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COZEN O'CONNOR

Pennsylvania Utility Commission Upholds Act 129 Energy Efficiency Targets for FirstEnergy, PECO

After months of hearings and petitions, at their December 5, 2012 meeting, the Pennsylvania Public Utility Commissions (PUC) upheld PECO's and FirstEnergy's energy efficiency savings targets for the second phase of Pennsylvania's Act 129 Energy Efficiency and Conservation Program (EE&C program).

Phase I of the EE&C program, which began in June 2009 and ends in May 2013, required Pennsylvania's seven largest electric distribution companies (EDCs) to adopt energy efficiency and conservation plans to reduce expected electricity consumption by 3 percent. Pursuant to an "Implementation Order" issued on August 3, 2012, the EDCs are required to further reduce electricity usage in their service territory by an amount particular to each EDC, ranging from 1.6 percent (West Penn Power Company) to 2.9 percent (PECO) by 2016.

Although the first phase of Act 129 EE&C programming set targets for peak load demand reduction as well, the PUC declined to set any additional demand reduction as a component of the second phase.

After the Implementation Order was filed, PECO, PPL Electric Utilities (PPL) and FirstEnergy (comprising Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn) initiated two proceedings seeking the PUC's reconsideration of the terms of the Implementation Order.

On August 20, 2012, PECO, PPL and FirstEnergy filed separate motions requesting reconsideration of various aspects of the Implementation Order, including the enforceability of the Implementation Order itself, and the energy savings targets. In addition to their motions for reconsideration, PECO, PPL and FirstEnergy requested evidentiary hearings on their savings targets, a "fast track" appeals process established by the terms of the Implementation Order.

The PUC denied the EDCs' broader motions for reconsideration on September 27, and held evidentiary hearings on the narrower issue of the savings targets in October. The PUC upheld the PECO and FirstEnergy savings targets, but has not yet issued an order on PPL's petition.

The PECO Petition

PECO sought to reduce its savings target from 2.9 percent to 1.3 percent. If approved, this would have been lower than the lowest savings target for any EDC established in the Implementation Order.

PECO argued that the PUC set the revenue from which the EE&C spending is derived at too high a level. Act 129 allows a utility to recover the costs for EE&C programs up to 2 percent of its 2006 revenue. The Implementation Order required the utilities to spend up to this limit on their EE&C programs.

PECO argued that the PUC was not obligated to require spending up to the cap, particularly because PECO's 2006 revenues were much higher than its 2011 revenues as a result of the recession and lower electricity prices. It also argued that the revenue PECO generates that it passed through to third-party electricity suppliers should be deducted from its total revenue pool.

The PUC declined to exclude the generation revenues from the EE&C program revenue pool:

> All EDC customers, both shopping and default service customers, are eligible to participate in the EE&C programs and receive the benefits of those programs. Since the scope of customers eligible to participate in the EE&C programs are shopping and default customers, we believe that excluding the energy components of the revenue from shopping customers will inappropriately constrain the funding available to EE&C Plans.

December 5, 2012 Order on PECO petition at 23.

PECO also argued that its budget for energy efficiency programming was too low to achieve both its energy savings target and to continue its Phase I demand response programming. The PUC determined that PECO's spending on its demand response programming should not reduce its Act 129 target because PECO could recover the costs for those programs through a separate cost recovery filing.

The FirstEnergy Petition

FirstEnergy sought to reduce the targets for its companies from 2.3 percent to 2.2 percent for Met-Ed, from 2.2 percent to 1.9 percent for Penelec, from 2.0 percent to 1.5 percent for Penn Power and from 1.6 percent to 1.2 percent for West Penn.

FirstEnergy argued the PUC's calculation of savings targets was too stringent for its largely rural customer base. In calculating the savings targets, the PUC increased its estimate of the cost of each unit of energy savings by 25 percent from the Phase I level to account for unforeseen contingencies and cost increases. According to FirstEnergy, because the escalation factor was based on a statewide average, it failed to take into account the FirstEnergy companies' higher administrative costs, lower rates and sparsely populated territory.

The PUC declined to reduce FirstEnergy's savings targets, stating:

> While FirstEnergy criticizes the … Commission for the adoption of, the alleged arbitrary 25% adjustment factor to acquisition costs to account for future uncertainties, they have failed to provide convincing evidence that would warrant the rejection of this allowance and adoption of the FirstEnergy proposals. To the contrary … the FirstEnergy proposals are supported by hypothetical discussions of potential mechanisms without providing factual information … and, thus, cannot form a basis for this Commission to alter the energy efficiency reduction targets ….

December 5, 2012 Order on First Energy Petition at 18–19.

The PPL Petition

PPL also requested an evidentiary hearing on its savings targets, but as a "protective measure," seeking an affirmation by the PUC that "an EDC retains the right to challenge subsequent modifications to the [Technical Resource Manual] and request modifications to its Phase II targets." PPL Petition at 5. PPL made the same request in its reconsideration petition, which was denied by the PUC. Unlike the PECO and FirstEnergy petitions, the administrative law judge certified the record for the PPL appeal, but the PUC has not yet issued an order on the petition.

After months of uncertainty, unless the utilities decide to appeal the PUC orders to Commonwealth Court, the structure and targets for Phase II of the Act 129 EE&C program seems to be settled.

To discuss any questions you may have regarding this Alert, or how it may apply to your particular circumstances, please contact a member of Cozen O'Connor's Energy, Environmental & Public Utilities Practice.