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July 9, 2012

Rosemary Chiavetta, Esq., Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, Pennsylvania 17120

**RE: Act 129 Energy Efficiency and Conservation Program  
Tentative Implementation Order  
Docket Nos. M-2012-2289411 and M-2008-2069887**

Dear Secretary Chiavetta:

Enclosed for filing, please find an original and three copies of the Reply Comments of the Energy Association of Pennsylvania ("EAP") in the above-referenced docket.

Sincerely,

A handwritten signature in black ink, appearing to read "Donna M. J. Clark".

Donna M. J. Clark  
Vice President and General Counsel

CC: Robert F. Powelson, Chairman  
John F. Coleman, Vice Chairman  
Pamela A. Witmer, Commissioner  
Wayne E. Gardner, Commissioner  
James H. Cawley, Commissioner  
Megan Good (Word format via email)  
Kriss Brown (Word format via email)

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Act 129 Energy Efficiency and Conservation Program : Docket No. M-2012-2289411  
: M-2008-2069887  
:   
Tentative Implementation Order :

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REPLY COMMENTS OF THE  
ENERGY ASSOCIATION OF PENNSYLVANIA

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**I. Introduction**

On May 10, 2012, the Pennsylvania Public Utility Commission (“PUC” or “Commission”) issued a Tentative Implementation Order (“TIO”) seeking public comment on proposed parameters for the next round of Act 129 Energy Efficiency and Conservation (“EE&C”) Plans. Comments were filed by numerous stakeholders on June 25, 2012, reflecting a variety of viewpoints on issues including the proposed targets for Phase II consumption and demand reduction, suggested changes to the statutory carve-outs for the low-income and government/educational/nonprofit sectors and the handling of updates to the Technical Reference Manual (“TRM”). The date for filing reply comments at this docket, originally set for Friday, July 6, has been extended until Monday, July 9, 2012. The Energy Association of Pennsylvania (“EAP” or “Association”) submits these reply comments on behalf of its EDC members subject to the provisions of Act 129.<sup>1</sup> These reply comments provide both general observations and address a discrete number of specific positions raised by stakeholders in comments filed in June

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<sup>1</sup> Duquesne Light Company, Metropolitan Edison Company, PECO Energy Company, Pennsylvania Electric Company, Pennsylvania Power Company, PPL Electric Utilities Corporation and West Penn Power Company.

2012. EAP anticipates that each of its EDC members subject to Act 129 will file company specific reply comments as well.

## **II. Reply Comments**

### **A. Reply Comments**

Initially, the continuation of Act 129 EE&C Plans beyond Phase I necessarily begins with a review of the statutory language found at 66 Pa. C.S. §§ 2806.1 (c)(3) and (d)(2) which requires the Commission to conduct cost/benefit analyses and determine that the benefits of the program/plans implemented under Phase I exceed the costs prior to setting additional incremental reductions in either consumption or demand. Given that Phase I peak demand reduction programs are only just now actively in progress and the Commission has not yet conducted a cost-effectiveness evaluation of the Phase I results, little evidence exists to date for the Commission to rely upon in reaching any conclusion regarding the cost-effectiveness of demand reduction measures under Act 129. As such, EAP fully supports the Commission proposal to defer setting peak demand reduction obligations beyond Phase I until the current SWE determines whether Phase I programs have been cost-effective and until a Phase II SWE performs a demand response market potential study. See TIO at pp. 15 -16.

Contrary to the assertions of a number of commentators, most notably the Joint Demand Response Commentators, the Commission is not empowered under Act 129 to create additional mandates or continue programs based on a reading of the “spirit of the law”. With respect to setting additional incremental mandates for either consumption or demand reductions, the Commission as a creation of statute “has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication.” *Feingold v Bell of*

*Pa.*, 477 Pa. 1, 8, 383 A.2d 791, 794 (1977). Further, it is axiomatic under administrative law that “an administrative agency may exercise only those powers which the legislature has conferred by clear and unmistakable language.” *Pennsylvania Nat’l Guard v. Workmen’s Compensation Appeal Board*, 63 Pa. Cmwlth. 1, 3, 437 A.2d 494, 495 (1981), *rev’d on other grounds*, 510 Pa. 348, 508 A.2d 292 (1986). The TIO correctly concludes that the time is not ripe to determine the parameters for further demand reduction mandates under Act 129. While the Commission can and does encourage EDCs to continue certain demand response programs such as residential load curtailment measures in the interim, it prudently refrains from setting new mandates prior to the statutorily required cost-effectiveness testing.

In reply to comments stating that the consumption reduction mandates set for Phase II are low, EAP reiterates the concerns set forth in its initial filing at pp. 4 – 6, a concern echoed by the comments of its individual EDC members subject to Act 129 filed at this docket. Moreover, goals for Phase II should not only consider the conclusions reached in the Potential Report and the statutory budget limitations under Act 129, but should reflect the experience gained in Phase I, including the impact of annual updates to the Technical Reference Manual (“TRM”).

EAP recognizes the Commission goal to update the TRM so as to include the most current savings values for measures included in the manual but believes that the impact of using those changes in savings values must factor into either the setting of the mandate or the determination of compliance. See EAP Comments at pp. 4 -5 and p.16. While many of the requirements and timeframes set under Act 129 are prescriptive, EAP believes that the statute provides for agency discretion in determining targets beyond Phase I following the determination of cost-effectiveness. 66 Pa. C.S. §§ 2806.1 (c)(3) and (d)(2). See also EAP Comments at p. 21.

## **B. Continuation and Creation of Carve-Outs**

To the extent the TIO or various commentators have proposed new mandates such as obtaining a minimum of 4.5% of the Phase II consumption reduction target from the low-income sector or fixing a particular consumption reduction target for the multifamily housing sector, EAP maintains that such fixed targets were not established by the statute and should not be included as goals subject to penalties in Phase II. EAP supports programs in Phase II EE&C plans which aim to achieve and expand opportunities for savings across all customer sectors but does not believe that new sector specific mandates can or should be imposed, or that penalties can or should be associated with achievement of savings from individual customer sectors.

## **C. Procedures to Require Competitive Bidding and Approval of Contracts with CSPs**

EAP reiterates its request to the Commission to reconsider its requirement that EDCs rebid all contracts with Conservation Service Providers (“CSP”) for Phase II, noting that both the comments of PennFuture and those of the Office of Consumer Advocate are aligned with the position of the Association and its EDC members subject to Act 129. See Comments of PennFuture at pp. 12 – 13 and Comments of the Office of Consumer Advocate at pp. 20 – 21.

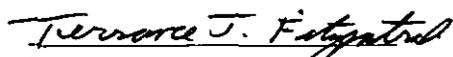
## **D. EDC Cost Recovery Tariff Mechanism.**

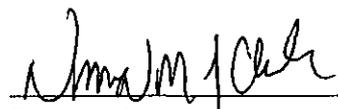
EAP contends that the continuation of the current Act 129 cost recovery mechanism which provides for a surcharge based on a levelized budget amount is preferable to the reconciliation approach outlined in the TIO and cites to the comments of the Office of Consumer Advocate at pp. 18 – 20 and the reply comments of PennFuture at p. 6 in further support of its position.

### III. Conclusion

EAP requests that the Commission incorporate the modifications and suggestions set forth in its comments and reply comments into the Final Implementation Order for Phase II. EAP believes that injecting flexibility into this regulatory program and its standards for implementation and compliance is critical to assuring that plans remain cost-effective and responsive to changing markets and new energy efficiency technology.

Respectfully submitted,

  
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