|  |  |
| --- | --- |
| **PENNSYLVANIA**  **PUBLIC UTILITY COMMISSION**  **Harrisburg, PA 17105-3265** | |
| Public Meeting held February 14, 2013 | |
| Commissioners Present:  Robert F. Powelson, Chairman  John F. Coleman, Jr., Vice Chairman  Wayne E. Gardner  James H. Cawley  Pamela A. Witmer | |
| Petition of PPL Electric Utilities Corporation for an Evidentiary Hearing on the Energy Efficiency Benchmarks Established for the Period June 1, 2013 through May 31, 2016 | Docket No. P-2012-2320369 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition of PPL Electric Utilities Corporation (PPL or Company) for an Evidentiary Hearing, filed on August 20, 2012 (Petition). In accordance with the Commission’s Order in *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411 and M-2008-2069887 (Order entered August 3, 2012) (*Phase II Implementation Order*), Administrative Law Judge (ALJ) Elizabeth H. Barnes certified the record in this proceeding on November 1, 2012. We have granted PPL’s request for an evidentiary hearing. However, for the reasons fully delineated below herein, *inter alia*, we decline to make the affirmations requested by PPL in its Petition.

# I. Background

On October 15, 2008, House Bill 2200 was signed into law as Act 129 with an effective date of November 14, 2008. Among other requirements, Act 129 directed that Energy Efficiency and Conservation (EE&C) Programs be developed by each of the Commonwealth’s largest electric distribution companies (EDCs) and be approved by the Commission. Specifically, Act 129 required each EDC with at least 100,000 customers to adopt a plan to reduce energy demand and consumption within its service territory. Initially, the Act required each affected EDC to adopt a plan to reduce electric consumption by at least one percent of its expected consumption for June 1, 2009 through May 31, 2010, by May 31, 2011. By May 31, 2013, the total annual weather-normalized consumption was to be reduced by a minimum of three percent. Also, by May 31, 2013, peak demand was to be reduced by a minimum of four-and-a-half percent of each EDC’s annual system peak demand in the 100 hours of highest demand, measured against the EDC’s peak demand during the period of June 1, 2007 through May 31, 2008.

On January 15, 2009, the Commission adopted an Implementation Order at Docket No. M-2008-2069887 (*Phase I Implementation Order*) which established the standards each plan must meet, and which provided guidance on the procedures to be followed for submittal, review and approval of all aspects of the EE&C plans. The Commission subsequently approved an EE&C plan (and, in some cases, modifications to the plan) for each affected EDC.

Another requirement of Act 129 directs the Commission to evaluate the costs and benefits of the adopted EE&C Program by November 30, 2013, and every five years thereafter. The Act provides that the Commission must adopt additional incremental reductions in consumption and peak demand if the benefits of the EE&C Program exceed its costs. In accordance with that directive, the Commission issued a Secretarial Letter on March 1, 2012, at Docket No. M-2012-2289411 seeking comments on several issues related to the design and implementation of any future phase of the EE&C Program, and whether additional incremental consumption and peak demand reduction targets should be adopted. On May 10, 2012, in response to the comments received pursuant to the Secretarial Letter, the Commission issued a Tentative Implementation Order (*Phase II* *Tentative Implementation Order*) to begin the process of evaluating the costs and benefits of the initial EE&C Plans and the possible establishment of new reduction targets. In the *Phase II* *Tentative Implementation Order*, the Commission found that the benefits of a Phase II Act 129 Program will exceed the costs. Therefore, the Commission proposed the adoption of additional required incremental reductions in consumption for another program term and sought additional comments on its specific proposals.

Subsequently, in response to the comments filed pursuant to the *Phase II* *Tentative Implementation Order*, on August 2, 2012, the Commission adopted the *Phase II Implementation Order* that established the standards each plan must meet (including the additional incremental reductions in consumption that each EDC must meet) and provided guidance on the procedures to be followed for submittal, review and approval of all aspects of EDC EE&C plans. Within the *Phase II Implementation Order*, the Commission tentatively adopted EDC-specific consumption reduction targets as set forth in Table 1 in Section A.2.c.1 of that Order. The targets varied from a high of 2.9% for PECO to a low of 1.6% for West Penn Power Company. The *Phase II Implementation Order* provided that these targets would become final for any covered EDC that did not petition the Commission for an evidentiary hearing by August 20, 2012.

On August 20, 2012, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company (FirstEnergy) filed Petitions for Reconsideration and Clarification of the *Phase II Implementation Order.* Also, on August 20, 2012, PPL Electric Utilities Corporation (PPL) filed a Petition for Reconsideration of the *Phase II Implementation Order*. On August 30, 2012, the Commission granted the Petitions filed by FirstEnergy and PPL pending further review of, and consideration on, the merits. The Office of Consumer Advocate (OCA) filed separate Answers to the FirstEnergy and PPL Petitions on August 30, 2012, and on the same date, the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) filed a Response to PPL’s Petition.

On September 4, 2012, PECO filed a Motion for Leave to File a Motion for Reconsideration and a Petition for Reconsideration of the *Phase II Implementation Order.* On September 13, 2012, the Commission adopted an Order granting PECO’s Motion for Leave to File a Motion for Reconsideration. On September 19, 2012, the Clean Air Council and the Sierra Club (CAC/SC) filed an Answer to PECO’s Petition for Reconsideration.

By Reconsideration Order entered September 27, 2012, at Docket Nos.   
M-2012-2289411 and M-2008-2069887 (*Phase II Reconsideration Order*), the Commission denied the Petitions for Reconsideration and Clarification filed by FirstEnergy and the Petitions for Reconsideration filed by PPL and PECO.

# II. Procedural History

The *Phase II Implementation Order* provided that, if an EDC filed a petition for an evidentiary hearing on the EDC-specific consumption reduction targets, the matter would be referred to the Office of Administrative Law Judge (OALJ) for hearings with the record being certified to the Commission by November 2, 2012. *Phase II Implementation Order* at 120. As noted, *supra*, PPL filed its Petition on August 20, 2012, and the matter was assigned to the OALJ with a certified record deadline of November 2, 2012. On August 30, 2012, the OCA filed a notice of Intervention.

An Initial Prehearing Conference was held on September 10, 2012. Petitions to intervene by the following Intervenors were granted by a Scheduling Orderdated September 13, 2012 (*Scheduling Order*), including, but not limited to: (1) CAUSE-PA; (2) CAC/SC; (3) Citizens for Pennsylvania’s Future (PennFuture); (4) Comverge, Inc.; (5) PPL Industrial Customer Alliance (PPLICA); and (6) the Sustainable Energy Fund of Central Pennsylvania (SEF).

On October 18, 2012, a hearing was held in Harrisburg. PPL, the OCA, CAC/SE, Comverge, PennFuture, SEF and the Statewide Evaluator (SWE) were present and represented by counsel.[[1]](#footnote-1) Statements and/or Exhibits submitted by PPL, PennFuture and the SWE were admitted into the record.

Main Briefs were filed on October 26, 2012, by PPL, the OCA, CAC/SC, PennFuture and SEF. Reply Briefs were filed on October 31, 2012, by PPL, CAC/SC, and PennFuture.

By Order Certifying the Record dated November 1, 2012, the ALJ provided a history of this proceeding; delineated the transcripts, statements and exhibits admitted into the record; and certified the record to the Commission for our consideration and disposition.

# III. Discussion

## Legal Standards

The *Phase II* *Implementation Order* tentatively established a three-year consumption reduction target for PPL of 2.1%, or 821,072 MWh. *Phase II* *Implementation Order* at 24. In this proceeding, the Company contests that target. The *Phase II Implementation Order* stated that “[i]f an EDC desires to contest the facts the Commission relied upon in adopting the consumption requirements” the EDCs had until August 20, 2012, to file a petition for an evidentiary hearing on its specific target. *Id.*   
at 31. Consequently, the scope of this proceeding is narrow and limited to this single issue.

The Company has the burden of proof in accordance with 66 Pa. C.S.   
§ 332(a). *Implementation Order* at 31. Courts have held that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied,* 529 Pa. 654, 602 A.2d 863 (1992). That is, the Company’s evidence must be more convincing, by even the smallest amount, than that presented by the other Parties. *Se‑Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission’s decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC,* 489 Pa. 109, 413 A.2d 1037 (1980).

We note that any issue that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*,

625 A.2d 741 (Pa. Cmwlth. 1993); *see also* *generally*, *University of Pennsylvania v.*

*Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

## PPL’s Petition for an Evidentiary Hearing

### Background

As stated, *supra*, in the *Phase II* *Implementation Order*, the Commission tentatively[[2]](#footnote-2) adopted a Phase II energy reduction target of 2.1% of PPL’s forecasted total consumption for the period June1, 2009 through May 31, 2010. As a result, PPL must implement measures to achieve a minimum 821,072 MWh reduction over the three years of the Company’s Phase II Plan. *Phase II* *Implementation Order* at 24. The consumption reduction targets for each EDC were based on the full two percent of each EDC’s annual 2006 revenues being spent on the energy efficiency program in each year of Phase II. The resulting reduction targets for each EDC were based on the SWE’s analysis which considered the specific mix of program potential, acquisition costs and available funding for each EDC. *Id.* at 29.

PPL notes that, as explained in the *Phase II Implementation Order,* the SWE's Market Potential Study methodology averaged the administration costs from program years one and two of Phase I, and increased them by twenty-five percent. PPL also notes that the program incentive funding estimates from Phase I were increased by the SWE by twenty-five percent for Phase II. Petition at 4 citing *Phase II Implementation Order* at 18-19. PPL submits that the Commission recognized that the twenty-five percent adjustment factor was used to account for future uncertainties when establishing program goals, including future Pennsylvania Technical Reference Manual (TRM) adjustments, without revising program goals. Petition at 5 citing *Phase II Implementation Order* at 19-20.

PPL states that the Commission has modified the TRM on an annual basis and these modifications have included, *inter alia*, changes to the expected savings to be achieved for certain energy efficiency measures included in EDC EE&C Plans, changes to eligibility requirements for certain programs, and proposed additions to the TRM. PPL notes that the Commission has also made changes to the Total Resource Cost (TRC) test methodology, which is used to analyze the costs and benefits of the EE&C Plans. PPL explains that the changes to the TRC have significantly reduced the cost-effectiveness of many EE&C measures and programs. PPL avers that, to account for the Commission's modifications to the TRM and TRC, as well as in response to other market forces, PPL has petitioned the Commission for approval to modify certain aspects of its previously approved Phase I EE&C Plan. PPL states that the Commission has approved some, but not all of PPL’s requested modifications to its Phase I EE&C Plan. PPL M.B. at 3-4.

PPL states that it requested an evidentiary hearing as a protective measure. The Company believes that the 2.1% Phase II consumption reduction target for PPL is “reasonably achievable.” Petition at 5. However, PPL submits that, for it to be achievable, the Commission must affirm that an EDC retains the right to challenge subsequent modifications to the TRM and request modifications to its Phase II targets if the facts include subsequent changes to the TRM that are not presently known or knowable. *Id.*

### Scope of this Proceeding

#### Positions of the Parties

CAC/SC avers that this proceeding was established to deal with the narrow issue of the factual determinations supporting the consumption reduction targets in the *Phase II Implementation Order*. CAC/SC submits that instead, PPL is only seeking an affirmation from the Commission that an EDC may challenge subsequent modifications to the TRM and request modifications to its Phase II consumption reduction targets. CAC/SC states that these are not factual issues but are questions of law which are inconsistent with the narrow proceeding created by the *Phase II Implementation Order*. Consequently, CAC/SC requests that PPL’s Petition be denied. CAC/SC M.B. at 6-7.

As a preliminary matter, PPL notes that CAC/SC did not present any testimony in this proceeding and raised this issue for the first time in its Main Brief, thereby depriving PPL any meaningful opportunity to respond. PPL avers that CAC/SC should have raised this issue at its earliest opportunity. PPL R.B. at 4-5.

PPL argues that the *Phase II Implementation Order* clearly contemplated a proceeding to address the evidence and arguments presented by PPL in this proceeding. *Id.* at 5. PPL submits that the *Phase II Implementation Order* provides in pertinent part, as follows:

The Commission, however, recognizes that the EDCs' face potential penalties if they fail to meet the Commission-determined consumption reduction requirements. As such, the Commission will tentatively adopt the EDC specific consumption reduction targets set forth in Table 1 above, subject to challenge by an EDC in accordance with the process described below. These consumption reduction targets will become final for any EDC that does not petition the Commission for an evidentiary hearing by August 20, 2012.

*If an EDC desires to contest the facts the Commission relied upon in adopting the consumption reduction requirements* contained in Table 1, it has until August 20, 2012, to file a petition requesting an evidentiary hearing on its specific consumption reduction target. The EDC contesting the consumption reduction requirement shall have the burden of proof in accordance with 66 Pa. C.S. § 332(a). The scope of any such proceeding will be narrow and limited to the consumption reduction requirement issue. If an EDC does not file *a petition by August 20, 2012, it will have been deemed to have accepted the facts and will be bound by the consumption reduction requirement* contained in Table 1for that EDC as there would be no remaining disputed facts.

\* \* \*

At such hearings, the EDC will *have the opportunity to present evidence and argument* as to its reasonable consumption reduction target for Phase II. While the Commission will not entertain petitions from other parties, any other party may intervene in the EDC requested hearing and present evidence.

*Phase II Implementation Order* at 30-31. (emphasis supplied).

PPL states that the *Phase II Implementation Order* provided that an EDC may petition for a hearing to contest the facts the Commission relied upon in adopting the consumption reduction requirements and to present both evidence and arguments related to the consumption reduction target. PPL avers that the Commission did not simply adopt a consumption reduction target, but rather adopted a consumption reduction target that purports to account for all future changes and excludes the Company’s rights to challenge the application of future changes to the TRM, TRC, and other Commission actions as well as request, if necessary, changes to its consumption reduction target. PPL submits that if it had not filed its Petition, it would have been bound by a consumption reduction target that excludes these rights. PPL R.B. at 6.

#### Disposition

We concur with CAC/SC to the extent that the core of PPL’s Petition is a procedural request that the Commission affirm that an EDC may petition for modifications to its energy reduction targets. However, the basis for PPL’s request is, *inter alia*, whether the analysis and assumptions utilized by the Commission to establish its Phase II energy reduction target adequately address potential changes in the TRM, TRC, or other market conditions. We find that PPL’s arguments are within the scope of this proceeding, as delineated in the *Phase II Implementation Order*, and we will consider the merits of the Petition.

### Commission’s Findings in the *Phase II Reconsideration Order*

As discussed, *supra*, by the *Phase II Reconsideration Order*, the Commission denied the Petitions for Reconsideration and Clarification filed by FirstEnergy and the Petitions for Reconsideration filed by PPL and PECO.

#### Positions of the Parties

The OCA, CAC/SC, PennFuture and SEF aver that the *Phase II Reconsideration Order* specificallyaddressed PPL’s concerns. With regard to PPL’s right to challenge future changes to the TRM, the Commission stated the following:

Initially, the Commission would like to point out that the TRM was established through separate proceedings under a separate docket than the Phase II Implementation Order. We also stress that since the inception of the TRM, the Commission has at all times allowed all interested parties to participate in and challenge any proposed updates or changes to the TRM and will continue to do so. PPL has not pointed to any language in the Phase II Implementation Order that expressly restricts a party from so challenging future proposed changes to the TRM. As such, PPL’s assertion that the Phase II Implementation Order restricts it or any other party from challenging any proposed future changes or updates to the TRM is without merit. The TRM establishes a standard for the expected consumption and demand savings for various projects. The TRM is subject to updating and, in any future proceeding in which the EDC’s compliance with the consumption or demand reduction targets are at issue, the EDC will remain free to submit evidence and argument that an alternative estimate of consumption or demand savings is more accurate. In the absence of such evidence, the Commission and parties can rely on the TRM as the default measure of estimated consumption and demand savings.

Accordingly, we will affirm in this order that all interested parties may participate, and are encouraged to do so, in any future proceedings that propose changes or updates to the TRM. Such participation may take the form of support or challenge to any proposed change or update to the TRM. Moreover, the TRM measures are subject to challenge in any subsequent proceeding in which an EDC’s compliance is at issue.

*Phase II Reconsideration Order* at 14-15.

The OCA submits that the Commission has also fully addressed PPL’s second request regarding its inability to challenge consumption reduction targets in the future. OCA M.B. at 6. The OCA points to the *Phase II Reconsideration Order* where the Commission determined:

In summary, the Commission finds that there are many factors, beyond and including the TRM, that could impact, both positively and negatively, the amount of electric energy savings attributable to an EDC’s EE&C plan. Thus, if we were to adopt PPL’s proposal, to allow future challenges to the established consumption reduction requirements, would create a scenario where such requirements would be constantly subject to increases and reductions as the many factors that affect an EDC’s ability to obtain consumption reductions becomes known. As such, for the reasons expressed in this Order and based on the facts and arguments presented in the Petitions, we decline to subject the EDCs, statutory advocates, this Commission and its staff, and all other interested parties to what would invariably result in perpetual proceedings on the consumption reduction requirements the Commission was mandated to establish.

*Phase II Reconsideration Order* at 18.

PPL argues that the remedies in the *Phase II Reconsideration Order* are inadequate because they do not provide a meaningful opportunity to review whether future changes to the TRM and TRC, that are adopted by the Commission, should be applied to Phase II reduction targets or whether Phase II reduction targets should be modified to account for such changes that are adopted. PPL notes that the TRM and TRC are used to verify compliance with the Act 129 targets and that the TRM updates are not EDC-specific. PPL submits that, while a TRM change may be acceptable to one EDC, it may prevent another EDC from meeting its EE&C Plan targets. PPL states that, although the EDCs and other interested parties are permitted to participate in and challenge any proposed updates to the TRM, the Commission could still adopt changes to the TRM, over the objection of an EDC, which could significantly jeopardize an EDC's ability to meet its consumption reduction targets within the statutorily set revenue cap. PPL avers that, if the EDC is not permitted to challenge the application of the updated TRM to the EE&C Plan or seek to modify its consumption reduction target, the EDC could potentially face very significant civil penalties. PPL concludes that challenging the TRM in a general, non-company specific proceeding clearly is not an adequate remedy. PPL M.B. at 27-28.

PPL avers that waiting for the Act 129 compliance hearing to submit evidence and argument that an alternative target would have been more accurate is also not an adequate remedy. PPL submits that EDCs should be permitted to seek pre-enforcement review through a petition to modify or amend their Phase II consumption reduction targets to account for changes to the TRM and TRC that are actually adopted*,* as well as to account for other Commission actions and market conditions that were not known or knowable at the time the EDCs' Phase II EE&C Plans were adopted. *Id.* at 28.

PPL explained that if future changes to the TRM, TRC, or other market forces require the Company to substantially revise its EE&C Plan, depending on the extent and timing of the modification, the Company may determine that it will not be able to achieve its Phase II consumption target. PPL states that it is at this point that PPL Electric could foresee the need to file a petition to request that the Commission amend or revise its Phase II consumption reduction target adopted in the *Phase II Implementation Order.* PPL does not believe that the filing of such petitions would or should be routine, but instead filed only when required. *Id.* at 29.

In response to PPL’s arguments, SEF states that, in the *Phase II Reconsideration Order,* the Commission appropriately determined that it was mandated to establish consumption reduction evaluation targets and that it would decline to subject the EDCs, the statutory advocates, the Commission staff and other interested parties to proceedings related to those targets where many factors, including the TRM, could impact both positively and negatively the amount of savings attributable to a EE&C Plan. SEF M.B. at 8.

SEF avers that PPL’s principal argument appears to be reduced to the fact that it will have to adjust its Phase II EE&C Plan to future changes. SEF submits that this is no different than what occurred in Phase I with PPL making numerous on-going adjustments to its Phase I EE&C Plan. SEF also points out that the Commission has an expedited review process that differentiates between minor and non-minor EE&C plan changes. *Id*.

#### Disposition

We do not concur with PPL’s position that, while the EDCs are permitted to participate in and challenge any proposed updates to the TRM, the Commission could still adopt changes to the TRM, over the objection of an EDC, which could significantly jeopardize an EDC's ability to meet its consumption reduction targets within the statutorily set revenue cap. An EDC isnot required to utilize an algorithm contained in the TRM if, based on the EDC’s best available statistics, the algorithm will not provide an accurate estimate of the energy savings for a particular EE&C measure being implemented by the EDC. As reflected in the *Phase II Reconsideration Order,* EDCs will remain free to submit, in a subsequent proceeding in which achievement of the consumption targets are reviewed, evidence and argument that an alternative estimate of consumption or demand savings is more accurate than the methodology set forth in the TRM. *Phase II Reconsideration Order* at 14. However, absent evidence to the contrary, the TRM will provide the default mechanism to measure whether the EDC has met its consumption reduction targets.

The *Phase II Reconsideration Order* recognizes that there are many factors, beyond and including the TRM, that could impact, both positively and negatively, the amount of electric energy savings attributable to an EDC’s EE&C plan. *Id.* However, we find that establishing variable consumption reduction targets is neither in the public interest nor necessary. We continue to believe that if we were to establish variable consumption reduction requirements, we would create a scenario where such requirements would be constantly subject to increases and reductions as the many factors that affect an EDC’s ability to obtain consumption reductions become known. As we stated in the *Phase II Reconsideration Order,* we decline to subject the EDCs, statutory advocates, this Commission and its staff, and all other interested parties to what would likely result in perpetual proceedings on the consumption reduction requirements the Commission was mandated to establish. *Id.* at 18.

Instead of changes to the Phase II consumption reduction targets, the EDCs should continue to respond to changes in the TRM, and other factors, by making changes to the design and implementation of their EE&C Plans, as necessary. Changes to an EDC’s EE&C Plan are often warranted when one or more measures do not produce the projected energy savings or are not as cost-effective as previously projected (e.g. changes to the TRM, lower-than-anticipated savings from custom measures not covered by the TRM and lower participation rates than projected by the EDC that may impact the actual savings obtained by the EDC’s EE&C plan). By maintaining a single energy reduction target for each EDC for the three-year duration of Phase II, each EDC will be required to substitute other cost-effective measures that will enable it to achieve its target. If we were to create an environment where the EDCs could respond to changes in the cost-effectiveness of a measure by lowering its energy reduction target, the impetus for achieving the maximum savings from the available EE&C funds would diminish.

PPL is concerned that it may find itself in the position that, despite making changes to its Phase II Plan to accommodate future changes to the TRM, TRC, or other market forces, the Company may determine that it will not be able to achieve its Phase II consumption target. We note that, in addition to annual reports required by Act 129, the Commission has directed that the EDCs continue to file quarterly reports on their EE&C Plans for the first three quarters of each reporting year of Phase II. *Phase II Implementation Order* at 77-78. We believe that the ongoing monitoring of the performance of the EDC Phase II Plans should put the EDCs and the Commission in a position to initiate appropriate actions if a Phase II EDC Plan is in danger of falling short of its energy reduction target.

### Twenty-five Percent Adjustment Factor

As noted, *supra*, the SWE's Market Potential Study methodology averaged the administration costs from program years one and two of Phase I, and increased them by twenty-five percent and the program incentive funding estimates from Phase I were increased by the SWE by twenty-five percent for Phase II.

#### Positions of the Parties

PPL argues that the Commission’s conclusion that the twenty-five percent adjustment is sufficient to account for all future changes in the TRM, TRC, other Commission actions and other market conditions is “manifestly unreasonable.” PPL M.B. at 14. PPL avers that the twenty-five percent in acquisition costs does not account for the proposed reduction in savings for the 2013 TRM, the potential changes to the 2014 and 2015 TRMs, and inflation. *Id.* at 18. In its direct testimony, PPL’s witness explained that the proposed changes to the 2013 TRM are exacerbated by a twenty-five to forty percent reduction in lighting savings, resulting from the Energy Independence and Security Act (EISA)[[3]](#footnote-3), that were included in the 2012 TRM. PPL St. No. 1 at 16. PPL states that the twenty-five percent adjustment also does not account for the fact that there will be less “low hanging fruit” available in Phase II, which is usually less costly to implement. PPL M.B. at 18.

In contrast to PPL’s arguments, PennFuture submits that the Phase II consumption reduction target for PPL is reasonable and conservative, obviating the need to later change the target based on changes to the TRM, federal law, or economic or baseline conditions. PennFuture avers that the SWE overestimated PPL’s acquisition costs and thereby underestimated PPL’s feasible consumption reduction target. PennFuture avers that PPL has ample cushion for meeting its consumption reduction target, even if underlying factors were to change. PennFuture M.B. at 6.

PennFuture points to its direct testimony which indicates that the SWE’s projected first-year Phase II acquisition costs for PPL are $224.71 per MWh savings, which is forty-four percent greater than the $156.23 per MWh costs reported in PPL’s July 16, 2012 Program Year 3, Quarter 4 Report to the Commission. PennFuture Exh. 1 at 3. PennFuture also presented*, inter alia*, the following factors which support its determination that the SWE overestimated PPL’s acquisition costs:

* PennFuture argues that there is no evidence to support the SWE’s statement that most least-cost measures have already been attained by EDCs. PennFuture states that information from the Pennsylvania Statewide Residential End-Use and Saturation Study, which indicates that current Compact Fluorescent Light saturation is only seventeen percent, appears to contradict this position. PennFuture M.B. at 7.
* PennFuture submits that the SWE’s Market Potential Study assumes fixed energy efficiency costs over time, which leads to an overestimation of program costs. PennFuture avers that the tendency is for measure costs to decrease over time. *Id.*
* PennFuture states that the SWE’s projection that non-incentive costs will increase over time is not supported by the record. PennFuture submits that the EDCs will no longer be dealing with start-up costs for most of their programs and their programs will benefit from customer awareness and economies of scale. *Id.*
* PennFuture argues that the SWE overestimates the impacts that EISA will have on the ability of EDCs to obtain future savings from the lighting sector. PennFuture states that the SWE’s Market Potential Study does not appear to explicitly address the classes of lamps that are exempt from EISA coverage, thereby lowering the potential savings from lighting in Phase II of Act 129. *Id.* at 8

SEF notes that, while PPL discusses at great length the potential impacts in program results of the proposed 2013 TRM changes and the 2013 Final TRC Order, along with unknown changes in subsequent TRMs, PPL witness Cleff noted that PPL is basing its Phase II EE&C Plan on the proposed 2013 TRM and believes it can meet the compliance targets with the lower savings proposed in the 2013 TRM. SEF M.B. at 4 citing PPL St. No. 1 at 13. SEF states that PPL acknowledged that it will have to adjust the mix of measures and customer sectors to accommodate the new acquisition costs and still develop a Phase II EE&C Plan that complies with the targets and funding constraints. SEF M.B. at 4-5 citing PPL St. No. 1 at 22-23.

#### Disposition

The Commission addressed in significant detail the concerns over the SWE’s Market Potential Study in the *Phase II Implementation Order.*[[4]](#footnote-4) Following its review of the Comments and Reply Comments filed in response to the *Phase II Tentative Implementation Order*, the Commission reached the following conclusion:

For the reasons discussed below, the Commission will tentatively adopt the energy efficiency targets recommended by the SWE for the Phase II EE&C program. The Commission tentatively finds that the Market Potential Study methodology is generally sound, credible and reliable for setting compliance targets for Act 129 programs. The Commission finds it significant that the SWE’s recommendations and findings contained in its Market Potential Study are based on national trends in energy efficiency programs, Pennsylvania-specific circumstances and forward-looking cost estimates, and that such a methodology is appropriate for setting targets to be achieved by May 31, 2016.

*Phase II Implementation Order* at 14.

While we acknowledge PPL witness Cleff’s statement that there are unknowns about what future adjustments may be made to the TRM or the impact those changes may have on the savings attributable to the EDC’s plans, and acquisition costs,[[5]](#footnote-5) we are not convinced by PPL’s arguments, outlined *supra*, that the SWE’s Market Potential Study methodology inadequately addresses these potential uncertainties. We point out that in its *Electric Energy Efficiency Potential for Pennsylvania Final Report* (Market Potential Study), the SWE noted that the program potential savings were less than the Phase I expected savings due to the impacts of federal legislation, changing baseline conditions and increasing saturation of energy efficient equipment. The SWE further noted that the expected program costs for Phase II were considerably higher than the Phase I program costs. Market Potential Study at 7. Furthermore, the SWE explained how it accounted for these effects on reduced program potential as follows:

In calculating expected program costs, incentive and non-incentive, the SWE team utilized economic and performance metrics from the Phase I implementation of PA EDC programs, as described in Section 4 of this report. Because the SWE team acknowledges that the existing EDC program savings have large shares of “low hanging fruit” and very cost-effective measures, Phase I non-incentive program cost estimates have been increased by an additional 25%. Additionally, program incentive funding estimates have been increased by an additional 25% to address uncertainties in future adoption rates, market pricing, and EDCs adopting more comprehensive and less cost-effective measures. The SWE team notes that the 25% increase in the percentage of measure costs paid by the EDC does not impact the TRC test results, because the TRC ratio calculation uses the total measure costs paid by the utility and the participant.

Market Potential Study at 100. We find it significant that PPL did not provide any credible quantitative evidence to the contrary nor challenge the SWE on cross-examination, demonstrating that the SWE’s methodology was inadequate. PPL’s simple assertions and incomplete analysis, without more, do not provide a credible basis to reject the SWE’s methodology. Regarding PennFuture’s testimony, we acknowledge it only to the extent that it demonstrates that the SWE’s methodology more than adequately accounts for future market changes. As such, we find that the SWE adequately accounted for the uncertainties that PPL cites when it determined that PPL’s three year program potential was 2.1 percent of PPL’s 2009-2010 load forecast.

### Conflict with Public Utility Code, Commission Regulations and Due Process

#### Positions of the Parties

As discussed in detail*, supra*, PPL avers that the *2012 Implementation Order* purportsto eliminate an EDC's right to challenge the Phase II consumption reduction targets in response to future changes in the TRM, TRC, and other Commission actions that are not presently known. PPL argues that this conclusion overrides, misapplies and ignores the statutory procedures set forth in Sections 703(g) and 2806.1(b)(3) of the Public Utility Code (Code), 66 Pa. C.S. §§ 703(g), 2806.1(b)(3), as well as the procedure provided in Section 5.572of the Commission's regulations, 52 Pa. Code § 5.572.PPL states that Section 703(g) authorizes the Commission to rescind or amend prior Orders, including such Orders as the *Phase II Implementation Order,* provided that the Commission satisfies the requirements of notice and opportunity to be heard as set forth in Chapter 7 of the Code. PPL M.B. at 19. Section 703(g) of the Code provides:

The commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.

PPL submits that Act 129 authorizes the Commission to modify or terminate any part of a previously approved EE&C Plan upon a determination that a measure in a plan will not meet the requirements of Act 129. PPL M.B. at 20. Section 2806.1(b)(2) of Act 129 provides as follows:

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 sections (c) and (d).

PPL also submits that the Commission's Regulations recognize the right to file a petition to request an amendment, rescission, or modification of a prior Commission Order. PPL states that Section 5.572(a)of the Commission's Regulations provide that a "[p]etition for . . . clarification, rescission, amendment, . . . or the like must be in writing and specify . . . the findings or orders involved, and the points relied upon by the petitioner, with appropriate record references and specific requests for the findings or orders desired." 52 Pa. Code § 5.572(a).PPL states that the Commission's Regulations further provide that "[p]etitions for rescission or amendment may *be filed at any time* according to the requirements of section 703(g)." 52 Pa. Code § 5.572(b) (emphasis added). PPL M.B. at 20-21.

PPL submits that since future changes in the TRM, TRC, and market conditions are entirely unknown at this time, the EDCs do not and cannot know what changes will actually be adopted. PPL avers that, through the *Phase II Implementation Order*, the Commission has prospectively foreclosed the opportunity for the EDCs to be heard on the issue of whether the twenty-five percent adjustment factor is sufficient to account for the changes that are actually adopted. Therefore, PPL argues that the *Phase II Implementation Order* has serious due process implications. PPL M.B. at 31. PPL states that, although the Commission is not required to grant the relief requested in a petition regarding an EDC reduction target, the Commission cannot preemptively conclude that any such petition will be denied. PPL submits that the Commission must fully consider the petition, consistent with the requirements of due process, and reach a conclusion based on the merits and evidence of record. *Id.* at 21.

PennFuture argues that Section 703(g) of the Code provides no support for PPL’s argument. PennFuture states that this provision does not provide any rights to an EDC, it merely affords the Commission the right to amend its Orders. PennFuture R.B. at 3. PennFuture also argues that there is nothing in Section 2806.1(b)(2) which would grant an EDC the ability to petition the Commission to alter its consumption targets. *Id.* at 3-4.

PennFuture states that PPL has been given all of the due process that it is due. PennFuture avers that, while the *Phase II Implementation Order* was adopted without evidentiary hearing as to the consumption reduction targets, the Commission expressly afforded the EDCs the ability to petition for an evidentiary hearing as to the consumption reduction targets. PennFuture notes that is precisely what PPL has done in this proceeding. PennFuture R.B. at 5.

#### Disposition

PPL’s assertions that the Commission’s actions and Orders misapply or ignore the statutory procedures set forth in the Code at Section 703(g) and 2806.1(b)(3), 66 Pa. C.S. §§ 703(g) and 2806.1(b)(3), as well as the Commission’s Regulations at 52 Pa. Code § 5.572, misinterpret the Commission’s prior orders. We note that at no time did this Commission state that an EDC could not file a petition for rehearing, reargument, reconsideration, clarification, recession, amendment, supersedeas or the like, as permitted by Section 703(g) of the Code and Section 5.572 of the Regulations. The Commission simply did not address those provisions as no party raised an issue relating to those provisions. Regarding Section 2806.1(b)(3) of the Code, we set forth the procedures by which an EDC may propose changes to its plan to achieve the required reductions in consumption. *See Phase II Implementation Order* at 90-93. In particular, we delegated authority to Commission staff to review and approve minor plan changes in an abbreviated process that significantly reduces the time to get Commission approval for EDC proposed changes.

### Necessity of Rulemaking Proceedings

#### Positions of the Parties

PPL submits that it is unclear whether the consumption reduction targets contained in the *Phase II Implementation Order* were intended to be a guideline, statement of policy or a regulation. PPL argues that for this reason alone, the Commission's conclusion in the *Phase II Implementation Order* isnot binding on the EDCs. PPL M.B. at 33.

PPL avers that a statement of policy is neither a rule nor precedent, but merely an announcement to the public of policy which an agency hopes to implement in future rulemakings or adjudications. PPL states that a policy statement does not establish a binding norm or obligation. PPL submits that, similar to a policy statement, a guideline is not an adjudication or rulemaking and does not establish a binding norm or obligation. *Id.* PPL argues that even if the Commission's conclusion in the *Phase II Implementation Order* is intended to be a guideline or policy statement, the Order is deficient. PPL states that the procedures, processes, analyses, standards, and requirements adopted by the Commission in the *Phase II Implementation Order* are not intended to be merely an announcement to the public of the policy that the Commission hopes to implement in future rulemakings or adjudications. PPL opines that it is clear that the *Phase II Implementation Order* attempts to establish a binding obligation on EDCs. *Id.* at 33-36.

PPL avers that it is well settled that in promulgating a regulation an agency must comply with the formal rulemaking procedures, including compliance with the Commonwealth Documents Law[[6]](#footnote-6) and the Regulatory Review Act.[[7]](#footnote-7) PPL submits that a regulation is defined by the Commonwealth Documents Law as follows:

Any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency or amending, revising or otherwise altering the terms and provisions of an existing regulation, or prescribing the practice or procedure before such agency.

PPL M.B. at 37 (citing 45 P.S. § 1102). PPL states that a substantially similar definition of a regulation is set forth in the Regulatory Review Act. PPL M.B. at 37 (citing 71 P.S.   
§ 745.3)*.*

PPL avers that the *Phase II Implementation Order* clearly prescribes the practice or procedure before the Commission regarding future challenges or amendments to Phase II consumption reduction targets. As discussed, *supra*, PPL argues that the *Phase II Implementation Order* attempts to establish a binding obligation on all EDCs by precluding them from challenging the application of future changes in the TRM or TRC to their Phase II consumption reduction targets, or from seeking to modify the Phase II consumption reduction targets to account for such changes. Therefore, PPL concludes that the *Phase II* *Implementation Order* announces a rule of general application that is binding on all EDCs and, thus, must comply with the requirements of a formal rulemaking proceeding. PPL M.B. at 37.

PPL states that although the *Phase II Implementation Order* was published in the *Pennsylvania Bulletin* and comments were solicited from interested parties, the Order failed to comply with the remaining requirements of either the Commonwealth Documents Law or the Regulatory Review Act. Accordingly, PPL opines that the *Phase II Implementation Order* was not lawfully promulgated in accordance with the formal rulemaking procedure and, therefore, cannot be a binding regulation on the EDCs. PPL M.B. at 37-38.

PennFuture avers that PPL’s arguments regarding the regulatory review process are beyond the scope of this proceeding which the *Phase II Implementation Order* limited to “the consumption reduction requirement issue.” Penn Future also states that the Regulatory Review Act specifically states “[t]his act is not intended to create a right or benefit, substantive or procedural, enforceable at law by a person against another person or against the Commonwealth, its agencies or its officers.” Therefore, PennFuture argues that PPL does not have standing to challenge the Commission’s procedure. PennFuture R.B. at 6.

#### Disposition

The issue of establishing the Phase II consumption reduction targets through the rulemaking process was raised by PECO in its Motion for Leave to File a Petition for Reconsideration and Petition for Reconsideration of the Phase II Implementation Order. In the *Phase II Reconsideration Order*, the Commission noted that it has a statutory obligation to complete a review of the cost effectiveness of the EE&C Program and to “adopt additional required reductions in consumption,” if the benefits of the EE&C Program exceed its costs, by November 31, 2013. 66 Pa. C.S.   
§ 2806.1(c)(3). *Phase II Reconsideration Order* at 20. Consistent with our findings in the *Phase II Reconsideration Order,* Act 129 does not require the Commission to use the rulemaking process to determine whether the existing statewide standards in the statute should be extended. The operative language in the statute is that the Commission “shall adopt” further reductions in consumption. 66 Pa. C.S. § 2806.1(c)(3). If the legislature had intended a *rulemaking* process, as opposed to an *adjudicative* process, for these further reductions, it would have so stated.

We do not agree with PPL that the *Phase II* *Implementation Order* announces a rule of general application that is binding on all EDCs and, thus, must comply with the requirements of a formal rulemaking proceeding. The Commission established individual consumption reduction requirements for each EDC as an adjudication, which does not fall within the scope of a regulation as defined by the Commonwealth Documents Law. *See Phase II Implementation Order* at 21*; Redmond v. Milk Marketing Board*, 363 A.2d 840, 843-844 (Pa. Cmwlth. 1976).

As an adjudication, the Commission provided notice and opportunity to be heard by EDCs, statutory advocates and interested persons for the standards in the *Phase II Implementation Order*. The establishment of consumption reduction requirements must be, and is, supported by substantial competent evidence. The Commission began conducting a comprehensive process for establishing the consumption reduction requirements prior to the issuance of the March 1, 2012, Secretarial Letter. The EDCs had the opportunity to participate, by providing data for the baseline studies; providing comments to the March 1, 2012 Secretarial Letter, March 16, 2012 stakeholder meeting, and *Phase II Tentative Implementation Order;* and by petitioning for and receiving an evidentiary hearing on its consumption reduction requirement. The Commission believes that this process provides all interested parties, in particular the EDCs, with adequate and meaningful notice and opportunities to be heard in accordance with the Administrative Agency Law, 2 Pa. C.S. § 504, Pennsylvania appellate court precedent and principles of due process.

# 

# IV. Conclusion

For the reasons set forth, *supra*, PPL’s Petition is granted, in part, and denied, in part. The Petition is granted to the extent we have conducted an evidentiary hearing concerning PPL’s consumption reduction targets established by *the Phase II Implementation Order*. For the reasons stated in this Order, as well as our *Phase II Reconsideration Order,* the Petition is denied to the extent that we decline to adopt PPL’s request to permit EDCs to challenge Phase II energy consumption targets in response to future changes to the TRM, TRC or other market changes that are not presently known; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition of PPL Electric Utilities Corporation for an Evidentiary Hearing, filed on August 20, 2012, is granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That the three-year, 2.1 percent Phase II energy efficiency reduction compliance target established for PPL Electric Utilities Corporation in the Commission’s Order in *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411 and M-2008-2069887 entered August 3, 2012, is affirmed.

3. That the Secretary shall serve a copy of this Opinion and Order on all active Parties to this proceeding.

4. That the proceedings at Docket Number P-2012-2320369 be marked closed.



**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: February 14, 2013

ORDER ENTERED: February 14, 2013

1. The SWE was represented by attorneys from the Commission’s Law Bureau. To prevent commingling of functions, those attorneys have been screened from any advisory duties related to this matter. [↑](#footnote-ref-1)
2. As indicated, *supra*, the Commission adopted the specific EDC targets, subject to an EDC filing a petition for an evidentiary hearing. The Commission stated that, if an EDC does not file a petition by August 20, 2012, it will have been deemed to have accepted the facts and will be bound by the consumption reduction requirement contained in the *Phase II Implementation Order* because there would be no remaining disputed facts. *Phase II Implementation Order* at 31. [↑](#footnote-ref-2)
3. Energy Independence and Security Act of 2007, 42 USC §§ 17001 *et seq*. [↑](#footnote-ref-3)
4. *See Phase II Implementation Order* at 13-21, 24-26. [↑](#footnote-ref-4)
5. *See* PPL St. No. 1-R at 5. [↑](#footnote-ref-5)
6. 45 P.S. §§1102 *et seq*. [↑](#footnote-ref-6)
7. 71 P.S. §§745.1 *et seq*. [↑](#footnote-ref-7)