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September 28, 2012

**VIA eFILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**Re:   Petition of PECO Energy Company for an Evidentiary Hearing  
      on the Energy Efficiency Benchmarks Established for the Period  
      June 1, 2013 through May 31, 2016  
      Docket No. P-2012-2320334**

Dear Secretary Chiavetta:

Enclosed for filing in the above-captioned matter is **PECO Energy Company's Motion *In Limine* to Exclude from the Record Portions of the Direct Testimony of PennFuture Witness Glenn Reed** (the "Motion") in the above-referenced matter.

As indicated on the attached Certificate of Service, copies of the Motion have been served on Administrative Law Judge Elizabeth Barnes and all parties of record.

Very truly yours,

  
Anthony C. DeCusatis

ACD/tp  
Enclosures

c: Per Certificate of Service

Almaty Beijing Boston Brussels Chicago Dallas Frankfurt Harrisburg Houston Irvine London Los Angeles Miami  
Moscow New York Palo Alto Paris Philadelphia Pittsburgh Princeton San Francisco Tokyo Washington Wilmington

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PETITION OF PECO ENERGY FOR AN :  
EVIDENTIARY HEARING ON THE :  
ENERGY EFFICIENCY BENCHMARKS : DOCKET NO. P-2012-2320334  
ESTABLISHED FOR THE PERIOD :  
JUNE 1, 2013 THROUGH MAY 31, 2016 :**

**CERTIFICATE OF SERVICE**

I hereby certify that I have this date served true and correct copies of **PECO Energy Company's Motion *in Limine* to Exclude from the Record Portions of the Direct Testimony of PennFuture Witness Glenn Reed** upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

**VIA ELECTRONIC MAIL AND  
FIRST CLASS MAIL**

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September 28, 2012

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PETITION OF PECO ENERGY** :  
**COMPANY FOR AN EVIDENTIARY** :  
**HEARING ON THE ENERGY** : **DOCKET NO. P-2012-2320334**  
**EFFICIENCY BENCHMARKS** :  
**ESTABLISHED FOR THE PERIOD** :  
**JUNE 1, 2013 THROUGH MAY 31, 2016** :

**PECO ENERGY COMPANY'S  
MOTION *IN LIMINE*  
TO EXCLUDE FROM THE RECORD  
PORTIONS OF THE DIRECT TESTIMONY OF  
PENNFUTURE WITNESS GLENN REED**

**I. INTRODUCTION AND OVERVIEW**

Pursuant to the Scheduling Order entered by Administrative Law Judge Elizabeth H. Barnes (“ALJ”) on September 13, 2012 (p. 4), PECO Energy Company (“PECO” or the “Company”) hereby moves for an Order *in Limine* denying admission into evidence of portions of the written direct testimony of PennFuture witness Glenn Reed, which was served on September 20, 2012. Specifically, the portions of Mr. Reed’s statement consisting of Question and Answer Nos. 24 through 27 and the first sentence of the second paragraph of the Answer to Question 42 (hereafter, the “Objectionable Portions”)<sup>1</sup> should be excluded from the record.

The Objectionable Portions of Mr. Reed’s statement should not be admitted because they seek to address matters that are outside the scope of this proceeding, namely, the “acquisition cost” for PECO’s Phase II energy efficiency and conservation (“EE&C”) program as determined by the Commission in its Order entered August 3, 2012 in the above-captioned proceeding

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<sup>1</sup> Mr. Reed’s statement does not contain page or line numbers. Hence, the portions of that statement subject to this Motion must be identified by Question and Answer numbers.

(“*Phase II Implementation Order*”). Neither PECO’s Petition for an Evidentiary Hearing, filed on August 20, 2012, nor its direct testimony, served on September 5, 2012, raised any issue with respect to the acquisition cost the Commission adopted for PECO in the *Phase II Implementation Order*.

In the *Phase II Implementation Order*, the Commission made clear that only electric distribution companies (“EDCs”) were being granted the right to contest their “specific consumption reduction target[s]” by filing a “petition for an evidentiary hearing” and that other parties seeking to participate in the evidentiary hearing must do so by filing “petitions for intervention.” *Id.* at 30-31. Consequently, the scope of the evidentiary hearing would be defined by the EDC’s petition, and other parties, whose participation is limited to the status of “intervenor,” would be permitted to address only those issues raised by the EDC. Indeed, the fast-track procedural schedule the Commission adopted (i.e., eliminating the requirement for an Initial Decision and calling for certification of the record by November 2, 2012) confirms that the Commission did not intend the evidentiary hearing to be a free-for-all in which intervenors could introduce any issue that conceivably could affect an EDC’s “consumption reduction target.” Accordingly, the issues in play in this proceeding are only those addressed in PECO’s Petition for Evidentiary Hearing and direct testimony, and an intervenor does not have the right to interject topics that are beyond the scope of the Company’s direct case.

## **II. THE PHASE II IMPLEMENTATION ORDER, PECO’S PETITION FOR AN EVIDENTIARY HEARING AND PECO’S DIRECT TESTIMONY**

In the *Phase II Implementation Order* (p. 30), the Commission acknowledged that PECO raised a valid “due process concern regarding the facts the Commission must rely upon to set individual EDC consumption reduction targets.” Therefore, the Commission “tentatively” adopted the EDC-specific consumption reduction targets set forth in Table 1 (p. 24) of the *Phase*

*II Implementation Order* “subject to challenge by an EDC” and emphasized that the consumption reduction target “would become final for any EDC that does not petition the Commission for an evidentiary hearing.” *Id.* at 31. In addition, the Commission ruled that only an EDC could petition for an evidentiary hearing on its specific consumption reduction target, that the EDC would have the “burden of proof,” and that “the scope of any such proceeding will be narrow and limited to the consumption reduction requirement issue.” *Id.* The Commission stated further that any party seeking to intervene had to file a petition for intervention within ten days of the EDC’s filing of a petition for evidentiary hearing. *Id.* at 31 and 120. The Commission established a fast-track schedule whereby the Office of Administrative Law Judge would conduct the requisite hearing and certify the record to the Commission by November 2, 2012, thereby dispensing with the issuance of an Initial Decision. *Id.*

As previously noted, PECO filed its Petition for Evidentiary Hearing on August 30, 2012. In its Petition, PECO sought an evidentiary hearing to address only two issues. First, whether the funds the Commission deemed available for Phase II consumption reduction targets under the “cap” imposed by Section 2806.1(g) of the Public Utility Code is overstated because the Commission failed to allocate an appropriate portion of such funds for the continuance, in Phase II, of PECO’s direct load control (“DLC”) program and other demand reduction (“DR”) programs that will be needed to achieve a subsequently determined peak demand reduction target (Petition for Evidentiary Hearing, pp. 4-8). Second, whether the Commission overstated the Phase II funding level by failing to use PECO’s current revenue, excluding amounts collected on behalf of electric generation suppliers (“EGSs”) under Commission-mandated consolidated billing to determine a reasonable maximum funding level (Petition for Evidentiary Hearing, pp. 8-10).

On September 5, 2012, PECO served its Statement No. 1, the direct testimony of Frank J. Jiruska, and accompanying exhibits. Mr. Jiruska's direct testimony addresses the two issues identified in PECO's Petition for Evidentiary Hearing, as summarized by Mr. Jiruska in his explanation of the purpose of his testimony:

My testimony is divided into four parts. First, I provide context for PECO's request for an evidentiary hearing.

Second, I discuss the amount of funding necessary for PECO to continue existing demand reduction ("DR") programs that are demonstrated to be cost-effective. I also describe the level of funding necessary to implement DR programs to achieve targeted savings by the May 31, 2017 deadline imposed by Act 129, if the statewide DR program is ultimately found to be cost-effective.

Third, I describe a revenue baseline to establish a spending limitation for PECO that is representative of current and reasonably projected revenue levels.

Finally, I calculate PECO's consumption reduction target based on: (1) allocating an appropriate level of funding to DR programs; and (2) using the proposed revenue baseline to determine PECO's spending limit.

PECO Statement No. 1, pp. 3-4.

As evidenced by the foregoing, PECO did not challenge any aspect of the "acquisition cost" established by the Commission in the *Phase II Implementation Order*. Accordingly, acquisition cost is not at issue in this proceeding.

### **III. THE DIRECT TESTIMONY OF PENNFUTURE WITNESS GLENN REED**

On September 20, 2012, PennFuture served the written direct testimony of its witnesses Courtney Lane and Glenn Reed.<sup>2</sup> Mr. Reed's statement consists of fifteen unnumbered pages. Nearly a third of Mr. Reed's statement is devoted to challenging the Commission's acquisition cost

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<sup>2</sup> Ms. Lane's testimony states that she is a customer of PECO with an interest in the subject matter of this proceeding. Presumably, Ms. Lane's testimony was filed to support PennFuture's claim of representational standing.



finding. *See, e.g.*, Question and Answer No. 24 (“Based on my review of the Market Potential Report, I believe the SWE [Statewide Evaluator] has overestimated the acquisition costs . . .”); Question and Answer No. 27 (“I believe the estimated Phase II acquisition cost is too high . . .”); Question and Answer No. 42 (“To summarize, the acquisition costs . . . are inflated . . .”). As previously indicated, PECO has not raised any issue regarding the acquisition cost finding made by the Commission in the *Phase II Implementation Order*.

**IV. THE OBJECTIONABLE PORTIONS OF MR. REED’S STATEMENT ADDRESS A MATTER THAT IS NOT WITHIN THE SCOPE OF THIS PROCEEDING AND, THEREFORE, SHOULD NOT BE ADMITTED INTO EVIDENCE**

**A. The ALJ Has The Authority To Deny The Admission Of Testimony That Is Outside The Scope Of This Proceeding**

The Commission’s regulations at 52 Pa. Code § 5.403(a) grant presiding officers “all necessary authority to control the receipt of evidence,” including “[r]uling on the admissibility of evidence” and “[c]onfining the evidence to the issues in the proceeding.” Administrative Law Judges have employed this power, with the Commission’s approval and affirmation, to exclude evidence that is outside the permissible scope of a proceeding and, in that way, to focus the evidence on the matters properly at issue. *Re Gas Cost Rate No. 5*, 57 Pa. P.U.C. 158 (1983) (“The testimony stricken by the ALJ addresses, in part, matters broader than the scope of the instant proceeding.”); *Pa. P.U.C. v. Pennsylvania-American Water Co.*, 1994 Pa. PUC LEXIS 120 (July 26, 1994) at \*158 (“The ALJ concluded as follows: ‘I agree with OTS that the issues raised by OCA are outside the scope of this investigation. . . .’ We conclude that the ALJ properly found the matters raised by the OCA to be better placed in the pending rulemaking proceeding.”) *See also Re Structural Separation Of Bell Atlantic-Pennsylvania, Inc. Retail And Wholesale Operations*, 2000 Pa. PUC LEXIS 59, Docket No. M-00001353 (Sept. 28, 2000) at

\*7-9 (Affirming the Administrative Law Judge’s decision in that case to exclude certain evidence as “beyond the scope of the proceeding.”)

**B. The ALJ Should Exercise The Authority Granted By The Commission’s Regulations To Exclude The Objectionable Portions Of Mr. Reed’s Statement**

The *Phase II Implementation Order* set four important parameters on the scope of this proceeding. First, it only permitted the EDC to initiate an evidentiary proceeding. Second, it authorized the EDC to seek an evidentiary hearing only “on its specific consumption reduction target” and, in so doing, described the scope of this proceeding as “narrow and limited.” Third, it limited the participation of other parties to “intervenor” status. Fourth, it set a fast-track schedule to conclude the evidentiary hearing process by November 2, 2012. *See Phase II Implementation Order*, pp. 30-31, 120.

From the well defined and carefully circumscribed process set forth in the *Phase II Implementation Order*, it is clear that the issues to be addressed in this proceeding are only those raised by PECO because: (1) it is the EDC – not other parties – that was granted the right to petition for an evidentiary hearing; (2) other interested parties are afforded only “intervenor” status and, as such, are not authorized to interject challenges or issues that were not raised, in the first instance, by the EDC; (3) the aggressive schedule imposed by the *Phase II Implementation Order* provides further confirmation that the Commission did not intend the evidentiary hearing to be a free-for-all in which intervenors could introduce any issue that conceivably could affect an EDC’s “consumption reduction target” – indeed, the Commission’s schedule would be entirely inadequate to the task if the hearing process were opened up to such far-ranging issues.

PennFuture, by seeking to re-litigate the acquisition cost that the Commission established in the *Phase II Implementation Order*, is attempting to interject an issue that is outside the permissible scope of this proceeding. In the *Phase II Implementation Order* (p. 24), the

Commission found that a reasonable acquisition cost estimate is \$227.55 per Megawatt Hour (“MWH”). As the Commission is aware, and as discussed in the *Phase II Implementation Order*, in PECO’s comments on the Tentative Order that preceded the *Phase II Implementation Order*, the Company proposed and vigorously supported a projected acquisition cost of not less than \$270.00 per MWH. *Id.* at 16. Although PECO continues to believe that the acquisition cost it proposed is reasonable and should have been adopted by the Commission, it has acquiesced in the Commission’s finding and, therefore, has not challenged that finding of fact. Under such circumstances, namely, where PECO accepted the Commission’s acquisition cost finding even though it is materially less than the amount PECO advocated, it is particularly inappropriate to permit an intervenor to mount an unauthorized challenge to that finding.

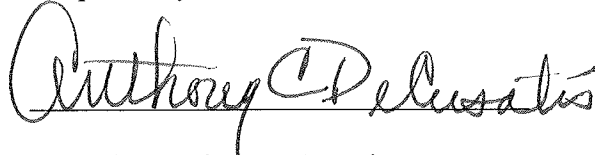
Moreover, if, contrary to the clear meaning of the *Phase II Implementation Order*, intervenors were free to raise any issue that could conceivably impact the EDC’s consumption reduction target, an EDC that petitioned for an evidentiary hearing would have had no choice but to challenge – and address at length in its direct testimony – every single input that might, directly or indirectly, alter its consumption reduction target. Obviously, that approach would have been totally at odds with the limited scope and fast-track process mandated by the Commission for this proceeding. In addition to violating the express terms and clear intent of the *Phase II Implementation Order*, allowing PennFuture to submit testimony that is beyond the scope of the Company’s direct case, coupled with the short response time and fast-track schedule, is unfair to the Company. That unfairness is magnified by the fact that PennFuture’s Prehearing Conference Memorandum, which was prepared well after PECO’s Petition for Evidentiary Hearing and direct testimony had been filed and served, does not even suggest that PennFuture intended to address acquisition cost in this proceeding.

In summary, the Objectionable Portions of PennFuture witness Reed's statement challenge a Commission finding of fact that PECO has accepted and, therefore, has not raised as an issue to be addressed in this case. Under the terms of the *Phase II Implementation Order*, PennFuture, as an intervenor, does not have the right to unilaterally challenge Commission findings that the EDC – PECO in this case – has accepted and not challenged. Thus, the Objectionable Portions of Mr. Reed's statement are outside the scope of PECO's direct case and, therefore, outside the scope of this proceeding. Moreover, permitting an intervenor to belatedly interject new issues after an EDC has presented its direct case would be unfair and a denial of fundamental due process – an unfairness that is compounded by PennFuture's silence in its Prehearing Conference Memorandum about its intent to try to expand the scope of this case. Accordingly, the Objectionable Portions of Mr. Reed's statement should not be admitted into the record in this proceeding.

## V. CONCLUSION

For the reasons set forth above, the ALJ should issue an Order finding and determining that the Objectionable Portions of Mr. Reed's statement should not be admitted into the evidentiary record in this case because they address matters that are outside the scope of PECO's direct case and outside the scope of this proceeding.

Respectfully submitted,



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