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October 26, 2012


Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

**RE: Petition of PPL Electric Utilities Corporation for an Evidentiary Hearing on the
Energy Benchmarks Established for the Period June 1, 2013 through May 31, 2016
Docket No. P-2012-2320369**

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Main Brief of PPL Electric Utilities Corporation in the above-referenced proceeding. Copies have been provided to the persons in the manner indicated on the Certificate of Service.

Respectfully Submitted,



Andrew S. Tubbs

AST/jl

Enclosures

cc: Certificate of Service
Honorable Elizabeth Barnes

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **Main Brief of PPL Electric Utilities Corporation** has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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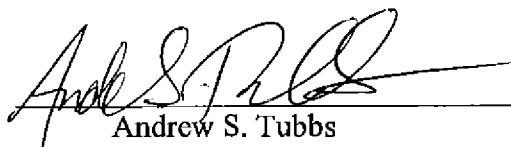
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Petition of PPL Electric Utilities Corporation For :
an Evidentiary Hearing on Energy Efficiency : P-2012-2320369
Benchmarks Established for the Period June 1, :
2013 though May 31, 2016. :

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I. INTRODUCTION AND BACKGROUND

This proceeding was initiated on August 20, 2012, when PPL Electric Utilities Corporation (“PPL Electric” or the “Company”) filed a Petition for an Evidentiary Hearing (“Petition”) pursuant to the Implementation Order issued by the Pennsylvania Public Utility Commission (“Commission”) on August 3, 2012. *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411, M-2008-2069887, 2012 Pa. PUC LEXIS 1259 (Implementation Order entered on August 3, 2012) (“*2012 Implementation Order*”). The sole issue raised in PPL Electric’s Petition is whether the Commission’s statement on page 20 of the *2012 Implementation Order* that “the application of the 25% adjustment factor allows for future [Technical Reference Manual (“TRM”)] adjustments on savings adjustments in future years without revising program goals” eliminates electric distribution companies’ (“EDCs”) legal rights to: (1) challenge the application of future changes to the TRM, Total Resource Cost (“TRC”), and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to their Phase II EE&C Plans, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and market conditions that are not presently known.

PPL Electric is a “public utility” and an “electric distribution company” as defined in Sections 102 and 2803 of the Pennsylvania Public Utility Code, 66 Pa.C.S. §§ 102, 2803. PPL Electric furnishes electric service to approximately 1.4 million customers throughout its certificated service territory, which includes all or portions of twenty-nine counties and encompasses approximately 10,000 square miles in eastern and central Pennsylvania.

House Bill No. 2200, subsequently identified as Act No. 129, became effective on October 15, 2008. Act 129 created, *inter alia*, an energy efficiency and conservation (“EE&C”)

program, codified in the Pennsylvania Public Utility Code, 66 Pa.C.S. §§ 2806.1, 2806.2. This program requires each EDC with at least 100,000 customers to adopt an energy efficiency and conservation plan (“EE&C Plan”). EE&C Plans are programs designed to achieve the Act 129 conservation and peak load reduction requirements, by specified dates, within the specified cost cap.

Act 129 requires the Commission to establish procedures for approving EE&C Plans submitted by EDCs. 66 Pa.C.S. § 2806.1(a)(1). In implementing this requirement, the Commission determined to update and use the TRM that was originally developed by the Commission pursuant to the Pennsylvania Alternative Energy Portfolios Standards Act.¹ *Energy Efficiency and Conservation Program*, Docket No. M-2008-2069887, 2009 Pa. PUC LEXIS 3 at *21 (January 16, 2009). The Commission held that each EE&C Plan will be evaluated as to whether the consumption and demand reduction goals in Act 129 will be achieved based on the use of the TRM. *Id.*, at *30.

By Order entered June 1, 2009, the Commission approved the 2009 version of the TRM (“2009 TRM”). *Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standards for the Participation of Demand Side Management Resources – Technical Reference Manual Update*, Docket No. M-00051865, 2009 Pa. PUC LEXIS 1143 (June 1, 2009). In approving the 2009 TRM, the Commission held that “the TRM will be used for implementation of Act 129,” and that “the TRM will provide vital guidance to EDCs in developing their EE&C plans.” *Id.*, at *13.

On July 1, 2009, in compliance with Section 2806.1(b)(1)(i) of Act 129, PPL Electric filed its Phase I EE&C Plan for the period of June 1, 2009 through May 31, 2013. Consistent

¹ Act of November 30, 2004, P.L. 1672, *as amended*, 73 P.S. §§ 1648.1-1648.8.

with the Commission's direction, PPL Electric relied upon the 2009 TRM to develop its Phase I EE&C Plan. PPL Electric's Phase I EE&C Plan includes a broad portfolio of energy efficiency, conservation, and peak load reduction programs. PPL Electric's Phase I EE&C Plan was approved by the Commission on October 26, 2009. *Petition of PPL Electric Utilities Corporation for Approval of its Energy Efficiency and Conservation Plan*, Docket No. M-2009-2093216, 2009 Pa. PUC LEXIS 2242 (October 26, 2009). The 2009 TRM was used by the Commission in evaluating and ultimately approving PPL Electric's Phase I EE&C Plan.

The Commission has modified the TRM on an annual basis. *2012 Implementation Order*, p. 20. These modifications have included, among other things, changes to the expected deemed savings to be achieved for certain energy efficiency measures included in EDC EE&C Plans, changes to eligibility requirements for certain programs, other energy conservation measures, and proposed additions to the TRM.² (Tr. 33-35; PPL Electric St. 1-R, p. 3.) Similarly, the Commission has made changes to the TRC, which is used to analyze the costs and benefits of the EE&C Plans,³ that have significantly reduced the cost-effectiveness of many EE&C measures and programs.⁴ To account for the Commission's modifications to the TRM and TRC, as well as in response to other market forces, PPL Electric has petitioned the Commission for approval to modify certain aspects of its previously approved Phase I EE&C

² See, e.g., *Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standards for the Participation of Demand Side Management Resources – Technical Reference Manual 2011 Update*, Docket No. M-00051865, 2011 Pa. PUC LEXIS 740 (February 28, 2011).

³ 66 Pa.C.S. § 2806.1(m).

⁴ See, e.g., *Implementation of Act 129 of 2008 – Total Resource Cost (TRC) Test 2011 Revisions*, Docket No. M-2009-2108601, 2011 Pa. PUC LEXIS 1465 (August 2, 2011); *2012 PA Total Resource (TRC) Test*, Docket No. M-2012-2300653, 2012 Pa. PUC LEXIS 1436 (August 30, 2012). Avoided costs of energy are much lower using the reference sources, and other criteria, such as heat rates and escalation factors, specified in the 2013 TRC.

Plan. (Tr. 34-35.) The Commission has approved some but not all of PPL Electric's requested modifications to its Phase I EE&C Plan.⁵

By November 30, 2013, the Commission is required to assess the cost-effectiveness of the EDCs' EE&C Plans and set additional reductions in consumption and peak demand if the benefits of the EDCs' EE&C Plans exceed their costs. 66 Pa.C.S. §§ 2806.1(c)(3), (d)(2). On May 10, 2012, the Commission issued a tentative order seeking comments on proposed required consumption reduction targets for each EDC, as well as guidelines for implementing Phase II of the EDCs' EE&C Plans for the period of June 1, 2013 through May 31, 2016. *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411, M-2008-2069887, 2012 Pa. PUC LEXIS 759 (Tentative Implementation Order entered May 11, 2012) ("*2012 Tentative Order*").

On June 25, 2012, PPL Electric filed comments with the Commission, generally agreeing with the proposals set forth in the *2012 Tentative Order*. However, PPL Electric requested refinements and clarifications of certain aspects of the *2012 Tentative Order*. Pertinent to this proceeding, PPL Electric requested that the Commission clarify that: (a) EDCs shall not be precluded from challenging future modifications to the TRM or its application to Phase II consumption reduction targets; and (b) EDCs shall not be prohibited from petitioning the Commission to modify the applicable Phase II consumption reduction targets based upon future changes to the TRM or other future changes that are not presently known.

On August 3, 2012, the Commission issued the *2012 Implementation Order*, which determined the required consumption reduction targets for each EDC and established guidelines for implementing Phase II of the EE&C program. In order to establish the EDCs' required

⁵ See, e.g., *Petition of PPL Electric Utilities Corporation for Approval of its Energy Efficiency and Conservation Plan*, Docket No. M-2009-2093216, 2010 Pa. PUC LEXIS 392 (February 17, 2010); *Petition of PPL Electric* (Continued on next page ...)

consumption reduction targets, the Commission’s Statewide Evaluator (“SWE”) conducted baseline studies and prepared a Market Potential Study for the Commission that recommended each EDC’s specific consumption reduction target. *2012 Implementation Order*, p. 13. The Commission explained that its overall framework for establishing savings reduction targets was designed to establish compliance energy reduction targets that must, at a minimum, be met. *2012 Implementation Order*, p. 25. The consumption reduction targets, as well as their three-year cumulative MWh figures, as applicable to PPL Electric, appear below.

Act 129 Phase II Three-Year Energy Efficiency Reduction Compliance Targets

EDC	Three-Year Program Acquisition Cost (S/MWh)	Three-Year % of 2009/10 Forecast Reductions	Three-Year MWh Value of 2009/10 Forecast Reductions
PPL	\$224.71	2.1	821,072

2012 Implementation Order, p. 24.

In the *2012 Implementation Order*, the acquisition costs from Phase I were increased by 25% for Phase II. According to the Commission, the 25% adjustment factor was used to account for future uncertainties when establishing program goals. *2012 Implementation Order* at 18-19. The Commission, therefore, rejected PPL Electric’s request for clarification, stating that “[t]he application of the 25% adjustment factor allows for future TRM adjustments on savings adjustments in future years without revising program goals.” *2012 Implementation Order*, p. 20. The Commission also held that EDCs will be deemed to have accepted the facts and will be bound by the consumption reduction requirements contained in the *2012 Implementation Order*

(...continued from previous page.)
Utilities Corporation for Approval of its Energy Efficiency and Conservation Plan, Docket No. M-2009-2093216, 2011 Pa. PUC LEXIS 2009 (May 6, 2011).

if the EDC has not filed a petition for an evidentiary hearing by August 20, 2012. *2012 Implementation Order*, p. 31.

On August 20, 2012, PPL Electric filed a Petition for Reconsideration, requesting, among other things, that the Commission clarify (a) that the 25% adjustment factor “for future TRM adjustments” does not preclude EDCs from challenging subsequent modifications to the TRM, and (b) that the 25% adjustment factor “for future TRM adjustments” does not preclude EDCs from requesting modifications to its Phase II targets to account for future changes to the TRM or other future changes that are not presently known.

On September 27, 2012, the Commission issued an order denying PPL Electric’s request for reconsideration. *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411, M-2008-2069887, 2012 Pa. PUC LEXIS 1545 (Reconsideration Order entered on September 27, 2012) (“*2012 Reconsideration Order*”). The Commission held that interested parties are permitted to participate in and challenge future changes to the TRM. The Commission further held that, in any future proceeding in which the EDC’s compliance with the consumption and 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 should be used. *2012 Reconsideration Order*, p. 14. However, the Commission failed to address the fundamental legal issue raised in PPL Electric’s Petition for Reconsideration -- whether the 25% adjustment factor adopted in the Implementation Order “for future TRM adjustments” prohibits an EDC from challenging the application of future modifications to the TRM or from seeking to modify the Phase II consumption reduction targets to account for future changes to the TRM or other future changes that are not presently known.

Also on August 20, 2012, PPL Electric filed the above-captioned Petition requesting an evidentiary hearing pursuant to the Commission's directive in the *2012 Implementation Order*. In its Petition, PPL Electric requested that the Commission affirmatively state that its approval of the 25% adjustment factor does not restrict an EDC's right to: (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and market conditions that are not presently known. (Petition, p. 6; PPL Electric St. 1, pp. 2-3.) PPL Electric's Petition was assigned to Administrative Law Judge Elizabeth H. Barnes ("ALJ").

Petitions to Intervene were filed by the Office of Consumer Advocate ("OCA"), the Commission on Economic Opportunity ("CEO"), Sustainable Energy Fund of Central Eastern Pennsylvania ("SEF"), PP&L Industrial Customer Alliance ("PPLICA"), Comverge, Inc., Clean Air Council and the Pennsylvania Chapter of the Sierra Club (collectively "Sierra Club"), Citizens for Pennsylvania's Future ("PennFuture"), Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA"), and Community Action Association of PA s/k/a/ CAPP. These Petitioners to Intervene were granted by the ALJ's September 20, 2012 Scheduling Order.

A Prehearing Conference was held on September 10, 2012, at which an expedited procedural schedule was established. Pursuant thereto, on September 28, 2012, PPL Electric served PPL Electric Statement No. 1, the Direct Testimony of Peter D. Cleff. On October 12, 2012, PennFuture served PennFuture Ex. 1, the Direct Testimony of Courtney Lane. Also on October 12, 2012, SWE submitted SWE Statement No. 1, Electric Energy Efficiency Potential

for Pennsylvania, SWE Statement No. 2, Pennsylvania Statewide Residential End-Use and Saturation Study, SWE Statement No. 3, Pennsylvania Statewide Commercial & Industrial End-Use and Saturation Study, and SWE Statement No. 4, the Direct Testimony of Richard F. Spellman and Patrick A. Burns. On October 17, 2012, PPL Electric served PPL Electric Statement No. 1-R, the Rebuttal Testimony of Peter D. Cleff.

An evidentiary hearing was held October 18, 2012. At the hearing, the parties moved their respective written testimonies and exhibits into the record. Certain parties conducted cross-examination of the witnesses for PPL Electric and PennFuture. The record was closed at the conclusion of the evidentiary hearing.

PPL Electric herein submits this Main Brief pursuant to the ALJ's Scheduling Order. This matter and the parties' briefs are to be directly certified to the Commission for review and disposition. *2012 Implementation Order*, p. 31. For the reasons explained below, the Commission should grant the relief requested in PPL Electric's Petition and issue an order that affirmatively states that the 25% adjustment factor adopted in the *2012 Implementation Order* does not preclude an EDC's right to: (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and other market conditions that are not presently known.

II. LEGAL STANDARDS

Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. It is well established 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, 602 (Pa. Cmwlth. 1990); *see also In Re: Pa. PUC v. Jackson Sewer Corporation*, Docket Nos. R-00005997, *et al.*, 2001 Pa. PUC LEXIS 53 at *9 (September 28, 2001) The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167 (1999).

If the petitioner sets forth a *prima facie* case, then the burden shifts to the opponent. *Energy Conservation Council of Pennsylvania v. Pa. PUC*, 995 A.2d 465, 483 n.16. (Pa. Cmwlth. 2010). Establishing a *prima facie* case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent which, if not met, results in an obligatory decision for the proponent. Once a *prima facie* case on a point has been established, if contrary evidence is not presented, there is no requirement that the applicant produce additional evidence in order to sustain its burden of proof. *Morrissey v. Pennsylvania Department of Highways*, 424 Pa. 87, 92, 225 A.2d 895, 897-98 (1967).

III. SUMMARY OF ARGUMENT

Preliminarily, it must be stressed what is actually being challenged by PPL Electric in this proceeding. In the *2012 Implementation Order*, the Commission approved a consumption reduction target of 2.1% for PPL Electric based upon the Market Potential Study performed by SWE. *2012 Implementation Order*, p. 24. The Commission also approved a 25% adjustment factor based upon the estimated acquisition costs contained in the Market Potential Study. *2012 Implementation Order*, pp. 19-20. In this proceeding, PPL Electric is not challenging the 2.1% consumption reduction target or the 25% adjustment factor adopted in the *2012 Implementation Order*. Rather, PPL Electric is simply requesting that the Commission make it clear that the *2012 Implementation Order* and *2012 Reconsideration Order* do not restrict PPL Electric’s right

to: (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and other market conditions that are not, and cannot be, presently known. (PPL Electric St. 1-R, pp. 1-2.)

According to the Commission, the 25% adjustment factor was used to account for future uncertainties when establishing program goals. *2012 Implementation Order*, pp. 18-20. The *2012 Implementation Order* and *2012 Reconsideration Order* appear to suggest that the 25% adjustment factor prohibits an EDC, such as PPL Electric, from challenging the application of future changes in the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets. The *2012 Implementation Order* and *2012 Reconsideration Order* also seem to suggest that the 25% adjustment factor prohibits an EDC from seeking to modify the Phase II consumption reduction targets to account for future changes in the TRM, TRC, other Commission actions, and other market conditions that are not presently known. This conclusion raises serious legal, policy, factual, and evidentiary issues.

The evidence of record in this proceeding demonstrates that the 25% adjustment may not be sufficient to account for all future changes in the TRM, TRC, other Commission actions, and other market conditions. It is apparent that the Commission will evaluate and verify compliance with Act 129 using the TRM. If the Commission decides to significantly modify future TRMs, these changes will occur after PPL Electric's Phase II EE&C Plan has been developed and will affect the savings that can be achieved. Such midstream changes to the TRM to reduce savings may jeopardize PPL Electric's ability to meet its Phase II reduction target and subject the

Company to a significant civil penalty. However, according to the *2012 Implementation Order*, PPL Electric is not permitted to request that its consumption reduction target be modified if such changes make it impossible for the Company to successfully achieve its Phase II consumption reduction target.

The Commission's *2012 Implementation Order* erred as a matter of law by prospectively eliminating the right to challenge the application of future modifications to the TRM or to seek to modify the Phase II consumption reduction targets to account for future changes to the TRM. EDCs have the right to petition the Commission to modify or rescind prior orders. Further, the Commission may modify a previously approved EE&C Plan upon a determination that the measure in the plan will not meet the requirements of Act 129. The Commission's attempt in the *2012 Implementation Order* to prospectively eliminate an EDC's right to petition to modify its Phase II consumption reduction target misapplies and ignores the Public Utility Code, Act 129, and the Commission's regulations.

The Commission's conclusion that the 25% adjustment is sufficient to account for all future changes in the TRM, TRC, other Commission actions, and other market conditions is entirely based on assumptions that are not presently known or knowable. It is clear that the potential impact of future changes to the TRM, TRC, and other market forces were not, and could not have been, considered by the Commission in determining the Company's Phase II consumption reduction target.

In the *2012 Reconsideration Order*, the Commission noted that EDCs and other interested parties may (1) participate in and challenge any proposed updates to the TRM, and (2) submit evidence in compliance hearings and argue that an alternative estimate of consumption or demand savings is more accurate. *2012 Reconsideration Order*, p. 14. However, the remedies

provided in the *2012 Reconsideration Order* are inadequate and do not provide a meaningful opportunity to review whether future changes that are *actually adopted* should be applied to the Phase II reduction targets, or whether the Phase II reduction targets should be modified to account for such changes that are *actually adopted*.

The conclusion reached in the *2012 Implementation Order* violates due process requirements. The *2012 Implementation Order* seeks to establish a binding rule by prospectively eliminating the right to (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets, and (2) request, if necessary, modifications to the Phase II consumption reduction target to account for any future changes to the TRM, TRC, other Commission actions, and market conditions that are not presently known. In essence, the Commission has preemptively reached a decision that the 25% adjustment factor is sufficient to account for future changes in the TRM or TRC without allowing parties an opportunity to present evidence regarding the changes that are *actually adopted*.

It is unclear whether the Commission's *2012 Implementation Order* is intended to be a guideline, statement of policy, or regulation. A guideline or statement of policy is not an adjudication or rulemaking, and does not establish a binding norm or obligation. Although the *2012 Implementation Order* announces a rule of general application and is intended to be binding on all EDCs, it was adopted without the requirements of a formal rulemaking proceeding. Therefore, the conclusion in the *2012 Implementation Order* -- that EDCs are prohibited from (1) challenging the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets, and (2) requesting, if

necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any such future changes -- is not binding.

The conclusion in the *2012 Implementation Order* that the 25% adjustment factor is sufficient to account for all future, unknown changes was not supported by substantial evidence of record in the *2012 Implementation Order* proceeding. The *2012 Implementation Order* was adopted without evidentiary hearings and, as a result, no testimony or other evidence was presented and there was no opportunity for cross examination. Moreover, there was nothing in the record for the *2012 Implementation Order* proceeding to support the conclusion that the 25% adjustment factor is sufficient to account for all future changes to the TRM. This conclusion is based on pure speculation and conjecture and, therefore, is not supported by competent and substantial evidence as a matter of law.

For these reasons, as further explained below, the conclusion reached in the *2012 Implementation Order* constitutes an error of law, abuse of discretion, violation of due process requirements, and is not supported by the evidentiary record. Accordingly, the Commission should make it clear that the *2012 Implementation Order* and *2012 Reconsideration Order*, including, but not limited to, the 25% adjustment factor, do not restrict PPL Electric's right to: (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and other market conditions that are not presently known.

IV. ARGUMENT

A. **THE EVIDENCE IN THIS PROCEEDING DEMONSTRATES THAT THE 25% ADJUSTMENT FACTOR MAY NOT BE ADEQUATE TO ACCOUNT FOR ALL UNKNOWN, FUTURE CHANGES**

The Commission's conclusion that the 25% adjustment is sufficient to account for all future changes in the TRM, TRC, other Commission actions, and other market conditions is manifestly unreasonable. In essence, the *2012 Implementation Order* allows the Commission to change the rules in the "middle of the game" without allowing the EDCs to adjust the consumption reduction target to account for such rule changes. This is particularly egregious when the updated rules are used to verify an EDC's compliance with Act 129 at the "end of the game." (PPL Electric St. No. 1-R, p. 12.) The evidence of record in this proceeding clearly demonstrates that the 25% adjustment factor may not be adequate to account for all unknown, future changes in the TRM, TRC, other Commission actions, and other market conditions.

In the *2012 Reconsideration Order*, the Commission stated that, "the TRM is a tool EDCs can use to estimate the amount of energy savings a program offering can potentially provide," and that, "[t]he TRM does not establish the goal, nor do changes to the TRM move the goal, the TRM simply measures the amount of electric energy savings obtained by the installation or implementation of a measure of program." *Reconsideration Order* at 17. However, the Commission acknowledged that the TRM, among other things, could impact, both positively and negatively, the amount of electric energy savings an EDC could achieve in its EE&C Plan. *2012 Reconsideration Order*, pp. 17-18. Furthermore, it is apparent that the Commission will evaluate and verify compliance with Act 129 using the updated TRM and TRC.

Despite the Commission's contention that the TRM is merely guidance, the Commission has stated that it "will utilize the [TRM] to help fulfill the evaluation process requirements contained in the Act [129]," and that each EE&C Plan "will be evaluated as to whether the

consumption and demand reduction goals in Act 129 will be achieved based on the use of a TRM.” *Energy Efficiency and Conservation Program*, Docket No. M-2008 2069887, 2009 Pa. PUC LEXIS 3 at *21, *30 (January 16, 2009). Moreover, in adopting updates to the 2011 TRM, the Commission stated as follows:

[T]he Commission will continue to update the TRM on an annual basis ... and apply these TRM values at the beginning of each subsequent ... EE&C Program compliance year.

* * *

We recognize the potential effect any changes to the TRM could have on the EDC’s existing plans, to include the amount of savings that may be obtained by an individual program offering, the costs of the plans, and the cost-effectiveness of individual program offerings, as well as the program as a whole.

* * *

As discussed above, the TRM values will change over time as well. In changing the TRM to reflect credible and accurate energy savings, the Commission is not changing any EDC plan; just one of the many assumptions the EDC relied upon in developing its plan. All of these changes or miscalculations in assumptions and estimates affect the results of the EDCs’ plans and will likely require EDCs to adjust their plans.

Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standards for the Participation of Demand Side Management Resources – Technical Reference Manual 2011 Update, Docket No. M-00051865, 2011 Pa. PUC LEXIS 740 at *72, *74, *76 (February 28, 2011). Based on these statements, it is apparent that the Commission will evaluate and verify compliance with Act 129 using the updated versions of the TRM.

The implication of this is that the Commission, by routinely updating the TRM and TRC, may materially change the rules used by an EDC to develop its Commission-approved EE&C Plan. Further, the Commission will use these revised rules to verify savings compared to the savings estimated in the EE&C Plan. However, the Commission will not permit an EDC to

request that its consumption reduction target be modified if such changes make it impossible for the EDC to successfully achieve its Phase II consumption reduction target. Such a result is particularly problematic given the statutorily set revenue cap and the threat of substantial civil penalties if the EDC is unsuccessful in reaching the consumption reduction target. (PPL Electric St. 1, pp. 5-6.)

If the Commission decides to significantly modify the TRM via the *2013 TRM Tentative Order* and/or subsequent Phase II TRMs, these changes will occur after PPL Electric's Phase II EE&C Plan has been developed and will affect the savings that can be achieved. Based on the TRM changes implemented in Program Years 2, 3, and 4 for Phase I and the changes proposed for 2013 (Phase II, Program year 1), PPL Electric reasonably anticipates that the 2013-2016 TRMs could further decrease savings. This puts PPL Electric in the position of trying to hit a moving target within a fixed budget. (PPL Electric St. 1, pp. 15-16.) Further, applying future changes to the 2013 TRM and subsequent TRMs, as well as changes to other Commission requirements such as the funding limit, the low-income set-aside target, or changes to the TRC that reduce the cost-effectiveness of EE&C programs, could impair the Company's ability to achieve its Phase II consumption reduction target within the funding cap, cost-effectiveness requirement, and other requirements. PPL Electric is concerned with the process used to identify these changes, the timing of these proposed changes, and, most importantly, the impact that these proposed changes will have on PPL Electric's ability to meet its Phase II compliance requirements within the Act 129 2% revenue cap. (PPL Electric St. 1, p. 14.)

Importantly, the final 2013 TRM is not scheduled to be issued until December 20, 2012, well over a month after EDCs are required to file their Phase II EE&C Plans on November 1, 2012. Although the proposed changes to the 2013 TRM are not final, the changes proposed in

the *2013 TRM Tentative Order*,⁶ if approved, combined with the lower avoided costs determined in accordance with the *2013 TRC Order*,⁷ would require the Company to exclude some existing measures that are popular with its customers because the savings have significantly decreased (2013 TRM v. Phase 1 and the Market Potential Study). (PPL Electric St. 1, pp. 14, 19.)

The risks associated with this issue are not hypothetical; they are real and substantial. The changes proposed for the 2013 TRM, in aggregate, will likely reduce PPL Electric's total EE&C Plan savings by 15% to 30% (in addition to the reduction due to Energy Independence and Security Act "EISA") and will increase PPL Electric's program acquisition cost by 15% to 30% (in addition to the reduction due to EISA). The Market Potential Study relied on by the Commission to set the consumption reduction targets assumed an approximately 25% to 40% reduction in lighting savings (compared to Phase I EE&C Plans) due to EISA but, importantly, did not account for most of the reductions proposed in the 2013 TRM. Therefore, the Commission's 25% adjustment factor may cover the reduced savings and increased acquisition costs associated with EISA but does not cover reduced savings and increased acquisition costs associated with changes to the 2013 TRM. (PPL Electric St. 1, p. 20.)

If PPL Electric carried forward the mix of measures from its Phase I EE&C Plan to the Phase II EE&C Plan, and the Commission decides to significantly modify the TRM via the *2013 TRM Tentative Order* and/or subsequent Phase II TRMs, it would be difficult for the Company to achieve the 2.1% consumption reduction compliance target. If the Commission adopts significant changes to the TRM, the compliance target for Phase II may need to be recalculated

⁶ *Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standards for the Participation of Demand Side Management Resources – Technical Reference Manual 2013 Update*, Docket Nos. M-2012-2313373, M-00051865, 2012 Pa. PUC LEXIS 1511 (September 13, 2012) ("*2013 TRM Tentative Order*").

⁷ *2012 PA Total Resource (TRC) Test*, Docket No. M-2012-2300653, 2012 Pa. PUC LEXIS 1436 (August 30, 2012) ("*2013 TRC Order*").

accordingly as the TRM changes are not reflected in the results of the Market Potential Study or the Phase II compliance targets.⁸ (PPL Electric St. 1, pp. 20-21.)

The Market Potential Study includes a 25% increase in program acquisition costs, presumably to address all future reductions to savings (EISA plus changes to the 2013 TRM). The *2012 Implementation Order* proposes \$0.225/kWh for PPL Electric's program acquisition cost, which is reasonable to address EISA alone. (PPL Electric St. 1, p. 22.) However, it does not account for the proposed reduction to savings for the 2013 TRM, does not account for potential changes to the 2014 or 2015 TRMs, and does not account for inflation. (SWE St. 4, p. 3.) Further it does not account for the fact that there will be less "low hanging fruit" available in Phase II, which are usually less costly to implement. (PPL Electric St. 1, p. 22.) Therefore, the SWE's proposed 25% "adder" to the program acquisition costs is not sufficient to address all of these future changes and potential impacts if the structure of PPL Electric's Phase II EE&C Plan is similar to Phase I.

Based on the foregoing, allowing the Commission to change the rules in the "middle of the game" without allowing the EDCs to request adjustments to their consumption reduction target to accommodate the significant rule changes is manifestly unreasonable. The evidence of record in this proceeding clearly demonstrates that the 25% adjustment factor may not be adequate to account for all unknown, future changes in the TRM, TRC, other Commission actions, and other market conditions. Therefore, the Commission should make it clear that the *2012 Implementation Order* and *2012 Reconsideration Order*, including, but not limited to, the 25% adjustment factor, do not restrict PPL Electric's right to: (1) challenge the application of

⁸ The Company explained that it does not plan to request changes to its target for minor changes to the TRM or other Commission actions; rather, it would make such a filing only if the changes are so significant that the Company cannot achieve its Phase II consumption reduction target. (PPL Electric St. 1-R, p. 6.)

future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and other market conditions that are not presently known.

B. THE 2012 IMPLEMENTATION ORDER CONTAINS A CLEAR ERROR OF LAW

The *2012 Implementation Order* purports to eliminate an EDC's right to challenge the application of future changes in the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets or from seeking to modify the Phase II consumption reduction targets to account for future changes that are not presently known. This conclusion overrides and misapplies the Public Utility Code, Act 129, and the Commission's regulations. For these reasons, as explained below, the conclusion reached by the *2012 Implementation Order* constitutes an error of law.

The power and authority of an administrative agency of this Commonwealth is limited to that granted by the enabling legislation. *Pennsylvania State Lodge, Fraternal Order of Police v. Department of Conservation*, 909 A.2d 413, 418 (Pa. Cmwlth. 2006). The conclusion reached by the *2012 Implementation Order* misapplies and ignores the statutory procedures set forth in Sections 703(g) and 2806.1(b)(3) of the Public Utility Code, 66 Pa.C.S. §§ 703(g), 2806.1(b)(3), as well as the procedure provided in Section 5.572 of the Commission's regulations, 52 Pa. Code § 5.572.

Section 703(g) of the Public Utility 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.

66 Pa.C.S. § 703(g). Section 703(g) authorizes the Commission to rescind or amend prior orders, including such orders as the *2012 Implementation Order* approving Phase II consumption reduction targets, provided the Commission satisfies the requirements of notice and opportunity to be heard as provided in Chapter 7 of the Public Utility Code.

Similarly, Act 129 authorizes the Commission to modify or terminate any part of a previously approved EE&C Plan. 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).

66 Pa.C.S. § 2806.1(b)(2). Therefore, pursuant to the plain language of Section 2806.1(b)(2), the Commission may modify a previously approved EE&C Plan upon a determination that the measure in the plan will not meet the requirements of Act 129.

Clearly, the General Assembly has granted EDCs the right under Sections 703(g) and 2806.1(b)(2) to petition the Commission asking that it exercise its authority to modify the consumption reduction targets adopted in a Phase II EE&C Plan. Indeed, the Commission's regulations recognize the right to file a petition to request an amendment, rescission, or modification of a prior order. 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). 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).

Notwithstanding, through the conclusion reached in the *2012 Implementation Order*, the Commission has ignored this right by prospectively prohibiting an EDC from petitioning the Commission to modify the Phase II consumption reduction targets to account for changes in the TRM, TRC, other Commission actions, and other market conditions that are not presently known. Such a result is clearly contrary to Section 703(g) and 2806.1(b)(2), as well as the Commission’s regulation at 52 Pa. Code § 5.572. Although the Commission is not required to grant the relief requested in such a petition, the Commission cannot preemptively conclude that any such petition will be denied. Rather, 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.

Based on the foregoing, the Commission’s attempt to prospectively eliminate an EDC’s right to petition to modify its Phase II consumption reduction targets misapplies and ignores Sections 703(g) and 2806.1(b)(2), as well as the Commission’s regulation at 52 Pa. Code § 5.572. Therefore, the Commission should make it clear that the *2012 Implementation Order* and *2012 Reconsideration Order*, including, but not limited to, the 25% adjustment factor, do not restrict PPL Electric’s right to: (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and other market conditions that are not presently known.

C. THE CONCLUSION REACHED IN THE 2012 IMPLEMENTATION ORDER CONSTITUTES AN ABUSE OF DISCRETION

The conclusion reached in the *2012 Implementation Order* eliminates an EDC's right to challenge the application of future changes in the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets or from seeking to modify the Phase II consumption reduction targets to account for future changes that are not presently known. This conclusion is manifestly unreasonable because it is based entirely upon assumptions that are not, and cannot be, known. Further, the "remedies" set forth in the *2012 Reconsideration Order* are not adequate. For these reasons, as explained below, the conclusion reached by the *2012 Implementation Order* constitutes an arbitrary and capricious abuse of administrative discretion.⁹

1. The 2012 Implementation Order Is Based On Assumptions That Are Not Presently Known

The Commission's conclusion that the 25% adjustment is sufficient to account for all future changes in the TRM, TRC, other Commission actions, and other market conditions is manifestly unreasonable because it is based entirely on assumptions that are not presently known or knowable. The Commission, in setting the Company's Phase II consumption reduction target, assumed a 25% to 40% reduction in lighting savings as compared to the Company's Phase I EE&C Plan due to changes in federal lighting standards (EISA). (PPL Electric St. 1, pp. 8-9.) Even assuming that the 25% adjustment factor may cover the increased acquisition costs for the Phase II EE&C Plans as a result of EISA, this represents only one set of known changes. There

⁹ The Pennsylvania Supreme Court has explained an abuse of discretion as follows:

An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused....

(Continued on next page ...)

are many other changes that also will impact the Company's Phase II EE&C Plan. Some of these additional changes are known at this time while additional changes are expected but have not yet been identified. (PPL Electric St. 1-R, p. 4.)

As acknowledged by the SWE in its testimony, the Market Potential Study relied upon the 2012 TRM and EDC-specific information but did not consider the 2013 TRM, much less future TRMs. (SWE St. No. 4, p. 3.) The SWE's Market Potential Study did not account for a number of the proposed reductions in savings contained in the proposed 2013 TRM, including residential appliance recycling, residential lighting, or commercial lighting retrofits. All of these proposed changes, if included in the Market Potential Study, would have reduced the economic potential and the savings that could be achieved in Phase II by the EDCs. (PPL Electric St. No. 1, pp. 16-20.)

Although PPL Electric is using the proposed 2013 TRM to prepare its Phase II EE&C Plan, the Company is unable to predict or prepare for the anticipated updates to the TRM and TRC, or other Commission requirements in 2014 and 2015. Therefore, it is impossible to determine at this time whether the 25% adjustment factor is sufficient to account for unknown, future changes. Indeed, in the *2013 TRM Tentative Order*, the Commission states that future TRMs are likely to further reduce savings. The impact of such future unknown changes could significantly affect PPL Electric's EE&C Plan, including reductions in savings (future TRMs), lower avoided costs (future TRCs), changes to allowable funding levels, changes to the low-income set-aside savings, targets, or other legislative or regulatory changes. (PPL Electric St. 1-R, pp. 4-5.)

(...continued from previous page.)

Paden v. Baker Concrete Construction, Inc., 540 Pa. 409, 412, 658 A.2d 341, 343 (1995).

Moreover, it is clear that the potential impact of future changes to the TRM, TRC, and other market forces were not considered by the Commission in determining the Company's Phase II consumption reduction target. Indeed, the SWE admitted that it has not performed any analysis to determine how future changes to the TRM or TRC would impact the SWE's Energy Efficiency Potential Study:

The SWE did not perform an analysis to determine how future changes in measure cost-effectiveness, measure savings, measure costs or avoided costs would affect the Energy Efficiency Potential Study. In order to perform such an analysis thoroughly and correctly, one would need to update all impacted measure cost and savings, update avoided cost inputs, re-run the benefit/cost analysis for the affected measures, recalculate the energy efficiency supply curves, and then conduct the scaling from the achievable potential scenario down to program potential. Because the SWE is unaware of any such analysis, we are unable to comment with certainty on the magnitude of any possible impacts.

(SWE St. No. 4, p. 3.)

Similarly, PennFuture was unable to identify any such future changes or their potential impact:

Q. Turning back to page 2 of your testimony, in response to question 6, you summarize that the purpose of your testimony is to show that the Statewide Evaluator adequately accounted for changes to the Technical Reference Manual changes in federal law, economic conditions and changing baseline conditions when determining PPL Electric Utilities Corporation's recommended Phase II consumption reduction target and that the target is reasonable and conservative. Is that a correct reading of your testimony?

A. Yes.

Q. Focusing first on changes to the Technical Reference Manual, what changes to the Technical Reference Manual are you referring to?

A. I'm referring to the fact that the SWE states in its Market Potential report that it lowers program potential and increases acquisition costs for Phase II to account to changing baseline

conditions and changes in federal law. The TRM by definition, accounts for changes in baseline conditions, federal law, so by fact it is accounting for potential future changes to the TRM.

Q. So are you not referring to any specific Technical Reference Manual?

A. No, and I did not in my testimony.

Q. As we sit here today, do you know what is going to be in the 2014 Technical Reference Manual?

A. I do not.

Q. Do you know what will be in the 2015 Technical Reference Manual?

A. I do not.

Q. Do you know what changes in federal law or federal regulations may occur in 2013, 2014 or 2015 that could affect PPL's ability to achieve its 2.1 percent target?

A. I do not.

Q. Do you know, as you sit here today, what changes in state regulations, state statute or Commission order could occur that could affect, positively or negatively, PPL's ability to meet its 2.1 percent target?

A. I do not.

* * *

Q. Economic conditions . Do you have any idea what the economy is going to be like next year, Ms . Lane?

A. No, I do not.

Q. Two thousand fourteen?

A. No.

Q. Two thousand fifteen?

A. No.

Q. None of these factors you listed, you know nothing about what those changes may be in the future?

A. No.

(Tr. 67-67.)

Accordingly, it is clear that neither the SWE, the Commission, PPL Electric, nor any other party knows what future adjustments may be made to the TRM or the impact those changes may have on savings reductions, acquisition costs, and PPL Electric's ability to meet its Phase II target. Thus, there is simply no factual or logical basis to conclude that the 25% adjustment factor will be adequate to account for all future TRM or savings adjustments that are unknown and unknowable at this time. Indeed, given the changes already reflected in the 2013 TRM, it is apparent that the 25% adjustment factor may well not be sufficient to reflect further changes.

(PPL Electric St. 1-R, p. 5.) For example:

An EDC could include 270,000 MWh/yr savings from residential CFLs in its EE&C Plan at an acquisition cost of \$0.07 per annual kWh saved (compared to an overall portfolio average of \$0.22/kWh) based on a current version of the TRM (which prescribes the estimated savings per CFL). However, if the Commission were to subsequently revise the TRM such that CFLs provide no allowable savings (*i.e.*, CFLs become the baseline measure), it likely would be impossible for an EDC to find other measures to replace the forgone CFL savings to meet its compliance target within the funding cap because other measures would be much more costly (probably \$0.20/kWh, which is roughly triple the cost of a CFL). In this simple example, the expected savings from the CFLs comprises approximately 30% of the EDC's compliance target, but only 10% of the funding cap. Therefore, this type of change to a TRM would hinder or affect the energy savings that can be achieved by an EDC's EE&C Plan and would likely hinder or prevent an EDC from achieving its compliance target within the funding cap.

(PPL Electric St. 1, p. 6.)

Based on the foregoing, the Commission erred in relying on assumptions that are not, and cannot be, presently known or knowable. Accordingly, the Commission should make it clear

that the *2012 Implementation Order* and *2012 Reconsideration Order*, including, but not limited to, the 25% adjustment factor, do not restrict PPL Electric's right to: (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target to account for any future changes to the TRM, TRC, other Commission actions, and other market conditions that are not presently known.

2. The Remedies Provided In The *2012 Reconsideration Order* Are Inadequate

In the *2012 Reconsideration Order*, the Commission denied PPL Electric's request that the Commission affirmatively state that EDCs will have the right to challenge the application of changes in the TRM or TRC to the EE&C Plans, and that the EDCs will have the right to seek Commission approval to modify the Phase II consumption reduction targets to account for future changes in the TRM, TRC, and other market conditions that presently are unknown. In denying PPL Electric's request, the Commission noted that EDCs and other interested parties may (1) participate in and challenge any proposed updates to the TRM, and (2) submit evidence in compliance hearings and argue that an alternative estimate of consumption or demand savings is more accurate. *2012 Reconsideration Order*, p. 14. However, the remedies provided in the *2012 Reconsideration Order* are inadequate and do not provide a meaningful opportunity to review whether future changes that are *actually adopted* should be applied to the Phase II reduction targets, or whether the Phase II reduction targets should be modified to account for such changes that are *actually adopted*.

As explained above, the TRM and TRC are used to verify compliance with Act 129. The TRM updates are not company specific. While one proposed change to the TRM may be

acceptable to one EDC, it may prevent another EDC from meeting its EE&C Plan targets. Although 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. (*See, e.g.*, PPL Electric St. 1, pp. 6, 19-21.) 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. Challenging the TRM in a general, non-company specific proceeding clearly is not an adequate remedy.

Similarly, waiting for the Act 129 compliance hearing to submit evidence and argument that an alternative target would have been more accurate is not an adequate remedy. Under this theory, the EDC is forced to wait for the enforcement proceeding at the end of the EE&C Plan period rather than taking proactive steps during the plan period to ensure compliance with Act 129. It is well established that willful noncompliance, agency enforcement, and a judicial appeal is not an adequate statutory remedy to test the validity of an order, regulation, or statute. *See, e.g., Arsenal Coal Co. v. Commonwealth*, 505 Pa. 198, 210, 477 A.2d 1333, 1340 (1984); *Northern Area Personal Care Home Administrators Association v. Department of Public Welfare*, 899 A.2d 1182 (Pa. Cmwlth. 2006); *Rouse & Associates v. Pennsylvania Environmental Quality Board*, 642 A.2d 642 (Pa. Cmwlth. 1994). Clearly, 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.

Finally, this evidentiary proceeding is not an adequate remedy to challenge unknown future changes in the TRM, TRC, other Commission actions, or market conditions that are not known at this time. As explained above, neither the Commission, the SWE, the Company, or any other party knows what future changes will *actually be adopted* or how they will impact the Company's EE&C Plan. Any attempt to put into evidence any such future changes would be nothing more than mere speculation. (SWE St. 4, p. 3; PPL Electric St. 1, p. 1-R, pp. 4-5; Tr. 64-67.) Clearly, this proceeding is not an adequate remedy to address the impact of potential, unknown, future changes to a previously-approved EE&C Plan.

No one can predict the future. There are many potential changes in the TRM, TRC, other Commission actions, or market conditions that could possibly occur. Changes to the TRM and TRC, as well as other market forces, have the potential to make it more difficult for an EDC to achieve its Phase II consumption reduction target. (PPL Electric St. 1, p. 7.) It is entirely unreasonable to foreclose an EDC's ability to challenge these future changes, if and when they occur, as suggested by the *2012 Implementation Order*. However, this does not necessarily mean that an EDC will need to request to modify its Phase II consumption reduction target.

PPL Electric 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. 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 the Phase II consumption reduction target adopted in the *2012 Implementation Order*. PPL Electric does not believe that the filing of such petitions would or should be routine, but instead filed only when required. (PPL Electric St. 1, p. 7.)

Based on the foregoing, the remedies set forth in the *2012 Reconsideration Order* are inadequate and do not provide a meaningful opportunity to review whether future changes should be applied to the Phase II reduction targets, or whether the Phase II reduction targets should be modified to account for such changes. The Commission should make it clear that the *2012 Implementation Order* and *2012 Reconsideration Order*, including, but not limited to, the 25% adjustment factor, do not restrict PPL Electric's right to: (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and other market conditions that are not presently known.

D. THE 2012 IMPLEMENTATION ORDER VIOLATES DUE PROCESS REQUIREMENTS

The Commission's conclusion in the *2012 Implementation Order* and *2012 Reconsideration Order* -- that EDCs are prospectively precluded from (1) challenging the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets and (2) requesting, if necessary, modifications to the Phase II consumption reduction target to account for any future changes to the TRM, TRC, other Commission actions, and market conditions that are not presently known -- amounts to a denial of due process rights. In essence, the Commission has preemptively reached a decision that the 25% adjustment factor is sufficient to account for future changes in the TRM or TRC without allowing parties an opportunity to present evidence regarding the changes that are *actually adopted*.

The *sine qua non* of due process is “notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause.” *Salters v. Pa. State Police Municipal Police Officers’ Education & Training Commission*, 912 A.2d 347, 351 (Pa. Cmwlth. 2006) (quoting *Fiore v. Board of Finance and Revenue*, 534 Pa. 511, 517, 633 A.2d 1111, 1114 (1993)). Through a general order, the Commission has concluded that the 25% adjustment factor will account for all future changes in the TRM, TRC, and market conditions and, therefore, eliminated EDCs’ rights to (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets and (2) request, if necessary, modifications to their Phase II consumption reduction targets to account for any such future changes. However, the Commission adopted the *2012 Implementation Order* without evidentiary hearings and, as a result, no testimony or other evidence was presented and there was no opportunity for cross examination.

Moreover, as explained above, the future changes in the TRM, TRC, and market conditions are entirely unknown at this time. Consequently, EDCs do not, and cannot, know what changes will *actually be adopted*. The Commission, through the *2012 Implementation Order*, has prospectively foreclosed the opportunity for EDCs to be heard on the issue of whether the 25% adjustment factor is sufficient to account for the changes that are *actually adopted*. Clearly, the *2012 Implementation Order* has serious due process implications.

As explained above, the future changes that are *actually adopted* could significantly impact an EDCs ability to meet its Act 129 requirements, thereby subjecting EDCs substantial civil penalties. (*See* Section IV.A, *supra*.) The conclusion reached in the *2012 Implementation Order* clearly affects the future duties, liabilities, and obligations of each individual EDC and,

therefore, is essentially an adjudication.¹⁰ Where the matter involved is an agency “adjudication,” the agency must provide notice of its action and the opportunity to hear challenges to that action. *AT&T Communications, Inc. v. Pa. PUC*, 570 A.2d 612, 618 (Pa. Cmwlth. 1990) (citing *Barasch v. Pa. PUC*, 546 A.2d 1296, 1305 (Pa. Cmwlth. 1988)). Given the prospective effect on the duties, liabilities, and obligations of the EDCs, and that EDCs do not, and cannot, know the changes that will *actually be adopted*, the EDCs are without the opportunity to be heard on the issue of whether the 25% adjustment factor is sufficient to account for the changes that are *actually adopted*.

Clearly, the prospective prohibition in the *2012 Implementation Order* violates due process requirements. For these reasons, the Commission should make it clear that the *2012 Implementation Order* and *2012 Reconsideration Order*, including, but not limited to, the 25% adjustment factor, do not restrict PPL Electric’s right to: (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and other market conditions that are not presently known.

¹⁰ An adjudication is defined by the Commonwealth Documents Law¹⁰ as follows:

“Adjudication” means any order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.

45 P.S. § 1102(1). Section 101 of the Administrative Agency Law contains a substantially similar definition of “adjudication.” *See* 2 Pa.C.S. § 101.

E. THE 2012 IMPLEMENTATION ORDER WAS ADOPTED IN VIOLATION OF THE REQUIREMENTS OF FORMAL RULEMAKING PROCEEDINGS

It is unclear whether the Commission's conclusion -- that EDCs are precluded from (1) challenging the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets and (2) requesting, if necessary, modifications to their Phase II consumption reduction target to account for any future changes to the TRM, TRC, other Commission actions, and market conditions that are not presently known -- is intended to be a guideline, statement of policy, or a regulation. For this reason alone, the Commission's conclusion in its *2012 Implementation Order* is not binding on EDCs.

A general statement of policy is the outcome of neither a rulemaking nor an adjudication. *Department of Environmental Resources v. Rushton Mining Company*, 591 A.2d 1168, 1173 (Pa. Cmwlth. 1991). It is neither a rule nor precedent, but merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications.¹¹ *Id.* Importantly, a policy statement does not establish a binding norm or obligation. *Id.* Similarly, a guideline is not an adjudication or rulemaking, and does not establish a binding norm or obligation.¹²

¹¹ The Commonwealth Documents Law defines a statement of policy as follows:

“Statement of Policy” means any document, except an adjudication or a regulation, promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof, and includes, without limiting the generality of the foregoing, any document interpreting or implementing any act of Assembly enforced or administered by such agency.

45 P.S. § 1102(13).

¹² A guideline is “[a] document, other than an adjudication, interpretation or regulation, which announces the policy an agency intends to implement in future rulemakings, adjudications or which will otherwise guide the agency in the exercise of administrative discretion. The document may not amend, repeal or suspend a published regulation or

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For example, in *Mid-Atlantic Power Supply Association v. Pa. PUC*, 746 A.2d 1196 (Pa. Cmwlth. 2000), the Commission issued a tentative order and solicited suggested procedures for EDCs and electric generation suppliers (“EGSs”) during the transition to full customer choice for retail electric use. A public meeting was held to resolve the final restructuring process, discuss amendments, and regulate the release of customer information. *Id.* at 1198. The Commission entered a final order which provided implementation procedures for full retail choice applicable to EDCs and EGSs.

On appeal, PECO Energy Company (“PECO”) challenged the final order as a regulation adopted in violation of the requirements of formal rulemaking proceedings. The Commonwealth Court noted that the Electricity Generation Customer Choice and Competition Act (“Electric Choice Act”), 66 Pa.C.S. §§ 2801-2812, directed the Commission to “provide guidelines for retail access pilot programs by order.” 66 Pa.C.S. § 2806.1(g). Based thereon, the Court determined that:

[T]he General Assembly’s directive to promulgate guidelines to implement provisions of legislation does not constitute a regulation, but instead is a policy statement not subject to the regulatory review process.... A policy statement does not establish a binding norm but *announces the agency’s tentative future intentions, and provides the agency with the flexibility to follow the announced policy or modify it if the circumstances are appropriate....* Additionally, the [Commission’s] Final Order sets forth a procedural policy which implemented the “... fair and orderly transition” mandate of the Electric Choice Act, 66 Pa. C.S. § 2802(13).

Id. at 1201. Accordingly, the Commonwealth Court concluded that the policy established in the Commission’s final order did not fall within the parameters of the Commonwealth Documents

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otherwise effectively circumscribe administrative choice, but shall establish a framework within which an agency exercises administrative discretion.” 1 Pa. Code § 1.4.

Law or the Regulatory Review Act and, therefore, was not binding and should be applied with flexibility.

In this case, the General Assembly in Act 129 directed the Commission to “adopt an energy efficiency and conservation program” that shall include the following:

- (1) Procedures for the approval of plans submitted under subsection (b).
- (2) An evaluation process, including a process to monitor and verify data collection, quality assurance and results of each plan and the program.
- (3) An analysis of the cost and benefit of each plan submitted under subsection (b) in accordance with a total resource cost test approved by the commission.
- (4) An analysis of how the program and individual plans will enable each electric distribution company to achieve or exceed the requirements for reduction in consumption under subsections (c) and (d).
- (5) Standards to ensure that each plan includes a variety of energy efficiency and conservation measures and will provide the measures equitably to all classes of customers.
- (6) Procedures to make recommendations as to additional measures that will enable an electric distribution company to improve its plan and exceed the required reductions in consumption under subsections (c) and (d).
- (7) Procedures to require that electric distribution companies competitively bid all contracts with conservation service providers.
- (8) Procedures to review all proposed contracts prior to the execution of the contract with conservation service providers to implement the plan. The commission may order the modification of a proposed contract to ensure that the plan meets the requirements for reduction in demand and consumption under subsections (c) and (d).
- (9) Procedures to ensure compliance with requirements for reduction in consumption under subsections (c) and (d).
- (10) A requirement for the participation of conservation service providers in the implementation of all or part of a plan.

(11) Cost recovery to ensure that measures approved are financed by the same customer class that will receive the direct energy and conservation benefits.

66 Pa.C.S. § 2806.1(a). Unlike the General Assembly's directive in the Electric Choice Act to promulgate "guidelines," Act 129 specifically directed the Commission to "adopt" procedures, processes, analyses, standards, and requirements.

Assuming, *arguendo*, that the Commission's conclusion in the *2012 Implementation Order* is intended to be a guideline or policy statement, the Order is still deficient. The procedures, processes, analyses, standards, and requirements adopted by the Commission in the *2012 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. Rather, it is clear that the *2012 Implementation Order* attempts to establish a binding obligation on EDCs -- (1) to not challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets and (2) to not request, if necessary, modifications to their Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and market conditions that are not presently known. This is not the proper purpose of a guideline or policy statement, which, as explained above, does not establish a binding norm or obligation. *Rushton*, at 1173.

Section 1504 of the Public Utility Code gives the Commission the express power to prescribe by regulations just and reasonable standards to be furnished, imposed, observed, and followed by any or all public utilities. 66 Pa.C.S. § 1504. The Commission's regulations are binding as long as they conform to the Commission's grant of delegated power, are issued in accordance with the proper procedures, and are reasonable. *Popowsky v. Pa. PUC*, 853 A.2d 1097 (Pa. Cmwlth. 2004).

It is well settled that in promulgating a regulation an agency must comply with the formal rulemaking procedures, including compliance with the Commonwealth Documents Law¹³ and the Regulatory Review Act.¹⁴ 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.

45 P.S. § 1102. A substantially similar definition of a regulation is set forth in the Regulatory Review Act. *See* 71 P.S. § 745.3. Importantly, the definition of “regulation” refers to rules or regulations of general application. *Redmond v. Commonwealth, Milk Marketing Board*, 363 A.2d 840, 844 (Pa. Cmwlth. 1976).

Clearly, the *2012 Implementation Order* prescribes the practice or procedure before the Commission regarding future challenges or amendments to Phase II consumption reduction targets. As discussed above, the *2012 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. Thus, the *2012 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 Commonwealth Documents Law requires an administrative agency to, *inter alia*, provide public notice of its intention to promulgate a regulation, publish the proposed regulation

¹³ Act of July 31, 1968, P.L. 769, *as amended*, 45 P.S. §§ 1102-1602.

in the Pennsylvania Bulletin, and solicit comments from interested parties. 45 P.S. § 1201. The Commonwealth Documents Law further requires that all administrative regulations shall be approved as to legality by the Department of Justice and shall be deposited with the Legislative Reference Bureau. 45 P.S. § 1205. Additionally, the Regulatory Review Act provides for review of a proposed regulation by the Independent Regulatory Review Commission. 71 P.S. §§ 745.5, 745.5a. Although the *2012 Implementation Order* was published in the Pennsylvania Bulletin and comments were solicited from interested parties, the Commission's *2012 Implementation Order* failed to comply with the remaining requirements of either the Commonwealth Documents Law or the Regulatory Review Act. Accordingly, the *2012 Implementation Order* was not lawfully promulgated in accordance with the formal rulemaking procedure and, therefore, cannot be a binding regulation.

Based on the foregoing, the *2012 Implementation Order* fails to comply with the requirements of formal rulemaking and, therefore, is not binding on EDCs. At best, the *2012 Implementation Order* is a guideline or statement of policy. As explained above, a guideline or policy statement is not binding and must be applied with flexibility. *Mid-Atlantic Power*, 746 A.2d at 120. For these reasons, the Commission should make it clear that the *2012 Implementation Order* and *2012 Reconsideration Order*, including, but not limited to, the 25% adjustment factor, do not restrict PPL Electric's right to: (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target to account

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¹⁴ Act of June 25, 1992, P.L. 633, *reenacted by* Act of February 21, 1986, P.L. 47, *amended by*, Act of June 25, 1997, P.L. 252, 71 P.S. §§ 745.1-745.15.

for any future changes to the TRM, TRC, other Commission actions, and other market conditions that are not presently known.

F. THERE WAS NO EVIDENCE IN THE 2012 IMPLEMENTATION ORDER THAT THE 25% ADJUSTMENT FACTOR ACCOUNTS FOR FUTURE UNCERTAINTIES

In its *2012 Implementation Order*, the Commission concluded that the 25% adjustment factor is sufficient to account for all future, unknown changes. This conclusion is the sole basis to support the Commission's position that EDCs are precluded from (1) challenging the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets, and (2) requesting, if necessary, modifications to their Phase II consumption reduction targets to account for any future changes to the TRM, TRC, other Commission actions, and market conditions that are not presently known. However, as explained above in Section IV.A, the evidence of record in this proceeding clearly demonstrates that the 25% adjustment factor may not be adequate to account for all unknown, future changes in the TRM, TRC, other Commission actions, and other market conditions. Moreover, there was no evidence of record in the *2012 Implementation Order* proceeding to support the Commission's conclusion that the 25% adjustment factor is sufficient to account for any future uncertainties.

It is well established that a decision of the Commission must be based upon substantial evidence. *Met-Ed Indus. Users Group v. Pa. PUC*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Service Commission*, 942 A.2d 274, 281 (Pa. Cmwlth. 2008). Substantial evidence must be "more than a scintilla and must do more than create a suspicion of the existence of the fact to be established." *Kyu Son Yi v. State Board of Veterinary Medicine*,

960 A.2d 864, 874 (Pa. Cmwlth. 2008) (citation omitted). Although an agency may draw on its own expertise to resolve issues of fact, any inferences must, in every case, be drawn from the established facts in order to satisfy the substantial evidence test. *Pennsylvania Labor Relations Board v. Sand's Restaurant Corp.*, 429 Pa. 479, 485, 240 A.2d 801, 804 (1968).

There was no evidence in the *2012 Implementation Order* proceeding to support the Commission's determination that the 25% adjustment factor adequately "allows for future TRM adjustments on savings adjustments in future years without revising program goals." *2012 Implementation Order*, p. 20.¹⁵ Indeed, the SWE admitted that it did not perform any analysis to determine how future changes to the TRM or TRC would impact the SWE's Energy Efficiency Potential Study:

The SWE did not perform an analysis to determine how future changes in measure cost-effectiveness, measure savings, measure costs or avoided costs would affect the Energy Efficiency Potential Study. In order to perform such an analysis thoroughly and correctly, one would need to update all impacted measure cost and savings, update avoided cost inputs, re-run the benefit/cost analysis for the affected measures, recalculate the energy efficiency supply curves, and then conduct the scaling from the achievable potential scenario shown to program potential. Because the SWE is unaware of any such analysis, we are unable to comment with certainty on the magnitude of any possible impacts.

(SWE St. No. 4, p. 3.)

As explained above, it is clear that neither the SWE, the Commission, PPL Electric, nor any other party knows what future adjustments may be made to the TRM or the impact those changes may have on savings reductions, acquisition costs, and PPL Electric's ability to meet its Phase II target. Moreover, there is nothing of record in the *2012 Implementation Order*

¹⁵ PPL Electric acknowledges that the 2.1% consumption reduction factor and the 25% adjustment in acquisition costs are based upon the Market Potential Study, the 2012 TRM, and SWE's analysis of each EDC. Indeed, PPL Electric is not challenging either of these figures. (PPL Electric St. 1-R, p. 8.)

proceeding to suggest that these future, unknown changes were considered by the Commission in adopting the *2012 Implementation Order*. Thus, there was simply no evidentiary basis for the Commission to conclude in the *2012 Implementation Order* that the 25% adjustment factor will be adequate to account for all future TRM or savings adjustments that are unknown and unknowable at this time. This conclusion in the *2012 Implementation Order* is based on pure speculation and conjecture and, therefore, is not supported by competent and substantial evidence as a matter of law.

In an effort to support the conclusion reached in the *2012 Implementation Order* and *2012 Reconsideration Order*, PennFuture's witness, Courtney Lane, testified that the 25% adjustment is adequate to account for future changes in the TRM and other future uncertainties. (PennFuture Ex. 1, p. 2.) Specifically, Ms. Lane testified that the "SWE took factors like changes to the TRM, changes in federal law, economic conditions and changing baseline conditions into account." (PennFuture Ex. 1, p. 7.) Ms. Lane's contention is without merit for several reasons.

First, the reasons given by Ms. Lane to support her conclusion are simply a rehash of PennFuture's comments to the *2012 Tentative Order*, which, as Ms. Lane conceded, were rejected by the Commission in the *2012 Implementation Order*. (Tr. 57.) Second, as explained above, Ms. Lane conceded that she is unable to identify any future changes to the TRM, changes in federal law, or economic conditions. (Tr. 67-67.) It is not clear how Ms. Lane can credibly testify that the 25% adjustment factor adequately takes into account future changes when neither she nor anyone else knows what those changes will be. Third, Ms. Lane's testimony is directly contrary to the SWE's testimony, which admitted that it did not perform any analysis of future changes to the TRM, TRC, or other future market conditions. (SWE St. No. 4, p. 3.) Fourth,

Ms. Lane admitted that she has not performed any analysis of any potential future changes to the TRM, TRC, federal law, or other future market conditions. (Tr. 67.) Finally, it must be remembered that Ms. Lane and PennFuture have nothing to lose in this matter. It is easy for Ms. Lane to speculate that the 25% adjustment factor is adequate to account for all future, unknown changes where neither she nor Penn Future will suffer any consequences if she is wrong. Clearly, Ms. Lane's testimony lacks any factual foundation and is contrary to the record evidence.

Based on the foregoing, the Commission's conclusion in the *2012 Implementation Order* that that the 25% adjustment factor will be adequate to account for all future TRM or savings adjustments was not supported by any evidence of record in the *2012 Implementation Order* proceeding. For this reason, the Commission should make it clear that the *2012 Implementation Order* and *2012 Reconsideration Order*, including, but not limited to, the 25% adjustment factor, do not restrict PPL Electric's right to: (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and other market conditions that are not presently known.

V. CONCLUSION

The *2012 Implementation Order* and *2012 Reconsideration Order* appear to suggest that the 25% adjustment factor prohibits an EDC, such as PPL Electric, from challenging the application of future changes in the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets. The *2012 Implementation Order* and *2012 Reconsideration Order* also seem to suggest that the 25% adjustment factor prohibits an EDC from seeking to modify the Phase II consumption reduction targets to account for future changes in the TRM, TRC, other Commission actions, and other market conditions that are not presently known. The evidence of record in this proceeding demonstrates that the 25% adjustment may not be sufficient to account for all future changes in the TRM, TRC, other Commission actions, and other market conditions. Further, this conclusion constitutes an error of law, abuse of discretion, violation of due process requirements, and was not supported by the evidentiary record in the *2012 Implementation Order* proceeding.

For the reasons explained above, the Commission should enter an order that affirmatively states that the *2012 Implementation Order* and *2012 Reconsideration Order*, including, but not limited to, the 25% adjustment factor, do not restrict PPL Electric's right to: (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and other market conditions that are not presently known.

Should any of these changes, in the Company's opinion, jeopardize the Company's ability to achieve its targets, PPL Electric requests clarification that it can challenge these changes. PPL Electric would seek to reduce its Phase II target only if such changes require the

Company to make substantial modifications to its Phase II EE&C Plan and the Company determines that, even with those modifications, it cannot meet its Phase II consumption reduction target within the funding cap, cost-effectiveness, and other compliance requirements. Again, the Company does not plan to request changes to its target for minor changes to the TRM or other Commission actions; it would make such a filing only if the changes are so significant that the Company cannot achieve its Phase II consumption reduction target.

WHEREFORE, PPL Electric Utilities Corporation respectfully requests that the Pennsylvania Public Utility Commission grant the above-captioned Petition and enter an order that affirmatively states that the *2012 Implementation Order* and *2012 Reconsideration Order* do not prohibit an electric distribution company from: (1) challenging the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; or (2) requesting, if necessary, modifications to their Phase II EE&C Plans, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and market conditions that are not presently known.

Respectfully submitted,

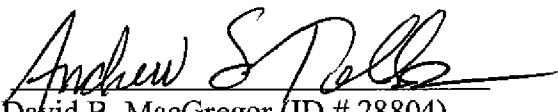
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