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| **PENNSYLVANIA**  **PUBLIC UTILITY COMMISSION**  **Harrisburg, PA 17105-3265** | |
|  | Public Meeting held December 17, 2009 |
| Commissioners Present:  James H. Cawley, Chairman  Tyrone J. Christy, Vice Chairman  Kim Pizzingrilli  Wayne E. Gardner  Robert F. Powelson |  |
| Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company for Consolidation of Proceedings and Approval of Energy Efficiency and Conservation Plans | Docket Nos. M-2009-2092222,  M-2009-2112952 and M-2009-2112956 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

# I. Introduction

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration filed by the Office of

Small Business Advocate (OSBA or Petitioner), regarding the Commission’s Opinion and Order entered in the above-referenced proceedings on October 28, 2009,[[1]](#footnote-1) which approved in part and rejected in part the Energy Efficiency and Conservation Plans (EE&C Plans), filed by Metropolitan Edison Company (Met Ed), Pennsylvania Electric Company (Penelec) and Pennsylvania Power Company (Penn Power) (collectively, FirstEnergy or the Companies).

# II. Background and Procedural History[[2]](#footnote-2)

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. 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. 66 Pa. C.S. § 2806.1(a).

By Opinion and Order entered January 16, 2009 at Docket No. M-2008-2069887 (*Implementation Order*), the Commission (1) established the standards that Electric Distribution Company (EDC) EE&C Plans must meet, and (2) provided guidance on the procedures to be followed for submittal, review and approval of all aspects of EDC EE&C Plans.

The Companies filed their Plans on July 1, 2009 and revised them several times during the proceedings. Numerous parties intervened, including the OSBA. The Plans were referred to Administrative Law Judge (ALJ) David A. Salapa, and on September 22, 2009, ALJ Salapa certified the record to the Commission for consideration and disposition.

The *October 2009 Order* approved in part and rejected in part the Plans as modified. The Companies were directed to submit revised Plans within sixty days of the date of entry of the *October 2009 Order.* The revised Plans were therefore required to be submitted on or before December 28, 2009. In fact, the Companies filed their revised Plans on December 2, 2009.

On November 12, 2009, the OSBA filed a Petition for Reconsideration (Petition) of the *October 2009 Order*. On November 23, 2009, FirstEnergy filed an Answer to the Petition. By Opinion and Order entered November 19, 2009, we granted reconsideration pending review of, and consideration on, the merits.

# III. Discussion

**Legal Standards**

The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 *et al.*, 56 Pa. P.U.C. 553 (1982). Under the standards set forth in *Duick*, a petition for reconsideration may properly raise any matter designed to convince this Commission that we should exercise our discretion to amend or rescind a prior Order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations that appear to have been overlooked or not addressed by the Commission. *Duick* at 559. It has also been held that, because a grant of relief on such petitions may result in the disturbance of final orders, it should be granted judiciously and only under appropriate circumstances. *West Penn Power v. Pa. PUC*, 659 A.2d 1055 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, No. 576 W.D., Allocatur Docket (April 9, 1996); *City of Pittsburgh v. PennDOT*, 490 Pa. 264, 416 A.2d 461 (1980).

We note that any issue, which 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 Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also *see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

**Positions of the Parties**

In its Petition, the OSBA requests that the Companies be required to file a red-lined version of their EE&C Plans. The OSBA argues that a red-lined version would facilitate meaningful review within a tight time frame. Petition at 8-9.

In addition, the OSBA notes that the *October 2009 Order* directed the Companies “to establish a separate cost recovery group for Government/Non-Proft customers.” *October 2009 Order* at 82. The OSBA asks this Commission to rule that, if the *October 2009 Order* “does not require a ‘separate cost recovery group’ to include *all* Government/Non-Profit customers, then the Commission [should] recognize Lighting as a separate class for purposes of cost-recovery.” Petition at 3.

The OSBA contends that both issues satisfy the *Duick* standards for reconsideration. According to the OSBA, the issue of lighting as a separate class was not addressed by the Commission in this proceeding, but was addressed in *Petition of PECO Energy Company for Approval of its Act 129 Efficiency and Conservation Plan and Expedited Approval of its Compact Fluorescent Lamp Program*, Docket No.   
M-2009-2093215 (Order entered October 28, 2009) (*PECO Order*). The OSBA contends that its issue concerning red-lined versions of the EE&C Plans addresses the filing schedule established by the Commission in the *October 2009 Order.* Petition at 4-5.

In response, FirstEnergy argues that neither of the issues raised by the OSBA meets the *Duick* standards for reconsideration. According to FirstEnergy, the Petition does not make any new or novel arguments, nor does it point to any considerations that were overlooked by the Commission. FirstEnergy’s Answer at 2. FirstEnergy further contends that reconsideration is unnecessary because its revised Plans will comply with the *October 2009 Order* and resolve the OSBA’s concerns. *Id*. at 3. FirstEnergy states that it will serve all parties with red-lined versions of the revised Plans. FirstEnergy also states that its revised Plans will establish two additional separate cost recovery groups. The first will be a “Non-Profit” cost recovery group, which will include the energy efficiency and conservation costs associated with customers receiving service under the Companies’ respective tariffs governing service to Non-Profit Organizations. The second will be a “Street Lighting” cost recovery group, which will include the energy efficiency and conservation costs associated with customers receiving service under the Companies’ “Street Lighting” rate schedules. *Id*. at 5-6.

**Disposition**

We shall deny reconsideration with respect to the OSBA’s request that we direct the Companies to recognize Lighting customers served under existing tariff schedules[[3]](#footnote-3) as a separate class for cost recovery purposes. In applying the *Duick* standard, we find that with regard to the Lighting issue, the OSBA has not met that standard in this case.

The creation of a separate cost category for Lighting was not raised or addressed in the *October 2009 Order* for the simple reason that no such specific cost category was offered by the Companies. In contrast, the issue of a separate class for Street Lighting was addressed by the Commission in the *PECO Order* due to the simple fact that PECO proposed a separate cost category for Street Lighting. Thus, we do not believe that the allocation of lighting costs is an issue ripe for determination in the present matter. Furthermore, the OSBA has failed to cite any case to support its position that we can look to evidence and facts presented in another case to decide a different case where such evidence and facts were not presented. Such a result would allow a party to, in essence, present new evidence after the record was closed without giving the other parties an opportunity to challenge and respond. This would clearly violate the due process rights of those other Parties. We are not willing to set such a precedent, and we suspect that the OSBA would not want its due process rights compromised in such a manner.

Further, the *October 2009 Order* specifically rejected the OSBA’s broad argument that 66 Pa. C.S. § 2806.1(a)(11) requires the creation of a separate rate class for Government/Non-Profit entities. In that Order, the Commission stated:

A more reasonable interpretation of Section 2806.1(a)(11) 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.

*October 2009 Order* at 81.

This statutory requirement may be accomplished in myriad ways. Act 129 establishes certain requirements that must be met by electric distribution companies (EDCs), but gives the EDCs discretion (subject to Commission review) over the method by which the EDC will comply with those requirements. In reviewing the revised Plans, we will determine whether FirstEnergy’s cost recovery mechanism complies with the requirements of 66 Pa. C.S. §2806.1(a)(11). As such, this aspect of the OSBA’s Petition is denied as premature.

With regard to the OSBA’s request that we order the Companies to submit versions of the revised Plans that are red-lined against the September 21, 2009 versions of the Plans, pursuant to our authority under Section 703(g) of the Code, 66 Pa. C.S.   
§ 703(g), we will amend the *October 2009 Order* to require the Companies to submit revised Plans that are red-lined to show all proposed changes to the September 21, 2009 versions of the Plans.

We note, in this regard, that the Companies submitted their revised Plans on December 2, 2009. The Companies represented that these were black-lined to show changes in the versions of the Plans filed on September 21, 2009. Our review of the revised Plans, however, indicates that the revised Plans do not black-line all of the changes made in the September 21, 2009 Plans. Many of the numbers shown in the tables/charts in the revised Plans are different from those in the September 21, 2009 Plan, although the figures are not stricken, underlined, or otherwise highlighted to indicate that the prior version of the document has been modified. *Compare*, for example, PUC Table 2 in the Revised Plans and PUC Table 2 in the September 21, 2009 Plans. In some cases, the table/chart has been completely re-formatted compared to the September 21, 2009 Plan, but the Revised Plan fails to indicate that the table has changed at all. *Compare* Met-Ed Table 6 of the Revised Plan with Met-Ed Table 6 of the September 21, 2009 Plan.

The failure to indicate that certain numbers in tables/charts have changed is misleading. When a reader reviews a document that purports to be black-lined to show changes in the prior version of that same document, and sees no special text to indicate that a change has been made in the document, the reader is entitled to believe that there is no such change. To the extent that the reader must compare the revised document to the original, the purpose of black-lining is defeated. We acknowledge that space is limited in some of the tables/charts in the revised Plans. Nevertheless, we believe that shading, notes, or other techniques can be used to alert the reader to the fact that changes have been made in the tables/charts. If necessary, First Energy could display the original table using text that is completely stricken, followed by another table that is completely underlined.

We will order the Companies to file with the Commission, and serve on all Parties to this proceeding, corrected, black-lined versions of the revised Plans. Considering the widespread use of computer technology, we believe it is reasonable to require that these corrected versions be filed within one week of the entry of this Opinion and Order.

We further note that, although the Companies bear the burden of proof in this proceeding, they did not submit any documentation with the revised Plans explaining the derivation of the new numbers in the charts/tables. Within seven days of the entry of this Opinion and Order, the Companies are directed to file with the Commission, and serve on all Parties to this proceeding, information supporting the data contained in the Plans (and, in particular, information explaining changes in the data compared to the September 21, 2009 Plans).

We note that the deadline for submitting Comments on the December 2, 2009 version of the revised Plans has passed. To ensure that the Parties have a fair opportunity to comment on all documents filed with the Commission, we will receive comments on the corrected revised Plans, and the information supporting the data in the corrected revised Plans, for a period of ten days from the date the respective documents are filed. These comments may be in addition to any Comments or Reply Comments submitted in response to the December 2, 2009 versions of the revised Plans. Due to the tight time constraints on our decision approving/disapproving the revised Plans, we will not accept Reply Comments on the corrected revised Plans or on the Companies’ information supporting the data.

Finally, Act 129 states “the revised plan shall be approved or disapproved by the commission within 60 days.” Considering that we did not order the Companies to file black-lined revised Plans in our *October 2009 Order,* we do not believe the Companies’ filing of deficient black-lined Plans provides a basis for modifying the deadline for our decision on the revised Plans. We find that the deadline for Commission action on the revised Plans is sixty days from December 2, 2009.

# V. Conclusion

For the reasons set forth above, we will deny the Petition for Reconsideration filed by the Office of Small Business Advocate consistent with this Opinion and Order; **THEREFORE;**

**IT IS ORDERED:**

1. That the Petition for Reconsideration of the Office of Small Business Advocate of the Opinion and Order entered October 28, 2009, is denied;

2. That, pursuant to our authority under 66 Pa. C.S. § 703(g), we will amend the Order entered at this docket number on October 28, 2009to require Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company to submit revised Plans that are red-lined to show all proposed changes to the September 21, 2009 versions of the Plans.

3. That, within seven days of the entry of this Opinion and Order, Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company shall file with the Commission, and serve on all Parties to this proceeding, corrected black-lined revised Plans, consistent with this Opinion and Order.

4. That, within seven days of the entry of this Opinion and Order, Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company shall file with the Commission, and serve on all Parties to this proceeding, information supporting the data contained in the corrected revised Plans, consistent with this Opinion and Order.

5. That the Parties may file comments on the corrected black-lined revised Plans, described in Paragraph 3 above, and the information supporting the data, described in Paragraph 4 above, within ten days after the date on which the revised Plans and the information, respectively, are filed with the Commission.



**BY THE COMMISSION,**

James J. McNulty

Secretary

(SEAL)

ORDER ADOPTED: December 17, 2009

ORDER ENTERED: December 17, 2009

1. *Joint Petition for Consolidation of Proceedings and Approval of Energy Efficiency and Conservation Plans of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company*, Docket Nos. M-2009-2092222 *et al.* (Order entered October 28, 2009) (*October 2009 Order)*. [↑](#footnote-ref-1)
2. A more complete Procedural History is set forth in the *October 2009 Order* at 8-12. [↑](#footnote-ref-2)
3. Specifically, Met Ed’s tariff schedules for Street Lighting, Ornamental Street Lighting and Outdoor Lighting; Penelec’s tariff schedules for High Pressure Sodium Vapor Street Lighting, Municipal Street Lighting and Outdoor Lighting; and Penn Power’s tariff schedules PLS, SV, SVD and SM. [↑](#footnote-ref-3)