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October 19, 2012

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Petition of PECO Energy for an Evidentiary Hearing on the Energy Efficiency
Benchmarks Established for the Period of June 1, 2012 through May 31, 2016;
Docket No. P-2012-2320334

Dear Secretary Chiavetta:

On behalf of Duquesne Light Company, I have enclosed for electronic filing the Main Brief of Duquesne Light Company in the above-captioned matter. Copies have been served on the presiding Administrative Law Judge and all parties as indicated in the attached Certificate of Service.

Very truly yours,



Alan M. Seltzer

AMS/kra
Enclosure

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I. INTRODUCTION

On October 15, 2008 Governor Rendell signed into law Act 129 of 2008 ("Act 129"), which took effect on November 14, 2008. Among other things, Act 129 requires electric distribution companies ("EDCs") in Pennsylvania with at least 100,000 customers to file energy efficiency and conservation ("EE&C") plans.¹

Pursuant to 66 Pa.C.S. § 2806.1(a), the Pennsylvania Public Utility Commission ("Commission") is required, among other things, to establish an EE&C Program, including a procedure for approving EDC EE&C plans, a process to evaluate the EE&C Program as a whole and each EDC EE&C plan, and a process by which recommendations can be made for additional consumption reduction measures. The Commission is also required to evaluate the costs and benefits of the EE&C Program by November 30, 2013, and every five years thereafter.²

On March 1, 2012 the Commission issued a Secretarial Letter soliciting comments on a variety of issues related to the development and implementation of Phase II of the EE&C Program. The Commission also held a stakeholder meeting on March 16, 2012 to provide parties an opportunity to address issues contained in the March 1, 2012 Secretarial Letter.

On May 10, 2012 the Commission issued a Tentative Implementation Order ("Tentative Order") in this proceeding outlining its proposed standards for Phase II of the EE&C programs, which will begin June 1, 2013. Interested parties, including each Pennsylvania EDC subject to the EE&C provisions of Act 129, filed comments to the Tentative Order.

On August 3, 2012 the Commission entered its Implementation Order at Docket Nos. M-2012-2289411 and M-2008-2069887, which establishes binding guidelines and standards for Phase II EE&C programs ("Phase II Implementation Order"). In response to due process

¹ See 66 Pa.C.S. § 2806.1(b).

² See 66 Pa.C.S. § 2806.1(e)(3).

concerns raised by PECO Energy Company (“PECO Energy”) in its comments to the Tentative Order, the Phase II Implementation Order permits EDCs to petition the Commission for an evidentiary hearing. Specifically, the Implementation Order provides:

...the Commission will tentatively adopt the EDC specific consumption reduction targets set forth in Table 1 above, subject to challenge by an EDC in accordance with the process described below. These consumption reduction targets will become final for any EDC that does not petition the Commission for an evidentiary hearing by August 20, 2012. ...The scope of any such proceeding will be narrow and limited to the consumption reduction requirement issue.³

Duquesne Light Company (“Duquesne Light”) has actively participated in this proceeding because of its significant interest in the outcome of PECO Energy’s argument that the Commission improperly interpreted sections 2806.1(g) and 2806.1(m) of Act 129, or exceeded the scope of the powers granted by the statute.⁴ PECO Energy essentially contends that dollars paid by shopping customers to electric generation suppliers (“EGSs”) should not be included in EDC EE&C Phase II plan budgets, and the consumption targets should be reduced proportionately because the Phase II formula employed to set consumption reduction targets makes the targets directly dependent on available funding.⁵ It is likely that any determination made by the Commission in response to PECO Energy's allegations regarding allowable spending would be binding on Duquesne Light and could possibly impact the consumption reduction target established by the Commission for Duquesne Light in the Phase II Implementation Order, which Duquesne Light has already accepted by not filing a timely petition for an evidentiary hearing.

³ Implementation Order at 30-31.

⁴ Petition at ¶ 18.

⁵ Petition at ¶¶ 8 and 15.

II. PROCEDURAL HISTORY

On or about August 20, 2012, PECO Energy filed a petition with the Commission requesting an evidentiary hearing (“Petition”). In the Petition, PECO Energy alleges that the Commission made a number of errors in the Phase II Implementation Order. Consistent with the Phase II Implementation Order, PECO Energy requested an evidentiary hearing to address two issues that impact its individual consumption reduction targets: (i) allocation of funds for direct load control and other Demand Response programs; and (ii) the Commission's alleged overstatement of allowable spending.

The Petition was thereafter assigned to the Commission’s Office of Administrative Law Judge (“ALJ”) with directions to certify the record to the Commission by no later than November 2, 2012.

Timely petitions to intervene or notices of intent to participate in the proceeding were filed by the Office of Consumer Advocate (“OCA”), CAUSE-PA, Citizens for Pennsylvania’s Future (“PennFuture”), Clean Air Counsel and Sierra Club, Independent Statewide Evaluator, Comverge, Inc., Philadelphia Area Industrial Users Group (“PAIEUG”) and Community Action Association of PA (“CAPP”) and Duquesne Light Company (“Duquesne Light”).

On August 29, 2012, the ALJ issued a Prehearing Order which, among other things, established the date and location of the Initial Prehearing Conference and directed all parties to file a Prehearing Conference Memorandum on or before September 7, 2012.

An Initial Prehearing Conference was held in this proceeding on September 10, 2012, which was attended by counsel for PECO Energy and the various intervenors. All of the outstanding petitions to intervene were granted at that time because they were unopposed. The presiding ALJ also established the procedural schedule for the proceeding.

On September 13, 2011, the ALJ issued the Scheduling Order which, among other things: (i) granted two outstanding Motions for Admission *pro hac vice*; (ii) granted the outstanding and unopposed petitions to intervene; (iii) confirmed the hearing and litigation schedule for the proceeding; (iv) established the ground rules for the conduct of discovery; and (iv) advised that the form of protective order proposed by PECO Energy would be signed and entered separately.⁶

The evidentiary hearing was held on October 3, 2012 in Harrisburg, Pennsylvania in accordance with the Scheduling Order, at which time PECO Energy's witness, Frank J. Jiruska, was the only witness who testified and was subject to cross examination. Other witnesses, including David Defide from Duquesne Light, were excused from appearing at the evidentiary hearing and their testimony was submitted and accepted into the record via affidavits confirming, among other things, the accuracy and authenticity of their prepared written testimony and exhibits.

III. SUMMARY OF ARGUMENT

Duquesne Light's narrow participation in this proceeding is limited to ensuring that the Commission, the ALJ, PECO Energy and the intervenors understand that the ultimate resolution of the treatment of revenues received from EGSs in calculating the applicable Phase II EE&C programs' consumption reduction targets *will impact* Duquesne Light's targets.

As of this time, Duquesne Light has accepted and believes it can achieve the reduction targets set for it by the Commission in the Phase II Implementation Order. Those targets reflect the *inclusion* of EGS revenues in the calculation of the allowable spending. If the Commission accepts PECO's assertion that – as a matter law – EGS revenues collected by PECO pursuant to mandated consolidated billing must be excluded from allowable spending for purposes of calculating its consumption reduction targets, Duquesne Light's targets must be reduced

⁶ The ALJ issued the Protective Order on September 11, 2012.

automatically to 1.5% or a new proceeding must be commenced to allow Duquesne Light the opportunity to establish new, lower targets.

Accordingly, Duquesne Light requests that the Commission (i) clarify in this proceeding its treatment of EGS revenues in setting consumption reduction targets under Act 129 and the Phase II Implementation Order; (ii) confirm whether its treatment of EGS revenues is intended to be uniformly applicable to all Pennsylvania EDCs, like Duquesne Light; and (iii) provide Duquesne Light a full and complete opportunity – consistent with traditional procedural due process requirements – to modify its consumption reduction target *if* the Commission concludes that EGS revenues should be excluded from PECO Energy’s allowable spending and such determination applies to Duquesne Light as well.

IV. ARGUMENT

A. Burden of Proof

As the petitioner or moving party, PECO Energy has the burden of proof in this matter. Section 332(a) of the Public Utility Code ("Code") requires the proponent of a rule or order "to bear the ultimate burden of persuading the Commission, by a preponderance of substantial evidence, that the relief sought is proper and justified under the circumstances."⁷ The Commission in the Phase II Implementation Order specifically noted that "[t]he EDC contesting the consumption reduction requirement shall have the burden of proof in accordance with 66 Pa.C.S. § 332(a)."⁸

A "preponderance of the evidence" means that one party must present evidence which is more convincing by even the smallest amount, than the evidence presented by an opposing

⁷ 66 Pa.C.S. § 332(a); Motheral, Inc. v. Duquesne Light Co., 2001 Pa. PUC LEXIS 4 at 9; *citing*, Se-Ling Hosiery v. Margulies, 70 A.2d 854 (Pa. 1954).

⁸ Phase II Implementation Order at 31.

party.⁹ Substantial evidence is "relevant evidence that a reasonable mind may accept as adequate to support a conclusion: more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established."¹⁰

If a petitioner has met its burden by a preponderance of substantial evidence and met its *prima facie* case, the fact finder must then determine whether a respondent has submitted evidence of co-equal value or weight in order to counter or refute the applicant's case. If a respondent has provided co-equal evidence in response to the applicant's case, the burden of proof cannot be deemed to have been satisfied unless the party bearing the burden presents additional evidence causing its position to be supported by a preponderance of the evidence.¹¹ Thus, with competing evidence, a petitioner must meet its burden of proof by a preponderance of substantial evidence, based on the overall weight of the evidence.

B. The Commission must Determine Whether Generation Revenues Collected for an EGS using Consolidated Billing are Properly Included in the Definition of Electric Distribution Company "Total Annual Revenue" Under Act 129.

Pursuant to Section 2806.1 of Act 129, the Commission is required to establish an EE&C Program, including a procedure for approving EDC EE&C plans, a process to evaluate the EE&C Program as a whole and each EDC EE&C plan, and a process by which recommendations can be made for additional consumption reduction measures.¹² The Commission is also required, among other things, to evaluate the costs and benefits of the EE&C Program by November 30, 2013, and every five years thereafter.¹³

⁹ See, Se-Ling Hosiery.

¹⁰ Murphy v. Pa Department of Public Welfare, White Haven Center, 480 A.2d 382 (Pa. Cmwlth. 1984).

¹¹ See, Motheral.

¹² 66 Pa.C.S. § 2806.1(a)

¹³ 66 Pa.C.S. § 2806.1(e)(3).

On January 16, 2009, the Commission issued its EEC&DR Phase I Implementation Order at Docket No. M-2008-2069887 (“Phase I Implementation Order”). On pages 34-35 of the Phase I Implementation Order, the Commission stated:

The Commission agrees with Duquesne, OCA, DEP and TRF, in that the General Assembly intended Act 129 to be competitively neutral, and not disadvantage EDCs that had active retail electric markets. The Commission also notes that, in ascertaining legislative intent, the Commission is to presume that the General Assembly did not intend a result that was impossible of execution, unreasonable or unconstitutional. See 1 Pa.C.S. § 1922. Excluding these EGS revenues may so limit Duquesne’s EE&C plan budget such that it could be impossible for it to meet the Act 129 EE&C targets. Therefore, the Commission interprets “amounts paid to the [EDC] for generation, transmission, distribution and surcharges by retail customer,” set forth as the definition of EDC total annual revenue in 66 Pa.C.S. § 2806.1(m), *to include all amounts paid to the EDC for generation service, including generation revenues collected by an EDC for an EGS that uses consolidated billing*. This result will bring Duquesne’s program budget closer to a level of parity with the other EDCs, and ensure that it has a more meaningful opportunity to comply with the EE&C provisions of Act 129.

(emphasis added).

The Phase I Implementation Order’s specific finding that Duquesne Light could include all amounts paid to it for generation service, including generation revenues collected for an EGS using consolidated billing, arose from comments Duquesne Light filed with the Commission in November 3, 2008.¹⁴ In those comments, Duquesne Light requested that the Commission exclude shopping customers from the definition of retail customers, or at least permit EDCs with significant shopping to include EGS revenues in the 2% spending cap. Specifically, Duquesne Light stated:

“Failure to make an adjustment will penalize the success of the competitive market in the Duquesne territory. Thus, if the Commission were to include other EGS’ customers in the Duquesne service territory as part of the definition of “retail customers,” (which Duquesne does not recommend), then at least in order to provide parity to electric utility customers across the state, the revenues of Duquesne should be adjusted upward pro forma to take into account all the

¹⁴ Duquesne Light Company St. No. 1, pp. 4-5.

generation sales that occurred in the EDC's service territory and not just the generation sales made by the default service provider, Duquesne.”

Based on the Commission's then-unique circumstances, the Commission determined that it was appropriate to interpret Section 2806.1(m) of Act 129¹⁵ to include all funds paid to the EDC for generation service, including generation revenues collected for an EGS using consolidated billing. Accordingly, EDCs were permitted to include EGS revenue generation revenues collected for an EGS using consolidated billing, without objection. Under these circumstances, Duquesne Light's acceptance of this approach, both in establishing the Phase I consumption reduction target and again in Phase II (by not filing a request for an evidentiary hearing), is imminently reasonable.

Nevertheless, Duquesne fully understands that the consumption reduction targets in Phase I were expressly established by Act 129 in Sections 2806.1(c) and (d).¹⁶ Importantly, as of November 30, 2013 and every five years thereafter, those mandated targets are no longer set by Act 129 but by the Commission. Whether the Commission may continue to include EGS collected revenues in definition of total annual revenue is uncertain. But regardless of how the Commission resolves this issue in the context of this Phase II proceeding for PECO Energy, it must confirm (i) Duquesne's good faith and justifiable reliance on the Commission's prior treatment of these revenues in establishing Act 129 consumption reduction targets *and* (ii) that any resolution of this proceeding applicable to all jurisdictional EDCs on a basis other than including such EGS revenues will require adjustments to Duquesne Light's Phase II targets.

¹⁵ 66 Pa.C.S. § 2806.1(m).

¹⁶ 66 Pa.C.S. § 2806.1(c) and (d).

- C. If the Commission in this proceeding excludes revenues collected by EDCs from shopping customers in establishing the Phase II consumption reduction targets, Duquesne Light's target must be reduced from the currently established 2% level.

Duquesne Light believes it can achieve the established 2.0 percent consumption reduction target with the allowable spending level set at two percent of its December 2006 annual revenues, *when EGS generation revenues collected by Duquesne Light are included* in that calculation.¹⁷ Duquesne further believes that the treatment of EGS revenues in setting consumption reduction targets under Act 129 should be uniform and consistent for all Pennsylvania jurisdictional EDC's.¹⁸ However, if, as a result of this proceeding, the Commission is inclined to depart from the approach on EGS revenues employed in the Phase I Implementation Order, Duquesne Light must be given an opportunity – consistent with traditional due process principles – to make a filing with the Commission allowing it reduce its consumption reduction target to 1.5%¹⁹ and allow interested Duquesne Light stakeholders an opportunity to address this proposed change in the target in a manner that protects the due process rights of such stakeholders.²⁰

As Duquesne Light witness David Defide testified in this proceeding, at that time of the Phase I Implementation Order, Duquesne Light's service territory was, and continues to be, the most successful competitive electric generation market in Pennsylvania.²¹ As of December 2006, approximately 46.5% of Duquesne Light's load was served by EGSs. As Mr. Defide noted, this level of customer shopping far exceeded the shopping in other Pennsylvania EDC territories during the 2006 time period, thereby creating a funding disparity between Duquesne

¹⁷ Duquesne Light Statement No. 1, pp. 2-3.

¹⁸ Duquesne Light Statement No. 1, p. 7.

¹⁹ As Duquesne Light witness Defide noted, without the EGS revenues, Duquesne Light would be able to achieve a 1.5% consumption reduction for Phase II. This number assumes that acquisition cost and efficiency potential remain constant, while the available funding is reduced for Duquesne Light by 26%, or \$15,239,889. Duquesne Light Statement No. 1, p. 6.

²⁰ *Id.*

²¹ Duquesne Light Company St. No. 1, p. 4.

Light and other EDCs. The lack of funding jeopardized Duquesne Light's ability to meet the Act 129 mandated consumption reduction targets.²²

Duquesne Light's current Phase I program was designed in a manner that relied on the inclusion of EGS generation revenue levels for shopping customers. And, as Duquesne Light witness Defide testified, since the Phase II consumption reduction targets are based on the EDC's available funding, efficiency potential and acquisition costs, Duquesne Light's evaluation of its ability to meet its Phase II target of 2% – and not seek a further hearing challenging that target – *was also dependent on the inclusion of EGS generation revenue from shopping customers in its territory.*²³

More specifically, Mr. Defide testified that Duquesne Light can comply with the Phase II target, although it will be challenging. Duquesne Light believes it can achieve the established consumption reduction target with the allowable spending level set at two percent of the Company's December 2006 annual revenues, *when EGS generation revenues collected by Duquesne Light are included* in that calculation. Based on this assessment, Duquesne Light determined not to petition the Commission for an evidentiary hearing.²⁴ However, depending on the Commission's treatment of EGS generation revenues, and if such determination is considered binding of Duquesne Light as an intervenor, this situation can change dramatically as a result of this proceeding.

²² *Id.*

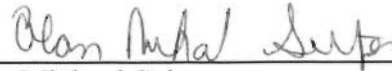
²³ Duquesne Light Statement No. 1, p. 6.

²⁴ Duquesne Light Statement No. 1, pp. 2-3.

V. CONCLUSION

For the reasons set forth above, Duquesne Light respectfully requests that the Commission grant all the relief requested in this Brief.

Respectfully submitted,



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Dated: October 19, 2012

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy for an :
Evidentiary Hearing on the Energy : Docket No. P-2012-2320334
Efficiency Benchmarks Established for the :
Period of June 1, 2012 through May 31, 2016 :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

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