Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
Tel: 215.963.5000
Fax: 215.963.5001
www.morganlewis.com

Morgan Lewis
COUNSELORS AT LAW

Anthony C. DeCusatis
Of Counsel
215.963.5034
adecusatis@MorganLewis.com

October 31, 2012

VIA eFILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Petition of PECO Energy Company for an Evidentiary Hearing on the Energy Efficiency Benchmarks Established for the Period June 1, 2013 through May 31, 2016
Docket No. P-2012-2320334

Dear Secretary Chiavetta:

Enclosed for filing is the **Reply Brief of PECO Energy Company** ("Reply Brief") in the above-referenced matter. The date for filing of this Reply Brief was extended from October 30, 2012 to October 31, 2012 because of the closure of the Public Utility Commission.

As evidenced by the attached Certificate of Service, a copy of the Reply Brief has been served electronically and via first class mail upon Administrative Law Judge Elizabeth H. Barnes and all parties.

Should you have any questions, please contact me directly at 215.963.5034. Thank you.

Very truly yours,

Anthony C. DeCusatis

ACD/tp
Enclosures
c: Certificate of Service (w/encls.)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PETITION OF PECO ENERGY FOR AN EVIDENTIARY HEARING ON THE ENERGY EFFICIENCY BENCHMARKS ESTABLISHED FOR THE PERIOD JUNE 1, 2013 THROUGH MAY 31, 2016	: : : : :	**DOCKET NO. P-2012-2320334**

CERTIFICATE OF SERVICE

I hereby certify that I have this date served true and correct copies of the **Reply Brief of PECO Energy Company** upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

VIA ELECTRONIC AND FIRST CLASS MAIL

Honorable Elizabeth H. Barnes
Administrative Law Judge
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
ebarnes@pa.gov

Jennedy S. Johnson
Aron J. Beatty
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
jjohnson@paoca.org
abeatty@paoca.org
Counsel for the Office of Consumer Advocate

Shaun A. Sparks
Krystle J. Sacavage
Pennsylvania Public Utility Commission
Law Bureau
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
shsparks@pa.gov
Counsel for Statewide Evaluator

Kriss Brown
Pennsylvania Public Utility Commission
Law Bureau
400 North Street, Second Floor West
P.O. Box 3265
Harrisburg, PA 17105
kribrown@pa.gov

Zachary M. Fabish
Sierra Club
50 F Street, N.W.
8th Floor
Washington, DC 20001
zachary.fabish@sierraclub.org
Counsel for the Sierra Club

Tishekia E. Williams
Duquesne Light Company
411 Seventh Avenue
Pittsburg, PA 15219
twilliams@duqlight.com
Counsel for Duquesne Light Company

Alan M. Seltzer
Buchanan Ingersoll Rooney PC
409 North Second Street, Suite 500
Harrisburg, PA 17101
alan.seltzer@bipc.com
Counsel for Duquesne Light Company

Joseph Otis Minott
Clean Air Council
135 S. 19th Street
Suite 300
Philadelphia, PA 19103
joe_minott@cleanair.org
Counsel for the Clean Air Council

Charis Mincavage
Adeolu A. Bakare
Teresa K. Schmittberger
McNees Wallace & Nurick LLC
100 Pine Street
Harrisburg, PA 17108-1166
cmincavage@mwn.com
abakare@mwn.com
tschmittberger@mwn.com
Counsel for Philadelphia Area Industrial Energy Users Group

Harry S. Geller
Patrick M. Cicero
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
pulp@palegalaid.net
Counsel for the Coalition of Affordable Utility Services and Energy Efficiency in Pennsylvania

Jeffrey J. Norton
Carl R. Shultz
Eckert Seamans Cherin & Mellott, LLC
213 Market Street,
8th Floor
Harrisburg, PA 17101
jnorton@eckertseamans.com
cshultz@eckertseamans.com
Counsel for Comverge, Inc.

Joseph L. Vullo
Burke Vullo Reilly Roberts
1460 Wyoming Avenue
Forty Fort, PA 18704
jlvullo@aol.com
Counsel of Community Action Association of Pennsylvania

Heather M. Langeland
PennFuture
425 Sixth Avenue, Suite 2770
Pittsburgh, PA 15219
langeland@pennfuture.org
Counsel for PennFuture

Respectfully submitted,

Romulo L. Diaz, Jr., Esquire (No. No. 88795)
Anthony E. Gay, Esquire (Pa. No. 74624)
Jack R. Garfinkle, Esquire (Pa. No. 81892)
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101-8699
Phone: 215.841.4635
Fax: 215.568.3389
E-mail: anthony.gay@exeloncorp.com

Anthony C. DeCusatis, Esquire (Pa. No. 25700)
Brooke E. Leach, Esquire (Pa. No. 204918)
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
Phone: 215.963.5034
Fax: 215.963.5001
E-mail: adecusatis@morganlewis.com
Counsel for PECO Energy Company

Date: October 31, 2012

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PETITION OF PECO ENERGY COMPANY FOR AN EVIDENTIARY HEARING ON THE ENERGY EFFICIENCY BENCHMARKS ESTABLISHED FOR THE PERIOD JUNE 1, 2013 THROUGH MAY 31, 2016	:	**DOCKET NO. P-2012-2320334**

REPLY BRIEF OF PECO ENERGY COMPANY

Before Administrative Law Judge
Elizabeth H. Barnes

Romulo L. Diaz, Jr.
(Pa. No. 88795)
Anthony E. Gay
(Pa. No. 74624)
Jack R. Garfinkle
(Pa. No. 81892)
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101-8699

Anthony C. DeCusatis
(Pa. No. 25700)
Brooke E. Leach
(Pa. No. 204918)
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921

Counsel for PECO Energy Company

October 31, 2012

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. PECO'S PROPOSED ADJUSTMENTS TO ITS PHASE II EE&C CONSUMPTION REDUCTION TARGET 2

A. PECO's Phase II Consumption Reduction Target Should Be Reduced By Allocating An Appropriate Level Of Funding To DR Programs 2

1. PECO's Mass Market DLC Program 2

2. Future Peak Demand Reduction Requirements 6

B. PECO's Phase II Consumption Reduction Target Should Be Reduced Based On The Commission's Overstatement Of Allowable Spending 10

1. Revenue Baseline 10

2. Treatment of EGS Revenues 12

III. CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Energy Efficiency and Conservation Program,
Docket Nos. M-2012-2289411 and M-2008-2069887
(Order entered Aug. 3, 2012) .... *passim*

Energy Efficiency and Conservation Program,
Docket No. M-2008-2069887 (Order entered Jan. 16, 2009) 14

STATUTES

66 Pa.C.S. § 2806.1(g) 11

I. INTRODUCTION

PECO Energy Company ("PECO" or the "Company") files this Reply Brief in response to the Main Briefs that were filed by the following parties:

Citizens For Pennsylvania's Future	("PennFuture")
Clean Air Council and Sierra Club	("CAC/Sierra")
Comverge, Inc.	("Comverge")
Duquesne Light Company	("Duquesne")
Office of Consumer Advocate	("OCA")

As explained in its Initial Brief, PECO has proposed adjustments to the energy consumption reduction target tentatively adopted by the Pennsylvania Public Utility Commission ("Commission") for the period June 1, 2013 to May 31, 2016 ("Phase II") in its August 3, 2012 Order ("*Phase II Implementation Order*")[1] in order to reflect an appropriate level of funding for demand reduction ("DR") and a total funding cap that is consistent with revenue levels achievable under current market and economic conditions. To a large extent, the arguments advanced by CAC/Sierra, the OCA and PennFuture ("Opposing Parties") were fully addressed in PECO's Initial Brief. Therefore, this Reply Brief focuses on the principal areas of disagreement as well as certain new contentions made by the Opposing Parties for the first time in their respective Main Briefs. None of the Opposing Parties' arguments have merit and, therefore, the Commission should reject those arguments and adopt the modifications PECO has proposed to its Phase II consumption reduction target.

---

1 *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411 and M-2008-2069887 (Order entered Aug. 3, 2012)

II. PECO'S PROPOSED ADJUSTMENTS TO ITS PHASE II EE&C CONSUMPTION REDUCTION TARGET

A. PECO's Phase II Consumption Reduction Target Should Be Reduced By Allocating An Appropriate Level Of Funding To DR Programs

As explained in its Initial Brief (pp. 6-14), PECO is proposing to allocate approximately $36 million of its total allowable Phase II energy efficiency and conservation ("EE&C") plan spending to sustain its existing, cost-effective direct load control ("DLC") measures for residential and small commercial customers (collectively, the "Mass Market DLC Program"). This proposed adjustment would produce an energy savings target of 2.5% instead of the 2.9% target tentatively adopted in the *Phase II Implementation Order*. PECO also proposes to allocate approximately $17.4 million of its total Phase II allowable funding to achieve a subsequently established peak DR target by May 31, 2017, which would further reduce PECO's consumption reduction target to 2.3%.

Comverge affirmatively supports PECO's proposed allocation of Phase II funds to DLC and DR measures, while Duquesne has not taken a position on this issue. The Opposing Parties, on the other hand, oppose allocating any Phase II funds to these measures. As explained below and in PECO's Initial Brief (pp. 8-12), these parties' arguments in opposition to PECO's proposals are based on erroneous interpretations of the *Phase II Implementation Order*, lack factual support and, therefore, should be rejected.

1. PECO's Mass Market DLC Program

The Opposing Parties generally support the continuation of PECO's Mass Market DLC Program as a reasonable way to avoid stranded costs and other detrimental effects that the Commission acknowledged would occur if those measures were interrupted between Phases I and III of PECO's EE&C program. *See Phase II Implementation Order*, pp. 38-40.

Nonetheless, the Opposing Parties resist allocating any Phase II funding to DLC measures because they contend PECO should be able to operate its Mass Market DLC Program throughout Phase II and still meet a 2.9% consumption reduction target within the Phase II spending limit. *See* CAC/Sierra Main Brief, pp. 7-9; OCA Main Brief, pp. 5-8; PennFuture Main Brief, pp. 7-12. In addition, CAC/Sierra contends that PECO's estimate of $12 million per year to continue the Mass Market DLC Program is overstated because it includes measures targeting commercial customers that do not appear to meet the cost-effectiveness criterion mentioned in the *Phase II Implementation Order* (p. 41).[2] None of these contentions is valid.

At the heart of all the Opposing Parties' arguments is the contention that PECO will have sufficient funding to continue its Mass Market DLC Program – and to ramp up other Phase III DR programs needed to meet a subsequent DR target – from surplus Act 129 funds remaining after PECO achieves its Phase II energy consumption reduction target. Stated differently, they believe that PECO can achieve a 2.9% consumption reduction target while spending less than all of the funds available within the Phase II spending limit. The Opposing Parties speculate that this outcome could result because "excess" savings will accrue in Phase I and carry over to Phase II and because actual acquisition costs may be lower than the Statewide Evaluator ("SWE")

---

[2] In its Main Brief (p. 15), PennFuture also reiterated its witness' contention that continuing the Mass Market DLC Program is not "mandatory." However, as explained in PECO's Initial Brief (p. 10), PennFuture ignores the Commission's findings that continuing cost-effective DR measures would benefit customers, while discontinuing such measures for the duration of Phase II will have significant deleterious effects. Similarly, PennFuture ignores the Commission's explicit assumption that the DR infrastructure deployed in Phase I will remain available for use if DR targets are established in Phase III. Thus, while not expressly mandating the continuation of reasonable DR measures in Phase II, what the Commission actually said in the *Phase II Implementation Order* amounts to a virtual mandate.

estimated.[3] Even putting aside the unproven factual assumptions underlying the Opposing Parties' suppositions, their arguments simply miss the point.

In the *Phase II Implementation Order* (pp. 25-26, the Commission directed that electric distribution companies' ("EDC") **entire** allowable Act 129 funding for Phase II should be dedicated **solely** to energy efficiency. In short, the plain language of that Order does not leave room for any Phase II funds to be used for DR programs. Consequently, even if PECO's Phase II consumption reduction target could be satisfied by expending less than all of PECO's allowable funds, any unused Phase II funding could not be applied to the Mass Market DLC Program or to any other DR measure.[4] Therefore, whether any "excess" Phase II funding might exist beneath the Act 129 spending cap is irrelevant because not a single dollar of any such "excess" could be spent on DLC and other DR measures. Simply stated, the Opposing Parties' assumption that the Mass Market DLC Program can be continued and other DR measures can be ramped up to meet a subsequently established DR target by using left-over Phase II Act 129 resources is in direct conflict with the express directives of the Commission in the *Phase II Implementation Order*.

---

[3] Each of the Opposing Parties contends that the acquisition cost used to determine PECO's Phase II consumption reduction target is overstated by comparison to PECO's Phase I experience, historic cost data from other jurisdictions and alleged flaws in the program design assumptions employed in the SWE's Market Potential Study. However, the Commission has already considered and rejected those arguments on the ground that the SWE's findings and conclusions in the Market Potential Study were properly based on national trends in energy efficiency programs, Pennsylvania-specific circumstances and forward-looking – not historic – cost estimates. *Phase II Implementation Order* (pp. 14-19).

[4] CAC/Sierra's contention (CAC/Sierra Main Brief, p. 8) that PECO has made no attempt to increase spending to take advantage of its remaining Phase I budget mischaracterizes Mr. Jiruska's responses to cross-examination. As Mr. Jiruska explained, PECO has not yet achieved its Phase I target and, therefore, a determination of how to dispose of "unused" Phase I funds, if any should exist, cannot be made until that target is actually met (Tr. 68).

CAC/Sierra also allege that PECO's estimate of $36 million for continuing the Mass Market DLC Program is overstated because it includes small commercial measures that CAC/Sierra claim are not cost-effective. Contrary to CAC/Sierra's contentions, the Total Resource Cost ("TRC") calculations PECO presented show that the Mass Market DLC Program provides significant net benefits to **all** of the customers encompassed by that program. CAC/Sierra's argument erroneously assumes that the residential and small commercial measures that, together, comprise the Mass Market DLC Program should be disaggregated and that each component should be subjected to a TRC test independently. There is no basis for taking that approach. The Mass Market DLC Program was conceived, designed and – most importantly – approved by the Commission as a **single** DR measure. And, as a single DR measure, the Mass Market DLC Program passes the TRC test easily, with a TRC score of 2.38 (PECO Exhibit FJJ-1). It was never contemplated that the elements comprising the Mass Market DLC Program could be – or would be – implemented on a stand-alone basis and, therefore, there is no reason to analyze each element separately as CAC/Sierra proposes to do. Additionally, CAC/Sierra overstates the impact of the small commercial component on the total cost of the Mass Market DLC Program. The small commercial measures represent approximately $5.9 million of the total $36 estimated three-year cost of that program. Finally, as explained in PECO's Initial Brief (p. 11), the small commercial measures embedded in the Mass Market DLC Program are essential if PECO is to have a reasonable opportunity to meet a subsequently determined peak demand reduction target by the statutory deadline.

CAC/Sierra also contend that Phase II funding is not needed because PECO should seek to recover the cost of the "voluntarily-undertaken" Mass Market DLC Program by petitioning the Commission for authority to establish a separate automatic adjustment clause under Section 1319

of Public Utility Code as the Commission suggested in the *Phase II Implementation Order*. However, as explained in PECO's Initial Brief (p. 13), unless those costs are recovered under the preexisting Act 129 cost recovery mechanism, serious questions exist as to whether the demand reductions achieved by a separately-funded program would count toward a DR target that is subsequently established under Act 129. Additionally, such a separate funding approach would unlawfully circumvent the Act 129 statutory cap, which the legislature intended to limit the impact of EE&C measures on customers' bills. *See* PECO Initial Brief, pp. 15-17.

For all the foregoing reasons, the objections to PECO's proposal to allocate $36 million of its total allowable Phase II funding to the Mass Market DLC Program are entirely without merit and should be rejected.

2. Future Peak Demand Reduction Requirements

If the Commission determines that further DR measures are cost effective and, therefore, as Act 129 requires, establishes further peak demand reduction targets, PECO would have to reduce its peak demand by the targeted levels during the summer of 2016 in order to avoid the imposition of mandatory statutory penalties. *See* PECO Initial Brief, pp. 3 and 12. There is no dispute that, in order to achieve peak demand reductions during the summer of 2016, all of the DR measures and associated infrastructure must be in place well before then (i.e., during Phase II). *See* PECO Statement No. 1, p. 14; Exhibit FJJ-5. And, if those programs and the associated infrastructure must be in place, they need to be funded with money that PECO is authorized to spend below the Act 129 statutory cap. Accordingly, PECO is proposing to allocate approximately $17.4 million of its Phase II allowable spending for such DR development costs.

The Opposing Parties oppose allocating any Phase II funding to pay the administrative costs essential to ramping up Phase III DR programs to meet subsequently-determined DR targets because they contend such funding is unnecessary. In summary, the Opposing Parties

assume that EDCs have been authorized to accelerate the expenditure of Phase III dollars to cover DR costs they may incur during Phase II. However, the Opposing Parties have furnished no authority from the *Phase II Implementation Order* or any other Commission pronouncement that grants EDCs permission to start spending Phase III funds during Phase II and be assured that those expenditures may be recovered from customers. Indeed, no such authority exists. In fact, the Commission was silent on this issue in the *Phase II Implementation Order* despite the fact that it was squarely presented for the Commission's consideration. Once again, the Opposing Parties have constructed their arguments on assumptions that are totally at odds with the plain language of the *Phase II Implementation Order.* The Commission has provided EDCs no assurance that costs incurred during Phase II to prepare for Phase III DR mandates will ultimately be recoverable if Phase II funds are not allocated to those measures now. *See* PECO Initial Brief, pp. 13-14.

In tacit recognition of the weakness of its arguments on the substantive issue, PennFuture has belatedly and improperly introduced a procedural objection for the first time in its Main Brief. Specifically, PennFuture asserts that, in its Prehearing Conference Memorandum, it had "objected" to PECO even raising the issues of allocating Phase II funds to DLC and DR measures because, in PennFuture's view, such issues are outside the scope of this proceeding PennFuture Main Brief, p. 2. PennFuture's argument should be rejected on several grounds.

First, PennFuture's contention that it broached this issue in its Prehearing Conference Memorandum is demonstrably incorrect. PennFuture's Prehearing Conference Memorandum (unnumbered p. 2) contains only the general statement that: "PennFuture objects to consideration of any issue outside the limited scope of review set forth in the Commission's Implementation Order, i.e., the consumption reduction requirement issue." By the time Prehearing Conference

Memoranda were filed on September 7, 2012, PECO twice had set forth in detail the issues it intended to raise and its positions on each issue. It did so first in its Petition for Evidentiary Hearing filed on August 20, 2012, and again in the direct testimony of Mr. Jiruska, which was served on September 5, 2012. If, in fact, PennFuture believed that the issues PECO intended to raise were outside the scope of proceeding, it had ample opportunity to state its objections with sufficient specificity to allow PECO, the ALJ and the other parties to actually know the subject of those objections. It did no such thing. Therefore, PennFuture's putative "objection" should be rejected simply because PennFuture engaged in transparent "sandbagging."

Second, a Prehearing Conference Memorandum is not the proper procedural vehicle for lodging an objection like the one PennFuture now purports to have made. If PennFuture had a legitimate objection – and it does not – and if intended to raise such an objection before now – and there is no evidence that PennFuture seriously entertained any "objection" until it belatedly tried to do so in its Main Brief – the proper way to proceed was by a motion *in limine* or a motion to strike the testimony of Mr. Jiruska filed at least twenty-four 24 hours before the evidentiary hearing **as required by the ALJ's Scheduling Order** (p. 4).[5] Having failed to raise its "objection" in the manner and at the time required by the ALJ's Scheduling Order, PennFuture is estopped from doing so now.

Third, Mr. Jiruska's testimony, which addressed all of the issues to which PennFuture now "objects," was moved into evidence at the hearing held on October 3, 2012. PennFuture

[5] In contrast to PennFuture's flaunting of the Scheduling Order, PECO followed the rules by raising a scope objection to PennFuture witness Reed's direct testimony in a Motion *In Limine* filed on September 28, 2012 – well in advance of the evidentiary hearing. Because PECO abided by the Scheduling Order's directive, PennFuture had the opportunity to file an Answer to PECO's Motion, and the Administrative Law Judge ("ALJ") had the opportunity to hear oral argument before ruling. *See* Tr. 27-30.

made no objection to the introduction of Mr. Jiruska's testimony then (Tr. 36-37), and it is, therefore, barred from doing so now.

Fourth, the issues PECO has raised are clearly within the scope of this proceeding even under the criterion PennFuture articulated in its Prehearing Conference Memorandum because they are absolutely central to "the consumption reduction requirement issue," as PECO explained in detail in its Petition for Evidentiary Hearing (pp. 7-8):

> A decision to allocate some 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 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.

The same explanation of the centrality of the DLC and DR issues to the Phase II consumption reduction requirement was provided in Mr. Jiruska's direct testimony (PECO Statement No. 1, pp. 7, 18-19). As previously explained, PennFuture did not raise any objection to entering Mr. Jiruska's testimony in the record.

For the foregoing reasons, the objections to PECO's proposal to allocate funds for DR measures that must be ramped up in Phase II to meet a possible Phase II DR target are meritless and should be rejected.

B. PECO's Phase II Consumption Reduction Target Should Be Reduced Based On The Commission's Overstatement Of Allowable Spending

A reasonable Phase II consumption reduction target should reflect a level of revenues that is reasonably achievable under current market and economic conditions. *See* PECO Initial Brief, pp. 14-17. To that end, PECO is proposing that the Commission use 2011 data, excluding electric generation supplier ("EGS") revenues collected by PECO pursuant to consolidated billing, to establish the allowable spending input for calculating its Phase II consumption reduction target. *Id.* These adjustments would reduce PECO's Phase II consumption reduction target by 1.0%. PECO Initial Brief, p. 15. The Opposing Parties urge the Commission to reject the use of a 2011 revenue baseline and PECO's proposed treatment of EGS revenue. As explained below, the Opposing Parties's arguments proceed from their erroneous interpretation of the relevant provisions of Act 129 and their refusal to afford the Commission the opportunity to exercise the discretion it clearly has to establish a reasonable spending cap for EE&C programs.

1. Revenue Baseline

The principal basis for the Opposing Parties' opposition to the Commission using a 2011 revenue baseline to establish PECO's spending limit is their contention that, unless EE&C spending is mandated up to the absolute maximum amount that Act 129 permits, cost-effective energy efficiency "benefits" would be foregone. *See* CAC/Sierra Main Brief, p. 15; OCA Main Brief, p. 13; PennFuture Main Brief, p. 17. However, as PECO explained in its Initial Brief (pp. 16-17), the Opposing Parties have chosen to focus on only one-half of the relevant equation, namely, the "benefits" that a **subset** of PECO's customer base would realize if EE&C spending is mandated to the outer limit set by Act 129. The second half of that equation, which the Opposing Parties simply ignore, is the underlying rationale for the legislature's imposition of a

spending limit, which is to moderate the overall impact of EE&C spending on the rates of **all** of PECO's customers. Clearly, the legislature, by enacting Act 129, acknowledged the importance of the "benefits" that certain customers would derive from properly designed EE&C programs. However, at the same time, the legislature recognized that those benefits come with a cost and, therefore, the benefits to **some** customers must be balanced against the financial impact of increased rates that must be borne by **all** customers including those that will not see any "benefits" from even the best-designed EE&C programs. To that end, Section 2806.1(g) was added to the Public Utility Code to set the farthest limit of permissible EDC spending.

In their respective Main Briefs, the OCA and PennFuture have posited an interpretation that would turn Section 2806.1(g) on its head. Specifically, they contend that, under Section 2806.1(g), EDCs are "statutorily mandated" to spend every penny up to the maximum spending limitation set forth in that section and, therefore, the Commission has no choice but to use 2006 revenue even if another year's revenues would produce a more reasonable spending level for an EDC's EE&C plan. *See* OCA Main Brief, p. 13; PennFuture Main Brief, p. 17. Section 2806.1(g) says no such thing. By its plain language, Section 2806.1(g) sets a maximum spending limit and, therefore, nothing therein bars the Commission from establishing reasonable spending levels that are less than the maximum. In short, the Opposing Parties have tried to create a legal issue where none exists. The plain language of Section 2806.1(g) simply does not support the tortured interpretation the Opposing Parties are trying to impose on it.

Putting aside the confusion that the Opposing Parties have created by their attempt to introduce a non-existent legal issue, the facts that are relevant to setting a reasonable spending level for PECO's Phase II EE&C program are not the subject of any legitimate dispute. No party disagrees that energy prices are considerably lower today than they were in 2006 and, as as a

result, EE&C surcharges are a higher proportion of customers' total bills. Accordingly, using a lower Phase II spending level to calculate PECO's Phase II consumption reduction target will result in more reasonable rates for EE&C cost recovery, which is the goal the legislature was trying to achieve when it imposed a ceiling on permissible spending.

CAC/Sierra has advanced an additional argument that, in fact, is not an argument at all, but a total mischaracterization of PECO's position. CAC/Sierra contends that PECO failed to explain why the Commission's use of the maximum allowable spending level to set Phase II consumption reduction targets impermissibly exceeds the Act 129 statutory spending cap. CAC/Sierra Main Brief, p. 13. However, PECO never alleged that the Commission exceeded the statutory spending cap. Rather, and as previously explained, the Commission's error was to convert a "not to exceed" value into a "not less than" expenditure level and, in so doing, to give no consideration to the rate impact of its decision. PECO's proposal to use reasonably expected revenue levels to be achieved during Phase II to establish the Phase II consumption reduction target would still provide substantial net energy efficiency benefits to participating customers while reducing the cost burden on **all** customers.

2. Treatment of EGS Revenues

As explained in PECO's Initial Brief (pp. 17-18), in addition to using PECO's 2011 revenue in lieu of 2006 revenues to establish a reasonable spending limit for Phase II, 2011 revenues should not include amounts that PECO collects on behalf EGSs pursuant to Commission-mandated consolidated billing. In large part, the arguments advanced in the Opposing Parties' Main Briefs were anticipated and addressed in PECO's Initial Brief.[6] A

[6] Duquesne does not oppose PECO's proposal. However, Duquesne explained in its Main Brief – as did its witness, Mr. Defide, in direct testimony – that, if the Commission adopts PECO's position on EGS revenue and applies it uniformly to all EDCs, then Duquesne

notable exception, however, is CAC/Sierra's contention – interjected for the first time in its Main Brief – that PECO's position on EGS billings amounts to a "legal" issue and, therefore, is beyond the scope of this proceeding, which should address "factual" issues only.

Like PennFuture (*see* Section II.A.2., *supra*), CAC/Sierra has "sandbagged" PECO, the ALJ and the other parties by remaining silent in the face of: (1) PECO's Petition for Evidentiary Hearing, filed on August 20, which expressly raised this issue as a subject PECO intended to address; (2) PECO's service, on September 5, of Mr. Jiruska's direct testimony, which discusses this issue at length; (3) PECO's Prehearing Conference Memorandum, served on September 7, 2012, which also identified this issue; and (4) finally, PECO's motion to admit Mr. Jiruska's testimony at the October 3, 2012 evidentiary hearing in this case, which CAC/Sierra did not oppose as being outside the scope of this proceeding. Thus, CAC/Sierra has already acquiesced to addressing the EGS billing in this proceeding, and it is clearly estopped from reneging on that prior acquiescence. Moreover, under the ALJ's Scheduling Order (p. 4), the kind of objection CAC/Sierra is now trying to lodge had to be presented, if at all, within twenty-four hours of the evidentiary hearing in this case. Clearly, CAC/Sierra did not do so and, just as clearly, having violated the ALJ's Scheduling Order, it cannot raise its objection at this late date.

In addition to the host of procedural and equitable defects in CAC/Sierra's position, its argument is simply wrong. The EGS billing issue is, indeed, a factual one, and PECO explained why that is so in its Petition for Evidentiary Hearing. As explained therein, the Commission's decision to include EGS billings in the EDC revenue baseline to calculate the 2% spending cap was based on its **factual** determination that, without EGS billings, the spending limitation would be too low to allow some EDCs that have experienced significant "shopping" (e.g., Duquesne) to

---

should have the opportunity to recalculate its energy consumption reduction target accordingly. PECO agrees with Duquesne's position. *See* PECO Initial Brief, p. 18.

meet the statutory Phase I reduction target of 3%. In its Petition for Evidentiary Hearing (p. 9), PECO stated its intention to present evidence that circumstances have changed between Phases I and II and, **as a factual matter**, the rationale for the Commission's prior decision is no longer operative:

> The Commission found it necessary to try to defend its position by contending that unless Section 2806.1(m) is interpreted in a manner that is facially inconsistent with the statutory language, EDCs with proportionately larger number of shopping customers would be disadvantaged, and it could be "impossible" for such EDCs "to meet the consumption reduction targets." *Phase II Implementation Order*, p. 104. The Commission could not point to any evidence to support is assertions. 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 decline in proportion to any reduction in allowable spending. PECO will 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. PECO will also recalculate its consumption reduction target based on the revised revenue figure.

CAC/Sierra's argument that the EGS billing is not within the scope of this proceeding is totally lacking in merit, has been raised improperly and belatedly, and represents CAC/Sierra's attempt to renege on it prior acquiescence to the propriety of PECO's addressing that issue in this case. Accordingly, CAC/Sierra's argument should be rejected.

In their respective Main Briefs, the Opposing Parties continue to rely on the Commission's decision in the *Phase I Implementation Order*[7] to include EGS consolidated billings in EDC revenue as a justification for doing the same in Phase II. In so arguing, the

---

[7] *Energy Efficiency and Conservation Program*, Docket No. M-2008-2069887 (Order entered Jan. 16, 2009).

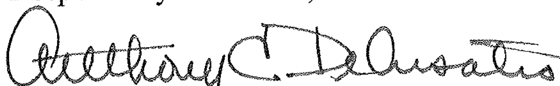
Opposing Parties totally ignore the difference in the ways consumption reduction targets were set in Phases I and II. As explained in PECO's Petition for Evidentiary Hearing, *supra*, and as further described by Mr. Jiruska (PECO Statement No. 1, p. 7), in Phase I, the consumption reduction target was established by statute as 3% for all EDCs. Each EDC had to have sufficient funds to meet that target. In contrast, under the approach the Commission has employed in Phase II, EDC-specific targets are a function of the available funding and, therefore, if the spending cap is reduced, the consumption reduction target is proportionately reduced as well. *See* PECO Initial Brief, pp. 14 (n. 10) and 18. As a result, the method the Commission employed to calculate each EDC's Phase II target eliminates the Commission's concern that EDCs with a larger number of "shopping" customers would be placed at a disadvantage if EGS consolidated billings were not added to EDC revenues. Therefore, the Opposing Parties' argument that the Commission should blindly duplicate what it did in Phase I ignores the significant factual differences in the way the Phase I and Phase II consumption reduction targets were established.

Contrary to the Opposing Parties' contentions, including in EDCs' revenue the amounts they collect as agents on behalf of EGSs is no longer justified by the concerns that underlay the Commission's decision on this issue in Phase I.

III. CONCLUSION

For the reasons set forth above and in PECO's Initial Brief, the Commission should enter an order adopting PECO Energy Company's proposed adjustments to its energy consumption reduction target for the period June 1, 2013 to May 31, 2016.

Respectfully submitted,



Romulo L. Diaz, Jr., Esquire (Pa. No. 88795)
Anthony E. Gay, Esquire (Pa. No. 74624)
Jack R. Garfinkle, Esquire (Pa. No. 81892)
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101-8699
Phone: 215.841.4635
Fax: 215.568.3389
E-mail: Anthony.Gay@Exeloncorp.com

Anthony C. DeCusatis, Esquire (Pa. No. 25700)
Brooke E. Leach (Pa. No. 204918)
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
Phone: 215.963.5034
Fax: 215.963.5001
E-mail: adecusatis@morganlewis.com

Counsel for PECO Energy Company

Dated: October 31, 2012

DB1/ 71468345.3