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April 21, 2011

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

VIA HAND DELIVERY

RE: Energy Efficiency and Conservation Program; Docket No. M-2008-2069887

Dear Secretary Chiavetta:

Please find enclosed the original and fifteen (15) copies of the Comments of Industrial Energy Consumers of Pennsylvania ("IECPA"), Duquesne Industrial Intervenors ("DII"), Met-Ed Industrial Users Group ("MEIUG"), Penelec Industrial Customer Alliance ("PICA"), Penn Power Users Group ("PPUG"), Philadelphia Area Industrial Energy Users Group ("PAIEUG"), PP&L Industrial Customer Alliance ("PPLICA") and West Penn Power Industrial Intervenors ("WPPII") to the Tentative Order entered on April 1, 2011, in the above-referenced proceeding.

Please date stamp the extra copy of this transmittal letter and Comments and kindly return them for our filing purposes.

Sincerely,

McNEES WALLACE & NURICK LLC

By 
Shelby A. Linton-Keddie

Counsel to Industrial Energy Users Group of
Pennsylvania, Duquesne Industrial Intervenors,
Met-Ed Industrial Users Group, Penelec Industrial
Customer Alliance, Penn Power Users Group,
Philadelphia Area Industrial Energy Users Group,
PP&L Industrial Customer Alliance and West Penn
Power Industrial Intervenors

/lmc

Enclosures

c: Kriss E. Brown, Esq., Assistant Counsel, Law Bureau (via E-Mail)

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I. INTRODUCTION

On October 15, 2008, Governor Rendell signed into law House Bill 2200, otherwise known as Act 129 of 2008 ("Act"). Among other things, the Act expands the Pennsylvania Public Utility Commission's ("PUC" or "Commission") oversight responsibilities and sets forth specific requirements on electric distribution companies ("EDCs") for energy conservation, default service procurements, and the expansion of alternative energy sources. Consistent with this Act, Pennsylvania's largest EDCs have submitted and are currently implementing Commission-approved Energy Efficiency and Conservation Plans ("EE&C Plan" or "Plan").

Act 129 requires the Commission, after an adequate period for implementation, to direct an EDC to modify or terminate any part of an approved Plan, if the Commission determines that a Plan measure will not achieve mandated targets in a cost-effective manner. *See* 66 Pa. C.S. § 2806.1(b)(2). When the Commission makes this determination, an EDC must submit a revised Plan, which offers substitute measures or increases the availability of existing measures to achieve Act 129's mandated energy efficiency and peak load reduction targets. *See* 66 Pa. C.S. § 2806.1(b)(3).

In an attempt to comply with these statutory requirements, the Commission initially permitted EDCs, as well as interested stakeholders, to propose EE&C Plan changes in conjunction with the EDCs' submittal of Annual Report filings, also required by Act 129. *See* 66 Pa. C.S. § 2806.1(i)(1). The requirements of these filings were further specified in PUC Secretarial Letters dated June 24, 2010, and September 1, 2010, respectively. Consistent with the Commission's Act 129 *Implementation Order*, the current process to respond to proposed Plan changes, regardless of their scope, is as follows:

The Commission and parties can make recommendations for Plan improvements or object to an EDC's proposed Plan revision within

30 days of the Annual Report filing. EDCs will have 20 days to file replies to these recommendations or objections, after which the Commission will determine whether to rule on the changes or refer the matter to an Administrative Law Judge ("ALJ") for hearings and a recommended decision.

April 1 Tentative Order at 2 (citing *Implementation Order* at 24). EDCs' first Annual Reports and proposed EE&C Plan changes were submitted to the Commission in September 2010. By following the above-described process for review of proposed Plan changes, most revised EE&C Plans received Final Commission approval at the end of January 2011. Because of "such delays" in approving EE&C Plan changes, the PUC believes that creation of an expedited approval process for certain minor EE&C Plan changes could reduce administrative costs, reduce the time it takes to end underperforming programs, implement or expand more effective programs, and increase the ability of a program to meet mandated goals in a cost effective manner. *See* April 1, 2011, Tentative Order at 4. To that end, on April 1, 2011, the Commission entered a Tentative Order, which proposes an alternative process for the approval of "minor" EE&C Plan changes, and seeks comments on the alternative approval process for minor Act 129 EE&C Plan changes as well as the proposed categories of changes that would qualify for this alternative approval process. *Id.* at 6.

The Industrial Energy Consumers of Pennsylvania ("IECPA") is an association of energy-intensive industrial companies operating facilities across the Commonwealth of Pennsylvania. IECPA's members consume in excess of 25% of the industrial electricity in Pennsylvania and employ approximately 41,000 workers across Pennsylvania. Also sponsoring these Comments are coalitions of industrial customers receiving service from most of the Commonwealth's EDCs: Duquesne Industrial Intervenors ("DII"), Met-Ed Industrial Users Group ("MEIUG"), Penelec Industrial Customer Alliance ("PICA"), Penn Power Users Group

("PPUG"), Philadelphia Area Industrial Energy Users Group ("PAIEUG"), PP&L Industrial Customer Alliance ("PPLICA"), and West Penn Power Industrial Intervenors ("WPPII") (collectively, "Industrial Customer Groups").

Because the Industrial Customer Groups use substantial volumes of electricity in their manufacturing and operational processes, electric costs represent a sizable component of overall operating costs, and therefore EE&C programs are important aspects of their energy management portfolios. In addition, because EDC ratepayers, including large commercial and industrial ("C&I") customers, are directly responsible for paying the costs of EE&C Plans, any action or Order regarding changes to EDCs' EE&C Plans are important to the Industrial Customer Groups. In light of this direct and substantial impact, the Industrial Customer Groups submit these limited Comments in order to highlight areas of concern to Large C&I customers with respect to the Commission's proposed alternative approval process for "minor" Act 129 EE&C Plan changes and categories of changes that would qualify for this alternative approval process. The Industrial Customer Groups look forward to working with the Commission and other stakeholders to develop an appropriate abbreviated procedure for certain limited categories of EE&C Plan changes.

II. COMMENTS

A. It is Questionable Whether the Commission Has the Authority to Delegate to Staff the Ability to Approve EE&C Plan Changes.

As proposed, the Commission's April 1 Tentative Order outlines the following expedited process for the approval of "minor" EE&C Plan changes:

- The Commission will delegate its authority to approve certain minor EE&C Plan changes, to Staff of the Bureau of Conservation, Economics and Energy Planning ("CEEP"), with assistance from Staff of the Bureau of Fixed Utility Services ("FUS") and the Law Bureau;

- EDCs that file minor Plan revisions for PUC approval must serve the Office of Consumer Advocate ("OCA"), Office of Small Business Advocate ("OSBA"), Office of Trial Staff ("OTS") and all parties of record at least 10 days prior to making its filing with the Commission;
- Concurrent with making its PUC filing, EDCs will be required to serve the OCA, OSBA, OTS and all parties of record the proposed revised Plan. This filing must indicate the date that parties were given advanced notice of the proposed changes;
- Interested parties will have 10 days to file comments on the proposed Plan changes, even if they have previously indicated their support for proposed minor Plan changes. All parties will then have 5 days to file reply comments;
- Commission staff will have 10 days from the close of the reply comment period to issue a Secretarial Letter approving or disapproving some or all of the proposed changes along with an explanation of its rulings. This consideration period may be extended by an additional 10 days if warranted. Commission staff could also refer some or all of the proposed revisions to the Office of Administrative Law Judge ("OALJ") for hearings and a recommended decision, if necessary; and
- Parties will be given 10 days to appeal the staff action in accordance with Commission regulations.

See Tentative Order pp. 4-5. As further proposed by the PUC, the Commission seeks to limit the approval authority delegated to Staff to the following three categories of "minor" EE&C Plan changes:

- Elimination of a measure that is underperforming or had exhausted its budgeted amount;
- The transfer of funds from one measure to another measure within the same customer class; and
- A change in the conditions of a measure, such as the addition of new qualifying equipment or a change in the rebate amount that does not increase overall costs to that customer class.

Tentative Order at 5. As explained below, it is questionable whether the Commission has the authority to delegate the ability to approve EE&C Plan changes to Staff, since any change to an EE&C Plan would be amending a Commission Order.

The Commission itself has acknowledged in the April 1 Tentative Order and individual Orders approving EDCs' EE&C Plans, that the current process in which the PUC (not its Staff)

reviews and approves proposed Plan Changes was set forth "because the EDC's Act 129 Plans are approved by Commission Order...[and therefore] procedures for rescission and amendment of Commission orders must be followed to amend that Order and to assure due process for all affected Parties." Tentative Order at 3 (citing January 28, 2011 PPL Order at 18). Nevertheless, the Commission's April 1 Tentative Order seeks to delegate authority to approve EE&C Plan changes to CEEP, with assistance from FUS and the Commission's Law Bureau.

While the Industrial Customer Groups do not object conceptually to an expedited process to approve minor EE&C Plan changes, the Industrial Customer Groups are concerned that the proposed process in the April 1 Tentative Order would unreasonably delegate authority to Commission Staff to unilaterally amend previous Commission Orders, without requiring Commission approval. This the Commission must not allow. As currently proposed in the Tentative Order, this result is inevitable because any change to an EDC's EE&C Plan amends a previous Commission Order.

To properly address this procedural issue, the proposed "alternative process" should result in a Commission Order either approving, disapproving or modifying the Staff's conclusions in the Secretarial Letter after the proposed time for appeals has tolled. As proposed, the expedited process does not explain what role, if any, the Commission would have regarding the approval or disapproval of minor changes, other than presumably reviewing Staff action if appealed. Such limited review is inappropriate when the result of Staff's action is the amendment of a previous Commission Order. Further, it is unknown whether the Commission will be consulted prior to Staff's issuance of its Secretarial Letter. As indicated above, the Commission should issue an Order either agreeing with or modifying Staff's conclusions or, at minimum,

formalize a procedure akin to 52 Pa. Code 5.536(a) to request review of Staff's final decision, even if no appeals are filed.

In addition to the concerns raised above, the proposal to delegate authority for approving the elimination of a measure that is underperforming or had exhausted its budgeted amount is counter to the plain language in Act 129. Section 2806.1(b)(2) of the Public Utility Code clearly provides that:

The commission shall direct an electric distribution company to modify or terminate any part of a plan approved under this section if, after an adequate period for implementation, the commission determines that an energy efficiency or conservation measure included in the plan will not achieve the required reductions in consumption in a cost-effective manner under subsections (c) and (d).

66 Pa. C.S. § 2806.1(b)(2) (emphasis added). The Tentative Order does not explain how the proposal to delegate this authority to Commission Staff conforms with Section 2806.1(b)(2) of Act 129, and should not be allowed until this issue is addressed. At minimum, any expedited approval process should result in a Commission Order, not a Secretarial Letter issued by Staff that approves or disapproves a Plan revision or refers an issue to OALJ for hearing and a recommended decision. This result is necessary because any change to an EE&C Plan amends a prior Commission Order.

B. The Commission Should Reconsider the Categories of "Minor" Changes That Would Be Subject to the Proposed Expedited Approval Process.

In addition to the concerns expressed above about the ability of the Commission to delegate authority that would result in Commission Staff unilaterally amending previous PUC Orders, the Industrial Customer Groups are concerned that defining "minor" EE&C Plan changes too broadly for purposes of expedited review could have detrimental impacts on customers. Specifically, the Industrial Customer Groups oppose the proposal that the "elimination of a

measure that is underperforming or has exhausted its budgeted amount" is a "minor" change, especially if measures for other classes, such as Large C&I, will be expected to absorb extra costs or peak load reduction requirements as a result of a program's dissolution (or underperformance). As a result, the proposed elimination of a measure, regardless of the reason, should be subject to the current review and approval process.

In addition, because EE&C surcharges are reconcilable, changes in the level or "the transfer of funds from one measure to another measure within the same customer class" that result in an increase of a measure's cost should be considered "major," even if the originally budgeted amount for that measure is not being exceeded. As a result, any proposal to transfer funds, even between measures within the same customer class, should be subject to the current review and approval process.

Finally, to the extent parties request additional information to analyze a specific change, that change should be excluded from the expedited revision process and subject to the current review and approval process. Removing these issues from the expedited process would give parties the time to request, review and analyze information regarding a proposed change, which could result in the withdrawal of opposition, instead of being forced to form an opinion and position on a lack of information. The ability to review requested information could also avoid the need for referral of "minor" issues to OALJ that would otherwise result from the lack of time included in the proposed expedited process.

While the Industrial Customer Groups understand the PUC's (and EDCs') motivation for the ability to approve minor EE&C Plan changes in a timely manner, such expediency needs to be balanced with the fact that many EE&C Plan changes result in direct and substantial financial impacts on EDC ratepayers that are responsible for the costs of these Plans. As a result, the

Commission should further review its proposal in the April 1 Tentative Order before issuing a Final Order.

III. CONCLUSION

WHEREFORE, the Industrial Energy Consumers of Pennsylvania, Duquesne Industrial Intervenors, Met-Ed Industrial Users Group, Penelec Industrial Customer Alliance, Penn Power Users Group, Philadelphia Area Industrial Energy Users Group, PP&L Industrial Customer Alliance, and West Penn Power Industrial Intervenors respectfully request that the Pennsylvania Public Utility Commission consider and adopt, as appropriate, the foregoing Comments.

Respectfully submitted,

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Dated: April 21, 2011