

COMMONWEALTH OF PENNSYLVANIA



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October 19, 2012

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17101

Re: Petition of PECO Energy 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 please find the Office of Consumer Advocate's Main Brief in the above-captioned proceeding.

Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Sincerely,

A handwritten signature in cursive script that reads "Jennedy S. Johnson".

Jennedy S. Johnson
Assistant Consumer Advocate
PA. Attorney ID# 203098

Enclosures

cc: Hon. Elizabeth H. Barnes, ALJ
Certificate of Service
160191

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

MAIN BRIEF
OF THE
OFFICE OF CONSUMER ADVOCATE

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Dated: October 19, 2012

TABLE OF CONTENTS

I. INTRODUCTION AND PROCEDURAL HISTORY1

II. ARGUMENT.....4

 A. Direct Load Control Programs.....4

 B. Reserving Funds in the Phase II Budget for Future Demand Response Programs9

 C. Total Budget Calculation.....12

III. CONCLUSION15

TABLE OF CITATIONS

Cases

Bayada Nurses, Inc. v. Commw., Dept. of Labor and Industry, 8 A.3d 866 (Pa. 2010)..... 13

Narberth Borough v. Lower Merion Twp., 915 A.2d 626 (Sup. 2007)..... 13

Administrative Decisions

Energy Efficiency and Conservation Program, Docket Nos. M-2012-2289411 and M-2008-2069887 (Tentative Order entered May 11, 2012)..... 2, 6

Energy Efficiency and Conservation Program, Docket Nos. M-2012-2289411 and M-2008-2069887 (Final Order entered August 3, 2012)..... passim

Energy Efficiency and Conservation Program, Docket Nos. M-2012-2289411 and M-2008-2069887 (Reconsideration Order entered August 27, 2012)..... 3, 10, 11

Statutes & Regulations

1 Pa.C.S. § 1921(a)..... 13

66 Pa.C.S. § 2806.1 1

66 Pa.C.S. § 2806.1(c)(3) 1

66 Pa.C.S. § 2806.1(d)(2) 10

66 Pa.C.S. § 2806.1(g)..... 13

I. INTRODUCTION AND PROCEDURAL HISTORY

Pursuant to Act 129 of 2008, the seven largest Electric Distribution Companies (EDCs) in the Commonwealth were required to file Energy Efficiency and Conservation (EE&C) plans with the Public Utility Commission (Commission). Act 129 set out a series of mandates required for each Plan and charged the Commission with the implementation and review of each EDC's Plan. 66 Pa.C.S. § 2806.1. On January 15, 2009, the Commission adopted an Implementation Order at Docket No. M-2008-2069887 establishing the standards each plan must meet and providing guidance on the procedures to be followed for submittal, review and approval of all aspects of EDC EE&C plans. The Commission was also charged with the responsibility to evaluate the costs and benefits of the EE&C Program by November 30, 2013, and every five years thereafter. 66 Pa.C.S. § 2806.1(c)(3). The Commission must adopt additional incremental reductions in consumption if the benefits of the EE&C Program exceed its costs. Id.

The passage of Act 129 presented Pennsylvania with the opportunity to further expand the Commonwealth's work on energy efficiency and demand response for the benefit of all customers. The Office of Consumer Advocate (OCA) participated actively in the development of the Phase I Energy Efficiency and Conservation (EE&C) Plans under Act 129 and has participated actively in the on-going Electric Distribution Company (EDC) stakeholder groups that have continued to work on the implementation of these programs. The OCA has supported the development of energy efficiency and demand response programs by Pennsylvania utilities for more than two decades. The OCA's work in these areas has reaffirmed its support for these programs and the OCA looks forward to continuing to work on the Phase II Plans.

In a March 1, 2012 Secretarial Letter, the Commission requested comments on a number of topics to aid in designing and implementing Phase II of the Act 129 EE&C programs applicable to the Commonwealth's seven largest EDCs. The OCA and other Stakeholders provided Comments on April 17, 2012, and on May 11, 2012, the Commission entered its Tentative Implementation Order regarding Phase II of the EE&C Plans. Energy Efficiency and Conservation Program, Docket Nos. M-2012-2289411 and M-2008-2069887 (Tentative Order entered May 11, 2012) (Tentative Order). The Commission also released a Baseline Energy Efficiency Study and a Market Potential Study conducted by the Statewide Evaluator (SWE) to assess the further potential for energy efficiency in the service territories of Pennsylvania's major EDCs. In accordance with the Tentative Order, the OCA and other stakeholders submitted Comments on June 25, 2012 and Reply Comments on July 9, 2012.

On August 3, 2012, the Commission adopted its Final Implementation Order regarding Phase II EE&C plans. Energy Efficiency and Conservation Program, Docket Nos. M-2012-2289411 and M-2008-2069887 (Order entered August 3, 2012) (Final Order). The Final Order established the requirements for Phase II of the Act 129 Energy Efficiency plans, including the establishment of new consumption reduction targets for the period of June 1, 2013 through May 31, 2016. PECO's consumption reduction target was set at 2.9% to be achieved using a three-year total budget of \$256,185,476. The Order stated that an EDC could submit a Petition for Evidentiary Hearing no later than August 20, 2012 for the limited purpose of challenging the consumption reduction requirements. If no Petition was filed, the consumption reduction requirements would be deemed accepted. Final Order at 31.

On August 20, 2012, PECO filed a Petition for an Evidentiary Hearing and filed the Direct Testimony and Exhibits of its witness Frank J. Jiruska on September 5, 2012.¹ The matter was assigned to the Office of Administrative Law Judge and was further assigned to ALJ Elizabeth H. Barnes. A prehearing conference was held on September 10, 2012 at which time a procedural schedule was adopted. On September 20, 2012, Citizens for Pennsylvania's Future (PennFuture) and Duquesne Light Company (Duquesne) filed Direct Testimony. On September 28, 2012, PECO filed its Rebuttal Testimony. Evidentiary hearings were held on October 3, 2012 for the purpose of admitting the pre-filed testimony of the non-Company parties and cross-examining the Company's witness. In accordance with the ALJ's Scheduling Order, the OCA hereby submits its Main Brief in this matter.

¹ The OCA would also note that on September 4, 2012, PECO filed a Motion for Leave to File a Petition for Reconsideration of the Commission's Final Order. The Motion was granted and the Commission issued a Reconsideration Order on September 27, 2012. Energy Efficiency and Conservation Program, Docket Nos. M-2012-2289411 and M-2008-2069887 (Order entered August 27, 2012) (Reconsideration Order). As will be discussed in Section II, below, the OCA submits that one of the Company's three claims as part of this proceeding was addressed and rejected in the Reconsideration Order.

II. ARGUMENT

In its Petition for Evidentiary Hearing, the Company puts forth three arguments (two of which are interrelated) regarding the consumption reduction targets that the Commission set for PECO. Petition at 4-10. The first two interrelated matters deal with Demand Response (DR) issues. First, while PECO supports the Commission's determination that its Direct Load Control (DLC) Program may continue, it takes issue with the Commission's failure to allocate any portion of the Phase II budget to this cost-effective DR program. Petition at 5-6. Second, PECO asserts that funding for future DR programs must be included as part of Phase II budgets if the Company is to meet the statutorily-set peak demand reduction target by May 31, 2017. Petition at 7-8. Third, the Company states that its total Phase II budget is too high because the Commission erroneously includes generation costs in the budget calculation and fails to consider the 2008 economic downturn in the calculation of PECO's 2006 "total annual revenue." Petition at 9-10.

The OCA supports PECO's proposal to continue the Company's residential DLC program. The OCA submits, however, that this does not warrant the requested modification to the Phase II consumption reduction targets. Similarly, the OCA disagrees that the Commission erred in failing to set aside money for Phase III DLC programs in the Phase II budget. Finally, the OCA submits that the Commission did not err in determining PECO's Phase II budget. The OCA will address each of these issues in detail below.

A. Direct Load Control Programs

The Company has requested that the Commission set aside \$12 million per year (\$36 million total) of its Phase II budget in order to continue its DLC program. PECO St. 1 at 14. As was discussed above, the Commission's Final Order, does not mandate the continuation

of Demand Response programs under Act 129, but states that EDCs may continue cost-effective residential demand response curtailment measures, such as Direct Load Control programs. Final Order at 42-43.

Preliminarily, the OCA would note that it has consistently supported the continuation of the Company's cost-effective residential Direct Load Control (DLC) program. The reason for this is that once the EDC installs the DLC switch on the customer's premises and a communication system to control that switch, those infrastructure costs are sunk whether the switch is used or not. The demand savings, on the other hand, can be achieved only when the switch is activated as part of a program. To put it another way, demand response programs, once implemented, should be sustained so that the continuing savings made possible by the initial investment in the programs can be realized.

The OCA agrees with PECO that its DLC program demonstrates significant benefits to its customers. Indeed, PECO's DLC program has a Total Resource Cost (TRC) score of 2.38. PECO St. 1 at 10. The OCA supports the Company's continuing the DLC program during Phase II. The OCA does not, however, agree that the Company needs to reduce its Phase II budget by \$36 million, thereby lowering its energy efficiency consumption reduction goals, in order to continue the program. Instead, the OCA submits that PECO should be able to continue its DLC program while still meeting its 2.9% consumption reduction target within the established budget of \$256,185,476. The reason for this is two-fold. First, as the OCA discussed in its Comments, the SWE study appears to be conservatively high in its calculation of acquisition costs. Therefore, the Company should readily be able to achieve its reduction goals within the budget established. Second, the Commission has allowed those EDCs that have achieved their

Phase I target before the end of Phase I, like PECO will, to continue their programs and credit excess savings towards their Phase II consumption reduction requirements.

With respect to the establishment of consumption reduction goals, a number of Commenters to the Commission's Tentative Order called into question the need for the 25% adder to the actual cost data from Phase I programs that was included in the Market Potential Study.² The Commenters pointed to acquisition costs in other states with similar levels of market maturity, which are significantly lower than those used to set the savings targets in Pennsylvania. Final Order at 14-32. In this proceeding, PennFuture witness Glenn Reed also testified that PECO's consumption reduction targets are underestimated due to the SWE's conservative estimate of acquisition costs. PennFuture St. 1 at 7-12. He stated:

My review reveals several issues with the Market Potential Study including the unsupported 25% mark-up of program costs in Phase II; program design assumptions related to measure penetration rates; overstatement of the impacts from the Energy Independence and Security Act of 2007 (EISA) lighting standards; and an underestimated savings in the non-residential sectors.

For the first point, the SWE does not provide any data to back up the 25% mark-up of program costs for Phase II. The acquisition cost of Phase II energy savings is one of the critical factors in determining the Phase II consumption reduction targets and therefore should not be determined arbitrarily. While the argument is made that subsequent savings will be more expensive (higher cost per kWh) no evidence to support this contention is made. Further, as noted in this testimony, PECO's Phase I acquisition costs are much lower than used to develop their Phase II targets as are those from other efficiency programs in a similar state of portfolio evolution. The addition of a 25% Phase II mark-up of program costs is unwarranted and will result in lower Phase II efficiency targets.

As to program design and measure penetration estimates, the Market Potential Study makes simplifying assumptions that do not reflect good program design. The Market Potential Study assumes that when multiple measures "compete" for the same baseline technology that equal numbers of those measures are installed. This is a simplified and in many cases an incorrect assumption. It does not address that through good program design an EDC will want to maximize

² See Final Order at 14-21, referencing Comments of the following Stakeholders filed on June 25, 2012. ACEEE at 3-6, KEEA at 1-4, NEEP at 2-4, OPower at 12-13, PennFuture at 2-7, Reinvestment Fund at 1-7, Sierra Club at 4-6, and Sustainable Energy Fund at 3-7.

program savings by more aggressively promoting more efficient technologies and work to do so in a way that minimizes the cost of those savings. Cost-efficiencies can be obtained through adjusting incentive levels, moving financial incentives upstream to reduce wholesale as opposed to retail pricing, etc.

Id. at 7-8. He went on to discuss two other reasons that the SWE's acquisition cost analysis is conservative. He explained:

In addition, I do not believe the SWE captures the remaining cost-effective energy lighting savings that will continue to be attainable over the next 8 to 9 years even with the new minimum federal lighting efficiency standards in place. For example, the detailed measure characterizations in the Market Potential Study do not appear to reflect an accurate interpretation of the EISA standards. Specifically, only three residential CFL measures are characterized: 100 watt, 75 watt and 40 watt CFL replacements. The 2012-2014 provisions of EISA only apply to general service lamps. There are over 20 lamp categories excluded from EISA coverage including reflector lamps, globe and candelabra lamps, three-way lamps, and more. Program administrators throughout much of the country have been increasingly focusing their CFL program efforts on these and other "specialty" CFL lamp categories since savings from these lamps will be higher as their baselines will not need to be adjusted upwards for EISA related efficiency improvements. The Potential Report does not appear to explicitly address these classes of lamps that are exempt from EISA coverage. This assumption arbitrarily lowers the potential savings from lighting in Phase II of Act 129.

Lastly, the Potential Report appears to underestimate savings in the non-residential sectors. Of primary concern is the dramatically lower potential noted for non-residential as compared to the residential sector. This may be a result of the study's focus on "replace on burnout" opportunities, which leaves substantial amounts of cost-effective early-retirement potential unaddressed. I also note that the study omits savings from a potentially large fraction of all exterior lighting opportunities because it omitted the lighting-specific rate classes under which many of these fixtures operate.

Id. at 9-10.

The SWE assumes an acquisition cost of \$277.55/MWh savings for Phase II for PECO, which is a 61% increase over PECO's Phase I acquisition costs. This acquisition cost is substantially higher than that seen in other programs of similar maturity. Id. at 10. As Mr. Reed pointed out, in 2009 and 2010, utilities in the Southwest achieved program savings at an average cost of \$160 - \$190 per first year MWh savings. PennFuture St. 1 at 10. Mr. Reed testified:

Specifically, Xcel in Colorado had an average cost of \$180/MWh; Rocky Mountain Power in Utah had a cost of \$190/MWh; and Arizona Public Service had a cost of \$160/MWh. Similarly, costs for newly developed energy efficiency programs in several Midwestern states including Ohio, Michigan, Illinois, Iowa and Arkansas have been approximately \$120 per first-year MWh.

Id. at 11. The SWE's conservatively high estimate of the acquisition costs provides adequate room in PECO's budget to readily achieve the savings goals. Therefore, the Company should be able to meet its Phase II reduction goals while also continuing its DLC program.³

The Company's request for a reduction in its energy efficiency target is also unnecessary given PECO's ability to bank the consumption reduction it achieves in excess of its Phase I goals for use during Phase II. Final Order at 58-60, 107. According to PECO's Program Year 3, Quarter 4 Report to the Commission, PECO has already achieved (and verified) 91% of its May 31, 2013 energy compliance target. PennFuture St. 1 at 12. PennFuture witness Reed explained:

Based on the fact that PECO is already at 91% of its May 31, 2013 energy savings compliance target as of May 31, 2012 – a year in advance, and still has funding available, it is safe to assume PECO will achieve savings in excess of its Phase I goal.

Id. at 13.

Accordingly, while the OCA supports the Company's inclusion of its DLC program in its Phase II Plan, the OCA submits that the Company does not need to reduce its energy efficiency targets to successfully run and fund the program.

³ The OCA would also note that PECO can bid into the PJM markets in order to help offset the cost of the DLC program. Specifically, PECO can bid the capacity provided by the DLC program into the PJM reliability Pricing Model (RPM) interim auctions. If the Phase II programs are approved by February 2013, the Company can also bid the capacity into the RPM base residual auction in May 2013 for the June of 2016 delivery year.

B. Reserving Funds in the Phase II Budget for Future Demand Response Programs

In its Final Order, the Commission declined to set any peak demand reduction targets for the proposed Phase II EE&C Plan period. Final Order at 32-45. Instead, the Commission decided to evaluate the cost-effectiveness of demand response programs and conduct a demand response market potential study (to be completed in the first quarter of 2013) so that cost-effective demand response targets and programs can be included in any Phase III Plans. Final Order at 33. In its Petition, the Company requested that the Commission set aside funds from PECO's Phase II budget in anticipation of any additional peak demand reductions that would need to be achieved during the summer of 2016 in order to meet the May 31, 2017 statutory deadline. PECO St. 1 at 14. The Company states that it requires approximately \$30 million (exclusive of the funding for its DLC program discussed in Section II.A. above) to provide it "with the opportunity to achieve peak DR requirements by the statutory deadline." Id. at 15.

As a preliminary matter, the OCA would note that it has consistently supported the inclusion of demand response programs and new demand response targets in the EDC's Phase II Plans. Demand response programs can be beneficial to customers in many ways, especially by reducing the amount of peak load that must be served (thus avoiding costly increments of capacity resources), impacting high peak hour prices, and reducing customer bills. Specifically, the OCA supported the continuation of the DR programs to ensure that the value of the applications and devices installed to meet the demand reduction and savings goals of Phase I were not lost.

That being said, the OCA does not agree that the set aside requested by the Company is necessary or appropriate. First, the OCA would note that the Commission

specifically considered, and rejected, this issue as part of PECO's Petition for Reconsideration. Reconsideration Order at 27-29. In its Petition for Reconsideration, PECO asserted that the Commission failed to recognize that an appropriate level of Phase II funding must be expended to continue existing, cost-effective direct load control (DLC) programs and to achieve subsequent mandated incremental peak demand reduction targets. Id. at 27. PECO further asserted that, in order to achieve the future peak demand reduction goals, it cannot dedicate its entire funding amount to energy consumption reduction programs. Id. In rejecting these arguments, the Commission stated:

The Commission, however, would like to address PECO's claim that its programs must be in place well before the summer of 2016 in order to achieve any potential required peak demand reductions by May 31, 2017, and PECO's assertion that it must spend Phase II funds to meet such an obligation. The Commission recognizes these concerns, but declines to adopt PECO's proposed resolution for the reasons expressed in this Order and based on the facts and arguments presented in its Petition.

Reconsideration Order at 29 (citation omitted). Accordingly, it appears that the issue of a specific demand response budget set aside was already rejected by the Commission in the context of PECO's Petition for Reconsideration.

Second, to the extent that the Commission determines that it will accept additional argument and evidence with respect to this issue, the OCA maintains that the set aside requested by the Company is unnecessary. With respect to the establishment of peak demand goals beyond Phase I plan, Act 129 states:

If the commission determines that the benefits of the plans exceed the costs, the commission shall set additional incremental requirements for reduction in peak demand for the 100 hours of greatest demand or an alternative reduction approved by the commission.

66 Pa.C.S. § 2806.1(d)(2). At this time there is no way to determine either the scope or design of the DR programs that the Commission may order for Phase III. Additionally, as witness Reed

explained, the Commission's discretion in setting any future goals makes PECO's calculation of future costs incredibly speculative. He stated:

Since the PUC hasn't ruled on the peak demand savings goals for Phase III or whether those goals will be based on the 100 hours of greatest demand or an alternative reduction, it is unclear how PECO can determine their required DR budget. It would seem that PECO's DR budget as testified to by Mr. Jiruska is purely speculative.

PennFuture St. 1 at 13-14. Indeed, in its Reconsideration Order, the Commission itself recognized the speculative nature of including such a set aside when it stated:

First, the Commission has begun the process to evaluate the cost-effectiveness and design of the current peak demand reduction program and anticipates completing that process in 2013. The design of a future cost-effective peak demand reduction program is unknown at this point and may be drastically different from the current program.

Second, as it is unknown whether the peak demand program is cost-effective or what a cost-effective peak demand program design will entail, any peak demand or DLC program PECO proposes for Phase II may not provide PECO with reductions that it can use toward a future requirement. If no cost-effective peak demand programs are available, there will be no peak demand reduction requirement to meet by May 31, 2017. In addition, if there is a cost-effective demand reduction program, PECO's proposed programs may not be compatible, thus providing none of the benefits PECO seeks by implementing such programs. Lastly, if the Commission institutes a Phase III EE&C Program that includes peak demand reductions, we will provide guidance on when plans will need to be filed and implemented and address the funding of such a program.

Reconsideration Order at 29 (citations omitted).

Third, there is no indication that PECO will have to wait until Phase III begins in order to plan for and enter into contracts to obtain peak demand savings in the summer of 2016. In its Final Order, the Commission states that it will allow EDCs to start incurring Phase II costs during Phase I for administrative duties, including but not limited to: contracting with contract service providers, trade allies and vendors; preparing marketing materials associated with Phase II measures; and contracting with an independent evaluator. Final Order at 114. The

Commission went on to direct that the recovery of Phase II costs which are incurred during Phase I be deferred until Phase II cost recovery rates become effective. Id. Therefore, PECO may be able to begin spending Phase III funds during Phase II if similar treatment is afforded.

As witness Reed explained:

Assuming the Commission continues to follow the directive set forth in its Implementation Order, PECO will be able to start spending Phase III DR funds in Phase II to begin contracting with contract service providers, trade allies and vendors; preparing marketing materials associated with Phase III measures; contracting with an independent evaluator; etc. for DR programs that would begin in the Summer of 2016.

...

Based on the Implementation Order it would seem that PECO will be able to use Phase III funds in Phase II to begin laying the foundation for Phase III DR programs. Therefore there is no need to set aside Phase II funds for this purpose.

PennFuture St. 1 at 14-15.

For the foregoing reasons, the OCA submits that PECO's request for funding set asides to achieve speculative Phase III demand response targets must be denied.

C. Total Budget Calculation

PECO's final argument in its Petition for Evidentiary Hearing is that the Commission erroneously includes generation costs and fails to consider the 2008 economic downturn in the calculation of PECO's 2006 "total annual revenue" pursuant to Section 2806.1(g). PECO states that the Commission will not have properly exercised its administrative discretion unless it sets the spending cap on the basis of total annual revenues that reflect current and reasonably projected market conditions rather than its actual 2006 total revenues. Petition at 9. Specifically, PECO takes issue with the Commission's 1) inclusion of amounts collected by EDCs as billing agents for EGSs in the calculation of total revenues and 2) failure to consider that energy prices are much lower than in 2008 when Act 129 was enacted. Id. The Company

proposes that the Commission change the annual spending limit to 2% of PECO's actual revenue in 2011, exclusive of amounts collected from electric generation suppliers. PECO St. 1 at 17-18. If this change were accepted, PECO's Phase II allowable spending would be \$165,590,000, reducing annual spending from \$85.4 million to \$55.2 million per year or by 35%. PECO St. 1 at 17-18.

Preliminarily, the OCA would note that a calculation of the 2006 total EDC revenues pursuant to Section 2806.1(g) was performed prior to the implementation of all of the EDC's Phase I Plans in 2009. It is illogical to suggest that the calculation of what constitutes 2006 total EDC revenues would somehow be different for Phase II than it was for Phase I. Further, the OCA submits that the Company's claims respect to the calculation of "total revenues" for the Phase II budget are contrary to the plain language of Act 129 and must be rejected. Act 129 states:

The total cost of any plan required under this section shall not exceed 2% of the electric distribution company's total annual revenue as of December 31, 2006.

66 Pa.C.S. § 2806.1(g). The Act goes on to define "Electric distribution company total annual revenue" as:

amounts paid to the electric distribution company for *generation*, transmission, distribution and surcharges by retail customers.

66 Pa.C.S. § 2806.1(m) (emphasis added).

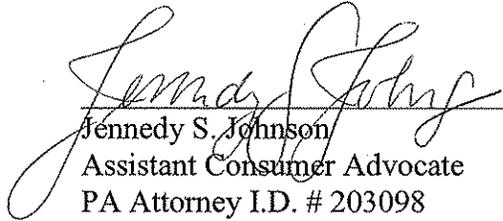
In Pennsylvania, it is well-settled that the "objective of all interpretation and construction of statutes is to ascertain and effectuate the intention of the legislature." 1 Pa.C.S. § 1921(a); Bayada Nurses, Inc. v. Commw., Dept. of Labor and Industry, 8 A.3d 866, 880 (Pa. 2010). The best indication of legislative intent is the plain language contained in the statute itself. Bayada Nurses, 8 A.3d at 880; see also Narberth Borough v. Lower Merion Twp., 915

A.2d 626 (Sup. 2007) (stating that the primary and favored indicator of the legislature's intention is the plain language of the statute under scrutiny). Here, the plain language of the statute mandates that the Commission include generation revenue in its calculation of total revenues for the purposes of this provision. Therefore, the OCA submits that PECO's attempt to exclude generation costs from the calculation of total revenues must be rejected.

III. CONCLUSION

The OCA maintains its support for the continuation of the Company's residential DLC program, but submits that PECO's requested modifications to the Phase II budget and consumption reduction targets, which PECO asserts are needed to continue this program, are not necessary. Similarly, the OCA submits that the Commission correctly decided not to set aside money for Phase III DLC programs in the Phase II budget and correctly included 2006 generation revenues in the calculation of the EDC's total annual revenues upon which the Phase II budget was set. For the foregoing reasons, the OCA respectfully requests that PECO's proposals be denied.

Respectfully Submitted,



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Date: October 19, 2012
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CERTIFICATE OF SERVICE

Re: Petition of PECO Energy 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

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Main Brief, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 19th day of October 2012.

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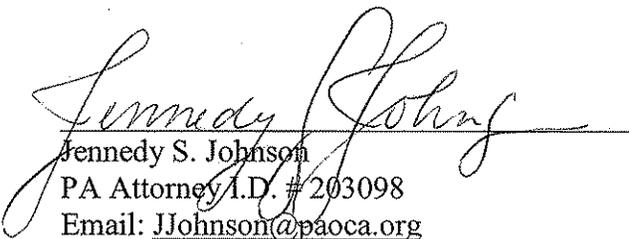
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