12‑13. PECO Energy Company is permitted to implement any portion of its Plan that was approved and not modified by this Opinion and Order; **THEREFORE;**

**IT IS ORDERED:**

1. That the Petition of PECO Energy Company for Approval of its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of its Compact Fluorescent Lamp Program Energy Efficiency and Conservation Program, filed on July 1, 2009, is granted, in part, and denied, in part, consistent with this Opinion and Order.
2. That the request of PECO Energy Company that we approve the contract between PECO Energy Company and Global Energy Partners, LLC in this proceeding is denied as improperly included in this proceeding.
3. That, following the entry of this Opinion and Order, the Commission’s Secretary’s Bureau shall submit a copy of the contract between PECO Energy Company and Global Energy Partners, LLC to the Commission’s Law Bureau for review consistent with our Opinion and Order entered January 16, 2009, at Docket No. M-2008-2069887, *In re: Energy Efficiency and Conservation Program.*
4. That PECO Energy Company’s Motion to Strike Portions of the Revised Reply Brief of EnerNOC, Inc. is granted, consistent with this Opinion and Order.
5. That the Commission Staff is directed to convene a working group, composed of affected electric distribution company representatives, consumer advocates, community‑based organizations and other interested parties, to identify the standardized data to be used in determining the proper proportion for low income households and clarify other matters affecting the annual reconciliation process.
6. That the working group referenced in Ordering Paragraph No. 5-, shall provide its recommendations to the Commission no later than February 16, 2010.
7. That PECO Energy Company shall participate in the working group referenced in Ordering Paragraph No. 5.
8. That PECO Energy Company’s proposed procedures for “mid-course” corrections set forth in its Energy Efficiency and Conservation Plan are rejected and shall be redrafted to reflect that all Energy Efficiency and Conservation Plan modifications shall be submitted to the Commission as a petition to modify this, or subsequent, Opinions and Orders addressing its Plan.
9. That PECO Energy Company shall provide, as part of its Annual Reports to the Commission on its Energy Efficiency and Conservation Plan, an assessment of the impact of its Conservation Voltage Reduction Program on customer voltage levels and any mitigation strategies that were implemented.
10. That the Commission’s working group convened to address fuel switching issues, shall address as part of its report to the Commission the fuel switching issues raised in this proceeding related to PECO Energy Company’s Home Energy Incentive Program.
11. That PECO Energy Company collect the appropriate data regarding fuel switching, in coordination with the statewide evaluator, including at least the following: (1) type of appliance and equipment being replaced; (2) the availability of natural gas at the customer’s location or immediate area; and, (3) whether electric appliances and equipment were installed in areas where natural gas is available.
12. That the working group referenced in Ordering Paragraph No. 10 shall submit its report to the Commission by March 31, 2010.
13. That PECO Energy Company’s Renewable Resource Program is denied. PECO Energy Company is encouraged to develop and resubmit another renewable resources program that yields a higher benefit/cost ratio.
14. That PECO Energy Company shall track all costs associated with the implementation of its proposed time of use rate programs so that cost allocation issues can be addressed in future proceedings.
15. That PECO Energy Company shall provide, as part of its Annual Reports to the Commission on its Energy Efficiency and Conservation Plan, an assessment of the extent to which implementation of its Plan is being affected by the lack of sources from which its customers can obtain financing for energy efficiency and conservation measures.
16. That the costs associated with the statewide evaluator be removed from PECO Energy Company’s Energy Efficiency and Conservation Plan. The costs of the statewide evaluator shall be reconciled separately and added to the PECO Energy Company’s Energy Efficiency and Conservation Charge.
17. That the costs associated with implementing the Residential Super Peak Time of Use rate program and the Commercial and Industrial Super Peak Time of Use rate program be removed from PECO Energy Company’s Energy Efficiency and Conservation Plan. The cost associated with these two Time of Use rate programs shall not be included in the Company’s Energy Efficiency and Conservation Charge.
18. That PECO Energy Company shall submit Total Resource Cost Test analyses as part of its Annual Reports to the Commission on its Energy Efficiency and Conservation Plan. These Total Resource Cost Test analyses shall conform to the methodology set forth in our Opinion and Order entered June 23, 2009, at Docket No. M-2009-2108601 as discussed in this Opinion and Order.
19. That PECO Energy Company shall amend its Energy Efficiency and Conservation Plan so that the Energy Efficiency and Conservation Charge is reflected as a separate line item on the monthly bills for commercial and industrial customers.
20. That PECO Energy Company shall amend its Energy Efficiency and Conservation Plan so that the Energy Efficiency and Conservation Charge is recovered from large commercial and industrial customers based on each customer’s PJM Peak Load Contribution.
21. That PECO Energy Company’s proposed allocation of common costs is rejected and PECO shall reallocate common costs among the eighteen program measures as a fixed percentage of each measure’s proposed costs, net of common costs.
22. That PECO Energy Company is prohibited from including in any future base rate filing a rate base claim and corresponding depreciation expense for any asset funded with revenues collected to fund PECO Energy Company’s Energy Efficiency and Conservation Plan.
23. That PECO Energy Company shall meet with stakeholders as needed, but no less than twice per year, until May 31, 2013, for a collaborative exchange concerning the implementation of its Energy Efficiency and Conservation Plan.
24. That any directive, requirement, disposition or the like contained in the body of this Opinion and Order, which is not the subject of an individual Ordering Paragraph, shall have the full force and effect as if fully contained in this part.
25. That PECO Energy Company shall file with this Commission and serve on all parties of record in this proceeding a revised Energy Efficiency and Conservation Plan consistent with the modifications directed in this Opinion and Order, within sixty (60) days of the date of entry of this Opinion and Order. Interested parties will have ten days to file comments on the revised portions of the Energy Efficiency and Conservation Plan, with reply comments due ten days thereafter. The Commission will approve or reject the revised portions of the Energy Efficiency and Conservation Plan at a public meeting within 60 days of the Company’s filing of its revisions to the Plan.
26. That PECO Energy Company is permitted to implement any portion of its Energy Efficiency and Conservation Plan that was approved and not modified by this Opinion and Order.
27. That a copy of this Opinion and Order be served on all parties of record and on Steven Pincus, Assistant General Counsel for PJM Interconnection, LLC.

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 **BY THE COMMISSION,**

 James J. McNulty

 Secretary

(SEAL)

ORDER ADOPTED: October 15, 2009

ORDER ENTERED: October 28, 2009

1. This manual can be found at: <http://www.clarkstrategicpartners.net/files/calif_standard_practice_manual.pdf>. [↑](#footnote-ref-2)
2. For the purpose of this proceeding, the members of PAIEUG, listed on Attachment A to its Petition to Intervene, are Air Liquide Industrial U.S., LP, The Boeing Company, Buckeye Partners, L.P., ConocoPhillips Trainer Refinery, Drexel University, Franklin Mills Associates Limited Partnership, GlaxoSmithKline, Jefferson Health System, Kimberly-Clark Corporation, Merck & Co., Inc., Saint Joseph’s University, Sanofi-Aventis, Temple University, and Villanova University. [↑](#footnote-ref-3)
3. On July 13, 2009, a Petition to Intervene was filed by UGI Utilities, Inc. – Gas Division (UGI) and UGI Central Penn Gas, Inc. (CPG) (collectively, UGI distribution companies), which was withdrawn by letter dated July 28, 2009. A letter purporting to be a Petition to Intervene filed on July 27, 2009, by E Cubed Company, LLC (E Cubed) on behalf of National Association of Energy Service Companies (NAESCO) and other entities was denied by Initial Decision dated August 10, 2009. [↑](#footnote-ref-4)
4. Because of some confusion occasioned by the September 7, 2009 holiday, Reply Briefs were deemed timely if filed on either September 8 or 9, 2009. By letter dated September 9, 2009, PAIEUG notified the ALJ that portions of EnerNOC’s Reply Brief contained an argument in response to positions taken by another party in another utility’s Act 129 proceeding. The ALJ allowed EnerNOC to file a revised Reply Brief, which it did on September 11, 2009. [↑](#footnote-ref-5)
5. 73 P.S. §§ 1649.101–1649.711 [↑](#footnote-ref-6)
6. *Electric Annual Report of PECO Energy Company for the Year Ended December 31, 2008 to the Commonwealth of Pennsylvania, Public Utility Commission*, Schedule 600. [↑](#footnote-ref-7)
7. PECO notes that TRF may have other resources available to it, as it is identified in DEP’s application for funds under ARRA. *See* PECO Ex. FJJ-2. [↑](#footnote-ref-8)
8. 66 Pa. C.S. § 2806.1(b)(1)(i)(C). [↑](#footnote-ref-9)