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|  | **PENNSYLVANIA**  **PUBLIC UTILITY COMMISSION**  **Harrisburg, PA 17105-3265** |  |

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|  | Public Meeting held October 29, 2020 |
| Commissioners Present: |  |

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| Gladys Brown Dutrieuille, Chairman | | |
| David W. Sweet, Vice Chairman | | |
| John F. Coleman, Jr. | |  |
| Ralph V. Yanora |  |  |
|  | P-2020-3019562 |  |
| Petition of the Industrial Energy Consumers of Pennsylvania to Suspend Implementation of the Act 129 Phase IV Requirements and For Other Relief | M-2020-3015228 |  |

**ORDER**

**BY THE COMMISSION:**

Before us for consideration is the Petition of the Industrial Energy Consumers of Pennsylvania (IECPA),[[1]](#footnote-2) filed pursuant to 52 Pa. Code § 5.42 and the Emergency Order issued by the Pennsylvania Public Utility Commission (Commission) on April 22, 2020, at Docket No. M-2020-301926, seeking a declaratory order to; (1) suspend implementation of the Act 129 Phase IV Energy Efficiency and Conservation (EE&C) requirements; (2) extend the term of the current Phase III EE&C Programs implemented by the subject Electric Distribution Companies (EDCs); (3) require Act 129-subject EDCs to immediately, and in conjunction with the extension of Phase III EE&C programs, reduce all EE&C surcharges imposed on customers by a minimum of fifty percent for the duration of the Phase III program; (4) mandate that all Phase III projects under progress or planned for future implementation on behalf of individual customers be completed or commences as soon as is feasible under each EDC’s existing Phase III program; and (5) suspend the penalties applicable to all EDCs subject to Act 129 for failure to achieve the Phase III energy and peak demand targets through the duration of the extended Phase III programs. We will treat IECPA’s Petition as a petition for amendment or recession of a Commission order, pursuant to Section 703(g) of the Public Utility Code and, for the reasons stated herein, deny it in its entirety.

**BACKGROUND**

**Act 129 and Phase IV Energy Efficiency & Conservation Plan**

Act 129 of 2008 (the Act or Act 129) was signed into law on October 15, 2008 and became effective on November 14, 2008. Among other things, Act 129 created Section 2806.1 of the Public Utility Code (Code), 66 Pa. C.S. § 2806.1. In relevant part, Section 2806.1(d)(2) required the Commission to set additional reductions in peak demand if such reductions are cost-effective. 66 Pa. C.S. § 2806.1(d)(2). EDCs that fail to achieve these reductions in consumption are subject to a civil penalty not less than $1 million and up to $20 million. 66 Pa. C.S. § 2806.1(f)(2).[[2]](#footnote-3)

As explained in the Tentative Implementation Order we issued on March 12, 2020 at Docket No. M-2020-3015228 (*Phase IV Tentative Implementation Order*), the Statewide Evaluator (SWE) submitted its final *Pennsylvania Act 129 Phase IV Energy Efficiency and Peak Demand Reduction Market Potential Study (EEPDR) and Pennsylvania Act 129 Phase IV Demand Response (DR) Potential Study* to the Commission on February 28, 2020, providing the SWE's evaluation and potential for additional cost‑effective incremental reductions in electric consumption and peak demand for the five-year period of Phase IV EE&C programs for EDCs subject to the requirements of Act 129. That evaluation and assessment was based on 2018 baseline studies of electricity usage and electrical consuming equipment installed in Pennsylvania at that time, specifically using the Act 129 Pennsylvania‑specific cost-effectiveness criteria and the most recent EDC avoided cost projections calculated according to the Commission's 2021 Total Resource Cost (TRC) Test Final Order. *Phase IV Tentative Implementation Order*, at 9.

On April 22, 2020, IECPA filed the instant Petition for the issuance of a declaratory order. This Petition was filed on behalf of IECPA’s member companies and represented that it was served on all necessary statutory parties, and certain identifiable parties of interest from other similar or related proceedings.

Answers were filed by the Building Performance Association (BPA); the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA); Duquesne Light Company (DLC); the Energy Efficiency Advocates (EEA); Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company (collectively, FirstEnergy); the Pennsylvania Energy Consumer Alliance, Met-Ed Industrial Users Group, Penelec Industrial Consumer Alliance, Philadelphia Area Industrial Energy Users Group, PP&L Industrial Customer Alliance, and West Penn Power Industrial Intervenors (collectively, Industrial Customers); Keystone Energy Efficiency Alliance (KEEA); the Office of Consumer Advocate (OCA); PECO Energy Company (PECO); PPL Electric Utilities Corporation (PPL); and the Sustainable Energy Fund of Central Eastern Pennsylvania (SEF). Letters in opposition to the Petition were filed by a group of seventeen (17) manufacturers, trade associations, large energy consumers, and service providers with a significant presence and investment interests in Pennsylvania (AB Energy, et al.), and by Ceres. BPA filed Comments to the Petition on May 12, 2020 (BPA May 12 Comments) and June 18, 2020 (BPA June 18 Comments).

Petitions to intervene were filed by DLC, EEA, FirstEnergy, the Industrial Customers, KEEA, PECO, PPL, and SEF. Motions for Admission *Pro Hac Vice* were filed by the Clean Air Council (CAC) and KEEA.[[3]](#footnote-4)

On June 18, 2020, the Commission issued its *Phase IV Implementation Order* in the EE&C Program proceeding at Docket No. M-2020-3015228, establishing both consumption reduction and demand reduction targets. These consumption reduction targets became final for any covered EDC that did not petition the Commission for an evidentiary hearing by July 6, 2020. *Phase IV Implementation Order* at 145. The Phase IV EE&C Programs are scheduled to commence on June 1, 2021. *Phase IV Implementation Order* at 89.

**DISCUSSION**

**Legal Standards**

IECPA filed its petition pursuant to 52 Pa. Code § 5.42. Section 5.42 of the Commission’s regulations permit the filing of petitions seeking a declaratory order to terminate a controversy or remove uncertainty. 52 Pa. Code § 5.42. Upon review, we note that IECPA’s petition specifically requests modification of Commission orders, and therefore is not properly before us as a petition for declaratory order pursuant to Section 5.42.

Section 1.2(a) of the Commission’s regulations permits us to, disregard an error or defect of procedure which does not affect the substantive rights of the parties, so as to secure the just, speedy, and inexpensive determination of a proceeding. 52 Pa. Code § 1.2(a). We will therefore treat IECPA’s Petition as a petition for amendment or rescission of a Commission order, pursuant to Section 703(g) of the Public Utility Code (Code), 66 Pa. C.S. § 703(g).

Since the filing of IECPA’s Petition on April 22, 2020, we issued our *Phase IV Implementation Order* on June 18, 2020. As such, we will treat IECPA’s Petition as a request to modify or rescind both the *Phase IV Tentative Implementation Order* and the *Phase IV Implementation Order*, as well as the our Order at *Energy Efficiency and Conservation Program*, Docket No. M-2014-2424864 (Implementation Order entered June 19, 2015) (*Phase III Implementation Order*).

By the terms of Section 703(g) of the Code, the Commission has the power to amend or rescind its own orders at any time subject only to the requirements of due process. Section 703(g) of the Code states:

The commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.

66 Pa. C.S. § 703(g); *see also* *Dep’t of Highways v. Pa. Pub. Util. Comm’n*, 138 A.2d 143 (Pa. Super. 1958). In exercising our authority to amend or rescind an order pursuant to Section 703(g) of the Code, the Supreme Court of Pennsylvania has stated: “Because such relief may result in disturbance of final orders, it must be granted judiciously and only under appropriate circumstances.” *See City of Pittsburgh v. Pa. Dep’t of Transp.*, 416 A.2d 461 (Pa. 1980).

While a petition under Section 703(g) may “properly raise any matter designed to convince the commission that it should exercise its discretion . . . to rescind or amend a prior order in whole or in part,” at the same time “[p]arties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them.” *Duick v. Pa. Gas and Water Co.*, Docket No. C-R0597001 *et al*., 56 Pa. P.U.C. 553 (Order entered

December 17, 1982) (*Duick*) (quoting *Pa. R.R. Co. v. Pa. Pub. Serv. Comm’n*, 179 A. 850, 854 (Pa. Super. 1935)). As we stated in *Duick*:

What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

*Duick* at 559.

Furthermore, a decision to deny a petition for rescission or amendment is a matter squarely within the Commission’s discretion, subject to being overturned only where a reviewing court finds “the agency’s decision demonstrates evidence of bad faith, fraud, capricious action or abuse of power.” *West Penn Power Co. v. Pa. Pub. Util. Comm’n*, 659 A.2d 1055, 1065 (Pa. Cmwlth. 1995).

Section 332(a) of the Code, 66 Pa.C.S. § 332(a), provides that the party seeking relief from the Commission has the burden of proof. IECPA seeks relief from the Commission, and, therefore, has the burden of proof in this proceeding.

Any decision of the Commission must be supported by substantial evidence. *See, e.g.*, Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704. Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); and *Murphy v. Comm., Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

Finally, it is well-settled that the Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. Pub. Util. Comm’n*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also*, generally, *Univ. of Pa. v. Pa. Pub. Util. Comm’n*, 485 A.2d 1217 (Pa. Cmwlth. 1984). Thus, any argument in the Petition that we do not specifically address shall be deemed to have been duly considered and denied without further discussion.

**IECPA’s Petition**

In its Petition, IECPA claims that the impacts of the COVID-19 pandemic has changed the landscape for both utilities and their customers since the Commission issued the *Phase IV Tentative Implementation Order* and the publication of the SWE's EEPDR. IECPA cites the statewide “stay at home” order, which required the closure of all “non-life sustaining businesses,” as the reason why many commercial and industrial (C&I) customers have had to significantly reduce or completely shut down their operations, and also resulted in the loss of jobs and/or significant reduction in income for customers. IECPA acknowledged that it will be some time before the economic impact of the pandemic can be fully quantified, but cited Department of Labor and Industry statistics on unemployment claims during the pandemic as evidence of widespread financial harm. Petition at 2-3.   
  
 IECPA expresses concern that any measures to impose additional electricity consumption savings and peak demand reductions, particularly when those measures are based on data that may no longer be valid or relevant, may create unintended economic hardships on utilities and their consumers and would significantly hinder the ability of all stakeholders to cope with the present emergency. IECPA notes that the Commission's *Phase* *IV Tentative Implementation Order* established a statewide budget for Phase IV EE&C programs of over $1.2 billion, which will be funded entirely through rates borne by consumers who are now confronted with what IECPA describes as unprecedented economic pressures and an uncertain economic future. IECPA encourages the Commission to re-evaluate the EEPDR in light of the certain changes in relation to demand and energy usage within the Commonwealth as a result of the pandemic, both in the short term and long term. Petition at 3-4.   
  
 IECPA asserts that schedules and deadlines contemplated by the Commission in the *Phase IV Tentative Implementation Order* for development and implementation of the Phase IV EE&C programs are schedules and deadlines established purely by regulatory function, based on the implementation of previous phases of the overall Act 129 goals; arguing that there is no statutory obligation within Act 129 that requires the Commission to implement a Phase IV EE&C regimen on the precise schedule established by the *Phase IV Tentative Implementation Order*.[[4]](#footnote-5) Rather, IECPA claims that the provisions of Act 129 required that EDCs file initial EE&C plans by July 1, 2009, and then "every five years or as otherwise required by the Commission." 66 Pa. C.S. § 2806.1(b). IEPCA contends that while Act 129 did require the Commission to evaluate the costs and benefits of EE&C plans beginning on November 30, 2013, "and every five years thereafter" (*i.e*., November 30, 2018; November 30, 2023; November 30, 2028, etc.), the Commission has since embarked on a separate EE&C filing and review trajectory, as it was empowered to do, that IECPA argues exceeds the requirements established by statute. Petition at 5.

In light of these concerns, IECPA requests the following relief:

1. **Immediately** **suspending the requirements and implementation of Phase IV EE&C programs for 270 days**, or for such period as the Commission determines is necessary, in order to permit the Commission, the subject Electric Distribution Companies, electricity ratepayers, and the Pennsylvania public to recover from the impacts of the current novel-coronavirus and COVID-19 pandemic before additional mandates of energy and peak demand reductions and the incurrence of the substantial costs necessary to achieve those savings, are imposed, and to otherwise re-evaluate Phase IV goals in light of the future energy impacts of the current novel-coronavirus and COVID-19 pandemic and recovery;
2. **Immediately, and commensurate with the suspension of Phase IV implementation,** **extending the** **term of the current Phase III EE&C Programs implemented by the subject Electric Distribution Companies for 270 days**, or for such period as the Commission determines is necessary, in order to provide an opportunity for Electric Distribution Companies, electricity ratepayers, and the Pennsylvania public to recover from the impacts of the current novel-coronavirus and COVID-19 pandemic before the mandated Phase III energy and peak demand targets must be met;
3. **Requiring Act 129-subject Electric Distribution Companies to immediately, and in conjunction with the extension of Phase III EE&C programs,** **reduce all EE&C surcharges imposed on customers by a minimum of fifty percent for the duration of the Phase III programs, including the 270-day extension**. At the end of the original Phase III period (i.e., May 31, 2021), and when pandemic recovery is hopefully cemented and better data is available to the Commission, utilities, and stakeholders, IECPA further recommends that the Electric Distribution Companies may then file to reconcile actual Phase III expenditures against over- or under-recoveries from customers, per normal reconciliation procedures for such costs. To the extent available data after the initial 270-day period indicates that a further decrease, or increase, in EE&C expenditures may be warranted over the remaining period of the Phase III programs, then the Electric Distribution Companies should be required to file for such adjustments, with corresponding adjustments to the applicable surcharges with all final expenses and revenues (not to exceed the expenses and revenues anticipated by the initial implementation of Phase III) to be reconciled at the termination of the Phase III program period;
4. **Mandating that all Phase III projects under progress or planned for future implementation on behalf of individual customers be completed or commence as soon as is feasible under each Electric Distribution Company's existing Phase III program**; and
5. **Immediately** **suspending the penalties applicable to all Act 129‑subject Electric Distribution Companies for failure to achieve the Phase III energy and peak demand targets through the duration of the extended Phase III programs**, subject to future modification, change, or waiver by the Commission, at its discretion, at the end of the

Phase III program period.

Petition at 14-15 (emphasis added).

**Answers and Comments**

1. **Suspending** **implementation of Phase IV EE&C programs**

The Industrial Customers support IECPA’s Petition and agree that the Commission should delay the implementation of Phase IV EE&C programs. Similarly, to IECPA, the Industrial Customers assert that, when Act 129 is read in conjunction with Sections 501 and 1301 of the Code, the Commission has statutory authority to delay the implementation of Phase IV for a year or longer. The Industrial Customers also point out that Act 129 does not expressly require or encourage the Commission to continue this program in perpetuity, and that Act 129 expressly states that the “reductions in consumption required by the commission shall be accomplished no later than May 31, 2017,” thereby confirming that the Commission is no longer under a mandate to conduct further phases of the program. Industrial Customers at 6‑7.

The OCA also agrees with IECPA that proceeding with implementation of Phase IV at this time does not seem reasonable due to the impacts of the COVID-19 pandemic. The OCA agrees with IECPA that any measures to develop additional electricity consumption savings and peak demand reduction targets, particularly when those targets are based on data that is no longer valid or relevant, could create unintended economic hardships on utilities and consumers. OCA at 1‑2.

FirstEnergy opposes IECPA’s request to delay Phase IV as it would extend the beginning of Phase IV to March of 2022, noting that the impacts of the pandemic may be reduced, mitigated, or resolved during the interim. FirstEnergy argues that IECPA’s requested 270-day delay is arbitrary and will only introduce highly speculative assumptions into the planning process for Phase IV. FirstEnergy at 6‑7. PECO does not support a delay of Phase IV implementation since the scope, duration, and full extent of the COVID-19 pandemic’s impact is unclear. PECO at 4. DLC asserts that IECPA’s request to delay implementation of Phase IV would throw EDCs’ EE&C programs into disarray, which would ultimately harm customers. DLC argues that the effects of COVID-19 (or any other factor) cannot be known at this time – and likely will still not be known even following the 270-day delay, asserting that Phase IV begin on schedule. DLC at 8‑9. PPL submits that a suspension or delay of the implementation of Phase IV is not necessary. PPL notes that the Commonwealth has already implemented a phased approach to re‑opening businesses and eliminating stay-at-home orders on a county-by-county basis. PPL submits that as businesses re-open and present restrictions are lifted, additional changes to energy demand and consumption will occur, and unwind the impacts IECPA asserts as its basis for the proposed delay of Phase IV of Act 129.PPL at 3.

CAUSE-PA opposes delaying the implementation of Phase IV, arguing that energy efficiency programs are vital to mitigating the financial impact of the pandemic, particularly for low-income customers. CAUSE‑PA at 5-6. The SEF opposes suspending implementation of Phase IV for 270 days because such a delay would bring Act 129 to a halt for the foreseeable future. SEF at 4.

Ceres asserts that a delay or minimizing of current program obligations under Act 129 will cost Pennsylvania energy efficiency jobs and result in higher energy costs for customers. Ceres at 2. The BPA opposes delaying the implementation of energy efficiency programs. BPA June 18 Comments at 1. The BPA asserts that there are existing mechanisms to amend Phase III and Phase IV goals and timelines before the Commission, and that the focus of the existing proceedings and activities before the Commission, regulatory agencies and the utilities should be placed on what energy efficiency services can be funded during the COVID crisis and how those services might best accelerate the achievement of the energy, cost savings and environmental goals of Act 129 in the long term. BPA May 12 Comments at 3. KEEA opposes delaying Phase IV implementation by 270 days, asserting that it is contrary to the interests of the Commission and the public because it would interfere with implementation plans that have been finalized and the impacts of COVID-19 do not make these decisions moot. KEEA at 4-8. EEA argues that IECPA provides no factual evidence that halting the above-described next steps in the Phase IV Planning Timeline will in any way ameliorate the present emergency and does not explain why any material effects of the economic issues it cites cannot be addressed during the Commission’s established planning process. EEA at 8-9. AB Energy, *et al*. represent that energy efficiency keeps energy costs low and supports local jobs, and therefore oppose any efforts to eliminate, suspend, or modify Act 129. AB Energy, et al. at 1-2.

1. **Extending the term of Phase III EE&C Programs**

The Industrial Customers supports extending Phase III for 270 days, in conjunction with suspending Phase IV implementation for 270 days. Industrial Customers at 20.

FirstEnergy notes that extending Phase III would pose unique challenges and considerations. Phase III EE&C targets, requirements and funding could require revision, as could EE&C program plans to address the extension. There would also be incremental administrative activities and costs associated with amending existing contracts or procuring services with conservation service providers to support implementation of Phase III programs beyond May 31, 2021. FirstEnergy at 6. DLC represents that IECPA’s proposal to extend Phase III for 270 days is neither necessary nor proportional in response to the COVID-19 pandemic. DLC is concerned that extending Phase III could harm DLC and its customers by requiring it to pare back its EE&C programs, and that stretching its Phase III programs for an additional nine months could yield gaps in EE&C programming, necessitating modifications to its Phase III EE&C Plan, and complicate a smooth transition to Phase IV. DLC supports the *Petition of the Energy Association of Pennsylvania to Amend the Commission’s June 19, 2015 Implementation Order*, filed May 1, 2020, at Docket No. M‑2014-2424864 (EAP Petition) as a more measured, incremental approach to COVID‑19 issues.[[5]](#footnote-6) DLC notes that the EAP Petition requests that the Commission permit EDCs to implement their EE&C demand response programs on a voluntary basis for the fifth year of EE&C Phase III. DLC at 6-7. PPL submits that an extension is not needed because the current and ongoing Phase III compliance targets remain attainable. PPL at 5.   
  
 The SEF notes that IECPA’s proposal to extend Phase III is problematic because it ignores the budgetary constraints that limit EDCs’ spending on Act 129 programs to 2% of each EDC’s annual revenue as of December 31, 2006. 66 Pa.C.S. §2806.1(g). The SEF is concerned that if EDCs pursued their EE&C Plans during the extension of Phase III in earnest it is possible that the cost limits could become relevant and in turn may subject EDCs to penalties. SEF at 5.

1. **Reduction of** **surcharges**

The Industrial Customers, who support IECPA’s proposal to reduce Phase III surcharges by 50%, suggest that funds currently being collected by the EDCs are not being used due to COVID-19 or that the surcharges do not reasonably reflect the benefits being provided. The Industrial Customers assert that reducing the surcharges would provide customers with immediate financial relief during this public health and resulting economic crisis. The Industrial Customers also submit that reducing the regulatory charges on Large C&I customers will help these customers by allowing them to direct more funds to critical operations, efforts to maintaining employee complements and avoid permanent harm, such as closures and layoffs. Industrial Customers at 19.

FirstEnergy points to the cost-recovery provision of Act 129, which provides that EDCs shall be assured full and current recovery of prudent and reasonable costs associated with their EE&C plans. FirstEnergy asserts that reducing all EE&C surcharges by 50% would not provide full and current cost recovery, and cause long-term disruption of collections, as well as causing negative customer reactions and financial instability for EE&C programs. FirstEnergy at 8-9. PECO asserts that IECPA’s request to immediately reduce EE&C surcharges is not prudent. PECO asserts that such reduction may disrupt existing programs and make it difficult to re-institute such programs after an extended hiatus. PECO recommends that the Commission maintain current surcharges, noting that even if EDCs ultimately end up spending less than their Phase III budgets, customers will not be at any financial risk since the EDCs perform a reconciliation. PECO at 5‑6.

DLC concludes that IECPA’s request to immediately reduce EE&C surcharges is counterproductive and should be denied. DLC asserts that this requested reduction would impede its ability to deliver energy and money-saving measures to customers. *Id.* DLC asserts that IECPA’s request is unnecessary because EE&C surcharges are reconcilable charges that only recover costs actually incurred. DLC represents that to the extent an EDC experiences an overcollection attributable to COVID-19 – an outcome that is speculative at this time – such overcollection will be refunded to customers through the ordinary operation of the EDC’s EE&C surcharge. DLC at 7‑8.PPL submits that IECPA’s proposal to reduce EE&C surcharges is unnecessary and inappropriate for several reasons. PPL asserts that the continued provision of cost-effective energy efficiency and demand response measures could be more beneficial to customers than a reduction of the EE&C surcharges, that Phase III EE&C surcharges are based upon projected program costs and are fully reconciled on an annual basis, that IECPA’s proposal could result in a substantial rate shock to customers, and that PPL’s customers already benefit from the reconciliation process. PPL at 5-7.

The OCA notes that while IECPA’s proposal to reduce Phase III surcharges may provide rate relief that would be beneficial to customers at this time, continuing with cost-effective energy efficiency and demand response that can be safely and cost‑effectively delivered could be more beneficial to customers. The OCA recommends revisiting any proposals to reduce charges at a later date when there is a better understanding of what programs can be delivered safely and at what cost. OCA at 3.

CAUSE-PA asserts that IECPA’s proposal for a reduction in Phase III surcharges is not appropriate given the current data, and that doing so, in conjunction with freezing and delaying the implementation of Phase IV, could have a detrimental effect on the viability of EE&C programs, including shuttering programs and workers becoming unemployed. CAUSE-PA at 11. The BPA and Ceres oppose IECPA’s proposal to reduce energy efficiency funding. BPA June 18 Comments at 1, BPA May 12 Comments at 6, Ceres at 1. KEEA argues that a reduction in surcharges would not provide meaningful economic relief for all electric customers and would lead to further harm to customers of all classes and energy efficiency providers. KEEA at 8‑12. EEA asserts that IECPA’s proposal to cut surcharges fails to acknowledge that Act 129 has a decade-long record of achieving high annual investment returns, and, more importantly, fails to show that cutting investment in Act 129 would benefit Pennsylvanians generally. EEA at 11.

1. **Mandating the immediate completion of all Phase III projects**

The OCA asserts that Phase IV implementation should be paused, and efforts be refocused on delivering those programs in Phase III that can be safely delivered while maintaining the ability to move forward quickly with additional program delivery when it is safe to do so. OCA at 1. The SEF and Ceres agree that EDCs should return to pursuing current and planned projects as soon as it is safe to do so. SEF at 4-5.

DLC is unclear as to the import of IECPA’s proposal but notes that it has maintained its EE&C programs to the extent reasonably possible under the circumstances. DLC objects to being required to conduct any EE&C-related activity that poses an unreasonable risk to customers, employees, or contractors. DLC at 9-10. PPL notes that it is already prioritizing projects that have been scheduled for completion, to the extent that the projects can be safely completed consistent with the restrictions imposed by the Commonwealth. PPL at 8.

1. **Suspending penalties**

The Industrial Customers acknowledge that under Act 129, Section 2806.1(f)(2) states than an EDC shall be subject to penalties for failure to achieve reductions as required by Sections 2806.1(c) and 2806.1(d). However, the Industrial Customers assert that Sections 2806.1(c) and (d) in Act 129 regarding Commission-ordered reductions in consumption and peak demand do not expressly require further reduction requirements. Citing Section 2806.1(c)(3), 66 Pa. C.S. § 2806.1(c)(3), the Industrial Customers claim that the Commission must “adopt additional required incremental reductions in consumption” only if the Commission “determines that the benefits of the program exceed the costs.” As to reductions in peak demand, the Industrial Customers assert that Section 2806.1(d)(2) of Act 129, 66 Pa. C.S. § 2806.1(d)(2), only requires reductions in consumption to be accomplished “no later than May 31, 2017,” and, therefore, the current Phase III reductions are only required by Commission order, not by statute. The Industrial Customers suggest that, due to a change in circumstances, the Commission has the power and discretion to amend its prior order. Industrial Customers at 20-21.

FirstEnergy agrees with IECPA that the imposition of penalties for an EDC’s failure to attain targets would be unreasonable given the unprecedented and unforeseeable circumstances of the COVID-19 pandemic. However, FirstEnergy concedes that the penalties imposed by Act 129 are legislatively mandated, and that the Commission may not have authority to modify them. As an alternative to waiving penalties, FirstEnergy proposes that the Commission adopt the approach presented in EAP’s Petition, which proposed modifying the *Phase III Implementation Order* to measure demand compliance based on EDC performance during the second, third and fourth years of Phase III. FirstEnergy also proposes that the Commission create an additional process in Phase IV through which targets could be revised due to force majeure events. FirstEnergy at 9-10.

DLC agrees with IEPCA that COVID-19, and the associated governmental actions and economic impacts, may ultimately prevent EDCs from meeting certain targets mandated under the Commission’s Phase III Implementation Order. DLC maintains that once the impacts of COVID-19 are better understood, additional modifications to Phase III may be warranted, potentially including waivers of penalties related to energy savings and/or demand reduction targets. DLC at 10. PPL generally does not oppose the suspension or waiver of penalties, it does however, note that it remains on track to meet existing Phase III compliance targets, and that an appropriate solution for addressing the impacts of the pandemic on EDCs’ ability to achieve certain Phase III compliance targets is contained in EAP’s Petition. PPL at 8.

The OCA does not support waiving Act 129 penalties at this time, since many EDCs are well on their way to achieving their Phase III consumption targets, and recommends revisiting the issue at a later date. OCA at 3-4. The SEF argues that Act 129 does not permit waiver of the penalty provisions, and specifically notes that Section 2806.1(f), 66 Pa. C.S. § s806.1(f), imposes mandatory penalties on EDCs that fail to meet the requirements of Act 129. SEF at 5. CAUSE-PA argues that it is premature to waive all penalties before any EDC has even requested such a waiver, particularly since it seems likely that several EDCs will be able to achieve their targets. CAUSE-PA at 12. Ceres and KEEA oppose suspension of penalties. Ceres at 1-2, KEEA at 13‑14.

**Analysis**

1. **Effect of the March 20, 2020 Emergency Order (Docket No. M-2020-3019262)**

Initially, we will address IECPA’s reference to the Emergency Order Chairman Gladys Brown Dutrieuille issued on March 20, 2020, providing for the modification of Commission filing and service requirements. *Re: Suspension of Regulatory and Statutory Deadlines; Modification to Filing and Service Requirements*, Docket Number M-2020-3019262 (*March 20, 2020* *Emergency Order*). IECPA filed its Petition at the *March 20, 2020 Emergency Order* docket and claims that the relief requested in its petition, specifically the proposed 270-day delay in implementing Phase IV and waiver of Act 129 penalties, are encompassed by the Commission’s *March 20, 2020* *Emergency Order*. Petition at 3, 4, 12. We disagree.  
  
 The Commission’s *March 20, 2020* *Emergency Order* acknowledged that the Commission’s response to the COVID-19 pandemic, namely implementing telework for its entire staff and vacating its physical offices across the Commonwealth, could result in challenges for the Commission, the regulated community, and the public with regard to compliance with statutory and regulatory deadlines, and other procedural and administrative requirements for filing and service of documents. As such, the *March 20, 2020* *Emergency Order* stated that statutory and regulatory deadlines for filing and service of documents may be suspended, extended, waived or changed during the pendency of the Governor’s Proclamation of Disaster Emergency,[[6]](#footnote-7) and delegated authority to the Commission’s Bureau Directors to implement such modifications at their discretion, subject to Commission review. In short, the *March 20, 2020* *Emergency Order*, was intended to allow forprocedural flexibility to accommodate any administrative complications regarding the filing and service requirements experienced by the Commission and any parties appearing before it due to the pandemic. The *March 20, 2020 Emergency Order* also allowed flexibility to extend statutorily established time periods for the Commission to take final action on matters before it. The *March 20, 2020* *Emergency Order* was not intended to circumvent the formal proceedings required for disposing of substantive matters pending before the Commission. Therefore, the *March 20, 2020 Emergency Order* is irrelevant and inapplicable to the relief sought by IECPA and other stakeholders.

Although IECPA specifically invoked our *March 20, 2020 Emergency Order* as the basis for seeking relief, the Petition also referenced the *Emergency Proclamation*. Petition at 3. Therefore, we will exercise our authority under 52 Pa. Code § 1.2(a) to disregard procedural defects and will also treat IECPA’s Petition as a request for suspension of certain provisions of the Code to aid in coping with the COVID-19 pandemic, pursuant to the Governor’s *Emergency Proclamation*.

For the reasons explained below, IECPA has failed to meet its burden to show that Phase III should be extended by 270 days and that Phase IV should be suspended by 270 days.

1. **The *Phase IV Implementation Order* Already Addresses COVID-19 Issues**

We note that IECPA filed comments to the *Phase IV Tentative Implementation Order* at Docket No. M-2020-3015228 (IECPA Phase IV Comments), which incorporated the instant Petition by reference. IECPA’s comments, much like the instant Petition, recommended that the implementation of Phase IV be suspended by 270 days to permit EDCs’, their customers, and the Pennsylvania public to begin meaningful recovery from the current pandemic, as much as is possible, before additional EE&C‑related programs and expenditures are put in place. IECPA Phase IVComments at 2.   
  
 Upon review, we determined that IECPA’s and others’ comments regarding potential future impacts of COVID-19 as grounds for modifying or delaying Phase IV implementation were speculative and premature.

IECPA’s comments and those made by other stakeholders regarding potential future impacts of COVID-19 and suspending the Phase IV planning process as premature, noting that there is significant uncertainty regarding the length of time in which COVID-19 will continue to impact EDCs’ programs and the wider economy. This uncertainty, paired with the Phase IV start date, which is still over a year away, supports the Commission’s finding that now is not the appropriate time to engage in speculative estimates of future COVID-19 impacts on Phase IV of Act 129. We maintain our position that this timeline balances the needs of all stakeholders; therefore, the Commission directs staff to proceed as outlined above.

*Phase IV Implementation Order* at 91.

The COVID-19 pandemic situation in Pennsylvania has changed significantly since we considered and disposed of IEPCA’s Phase IV comments in our *Phase IV Implementation Order*. Pursuant to Section 5.408 of our regulations, we take official notice of the fact that Governor Wolf lifted the statewide stay-at-home requirements on May 8, 2020.[[7]](#footnote-8) *See* 52 Pa. Code § 5.408 and 66 Pa. C.S. § 331(g). Further, as of July 3, 2020, all counties in the Commonwealth have been operating in the “Green Phase.”[[8]](#footnote-9) Under the Green Phase, all businesses in the Commonwealth may operate, subject to applicable safety requirements and restrictions to mitigate against the spread of COVID-19.[[9]](#footnote-10) Although the Green Phase allows for the resumption of certain activities, a number of restrictions remain in place pursuant to the directives of the Governor and the Pennsylvania Secretary of Health.[[10]](#footnote-11) In the Green Phase, for example, continued telework is strongly encouraged, businesses with in-person operations must operate at a reduced capacity, masks are required in most settings, large gatherings are prohibited, and social distancing is required. *See supra*, n. 8.

In light of the Commonwealth’s progress in the phased reopening plan since the issuance of our *Phase IV Implementation Order*, we reaffirm that the relief sought by

IECPA is premature and based on speculative assertions. Therefore, we decline to

modify the *Phase IV Implementation Order*.

1. **Act 129 Mandates Continued Implementing EE&C Programs**  
    We now turn our attention to the Industrial Customers’ argument that Sections 2806.1(c) and (d) of the Code do not expressly require further reductions in consumption and peak demand, and that the current Phase III reductions are only required by Commission order, not by statute. The Industrial Customers suggest that, due to a change in circumstances, the Commission should amend its *Phase III Final Implementation Order*, under Section 703(g) of the Public Utility Code. Industrial Customers at 20-21.

We disagree. Similar arguments were raised by FirstEnergy during the Phase III EE&C proceeding. We addressed and rejected those arguments in our *Phase III Implementation Order*.

[T]his Commission observes that the Act is clear in providing us with the authority to prescribe additional peak demand reduction requirements, if the peak demand reduction programs are cost-effective. In fact, we are of the opinion that we are required to prescribe additional requirements in the event a cost-effective peak demand reduction methodology is available within the Act 129 framework. We also note that FirstEnergy’s argument erroneously relies on the supposition that, because the General Assembly did not include the phrase “and every five years thereafter” in subsection 2806.1(d)(2) as it did in subsection 2806.1(d)(3), it could not have intended for DR to continue past Phase I. But FirstEnergy’s argument incorrectly converts the lack of a legislative requirement into a prohibition against Commission action. In other words, FirstEnergy is erroneously asserting that because the General Assembly did not expressly require the Commission to look at the cost-effectiveness of the peak demand reduction program every five years, the Commission is prohibited from instituting a cost-effective peak demand reduction program. But, in fact, the General Assembly did not expressly or impliedly make such a prohibition. Nowhere in Act 129 did the General Assembly expressly state that the Commission is prohibited from continuing either the consumption reduction or peak demand programs. In fact, it expressly required the Commission to adopt additional incremental reductions if the programs were found to be cost-effective.

Furthermore, we find it significant that the General Assembly did not include a “sunset” provision into Act 129. The General Assembly has previously imposed such “sunset” provisions in the Public Utility Code, e.g. 66 Pa.C.S. § 1419; thus, had the General Assembly intended that either the consumption reduction requirements in subsection 2806.1(c) or the peak demand reduction requirements in subsection 2806.1(d) to end upon a certain date, as FirstEnergy asserts, it would have provided for such an expiration date, which it did not. Therefore, we continue to maintain that it was the intent of the General Assembly that both of these reduction requirements are to continue, provided they are cost-effective.

*Phase III Implementation Order* at 19-20.

Furthermore, the Commission has made no finding that the reduction requirements in Phase IV, or in any preceding EE&C program, was not cost-effective. Therefore, pursuant to Act 129, the Commission must continue consumption and peak demand reduction programs until such additional incremental reductions are no longer found to be cost-effective.

1. **IECPA’s Request for Rescission or Amendment of the *Phase IV Implementation Order***

In support of its Petition, IECPA claims,

[m]uch has changed in Pennsylvania since the issuance of the Tentative Implementation Order and the publication of the SWE’s EEPDR, both for utilities and their customers. Specifically, the current novel-coronavirus and COVID-19 pandemic, as well as the Commonwealth’s response to the emergency, which currently includes a statewide “stay at home” order and an order requiring the closure of all “non-life sustaining businesses,” have forcefully impacted every aspect of economic life in Pennsylvania. For many commercial and industrial (“C&I”) utility customers, this has meant either the wholesale closure of operations or significant reductions in production capability and output. For residential ratepayers of electric utilities, this includes the loss of jobs for many and the reduction in income for many others. **While the actual economic impact of the pandemic is** **not currently known in full, and will not likely be known for many months**, as of April 21, 2020, the Pennsylvania Department of Labor and Industry reported as many as 1.56 million unemployment claims. All of this has had an immediate and substantial impact on electric utilities within the Commonwealth, and on electricity consumption, the demand for electrical power, and projections going forward for what electricity needs (both demand and energy) may arise in the future, both near and far.

IECPA Petition at 3 (internal citations omitted) (emphasis added). Outside of a single Department of Labor and Industry unemployment statistic, IECPA’s argument is based on sweeping generalizations and speculation about the long‑term impacts of the COVID-19 pandemic on utility customers.

In addition, IECPA fails to explain the basis for its proposals. For example, IECPA provides no explanation for the methodology or data by which it arrived at its proposed 270-day delay of Phase IV, nor does it describe what calculations were employed in concluding that Phase III EE&C surcharges should be reduced by “at least” 50%. Nor does IEPCA provide evidence of how, under the Governor’s *Emergency Proclamation*, their specific proposals would help stakeholders cope with the impacts of the COVID-19 pandemic.[[11]](#footnote-12)

It is well-established that speculation does not amount to substantial evidence.[[12]](#footnote-13) Accordingly, IECPA has failed to sustain its burden of proof under Section 332(a) of the Code, 66 Pa. C.S. § 332(a), due to a lack of substantial evidence.  As such, we decline to exercise our authority under Section 703(g) of the Code, 66 Pa. C.S. § 703(g) to amend the *Phase III Implementation Order* or to suspend provisions of the Code pursuant to the Governor’s *Emergency Proclamation* and deny IECPA’s Petition;

**THEREFORE,** 

**IT IS ORDERED:**

1. That Industrial Energy Consumers of Pennsylvania’s Petition to Suspend Implementation of the Act 129 Phase IV Requirements and For Other Relief at Docket Nos. M-2020-3015228 and P-2020-3019562 is denied.

2. That this order be served on all jurisdictional electric distribution companies subject to the requirements of the Act 129 Energy Efficiency and Conservation Program, the Commission’s Bureau of Investigation and Enforcement, The Office of Consumer Advocate, the Office of Small Business Advocate, and all parties that filed responses to this Petition.

3. That this case be marked closed.

**** **BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: October 29, 2020

ORDER ENTERED: October 29, 2020

1. IECPA is an association of energy-intensive industrial consumers taking service from a variety of regulated utilities in Pennsylvania. [↑](#footnote-ref-2)
2. An expanded history of Act 129 can be found at pages 2-6 of the *Phase IV Final Implementation Order.* [↑](#footnote-ref-3)
3. Since with this Order we deny IECPA’s Petition and take no action to rescind or amend our *Phase IV Implementation Order*, we will, pursuant to Section 1.2(a) of our regulations (52 Pa. Code § 1.2(a)), treat the Petitions to Intervene and Petitions for Admission *Pro Hac Vice* filed at this docket as part of those entities’ Answers to the IEPCA Petition. We find that this action does not prejudice the substantive rights of the entities that filed Petitions to Intervene, since their arguments were considered and disposed of in our *Phase IV Implementation Order*. [↑](#footnote-ref-4)
4. IECPA cites our *March 20, 2020* *Emergency Order* as support for its argument that the Phase IV program schedules and deadlines are regulatory functions and not statutory deadlines. The Industrial Customers cite the Commission’s *March 20, 2020 Emergency Order* as support that the Commission has discretionary authority to suspend certain regulatory and statutory deadlines that would permit the Commission to grant IECPA’s Petition. Industrial Customers at 7. [↑](#footnote-ref-5)
5. On June 3, 2020, we issued our Order granting EAP’s Petition. *Petition to Amend the Commission’s June 19, 2015 Implementation Order*, Docket No. M‑2014‑2424864 (Order entered June 3, 2020) (*EAP Petition Order*). In granting EAP’s Petition, we modified our *Phase III Implementation Order* to measure EDCs’ compliance with peak demand reduction (DR) targets based on EDC performance during the second, third, and fourth program years of Phase III (June 1, 2017 through May 31, 2020), and permit EDCs to implement approved DR programs on a voluntary basis for the fifth and final program year (June 1, 2020 through May 31, 2021). [↑](#footnote-ref-6)
6. Governor Wolf’s Proclamation of Disaster Emergency issued on March 6, 2020 in response to the COVID-19 pandemic (*Emergency Proclamation*) authorized and directed the suspension of “the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business,or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions . . . would in any way prevent, hinder, or delay necessary action in coping with this emergency.” A copy of the *Emergency Proclamation* can be viewed at: <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf> [↑](#footnote-ref-7)
7. *Order of the Governor of the Commonwealth of Pennsylvania for Limited Opening of Businesses, Lifting of Stay at Home Requirements, and Continued Aggressive Mitigation Efforts*, Commonwealth of Pennsylvania, Office of the Governor (May 7, 2020), available at: <https://www.governor.pa.gov/wp-content/uploads/2020/05/20200507-TWW-Yellow-Phase-Order.pdf>. [↑](#footnote-ref-8)
8. *Governor Wolf Green Phase Orders Updated to Include Last County Moving to Green on July 3*, Commonwealth of Pennsylvania, Office of the Governor (July 2, 2020) available at <https://www.governor.pa.gov/newsroom/reopening-phase-orders-updated-to-include-last-county-moving-to-green-on-july-3/> [↑](#footnote-ref-9)
9. *Process to Reopen Pennsylvania*, Commonwealth of Pennsylvania, Office of the Governor   
   (Last updated October 1, 2020) available at <https://www.governor.pa.gov/process-to-reopen-pennsylvania/>. [↑](#footnote-ref-10)
10. *Id.* [↑](#footnote-ref-11)
11. We note that EDCs that filed responses to IECPA’s Petition, while not opposed the potential waiver of Act 129 penalties, and some asserted that they were on target to meet existing Phase III consumption reduction requirements, and would prefer to wait until there exists a better understanding of the ultimate financial impact of COVID-19 before requesting modification or waiver of penalties. *See* Page 18. [↑](#footnote-ref-12)
12. *W. Penn Power Co. v. Pa. PUC*, 219 A.3d 716, (Pa. Cmwlth. 2019), quoting *Bobchock v. Unemployment Comp. Bd. of Review*, 525 A.2d 463, 465 (Pa. Cmwlth. 1987), see also *W.J. Menkins Holdings, LLC v. Douglass Twp.*, 208 A.3d 190, 199 (Pa. Cmwlth. 2019). [↑](#footnote-ref-13)