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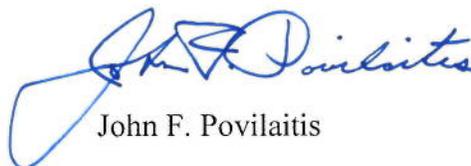
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Petition of Metropolitan Edison Company, Pennsylvania Electric Company,
Pennsylvania Power Company and West Penn Power Company for an Evidentiary
Hearing on the Energy Efficiency Benchmarks Established for the Period June 1,
2013 through May 31, 2016; Docket Nos. P-2012-2320450, P-2012-2320468,
P-2012-2320480, and P-2012-2320484

Dear Secretary Chiavetta:

On behalf of Metropolitan Edison Company, Pennsylvania Electric Company,
Pennsylvania Power Company and West Penn Power Company, I have enclosed for electronic
filing the Main Brief in the above-captioned matter. Copies have been served on all parties as
indicated in the attached certificate of service.

Very truly yours,



John F. Povilaitis

JFP/kra
Enclosure
cc: Administrative Law Judge Elizabeth H. Barnes (via email and first class mail)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Metropolitan Edison Company,	:	
Pennsylvania Electric Company, Pennsylvania	:	Docket Nos. P-2012-2320450
Power Company and West Penn Power	:	P-2012-2320468
Company for an Evidentiary Hearing on the	:	P-2012-2320480
Energy Efficiency Benchmarks Established	:	P-2012-2320484
For the Period June 1, 2013 through	:	
May 31, 2016	:	

**MAIN BRIEF
ON BEHALF OF
METROPOLITAN EDISON COMPANY,
PENNSYLVANIA ELECTRIC COMPANY,
PENNSYLVANIA POWER COMPANY AND
WEST PENN POWER COMPANY**

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Dated: November 2, 2012

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I. INTRODUCTION AND BACKGROUND

Act No. 129 (“Act 129”), effective October 15, 2008, established two general phases for energy and demand reduction programs implemented by electric distribution companies (“EDCs”) with at least 100,000 customers. Phase I of Act 129 was initiated by the Commission’s January 16, 2009 Order and set forth guidance for the EDCs on the energy efficiency and conservation (“EE&C”) plan approval process and numerous other issues critical to EDC compliance with Act 129.¹ The Commission did not need to address the target goal for energy and demand reductions in the Phase I Implementation Order because that goal was prescribed by Act 129 as a 1% energy reduction by May 31, 2011, a 3% energy reduction by May 31, 2013 and a 4.5% annual system peak demand reduction by May 31, 2013.²

As part of its Act 129 implementation, the Commission decided that it would utilize the Technical Resource Manual (“TRM”), originally developed to assist in implementation of the Pennsylvania Alternative Energy Portfolios Standards Act,³ as a vehicle to provide guidance to the EDCs in developing their EE&C plans. The Commission approved a 2009 version of the TRM and eventually developed a process by which it would re-examine TRM issues on an annual basis, which has resulted in TRM updates in 2010, 2011 and 2012.⁴

Phase I EE&C plans have been approved for all EDCs subject to Act 129 and are currently in effect. Act 129 also requires the Commission, no later than November 30, 2013, to determine if the Phase I EE&C plans have been cost effective and, if so, to set additional energy

¹ *Energy Efficiency and Conservation Program*, Docket No. M-2008-2069887 (January 16, 2008) (“Phase I Implementation Order”).

² 66 Pa. C.S. § 2806.1(c)(d).

³ 73 P.S. §§ 1648.1-1648.8.

⁴ *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 (June 1, 2009).

and peak load reductions if the benefits of further EE&C plans exceed costs.⁵ To implement that statutory directive, the Commission issued a Tentative Order requesting comments on proposed energy reduction goals for EDCs and the procedures under which they would undertake these goals in a second phase of EE&C plans that would run from June 1, 2013 through May 31, 2016 (“Phase II”).⁶ The Tentative Order established Phase II acquisition costs and energy reduction target goals for each EDC subject to Act 129.

Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”), Pennsylvania Power Company (“PennPower”) and West Penn Power Company (“West Penn”) (collectively, the “Companies”) submitted Comments and Reply Comments to the Commission’s Tentative Order on June 25, 2012 and July 9, 2012, respectively. In their Comments and Reply Comments, the Companies stressed, *inter alia*, that the acquisition costs set for the Companies were too low and consequently the reduction goals were too high given potential future TRM savings reductions, the need for higher incentive payments, the chilling effect the Companies’ lower retail rates have on customers’ use of measures and other factors that in the aggregate make achievement of the proposed Phase II goals unreasonably risky. The Companies specifically noted with respect to TRM changes that acquisition costs had to take into account savings reductions in the TRM because it was unreasonable to set acquisition costs and targets “using one set of assumptions, and holding the Companies accountable for results using another.”⁷

On August 3, 2012, the Commission entered its Phase II Implementation Order which set acquisition costs and energy reduction targets for each EDC. The Phase II Implementation Order relied on baseline studies and a Market Potential Study conducted by its Statewide Evaluator

⁵ 66 Pa. C.S. § 2806.1(c)(3), (d)(2).

⁶ *Energy Efficiency and Conservation Program*, Docket No. M-2012-2289411, M-2008-2069887 (May 11, 2012),

⁷ Comments p. 6.

("SWE"). The Market Potential Study adopted a statewide 25% cost adjustment factor that was intended to account for future uncertainties that could impact the EDCs' actual acquisition costs. The Companies' energy reduction targets set in the Phase II Implementation Order were Met-Ed 2.3%, Penelec 2.2%, Penn Power 2.0% and West Penn 1.6%.⁸

The Commission intended to make the foregoing goals final for EDCs, but being mindful that potential penalties could be assessed if these goals were not met, it established a goal challenge process. EDCs were permitted to file petitions seeking evidentiary hearings and challenging the reduction targets by August 20, 2012.⁹ The Companies filed petitions seeking such evidentiary hearings. On August 20, 2012 the Companies also filed a Petition for Reconsideration of the Phase II Implementation Order that was denied by the Commission in an Order entered September 27, 2012.¹⁰

An Initial Prehearing Conference was conducted before Administrative Law Judge ("ALJ") Elizabeth H. Barnes on September 10, 2012. ALJ Barnes was directed to certify the record of the proceeding to the Commission. Following that Prehearing Conference, ALJ Barnes issued a Scheduling Order setting a procedural schedule for litigation of the petitions, establishing other rules for the conduct of the proceeding and granting the interventions of the Community Action Association of PA, CAUSE PA, the Clean Air Council/Sierra Club, Met-Ed Industrial Group, Penelec Industrial Customer Alliance, Penn Power Users Group, West Penn Industrial Intervenors, Citizens for Pennsylvania's Future ("PennFuture") and the Office of Consumer Advocate ("OCA"). The SWE filed a Notice of Appearance and participated in the Prehearing Conference through administrative counsel. Consistent with the Scheduling Order,

⁸ Phase II Implementation Order at 24.

⁹ Phase II Implementation Order at 31.

¹⁰ *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2299411, M-2008-2069887 (September 27, 2012).

the Companies' written Direct and Rebuttal Testimony was served on the ALJ and all parties, and Direct Testimony from OCA, PennFuture and the SWE was also served. An evidentiary hearing was conducted before ALJ Barnes on October 19, 2012, at which the Companies' Witness Mr. Edward C. Miller was cross examined, and testimony and exhibits were introduced into the evidentiary record. Main Briefs were originally due on October 31, 2012. ALJ Barnes granted the Companies' request to establish noon on November 2, 2012 as the due date for briefs due to the arrival of Hurricane Sandy. The record in this proceeding is scheduled to be closed on November 2, 2012, at which time the record is to be certified by ALJ Barnes to the Commission for disposition.

The Phase II Implementation Order was an industry-wide effort by the Commission to set acquisition costs and energy reduction target goals for all major EDCs subject to Act 129. After this initial effort, the Commission provided an opportunity for individual EDCs to present evidence and argument on modification of the generic determinations on acquisition costs and goals that were made in the Phase II Implementation Order. As will be seen in the argument which follows, specific facts and circumstances applicable to the Companies support an increase in the assigned acquisition costs with a corresponding decrease in their energy reduction goals. Acquisition costs are vitally important in Phase II because they represent the reasonable cost an EDC must expect to expend to achieve a megawatt hour ("MWh") reduction in energy consumption in its service territory. The amount of the acquisition cost essentially dictates the required energy reduction goal for each EDC because the budget for the Phase II effort is fixed at 2% of total 2006 revenues.¹¹

The Commission's Phase II energy reduction goals were based on an extensive, professional analysis by the SWE that took many, but not all, relevant factors into account. It is

¹¹ 66 Pa. C.S. § 2806.1(g).

not surprising that in such a large, industry-wide, statewide effort, some fine tuning of the acquisition cost results is needed to take EDC-specific circumstances into consideration. Such includes the residual effect of Phase I results for lower budget EDCs, the need for higher administrative costs in rural service territories, the need for higher incentive costs in service territories with below average retail rates, the effect of future TRM changes, and the likelihood that, in fact, the Companies will not achieve a 100% realization rate as was assumed by the Market Potential Study. All of these factors have a relationship to acquisition costs, and this proceeding provides an opportunity to the Commission to exercise the latitude it has under Phase II of Act 129 to set reasonable, achievable energy reduction goals that do not unduly risk the incurrence of financial penalties on the EDCs charged with implementing Phase II EE&C plans.

Adoption of the following recommended adjustments to the Companies' acquisition costs and goals should provide the Companies with a reasonable opportunity to reach those goals. Nevertheless, as part of this further consideration of appropriate forward-looking energy reduction goals, the Companies also recommend that the Commission reconsider its decision in the Phase II Implementation Order and Reconsideration Order to deny the EDCs any opportunity to petition for revisions of goals in the future. Flexibility to take future as yet unknown circumstances into account is one of the Commission's great inherent powers and it should not be laid aside in such an important endeavor as Phase II of Act 129.

II. SUMMARY OF ARGUMENT

The Commission has set immutable specific energy reduction goals for the Companies in Phase II of their Act 129 Phase II EE&C Plans by relying on a Market Potential Study conducted by the SWE that is flawed in material respects.

First, the Commission failed to consider and adequately address a number of specific factors that create a high probability that the Companies will not be able to achieve their

Commission-established Phase II energy reduction goals, such as: (i) the 2013 TRM changes that are expected to significantly reduce savings but were not taken into account in the SWE's Market Potential Study; (ii) unknown 2014 and 2015 TRM changes that have the potential to further impact savings adversely, thereby justifying an increase in the Companies' acquisition costs; and (iii) the failure of the Market Potential Study to consider (and thereby underestimate) the Companies' administrative costs, incentive costs and the relative differences in EDC retail rates in setting the Companies' acquisition costs, all of which are below the EDC statewide average.

Second, the Market Potential Study relied upon by the Commission in setting the Companies' energy reduction targets improperly assumed a 100% realization rate for the Phase II programs rather than the Companies' fully documented, current and real-world based 96% realization rate and did not address in any way the uncertainty with realization rates being less than 96% as programs evolve.

Third, the Implementation Order that established the Companies' energy reduction goals for their Phase II EE&C programs violates the Companies' constitutional right to procedural due process, Act 129 and the Public Utility Code by failing to explicitly provide that they have the right to file, request and, upon appropriate evidence and Commission finding, obtain modifications to their Phase II energy reduction targets if future and as yet unknown events or circumstances (such as changes to the TRM, market forces, etc.) require such action and results.

In addition to correcting the due process issue to account for future and currently unknown circumstances and events, the Commission must adopt the following revised 3-year program acquisition costs for the Companies that are fully supported by the evidentiary record in this proceeding:

- Met-Ed: \$234.33
- Penelec: \$247.62
- Penn Power: \$278.28
- West Penn: \$287.41

III. ARGUMENT

A. The SWE's Market Potential Study Did Not Make Adequate Provision for Multiple Factors Impacting Acquisition Cost Levels That Should Have Been Addressed.

The Phase II Implementation Order set specific energy reduction goals for each of the Companies that relied on the analysis performed in the SWE's Market Potential Study. However, as was made clear in Witness Miller's Direct Testimony, and his rebuttal of the witnesses for the SWE, PennFuture and OCA, the Commission failed to incorporate into that analysis a number of factors that make the Companies' achievement of those goals unacceptably risky. These errors were compounded by the Commission's decision in the Phase II Implementation Order to refuse to entertain future EDC requests to revisit the level of Phase II goals despite future TRM changes and other uncertainties that could impact goal achievement. The following arguments address these factors.

1. The 2013 TRM changes were not adequately considered in the SWE's Market Potential Study.

The Commission has changed the TRM annually and frequently, and those changes reduce the savings for measures significantly.¹² The Commission currently has outstanding a Tentative Order that outlines proposed 2013 changes in the TRM.¹³ When finalized, those 2013 TRM changes will be effective in the first program year of Phase II and will almost always

¹² FE Statement No. 1, p. 10.

¹³ *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 (September 13, 2012).

reduce savings compared to Phase I.¹⁴ However, as explained by Witness Miller, the Market Potential Study relied on by the Commission in the Phase II Implementation Order used savings assumptions primarily based on the 2012 TRM. When the 2013 TRM changes are made final, the savings levels assumed in the Market Potential Study will be obsolete and actual savings will be lower than those assumed in the Market Potential Study.¹⁵ This phenomenon has a cascading effect, with the decrease in savings proportionally increasing the acquisition costs which in turn reduces the ability and confidence of the Phase II EE&C plans to meet the Phase II Implementation Order goals within the approved budgets.¹⁶

The Phase II Implementation Order attempted to take into account the impact of “future uncertainties,” including future TRM changes, by including a 25% cost increase factor.¹⁷ As pointed out by Witness Miller however, relative to the Companies’ assigned acquisition costs, the proposed 2013 TRM changes alone account for 10% of the 25% acquisition cost increase, leaving only 15% for future uncertainties.¹⁸ Witness Miller also noted that when the draft 2013 TRM changes were applied to the Market Potential Study for Met-Ed, there was a decrease of 10% in savings, which was fairly consistent across all customer sectors. This impact is illustrated by the following table applicable to Met-Ed:

Impact of the draft 2013 TRM changes on the Market Potential Study

Sector	kWh In Potential Study	kWh Adjusted for TRM Updates	Percent Reduction
Residential	214,448,051	193,795,592	90%
Commercial	102,512,359	92,805,997	91%
Industrial	59,796,044	53,119,342	89%
Total	376,756,454	339,720,931	90%

¹⁴ Id.

¹⁵ Id.

¹⁶ FE Statement No. 1, p. 11.

¹⁷ Since the Companies have acquisition costs below the statewide average acquisition costs, the 25% increase provided them with a smaller adjustment to their costs than other EDCs. FE Statement No. 1, p. 15.

¹⁸ FE Statement No. 1, p. 8.

The foregoing table considers both the increases and decreases in savings included in the draft 2013 TRM update.¹⁹ This establishes that with a fixed budget, if programs and measures do not change and TRM savings decrease, an EDC will achieve fewer reductions in energy consumption than expected, with no change in program budgets, and fall short of expected targets.²⁰

In an apparent effort to justify its use of the 2012 TRM rather than the results of the 2013 TRM in the Market Potential Study, the SWE pointed out in its testimony that for a number of measures, it deviated from the 2012 TRM. As an example, it cited its use of EDC-specific building energy simulation models in conjunction with weather sensitive residential measures.²¹ But as Witness Miller pointed out, the Companies' calculation that the 2013 TRM savings reductions eroded 10% of the 25% SWE acquisition cost increase (leaving only 15% remaining) was based on the Market Potential Study results, so the SWE's reliance on non-2012 TRM factors was already factored into the Companies' analysis.²²

Witness Miller illustrated the impact of the draft 2013 TRM savings reductions on specific measures in the context of the Phase II potential for Met-Ed. Certain Residential Appliances measure savings are reduced by 48.8%; Residential Water Heaters and Low Flow Showerheads/Aerators measure savings are reduced by 23.8%; Commercial/Industrial Variable Frequency Drives on Pumps measure savings are reduced by 30.0%; and Commercial/Industrial Variable Frequency Drives on Fans measure savings are reduced by 43.1%. These 2013 TRM reductions in savings have not been accounted for in the energy reduction targets set by the

¹⁹ FE Statement No. 1, p. 18.

²⁰ FE Statement No. 1, p. 16.

²¹ SWE Statement No. 4, p. 3.

²² FE Statement No. 1-R, p. 15.

Commission in the Phase II Implementation Order, which were based on available funding and not revised in any way specific to these reductions.²³

In rebuttal of Witness Miller, OCA's Witness Crandall asserted that TRM changes could increase or decrease savings, and therefore revisions to the Companies' goals based on TRM changes were not necessary.²⁴ Witness Miller pointed out in response that: 1) the TRM has been updated each year and therefore the availability of measures that could create significant new savings attributable to programs in the TRM in future years are depleted; 2) new measures are less likely to expand savings since technology baselines are likely to reflect higher standard efficiencies with savings only incremental in nature; 3) new savings measures are likely to already include and simply replace existing custom measures; 4) Federal and State energy codes and building standards constantly strive for higher efficiency standards; and 5) new measures that provide significant new savings are not on the horizon and if such measures become available, they are likely to come at an acquisition cost higher than existing measures.²⁵

In its Phase II Implementation Order and its Reconsideration Order, the Commission has attempted to separate annual TRM updates from EDCs achieving their energy reduction target goals. In the Reconsideration Order, the Commission contended that "the TRM and any potential changes to it does not in any way hinder or affect the energy savings that can be achieved by an EDC's EE&C plan...The TRM does not establish the goal, nor do changes in the TRM move the goal, the TRM simply measures the amount of electric energy savings obtained

²³ FE Statement No. 1, pp. 18-21. Witness Miller also explained that the Market Potential Study did not take into account recent Total Resource Cost ("TRC") changes that significantly reduced avoided costs from Phase I. Lower TRM savings combined with lower avoided costs threatens the Companies' plans so they continue to be cost effective with a positive benefit-cost ratio. Phase I measures no longer cost effective could be unavailable in Phase II. FE Statement No. 1, pp. 11-12.

²⁴ OCA Statement No. 1, p. 5.

²⁵ FE Statement No. 1-R, p. 5.

by installation or implementation of a measure or program.”²⁶ This, of course, is incorrect. All things being equal, an EE&C Plan that needs to spend its entire fixed budget to meet reduction goals with a given set of programs and measures will not meet the goals if, in mid-plan, the savings deemed to accrue from the plan are revised downwards.

The Commission came closer to acknowledging the reality of this situation in the Phase II Implementation Order when it stated in the context of the TRM change issue “[t]he Commission believes the need for the most up-to-date information regarding deemed savings values and assumptions, as well as the inclusion of changes to standards, codes or regulations, outweighs the potential changes an EDC may need to make to its EE&C Plan following an update.”²⁷ This excerpt from the Phase II Implementation Order recognizes that TRM changes can impact an EE&C plan and trigger a re-evaluation of the Plan’s ability to achieve its energy reduction targets.

The Commission’s failure to address the ability of future TRM updates to reduce savings to EE&C plans and target goals is based on the false premise that there is a limitless number of plan modifications that can always be brought to bear in a timely fashion if annual TRM updates change the savings assumptions built into an EDC’s plan. Witness Miller in his Direct Testimony explained why this assumption is incorrect:

- Q. If TRM changes decrease savings, can’t an EDC simply make up the reduction in savings by amending their plan and changing their measures?**
- A. No. The Commission seems to believe that TRM changes, both tentatively known changes in 2013 and unknown changes in 2014 and 2015, which are all Phase II program years, can simply be compensated for by adjusting budgets and measures to fit the new allowable level of TRM savings and thus meet reduction targets. This ignores the fact that the budget is fixed (2% of 2006 revenues), that each EDC has a fixed overall acquisition cost and that programs and measures cannot always be

²⁶ Reconsideration Order at 17.

²⁷ Implementation Order at 72.

modified to achieve a different and higher level of savings. If an EDC's plan is at the budget cap, the only way to make up for the lost savings is to increase reliance on lower cost programs and measures, to the extent that they are available, which increases risk and uncertainty. In addition, this assumption that you can always amend your EE&C plan to compensate for reduced TRM-driven savings does not take into account the cost, resources and timing in developing and amending the EE&C Plan that ensue when programs and budget allocations need to be changed. You cannot instantly change your Plan and obtain instant results, and in addition you can only adopt Plan changes that fill the gap in savings in a credible manner with a sound benefit cost ratio, and with reasonable customer participation levels. The Commission's assumption that TRM changes do not affect or impact achieving target goals is simply incorrect and without any basis.²⁸

PennFuture's Witness Reed supported the Commission's implicit stance on this issue by explicitly arguing that the Companies coped with TRM changes in Phase I by amending their plans, and that this process was relatively simple given the Commission's expedited review process.²⁹ Witness Miller effectively rebutted Witness Reed's suggestion with the following points:

- The expedited process is only for changes that do not impact budgets among customer sectors; TRM changes can require plan modifications that exceed the Commission's definition of minor plan changes approved within the expedited process since it may be necessary to shift funds between customer sectors to leverage better performing and cost-effective programs to meet goals.³⁰
- Assuming plans can always be changed to meet targets ignores the time and cost it takes to modify and pursue plan changes; plan modifications require budget expenditures and Phase II is a 3-year period with annual savings requirements that are a percentage of the total portfolio leaving no margin for catching up reduced savings assumptions.³¹
- Changing a plan in "midstream" potentially creates customer confusion and can slow participation while plans are being modified and approved.³²

²⁸ FE Statement No. 1, p. 17.

²⁹ Reed Direct Testimony, p. 14.

³⁰ FE Statement No. 1-R, pp. 12-13.

³¹ FE Statement No. 1-R, p. 12.

³² Id.

- It is uncertain that the Companies will be able to modify plans in the manner needed while maintaining all customer sector carve outs, as well as budgets, timing and program cost-effectiveness requirements.³³
- Experience has shown that approval of plan modifications can take as long a year to obtain and at least take 2-3 months.³⁴

In taking the stance, as it has in the Phase II Implementation Order and Reconsideration Order, that TRM changes can be considered and implemented on an annual basis without regard to the implications for already designed and launched EE&C plans, the Commission has departed from its original prudent and reasonable position on this issue. In the original Phase I Implementation Order, the Commission took care to make certain that its TRM decisions were made in advance of the design of Phase I plans so that saving, programs and reduction goals were all synchronized:

It is the intent of the Commission to complete the TRM update early in 2009 such that EDCs will have ample time **to incorporate any TRM updates in its EE&C plan.**

Thereafter, the Commission **will periodically review** and initiate the process to update the TRM as needed. Any such updates will be **prospective** in nature and applicable to measures **undertaken after** final approval of any TRM changes.³⁵ (emphasis added.)

The Companies will submit Phase II Plans that reflect the soon-to-be approved 2013 TRM savings reductions, which were not taken into account by the SWE's Market Potential Study that formed the basis for setting the Phase II acquisition costs. However, these reductions already erode 10% of the 25% acquisition cost increase (leaving only 15%) made available by the Phase II Implementation Order. This demonstrates that the acquisition costs assigned to the Companies are already outdated and that the Companies' Plans will have an unacceptable higher

³³ Id.

³⁴ Id.

³⁵ Phase II Implementation Order at 13-14.

level of risk to meet the targets, thus subjecting them to potential penalties. The Commission should adjust the reduction goals set for the Companies in Phase II.

2. The 2014 and 2015 TRM changes have the potential to further erode the adequacy of the Companies' acquisition costs set in the Market Potential Study.

The Companies' argument that TRM changes justify an increase in their acquisition costs and a corresponding reduction in target goals is based, in part, on relatively known proposed 2013 TRM savings reductions not considered in the Market Potential Study. But given the Commission's current policy to revise the TRM on an annual basis, there is clear potential for savings adjustments in the 2014 and 2015 program years of the Phase II plan to similarly impact savings.³⁶

Witness Miller estimated that to compensate for as yet unknown future TRM changes that will become effective during the Companies' Phase II plans, an additional 10% acquisition cost adjustment is needed for each annual TRM change.³⁷ Combined with the 2013 TRM erosion of the 25% cost adjustment factor relating to 2013 TRM changes, the increase in acquisition costs needs to be at least 30% solely to compensate for the uncertainty associated with TRM changes.³⁸

Witness Miller recalculated the Companies' acquisition costs based on a 30% adjustment factor to compensate for the estimated impact of future TRM savings changes. Witness Miller's Exhibit ECM-1 (attached to this Main Brief as Appendix 1) in Column E³⁹ shows an assumed base acquisition costs for each Company, with the 25% adjustment factor removed. If a 30% adjustment factor is used to compensate for TRM changes, the base acquisition costs would be

³⁶ FE Statement No. 1, p. 21.

³⁷ FE Statement No. 1, pp. 21-22.

³⁸ FE Statement No. 1, p. 22.

³⁹ Exhibit ECM-1 sets out each of the adjustments to acquisition costs advocated by Witness Miller – TRM Updates (Column F), Realization Rates (Column G), and adjustments for different EDC retail rates (Column H).

increased by the following amounts: Met-Ed - \$53.01; Penelec - \$51.89; Penn Power - \$50.21; West Penn - \$50.26.

As a further means of fairly dealing with the uncertain impact of TRM changes on the Companies' EDC Phase II EE&C plans, Witness Miller proposed that the Commission adjust energy reduction goals for the EDCs based on TRM savings changes not addressed in the Market Potential Study, as those changes are adopted in the annual TRM updating process.⁴⁰ This would eliminate uncertainty on the impact of TRM changes on projected EE&C plan savings.

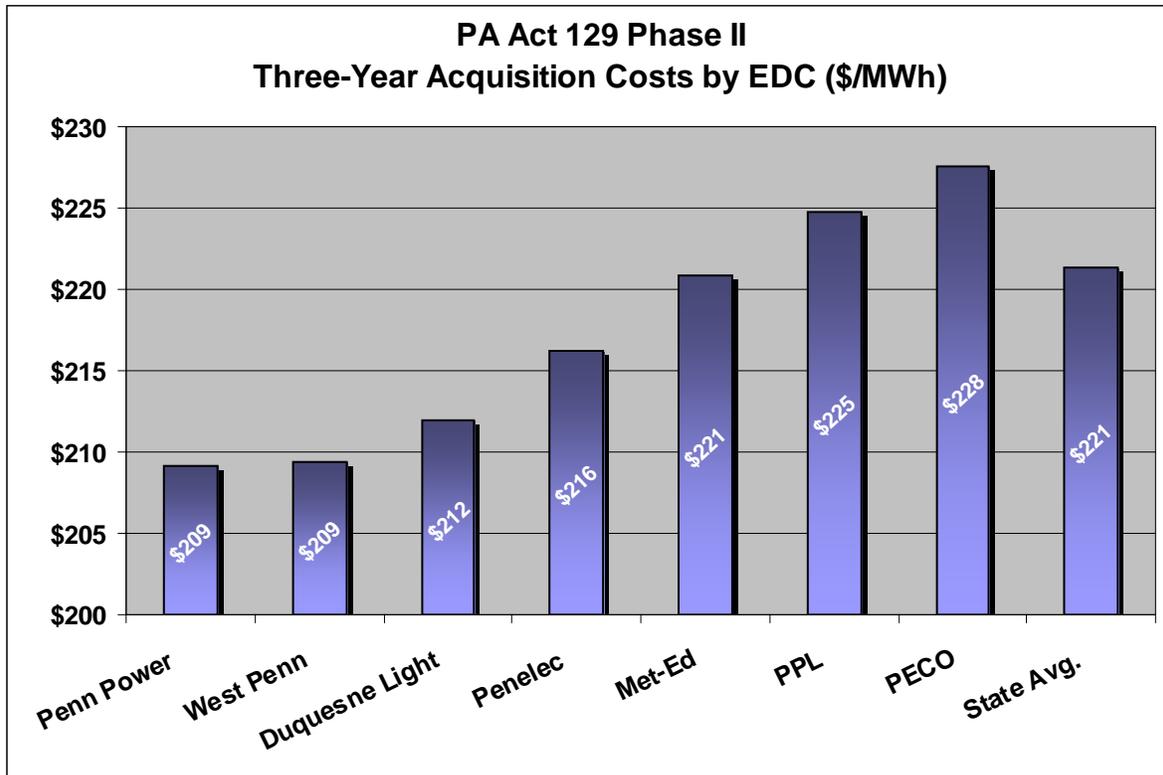
The Companies have proposed two alternative means of fairly dealing with the impact of annual TRM changes on their EE&C plans utilizing acquisition costs set without any specific consideration of 2013, 2014 or 2015 TRM changes. One takes actual 2013 impacts on saving into account and projects similar impacts for 2014 and 2015. Alternatively, the Commission can adjust Phase II goals as those TRM changes become known. Both alternatives are clearly superior to a Market Potential Study that failed to consider any specific 2013, 2014 or 2015 TRM changes.

3. The SWE's acquisition costs set for the Companies through the Market Potential Study fail to take into account important issues relating to administrative costs, incentive costs and relative differences in EDC retail rates.

There is no dispute that the acquisition costs set for the Companies in the Phase II Implementation Order, which were the result of the SWE's analysis in the Market Potential Study, are all below the EDC statewide average. The table below, excerpted from Witness Miller's testimony, vividly demonstrates this point:⁴¹

⁴⁰ FE Statement No. 1, p. 22.

⁴¹ FE Statement No. 1, p. 5.



In Phase I, the Commission was constrained by Act 129 in setting acquisition costs for each EDC. A fixed maximum budget and unalterable statutory energy reduction goals made the issue of acquisition costs a mathematical fall-out number for each EDC. The inequity of this situation was compounded by the fact that EDCs with the lowest EE&C Plan budgets had those lower budgets because their retail rates in 2006 were lower than other EDCs. Lower retail rates only made the task of persuading customers to invest in programs and measures to reduce consumption more difficult and expensive given longer payback periods due to lower retail rates. In Phase II, the Commission now has the legal latitude to set acquisition costs and related energy reduction goals in a way that eliminates the inequities of Phase I, and it must exercise that latitude by setting reasonable and fair reduction goals that are not unduly risky to achieve by the lower budget EDCs such as the Companies.

There are three separate factors that the Market Potential Study did not adequately consider in setting the Companies' acquisition costs below the statewide average in Phase II. Those factors are incentive costs, administrative costs and differences in retail rates between the Companies and other EDCs. Witness Miller addressed all three of these factors in his testimony.

a) Incentive costs.

Witness Miller explained that EDCs assigned lower acquisition costs are at a disadvantage because they are not able to provide greater incentives to customers who participate in programs and thus match the total benefits made available to customers in other EDC service territories.⁴² Lower incentives are particularly disadvantageous where the EDCs' retail rates are lower. The SWE assumed that the measure uptake in the Market Potential Study was a function of the rebate level relative to incremental cost. This was not a completely reasonable assumption as customers often also consider the financial benefits that come from reduced bills that depend on EDC-specific electric rates. This effect is particularly true in the non-residential customer sector where measure acceptance is sensitive to payback time.⁴³ As Witness Miller stated, "[t]he SWE's incentive costs were solely based on incenting a portion of the incremental cost of measures from the MPS [Market Potential Study] specific to each EDC and did not take into account that EDCs with lower rates would need to pay a customer a greater incentive to participate than an EDC with higher rates."⁴⁴

In addition to the gap in the SWE's analysis relative to the relationship between incentive levels and retail rates, the SWE methodology on incentive cost assumptions was flawed by its reliance on the results of Phase I Plan Years 1 and 2. This reliance on Plan Years 1 and 2 practically meant that the SWE was only looking at the initial 12-18 months of the Phase I

⁴² FE Statement No. 1, pp. 22-23.

⁴³ FE Statement No. 1, pp. 22-23.

⁴⁴ FE Statement No. 1-R, p. 13.

programs. This period was not fully representative of Phase I because at that point in time, the Companies had only achieved 33% of their Phase I targets (West Penn was only at 15%), so the remaining potential would be overstated in the SWE's analysis, especially for low cost measures. This overstatement has the effect of reducing the incentive acquisition costs assumed for Phase II by the SWE.⁴⁵ The Companies anticipate that incentive acquisition costs will increase and track toward available budgets as all programs are fully implemented for Phase I consistent with the Phase I plan design.⁴⁶

Witness Miller's critique of the SWE's analysis relative to incentive acquisition costs supports an increase in those acquisition costs for the Companies.

b) Administrative (non-incentive) acquisition costs.

The SWE provided each EDC with the same statewide average of reported non-incentive (administrative) costs for Phase II.⁴⁷ Witness Miller expressed the same concerns about the SWE's methodology on this cost issue as he had with respect to incentive costs, i.e., inappropriate reliance on only the first 12-18 months of the Phase I implementation period.⁴⁸ In addition, Witness Miller explained that the SWE's analysis did not recognize that EDCs have different administration, marketing measurement and evaluation costs. The Companies operate in large and more sparsely populated rural service territories, and the SWE's methodology did not adequately take into account the increased non-incentive costs the Companies experience in providing the same programs as their EDC counterparts provide in more urban service territories.⁴⁹

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ FE Statement No. 1-R, p. 14.

⁴⁸ Id.

⁴⁹ FE Statement No. 1, p. 15; FE Statement No. 1-R, pp. 14-15.

Witness Miller provided a specific, concrete example of how the administrative expense of Phase I considered by the SWE, combined with the rural nature of the Companies' service territories, collectively understates administrative costs. The Market Potential Study identified many residential measures that involve contractors entering and spending significant time in homes. The rural nature of the Companies' service territories makes providing these measures more costly than in urban areas. In addition, the Phase I administrative costs did not completely capture the true Phase II administrative cost of in-home measures because administration costs in the Phase I home audit program was driven by the low cost of energy conservation kits. Therefore, Phase I included relatively few on-site audits and the administrative costs of on-site audits were not represented in the Phase I administrative costs.⁵⁰

The SWE's underestimation of the Companies' administrative costs together with the more costly nature of the Companies' service territories for these types of expenses, justify an increase in their acquisition costs.

c) Differences in retail rates.

As noted above, the SWE's analysis did not adequately consider the differences in the retail rates of the Companies compared to the other EDCs that have been assigned higher acquisition costs. EDC's, like the Companies, with lower retail rates simply must pay a customer a greater incentive to persuade them to participate and accomplish energy reduction goals.⁵¹ Not only is this incentive level to retail rate relationship unrebutted in the record of this proceeding, Witness Reed for PennFuture acknowledged the relationship between rates, incentive levels and program participation.⁵²

⁵⁰ FE Statement No. 1, p. 14.

⁵¹ FE Statement No. 1, p. 23; FE Statement No. 1-R, p. 13.

⁵² Reed Statement, p. 9.

Witness Miller provided a concrete example of this issue for a commercial or industrial customer with locations in both West Penn's service territory and PECO's territory. With a limited budget opportunity, the customer must decide if they will pursue the same energy efficiency program in the West Penn service territory, where retail rates are \$6.71¢/ kWh to \$8.13¢/kWh, or the PECO service territory with 40-55% higher retail rates.⁵³

Obviously, absent some incentive payment advantage that West Penn can provide at a higher acquisition cost, the customer will likely pursue the PECO energy efficiency program. Witness Miller confirmed that Air Products, Sears, K-Mart, Kohl's Department Stores supermarket chains and other numerous chain store accounts are in this very situation.⁵⁴

The Companies' average retail rate is 9.66¢/kWh compared to the statewide average Act 129 EDC retail rate of 11.44¢/kWh. West Penn and Penn Power are significantly below the statewide average retail rate at 8.44¢/kWh and 9.03¢/kWh respectively.⁵⁵

Witness Miller identified the adjustment to the Companies' acquisition costs that would remedy the failure of the Market Potential Study to include this retail rate differential factor in its analysis. As depicted in Miller Exhibit ECM-1, column H,⁵⁶ the Companies should receive an upward adjustment of their acquisition costs that averages 17% to compensate for this factor. The foregoing evidence supporting an increase in acquisition costs based on inadequate allowances for incentive costs and the SWE's understatement of administrative costs all combine to make this proposed adjustment of the Companies' acquisition costs extremely conservative, reasonable, appropriate and supported by a preponderance of the evidence.

⁵³ FE Statement No. 1-R, p. 14.

⁵⁴ Tr. 58-59.

⁵⁵ FE Statement No. 1-R, p. 14.

⁵⁶ See Appendix I to Main Brief.

d) The Intervenors have failed to effectively rebut the Companies' evidence supporting this adjustment to acquisition costs.

OCA Witness Crandall and PennFuture Witness Reed both argue that acquisition costs from non-Pennsylvania jurisdictions demonstrate the adequacy of the acquisition costs set for the Companies in the Phase II Implementation Order. In his Rebuttal Testimony, Witness Miller noted that the OCA's evidence on this issue compared historical acquisition cost data from 2009 and 2011, two to four years earlier than the time frame of Phase II, to the Companies' acquisition costs for the future period of 2013-2015. The Companies' witness also pointed out that:

- The data from these non-Pennsylvania jurisdictions has not been shown to be similar to Pennsylvania with respect to savings requirements, the time to accomplish the reductions and other underlying conditions, such as customer density and geography.
- It is not clear if these other jurisdictions carve out specific savings requirements for specific customer sectors, such as governmental/non-profit or low income customers that increase acquisition costs.
- No evidence has been provided on whether the acquisition costs from these other jurisdictions take into account how much efficiency has already been achieved, the level of "deemed" savings or how savings are determined by jurisdiction and customer mix.
- Efficiency incentives can be "buried" in other rates in these non-Pennsylvania jurisdictions. For example, in Ohio incentives can be in the form of an exemption to a surcharge, which is a way of providing an incentive that does not appear in the EDCs acquisition costs.⁵⁷

Witness Miller addressed similar flaws in Witness Reed's testimony on acquisition costs from other jurisdictions, stating that "[u]nless all of the requirements and conditions are identical, this is informative but does not address what the adequate acquisition cost would be for

⁵⁷ FE Statement No. 1-R, pp. 3-4. The Companies anticipate that CAC/Sierra Club will argue that witness Miller cannot say with certainty that these jurisdictions are not identical to Pennsylvania. Tr. 46. In addition to that not being plausible, it was the Intervenors' burden to rebut the Companies position and their evidence from other jurisdictions that was shown to be relevant to Pennsylvania failed to shift the burden of going forward back to the Companies. Furthermore, although witness Miller did not complete a formal "survey" on the issue, his personal experience on non-Pennsylvania factors supported his rebuttal testimony. Tr. 46-47.

the Companies with Pennsylvania specific requirements and conditions.⁵⁸ Importantly, and in contrast to the acquisition cost data presented by witnesses Crandall and Reed, the SWE determined that the mean acquisition costs for approximately two dozen utilities and public benefit organizations with energy efficiency programs proposed or approved for 2013 and beyond were \$220 per first year MWh saved, which supports the SWE-determined Pennsylvania statewide acquisition cost of \$221.39. However, the Companies' concerns about the adequacy of acquisition costs assigned by the Phase II Implementation Order (which are all below the statewide average acquisition cost) are valid because Penelec, Penn Power and West Penn all have average retail rates less than the statewide average, serve rural areas and have been assigned acquisition costs below the statewide average.⁵⁹

OCA and PennFuture also presented a series of arguments aimed at showing the Companies' assigned acquisition costs were adequate and reasonable based on assumed cost savings measures or other strategies they could implement.⁶⁰ Witness Miller effectively countered all of these arguments as follows:

- *Allegation: Use of trade allies and joint delivery services will reduce costs –*

Response: The Companies already deploy these strategies and will continue to use these options in Phase II. These options do, however, also bring costs and such delivery channels are not likely to reach as many customers in the Companies' rural service territories as they would in urban areas. This is a vague potential benefit that in no way offsets the specific acquisition cost issues the Companies have raised.⁶¹

- *Allegation: The Market Potential Study incorrectly assumed when multiple measures compete, equal numbers of measures will be installed despite there being more efficient technologies –*

Response: The Market Potential Study's assumption that equal numbers of measures will be selected is actually correct because every customer and

⁵⁸ FE Statement No. 1-R, p. 10.

⁵⁹ FE Statement No. 1-R, pp. 10-11.

⁶⁰ OCA Statement No. 1, pp. 9-10; Reed Statement pp. 4-5, 9-11.

⁶¹ FE Statement No. 1-R, pp. 4-5.

opportunity is different. Furthermore, it is incorrect to just assume more efficient technologies will reduce the cost of achieving savings. For example, heat pump water heaters are more efficient and produce more savings than storage-type water heaters, but they carry a significantly higher incremental cost that cannot be overcome in customers' minds, particularly where retail rates are lower than average. Even if more aggressive marketing attempted to overcome this customer phenomenon, the additional costs of the effort push acquisition costs upward.⁶²

- *Allegation: Phase I acquisition costs corroborate the adequacy of the assigned Phase II acquisition costs –*

Response: First, Witness Miller could not corroborate Witness Reed's claimed Phase I acquisition costs for West Penn.⁶³ In Phase I, EDCs with lower budgets had to design programs with lower cost programs and measures to capture the "low hanging fruit". Witness Miller substantiated his claim of heavy reliance in Phase I on low cost measures with his excerpt from the Market Potential Study that showed the Companies' lower maximum acquisition costs of in Phase I,⁶⁴ These lower budgets necessarily forced reliance on low cost measures. However, these measures are being exhausted and to the extent they can be continued, the costs of achieving success with these measures increase since direct engagement activities will have to replace less expensive mass marketing efforts.⁶⁵ This allegation is particularly confounding since reduced savings from TRM updates, increasing federal efficiency standards and changing baseline conditions all point to EDCs needing to spend more to acquire additional participation to produce equivalent savings in Phase II.⁶⁶

- *Allegation: The Companies should have single, statewide program implementation vendors to save costs –*

Response: The Companies already have aligned program designs and have pursued joint implementation vendors for their programs. Moreover, it cannot always be assumed that joint implementation vendors always provide economies of scale.⁶⁷

By underestimating the Companies' incentive costs and administrative costs in Phase II, the SWE's methodology has produced acquisition costs that place unreasonable risk on achievement of the Phase II goals. This, in conjunction with the failure to take into account the

⁶² FE Statement No. 1-R, p. 6.

⁶³ Id.

⁶⁴ FE Statement No. 1-R, p. 7.

⁶⁵ FE Statement 1-R, pp. 6-8. Witness Miller provided specific examples of lower cost measures not expected to be available in Phase II: the West Penn Conservation Voltage Reduction Program and the Opt-In Energy Efficiency Kit measure under the Home Performance Program. FE Statement No. 1-R, p. 8.

⁶⁶ FE Statement No. 1-R, p. 5.

⁶⁷ FE Statement No. 1-r, p. 11.

profound effects of low retail rates prevalent in the Companies' service territories, requires the Commission to revise the Companies' assigned acquisition costs and the related energy reduction goals.

e) The Market Potential Study improperly assumed a 100% realization rate for Phase II Programs.

As Companies' witness Miller testified, realization rates establish the verified savings of the EE&C programs for compliance with the energy reduction targets.⁶⁸ They also address confirmed levels of participation and installation rates that may differ from program assumptions. Though realization rates may at times exceed 100% for certain programs, at the portfolio level, i.e. the entire plan, they are usually below 100% for individual programs. Currently, the Companies have an overall realization rate of approximately 96%.⁶⁹

Although the Companies are currently experiencing an approximate 96% realization rate⁷⁰, the Market Potential Study conducted by the SWE and relied upon by the Commission in the Phase II Implementation Order assumes an unrealistic 100% realization rate.⁷¹ This rate is unrealistic because, as Mr. Miller testified, as the EE&C programs in Phase II begin to address more complicated measures (beyond the so-called "low hanging fruit"), "the variability in the realization rates can increase and realization rates can drop."⁷² By imputing a 100% realization rate on the Companies, the Commission is asking for perfection knowing full well that such goal is not achievable, fair or realistic.

⁶⁸ FE Statement No. 1, p. 12.

⁶⁹ *Id.*

⁷⁰ A realization rate of 96% means that the Companies only get credit for 96% of the savings provided under their EE&C programs. FE Statement No. 1, p. 13.

⁷¹ *Id.* at 13.

⁷² *Id.*

Importantly, any reduction in program savings during the term of Phase II due to changing realization rates *increases* the Companies' acquisition costs.⁷³ And, increases in acquisition costs to account for future uncertainties including, without limitation, changing realization rates will result in the need to decrease the Companies' Phase II targets.⁷⁴

In his Exhibit ECM-1, Mr. Miller revised the Companies' acquisition cost to more accurately reflect the impact on the changing TRM, realization rates and the impact of each company's EDC rates.⁷⁵ In particular, Mr. Miller adjusted the Companies' realization rate to 96% (see column G on Exhibit ECM-1) based on the Companies' average portfolio realization rates in its recent November 15, 2011 Planning Year 2 Report.⁷⁶ This revised realization rate, supported by the Companies' documented, current and real-world experience is clearly appropriate versus the assumed and unsupported 100% realization rate assumed in the Market Potential Study.

For the reasons specified above, the Companies urge the Commission to establish a 96% realization rate for its Phase II programs.

The following section of this Main Brief will summarize the adjustments to acquisition costs and goals that are necessary to provide the Companies a reasonable opportunity to reach their Phase II goals.

B. The Companies' Phase II Energy Reduction Targets Should Match Reasonable Acquisition Cost Levels.

In their comments to the Tentative Phase II Implementation Order, the Companies advocated the adoption of higher acquisition rates than had been proposed by the Commission.⁷⁷

⁷³ *Id.* at 16.

⁷⁴ *Id.* at 4.

⁷⁵ *Id.* at 23.

⁷⁶ Exhibit ECM-1, note (G).

⁷⁷ *Comments of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company to the May 10, 2012 Tentative Order on Act 129 Energy Efficiency and*

Their recommendation was not adopted, but as Witness Miller testified, this proceeding provides further opportunity to rectify this problem and provide the Companies with a reasonable opportunity to reach their goals and avoid significant financial penalties.⁷⁸

Based on the cumulative effect of the unaddressed factors impacting their acquisition costs, the Companies have calculated Phase II targets that provide a more reasonable level of attainment. Exhibit ECM-1, depicted below, provides revised acquisition costs and energy savings targets for the Companies, calculated by adopting the specific adjustments related to annual TRM updates, current realization rates and the impact of retail rates on customer participation and incentive levels.⁷⁹

Exhibit ECM-1								Witness: Edward C. Miller	
Revised Acquisition Cost									
*Based on specific percentage adjustments to overall acquisition cost									
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	
					Adjustments for:				
Op Co	Line No.	Unit	3-Year Program Acquisition Cost	Base Acquisition Cost	TRM Updates	Realization Rates	EDC Rates	Revised 3-Year Program Acquisition Cost	
Met-Ed	1	%	NA	NA	30%	4%	-1%	NA	
	2	\$ / MWh	\$220.87	\$176.70	\$53.01	\$7.07	-\$2.44	\$234.33	
Penelec	3	%	NA	NA	30%	4%	10%	NA	
	4	\$ / MWh	\$216.19	\$172.95	\$51.89	\$6.92	\$15.86	\$247.62	
Penn Power	5	%	NA	NA	30%	4%	27%	NA	
	6	\$ / MWh	\$209.20	\$167.36	\$50.21	\$6.69	\$54.02	\$278.28	
West Penn	7	%	NA	NA	30%	4%	36%	NA	
	8	\$ / MWh	\$209.42	\$167.54	\$50.26	\$6.70	\$62.91	\$287.41	
Notes									
(D)	Source: "Implementation Order" dated August 3, 2012 in Case M-2012-2289411 and M-2008-2069887								
(E)	Calculation: (D) * (4/5) [To remove the 25% increase]								
(F)	Percent Change based on TRM savings reduction associated with draft 2013 TRM update, 3-years Dollar change is a calculation: (Percent Change) * (E)								
(G)	Percent Change based on November 15, 2011 PY2 Report, FE average portfolio realization rates Dollar change is a calculation: (Percent Change) * (E)								
(H)	Percent Change based on ratio of EDC rates to Statewide Average per Edison Electric Institute Typical Bills and Average Rates Report 2011 PA Average Retail Rates by EDC (cents/KWh) Dollar change is a calculation: (Percent Change) * (E)								
(I)	Calculation: SUM (E) through (H)								

Conservation Program Phase II, Docket No. M-2012-2289411, pp. 4-8 (“In light of the foregoing, the Companies believe that the acquisition costs used to support the results presented in Table 1-3 of the [Market] Potential Study are too low and that the Commission should use adjusted values considering the above observations.”).

⁷⁸ FE Statement No. 1, p. 24.

⁷⁹ Id.

Column F depicts the acquisition cost adjustment to account for TRM updates. Column G shows the acquisition cost correction needed to incorporate the current 96% realization rate factor, rather than the 100% rate assumed in the Market Potential Study. And Column H shows the impact on acquisition costs if the differences in EDC retail rates as a percentage of the statewide average are taken into account. All of these adjustments to acquisition costs are supported by a preponderance of evidence and, if added to the assumed base acquisition cost, will produce the revised total acquisition costs set forth in Column I.

Utilizing the revised total acquisition costs shown in Column I, the Companies have calculated the revised energy reduction target goals that would be assigned to each of them after adoption of their proposed adjustments to acquisition costs:

Exhibit ECM-3			Witness: Edward C. Miller		
Summary Revised Phase II Targets for the Companies					
*Based on revised acquisition costs					
(A)	(B)	(C)	(D)	(E)	(F)
Line No.	Op Co	Spending Cap	Revised Acquisition Cost	Revised Target	2009 / 2010 Forecast Reductions
		\$ in Millions	\$ / MWh	MWh	%
1	Met-Ed	\$74.60	\$234.33	318,350	2.2%
2	Penelec	\$68.92	\$247.62	278,334	1.9%
3	Penn Power	\$19.98	\$278.28	71,799	1.5%
4	West Penn Power	\$70.69	\$287.41	245,955	1.2%
NOTES					
(D)	Revised 3-Year Acquisition Cost, Source: ECM-1				
(E)	Target revised based on higher acquisition cost, Source: ECM-2				
(F)	Resulting reductions based on revised acquisition costs				

It is clear that the assumptions made for acquisition costs and savings in the Phase II Implementation Order do not adequately address the Companies' concerns. Therefore, the uncertainties and risks faced by the Companies are unacceptably high and it is necessary for the

Commission to take corrective action.⁸⁰ The Commission should adopt the foregoing revisions to acquisition costs and target goals (columns D and F), an action they are fully permitted by law to take, in order to provide the Companies with a reasonable opportunity to reach their assigned goals and avoid penalties.

C. The Implementation Order Violates Act 129 and Fundamental Due Process Rights by Prohibiting the Companies from Petitioning for Relief from Future Commission Actions that Impact their Phase II Plans and their Target Goals.

A critical concern expressed by the Companies in this proceeding is the potential adverse impact future events and conditions that are completely outside of the Companies' control could have on their consumption reduction targets. One clear example would be changes to the TRM that occur *after* the Companies' Phase II Plans and Target Goals have been approved. The Commission's failure to allow a clear and unequivocal mechanism by which the Companies can seek and potentially obtain changes in their consumption reduction targets resulting from future unknown events and conditions, like subsequent changes in the TRM, violates the Companies' constitutional due process rights and provisions of Act 129 and the Public Utility Code, all of which must be addressed in this proceeding and not delayed for resolution later.

Witness Miller identified the issue in both his direct and rebuttal testimony:

... to address the uncertainty with the TRM updates, the Commission could adjust the energy reduction goals for EDCs based on the reduction of savings included in all of the TRM updates during Phase II that were not addressed in the Market Potential Study *at the time it adopts those TRM reductions in savings.*⁸¹

And as I indicated in my Direct Testimony, if the Commission does not adjust the Companies' goal in this proceeding, it must certainly allow the Companies to have the opportunity to request modifications to their goals when future TRM changes that affect savings (including those potentially approved for 2013) are approved and mandated. It is fundamentally unfair to approve a plan

⁸⁰ FE Statement No. 1, p. 25.

⁸¹ FE Statement No. 1, p. 22 (emphasis added).

based on one set of savings assumptions and then change those assumptions through TRM changes.⁸²

1. Due Process Violations

The Companies' due process concerns are not new to this proceeding. Indeed, on August 20, 2012, PPL Electric Corporation ("PPL Electric") filed a Petition for Reconsideration of the Phase II Implementation Order requesting, among other things, that the Commission clarify that the 25% adjustment factor adopted in that order "for future TRM adjustments" does not prohibit 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. On September 27, 2012, the Commission denied PPL Electric's request for reconsideration in *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411, M-2008-2069887, 2012 (September 27, 2012), thereby failing to address the fundamental due process issue raised by PPL Electric and again by the Companies in this proceeding. While the Reconsideration Order did note that EDCs and other parties could (i) participate in and challenge any proposed updates to the TRM and (ii) submit evidence and argue that an alternative estimate of consumption or demand savings is more accurate,⁸³ that order did not provide a clear and unequivocal opportunity for EDCs to challenge and the Commission to review whether future changes that are actually adopted by the Commission should be applied to *previously approved* Phase II reduction targets, or whether the Phase II reduction targets should be modified to reflect changes that are actually adopted by the Commission.

⁸² FE Statement No. 1-R, pp. 15-16.

⁸³ Reconsideration Order, p. 14.

Absent clarifying and definitive guidance from the Commission, any Commission final order in this proceeding will, like the Phase II Implementation Order, continue to suffer from significant constitutional infirmities.

Absent remediation, the conclusion reached by the Commission in the Phase II Implementation Order violates due process requirements. The Phase II Implementation Order seeks to establish a binding rule by prospectively eliminating the right to (1) challenge the application of future changes to the TRM 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, 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 all future changes in the TRM, among other things, without allowing the parties – including the Companies – an opportunity to present evidence regarding the changes that are *actually adopted*.

It is unclear whether the Commission's Phase II 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 Phase II 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 Phase II Implementation Order -- that EDCs are prohibited from (1) challenging the application of future changes to the TRM 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 and amounts to a denial of due process.

The essence 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."⁸⁴ However, the Commission adopted the Phase II Implementation Order without evidentiary hearings and, as a result, no testimony or other evidence was presented. Moreover, there was no opportunity for cross examination. Via that general order, the Commission has in effect concluded that the 25% adjustment factor will account for all future changes in the TRM and other uncertainties and, in effect, eliminated the Companies' and other EDCs' rights to (1) challenge the application of future changes to the TRM, and (2) request, if necessary, modifications to their Phase II consumption reduction targets to account for any such future changes.

As explained above, the future changes in the TRM, among other things, are entirely unknown at this time and the 25% adjustment factor is insufficient to protect the Companies from future unknown events that could adversely impact their consumption reduction targets, savings, etc. Consequently, the Companies and other EDCs do not, and cannot, know what changes *will actually be adopted* and what impacts, if any, such changes will have on them. The Commission, through the Phase II Implementation Order, has prospectively foreclosed the opportunity for the Companies and other EDCs to be heard on the whether the 25% adjustment factor is sufficient to account for the changes that are *actually adopted*. As such, the Phase II Implementation Order has serious due process deficiencies that must be addressed and rectified in this proceeding.

⁸⁴ *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))

As explained elsewhere in this brief, the future changes that are *actually adopted* could significantly impact the Companies' ability to meet their Act 129 requirements, thereby subjecting them to substantial civil penalties. The conclusion reached in the Phase II Implementation Order clearly affects the Companies' future duties, liabilities, and obligations and, therefore, constitutes an adjudication. 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.⁸⁵ Given the prospective effect on the Companies' duties, liabilities, and obligations, and that the Companies do not, and cannot, know the changes that will *actually be adopted*, they 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 Phase II Implementation Order violates due process requirements. For these reasons, the Commission should make it clear in this proceeding that neither the Phase II Implementation Order nor the Reconsideration Order, including, but not limited to, the 25% adjustment factor, restrict their right to: (1) challenge the application of future changes to the TRM, 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, other Commission actions, and other uncertainties that are not presently known.

2. Violations of Act 129 and the Public Utility Code

As stated above, the Phase II Implementation Order appears to eliminate an EDC's right to challenge the application of future changes in the TRM, and other Commission actions to

⁸⁵ *AT&T Communications, Inc. v. Pa. PUG*, 570 A.2d 612, 618 (Pa. Cmwlth. 1990) (citing *Barasch v. Pa. PUG*, 546 A.2d 1296, 1305 (Pa. Cmwlth. 1988))

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. To the extent this view overrides and misapplies the Public Utility Code, Act 129, and the Commission's regulations, it is erroneous as a matter of law. Once again, the Commission must rectify this clear error in this proceeding.

The power and authority of a Pennsylvania administrative agency is limited to that granted by the enabling legislation.⁸⁶ The Commission's attempt in the Phase II Implementation Order to preclude review and potential modification of the Companies' established Phase II Target Goals based upon future and unknown events misapplies and ignores the statutory procedures set forth in Public Utility Code Sections 703(g) and 2806.1(b)(3), 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 Phase II 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:

⁸⁶ *Pennsylvania State Lodge, Fraternal Order of Police v. Department of Conservation*, 909 A.2d 413, 41 (Pa. Cmwlth. 2006)

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.

The General Assembly has granted the Companies and other EDCs the right under Sections 703(g) and 2806.1(b)(2) to petition the Commission to 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 the clear provisions of the Public Utility Code and the Commission's own regulations, in the Phase II Implementation Order, the Commission ignored all parties' statutory right to request the Commission to amend, clarify, rescind, etc. a prior order by prospectively prohibiting all EDCs from petitioning the Commission to modify the Phase II consumption reduction targets to account for changes in the TRM, 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, it 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 the Companies' right to petition to modify its Phase II consumption reduction targets misapplies and ignores Sections 703(g) and 2506.1(b)(2) of the Public Utility Code, as well as the Commission's regulation at 52 Pa. Code § 5.572.

IV. CONCLUSION

In Phase II of Act 129, the Commission has been liberated from the Phase I mandatory statutory constraints on energy reduction goals for EDCs that work inequities on rural EDCs that have lower budgets, higher incentive and administrative costs and below statewide average retail rates. The Companies have proposed and supported adjustments to their acquisition costs and associated energy reduction target goals assigned in the Phase II Implementation Order, that still provide substantial public interest benefits but correct those cost levels and goals so that the Companies have a realistic and reasonable opportunity to achieve those targets without undue risk of penalty. In the near future, the Companies will be submitting Phase II plans that reflect their best efforts to meet the goals set by the Phase II Implementation Order. However, those plans will include an acknowledgement that goal attainment is unreasonably risky under the acquisition costs and goals prescribed for the Companies in the Phase II Implementation Order.

The Commission should adopt the Companies proposed revisions to acquisition costs and target goals recommended in this proceeding. It should also revise its position that once set, it

will not reopen the issue of proper target goals for EDCs in the future regardless of changes in the TRM, federal and state standards or other currently unanticipated market events that may occur during the course of the Phase II plan period.

Respectfully submitted,

Dated: November 2, 2012



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APPENDIX 1

Revised Acquisition Cost

*Based on specific percentage adjustments to overall acquisition cost

(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)
Op Co	Line No.	Unit	3-Year Program Acquisition Cost	Base Acquisition Cost	TRM Updates	Realization Rates	EDC Rates	Revised 3-Year Program Acquisition Cost
Met-Ed	1	%	NA	NA	30%	4%	-1%	NA
	2	\$ / MWh	\$220.87	\$176.70	\$53.01	\$7.07	-\$2.44	\$234.33
Penelec	3	%	NA	NA	30%	4%	10%	NA
	4	\$ / MWh	\$216.19	\$172.95	\$51.89	\$6.92	\$15.86	\$247.62
Penn Power	5	%	NA	NA	30%	4%	27%	NA
	6	\$ / MWh	\$209.20	\$167.36	\$50.21	\$6.69	\$54.02	\$278.28
West Penn	7	%	NA	NA	30%	4%	36%	NA
	8	\$ / MWh	\$209.42	\$167.54	\$50.26	\$6.70	\$62.91	\$287.41

Notes

- (D) Source: "Implementation Order" dated August 3, 2012 in Case M-2012-2289411 and M-2008-2069887
- (E) Calculation: (D) * (4/5) [To remove the 25% increase]
- (F) Percent Change based on TRM savings reduction associated with draft 2013 TRM update, 3-years
Dollar change is a calculation: (Percent Change) * (E)
- (G) Percent Change based on November 15, 2011 PY2 Report, FE average portfolio realization rates
Dollar change is a calculation: (Percent Change) * (E)
- (H) Percent Change based on ratio of EDC rates to Statewide Average per Edison Electric Institute Typical Bills and Average Rates Report
2011 PA Average Retail Rates by EDC (cents/KWh)
Dollar change is a calculation: (Percent Change) * (E)
- (I) Calculation: SUM (E) through (H)

APPENDIX 2

Proposed Findings of Fact

1. On August 3, 2012, the Commission entered its Phase II Implementation Order which set acquisition costs and energy reduction targets for each EDC, including the Companies. *Phase II Implementation Order at 24.*
2. The Phase II Implementation Order relied on baseline studies and a Market Potential Study conducted by its Statewide Evaluator (“SWE”). *Phase II Implementation Order at 14.*
3. The Market Potential Study adopted a statewide 25% cost adjustment factor that was intended to account for future uncertainties that could impact the EDCs’ actual acquisition costs. *Phase II Implementation Order at 19.*
4. The Companies’ energy reduction targets set in the Phase II Implementation Order were Met-Ed 2.3%, Penelec 2.2%, Penn Power 2.0% and West Penn 1.6%. *Phase II Implementation Order at 24.*
5. The Commission has changed the TRM annually, and those changes frequently reduce the savings for measures significantly. *FE Statement No. 1, p. 10.*
6. When the 2013 TRM changes are made final, the savings levels assumed in the Market Potential Study will be outdated and actual savings will be lower than those assumed in the Market Potential Study. *FE Statement No. 1, p. 10.*
7. The proposed 2013 TRM changes alone account for 10% of the 25% acquisition cost increase for the Companies, leaving only 15% for future uncertainties. *FE Statement No. 1, p. 8.*
8. When the draft 2013 TRM changes are applied to the Market Potential Study for Met-Ed, there is a decrease of 10% in savings, which was fairly consistent across all customer sectors. *FE Statement No. 1, p. 18.*
9. If programs and measures do not change and TRM savings decrease, an EDC will achieve fewer reductions in energy consumption than expected and fall short of expected targets. *FE Statement No. 1, p. 16.*
10. The 2013 TRM savings reductions eroded 10% of the 25% SWE acquisition cost increase (leaving only 15% remaining) for the Companies. *FE Statement No. 1-R, p. 15.*
11. The 2013 TRM reductions in savings have not been accounted for in the energy reduction targets set by the Commission in the Phase II Implementation Order, which were based on available funding and not revised in any way specific to these reductions. *FE Statement No. 1, pp. 18-21.*

12. To compensate for as yet unknown future TRM changes that will become effective during the Companies' Phase II plans, an additional 10% acquisition cost adjustment is needed for each annual TRM change. *FE Statement No. 1, pp. 21-22.*
13. Combined with the 2013 TRM erosion of the 25% cost adjustment factor relating to 2013 TRM changes, the increase in acquisition costs for the Companies needs to be at least 30% solely to compensate for the uncertainty associated with TRM changes. *FE Statement No. 1, p. 22.*
14. A 30% adjustment factor is appropriate to compensate the Companies for TRM changes, and using such a factor increases each of the Companies' base acquisition costs in the following amounts: Met-Ed - \$53.01; Penelec - \$51.89; Penn Power - \$50.21; West Penn - \$50.26. *Exhibit ECM-1.*
15. As an alternative to the 30% TRM adjustment factor, reopening the Phase II Implementation Order targets to reflect final TRM savings changes that occur during Phase II will synchronize Phase II plans with appropriate reduction goals. *FE Statement No. 1, p. 22.*
16. The acquisition costs set for the Companies in the Phase II Implementation Order, which were the result of the SWE's analysis in the Market Potential Study, are all below the EDC statewide average. *FE Statement No. 1, p. 5.*
17. EDCs assigned lower acquisition costs are at a disadvantage relative to other EDCs because they are not able to provide greater incentives to customers who participate in programs and thus match the incentives made available to customers in other EDC service territories. *FE Statement No. 1, pp. 22-23.*
18. The Companies' incentive acquisition costs will increase and track toward available budgets for Phase I consistent with the Phase I plan design. *FE Statement No. 1-R, p. 13.*
19. The SWE provided each EDC with the same statewide average of reported non-incentive (administrative) costs for Phase II. *FE Statement No. 1-R, p. 14.*
20. EDCs such as the Companies operate in large and sparsely populated rural service territories, and the SWE's methodology did not adequately take into account the increased non-incentive costs the Companies experience in providing the same programs as their EDC counterparts provide in their more urban service territories. *FE Statement No. 1, p. 15; FE Statement No. 1-R, pp. 14-15.*
21. EDCs like the Companies, with lower retail rates, must pay a customer a greater incentive to persuade them to participate and accomplish energy reduction goals than EDCs with higher retail rates. *FE Statement No. 1, p. 23; FE Statement No. 1-R, p. 13.*
22. The Companies' average retail rate is 11.83¢/kWh compared to the statewide average Act 129 EDC retail rate of 13.39¢/kWh, and West Penn and Penn Power are significantly

below the statewide average retail rate at 9.78¢/kWh and 11.15¢/kWh respectively. *FE Statement No. 1-R, p. 14.*

23. The Companies are entitled to receive an upward adjustment of their acquisition costs that averages 17% to compensate for their lower average retail rates compared to other higher retail rate EDCs. *Exhibit ECM-1, column H.*
24. Realization rates establish the verified savings of the EE&C programs for compliance with the energy reduction targets. *FE Statement No. 1, p. 12.*
25. The Companies are currently experiencing an approximate 96% realization rate. *FE Statement No. 1, p. 13.*
26. The Market Potential Study conducted by the SWE and relied upon by the Commission in the 2012 *Implementation Order* assumes an unrealistic 100% realization rate. *FE Statement No. 1, p. 13.*
27. Any reduction in program savings during the term of Phase II due to changing realization rates *increases* the Companies' acquisition costs. *FE Statement No. 1, p. 16.*
28. Increases in acquisition costs to account for future uncertainties including, without limitation, changing realization rates will result in the need to decrease the Companies' Phase II targets. *FE Statement No. 1, p. 4.*
29. The revised acquisition costs and energy savings targets for the Companies shown on Exhibit ECM-1, calculated by adopting the specific adjustments related to annual TRM updates, current realization rates and the impact of retail rates on customer participation and incentive levels, are reasonable, appropriate and should be adopted. *Exhibit ECM-1; FE Statement No. 1, p. 24.*
30. The revised energy reduction amounts and target goals that would be assigned to each of the Companies as shown on Exhibit ECM-3 are reasonable, appropriate and should be adopted. *Exhibit ECM-3; FE Statement No. 1, p. 25.*

APPENDIX 3

Proposed Conclusions of Law

1. After evaluation of the previously approved energy efficiency and conservation plans of electric distribution companies subject to Act 129 of 2008, the Commission has legal authority pursuant to Section 2806.1(c)(3) of the Public Utility Code, 66 Pa. C.S. § 2806.1(c)(3), to establish additional required incremental reductions in energy consumption, provided that the benefits of the plan exceed the costs.
2. The Commission has legal authority under Act 129 of 2008 to establish procedures to ensure electric distribution company compliance with the reduction in consumption requirements it sets under Section 2806.1(a)(9), 66 Pa. C.S. § 2806.1(a)(9), including the establishment of reasonable energy reduction targets in Phase II of energy efficiency and conservation plans.
3. The Companies have established by a preponderance of the evidence that their acquisition costs should be increased and related energy reduction targets should be decreased relative to the costs and targets set in the Phase II Implementation Order, as recommended by the Companies.
4. Electric distribution companies have the right under the Public Utility Code, the Commission's regulations and constitutional due process principles, to request and be heard by the Commission on proposed modifications of their Commission-established energy reduction targets during the implementation of their Phase II EE&C plans.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Metropolitan Edison Company, :
Pennsylvania Electric Company, Pennsylvania : Docket Nos. P-2012-2320450
Power Company and West Penn Power : P-2012-2320468
Company for an Evidentiary Hearing on the : P-2012-2320480
Energy Efficiency Benchmarks Established : P-2012-2320484
For the Period June 1, 2013 through May 31, 2016 :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

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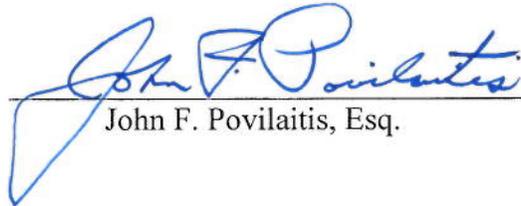
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