

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF SMALL BUSINESS ADVOCATE

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May 2, 2011

HAND DELIVERED

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

**Re: Energy Efficiency and Conservation Program and EDC Plans
Docket No. M-2008-2069887**

Dear Secretary Chiavetta:

I am delivering for filing today the original plus fifteen copies of the Reply Comments of the Office of Small Business Advocate on the Tentative Order. I have also delivered an electronic copy of these Comments to Kriss Brown at kribrown@state.pa.us.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in cursive script that reads "William R. Lloyd, Jr.".

William R. Lloyd, Jr.
Small Business Advocate
Attorney ID No. 16452

Enclosures

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Energy Efficiency and Conservation Program : Docket No. M-2008-2069887

**REPLY COMMENTS
ON THE TENTATIVE ORDER
ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

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I. Background

A. Act 129

Act 129 of October 15, 2008 (“the Act” or “Act 129”), required the Pennsylvania Public Utility Commission (“Commission”) to adopt an Energy Efficiency and Conservation Program (“EE&C Program”). Act 129 also required each electric distribution company (“EDC”) with at least 100,000 customers to propose an Energy Efficiency and Conservation Plan (“EE&C Plan”) for approval by the Commission.

Each EE&C Plan must reduce electric consumption by at least 1% of the EDC’s expected consumption for June 1, 2009, through May 31, 2010, adjusted for weather and extraordinary loads. This 1% reduction is to be accomplished by May 31, 2011. By May 31, 2013, the total annual weather-normalized consumption is to be reduced by a minimum of 3%. Also, by May 31, 2013, peak demand must be reduced by a minimum of 4.5% of the EDC’s annual system peak demand in the 100 hours of highest demand, measured against the EDC’s peak demand during the period of June 1, 2007, through May 31, 2008.

By November 30, 2013, the Commission is required to assess the cost-effectiveness of its EE&C Program and to set additional incremental reductions in electric consumption if the benefits of the EE&C Program exceed its costs.

After soliciting input from the EDCs and other interested parties, the Commission entered an Implementation Order (at Docket No. M-2008-2069887) on January 15, 2009, establishing its EE&C Program. Among many things, the Implementation Order established the process by which EDCs may seek Commission approval of changes in their EE&C Plans. *See* Implementation Order, at 24.

B. Initial EE&C Plans

On July 1, 2009, each of the following EDCs filed an EE&C Plan with the Commission for review and approval: West Penn Power Company (“West Penn”), at Docket No. M-2009-2093218; Duquesne Light Company (“Duquesne”), at Docket No. M-2009-2093217; PPL Electric Utilities Corporation (“PPL”), at Docket No. M-2009-2093216; PECO Energy Company (“PECO”), at Docket No. M-2009-2093215; and Metropolitan Edison Company (“MetEd”), Pennsylvania Electric Company (“Penelec”), and Pennsylvania Power Company (“Penn Power”), consolidated at Docket No. M-2009-2092222. The Office of Small Business Advocate (“OSBA”) intervened in each EDC’s proceeding, filed testimony, and submitted briefs.

Each EDC proposed its own mix of EE&C programs and proposed its own customer groupings for delivery of those programs and the recovery of the related costs. Although the OSBA evaluated each EE&C Plan and commented on some of the unique aspects of the Plans, the OSBA focused its attention on key policy and procedural issues applicable to the Plans across-the-board.

After an initial evaluation, the OSBA concluded that each EE&C Plan was reasonable as a starting point. Given the abbreviated time frame for reviewing the Plans and also the lack of data (because the programs were new and untested), the OSBA pointed out that an assessment of the worthiness of the various proposed EE&C programs

prior to implementation would be speculative. Therefore, the OSBA proposed that each EE&C Plan be subjected to a full vetting as part of the annual reconciliation proceeding. The OSBA further proposed that the annual vetting should include an evaluation of the cost-effectiveness of the various EE&C programs and of the method for recovery of the costs of those programs.

Although the Commission addressed the annual review process somewhat differently for each EDC, the process approved by the Commission provides the OSBA the opportunity to recommend changes in the individual EE&C Plans and to challenge the reasonableness of specific costs and their allocation among the customer groupings.

C. First Annual Review

On or before September 15, 2010, the EDCs made filings to facilitate the first annual Commission review of their EE&C Plans. The OSBA reviewed these filings but ultimately contested only the proposal by West Penn to make major changes in the EE&C Plan previously approved by the Commission. Specifically, West Penn proposed to reduce its heavy reliance on smart meters and to add new programs and expand existing programs in order to meet the conservation reductions mandated by Act 129. The net effect of the amendments was to shift about \$6 million in costs from residential customers to non-residential customers. Ultimately, the OSBA and West Penn reached an agreement under which the EDC could implement the proposed changes, but the question of whether non-residential customers would be charged an additional \$6 million would be resolved in another proceeding.

D. Tentative Order

Final Commission approval of EE&C Plan changes proposed by some EDCs as part of the first annual review process took more than four months. In recognition of that fact, the

Commission entered a Tentative Order (at Docket Number M-2008-2069887) on April 1, 2011, aimed at streamlining the process for reviewing so-called “minor” changes to individual EE&C Plans.

The Commission invited comments on the Tentative Order by April 21, 2011, and reply comments by May 2, 2011.

The OSBA did not file comments because the Tentative Order appeared to strike a reasonable balance between the interests of ratepayers and the interests of EDCs. However, the Energy Association of Pennsylvania (“EAPA”) and numerous individual EDCs filed comments seeking to accelerate the review of proposed EE&C Plan changes even more than proposed by the Commission and to apply the accelerated review to a broader range of EE&C Plan changes than proposed by the Commission. These parties advocated procedural changes that would upset the balance struck by the Commission in the Tentative Order. Therefore, the OSBA is filing these reply comments in order to respond to the EAPA and some of the individual EDCs.

II. Response to Proposed Changes in the Tentative Order

A. Balancing Ratepayers v. EDCs

The EAPA sought to justify its proposed changes in the Tentative Order by pointing out that individual ratepayers participate in EE&C programs on a voluntary basis and that EDCs face financial penalties if they fail to achieve the conservation mandated by Act 129. *See* EAPA Comments, at 4 and 6-7. Unfortunately, the EAPA ignored the fact that all ratepayers, *i.e.*, those who participate in the programs and those who do not, are legally obligated to finance the EE&C programs. In short, the EDCs are spending ratepayers’ money, not stockholders’ money, to achieve the conservation mandated by Act 129. Therefore, the ratepayer advocates should have

a fair opportunity to question whether ratepayers' money is being spent in a cost-effective manner. For the most part, the EAPA's proposed changes in the Tentative Order would seriously compromise that opportunity.

B. Length of Review Period

Under the Implementation Order, the ratepayer advocates have 30 days to evaluate and comment on proposed EE&C Plan changes following the EDC's filing of its annual report. *See* Implementation Order, at 24. Under the Tentative Order, the ratepayer advocates would be required to comment within 10 days of the filing of the annual report, but they would receive at least 10 days' notice of any proposed EE&C Plan changes before the EDC filed its annual report. *See* Tentative Order, at 4. As a result, the ratepayer advocates would have at least 20 days to evaluate the EE&C Plan changes and prepare comments.

The EAPA recommended that the 10-day pre-filing notification be eliminated and that the post-filing "comment" period be revised to provide 10 days for objections and, if there are objections, an additional five days for comments. *See* EAPA Comments, at 3-4. According to the EAPA, "advance service of the proposed 'minor changes' is an unnecessary first step that does not promote efficient use of time and resources." *See* EAPA Comments, at 3. *See also* PPL Comments, 4 and 8-9 (recommending elimination of the 10-day pre-filing notification and the possible extension of the post-filing comment period from 10 days to 15 days); and PECO Comments, at 4 (recommending that the 10-day pre-filing notification be retained but that the post-filing comment period be shortened from 10 days to five days).

The Tentative Order would already reduce the time in which the ratepayer advocates must evaluate proposed changes in EE&C Plans. By eliminating the 10-day pre-filing notice of proposed changes, the EAPA would prevent anything more than a very cursory review of those

changes. All EDCs filed their first annual reports at the same time. Most EDCs proposed changes in their EE&C Plans as part of the first annual review of the cost-effectiveness of those Plans. Therefore, the workload on the Commission and on individual parties was substantial. That workload is unlikely to decline in future years.

Some parties may be able to participate in multiple pre-filing stakeholder collaboratives and to carry out a detailed review of most, if not all, EE&C Plan changes. However, the OSBA lacks the budget and staff required for that level of participation. Therefore, the OSBA urges the Commission to reject the calls by the EAPA and some individual EDCs to shorten the 20-day period for review proposed in the Tentative Order. Specifically, the Commission should not eliminate the 10-day pre-filing notification unless the Commission also lengthens the post-filing comment period from 10 days to 20 days.

C. Definition of “Minor” Changes

The EAPA and several individual EDCs proposed to expand the range of EE&C Plan changes subject to accelerated review. *See* EAPA Comments, at 6-8; and PPL Comments, at 10-13. The OSBA agrees with the Tentative Order (and with the EAPA Comments, at 6) that the normal review process should apply to changes that would increase costs assigned to a rate class.

However, the OSBA disagrees with the proposal by the EAPA and some EDCs to apply accelerated review to changes “[m]odifying program delivery and management functions such as evaluation, measurement and verification, quality assurance, marketing, program management, tracking systems program administration, program schedules and Total Resource Cost Test inputs so long as the changes do not increase the cost to a customer class.” *See* EAPA Comments, at 7; and PPL Comments, at 12-13. This category of changes involves the process for determining how well an EE&C Plan is working rather than the process for approving

“tweaks” to make existing EE&C programs more effective or for approving cost-neutral substitutions of new programs for those that are underperforming. Act 129 is replete with *explicit requirements for evaluation of EE&C Plans and the programs that make up those Plans. See, e.g.,* Section 2806.1(a)(2), (c)(3), (d)(3), (i), and (k)(1). Therefore, EE&C Plan changes which could affect that evaluation can not properly be characterized as “minor.”

The OSBA also disagrees with PPL’s proposal to specify those changes that will be considered “major” and subject to traditional review and, by default, to treat every other change as “minor” and subject to accelerated review. *See* PPL Comments, at 4 and 10-12. It is impossible to predict all of the types of EE&C Plan changes that EDCs will propose. Therefore, the Commission should reject PPL’s proposal because the proposal would guarantee accelerated review for unspecified changes that could have a significant negative impact on ratepayers.

D. “Measure” v. “Program”

There appears to be an ambiguity about what the Commission intended to be a “measure.” *See* Tentative Order, at 5. Specifically, the OSBA assumed that a “measure” was intended to cover specific EE&C programs and not just an element of a program. However, at least some other parties assumed that the Commission intended an EE&C “measure” to be different from an EE&C “program.” *See, e.g.,* Duquesne Comments, at 1, and EAPA Comments, at 6-7. To resolve this ambiguity, the OSBA supports Duquesne’s proposal to make the accelerated review process applicable to minor changes in EE&C “programs” and not just to minor changes in EE&C “measures.”

E. Changes without Commission Approval

With the EAPA’s support, PPL renewed an argument that it lost in a prior proceeding, *i.e.*, that there is no statutory requirement that the Commission approve each change to an EE&C

Plan. The linchpin of PPL's argument is the claim that, in the earlier ruling, the Commission erroneously relied on Section 2806.1(b)(2) and (3) of the Public Utility Code, 66 Pa.

C.S. §2806.1(b)(2) and (3), as authority for requiring Commission approval of all changes. See PPL Comments, at 3-4 and 5-8; and EAPA Comments, at 2.

Even assuming *arguendo* that the Commission incorrectly relied on Section 2806.1(b)(2) and (3), PPL overlooked the fact that the Commission approved the EE&C Plans by entering orders. Therefore, approval of a change in an EE&C Plan would require an amendment to the order that approved that Plan. Under Section 703(g) of the Public Utility Code, 66 Pa. C.S. §703(g), the Commission may amend an order only after providing notice and an opportunity to be heard. Although the precise nature of the notice and of the opportunity to be heard may vary, the requirement for Commission approval of an amendment to an order does not change.

WHEREFORE, the OSBA respectfully requests consideration of the foregoing Reply Comments as the Commission finalizes the Tentative Order.

Respectfully submitted,



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