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April 27, 2020

Rosemary Chiavetta, Esq., Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, Pennsylvania 17120

Re: Act 129 Phase IV Tentative Implementation Order, Docket M-2020-3015228

Dear Secretary Chiavetta:

Enclosed for filing at the above-referenced docket, please find the comments of the Energy Association of Pennsylvania to the Act 129 Phase IV Tentative Implementation Order.

Sincerely,

Donna M.J. Clark

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Vice President & General Counsel

Enclosure

CC: Joseph Sherrick, Bureau of Technical Utility Services (email only)
Adam Young, Law Bureau (email only)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Energy Efficiency and Conservation Program	:	Docket No. M-2020-3015228

Comments of the
Energy Association of Pennsylvania
To Act 129 Phase IV Tentative Implementation Order

I. Introduction

On March 12, 2020, the Pennsylvania Public Utility Commission ("PUC" or "Commission") entered a Tentative Implementation Order ("Phase IV Tentative Implementation Order") to present its evaluation of the continuing costs and benefits of the Energy Efficiency and Conservation Program ("EE&C Program") pursuant to Act 129 of 2008 and to propose additional incremental reductions in electric consumption and peak demand for a potential Phase IV based on its determination that the EE&C Program continues to be cost-effective. The Commission currently seeks public input on its determination that an EE&C Program will continue to be cost-effective; on the proposed additional mandated incremental reductions in consumption and peak demand for a potential Phase IV; and on a number of specific parameters that would impact the design and implementation of potential Phase IV Energy Efficiency & Conservation Plans ("EE&C Plans") that each electric distribution company ("EDC") operating in the Commonwealth of Pennsylvania with at least 100,000 customers is required to adopt pursuant to Section 2806.1 of the Public Utility Code, 66 Pa.C.S. § 2806.1.

The Phase IV Tentative Implementation Order as well as the underlying analysis and work conducted by the Commission, its staff, and the Phase III Statewide Evaluator ("SWE") was completed prior to the outbreak of the coronavirus (COVID-19) pandemic in the United States, prior to the Pennsylvania Governor's Declaration of a Disaster Emergency on March 6, 2020 and the subsequent orders related to COVID-19 that have been issued by the Governor of Pennsylvania, the Pennsylvania Secretary of Health, and the Commission. COVID-19 and the actions taken thus far to combat this public health threat may have an impact on the implementation of a potential Phase IV EE&C Program. Determining a reasonable way to address the potential impacts caused by this unforeseen circumstance warrants consideration now by the Commission in the context of finalizing a Phase IV implementation order.

The critical studies conducted by the SWE include an energy efficiency and peak demand reduction potential study ("EEPDR Potential Study") and a dispatchable demand response potential study ("DDR Potential Study"). The EEPDR Potential Study and the DDR Potential Study provide expert opinions and reports regarding cost-effective consumption and peak demand reduction potential in Pennsylvania based on a variety of assumptions. These studies provided the foundation for the Commission's conclusions and proposals detailed in the Phase IV Tentative Implementation Order. Both potential studies were submitted by the SWE to the Commission on February 28, 2020 and subsequently released to the public by a Secretarial Letter dated March 2, 2020.

As in previous phases of Act 129, public input regarding the methodology/work plan established to conduct the potential studies was not sought by the Commission. These studies are, in fact, expert reports prepared to inform the Commission's determinations regarding various mandatory targets and design parameters for the next Act 129 EE&C Program and subsequent

EE&C Plans. In contrast to previous phases, however, the COVID-19 pandemic and subsequent related state actions precluded the stakeholder meeting from occurring which ordinarily would have been scheduled with the SWE to provide information regarding how the studies were conducted and to detail underlying assumptions. The stakeholder meeting set for March 27 was cancelled. Consequently, stakeholders had no opportunity to ask questions and/or seek clarifications concerning the numerous assumptions and extensive data used by the SWE to conduct the potential studies completed prior to the COVID-19 pandemic. Notably, there has been no opportunity to identify issues or concerns arising from the unforeseen and fluid circumstances presented by the pandemic. Nor has there been an opportunity to offer and discuss solutions.

These comments represent the first opportunity for public discourse on the potential impacts that the COVID-19 pandemic or other future unexpected circumstances could have on the EDCs ability to successfully achieve the proposed mandates established for the Phase IV EE&C Program. Essentially, the COVID-19 pandemic and its impact have revealed a fundamental need to build additional flexibility into the Act 129 EE&C Program. A final implementation order that outlines a process for EDCs to apply to the Commission for relief from various unforeseen circumstances would provide a solution.

The Phase IV Tentative Implementation Order envisions a five-year Phase IV EE&C Program that would operate from June 1, 2021 through May 31, 2026 and sets forth proposed mandatory incremental reduction targets for consumption and peak demand for each of the EDCs subject to Act 129.[1] *See* Phase IV Tentative Implementation Order at p. 8, Table 1 and at p. 37,

[1] *See* fn. 5, *infra*.

Table 16.[2] The Phase IV Tentative Implementation Order provides thirty days for public input from the date published in the *Pennsylvania Bulletin* (i.e., March 28, 2020) and allows an additional fifteen days for reply comments. Comments are due on April 27 with reply comments due on May 12. The Energy Association of Pennsylvania ("EAP" or "Association") provides comments to the Phase IV Tentative Implementation Order in addition to the specific comments filed by its EDC members subject to the provision of Act 129.[3]

II. Comments

A. The Onset and Ramifications of Current Unforeseen Circumstances Calls for a Phase IV Energy Efficiency and Conservation Program Which Provides Flexibility in the Setting of Targets or Other Requirements and a Fair Process for Consequent Adjustments to Individual EDC Energy Efficiency and Conservation Plans as Necessary.

As detailed above, at the time the EEPDR and DDR Potential Studies and the Phase IV Tentative Implementation Order were respectively conducted and entered, neither the Commission nor the SWE could have foreseen the devastating effects of the COVID-19 pandemic, including its impact on the Commonwealth, its economy, its citizens, and the energy efficiency marketplace. EAP urges the Commission to act now and craft an implementation order which builds on the experience and maturity of the Act 129 EE&C Program and establishes a process flexible enough to address continued impacts of the COVID-19 pandemic and any other

[2] *See also*, Phase IV Tentative Implementation Order at p. 12, Table 4. EDCs will spend collectively approximately $1.2 billion to implement EE&C Plans during Phase IV as well as approximately $10 million to fund a Phase IV Statewide Evaluator contract. Estimated costs for each program year, excluding the Statewide Evaluator contract, are approximately $245 million in the aggregate.

[3] EAP members subject to Act 129 include Duquesne Light Company ("Duquesne"); Metropolitan Edison Company ("Met-Ed"); PECO Energy Company ("PECO"); Pennsylvania Electric Company ("Penelec"); Pennsylvania Power Company ("Penn Power"); PPL Electric Utilities ("PPL") and West Penn Power Company ("West Penn Power").

future unforeseen circumstances or factors beyond the utilities control that would require changes to the mandates or other requirements established in the Phase IV Final Implementation Order.

In that respect, the "business-as-usual" process used to establish and challenge the mandates, and to a lesser extent, the design parameters for Phase IV of Act 129 is no longer sufficient. The general process of finalizing mandates and other design criteria for the next Act 129 phase was formed at the conclusion of the initial EE&C Program approximately a decade ago. At that point, the Commission and the EDCs, along with other interested parties, were focused on the stringent timeframes created by the statute and the need to facilitate a seamless and orderly path between phases so as to avoid a costly shut-down of programs. Mandates, design criteria, and parameters as well as processes and deadlines for challenging targets, filing new EE&C Plans, and reporting criteria were proposed in a tentative order. Public input was solicited and comments were filed. A final implementation order was entered and, at that point, EDCs could initiate a formal proceeding limited to a challenge of consumption and peak demand requirements via an expedited evidentiary hearing. *Accord,* Phase IV Tentative Implementation Order at pp. 23-25.

The goal was to provide a brief window to the EDCs to challenge targets[4] and for the Commission to resolve any challenge such that the new plan for the next phase would be filed by mid-November. The order ruling on that new plan would be finalized in the early Spring of the following year and the new phase could begin the day after the old phase ended. No consideration was given to when and how to make adjustments to targets or other requirements if

[4] The implementation orders provide that "the Commission will not entertain petitions from other parties" challenging targets but allow for other parties to "intervene in the EDC-requested hearing and present evidence." *See, e.g.,* Phase IV Tentative Implementation Order at p. 24.

circumstances beyond the control of the EDCs occurred and impeded EDC performance and the ability (or willingness) of customers to participate in Act 129 programs and measures.

In the past, maintaining specific reduction targets for the duration of an Act 129 EE&C Program was a reasonable practice under Pennsylvania's energy efficiency statute. It resulted in the implementation of plans that delivered measurable, verifiable and cost-effective savings to customers under a prescriptive statutory scheme which penalizes EDCs for missing either mandated target by even one MWh or MW, respectively.[5] The unforeseen circumstances created by the COVID-19 pandemic, however, highlight the need to provide an additional process during a phase whereby an EDC can apply to the Commission to amend targets or other requirements due to factors beyond the control of the utility, i.e., a process which provides the Commission to essentially declare a force majeure event and approve adjustments.[6]

EAP contends that the Commission has discretion under Act 129 of 2008 to provide for this additional process under extraordinary and unforeseen circumstances such as the COVID-19 pandemic.[7] And to the extent the Commission has not expressly recognized this discretion

[5] EDCs face mandatory penalties of up to $20 million for failure to meet the Commission determined targets. 66 Pa. C. S. § 2806.1(f)(2). As of March 2019, Pennsylvania is one of 24 states that have statutes establishing statewide energy efficiency resource standards and requiring utilities to reduce consumption and/or demand. However, many states neither mandate that the utility achieve 100% of a determined target nor mandate penalties based on the failure to meet a prescriptive target. In Massachusetts, for example, utilities meet their EE requirements if they achieve 75% of the agreed-upon goal. And, in other states not only are utilities not subject to monetary penalties, they are eligible to receive incentives if they reach 70% (Connecticut), 80% (Colorado) or 85% (California) of their consumption reduction target. See, ACEEE 2019 State Energy Efficiency Scorecard, https://www.aceee.org/sites/default/files/publications/researchreports/u1908.pdf and *State Electric Regulatory Framework.* The Edison Foundation Institute for Electric Innovation. IEI Report December 2014. https://www.edisonfoundation.net/iei/publications/Documents/IEI_stateEEpolicyupdate_1214.pdf

[6] The Ohio energy efficiency statute allows an amendment to "benchmarks…if, after application by the electric distribution utility, the commission determines that the amendment is necessary because the utility cannot reasonably achieve the benchmarks due to regulatory economic or technological reasons beyond its reasonable control." Ohio Administrative Code, Section 4901: 1-39-05(D).

[7] See, 66 Pa. C. S. § 2806.1(c)(3) which provides discretion to the Commission to set the incremental targets in subsequent phases of the Act 129 EE&C Program where it has been determined that the EE&C Program remains cost-effective. The Commission has previously exercised such discretion by creating requirements not specifically required by the statutory language, such as the various low-income parameters and by discontinuing requirements found to be unnecessary as the market matured, such as proposing to eliminate the GNI carve-out in Phase IV.

previously, the Governor's Declaration of Disaster Emergency and subsequent orders closing non-essential business and requiring the Commonwealth's citizens to stay-at-home provide the basis and the justification for the Commission to establish a process whereby EDCs can apply for modifications of Phase IV consumption and demand reduction targets or other requirements based on unforeseen circumstances that are beyond the control of a utility.

Additionally, establishing a way for the EDCs to apply for relief during a phase to address unforeseen circumstances facilitates an administratively efficient process for the new EE&C Plans and the timely and orderly start of Phase IV of the EE&C Program. It would build flexibility into this regulatory program such that, if circumstances warrant and the market or business operations remain constrained or other unforeseen circumstances impact an EDC's ability to achieve mandatory targets or other requirements[8], the EDC has a clear path to apply for relief. By acting now in the context of finalizing the Phase IV Implementation Order, EAP believes that the timeline for Phase IV could remain fully intact, i.e., Fall filing of the new EDC EE&C plans, with a Commission order finalizing those plans entered in early Spring of 2021, and a June 1, 2021 start date for the next phase.

B. The Implementation Order Should Provide for Carryover of Coincident Peak Savings Achieved in Phase III as Cost-Effective and as Incentive for EDCs to Maximize Savings from Consumption Reduction Programs During the Final Year of Phase III.

Similar to proposals regarding accumulated savings in excess of consumption reduction requirements achieved in earlier phases of the EE&C Program, the Phase IV Tentative

[8] For example, it is difficult to determine the full extent of the economic fall-out on customers and what behaviors will become the "new norm". Even assuming a fast recovery of the overall economy and that citizens return to jobs from which they were furloughed, it is not possible to project whether individual business or household finances will support energy efficiency projects or whether there will be a willingness to have contractors enter a home or business to complete projects until there is more certainty that the health crisis has been abated.

Implementation Order provides that EDCs are allowed to carryover consumption reduction savings "attained in Phase III in excess of their targets for application towards their Phase IV targets." Phase IV Tentative Implementation Order at p. 23. The Commission explains that allowable carryover savings must have exceeded the Phase III target, not including any carryover from Phase II. *Id.* The Phase IV Tentative Implementation Order also recognizes the benefit of permitting the carryover of low-income carve-out consumption savings from Phase III. To be eligible, the EDC must have both accumulated carryover consumption savings based on the overall portfolio target for Phase III and exceeded its Phase III low-income carve-out target. Experience with carryover savings has been successful and encourages EDCs to continue program implementation past the attainment of targets to the conclusion of the phase so long as budgets remain.

In concert with the change in the proposed demand reduction program for Phase IV and the Commission's recognition of the many benefits associated with coincident peak demand reduction achieved through energy efficiency measures, EAP recommends that the Commission allow for carryover of coincident peak demand savings achieved in Phase III towards the target established for coincident peak demand savings in Phase IV. EAP suggests that where the criteria for carryover of accumulated consumption savings, including low-income carve-out consumption savings, is met, the coincident peak demand savings attributable to the carryover consumption savings should be available to meet Phase IV demand reduction targets. This is in line with the Commission's proposal that in Phase IV demand reduction can be achieved via the coincident peak demand reduction from the consumption reduction measures as compared to peak reduction achieved via a dispatchable demand reduction program. The Commission has concluded that this program change is more beneficial and cost-effective than the prior program design. Permitting carryover aligns with that conclusion and will be an incentive for EDCs to maximize consumption reduction savings during Phase III to the benefit of customers even after Phase III savings have been achieved.

C. Establishing Prescriptive Phase IV Peak Demand Reduction Targets Based on Achieving 100% of the Estimate for Expected Reduction in Coincident Peak Demand is Overly Prescriptive, Aggressive and Fails to Provide Needed Program Design and Implementation Flexibility to EDCs.

EAP supports the Commission proposal to require that EDCs achieve Phase IV peak demand reduction targets via coincident peak demand reduction achieved through energy efficiency measures as opposed to achieving targets via dispatchable demand response programming. As the Commission opined in the Phase IV Tentative Implementation Order, not all MW impacts are created equally. Phase IV Tentative Implementation Order at p. 34.

Coincident peak demand reductions achieved via energy efficiency measures, which typically have multiple years of useful life, will persist for years after the conclusion of Phase IV in 2026 versus reductions achieved via dispatchable demand response programs. *Id.* Coincident peak demand reductions achieved via energy efficiency measures are available every day, summer and winter, versus reductions achieved via dispatchable demand response programs that operate on a limited number of days over a summer. *Id.* Moreover, peak demand reductions coincident to consumption reductions are more economical, eliminating the need for separate demand response programs and streamlining program administration. For all these reasons, EAP supports the shift from dispatchable demand response programming to a reliance on coincident peak demand reduction achieved in connection with the consumption reduction programming for the Phase IV EE&C Program.

EAP contends, however, that creating a Phase IV peak demand reduction target for each EDC based on achieving 100% of "the expected reduction in coincident peak demand estimated in the EEPDR Potential Study" is overly prescriptive, aggressive and unreasonable. The basis of the proposed demand reduction target is such that an EDC's failure to meet the consumption reduction target for Phase IV will likely result in the failure to meet its peak demand reduction obligations effectively doubling the potential for penalties for the energy efficiency targets. Requiring perfect performance versus a measure of best efforts in order to achieve compliance and avoid the minimum one-million-dollar penalty pursuant to 66 Pa. C.S. § 2806.1(f) creates an inflexible compliance standard that will be inherently difficult and costly to achieve.

Heightening this concern, the underlying assumptions and mix of energy efficiency measures used by the SWE to determine the estimated coincident peak demand reduction in the EEPDR Potential Study have not been fully disclosed and, even if made available to the EDCs and adopted in their individual Phase IV EE&C Plan, would not result in actual savings equal to the estimate in the study. Even without the uncertainties created by the COVID-19 pandemic and the actions imposed to abate the health crisis, meeting the precise estimate would be based entirely on luck and circumstance as opposed to effective implementation and reasonable performance.

Rather than basing the target on meeting 100% of "the expected reduction in coincident peak demand estimated in the EEPDR Potential Study", EAP suggests a target equal to a reduced percentage of that estimate. Using a reduced percentage of the expected reduction estimated in the EEPDR Potential Study allows the EDCs to design and implement cost-effective programs based on their experience in previous phases with successfully managed consumption reduction programs. On the other hand, using 100% of the expected reduction for setting the mandatory

Phase IV peak demand reduction target restricts the design and implementation discretion afforded EDCs under Act 129 and does not acknowledge that the potential studies, like any study or model, cannot predict or provide precise outcomes. Using 100% of the expected reduction essentially prescribes the exact mix of measures that an EDC would need to implement to achieve the coincident peak demand reduction target.

Using a reduced percentage of the expected reduction as estimated by the SWE would account for the fact that the EDCs cannot necessarily duplicate the measure mix employed by the SWE.[9] It would also take into consideration that actual customer participation will not be the same as the customer participation assumed by the SWE. There are a myriad of programs and measures that can be implemented to achieve the consumption reduction and coincident peak demand reduction targets and the Phase IV targets should not work to restrict program design or implementation innovation and flexibility.

For all these reasons, EAP asks the Commission to use a reduced percentage of the expected reduction in the coincident peak demand as estimated in the EEPDR Potential Study as opposed to the current 100%.

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[9] The measure mix employed by the SWE to determine the estimate is not disclosed in the EEPDR Potential Study. Further, it appears that the SWE has used energy savings profiles to predict summer coincident peak demand reductions resulting in inflated energy efficiency demand reduction potential. An alternative approach would be to use demand reduction profiles to estimate coincident peak demand reduction. It is admittedly difficult to understand and analyze the basis for the SWE's estimate (let alone raise a challenge to the estimate) without access to the underlying data and assumptions relied upon in the EEPDR Potential Study. EAP requested the underlying assumptions and data in a Right to Know Law request submitted to the Commission in early March. The response to that request, originally due in early April, has been delayed due to the impact of the COVID-19 pandemic.

D. EDCs Support the Elimination of the Preliminary Annual Report and Seek a Streamlined Format for Both the Semi-Annual Report and the Final Annual Report in Order to Meet the Proposed Shortened Filing Timeframe.

For Phase IV, the Commission proposes the elimination of preliminary annual reports and a shortened timeframe for submitting both the semi-annual report and final annual report in order to provide information to the public in a timely fashion. Phase IV Tentative Implementation Order at pp. 49-51. As noted by the Commission, "the EDCs and participating stakeholders have maintained a well-functioning system of providing and receiving feedback from each other to aid in the implementation of successful EE&C Programs in Phase IV" which supports a streamlined reporting process. *Id.* at p. 49. This is evidenced in the numerous stakeholder meetings held by each EDC throughout the year which provide feedback on existing measures/programs and solicit ideas for new programs.

EAP suggests that revisions to the reporting format is critical to shortening the submission timeframes and recommends that the SWE work with the EDCs to determine what information, tables and data can be eliminated or streamlined to enable the earlier filing dates. Streamlining information into fewer tables that present consolidated useful information will improve both the development and the review of these reports. EAP believes that an examination of reporting formats used in other jurisdictions would be helpful in this effort.

E. Increased Flexibility for Phase IV CSP RFP Competitive Bidding Procedures is Warranted.

In the Phase IV Tentative Implementation Order, the Commission proposes to maintain the requirement, first adopted in Phase III, to require EDCs to file Conservation Service Provider ("CSP") competitive bidding procedures and to require EDCs to bid all CSP contracts "without exception". Such contracts include "those that provide consultation, design, and administration and management or advisory services to the EDCs." Phase IV Tentative Implementation Order at pp. 57-58.

EAP believes that increased flexibility in the requirement to bid all CSP contracts provides the most cost-efficient contracting for CSP services and suggests that the uncertainties arising from the impact of the COVID-19 pandemic further support consideration of foregoing the requirement to bid all CSP contract without exception. EAP proposes that the Commission delegate authority to the Bureau of Technical Utility Services ("TUS") to waive that requirement based on reasonable cause, including factors such as the number and availability of potential providers, the duration of the existing contracts which were competitively bid, and prior cost-effective performance.

EAP maintains that wide scale rebidding will unnecessarily increase costs and prove unwieldy as EDCs work to implement a smooth transition between Phase III and Phase IV complicated by the impact of efforts undertaken by the federal government and the Commonwealth to combat this health crisis. The requirement to rebid all CSP contracts "without exception" may cause program suspension, delay and other inefficiencies as programs are transitioned to new CSPs, who must then establish their own relationships, implement processes, and ramp-up program services.

Providing some discretion to TUS to consider waiving the requirement to rebid all CSP contracts will provide administrative efficiency and flexibility, if warranted. CSPs that have been retained by the EDCs are nationally recognized experts in designing and implementing energy efficiency programs and/or in the area of EM&V and tracking of savings. Those CSPs play a key role as required by the statute to assure EDC compliance with Act 129. 66 Pa. C.S. §2806.1 (b)(1)(i)(c) and (e).

Given the current uncertainties and the benefit to both EDCs and their ratepayers to retain proven and experienced CSPs, EAP suggests that providing discretion to TUS to consider and resolve requests for waiver from the requirement to rebid all CSP contracts is warranted and still allows for the desired oversight from the Commission.

III. Conclusion

EAP offers these comments along with the individual comments filed by its EDC members subject to Act 129 for the Commission to consider in reaching a final decision with respect to the implementation of the Phase IV Energy Efficiency and Conservation Program. The task presented to the Commission, the EDCs, and all the stakeholders of projecting the market potential and fixing targets and rules for the next phase of energy efficiency programs is historically complex and challenging. The onset of the worldwide COVID-19 pandemic and the restrictions imposed by the Governor and the Secretary of Health to abate the health crisis have increased that challenge, creating unforeseen circumstances and uncertainties in our economy and the manner in which the citizens of Pennsylvania interact and conduct business. Neither the Phase IV Tentative Implementation Order nor the underlying Potential Studies considered and/or analyzed those impacts.

EAP urges the Commission to consider those impacts and craft an implementation order that offers design flexibility, allows for innovation and sets forth a streamlined and efficient process whereby EDCs can seek relief expeditiously or offer alternatives to achieve reduction goals and other requirements in the wake of unforeseen circumstances such as the COVID-19 pandemic and its impacts.

Respectfully submitted,

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