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May 15, 2015

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

**Re: Act 129 Energy Efficiency and Conservation Program Phase III
Docket No. M-2014-2424864**

Dear Secretary Chiavetta:

Enclosed for filing please find the reply comments of the Energy Association of Pennsylvania to the Tentative Implementation Order at the above-referenced docket.

Sincerely,

A handwritten signature in blue ink, appearing to read "Donna M. J. Clark".

Donna M. J. Clark
Vice President and General Counsel

Enclosure

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Energy Efficiency and Conservation Program

:

Docket No. M-2014-2424864

**Reply Comments of the
Energy Association of Pennsylvania
To Act 129 Phase III Tentative Implementation Order**

I. Introduction

The Energy Association of Pennsylvania (“EAP” or “Association”) filed comments on April 27, 2015 to the Phase III Tentative Implementation Order, Docket M-2014-2424864, issued by the Pennsylvania Public Utility Commission (“PUC” or “Commission”). In total, twenty-two sets of comments were filed offering a variety of viewpoints and suggestions regarding the Energy Efficiency and Conservation Program that the Commission has proposed will begin on June 1, 2016 (“Phase III”). The Association sought and the PUC granted an extension of time for the filing of reply comments to May 15, 2015.

EAP files these reply comments in further support of the data submitted and analysis provided by its electric distribution company (“EDC”) members¹ subject to Act 129 and in opposition to many of the positions and opinions offered by other non-utility interested parties. The fact that EAP has not addressed every suggestion proffered by interested parties should not be viewed as support for those positions. For example, EAP does not support suggestions to increase the proposed reduction mandates for electric consumption or demand; EAP does not

¹ EAP members subject to Act 129 include Duquesne Light Company (“Duquesne”); Metropolitan Edison Company (“Met-Ed”); PECO Energy Company (“PECO”); Pennsylvania Electric Company (“Penelec”); Pennsylvania Power Company (“Penn Power”); PPL Electric Utilities (“PPL”) and West Penn Power Company (“West Penn Power”).

support suggestions to increase the carve-outs for the low-income sector or the government, non-profit, institutional sectors; EAP does not support suggestions to base compliance on net verified savings; and EAP does not support the creation of a separate multi-family carve-outs, among others.

EAP notes that the majority of the suggestions of the non-utility interested parties are not supported by an analysis of available facts or data reported by the EDCs OR based on a critical review of the Statewide Evaluator (“SWE”) expert studies or supported by third party expert opinion or studies. And, while many of the stakeholders would like to see their particular interests furthered and promoted via the Act 129 Energy Efficiency and Conservation Program, EAP contends that mandating specific measures, program designs or carve-outs that benefit discrete sectors of customers/interested parties does not further the legislative goals of Act 129. Mandating such a prescriptive approach, in fact, strangles the flexibility and creativity necessary to adopt new technology and respond to changing standards and market conditions. Increasing the number of “musts” and dictating the specifics of program design inhibits the development of the comprehensive programs sought by many of the non-utility interested parties and increases the compliance risks to EDCs.

EAP urges the Commission to refrain from adding to the number and specificity of the requirements already embedded in Act 129. EAP believes that, as implementation of Act 129 enters its eighth year with the beginning of Phase III, Commission policy direction should broadly encourage the EDCs to continue to work with their stakeholders to develop plans that result in customer participation and lead to cost-effective and measurable savings.

Moreover, EAP reiterates its concern that creating binding Act 129 mandates or requirements subject to compliance penalties through the current generic order process does not

protect the interests of either the EDCs or their customers. Many of the suggestions offered by commentators are not supported with cost and savings data and are not accompanied by the type of analysis and expert opinion which would be required to support regulations or which would be offered as evidence in a litigated proceeding to convince the fact-finder to reach a particular conclusion.

For these reasons, as well as those set forth below and contained in the comments/reply comments of its individual EDC members, EAP respectfully requests the Commission to exercise its discretion to avoid increasing the complexity of or adding to the list of requirements for Phase III of Act 129.

II. EAP Supports Voluntary Cost-Effective Phase III Demand Reduction

EAP asks the Commission to, *inter alia*, exercise its discretion and reconsider mandating demand reduction targets for Phase III.² In its comments filed on April 27, EAP suggested that a reasonable approach to Phase III based on current circumstances and the various studies completed by the SWE would be to permit voluntary cost-effective demand reduction measures as part of the energy efficiency and conservation plans (“EE&C Plans”) that will be filed under Act 129. Dollars not allocated to demand reduction could then be devoted to reductions in electric consumption which the Commission has acknowledged would provide a greater net benefit to ratepayers.³

² See also, Joint Comments filed by Met-Ed, Penelec, Penn Power and West Penn Power at pp. 3-11 contending that there is no legal authority to mandate demand reduction targets under §2806.1(d)(2) for Phase III of Act 129, that the SWE DR Potential study is based on flawed assumptions, and that, in any event, mandatory penalties applicable in Phase I do not apply, as a matter of law, to Phase III demand or energy reduction targets and Comments of PPL at p. 17, fn. 21 stating that the statute does not mandate peak demand reductions in Phase III, particularly beyond May 2017.

³ Phase III Tentative implementation Order at pp. 34-35. A voluntary approach to demand reduction could also provide the EDCs with the flexibility to determine a budget allocation as between consumption reduction and demand reduction programs that differs from the proposal set forth in the Phase III Tentative Implementation Order and discussed at pp. 33-35 and 41-42. Otherwise, the Commission is in effect setting spending minimums and maximums for consumption and demand reduction programs despite its statement to the contrary. *Id.* at p. 34.

EAP maintains that the U.S. Supreme Court decision on May 4, 2015 which granted review of a D.C. Circuit Court of Appeals holding that overturned the Federal Energy Regulatory Commission's (FERC) Order 745 provides additional support for a Phase III Energy Efficiency and Conservation Program that does not include demand reduction mandates. The Phase III Tentative Implementation Order recognizes that the outcome of the appeal to the U.S. Supreme Court could result in the PUC reconsidering demand reduction targets set for Phase III. The U.S. Supreme Court has now determined to hear the appeal. Resolution of that case will likely provide guidance with respect to the need for and design of state demand reduction programs. EAP asks the Commission to refrain from committing limited Act 129 funds and EDC resources in the Final Implementation Order and reconsider the prudence of establishing a demand reduction mandate in light of this new development.⁴

EAP reiterates, however, that it does support voluntary, cost-effective demand reduction programs for Phase III such as the residential load control program offered in Phase II by PECO. The proposed mandates for Phase III consumption reduction and demand reduction targets are dependent, in part⁵, on how the budget is allocated between the two goals. Consistent with that premise and assuming no mandated demand reduction, if an EDC were to include a voluntary cost-effective demand reduction program in its Phase III EE&C Plan, the budget allocated for that program would necessarily reduce the budget available to achieve the Phase III consumption reduction target. The consumption reduction mandate for Phase III would accordingly be

⁴ See, e.g. Comments of PECO at pp. 23 – 27 and Comments of Duquesne at p. 5. EDC comments detail the difficulty of achieving the proposed demand reduction targets with the budget allocation set forth in the Phase III Tentative Implementation Order. Accord, Comments of PPL at pp. 16 – 17 which advocate for the elimination of the Phase III demand reduction target where, as in the case of PPL, cost-effective demand reduction is not reasonably achievable and at pp. 17 -20 analyzing the flaws in the SWE Demand Reduction Potential Study.

⁵ The other key variable in determining the target mandates is the acquisition cost of consumption and demand savings. See, e.g., Comments of PPL at pp. 42 – 50; Joint Comments of Met-Ed, Penelec, Penn Power and West Penn Power at pp. 22 – 25; and Comments of PECO at pp. 7 – 13 providing additional data and expert analysis which challenge the conclusion of the SWE determination of acquisition costs.

adjusted or adjustable so as to account for the lower budget allocation and so as not to foreclose the possibility of a voluntary cost-effective demand reduction program. EAP further maintains that the proposed consumption reduction targets should be decreased based on the expert opinion and analysis and the additional data supplied in EDC comments. *See, infra*, at fn. 5. EAP contends that the expert analysis offered by the EDCs on the issue of determining the acquisition cost for both consumption and demand savings outweighs the opinions offered by the SWE and should be adopted in the Commission's Final Order.⁶

III. Using the Sum of Incremental Annual Program Potential to Determine Mandated Targets Does Not Align With The Commission Proposal to Measure Savings For Purposes of Determining Compliance On a Cumulative Basis

The SWE calculated the Phase III program potential and set individual EDC targets for energy consumption reduction using the sum of incremental annual savings. *See*, Phase III Tentative Implementation Order at p. 42, Table 6 and the *Addendum to 2015 SWE Market Potential Studies: Application of Market Potential Study Results to Phase III Goals* (“*Addendum*”) dated February 23, 2015 at p. 5. In contrast, the Commission proposed that, for the purposes of compliance, savings will be determined at the end of Phase III taking into account the useful life of measures or savings decay, i.e. cumulative savings. *See*, Phase III Tentative Implementation Order at p. 43, *2015 SWE Demand Response Potential Study* at pp. 6 - 8, and *Addendum* at p. 1.

Each of the EDCs subject to Act 129 as well as the Keystone Energy Efficiency Alliance (“KEEA”) commented that the methodology used by the SWE to determine the target for

⁶ Further support for higher acquisition costs is found in the SWE's Semiannual Report for PY6 of Act 129 at p. 9 which was issued on May 8, 2015 after the entry of the Phase III Tentative Implementation Order. The SWE notes that, in the aggregate, the actual PY6 energy efficiency acquisition cost at \$.24 per kWh saved is 14% more than that projected at \$.21 per kWh saved. Both are higher than the projected acquisition cost of \$.18 per kWh saved for Phase III used by the SWE in establishing targets.

consumption reduction did not align with the way in which the Commission stated it would determine compliance at the conclusion of Phase III.⁷ EAP submits that the final order should align the manner in which targets are set with the way in which compliance will be determined, i.e. if the sum of incremental program potential is used to determine targets than the sum of incremental savings should determine compliance OR if the Commission believes that cumulative savings at the end of the Phase III EE&C Plans determines compliance then targets should be based on cumulative savings potential.

IV. Funding for the SWE in Phase III Can be Considered an Administrative Cost of the EDCs EE&C Plans and Subject to the 2% Statutory Limitation on Costs.

The concerns expressed at the outset of Act 129 planning in 2009, based on the fixed targets for Phase I, that the statutory cost limitation might impede compliance by the EDCs have been ameliorated and the costs of the SWE contract between Phase I and Phase II on an annual basis have been fairly consistent.⁸ Based on the tasks which the Commission suggests will be part of the SWE RFP for Phase III, EAP believes that costs will continue to be approximately three million in the aggregate for each year of an Energy Efficiency and Conservation Program. EAP recommends that those costs should be included in the EDC Act 129 budgets as administrative costs. *See*, Phase III Tentative Implementation Order at p. 11. While this will result in a corresponding reduction in EDC compliance targets, it more closely adheres to the statutory language at 66 Pa. C.S. § 2806.1(g). Placing these costs under the statutory limit is

⁷ *See, e.g.*, Comments of PPL at pp. 57 – 60; Comments of PECO at pp. 19 – 20; Comments of Duquesne at pp. 10 - 11; Joint Comments of Met-Ed, Penelec, Penn Power and West Penn Power at pp. 20 – 22; Comments of KEEA at pp. 5 - 6.

⁸ The SWE was paid \$10,796,994 under its Phase I contract with the Commission. For Phase II through March 2015, the SWE has been paid \$7,113,021 for work performed under its Phase II Contract with the Commission. To date, the SWE has been paid approximately \$2.98 million in each of the six years of the Act 129 Energy Efficiency and Conservation Program.

reasonable at this juncture, represents a cost savings to ratepayers, and falls within the Commission's discretion to effectuate.

V. Any Working Groups Established to Address the Multifamily Housing Segment or Develop Suggestions for Potential Pilots for Act 129 Programs or Measures Cannot Establish Binding Requirements.

EAP acknowledges the benefit of and generally supports the use of working groups or some other collaborative process to explore issues in the context of Commission investigations or proceedings. EAP does not and cannot agree that suggestions made by working groups would result in binding requirements for EDCs or any regulated utility as proposed by CAUSE-PA in its comments. Binding norms may only be created through a rulemaking process or in the context of a litigated proceeding before the Commission.⁹

EAP's comments have outlined a number of due process constraints regarding the use of a generic order process in the context of Act 129 to determine, *inter alia*, mandated compliance targets. Due process concerns are heightened where, as here, the determinations regarding mandates, carve-outs, program design, budget allocation, and acquisition costs set forth in the final order affect how compliance is achieved and can lead to statutory penalties that do not consider the reasonableness or best efforts of EDCs in striving to meet the targets and direction set by the Commission. EAP's concerns would be magnified if the Commission were to use a working group to further dictate policy direction or mandate program designs or pilots while the EDCs were devoting resources, time and funding to the development and approval of Phase III EE&C Plans. This is one time when EAP would ask the Commission to forego the use of a staff led working group to examine potential programs or pilots. EAP believes that such efforts, if

⁹ *Pennsylvania Human Relations Commission v. Norristown Area School District*, 374 A2d 671 (Pa. 1977).

necessary at all, should be discussed within the existing collaborative process used by each EDC to hear suggestions and concerns from stakeholders.

VI. EAP Supports The Commission Proposal to Utilize the 2016 TRM in the Evaluation Process for the Entirety Of Phase III.

EAP agrees with the decision of the Commission to rely primarily upon the 2016 TRM in the evaluation process for the duration of Phase III of Act 129. The framework of the TRM has been modified since the enactment of Act 129 of 2008 and has successfully adapted to reflect changing codes and energy efficiency standards. The EDCs and their independent evaluation, measurement and verification (“EM&V”) experts have also worked extensively with PUC staff, the SWE and their subcontractors to ensure less reliance on deemed savings values by incorporating evaluation results and site-specific inputs into the TRM framework. EAP acknowledges that a mid-phase TRM update might become necessary and would understand that, in such an event, input from the EDCs and other stakeholders would be sought as it has been during the current annual update process. Finally, given the significant amount of time devoted to the annual TRM update by the SWE and EDC evaluation experts, EAP believes and is hopeful that this change will be reflected in decreased evaluation costs.

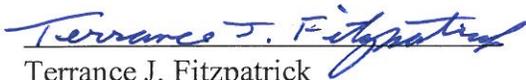
VII. Conclusion

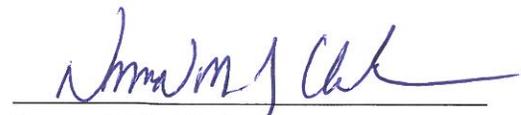
EAP respectfully asks the Commission to review the suggestions with the goal of simplifying and streamlining the policy parameters that will determine the direction of Phase III. Overly aggressive fixed targets for consumption and demand reduction coupled with prescriptive program design rules and low acquisition cost assumptions will result in EE&C Plans which are less comprehensive than desired by both stakeholders and EDCs alike and will increase the compliance risk to EDCs. The Commission can use its discretion to craft a final order which sets

reasonably achievable consumption reduction targets based on supportable acquisition costs and which allows for the adjustment of those consumption reduction targets in the event an EDC proposes voluntary cost-effective demand reduction. Further, EAP maintains that Phase III carve-outs, if any, should be straightforward and less prescriptive than proposed in the Phase III Tentative Implementation Order or proposed by a number of the non-utility interested parties.

EAP appreciates the opportunity to provide these Reply Comments to the Phase III Tentative Implementation Order. EAP looks forward to working with the Commission and stakeholders beyond this immediate Phase III implementation proceeding to ensure that the targets and parameters developed for future Act 129 Energy Efficiency and Conservation Programs are determined in a fair and open process.

Respectfully submitted,


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