BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PECO Energy	:	
For an Evidentiary Hearing on the Energy	:	P-2012-2320334
Efficiency Benchmarks Established for the Period	:	
June 1, 2013 through May 31, 2016	:	

CLEAN AIR COUNCIL AND SIERRA CLUB'S REPLF BRIEF IN OPPOSITION TO PECO ENERGY'S PETITION FOR EVIDENTIARY HEARING

Date: October 30, 2012

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Clean Air Council ("Council") and the Pennsylvania Chapter of the Sierra Club ("Sierra Club") (collectively, "Intervenors"), on behalf of their respective members and the public interest, submit this Reply Brief in support of their Brief in Opposition to PECO Energy's ("PECO") Petition for Evidentiary Hearing ("Opposition Brief") and PECO's accordant to revise downward its energy efficiency targets as part of the Phase II Implementation Order issued by the Pennsylvania Public Utility Commission (the "Commission" or the "PUC") under Act 129.

I. INTRODUCTION

As explained in Intervenors' Opposition Brief and in the following Reply Brief, the targets specified for PECO in the Implementation Order are achievable and provide PECO with more than an adequate buffer to ensure that they are achieved within the spending cap specified by law while still allowing PECO to continue its demand response programs. PECO has failed to carry its burden to demonstrate otherwise, and has instead ignored its own prior experience in Phase I and relied on unsupported assumptions to argue that the spending allocations under Phase II are inadequate, despite being 25% higher than PECO's actual cost per megawatt/hour of

reductions in Phase I. Accordingly, the Phase II Implementation Order should remain unchanged, and PECO's petition should be denied.

II. ARGUMENT

In its main brief, PECO argues variously that, despite the Implementation Order's language to the contrary, PECO is required to implement demand response programs as part of Phase II, that the credits PECO carries over from Phase I actually cannot be applied to Phase II, and that thus, it must have its Phase II reduction target reduced to pay for the demand response programs it wishes to implement. Similarly, PECO argues that the spending cap employed by the Commission in calculating its reduction targets was too high.

PECO is wrong on all counts, and fails to present evidence sufficient to carry its burden to show that changes to the Implementation Order are required. Instead, the evidence in the record shows that PECO has ample resources available to it to carry out the demand responses it states it would like to implement, and that the cost cap calculated by the Commission was entirely appropriate. PECO's petition should be denied.

A. Standard of Review

A party seeking a rule or order from the Public Utility Commission bears the burden of proof. 66 Pa. C.S. § 332(a); *see also* Implementation Order at 31 ("The EDC contesting the consumption reduction requirement shall have the burden of proof"). As such, a "litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible." *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990) (denying petition where based only on substantial evidence). If a party upon whom the burden of proof is placed

fails to carry that burden, denial of the relief requested is necessary. *See, e.g., Warwick Water Works, Inc. v. Pennsylvania Public Utility Com'n*, 699 A.2d 770, 774-75 (Pa. Cmwlth. 1997).

B. PECO Improperly Characterizes the Implementation Order as Requiring Demand Response When the Commission's Order Instead Merely Allows It in Limited Situations

PECO argues that it should be allowed to divert Phase II funds away from energy efficiency and towards demand response, on the theory that—contrary to the Implementation Order's plain language—the Commission has required it to implement demand response programs in Phase II. However, PECO's reading of the Implementation Order is simply unsupportable; the Implementation Order contemplates electric distribution companies ("EDCs") conducting demand response programs in certain, specifically-enumerated contexts, on a voluntary basis.

The Implementation Order says the following concerning demand response programs, in a subsection titled "Exclusion of Peak Demand Reduction Obligations for Phase II":

> The Commission believes Act 129 is clear in its direction that the Commission must determine the cost-effectiveness of demand response programs before proposing additional peak demand reduction targets. As such, we will not adopt the position of those parties who advocate for additional peak demand reduction targets at this time.

Implementation Order at 33. Essentially, the Commission notes that it cannot require demand response until the Statewide Evaluator ("SWE") determines that such programs are cost effective; at that point, the Commission may begin a process to develop and require such programs:

> Should the SWE's demand response study result in a finding of cost-effective demand response programs for future phases of Act 129, the Commission will issue a tentative order proposing a TRC methodology for such demand response programs. Such a proceeding would be the appropriate forum for parties to argue the merits of the inclusion or exclusion of various factors within the TRC calculation for demand response . . .

Id. at 40. However, while noting that the Commission will not at this point require demand response programs as part of Phase II, the Implementation Order does go on to say that EDCs may of course implement such programs if they so choose:

> EDCs **<u>may</u>** continue, under the Act 129 EE&C Program, residential demand response curtailment measures, such as direct load control programs, that will be cost effective if continued. . . . **<u>The Commission will not, however, set any reduction goals for an EDC choosing to voluntarily continue any DR programs.</u>**

Id. at 42 (emphasis added). In short, the Implementation Order specifically does not require demand response programs as part of Phase II, and instead states that such programs are "voluntary" on the part of EDCs.

Nonetheless, PECO attempts to argue that the Implementation Order forces it to conduct demand response programs, claiming that an indication from the Commission that EDCs "may" continue such programs is "hardly different, from a practical matter, from imposing such a requirement." PECO Brief at 10. However, this interpretation ignores the plain language of the Implementation Order, which is abundantly clear. The Implementation Order repeatedly refers to aspects of the energy efficiency programs as "requirements," but pointedly declines to refer to

demand response in such a way.[1] Indeed, PECO even admits as much, suggesting that "while not using the works [sic] 'require' or 'requirement'" the Commission somehow really did mean "requirement." PECO brief at 10.[2] The Commission is and was perfectly capable of requiring things that it meant to require, and of declining to require things that it meant to be voluntary. To pretend otherwise, as PECO does, effectuates an unnecessary and unwarranted misreading of the Implementation Order.

PECO's argument on this point thus fails; none of its Phase II funding should be diverted to demand response programs, and accordingly, its reduction targets should remain unchanged.

C. Despite PECO's Misreading of the Implementation Order to Require that All Phase II Budget Be Spent, PECO Has Credits from Phase I that Could Easily Be Used for Demand Response

Although PECO has ample carryover resources available to it from Phase I in the form of credits from overcompliance, PECO relies on a similar misreading of the Implementation Order to argue that those resources are unavailable for the demand response programs it would like to continue in Phase II, by claiming that the Implementation Order requires every dollar available in Phase II be spent on energy efficiency, regardless of credits, targets, or any other consideration. PECO is simply wrong, however.

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[1] *See* Implementation Order at 40 ("We, however, do not believe it is prudent to require residential demand response programs absent a determination of cost-effectiveness"); *see also*, *id.* at 20 (referring to a "requirement" for EDCs to include "comprehensive measures" in their EE&C plans); *id.* at 24 (referring to "consumption reduction requirements"); *id.* at 28 ("requir[ing]" EDCs to submit EE&C plans designed to achieve at least 25 percent of the target amount in each program year); *id.* (referencing "requirements" for quarterly and annual reports from the EDC); *id.* at 30 (noting potential penalties if EDCs fail to meet the Commission-determined consumption reduction "requirements");

[2] PECO's claims are especially odd given the Commission's clear statement that it believes that it cannot require demand response programs until *after* the SWE determines they are cost-effective. Implementation Order at 33.

The Implementation Order specifically addresses an important issue for transition from Phase I to Phase II: what to do with reductions achieved during Phase I in excess of Phase I targets? The Commission decided that such reductions should be applied towards achieving targets in Phase II: "[t]he Commission will allow those EDCs that have achieved their Phase I three percent target before the end of Phase I to continue their programs **and credit all of those savings above the three percent Phase I target towards Phase II targets**". Implementation Order at 58-59 (emphasis added). This "carryover" ensures that EDCs receive credit for overcompliance in Phase I, by applying those reductions to the new targets in the Implementation Order.

In the case of EDCs like PECO that are projected to have very significant savings from Phase I above and beyond Phase I targets, crediting those savings towards Phase II will free up substantial resources that could be used for additional energy efficiency, or put towards the demand response programs that PECO desires to implement. Specifically, PECO is projected to save an extra 83,000 MWh over and above its target for Phase I. *See* Docket No. P-2012-2320334 October 3, 2102 Hearing Transcript ("Hearing Transcript") at 66:16-19. These 83,000 MWh extra savings from Phase I can be used to reduce PECO's overall Phase II target of 1,125,851 MWh in energy savings, at a calculated acquisition cost of $227.55 per MWh. Implementation Order at 24, tbl. 1. This translates to a reduced Phase II target of 1,042,851 MWh, or a budget savings of roughly $19 million—enough to pay for the majority of the residential direct load control ("DLC") program PECO would like, or a slightly scaled back program in its entirety.

In face of this, PECO argues that the Implementation Order, while providing for carryover credits, simultaneously precludes the use of those credits. *See* PECO Brief at 9.

PECO does so through reference to statements in the Implementation Order to the effect that the "goal" of the Commission is for EDCs to "seek out additional, cost-effective measures to implement," once targets are met, and that the Commission "expect[s]" that EDCs will "meet their compliance targets and continue to strive for more, cost-effective savings." Implementation Order at 26. But such aspirational language does not nullify the Implementation Order's clear establishment of carryover credits from Phase I, particularly when placed in its proper context. Although PECO does not cite to it, these statements are preceded by language indicating that the Commission is not *requiring* EDCs to exhaust their Phase II budgets on energy efficiency even after targets are met:

> At the outset, the Commission would like to explain our overall framework for establishing savings reduction targets. Our framework is designed to establish compliance energy reduction targets that must, at a minimum, be met. Our framework also **strives to encourage** EDCs to exceed those targets **if** additional, cost-effective savings **can be obtained** within the limited program budgets.

Id. at 25 (emphasis added). Instead, such additional measures are *encouraged*, if they are cost-effective.[3]

Moreover, it is a bedrock canon of regulatory interpretation that one provision of a rule or order should not be read to contradict another provision—the Commission is presumed to have issued the Implementation Order in such a way that all of its provisions have meaning. If, contrary to its plain language meaning, the provision of the Order encouraging EDCs to implement further cost-effective reduction measures even after reduction targets have been met

[3] The Commission thus places both Phase II reductions in excess of an EDC's targets and potential Phase II demand response programs on the same footing: potentially beneficial endeavors that may be voluntarily undertaken if cost-effective. *Compare* Implementation Order at 25-26 *with id.* at 42.

means that all Phase II budget *must* be exhausted on energy efficiency, then the provisions providing for carryover credits from Phase I are meaningless.[4] Such a reading is nonsensical and unnecessary. PECO's argument that it lacks resources to implement its proposed Phase II demand response programs fails, as its credits from Phase I can be applied in Phase II.

D. PECO's Proposed DLC and DR Spending Is Significantly Inflated

PECO proposes diverting roughly $36 million for direct load control ("DLC") and $17.4 million for demand response programs from its Phase II energy efficiency budget, and reducing its energy efficiency target by a concordant amount. However, even if PECO had demonstrated through evidence that it was appropriate or necessary to so divert funds—which it has not—the sums it wishes to divert to its desired programs are inflated.

First, the $36 million for PECO's proposed DLC program improperly includes program elements that both fail to be cost-effective and are disallowed by the Implementation Order. As per the Order, "EDCs may continue, under the Act 129 EE&C Program, **residential** demand response curtailment measures, such as direct load control programs, **that will be cost effective** if continued." Implementation Order at 42 (emphasis added). However, PECO's proposed DLC program is not just for residential DLC—it includes commercial and industrial DLC as well. *See* PECO Direct Testimony, Exhibit FJJ-1 (separating out DLC program categories into "Residential DLC" and "Commercial/Industrial DLC").[5] Moreover, those components are also

[4] PECO's argument likewise needlessly nullifies the MWh reduction targets in Phase II as the requirements EDCs are intended to hit—if the Commission were really simply requiring EDCs to spend their entire budgets on cost-effective reductions, full-stop, then why bother setting specific MWh targets? Implementation Order at 24.

[5] PECO's witness, Frank Jiruska, distinguished between residential and "mass market" DLC in explaining why it included commercial and industrial DLC in its total DLC cost figure. *See* Hearing Transcript at 38:2-17. However, the Implementation Order does not embrace PECO's proposed formulation; the only place the term "mass market" appears in the Implementation

deemed by PECO itself to not be cost-effective. *See id.*; *see also* Hearing Transcript at 72:4-17 (if the cost-benefit ratio is less than one "the benefits do not exceed the costs"). Thus, PECO's $36 million in proposed costs for the DLC program it would like to implement is inflated beyond what the Commission authorizes.

Second, the $17.4 million cost that PECO projects for "a subsequently established peak DR target by May 31, 2017" is entirely without basis. PECO Brief at 12. As PECO notes, the proposed spending would be for a "subsequently established" program—i.e., for one that does not now, and may not ever, exist, as indeed, PECO testified:

> Q: Is it PECO's position that absent being able to spend Phase II funds, that you won't be able to achieve Phase III demand response targets?
>
> A: That's correct, **should Phase III contain demand response targets, which is still unknown**.
>
> Q: Yes. That was going to be my follow-up question, whether or not Phase III targets have been set.
>
> A: They have not yet.
>
> Q: They have not yet. **So you can't say now that you know what those targets will be?**
>
> A: **That's correct**.

Hearing Transcript at 39:9-19 (emphasis added); *see also* Public Utility Commission Reconsideration Order, Docket Nos. M-2012-2289411, M-2008-2069887 (Sept. 27, 2012) ("Reconsideration Order") at 29 ("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").

Order is in paraphrasing PECO's comments on the tentative implementation order. Implementation Order at 36.

Thus, PECO's projection of $17.4 million in Phase II costs towards unknown Phase III demand response requirements is at best speculative, and at any case unwarranted.[6] *Samuel J. Lansberry*, 578 A.2d at 602; *Warwick Water Works*, 699 A.2d at 774-75.

Because the total amounts of money PECO proposes to divert from Phase II energy efficiency programs are overstated, PECO's arguments that it cannot fund the demand response it would like to implement through existing mechanisms fall flat. *See* PECO Brief at 10 (appearing to argue that if carryover credits from Phase I do not wholly eclipse the DLC spending PECO would like to engage in, those credits should be ignored and all DLC spending diverted from energy efficiency). Instead, and as explained more fully in Intervenors' Opposition Brief, the evidence PECO has submitted and PECO's own testimony indicate that PECO could quite easily pursue its desired demand response programs during Phase II without re-allocation of funds away from energy efficiency and concomitant reduction of the energy efficiency targets.[7] PECO has failed to carry its burden in establishing that such a reduction is necessary, and therefore its petition should be denied.

[6] Nor does PECO at any point explain how the six components of the $17.4 million in Exhibit FJJ-6 are arrived at, how they could be accurate given that PECO is merely guessing at what might be required in Phase III; nor is there any discounting for the likelihood that no funds may need to be spent at all, or for what later Phase II program years PECO plans to spend the money. Instead, PECO merely alludes to "uncertainty" as an explanation for part of the cost. PECO Testimony at 15. It is notable that PECO wishes to project detailed demand response program costs for a program that will not even be created by the Commission for several years, while simultaneously attempting to downplay the prevision with which it knows the value of the carryover credits from Phase I that it could use to pay for demand response in Phase II. *See* PECO Brief at 10, n.7 ("The final actual savings figure will not be known until Phase I ends on May 31, 2013, although even that figure must be verified by the Commission in February 2014").

[7] *See* Intervenors' Brief at 6-9 (demonstrating that carryover credits, unused Phase I budget, and budgetary cushion in Phase II could provide many tens of millions of dollars of available funding for potential demand response programs without necessitating a target reduction).

E. The Commission Calculated Revenues—and therefore PECO's Spending Cap—Properly

Finally, the spending cap for PECO in the Implementation Order was developed properly and is completely consistent with the requirements of Act 129. Act 129 establishes the spending cap for each EDC as "2% of the electric distribution company's total annual revenue as of December 31, 2006," and defines "electric distribution company total annual revenue" as "[a]mounts paid to the electric distribution company for generation, transmission, distribution and surcharges by retail customers." 66 Pa. C.S. § 2806.1(g), *id.* at § 2806.1(m). Thus, the Commission acted entirely consistent with the statute and well-within its authority in setting the cap for PECO as 2% of its 2006 revenues.

In face of this, PECO makes two arguments. First, PECO maintains, without authority, that the Commission "must" set a funding level that is "below the 'cap'" and also "based on the revenue levels an EDC is likely to achieve during the period that a consumption reduction target must be met." PECO Brief at 15-16. However, PECO's argument is a *legal* one, not an evidentiary one, and thus is completely out of place in the narrow discussion of issues in the evidentiary hearing process. *See* Implementation Order at 31 (evidentiary petitions are solely "to contest the facts the Commission relied upon in adopting the consumption reduction requirements" and "[t]he scope of any such proceeding will be narrow and limited to the consumption reduction requirement issue."). Arguing that the Commission somehow failed to apply a novel legal test in determining the appropriate spending cap does not address the "facts the Commission relied upon," and thus is extraneous to this proceeding. PECO could have and should have sought resolution of this issue through the reconsideration process, in which it did participate.

Moreover, even adopting *arguendo* PECO's "reasonableness" test, PECO has presented no real evidence that the spending cap is unreasonable. At most, PECO simply argues that 2006 revenues were somewhat higher than current revenues, and that current electrical prices are somewhat lower than they were in 2006. PECO Brief at 16; PECO Testimony at 16-17. In addition to failing to flesh those assertions out with concrete numbers, PECO also fails to offer evidence as to either what revenues or electrical prices will be "during the period that a consumption reduction target must be met," i.e., during Phase II. Certainly, the spending cap is higher than what PECO appears to desire, but this in and of itself is not evidence carrying PECO's burden.[8] *Samuel J. Lansberry*, 578 A.2d at 602; *Warwick Water Works*, 699 A.2d at 774-75.

Second, PECO argues that the Commission's legal interpretation as to the definition of "revenues" is incorrect, despite being consistent with the definition employed in Phase I. However, the Commission's promulgation of the Implementation Order and the spending caps contained therein is completely consistent with its authority under Act 129, and is therefore deserving of deference. *Schuylkill Twp. v. Pennsylvania Builders Ass'n*, 607 Pa. 377, 385 (Pa. 2010) (courts must give "substantial deference to an agency's interpretation of a statute the agency 'is charged with implementing and enforcing.'") (citing *Commonwealth, Office of Administration v. Pennsylvania Labor Relations Board*, 591 Pa. 176, 916 n. 11 (Pa. 2007)); *see also Cherry v. Pennsylvania Higher Education Assistance Agency*, 537 Pa. 186 (Pa. 1994) ("An interpretation by the agency charged with a statute's implementation is accorded great weight and

[8] PECO refers to PECO's revenues and electrical prices as "important factors" that "were not considered and not recognized by the Commission in establishing the consumption reduction targets". PECO Brief at 16. However, PECO also testified that such information was known to the Commission when it issued the Implementation Order. Hearing Transcript at 69:10-19 (noting that energy prices are "publicly available information.")

will be overturned only if such a construction is clearly erroneous.") More importantly, PECO's arguments are, again, legal and not evidentiary, and so exceed the scope of this docket, and could have and should have been addressed during the reconsideration process. *See* Implementation Order at 31 (evidentiary petitions are solely "to contest the facts the Commission relied upon in adopting the consumption reduction requirements" and "[t]he scope of any such proceeding will be narrow and limited to the consumption reduction requirement issue.")

As such, PECO's arguments concerning the cost cap for Phase II fail, and its petition should be denied.

III. CONCLUSION

For the foregoing reasons, PECO has failed to sustain its burden in demonstrating that alterations to the energy efficiency targets set for it in the Implementation Order should be altered. PECO's Petition should accordingly be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of Clean Air Council and Sierra Club's Reply Brief in Opposition to PECO Energy's Petition for an Evidentiary Hearing upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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