



January 8, 2021

VIA E-File

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

**Re: Energy Efficiency and Conservation Program, Docket M-2020-3015228
Act 129 Ph. IV Plans, Docket Nos. M-2020-3020818, -20, -21, -22, -23, -24, -30**
Joint Expedited Motion for Extension of Procedural Schedule

Dear Secretary Chiavetta:

Please find the attached **Joint Expedited Motion for Extension of Procedural Schedule of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), Natural Resources Defense Council, the Office of Consumer Advocate, the Office of Small Business Advocate, the Commission on Economic Opportunity, the Community Action Association of Pennsylvania, the Sustainable Energy Fund of Central Eastern Pennsylvania, and the Tenant Union Representative Network** in the Energy Efficiency and Conservation Program Proceedings.

On the instructions of Deputy Chief Administrative Law Judge Mark A. Hoyer and Administrative Law Judge Emily DeVoe, we are serving a copy of this filing on Chief Administrative Law Judge Charles Rainey and each of the Commissioners.

Pursuant to the Commission's Emergency Order issued on March 20, 2020, and as indicated on the attached Certificate of Service, copies will be served on parties of record by email only.

Respectfully Submitted,



Elizabeth R. Marx, Esq.
Counsel for CAUSE-PA

CC: Parties of Record, Certificate of Service
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Energy Efficiency and Conservation Program	:	Docket No. M-2020-3015228
	:	
Petition of PPL Electric Utilities for Approval of its Act 129 Phase IV Energy Efficiency and Conservation Plan	:	Docket No. M-2020-3020824
	:	
Petition of PECO Energy Company for Approval of its Act 129 Phase IV Energy Efficiency and Conservation Plan	:	Docket No. M-2020-3020830
	:	
Petition of Duquesne Light Company for Approval of its Act 129 Phase IV Energy Efficiency and Conservation Plan	:	Docket No. M-2020-3020818
	:	
Joint Petition for Consolidation and Approval of the Act 129 Phase IV Energy Efficiency and Conservation Plan of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company	:	Docket No. M-2020-3020820
	:	Docket No. M-2020-3020821
	:	Docket No. M-2020-3020822
	:	Docket No. M-2020-3020823
	:	

CERTIFICATE OF SERVICE

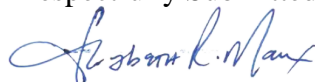
I hereby certify I have on this day served copies of the **Joint Expedited Motion for Extension of Procedural Schedule** in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party) and consistent with the Commission’s March 20, 2020 Emergency Order.

VIA EMAIL ONLY	
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January 8, 2021

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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	:	Docket No. M-2020-3020822
	:	Docket No. M-2020-3020823

JOINT EXPEDITED MOTION FOR EXTENSION OF PROCEDURAL SCHEDULE

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DATE: January 8, 2021

I. Introduction

1. Pursuant to 52 Pa.Code §§ 1.15 and 5.202, the Coalition for Affordable Energy Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”), Natural Resources Defense Council (“NRDC”), the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), the Commission on Economic Opportunity (“CEO”), the Community Action Association of Pennsylvania (“CAAP”), the Sustainable Energy Fund of Central Eastern Pennsylvania (“SEF”), and the Tenant Union Representative Network (TURN) (collectively, “Joint Movants”) hereby submit this Joint Expedited Motion for Extension of the Procedural Schedules adopted in the above dockets, which involve filings of various electric distribution companies (“EDCs”) for approval by the Pennsylvania Public Utility Commission (“Commission”) of their Phase IV Energy Efficiency and Conservation Plans (“Phase IV Plans”) under Act 129.¹
2. At the Prehearing Conferences in each of the formal Act 129 Plan proceedings, a procedural schedule was adopted requiring the evidentiary hearings in each proceeding to be held *on or before the deadline* established in the Notice published in the *Pennsylvania Bulletin*² for parties to intervene and/or submit answers, comments and recommendations with respect to the Phase IV Plans. The procedural schedules thus raise serious due process issues, given the outright denial of the right of potential intervenors to participate in the hearings as well as the prejudice to

¹ Act 129 of 2008 (“Act 129”), among other thing, creates an energy efficiency and conservation (“EE&C”) program, codified in the Pennsylvania Public Utility Code at Sections 2806.1 and 2806.2, 66 Pa. C.S. §§ 2806.1 and 2806.2, and requires the Commission to establish procedures for approving EE&C Plans submitted by EDCs. 66 Pa. C.S. § 2806.1(a)(1).

² 51 Pa.B. 116, January 2, 2021; 51 Pa.B. 252, January 9, 2021.

current parties' opportunity to meaningfully participate in the process under the compressed time schedule.

3. The Joint Movants therefore request an extension of the procedural schedules adopted in the Prehearing Conference Orders to address these due process issues and thereby provide all stakeholders with an opportunity for meaningful participation in these proceedings.
4. As of the time of filing, Joint Movants have received responses from all parties to the proceedings and each of the EDCs regarding their position on the Motion. It is the Joint Movant's understanding that all of the parties and the EDCs across all seven docketed proceedings either support or do not oppose the Motion, with the exception of Duquesne Light Company (DLC). While DLC does not object to an extension of the procedural schedule, it is opposed to extending the deadline for a final order approving the Plans beyond March 30, 2021.

II. Procedural Background

5. On June 18, 2020, the Commission issued its Implementation Order, setting forth detailed parameters governing the review and approval of Phase IV Plans.
6. In relevant part, the Implementation Order established a procedural process for review and approval of each EDC's Phase IV Plan. (Implementation Order at 87-88).
7. Pursuant to the Commission's established process for review and approval, the EDCs were ordered to file proposed Phase IV Plans by November 30, 2020. (*Id.*) Thereafter, the Commission was to publish notice of the Plans in the *Pennsylvania*

Bulletin within 20 days of the Plan filing, or by December 19, 2020. (*Id.*) The Implementation Order, in relevant part, provides:

The Commission will publish a notice of each proposed plan in the *Pennsylvania Bulletin* within 20 days of its filing. In addition, the Commission will post each proposed plan on its website. An answer along with comments and recommendations are to be filed within 20 days of the publication of the notice in the *Pennsylvania Bulletin*.

8. The Notice of the proposed Phase IV Plans was published in the *Pennsylvania Bulletin* on January 2, 2021 (“Notice”),³ fourteen (14) days *after* the proposed publication date established in the Implementation Order.
9. In relevant part, the Notice advised the following:

In accordance with the Energy Efficiency and Conservation Program Implementation Order, entered on June 18, 2020, at Doc. No. M-2020-3015228, responsive pleadings, along with comments and recommendations, are to be filed with the Commission within 20 days of the publication of this notice in the *Pennsylvania Bulletin*.

51 Pa.B. 116. Pursuant to the Notice, responsive pleadings are due on or before January 22, 2021.⁴

10. The Commission’s regulations establish that “responsive pleadings” include formal Answers and Petitions to Intervene, which would grant interested parties the right to fully participate in the formal litigated proceedings. *See* 52 Pa. Code §§ 5.61(a), 5.74(b).
11. Prehearing Orders issued (or to be issued) this week set the evidentiary hearings for January 21 (in the case of PPL Electric Utilities)⁵ and for January 22 (in the case of

³ 51 Pa.B.116.

⁴ For reasons that are unclear, notice of the proposed Phase IV Plans was again published today, January 8, 51 Pa.B.252. The January 8 notice appears to be identical to the Notice, except that the former includes a hyperlink to each proposed plan, whereas the latter includes a link to a Commission page where all the plans are available. Like the Notice, the January 9 notice states that Answers and Comments are to be filed with the Commission within 20 days.

⁵ Docket No. M-2020-3020824, Prehearing Order issued on January 8, 2021.

the FirstEnergy dockets,⁶ Duquesne Light Company,⁷ and PECO.)⁸ The Orders also establish the remaining elements of the procedural schedule leading up to the evidentiary hearings (e.g., filing of other parties' direct testimony, service of rebuttal testimony, service of comments) as well as post-hearing activities (filing and service of briefs; filing and service of reply comments, revised Phase IV Plan, close of record; certification of the record). As a result, those parties who have successfully intervened in the cases have either 19 or 20 days from the date of the Notice to review complex filings; develop, issue and receive responses to discovery requests; prepare and file direct testimony; prepare and file rebuttal testimony; and prepare for hearings. Potential parties who have not intervened in the cases and who are reasonably relying on the Notice will find, if they wait to intervene on the January 22, 2021 due date established in the Notice, that the hearings—and all the events leading up to them—have already occurred or are occurring on the day of the intervention deadline.

⁶ Docket Nos. M-2020-3020820 (Metropolitan Edison Company), M-2020-3020821 (Pennsylvania Electric Company), M-2020-3020822 (Pennsylvania Power Company), M-2020-3020823 (West Penn Power Company), Prehearing Order issued on January 6, 2021.

⁷ Docket No. M-2020-3020818, Prehearing Order issued on January 7, 2021.

⁸ In Docket No. M-2020-3020830, the prehearing conference was held on January 8; the Prehearing Order has not yet been issued.

III. Argument

A. Litigation Should Not Begin Until After Petitions to Intervene and Responsive Pleadings Are Due.

The Notice establishes January 22, 2021 as the deadline for parties to submit “responsive pleadings.” Because a party cannot file a responsive pleading without petitioning to intervene, in practical terms January 22 is also the deadline to intervene in time to participate meaningfully in the proceedings. However, the procedural schedules adopted at the prehearing conferences require litigation to commence well in advance of January 22. Direct testimony by other parties, for example, is required to be filed on January 13 or January 14 under the various Prehearing Orders, with rebuttal testimony due within a few days thereafter. In fact, the procedural schedules contemplate that *all testimony* will be filed before the January 22 deadline for submittal of responsive pleadings. This prejudices the current parties to the proceeding; they are required to submit testimony while formal answers and comments from potential intervenors are still pending. Subject matter experts will not have the benefit of reviewing public comments, and parties will be unable to respond to Comments. If Comments are included in the record in these proceedings, the parties must have the opportunity to respond.

The Notice establishes the starting point for the litigation process in the respective proceedings. The litigation schedules in each of the Phase IV proceedings therefore must be set to provide opportunity for the interested parties to participate in the proceedings in a meaningful manner – including the ability to address the responsive pleadings in testimony. As such, the procedural schedules in each of the proceedings should be extended, as discussed further below.

B. There is No Statutory Provision That Limits the Commission's Ability to Grant Relief.

Act 129 establishes a 120-day deadline for the Commission to approve or disapprove an EEC plan. 66 Pa C.S. 2806.1(e). Importantly, Act 129's 120-day timetable for the Commission to approve or disapprove an EEC plan is directory, rather than mandatory, in nature. In *West Penn Power Co. v. Pa. P.U.C.*, the Commonwealth Court explained the factors that make a statutory timeframe directory, as follows:

Whether a statute is mandatory or directory must be determined by considering legislative intent gleaned from review of the entire statute and from considering the nature and object of the statute and the consequences of the construction of it one way or the other. *Pennsylvania Railroad Company v. Board of Revision of Taxes*, 372 Pa. 468, 93 A.2d 679 (1953). If the thing directed to be done is the essence of the thing required, the statute is mandatory. *Id.* If, however, the statute merely directs that certain proceedings be done in a certain manner or at a certain time, it is directory. *Prichard [***8] v. Willistown Township School District*, 394 Pa. 489, 147 A.2d 380 (1959). Failure to follow a mandatory statute renders the proceedings void, whereas failure to follow a directory statute does not. *American Labor Party Case*, 352 Pa. 576, 44 A.2d 48 (1945).

104 Pa. Commw. 21, at 27; 521 A.2d 75 (1987).

Clearly, the section of the statute regarding a 120 day timetable, rather than a 134 day timetable as requested herein, is not essential to compliance with the statute, and therefore, lack of strict compliance is not fatal to this Petition.

Moreover, Act 129's 120 timetable was indicated for ***Phase I filings***, which by statute were due on July 1, 2009. Nothing in Act 129 establishes a similar deadline for the approval of subsequent EEC plans; these deadlines are established by the Commission through its implementation orders in subsequent phases. Deadlines

established by Commission order, of course, are far different from the deadlines established by statute; the Commission on its own motion can modify its previous orders.

Thus, although the Phase IV Implementation Order applicable to these proceedings provides that “[t]he Commission will approve or reject all or part of a plan at public meeting within 120 days of the EDC’s filing,” that 120-day requirement is not immovable. As discussed in the following section, fundamental due process concerns are raised when the deadline for submitting responsive pleadings is delayed by 14 days while the Prehearing Orders rigidly adhere to a 120-day requirement for Commission approval of EEC plans.

C. Due Process Requires that the Schedule in these Proceedings Be Extended.

The procedural schedules in the Prehearing Orders raise fundamental due process issues. The Pennsylvania Constitution provides, in part, that “[n]o adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard.” 2 Pa. Cons. Stat. § 504. Several stakeholders that have participated in past Act 129 phases have not intervened in these proceedings.

Based on the Implementation Order and the Notice, these potential intervenors have until January 22 to file a formal Answer and intervene in the respective Phase IV proceedings. They would also have a right, pursuant to Commission regulations, to file a Petition to Intervene along with their Answer.⁹ However, under the schedules established at the prehearing conferences, they are completely foreclosed from participation in the

⁹ 52 Pa. Code 5.74(b): Petitions to intervene shall be filed No later than the date fixed for the filing of responsive pleadings in an order or notice with respect to the proceedings but not less than the notice and protest period established under 5.14 and 5.53...absent good cause shown.

litigation. As such, parties filing a formal Answer (and Petition to Intervene) pursuant to the timeline established in the Notice would be precluded from effective participation in the formal proceedings.

The current procedural schedule therefore violates interested parties' right to due process and raises the potential for appeals on these grounds, which could ultimately delay implementation of the Act 129 Plans. Moreover, as noted above, current parties are also prejudiced by being required to proceed with litigation while formal Answers and comments are still pending.

“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews . Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The procedural schedules – which provide no more than 20 days to review complex filings, develop, issue, and receive back discovery responses, develop testimony, and prepare for hearing – deprive all interested parties reasonable notice of hearing and the opportunity to be heard “at a meaningful time and in a meaningful manner.”

By sequencing the evidentiary hearing before the deadline for interested parties to intervene and submit answers, the procedural schedule further prejudices those interested parties who timely intervene on January 22 – which is the day of the hearing in the case of three proceedings and the day *after* the hearing in the case of the other – by completely depriving these parties the opportunity to be heard at the hearing. “[C]onsiderations of due process involve common-sense reasoning and fundamental fairness. Moreover, due process is a flexible concept incapable of exact definition, and is concerned with the procedural safeguards demanded by each particular situation in light of the legitimate

goals of the applicable law.” *In the Interest of F.C., III*, 2009 PA Super 9, 966 A.2d 1131 (Pa. Super. 2009). Common-sense reasoning and fundamental fairness demand sufficient notice and opportunity to intervene be afforded to interested parties and that the evidentiary hearings be scheduled to provide intervening parties sufficient time to prepare their case and be heard in a meaningful manner.

Moreover, with respect to the legitimate goals of the actual law, the Commission stressed in its Implementation Order the importance of establishing a timeline that “balances the needs of all stakeholders.” (Implementation Order, p. 91) There is nothing in Act 129 that requires this proceeding to be completed within 120 days, as noted above. Imposing an unreasonable procedural schedule in order to achieve compliance with a 120-day requirement that does not apply fails to balance the needs of all stakeholders. As discussed in the next section, granting limited relief by extending the procedural scheduled in these dockets would address these fundamental due process issues.

IV. Requested Relief

Joint Movants request that the procedural schedule in each docket be extended by fourteen (14) days – the length of time corresponding with the delay of publication in the *Pennsylvania Bulletin*. The table below shows a comparison of deadlines. This schedule would delay the start of litigation – the filing of testimony – until fourteen (14) days after the deadline for intervening and submitting answers has expired. This would give the parties an opportunity to address any “responsive pleadings” submitted by the January 22 deadline established in Notice. It should be noted that, even with a 14 day extension, the Commission would still be able to rule on the Phase IV Plans by its April 15 Public Meeting.

Joint Movants propose the following revised deadlines:

	Original Deadline	New Deadline (+14 days)
Plan Filing	November 30, 2020	November 30, 2020
Publication in <i>Pa. Bulletin</i>	December 19, 2020 (19 days from filing) ¹⁰	January 2, 2021 (actual publication date; 33 days from filing)
Evidentiary Hearings	February 3, 2021 (65 days from filing) ¹¹	February 17, 2021 (79 days from filing)
Commission decision	March 30, 2021 (120 days after filing) ¹² Nearest Public Meeting Dates: March 25 / April 15	April 13, 2021 (134 days after filing) Nearest Public Meeting Dates: March 25 / April 15

V. Conclusion

The Joint Movants request an extension of the procedural schedules adopted in the Prehearing Conference Orders in the above dockets by fourteen (14) days to address the due process considerations described above and to provide all stakeholders with an opportunity for meaningful participation in these proceedings.

Respectfully submitted this 8th day of January, 2021.

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¹⁰ The Implementation Order provides that “[t]he Commission will publish a notice of each proposed plan in the Pennsylvania Bulletin within 20 days of its filing.” (Implementation Order, p. 87).

¹¹ The Implementation Order provides that “[s]uch hearings are to be completed on or before the 65th day after a plan is filed.” (*Id.*)

¹² The Implementation Order provides that “[t]he Commission will approve or reject all or part of a plan at public meeting within 120 days of the EDC’s filing.” (*Id.*)

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