**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company :

for Approval of its Act 129 Phase II : M-2012-2333992

Energy Efficiency and Conservation Plan :

**FIFTH PREHEARING ORDER**

In accordance with the provisions of 52 Pa. Code § 5.483, the purpose of this Order is to clarify my prior statements at the Prehearing Conference on November 30, 2012, with respect to "comments," filed with the Secretary of the Commission at this docket and the relationship of “comments” to the certified (evidentiary) record.

On November 1, 2012, PECO Energy Company (PECO or Company) petitioned the Pennsylvania Public Utility Commission (Commission) for approval of the Company's Phase II Energy Efficiency and Conservation Plan (Phase II Plan). The Phase II Plan is intended to reduce energy consumption in accordance with the requirements of Act 129 of 2008, 66 Pa.C.S.

§ 2806.1 (Act 129) and the *Energy Efficiency and Conservation Program*, Docket No. M-2012-2289411 (Order entered August 3, 2012) (*Implementation Order*).

A Prehearing Conference was held in this case on November 30, 2012, at which time I articulated how I anticipated “comments” being treated in this case, that being in response to a question from an observer for the Keystone Energy Efficiency Alliance (KEEA). N.T. 33-34; 35-37. Given that one of the primary responsibilities of a Presiding Officer in these Act 129 Phase II cases is the certification of the record in conformity with the Commission’s directive, as opposed to issuing a decision, this is a critical issue. My decision was and remains that pre-filed comments from non-intervenors will not be included in the certified record.

What constitutes, “the record?” Turning to *Black’s Law Dictionary*, “Record *Court proceedings*,” is defined as:

The official collection of all the trial proceedings, exhibits, orders and word-for-word testimony that took place during the trial. The ‘record’ includes pleadings, the process, the verdict, the judgment and such other matters as by some statutory or other recognized method have been made a part of it. *C.J. Tower & Sons of Buffalo, Inc. v. U.S. Cust Ct*., 347 F.Supp 1388, 1389

*Black’s Law Dictionary* 1145 (5th ed. 1979).

In the *Implementation Order*, the Commission also makes it clear that the certified record is to be derived from the evidentiary proceeding:

If an EDC files a Petition by August 20, 2012, the matter will be assigned to the Office of Administrative Law Judge for *expedited hearings with certification of the record* to the Commission by no later than November 2, 2012. Petitions for intervention must be filed within 10 days of an EDC filing a request for a hearing.

At such hearings, the EDC *will have the opportunity to present evidence* and argument as to its reasonable consumption reduction target for Phase II. While the Commission will not entertain petitions from other parties, any other party *may intervene in the EDC-requested hearing and present evidence*. Given the narrow scope of the proceeding and time constraints, we believe it is appropriate to have *certification of the record rather than issuing a recommended decision*. As part of this process, the parties will have the opportunity to file main and reply briefs directly to the Commission rather than filing exceptions to a recommended decision.

*Implementation Order* at 31 (emphasis added).

Of course, the Commission is not bound in its evidentiary determinations by the rulings of Presiding Officers and may take whatever notice it wishes of comments filed at this docket. However, for a Presiding Officer, the Pennsylvania Public Utility Code at 66 Pa. C.S.

§ 335(a) provides for the certification of “the entire record” to the Commission for decision in a proceeding.[[1]](#footnote-1) While Section 335(a) does not define what constitutes “the entire record,” the *Implementation Order* clearly contemplates that the record in this case is to be established in the context of an adversarial proceeding. Further, the Commission’s regulation at 52 Pa. Code Section 5.402(a) states: "A party shall move the admission of evidence *into the record* upon presentation of the sponsoring witness, and after opportunity for other parties to examine the witness." (Emphasis added). Evidence "of record," therefore, must be formally sponsored by a party and received *into* the record.[[2]](#footnote-2) This provision of the Commission's procedural rules and regulations is essential to the integrity of the record and to afford due process of law.

In sum, and based on the foregoing, as Presiding Officer I will only consider including “comments” in the certified record if they are introduced at hearing by a party to the proceeding and an authenticating witness is made available for cross-examination.

Date: January 2, 2013 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Dennis J. Buckley

Administrative Law Judge

**P-2012-2333992 - Petition of Peco Energy Company for Approval of its Act 129 Phase II Energy Efficiency and Conservation Plan.**

***Revised 12/28/12***

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1. See also 52 Pa. Code § 5.531(a), *Certification of record without decision*. [↑](#footnote-ref-1)
2. I note that even “public documents,” including reports, decisions, opinions “or other document[s] on file with the Commission,” are to be offered into evidence. 52 Pa. Code § 5.406(a)(1). [↑](#footnote-ref-2)