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|  | **PENNSYLVANIA**  **PUBLIC UTILITY COMMISSION**  **Harrisburg, PA 17105-3265** |  |

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|  | Public Meeting held May 21, 2020 |
| Commissioners Present: |  |

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| Gladys Brown Dutrieuille, Chairman | | |
| David W. Sweet, Vice Chairman | | |
| John F. Coleman, Jr. | |  |
| Ralph V. Yanora |  |  |
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| Petition to Amend the Commission’s June 19, 2015 Implementation Order | M-2014-2424864 |  |

**ORDER**

**BY THE COMMISSION:**

Before us for consideration is the Petition of Energy Association of Pennsylvania (EAP) filed pursuant to Sections 501(a) and 703(g) of the Public Utility Code, 66 Pa. C.S. §§ 501(a), 703(g), and 52 Pa. Code § 5.572(d) for an amendment of the Commission’s June 19, 2015 Energy Efficiency and Conservation (EE&C) Program Implementation Order at the above-captioned docket.[[1]](#footnote-1) EAP requests that the Commission modify the *Phase III Implementation Order* to measure compliance with peak demand reduction (DR) targets based on electric distribution company (EDC) performance during the second, third, and fourth program years of Phase III (June 1, 2017 through May 31, 2020), and permit EDCs to implement approved DR programs on a voluntary basis for the fifth and final program year (June 1, 2020 through May 31, 2021). EAP sought expedited consideration of this Petition. For the reasons stated herein, the Commission grants EAP’s Petition.

**BACKGROUND**

**Brief History of Act 129**

Act 129 of 2008 (the Act or Act 129) was signed into law on October 15, 2008, and became effective on November 14, 2008, which, among other things, created Section 2806.1 of the Public Utility Code (Code), 66 Pa. C.S. § 2806.1. In relevant part, Section 2806.1(d)(2) required the Commission to set additional reductions in peak demand if such reductions are cost-effective. 66 Pa. C.S. § 2806.1(d)(2). EDCs that fail to achieve these reductions in consumption are subject to a civil penalty not less than $1 million and up to $20 million. 66 Pa. C.S. § 2806.1(f)(2).

On June 19, 2015, the Commission issued its *Phase III Implementation Order* in the EE&C Program proceeding at the above-captioned docket, establishing both consumption reduction and demand reduction targets. *Phase III Implementation Order* at 35. The demand reduction targets established by the Commission were based upon a variety of assumptions about the availability of cost-effective demand reductions and PJM peak load forecasts. *Id.* at 57. Due to the timing of Phase III implementation and Phase III program years, the Commission did not require EDCs to obtain peak demand reductions in the first year of Phase III (June 1, 2016 – May 31, 2017). *Id.* at 24, 25.

For the remaining four years of Phase III (June 1, 2017 – May 31, 2021), the Commission established EDC-specific demand reduction targets. These targets were expressed as a megawatt average annual potential savings for all EDCs subject to Act 129 requirements, with the exception of the Pennsylvania Electric Company. *Id.* at 35. To meet these targets, the Commission directed EDCs to develop dispatchable demand response programs that would curtail load, according to the Commission’s specifications, for up to six curtailment events per year. Specifically, curtailment events would be called for the first six days that the peak hour of the day-ahead forecast by regional transmission organization PJM Interconnection, LLC (PJM) was greater than 95% of the PJM summer peak demand forecast for the months of June through September during each year of the program. *Id.* at 43-44.

To comply with its demand reduction target, each EDC must demonstrate that the average megawatts obtained during each curtailment event called over the four-year period equals or exceeds the average annual potential savings requirement for the EDC. *Energy Efficiency and Conservation Program*, Docket No. M-2014-2424864 (August 20, 2015) (*Phase III Clarification Order*) at 7, 14. Additionally, the Commission required that EDCs obtain no less than 85% of the demand reduction target during any one event. *Phase III Implementation Order* at 36. The failure to meet this per-event requirement alone would not subject an EDC to the penalties provided under 66 Pa. C.S. § 2806.1(f)(2), but could subject the EDC to the penalties prescribed at 66 Pa. C.S. § 3301(a). *Phase III Clarification Order* at 10.

On May 1, 2020, EAP filed the instant Petition for an amendment of the Commission’s June 19, 2015 EE&C Program Implementation Order. This Petition was filed on behalf of EAP’s member companies and was served on all parties to the Phase III Act 129 proceedings to approve each EDC’s EE&C plan.

The Office of Consumer Advocate (OCA) and the Pennsylvania Energy Consumer Alliance, comprised of the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, the Philadelphia Area Industrial Energy Users Group, the PP&L Industrial Customer Alliance, and the West Penn Power Industrial Intervenors (collectively, “Industrial Customers”) filed answers to EAP’s Petition. Advanced Energy Management Alliance (AEMA) filed reply comments.

**DISCUSSION**

**Legal Standards**

By the terms of Section 703(g) of the Code, the Commission has the power to amend or rescind its own orders at any time subject only to the requirements of due process. Section 703(g) of the Code states:

The commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.

66 Pa. C.S. § 703(g); *see also* *Department of Highways v. Pa. PUC*, 138 A.2d 143 (Pa. Super. 1958). In exercising our authority to amend or rescind an order pursuant to Section 703(g) of the Code, the Supreme Court of Pennsylvania has stated: “Because such relief may result in disturbance of final orders, it must be granted judiciously and only under appropriate circumstances.” *See City of Pittsburgh v. Pennsylvania Department of Transportation*, 416 A.2d 461 (Pa. 1980).

While a petition under Section 703(g) may “properly raise any matter designed to convince the commission that it should exercise its discretion . . . to rescind or amend a prior order in whole or in part,” at the same time “[p]arties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them.” *Duick v. Pennsylvania Gas and Water Company*, Docket No. C-R0597001 *et al*., 56 Pa. P.U.C. 553 (Order entered

December 17, 1982) (*Duick*) (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. Ct. 1935)). As we stated in *Duick*:

What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

*Duick* at 559.

Furthermore, a decision to deny a petition for rescission or amendment is a matter squarely within the Commission’s discretion, subject to being overturned only where a reviewing court finds “the agency’s decision demonstrates evidence of bad faith, fraud, capricious action or abuse of power.” *West Penn Power Co. v. Pa. PUC*, 659 A.2d 1055, 1065 (Pa. Cmwlth. 1995).

Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), provides that the party seeking relief from the Commission has the burden of proof. EAP seeks relief from the Commission, and, therefore, has the burden of proof in this proceeding.

Any decision of the Commission must be supported by substantial evidence. *See, e.g.*, Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704. “Substantial evidence” is such relevant evidence that a reasonable mind might 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. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n*., 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and *Murphy v. Comm., Dept. of Public Welfare, White Haven Center*, 85 Pa. Commonwealth Ct. 23, 480 A.2d 382 (1984).

Finally, it is well-settled that the Commission is 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); *see also*, generally, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984). Thus, any argument in the Petition that we do not specifically address shall be deemed to have been duly considered and denied without further discussion.

**EAP’s Petition**

EAP seeks modification of the *Phase III Implementation Order*, and requests that we amend it by eliminating the obligation to obtain peak demand reductions during the fifth program year, and instead measure compliance based on the second, third and fourth program years of Phase III. EAP states that the COVID-19 pandemic, Pennsylvania’s mandated closure of non-essential businesses, and the subsequent effects on Pennsylvania’s economy has substantially reduced electric demand, will be a significant obstacle to EDCs’ achievement of mandated targets, and accordingly increase the risk that they will be subject to significant compliance penalties.

EAP submits that, among other impacts of COVID-19, Governor Wolf’s mandated closure of non-essential businesses has substantially reduced demand for electricity from EAP’s member EDCs. Petition at 2. EAP notes that one of the ways that EDCs achieve demand reduction requirements established in the *Phase III Implementation Order* is through participation by Pennsylvania businesses to reduce electric demand during peak usage periods. *Id.* Given that June 1, 2020 is impending, EAP requested expedited consideration of its Petition by the Commission.

In support of their request, EAP suggests 1) that demand response participants already committed to the program may not be able to provide the anticipated load reductions; 2) that EDCs are severely hampered in their ability to pursue additional demand response participants and 3) that this creates a compliance penalty risk to the EDCs that requires the Commission to alter the established goals. Regarding the response of participants enrolled in the EDC DR programs, EAP asserts that the unanticipated decrease in demand resulting from COVID-19 related closures, and anticipated increased demand as industrial facilities operate more hours per day to make up for lost production will impair the ability of EDCs to meet certain demand reduction targets set forth in the fifth program year of Phase III.

**Answers**

Answers to the EAP Petition were filed by the OCA and the Industrial Customers, while the AEMA filed reply comments. In its Answer, the Industrial Customers recommend that the Commission grant EAP’s Petition under three conditions:

1) The Commission clarify that customers who had commitments to do DR under Act 129 programs are not penalized during the remainder of Phase III;

2) The Commission order an immediate reduction of the projected 2020 cost for the EE&C DR program by at least 50% to 75%, to be reflected in revised EE&C surcharges, beginning June 1, 2020; and

3) The Commission require the EDCs to closely monitor actual and projected EE&C expenditures for all measures during the June 1, 2020 to May 31, 2021 program year for Phase III and to implement interim adjustments to the EE&C surcharges if the actual conditions vary from the assumptions used to establish the June 1, 2020 rates.

Industrial Customers at 7.

The AEMA likewise supports the requested relief in the EAP Petition, which makes programs voluntary this summer and allows for continuity, while supporting the overall objectives of Phase III peak shaving programs. In addition to approving the EAP request, AEMA requests the Commission direct utilities to modify their contracts with Conservation Service Providers (“CSP”) to align CSP obligations with the revised obligations of the utilities. Moreover, AEMA requests that an amended Implementation Order include direction to utilities and applicable CSPs to modify their contracts with CSPs and CSP’s subcontractors respectively to eliminate penalty provisions for 2020 or otherwise align these provisions consistent with any utility incentives that are established through an amendment. AEMA Answer at 2-3.

Finally, the OCA concurs with EAP’s requested relief as it provides a reasonably balanced means to addressing the current crisis. The OCA particularly supports EAP’s request that the EDCs be permitted to proceed with voluntary demand response programs in Program Year 5. OCA Answer at 2.

**Analysis**

We find that the standard set forth in *Duick* has been met insofar as the extraordinary circumstances involving COVID-19 provide new and novel arguments which compel reconsideration of the *Phase III Implementation Order* final program year DR targets. We also find that under the present circumstances and consistent with our prior actions, that the EAP Petition warrants expedited consideration.[[2]](#footnote-2)

In support of its Petition, EAP cites to the substantial number of unemployment claims made in Pennsylvania, and significant reported weekday declines in peak demand by PJM Interconnection, LLC.[[3]](#footnote-3) We take judicial notice of the most current PJM data and Pennsylvania unemployment compensation claims, which stand at 1,889,657 as of May 15, 2020 according to the Pennsylvania Department of Labor and Industry. As another sign of significant economic contraction, we also take notice of Pennsylvania’s reported General Fund revenue collections as of May 1, 2020, which were $2.2 billion less than anticipated for the month of April 2020. While the Department of Revenue believes most of this missing revenue is due to delayed payment, it believes that approximately $395 million of the shortfall was due to reduced economic activity in April.[[4]](#footnote-4) Additionally, all of Pennsylvania’s counties remain under either Phase Red or Phase Yellow or Phase Green, all of which entail significant restrictions on economic activity.

As such, we find the relief sought via this instant Petition is reasonable and in the public interest. It is clear that, to date, electricity usage and business operations have been altered substantially. To that end, reclassifying the DR targets for the final year of Phase III provides an appropriate balance of 1) offering customers and DR service providers access to the Act 129 DR programs, 2) insulating utilities from unmanageable risk, and 3) preventing the DR programs from completely ‘going dark’ for the upcoming summer. The relief sought here is reasonable because of the pandemic effects on electricity and businesses and the timeframe applicable to the Petition. Here, EAP seeks the unique and specific remedy to reclassify the DR program criteria for June 2020 through September 2020 – a period that is immediately impending and only lasts four months. As such, we find it prudent to approve the EAP’s Petition.

We further find that the conditions the Industrial Customers and AEMA propose should not be adopted at this time. The EDCs will need to review, revise and propose amendments to their existing Phase III plans as a result of the disposition of this Petition. EDCs should carefully consider the effect of granting this Petition on customer DR obligations and CSP contracts and make appropriate and necessary modifications. EDCs should also carefully evaluate the opportunities for cost-effective, voluntary DR reductions for the final year of Phase III, and take into consideration the impact of the COVID-19 pandemic on their customers and their utility service. To the extent any EDC experiences DR program expense reductions due to approval of the EAP Petition, those changes will naturally be reflected in EDCs cost-recovery mechanisms. Accordingly,

EDCs should file any necessary plan amendments as soon as reasonably possible, consistent with Commission procedures for seeking modifications of Act 129 plans.

We note that approval of the EAP Petition should not be interpreted as an opportunity for EDCs to abolish DR this summer. We encourage EDCs to continue offering Act 129 DR products and services this summer to the extent customer participation is still accessible.

Finally, our disposition on this instant EAP Petition is based on the unique facts and circumstances established by the EAP Petition and the relief sought therein. Approval of this Petition should not be construed as prejudicial to any other subject matter in related proceedings currently pending or in the future; **THEREFORE,**

**IT IS ORDERED:**

1. That the Energy Association of Pennsylvania’s Petition to Amend the Commission’s June 19, 2015 Implementation Order at Docket No. M-2014-2424864 is granted consistent with this Order.

2. That this order be served on all jurisdictional electric distribution companies subject to the requirements of the Act 129 Energy Efficiency and Conservation Program, the Commission’s Bureau of Investigation and Enforcement, The Office of Consumer Advocate, the Office of Small Business Advocate, the Energy Association of Pennsylvania and all parties that filed responses to the Petition.

3. That this case be marked closed.

**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: May 21, 2020

ORDER ENTERED: June 3, 2020

1. *Energy Efficiency and Conservation Program*, Docket No. M-2014-2424864 (Implementation Order entered June 19, 2015) (*Phase III Implementation Order*). [↑](#footnote-ref-1)
2. *Re Suspension of Regulatory and Statutory Deadlines; Modification of Filing and Service Requirements*, M-2020-3019262 (Emergency Order entered March 20, 2020). [↑](#footnote-ref-2)
3. In PJM’s latest update from May 11, it reports that the average, weather adjusted decline in weekday peaks since March 24 is 10%, with a range from 6.5% to 15.2%. Total energy usage is down by 7.9% on average since March 24. PJM Pandemic Coordination Page. [↑](#footnote-ref-3)
4. <https://www.media.pa.gov/Pages/Revenue-Details.aspx?newsid=315> [↑](#footnote-ref-4)