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August 20, 2012

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120**RECEIVED**

AUG 20 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Dear Secretary Chiavetta:

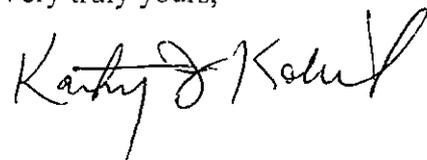
Re: *Petition for Reconsideration and Clarification of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company; Docket Nos. M-2012-2289411 and M-2008-2069877*

Enclosed for filing please find the original and one (1) copy of the above-referenced Petition for Reconsideration and Clarification submitted on behalf of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company. Please date stamp the additional copy and return it to me in the enclosed, postage-prepaid envelope.

As indicated on the Certificate of Service, copies have been served on the parties in the manner indicated.

Please contact me with any questions regarding this matter.

Very truly yours,

kag
Enclosures

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AUG 20 2012

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
PA-PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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Act 129 Energy Efficiency and Conservation	:	Docket No: M-2012-2289411
Program Phase Two	:	M-2008-2069877
	:	
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**PETITION FOR RECONSIDERATION AND CLARIFICATION OF METROPOLITAN
EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, PENNSYLVANIA
POWER COMPANY AND WEST PENN POWER COMPANY**

I. INTRODUCTION

Act 129 of 2008 ("Act 129") charged the Pennsylvania Public Utility Commission ("Commission") with the task of developing an energy efficiency and conservation program ("EE&C Program.") The Act also established energy efficiency ("EE") and peak demand reduction ("PDR") targets that each electric distribution company ("EDC") with at least 100,000 customers had to meet by May 31, 2011 and/or May 31, 2013. Pursuant to Section 2806.1(C)(3) of Act 129, the Commission was also charged with evaluating the costs and benefits of the EE&C Program by November 30, 2013 and every five years thereafter. To help fulfill this statutory obligation, the Commission adopted a tentative order in the above captioned proceeding on May 10, 2012, outlining its proposed standards for a Phase II EE&C Program which is currently scheduled to begin June 1, 2013. On August 3, 2012, after receiving comments and reply comments from the Companies and other interested parties, the Commission entered its Implementation Order ("August 3 IO"), in which it established energy efficiency ("EE") (but not

peak demand reduction (“PDR”)) targets for the period June 1, 2013 through May 31, 2016 (“Phase II Period”) and set forth what appears to be directives with which Pennsylvania EDCs are expected to comply. Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company (collectively, “the Companies”) submit herein their Petition for Reconsideration, which focuses predominantly on a request for clarification of the nature of the August 3 IO and asks the Commission to reconsider its hearing process related to established benchmarks.

II. STANDARD OF REVIEW

In *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1985), quoting *Pennsylvania R.R. Co. v. Pa. Pub. Util. Comm’n*, 118 Pa. Super.380, 179 A. 850 (1935) the standards for granting a petition for reconsideration were set forth as follows:

Parties ..., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them... What we expect to see raised in such petitions are new and novel arguments, not previously heard, or consideration which appear to have been overlooked or not addressed by the Commission.

In this Petition, the Companies raise points not previously heard or considered and which the Commission may have overlooked. Accordingly, the Companies’ Petition should be granted and the Commission should modify or clarify its August 3 IO consistent with the comments set forth herein.¹

¹ The Companies have several other concerns not raised in this Petition. The Companies failure to address any issue should not be construed as agreement with the Commission’s position on any given issue.

III. PETITION FOR RECONSIDERATION OR CLARIFICATION

- a. **The Companies ask the Commission to clarify that the August 3 IO sets forth guidelines through an order that is akin to a policy statement, and not legally binding directives and penalties through an order with the force of law.**

As previously indicated, this Petition focuses predominantly on procedural matters, the first of which is to seek clarification as to the nature of the Commission' s August 3 IO. In order to fulfill its statutory obligation to evaluate the cost effectiveness of the EE&C Program, the Commission issued the August 3 IO to provide guidance on how the EDCs should comply with the EE&C program during the Phase II Period. However, in issuing the August 3 IO, the Commission did not adhere to the formalities required to adopt a "regulation,"² and, as a consequence, the August 3 IO does not have the "force of law" that attends a regulation.³ Indeed, the Commission reached this same conclusion, after also relying on the *Norristown* opinion (cited in footnote 3 below), when delineating the legal effect of similar orders issued to implement Chapter 14 of the Public Utility Code after the Responsible Utility Customer Protection Act (Act 201 of 2004) was enacted:

Since the *Implementation Orders* are not adjudications, they should not be construed to have created "binding norms" that have the force of law. **If they are so interpreted, then the *Implementation Orders* would be illegal because they are in the nature of unpromulgated regulations.** [*Chapter 14 Implementation – Declaratory Order*, Docket No. M-00041802F0002, 2005 Pa. PUC LEXIS 20 at *19-20 (November 21, 2005) (footnotes omitted)(emphasis added)].

A statement of policy, on the other hand, is defined in the Commonwealth Documents Law as:

² See 45 P.S. §§ 1201 et seq. (Procedural requirements that must be observed to adopt a regulation); 71 P.S. § 745.5(a) (the Regulation Review Act)(Requirement for review of a proposed regulation by the Independent Regulatory Review Commission and standing committees of the House and Senate).

³ *Pa. Human Relations Comm'n. v. Norristown Area School Dist.*, 473 Pa. 334, 350, 374 A.2d 671 (1977).

Any document, except an adjudication or a regulation, promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof, and includes, without limiting the generality of the foregoing, any document *interpreting or implementing any statute enforced or administered by such agency*. [45 Pa. C.S. § 501 (“Statement of Policy”)(emphasis added.)]

In the August 3 IO, the Commission blurs the above distinctions, on the one hand setting forth policy positions, filing dates and certain procedural requirements as if the August 3 IO was a statement of policy; and on the other hand, establishing penalties should an EDC fail to achieve the customer segment carve outs, as if the August 3 IO had the force of law. The Commission further confuses the nature of the August 3 IO by citing 66 Pa. C.S. § 3301(a) as its authority to establish such penalties.⁴ However, as the Commission correctly notes, this authority is limited to among other unrelated situations, one in which an EDC “shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission.”⁵

The Commission’s reliance on this provision is misplaced for several reasons. First, as the Commission has acknowledged in the past, Implementation Orders do not create “binding norms” that have the force of law. Therefore, as a policy statement, the August 3 IO cannot establish binding penalties on EDCs pursuant to 66 Pa. C.S. § 3301(a). And second, the Commission, as a creature of statute, is only authorized to act within the scope of its duties as established by the Pennsylvania legislature.⁶ Nowhere in Act 129 did the Pennsylvania legislature establish penalties should an EDC fail to achieve specific customer segment carve out requirements. Therefore the Commission’s actions involve neither the interpretation nor

⁴ August 3 IO, p. 48.

⁵ Id. (emphasis omitted).

⁶ *Feingold v. Bell of Pa.*, 477 Pa. 1,8, 383 A.2d 74 (1973); *Pennsylvania Nat’l Guard v. Workmen’s Compensation Appeal Board*, 63 Pa. Cmwlth 1,3, 437 A.2d 494, 495 (1981) (*rev’d on other grounds*, 510 Pa. 348, 508 A.2d 292 (1986)).

implementation of any statute. As the Commission correctly concluded in the August 3 IO, “the carve-out is specifically prescribed under subsection (b), 66 Pa. C.S. § 2806.1(b)(1)(i)(B), which is separate and apart from subsections (c) and (d), 66 Pa. C.S. §2806.1(c) and (d).”⁷ Therefore, because Act 129 did not contemplate penalties for failing to achieve the carve out targets, it is beyond the Commission’s authority to create them *sua sponte*.

In sum, the Companies respectfully ask the Commission to clarify that its August 3 IO is deemed by the Commission to be a policy statement with which the Companies should strive to comply, rather than an order that creates binding norms and has the force of law. If the Commission deems it the latter, then the Commission has erred (i) by failing to follow the procedural guidelines established either to develop regulations or to properly adjudicate the issue, thus violating the Companies’ due process rights; and (ii) by creating penalties *sua sponte* when no such penalties were established in Act 129 and no enabling statute was created under which the Commission was so authorized to act.

b. The Companies ask the Commission to reconsider the timing of the evidentiary hearing on the EE benchmarks established in the August 3 IO.

In the August 3 IO, the Commission established EE benchmarks for each of the Pennsylvania EDCs.⁸ The Commission indicated that the EDCs had until August 20, 2012 to submit a petition for an evidentiary hearing, which will be limited to the consumption reduction requirement issue.⁹ Should the EDC fail to submit such a petition within two and a half weeks of receiving its benchmarks, the benchmarks as set forth in the August 3 IO will be deemed accepted by the EDC.¹⁰ For reasons discussed below, the Companies ask the Commission to

⁷ August 3 IO, p. 46.

⁸ August 3 IO, p. 24.

⁹ *Id.* at 31.

¹⁰ *Id.*

change the date of any evidentiary hearing on this issue to coincide with the evidentiary hearing that will assess the sufficiency of the EE&C Plan for the Phase II Period.

As this Commission is aware, each EDC's EE&C Plan is complicated and requires significant work to assess programs, analyze potential participants and participation rates, and develop combinations of programs and measures that will comply with established targets within the 2% spending cap. Inasmuch as this process takes months of modeling and evaluation, and noting that the Phase II EE&C Plans are not required to be filed until November 1, 2012, it is premature and virtually impossible for an EDC to determine if it can achieve the EE targets as set forth in the August 3 IO within 17 days of being advised of those targets. As a result, the Commission has left the Companies with no choice but to file a petition in order to preserve their rights while they continue to develop their EE&C Plans for the Phase II Period, not necessarily because they do not believe that they can achieve the established targets, but rather because they have to do a more thorough assessment of market potential, program trends, market demands, and new program potential before they can be certain.¹¹

Rather than require a separate evidentiary hearing, the Companies suggest that time and resources for all involved would be better utilized if EDCs could simply challenge the recommended benchmarks if deemed necessary as part of their overall evidentiary hearing on the sufficiency of the Phase II EE&C Plans. As many parties noted in their comments, resources will be limited and will be taxed by having to assess all EDC plans on what is expected to be a relatively concurrent basis. Additional evidentiary hearings in the interim to address the benchmark levels will simply add to this burden, not only for Company personnel who will have to be diverted from plan development to support the Companies' claims, but also intervening

¹¹ The Companies' Petition for an Evidentiary Hearing is being filed contemporaneously with this Petition for Reconsideration and Clarification.

parties and Commission staff. Moreover, much of the work is redundant with that which will be required during the evidentiary hearing on the Phase II EE&C Plans. If combined into a single evidentiary hearing, petitions to intervene, prehearing conferences, hearings, briefs and orders would only be required once, rather than twice under the current process created by the Commission. And some could be avoided in their entirety should an EDC later determine that they believe they can achieve the targets as established and subsequently withdraw their petition for the hearing. Finally, by allowing the benchmarks to be challenged if need be during the evidentiary hearing on the Phase II Plans, the Commission will have a more complete record of the Plan potential.

Not only does the combination of the hearing on the benchmarks with the hearing on the sufficiency of the Phase II EE&C Plans more effectively and efficiently utilize resources, but it also preserves the EDCs' rights to due process. The Commission recognized the due process concern when establishing the hearing process on benchmarks discussed above.¹² While the Companies appreciate the Commission's proposed solution, it is simply not sufficient given the timing of the filing deadline. The Commission has created a situation in which an EDC cannot win. It has placed the burden of demonstrating the unreasonableness of the EE targets on the EDC, but has provided the EDC with neither sufficient time to determine if the targets are unreasonable, nor sufficient time to develop the evidence to support its position. Accordingly, the Companies urge the Commission to reconsider the process established to challenge the recommended benchmarks and, instead modify it by simply addressing this issue as part of the comprehensive evidentiary hearing on the sufficiency of the Phase II EE&C Plans.

¹² August 3 IO, p. 30.

IV. CONCLUSION

In sum, the Commission exceeded its statutory authority by creating penalties related to customer segment carve outs, especially through an implementation order statement that creates no binding norms and has no force of law. Accordingly the Companies ask the Commission to revise the August 3 IO by removing such penalties. In the interest of resource management and efficiency, the Companies also respectfully ask the Commission to reconsider its hearing process and combine in a single evidentiary hearing the issue related to the establishment of EDC energy efficiency benchmarks and the overall sufficiency of the Phase II EE&C Plans.

Respectfully submitted,

Dated: August 20, 2012



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Act 129 Energy Efficiency and Conservation : Docket No: M-2012-2289411
Program Phase Two : M-2008-2069877

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing document upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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Pennsylvania Public Utility Commission
Commonwealth Keystone Building
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Harrisburg, PA 17120

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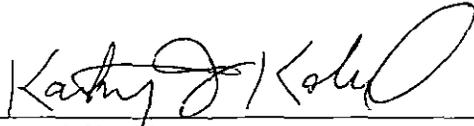
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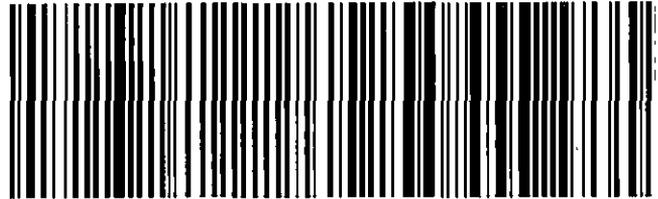
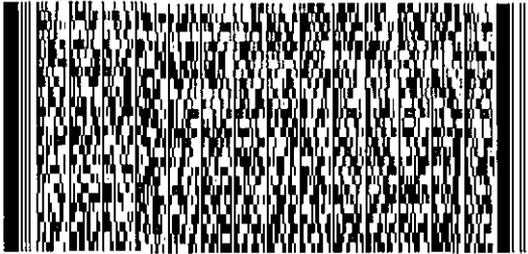
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