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August 20, 2012

VIA ECF AND OVERNIGHT DELIVERY

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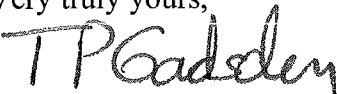
**Re: Energy Efficiency & Conservation Program,
 Docket Nos. M-2012-2289411 & M-2008-2069887**

Dear Secretary Chiavetta:

Pursuant to Ordering Paragraph No. 3 of the Commission's Implementation Order entered August 3, 2012, enclosed for filing is the original **Petition of PECO Energy Company for an Evidentiary Hearing** ("Petition").

As indicated on the attached Certificate of Service, a copy of the Petition has been served via overnight delivery upon the statutory parties and via first class mail to all other parties who submitted Comments and/or Reply Comments to the Commission's Tentative Implementation Order.

Very truly yours,


Thomas P. Gadsden

TPG/tp
Enclosures

c: Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ENERGY EFFICIENCY AND CONSERVATION PROGRAM : **DOCKET NOS. M-2012-2289411**
: **M-2008-2069887**

**PETITION OF PECO ENERGY COMPANY
FOR AN EVIDENTIARY HEARING**

PECO Energy Company (“PECO” or the “Company”) hereby petitions the Pennsylvania Public Utility Commission (the “Commission”) for an evidentiary hearing pursuant to Ordering Paragraph No. 3 of the Commission’s Implementation Order entered August 3, 2012 in the above-captioned proceedings (“*Phase II Implementation Order*”). PECO files this Petition for the purpose of presenting testimony and other evidence on the matters set forth in Section II, below.

I. INTRODUCTION AND BACKGROUND

1. Act 129 of 2008 (“Act 129”) added Section 2806.1 to the Pennsylvania Public Utility Code. 66 Pa.C.S. § 2806.1.¹ Section 2806.1(b) required Pennsylvania electric distribution companies (“EDCs”) to file energy efficiency and conservation (“EE&C”) plans by July 1, 2009 containing the plan elements specified in that section (“Phase I EE&C Program”).² Additionally, Sections 2806.1(c) and (d) required that EDCs’ EE&C plans be designed: (1) to reduce retail energy consumption by a minimum of 1% by May 31, 2011 and a minimum of 3%

¹ Hereafter, all section references are to the Pennsylvania Public Utility Code unless otherwise noted.

² Section 2806.1(l) exempts EDCs with fewer than 100,000 customers from this requirement.

by May 31, 2013; and (2) to reduce peak demand savings, measured by reference to the 100 highest hours of demand, by a minimum of 4.5% by May 31, 2013.

2. In compliance with Section 2806.1 and the Commission's Order entered January 15, 2009 at Docket No. M-2008-20698878, which initially implemented the terms of that section ("*Phase I Implementation Order*"), PECO prepared and submitted its EE&C plan for the Phase I EE&C Program on July 1, 2009. PECO's plan was subsequently approved by the Commission in its Order entered October 28, 2009 at Docket No. M-2009-2093215.

3. Sections 2806.1(c)(3) and (d)(2) also require the Commission, by November 30, 2013, to evaluate the costs and benefits of the Phase I EE&C Program and, if the benefits of the Program are found to exceed their costs, to adopt "additional required incremental reductions in consumption" and "additional incremental requirements for reduction in peak demand." Additionally, Section 2806.1(d)(2) provides that, if the Commission imposes additional requirements for an incremental reduction in peak demand, the reduction "shall be accomplished no later than May 31, 2017."

4. The Commission retained a Statewide Evaluator ("SWE") to conduct market potential and baseline studies in order to comply with the requirements for cost-benefit analyses imposed by Sections 2806.1(c)(3) and (d)(2). On May 8 and 10, 2012, respectively, the Commission publicly released the SWE's Baseline Studies and Market Potential Study. *See Phase II Implementation Order*, pp. 11-12. Based on those studies and the Commission's interpretation of the program cost cap imposed by Section 2806.1(g), the SWE concluded that "instituting a second phase of Act 129 electric energy efficiency programs will be cost-effective for Pennsylvania ratepayers." *Id.* at 12. Additionally, the SWE estimated that the statewide potential for cumulative annual energy savings would amount to 2.3% relative to projected 2010

baseline megawatt-hour (“MWh”) sales based on a statewide average acquisition cost of \$221.39 per MWh. *Id.* at 12-13, 18.

5. The Commission has not definitively found that the benefits of the Phase I EE&C Program exceeded its costs. *Phase II Implementation Order*, p. 13. However, based on the SWE’s studies, the Commission concluded that “the benefits of a Phase II Act 129 program will exceed the costs” and, therefore, the Commission adopted “additional required incremental reductions in *consumption* for another EE&C Program term.” *Id.* at 13 (emphasis added). The Commission declined to establish a further peak demand reduction (“DR”) target to be achieved by May 31, 2017 because “we do not believe we have the information to definitively determine if the current or another peak demand reduction program design is cost-effective, at this time.” *Id.* at 33. The Commission nevertheless provided that EDCs may continue cost-effective residential demand response curtailment measures under Act 129 without specific demand reduction goals. *Id.* at 42.

6. Using data from the SWE’s Market Potential Study and Baseline Studies, the Commission established EDC-specific consumption reduction targets for Phase II in place of the statewide target applied to all EDCs in Phase I EDC EE&C Programs. *Id.* at 14-23. The Phase II consumption reduction target set by the Commission for PECO is 2.9%. *Id.* at 24. However, the Commission acknowledged that PECO had raised a legitimate due process issue with respect to the Phase II EDC targets because EDCs had not been afforded the opportunity for an evidentiary hearing on the facts used by the Commission to impose the targets identified in the *Phase II Implementation Order*. *Id.* at 30-31. Accordingly, the Commission stated that it would “tentatively adopt the EDC specific consumption reduction targets” subject to “challenge by an EDC.” Specifically, each EDC was afforded the opportunity to file, by August 20, 2012, a

petition “requesting an evidentiary hearing on its specific consumption reduction target.” *Id.* at 31 and 120. The Commission imposed a foreshortened procedural schedule that requires the evidentiary and briefing phases to be completed before November 2, 2012 so that the record can be certified directly to the Commission by that date. *Id.*

II. MATTERS FOR WHICH AN EVIDENTIARY HEARING IS REQUESTED

7. PECO requests an evidentiary hearing to address two matters, delineated below, that impact the consumption reduction target the Commission tentatively set for PECO.³

A. Allocation Of Funds For Direct Load Control (“DLC”) And Other DR Programs

8. The Commission has decided to establish Phase II consumption reduction targets based on a formula that makes those targets a function of: (1) an EDC’s total revenues, up to the “cap” imposed by Section 2806.1(g);⁴ and (2) the projected “acquisition cost,” expressed in dollars per MWh, for an EDC to achieve reductions in consumption. Thus, the total dollars available to be spent divided by the projected acquisition cost (in dollars per MWh) produces, arithmetically, the mandated target, expressed in MWh, which the Commission converted to a percentage savings requirement using forecasted EDC sales. In other words, the Phase II consumption reduction “target” is not an independently determined value similar to the Phase I EE&C Program requirements; instead, it is a variable amount that changes based on the maximum level of spending the Commission deems available to each EDC.⁵ As a consequence,

³ PECO believes that the Commission has made a number of additional errors in its *Phase II Implementation Order*, including exceeding its statutory authority under Section 2806.1, failing to adhere to applicable precedent and making findings and conclusions that are arbitrary and capricious or not supported by substantial evidence.

⁴ Section 2806.1(g) provides 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.”

⁵ PECO fundamentally disagrees with the Commission’s approach to setting EDC-specific targets in this manner for a variety of reasons. Additionally, the Commission’s approach, by making each EDC “target” a function of

the level of spending that the Commission assumed to be available for Phase II consumption reduction programs is a critically important input to the formula the Commission used to derive PECO's Phase II consumption reduction "target."

9. As previously explained, the Commission declined to set required peak DR targets to be achieved by May 31, 2017 because the SWE's final report on the cost-effectiveness of existing DR programs and its recommendations for further required reductions will not be received by the Commission until the first quarter of 2013. *Phase II Implementation Order*, p. 33. However, as numerous parties, including PECO, explained, deferring a decision on the **overall** cost-effectiveness of statewide DR programs should not result in eliminating Act 129 funding for specific, existing DR programs that are demonstrated to be cost-effective. Indeed, to do so would undoubtedly lead to customer confusion; would produce "stranded costs" that impose burdens on customers with no attendant benefits; and would make it materially harder, if not impossible, to implement DR programs in sufficient time to achieve targeted savings by the May 31, 2017 deadline imposed by Section 2806.1(d)(2) if, hereafter, the statewide DR program is found to be cost-effective. *Id.* at 32-38; *see also* PECO Comments, pp. 10-12. Accordingly, various parties, including PECO, advocated that the Commission allocate an appropriate portion of the total allowable spending to cost-effective DR programs so that they can continue to provide benefits to customers pending a final decision on the cost-effectiveness of the statewide DR program.

the EDC's total allowable "spend," has improperly converted a "cap" – *i.e.*, a level of expenditure that cannot be exceeded – into a mandate that EDCs must spend every dollar up to the legislatively mandated limitation. *See Phase II Implementation Order*, p. 26 (directing that "Pennsylvania EDCs are not to stop spending their program budgets when they achieve their savings target within a phase"). The Commission further undermines the statutory spending limit by endorsing alternative funding mechanisms for DR programs. *Id.* at 43

10. Although the Commission deferred a decision on the cost-effectiveness of the statewide peak demand reduction program, it found that **specific** DR programs that are shown to be cost-effective may continue as part of an EDC's Act 129 peak reduction programs:

The Commission, however, does recognize that the EDCs and residential electric customers in particular have made significant strides in the implementation of residential curtailment measures, such as direct load control programs. Therefore, to minimize customer confusion or adverse customer reaction, EDCs may continue, *under the Act 129 EE&C Program*, residential demand response curtailment measures, such as direct load control programs, that will be cost effective if continued. Such specific measures, if continued, could be viewed as providing the interim demand response program suggested by some parties until the Commission determines whether or not there is a cost-effective Act 129 peak demand reduction program design. The Commission will not, however, set any reduction goals for an EDC choosing to voluntarily continue any DR programs.

Phase II Implementation Order, p. 42 (emphasis added).

11. Notwithstanding its determination that cost-effective DR programs may continue “under the Act 129 EE&C Program” for the duration of Phase II, the Commission did not allocate any portion of the allowed spending to such programs for Phase II. Additionally, while acknowledging that certain DR programs – and, specifically, DLC – are cost-effective and, therefore, properly may be continued, it did not delineate the programs to be continued nor did it acknowledge that continued spending is necessary to maintain those programs, even on an “interim” basis, “under the Act 129 EE&C Program.”

12. PECO requests an evidentiary hearing to present evidence to show that its existing residential DR program, in particular DLC, is cost-effective and, therefore, should continue on an interim basis during Phase II pursuant to the Commission's authorization at page 42 of the *Phase II Implementation Order*, as quoted above.

13. Additionally, PECO will present evidence that Phase II funding for DR programs, in addition to DLC, is essential if EDCs are to have a reasonable opportunity to achieve any meaningful reduction in peak demand by the statutory deadline of May 31, 2017 if the Commission, hereafter, determines that a peak DR target should be imposed. In fact, unless the Commission provides for a reasonable level of funding for DR during Phase II, it will likely be impossible for PECO to achieve any meaningful level of peak DR by the statutory deadline. Therefore, PECO will present evidence that, as a summer-peaking utility, a reduction in “peak demand” must be achieved during the summer of 2016 (*i.e.*, during the Phase II period) in order to meet a peak demand reduction “target” by the statutory deadline of May 31, 2017.

14. Specifically, PECO will present evidence showing that, in order for a peak DR to occur during the summer of 2016, all of the programs and associated infrastructure needed to achieve that reduction must be in place well before the summer of 2016. That being the case, the Commission’s failure to allocate any portion of allowable spending to DR during Phase II either: (1) assures that summer-peaking EDCs could not achieve targeted peak demand reductions by the statutory deadline, if the Commission subsequently decides to impose such a requirement; or (2) is equivalent to a pre-determination by the Commission that, irrespective of what the SWE finds, it does not intend to implement a second phase of DR programs.

15. A decision to allocate the necessary portion of total allowable spending to DR programs will have a direct and immediate effect on the “target” the Commission tentatively established for PECO’s **consumption** reduction. As previously explained, the Commission derived the Phase II EDC consumption reduction targets based on a formula that made those targets a function of the total allowable level of spending for each EDC. If a portion of the allowable spending is allocated to DR – as it should be – the spending available under the

statutory spending cap for consumption reduction is reduced and, as a result, the consumption reduction target must be lowered as well. Consequently, a determination that a portion of total spending should be allocated to DR programs will impact PECO's consumption reduction "target" and, therefore, is a proper subject of the requested evidentiary hearing since PECO's consumption reduction target will otherwise become final for purposes of its Phase II EE&C Plan. *See Phase II Implementation Order*, pp. 30-31.

16. At the evidentiary hearing, PECO will present evidence showing the level of spending that is needed: (1) to continue cost-effective DR programs on an interim basis; and (2) to maintain other DR programs that will be needed to achieve a subsequently determined peak DR target. Based on that spending level, PECO will present evidence showing the recalculation of its consumption target using the same formula the Commission employed to tentatively determine PECO's consumption reduction target.

B. The Commission's Overstatement Of Allowable Spending

17. As previously explained, the Commission calculated the EDC consumption reductions targets improperly using a formula that makes such targets a function of allowable spending levels. As noted *supra*, the Commission determined that allowable spending should be the entire amount up to the ceiling imposed by Section 2806.1(g), which provides: "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." (Emphasis added.)

18. Section 2806.1(m) defines "Electric distribution company total annual revenue" as: "Amounts *paid to* the electric distribution company *for generation*, transmission, distribution and surcharges by retail customers." (Emphasis added.) The Commission has interpreted "paid to the electric distribution company for generation" to include amounts that are clearly not "paid"

to EDCs “for generation” but, instead, are collected by EDCs simply as billing agents for electric generation suppliers (“EGSs”) under Commission-mandated consolidated billing. *See Phase I Implementation Order*, pp. 34-36.

19. In the *Phase II Implementation Order*, the Commission repeated a finding from the *Phase I Implementation Order* that EDCs with proportionately larger numbers of shopping customers would be disadvantaged because it could be “impossible” for such EDCs “to meet the consumption reduction targets.” *Phase II Implementation Order*, p. 104. The Commission did not point to any evidence to support this assertion with respect to Phase II programs. To the contrary, and as PECO will establish, the Commission’s assertion is factually incorrect. Indeed, under the formula the Commission has employed to set tentative consumption reduction targets, a reduction in allowable spending would **not** impair an EDC’s ability to meet its target because, as calculated by the Commission, the target will automatically decline in proportion to any reduction in allowable spending.

20. As previously noted, Section 2806.1(g) states that the total cost of an EE&C plan “shall not exceed 2% of the electric distribution company’s total annual revenue as of December 31, 2006.” By setting a not-to-exceed amount, the legislature afforded the Commission authority to set a lower ceiling in the exercise of reasonable administrative discretion. PECO will present evidence demonstrating that the Commission will not have properly exercised its administrative discretion unless it uses the authority granted by the legislature to set the spending cap on the basis of total annual revenue that is representative of current and reasonably projected market conditions. To that end, PECO will present evidence of the significant changes in the energy markets that have occurred since 2006 and will explain why those changes must be considered in establishing a reasonable baseline for calculating the 2% “cap.” Those changes, together with

the erosion of overall economic conditions, stagnating or declining employment in the wake of the 2008 economic downturn, and the increased impact of EE&C surcharges as a proportion of customers' total electric bills, all require that the Commission re-examine allowable spending limits and base the calculation of reasonable "caps" on annual revenue that is representative of revenue levels to be experienced during Phase II. PECO will also present evidence showing what its spending cap should be, based on its annual revenue as of December 31, 2006 excluding amounts for which it is merely a billing agent for EGSs under Commission-mandated consolidated billing, and will recalculate its consumption reduction target based on the revised revenue figure.

III. PROPOSED LITIGATION SCHEDULE

21. The *Phase II Implementation Order* (p. 31) provides that the Office of Administrative Law Judge shall certify the record to the Commission no later than November 2, 2012. Consistent with that deadline, PECO proposes the following schedule for serving written testimony, conducting an evidentiary hearing and submitting briefs:

August 20, 2012	Petition filed by PECO
August 30, 2012	Due date for filing Petitions to Intervene
September 5, 2012	Due date for PECO's direct testimony
September 20, 2012	Due date for Intervenors' direct testimony
September 28, 2012	Due date for rebuttal testimony
October 4, 2012	Evidentiary hearing
October 19, 2012	Initial Briefs to be filed
October 30, 2012	Reply Briefs to be filed
November 2, 2012	Certification of the record to the Commission

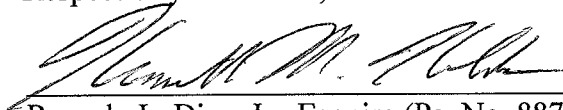
IV. SERVICE OF THIS PETITION AND FURTHER NOTICE, IF ANY

22. PECO is serving copies of this Petition on all parties who filed comments at Docket No. M-2012-2289411. If the Commission determines that further notice is required, PECO will provide such notice as the Commission directs.

V. CONCLUSION

Based upon the foregoing, PECO respectfully requests that the Commission grant this Petition and enter an Order referring the matters set forth in Section II, above, to the Office of Administrative Law Judge for an evidentiary hearing in accordance with the schedule set forth in Section III, above.

Respectfully submitted,



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August 20, 2012

For PECO Energy Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ENERGY EFFICIENCY AND CONSERVATION PROGRAM : **DOCKET NOS. M-2012-2289411**
: **M-2008-2069887**

CERTIFICATE OF SERVICE

I hereby certify that I have this date served true and correct copies of the **Petition of PECO Energy Company for an Evidentiary Hearing Pursuant to Ordering Paragraph No. 3 of the Commission's Implementation Order entered August 3, 2012** upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

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