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May 2, 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 Reply 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 Reply 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

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

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY COMMENTS OF THE INDUSTRIAL CUSTOMER GROUPS

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Dated: May 2, 2011

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).

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 can also submit Petitions to amend their Plans at any time and request expedited approval as Metropolitan Edison Company, Penn Power Company and Pennsylvania Electric Company did in February of 2011.

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.

Consistent with the deadlines established in the Commission's April 1, 2011, Order, the Industrial Energy Consumers of Pennsylvania ("IECPA") *et al.* (collectively, "Industrial Customer Groups"),[1] submitted Comments on April 21, 2011, summarizing the Industrial Customer Groups' general areas of concern about the proposed expedited process for the approval of minor EE&C Plan changes.[2] On April 21, 2011, Comments were also submitted by the following parties: the Energy Association of Pennsylvania ("EAPA"); PPL Electric Utilities Corporation ("PPL"); PECO Energy Company ("PECO"); Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company (collectively, "the FE Companies"); and Duquesne Light Company ("Duquesne").

Pursuant to the Commission's April 1, 2011, Tentative Order, the Industrial Customer Groups hereby submit these Reply Comments to address specific areas of concern of Large Commercial and Industrial ("C&I") Customers with respect to other stakeholders' proposals and Comments submitted in response to the Commission's April 1 Tentative Order.[3]

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[1] IEPCA is an *ad hoc* group of energy-intensive industrial companies operating facilities across Pennsylvania. IECPA's members annually consume in excess of 25% of the industrial electricity in Pennsylvania and employ approximately 41,000 workers across Pennsylvania. Also sponsoring these Reply 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").

[2] Specifically, the Industrial Customer Groups' Comments questioned the ability of the Commission to delegate the approval of EE&C Plan changes to Staff without also requiring ultimate Commission approval and requested that the Commission revisit and revise its list of what EE&C Plan changes would be appropriate for expedited review. *See generally*, Industrial Customer Groups' Comments.

[3] The Industrial Customer Groups' failure to address a specific proposal raised by any party does not represent the Industrial Customer Groups' support for, or acquiescence to, such proposal. The Industrial Customer Groups specifically note that these Reply Comments will only address issues that necessitate an additional response.

II. COMMENTS

A. The Fact that PPL's Requested Modifications to its EE&C Plan are awaiting a Final Commission Order are a result of PPL's Own Actions, Not a Flaw in the Current Review Process for EE&C Plan Modifications.

In Comments submitted by EAPA and PPL, both parties attempt to suggest that the current review procedure for EE&C Plan changes is unworkable and needs revision in part because PPL's Petition that was originally submitted on September 15, 2010, and then re-submitted on February 28, 2011, is still awaiting a Final Commission Order. *See* EAPA Comments at 2; PPL Comments at 3. However, both parties conveniently fail to mention that this "delay" was caused entirely because of PPL's perceived ambiguity in the Commission's October 28, 2009, Order at Docket No. M-2009-2093216, as well as PPL's disregard for the clear Commission directives collectively contained in the PUC's June 24, 2010, and September 1, 2010, Secretarial Letters which unambiguously required EDCs to submit "any proposed EE&C plan revisions" in a "complete copy of [an EDCs'] revised plan." June 24, 2010, Secretarial Letter, Docket No. M-2008-2069887; September 1, 2010, Secretarial Letter, Docket No. M-2009-2093216. Instead, in an attempt to avoid Commission review for various EE&C Plan changes, PPL chose to submit only two of the approximately 22 changes to its EE&C Plan as part of its September 15, 2010, Petition. In its January 28, 2011, Order, the Commission confirmed that all 22 changes should have been submitted in the September Petition and required PPL to resubmit a Petition with all changes reflected. Comments and Reply Comments were due on March 21, 2011, and March 31, 2011, respectively, and additional evidentiary hearings will not be held. Any delay in resolving PPL's filing is due to this action by PPL, not the review process itself. Any suggestion that the current review process for EE&C Plan changes is unworkable because PPL's Petition remains outstanding should be rejected by this Commission.

B. The Commission has Correctly Determined That All Changes to an EE&C Plan Require Commission Approval.

Despite the Commission's clear determination in its October 29, 2009, Order and January 28, 2011, Order, both at Docket No. M-2009-2093216, that "because EDCs' Act 129 Plans are approved by Commission Order, procedures for rescission and amendment of Commission orders must be followed to amend that Order and to assure due process for all affected Parties," PPL (and EAPA) again incorrectly suggests that requiring EDCs to petition the Commission for approval of any modification to an approved EE&C Plan is not required under the Public Utility Code. *See* PPL Comments at 5; *see also* EAPA Comments at 2, n. 2. In essence, PPL argues that the Commission's reliance on 66 Pa. C.S. §§ 2806.1(b)(2) and 2806.1(b)(3) for the proposition that all changes require approval is not persuasive. *See* PPL Comments pp. 5-8.

Page 18 of the Commission's January 28, 2011, Order clearly states:

> We do not agree with PPL's interpretation of the *October 2009 Order*. As stated in the portion of the *October 2009 Order* presented, *supra*, **because the EDC's Act 129 Plans are approved by Commission Order, procedures for rescission and amendment of Commission orders must be followed to amend that Order and to assure due process for all affected Parties. Accordingly, if the EDC believes that it is necessary to modify its Act 129 Plan, the EDC must file a petition requesting that the Commission rescind and amend its prior Order approving the plan.** The Commission's *October 2009 Order and February 2010 Order* approved all components of PPL's Plan filed at that time. The Commission's approval was not limited to specific aspects of the Plan.

January 28, 2011, Order at 18 (emphasis added) (internal citations omitted). Further, the Commission continued, "we cannot ignore our statutory requirements under Act 129, and the due process rights of the Parties, to address proposed changes to a Commission-approved Plan. Consequently, *all* proposed changes must be fully reflected in EE&C plans so they can be reviewed by the Commission and affected parties." January 28, 2011, Order at 19 (emphasis in original).

While PPL (and certainly EAPA) will likely admit that, pursuant to 66 Pa. C.S. § 2806.1(e)(2), the Commission, by Order, approved PPL's and other EDCs' EE&C Plans, PPL fails to explain how that Plan and Order may be revised without Commission approval as required by 66 Pa. C.S. § 703. Instead, PPL argues, unconvincingly, that "the adoption by the Commission of the current standard has resulted in the Commission managing every detail of an EDC's EE&C Plan" which is counter to "the Commission's commitment that it would not micromanage the EE&C Plans." *See* PPL Comments at 8, 4. These arguments not only ignore procedures for rescission and approval of Commission Orders but also ignore the recognition of the need to preserve other parties' due process.

The Commission correctly addressed both issues in its October 2009 Order when stating:

> Because the EDC's Act 129 Plan will be approved by Commission Order, procedures for rescission and amendment of Commission orders must be followed to amend that Order and to assure due process for all affected Parties. See 66 Pa. C.S. § 703(g) (relating to fixing of hearing: rescission and amendment of orders). Accordingly, if the EDC believes that it is necessary to modify its Act 129 Plan, the EDC may file a petition requesting that the Commission rescind and amend its prior Order approving the plan. See 52 Pa. Code §§ 5.41 (relating to petitions generally) and 5.572 (relating to petitions for relief).
>
> The EDC's petition should explain the specific reasons supporting its requested modifications to its approved plan, i.e., the shifting of funds between programs or customer classes, the discontinuation of a program, etc. The petition should also contain a request to modify its cost recovery mechanism. Evidence supporting the modification of the plan and the cost recovery mechanism shall be submitted with the petition. The petition shall be served on all Parties participating in the EDC's Act 129 Plan proceeding. If the EDC believes that the need for modification of its plan is immediate, the EDC can request expedited consideration of its petition.

October 2009 Order at 93. PPL (and EAPA) have failed to persuasively rebut the Commission's repeated, correct conclusion that the statutory requirements under Act 129, as well as the due process rights of all interested parties, require the Commission to approve proposed changes to a Commission-approved Plan, since those changes will result in revising a Commission Order. As

such, the PUC should properly reject any argument that all proposed changes to an EDC's EE&C Plan do not require Commission review and approval.

C. Accepting EDCs' Suggestion That if no Objections are Submitted within 10 days, There Should be Automatic Commission Approval of EE&C Plan Changes without the Submission of Comments, Deprives Parties of Due Process.

In the current, "non-expedited" review process for EE&C Plan revisions, the Commission and interested parties can make recommendations for Plan improvements or object to an EDC's proposed Plan revision within 30 days of the Annual Report filing. Similarly, under the Commission's proposed expedited process for approval of minor EE&C Plan changes, "all interested parties will have 10 days to file comments on the proposed plan changes...all parties will then have 5 days to file reply comments." Tentative Order at 4. In an attempt to further streamline the Commission's proposed expedited process, three parties (PPL, PECO and EAPA) suggest at least a variation of the following concept: rather than allow parties to submit comments, if there is no objection to an EE&C Plan revision within a certain amount of time (i.e., 10 days or during the 10-day notice period), then the Commission should approve the change within five days (or immediately as suggested by PECO), without the need for comments. Such proposals deprive parties of due process and should be rejected by the Commission. It is fundamental that administrative agencies, such as the Public Utility Commission, must ensure parties due process through notice and a meaningful opportunity to be heard. Accepting these parties' suggestion that EE&C changes should be automatically accepted if no objections are filed and without allowing parties the ability to Comment (even to show their support or ask for clarification) should be rejected by the Commission. Instead, the Commission should preserve its proposal to allow for comments and/or objections within a certain period of time (i.e., 10 or 15 days from a Petition's filing).

The preservation of interested and affected parties' due process is even more important when considering the substantial, non-bypassable financial contributions provided by EDC ratepayers to fund these Plans. PPL cites the need for flexibility in making Plan changes because the utility may be fined between $1 million and $20 million if not achieving its statutory mandates (*see* PPL Comments at 6) while EAPA states, at least two times, that Act 129 couples mandates with penalties and customer participation is voluntary (*see* EAPA Comments pp. 4,6). However, both parties either overlook or ignore the need for ratepayers to have a meaningful opportunity to provide input when changes, even if "minor," are being proposed to the multi-million dollar ratepayer funded Plans. As the Commission may recall, the budgets for the seven major EDCs' EE&C Plans are as follows: PPL Electric Utilities Corporation - $246 million; West Penn Power Company - $94.25 million; Duquesne Light Company - $78.2 million; PECO Energy Company - $341.6 million; Metropolitan Edison Company - $24.9 million; Pennsylvania Electric Company - $23.0 million; and Pennsylvania Power Company- $6.7 million. In light of the financial impact to ratepayers to fund these Plans, at minimum, interested parties should be given the right to provide comments to <u>any</u> Plan change, as proposed by the Commission. Comments should not be allowed for "minor" EE&C Plan changes only upon an objection by a party. Depriving parties the ability of a meaningful opportunity to be heard on minor EE&C Plan changes, especially considering the fact that the proposed expedited procedure, in most cases, does not anticipate hearings, raises significant due process concerns because the resulting effect of any EE&C Plan change is a revision to a prior Commission Order.

D. Consistent with the Industrial Customer Groups' Comments, the Commission Should Reconsider What Types of Changes Should be Eligible for the Proposed Abbreviated Process.

In an effort to expand what types of EE&C Plan revisions would be available for the proposed expedited review process, PPL and EAPA suggest that identifying what constitutes a "major change" would simplify, for Commission Staff, what is considered a "minor change" and would provide a clear distinction to Staff to apply when faced with a request for a Plan modification. As proposed by EAPA, "major changes" should be defined as follows: shifting program funds between customer classes; increasing the projected cost of a program for a customer class apart from shifting funds; and adding or deleting a program. *See* EAPA Comments at 6. Similarly, PPL proposes that the Commission define changes as "major" if they: shift program funds or energy savings between customer classes or increase the projected cost at completion for a customer class (without shifting to another class); adding an EE&C Plan program; or deleting an EE&C Plan program. *See* PPL Comments at 11. For both parties, any change that is not considered "major" would automatically be eligible for and go through the "expedited approval process."

Upon review, the Industrial Customer Groups again question the appropriateness of some of the proposed changes for "expedited review." As proposed by the EDCs, the tentative expedited process would become the rule instead of the exception as contemplated by the Commission's Tentative Order, which seems unnecessary and inappropriate at this time.

As articulated in the Industrial Customer Groups' April 21 Comments, the Industrial Customer Groups have significant concerns regarding EDCs' attempts to expeditiously incorporate numerous self-described "minor" changes that could have substantial impacts on

ratepayers, possibly without the need for Commission approval.[4] Essentially, due to the direct financial impacts of many EE&C Plan changes, the Industrial Customer Groups believe that any change which would change costs for a customer class, either through a program's or measure's addition, deletion or modification should be subject to the current review process for EE&C Plan changes.

E. Concurrent with EDCs' Submission of Proposed Plan Revisions, EDCs Should, at Minimum, Make Available an Updated, Black-lined Complete Revised Version of its EE&C Plan for Public Inspection.

In its Comments, the FE Companies note the time and cost involved with regularly preparing and serving complete copies of its proposed revised EE&C Plans. As a result, the FE Companies suggest that EDCs instead "simply file documentation (which may include various [affected] pages form the approved plan) sufficient to support the change, which would also explain how the changes affect the current plan as approved." FE Companies' Comments at 2. Upon review, the Industrial Customer Groups can agree to such a procedure, provided that EDCs: (1) serve parties with redlined (or black-lined) revisions to every page of an EE&C Plan that would change as a result of the proposed revision; and (2) concurrently make available an updated, black-lined (or redlined) complete version of its EE&C Plan for public inspection, most likely on the EDC's webpage. The availability and accessibility of these Plans is essential for customers, Curtailment Service Providers, the Commission and interested parties to reference a complete and current version of a Company's EE&C Plan for any reason.

[4] At explained in the Industrial Customer Groups' Comments, the Tentative Order contemplates Commission Staff, not Commission approval of minor EE&C Plan changes. Because the result of EE&C Plan changes result in the revision of a Commission Order, the Industrial Customer Groups question whether such delegation is appropriate and legal. *See* Industrial Customer Groups' Comments pp. 4-7.

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 Reply Comments.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By _____

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Dated: May 2, 2011