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| **PENNSYLVANIA****PUBLIC UTILITY COMMISSION****Harrisburg, PA 17105-3265** |
| Public Meeting held December 5, 2012 |
| Commissioners Present:Robert F. Powelson, ChairmanJohn F. Coleman, Jr., Vice ChairmanWayne E. GardnerJames H. CawleyPamela A. Witmer |
| 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 |  P-2012-2320450 P-2012-2320468P-2012-2320480P-2012-2320484 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition of Metropolitan Edison Company (Met-Ed), Pennsylvania Electric Company (Penelec), Pennsylvania Power Company (Penn Power) and West Penn Power Company (West Penn) (collectively, the Companies or FirstEnergy) for an Evidentiary Hearing on the Energy Efficiency Benchmarks Established for the Period June 1, 2013 through May 31, 2016 (Petition), filed on August 20, 2012. In accordance with the Commission’s Order in *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411 and M-2008-2069887 (Order entered August 3, 2012) (*Phase II Implementation Order*), Administrative Law Judge (ALJ) Elizabeth H. Barnes certified the record in this proceeding on November 2, 2012. For the reasons stated below, we shall deny the Petition of FirstEnergy and reaffirm the energy efficiency benchmarks provided within our *Phase II Implementation Order*.

# I. Background

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

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

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

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

Law Judge for hearings with the record being certified to the Commission by November 2, 2012.

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

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

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

As previously noted, on August 20, 2012, the Companies filed a Petition for an Evidentiary Hearing on the Energy Efficiency Benchmarks Established for the Period June 1, 2013 through May 31, 2016 by the *Phase II Implementation Order*.

# II. Procedural History

The *Phase II Implementation Order* provided that, if an EDC filed a petition for an evidentiary hearing, the matter would be referred to the Office of Administrative Law Judge for hearings with the record being certified to the Commission by November 2, 2012. *Phase II Implementation Order* at 120. As noted, *supra*, the Companies filed their Petition on August 20, 2012, and the matter was assigned to the Office of Administrative Law Judge with a certified record deadline of November 2, 2012.

The Community Action Association of Pennsylvania (CAAP) filed a Petition to Intervene on August 29, 2012.

This matter was assigned to ALJ Elizabeth H. Barnes, who issued a Prehearing Conference Order on August 29, 2012, and a Prehearing Conference Notice on August 30, 2012. Also on August 30, 2012, the Office of Consumer Advocate (OCA) filed a Notice of Intervention and Public Statement, the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, the Penn Power Users Group and the West Penn Power Industrial Intervenors (collectively, the Industrials) filed a Joint Petition to Intervene, the Citizens for Pennsylvania’s Future (PennFuture) filed a Petition to Intervene, CAUSE-PA filed a Petition to Intervene, the CAC/SC filed a Joint Petition to Intervene and the Statewide Evaluator (SWE) filed a Notice of Appearance.

An Initial Prehearing Conference was held before the ALJ on September 10, 2012, at which time a procedural schedule was adopted. On September 18, 2012, ALJ Barnes issued a Scheduling Order whereby the ALJ granted the Petitions to Intervene, set a due date for the submission of testimony and briefs and designated that a hearing be scheduled for October 19, 2012, in Harrisburg, Pennsylvania. Also on September 18, 2012, the ALJ issued a Hearing Notice.

On October 19, 2012, a hearing was held regarding the energy efficiency benchmarks pertaining to the Companies. A transcript of the evidentiary hearing held on October 19, 2012, was filed on October 23, 2012, consisting of pages 20 through 60.

Main Briefs were filed on November 2, 2012,[[1]](#footnote-1) by FirstEnergy, the OCA, PennFuture and jointly by the CAC/SC. FirstEnergy also filed proposed Findings of Fact and Conclusions of Law on November 2, 2012.

On November 2, 2012, ALJ Barnes issued an Order Certifying Record to the Commission identifying the documents that comprise the evidentiary record in this proceeding.

# III. Discussion

##  A. Legal Standards

The *Phase II Implementation Order* tentatively established three-year consumption reduction targets for the FirstEnergy Companies of 1.6% for West Penn, 2.0% for Penn Power, 2.2% for Penelec and 2.3% for Met-Ed. *Phase II Implementation Order* at 24. In this proceeding, the Company contests those targets. The scope of this proceeding is narrow; it is limited to the consumption reduction requirement issue.

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

We note that any issue that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC,* 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC,* 485 A.2d 1217 (Pa. Cmwlth. 1984).

## B. The Request to Modify the Companies’ Energy Efficiency Benchmarks is Denied

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### 1. Positions of the Parties

### a. Companies

 In their Petition, the Companies aver that they cannot be certain if they can achieve the Commission imposed energy efficiency benchmarks until after they have assessed programs, analyzed potential participants and participation rates, and developed combinations of programs and measures that will comply with established targets within the 2% spending cap. According to the Companies, this is an ongoing process that must be performed through an iterative process that takes several months. Petition at 3.

 FirstEnergy witness Miller testified that the goals for energy reductions set by the Commission for Phase II are too high and should be lowered. FE Statement No.1 at 2. Mr. Miller stated that adjustments to these goals are required to provide the Companies with a reasonable level of confidence of their ability to achieve the goals with the available funding, recognizing that the Companies are subject to severe financial penalty if the goals are not met. According to the FirstEnergy witness, the Companies are unconvinced that the Commission has taken all costs and economic factors into account when determining the Phase II mandatory reduction. *Id.* at 3. Mr. Miller asserts that the 25% adjustment factor to acquisition costs adopted by the Commission, as recommended by the SWE, to account for future uncertainties associated with the cost to achieve additional energy savings is insufficient to cover all the elements of uncertainty the Companies have identified. *Id.* at 8-9. The uncertainties identified by FirstEnergy include: annual changes to the Technical Reference Manual (TRM), changes to avoided costs, realization rates of less than 100%, as well as differences in average retail rates between the Companies and the other Pennsylvania EDCs. *Id.* at 10-23.

 According to the Companies, their specific facts and circumstances support an increase in the assigned acquisition costs with a corresponding decrease in their energy reduction goals. FirstEnergy avers that 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 reduction in energy consumption in its service territory. FirstEnergy states that the amount of the acquisition cost dictates the required energy reduction goal for each EDC because the budget for the Phase II effort is fixed at two percent of total 2006 revenues per 66 Pa. C.S. § 2806.1(g). FirstEnergy M.B. at 4.

 Initially, FirstEnergy alleges that the 2013 TRM changes were not adequately considered in the SWE’s Market Potential Study. FirstEnergy notes the Commission’s Tentative Order that outlines proposed 2013 changes in the TRM[[2]](#footnote-2) that, when finalized, will reduce savings compared to Phase I. FirstEnergy avers that the proposed 2013 TRM changes alone will account for 10% of the 25% acquisition cost adder allowed by the Commission in the *Phase II Implementation Order*, leaving only 15% for future uncertainties. As a result, FirstEnergy notes 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 and will fall short of expected targets. According to FirstEnergy, this demonstrates that the acquisition costs assigned to the Companies are already outdated and that the Companies’ Plans will have an unacceptable higher level of risk to meet the targets, thus subjecting them to potential penalties. FirstEnergy M.B. at 7-14.

 Next, FirstEnergy notes that, 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. FirstEnergy estimates that, to compensate for these yet unknown future TRM changes, an additional 10% acquisition cost adjustment is needed for each annual TRM change. According to FirstEnergy, combined with the 2013 TRM erosion of the 25% cost adjustment factor, the increase in acquisition costs needs to be at least 30% solely to compensate for the uncertainty associated with TRM changes. *Id.* at 14.

 FirstEnergy notes 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. However, according to FirstEnergy, 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. FirstEnergy lists these factors as incentive costs, administrative costs and differences in retail rates between the Companies and other EDCs. *Id.* at 15-17.

First, the Companies aver 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. According to FirstEnergy, EDCs with lower rates would need to pay a customer a greater incentive to participate than an EDC with higher rates. FirstEnergy avers that this fact supports an increase in the acquisition costs for the Companies. *Id.*at 17-18.

Next, FirstEnergy explains that the SWE provided each EDC with the same statewide average of reported non-incentive or administrative costs for Phase II. According to the Companies, this analysis did not recognize that EDCs that operate in large and more sparsely populated rural service territories will experience increased non-incentive costs as compared to their EDC counterparts located in more urban service territories. FirstEnergy avers that the rural nature of the Companies’ service territories makes providing these measures more costly than in urban areas and this fact justifies an increase in their acquisition costs. *Id.* at 18-19.

Additionally, FirstEnergy argues that 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. FirstEnergy avers that EDCs with lower retail rates simply must pay customers a greater incentive to persuade them to participate and accomplish energy reduction goals. According to the Companies, their average retail rate is 9.66 ¢/kWh and the statewide average Act 129 EDC retail rate is 11.44 ¢/kWh. As a result, FirstEnergy avers its Companies should receive an upward adjustment of their acquisition costs that averages 17% to compensate for this factor. *Id.* at 19-20.

FirstEnergy next criticizes the Market Potential Study for improperly assuming a 100% realization rate for Phase II programs. According to FirstEnergy, currently the Companies have an overall realization rate of approximately 96%, which means that the Companies only get credit for 96% of the savings provided under their EE&C programs. FirstEnergy avers that assuming a 100% realization rate is unrealistic since, as the EE&C programs in Phase II begin to address more complicated measures, realization rates can decrease. By imputing a 100% realization rate on the Companies, the Commission is asking for perfection knowing full well that such a goal is not achievable, fair or realistic. *Id.* at 24.

In summary, FirstEnergy states that, based on the cumulative effect of the unaddressed factors impacting the Companies’ acquisition costs, they have calculated Phase II targets that provide a more reasonable level of attainment. According to FirstEnergy, the revised energy reduction targets that should be assigned to them after adoption of their proposed adjustments to acquisition costs are 2.2% for Met-Ed, 1.9% for Penelec, 1.5% for Penn Power and 1.2% for West Penn. *Id.* at 26-27.

### b. Office of Consumer Advocate

 The OCA, PennFuture and the CAC/SC are all opposed to the Companies’ Petition.

The OCA submits that the Commission’s *Phase II Implementation Order* and the consumption reduction targets proposed by the SWE should be affirmed. The OCA avers that the SWE proposed energy consumption targets for the FirstEnergy Companies that were readily achievable, as the 25% adder to the cost per MWh of energy savings provides implementing utilities ample flexibility and resources to plan and design programs to meet the Phase II requirements. In response to the Companies’ concern with regard to future TRM changes, the OCA asserts that it is possible that TRM changes could also go in the other direction resulting in savings that could increase. According to the OCA, the 25% acquisition cost adder will enhance flexibility and mitigate program implementation difficulties. OCA M.B. at 4-10.

 According to the OCA, the Companies’ proposed increases to their acquisition costs are higher than necessary and would be excessive, particularly in relationship to the acquisition costs achieved by other utilities around the country for programs of similar maturity. In support of this statement, OCA witness Crandall created Table 1 in his testimony, OCA St.1 at 6, which compares the acquisition costs of other utility programs around the country that have been in operation for as long as the FirstEnergy programs. According to the OCA, Table 1 reveals lower acquisition costs for each of the seven other similar utility energy efficiency programs. The OCA submits that the seven examples of acquisition costs from other jurisdictions represent examples of what other similarly-situated utilities have achieved. They also demonstrate that the SWE’s proposed acquisition costs and consumption reduction targets are conservatively high to account for uncertainties and result in consumption reduction targets that are reasonably achievable. Therefore, the OCA requests that FirstEnergy’s proposals be denied. *Id.* at 11-14.

 Additionally, the OCA notes that it is incumbent upon the EDC to design programs in a way that addresses costs and uncertainties. The OCA avers that the Companies should seek out cooperative arrangements with trade allies, community partners and other program implementers to help control costs. According to the OCA, such cooperative arrangements will help the Companies to keep operating costs down, to increase installation and realization rates and to improve customer satisfaction. The OCA submits that such joint initiatives can provide savings opportunities and the Companies should explore all such potential savings opportunities as such efforts can potentially reduce acquisition costs because the costs can be shared with other trade allies, community partners and other program implementers. *Id.* at 14-16.

### c. PennFuture

 PennFuture submits that FirstEnergy has failed to sustain its burden of proof in its Petition. Initially, PennFuture avers that lowering the FirstEnergy targets would be harmful to consumers as energy efficiency is the least cost way to meet the electricity needs of the Companies’ customers. PennFuture states that lowering the Phase II savings goals will also decrease the amount of Demand Reduction Induced Price Effects (DRIPE) impacts customers receive as a quantifiable benefit of energy efficiency.[[3]](#footnote-3) According to PennFuture, the reduced energy demand due to efficiency programs allows for the shedding of the most expensive resources on the margin and lowering the overall cost of energy. This reduces the wholesale prices of energy and demand which are passed on to retail customers. Also, PennFuture notes that reduced savings goals will mean that fewer customers will be able to attain savings. PennFuture M.B. at 5-6.

 Next, PennFuture avers that the record evidence shows that FirstEnergy’s consumption reduction goals are reasonable, particularly when compared to the statewide average for Phase II. PennFuture states that three of the Companies’ goals are below the statewide average of 2.3% with only Met-Ed with a savings goal equal to that average. PennFuture points out that, when compared to the Companies’ reduction goals in Phase I, the reduction goals set forth in the *Phase II Implementation* *Order* have been lowered for each FirstEnergy EDC except Met-Ed. PennFuture further alleges that FirstEnergy’s reduction targets are arguably underestimated and should not be lowered. *Id.* at 7-10.

 PennFuture further alleges that the acquisition costs set forth in the *Phase II* *Implementation Order* are sufficient and potentially overestimate the acquisition costs. PennFuture witness Reed analyzed the Companies’ data as reported in the July 16, 2012 Program Year 3, Quarter 4 Report and arrived at the following acquisition costs for Phase I:

Met-Ed $144 per first year MWh savings

Penelec $136 per first year MWh savings

Penn Power $108 per first year MWh savings

West Penn $115 per first year MWh savings

PennFuture provided the following Phase II acquisition costs and percentage increase over Phase I as proposed by the SWE:

Met-Ed $220.87 which is a 54% increase

Penelec $216.19 which is a 59% increase

Penn Power $209.20 which is a 94% increase

West Penn $209.42 which is an 82% increase

PennFuture opines that these upward adjustments for Phase II are sufficient to cover any future uncertainty as these costs have been significantly increased. PennFuture avers that these increases in acquisition costs should more than address any future changes to the TRM and market uncertainties. *Id.* at 10-11.

 Next, PennFuture avers that there is no evidence to support a reduction in Phase II goals based on a purported need for increased acquisition costs, as the SWE has already increased the Companies’ Phase II acquisition costs significantly over actual Phase I acquisition costs. Additionally, PennFuture opines that based upon experience in other states, the SWE acquisition costs are already too high. For example, PennFuture provides that in 2009 and 2010, utilities in the Southwest achieved program savings at an average cost of $160-$190 per first year MWh savings. Similarly, costs for newly developed energy efficiency programs in several Midwestern states including Ohio, Michigan, Illinois, Iowa and Arkansas have been approximately $120 per first year MWh. *Id.* at 13.

 PennFuture argues that the Companies have also not fully realized cost efficiencies from enhanced program designs and implementation strategies. PennFuture asserts that joint statewide program implementation of efficiency programs would bring about economies of scale as well as increased customer and trade ally participation but has not been actively pursued by FirstEnergy. PennFuture avers that having single, statewide program implementation vendors will decrease the costs to all EDCs as would the use of the same incentive processing vendors. Also, PennFuture claims that the Companies have not fully realized cost efficiencies from enhanced program design. *Id.* at 13-14.

 PennFuture argues that the acquisition costs used to determine the Companies’ Phase II reduction goals are sufficiently inflated to cover any future changes to the TRM or other market uncertainty based on the Companies’ most recent experience, similar experience in other jurisdictions and a more critical review of the SWE’s Market

Potential Study. PennFuture opines that nearly all of the Companies’ proposed adjustments to their Phase I acquisition costs should be ignored as they are either unsupported by record evidence or represent simplifications of complex relationships as to not be useful. *Id.* at 14-15.

 Lastly, PennFuture notes that the Commission allows enough flexibility for the Companies to adjust their Phase II EE&C Plans during Phase II to deal with any TRM updates and changing market conditions. PennFuture points out that the Commission allows EDCs to propose plan changes in conjunction with their annual report required by the Act at 66 Pa. C.S. § 2806.1(i)(1). In addition, in the *Phase II Implementation Order*, the Commission expanded the expedited review process for approving minor EE&C plan changes proposed by the EDCs. *Id.* at 15-17.

### d. Clean Air Council/Sierra Club

The CAC/SC opines that the targets specified for the FirstEnergy Companies are achievable and provide them with more than an adequate buffer. The CAC/SC avers that the Companies have failed to carry their burden to prove otherwise, have ignored their own prior experience in Phase I and have relied on unsupported assumptions to argue that the spending allocations under Phase II are inadequate. The CAC/SC avers that the *Phase II Implementation Order* targets should remain unchanged. The CAC/SC claims that the Companies’ proposed reduction targets are supported by hypothetical discussions of potential mechanisms without providing data-based information. According to the CAC/SC, such conjecture is not evidence sufficient to support the FirstEnergy proposals. The CAC/SC maintains that the evidence indicates that the energy efficiency targets set in the *Phase II Implementation Order* are achievable and should be approved. CAC/SC M.B. at 2-5.

 The CAC/SC states that the evidence presented by the Companies consists almost entirely of hypothetical mechanisms by which FirstEnergy might have higher acquisition costs in Phase II than in Phase I, but no real evidence as to what those increased costs will be, or showing that the 25% cushion provided by the SWE is inadequate. For example, according to the CAC/SC, the Companies’ witness testified that they had not done any analysis to ascertain what impact, if any, having a rural service territory had on acquisition costs in Phase I. Tr. at 37. In actuality, the CAC/SC notes that according to the *Phase II Implementation Order*, EDCs with urban service territories experienced higher acquisition costs in Phase I than did the FirstEnergy EDCs. Therefore, the CAC/SC avers that not only is there no evidence supporting FirstEnergy’s hypothesis that rural service territories necessitate higher acquisition costs, the experience of the EDCs in Phase I indicates the opposite. *Id.* at 6-7.

 Next, the CAC/SC notes that, with regard to FirstEnergy’s claims concerning realization rates, their witness admitted that this was speculative and that the Companies could not say what those realization rates would be for Phase II at this time. Tr. at 39. The CAC/SC opines that speculation is not evidence. With regard to FirstEnergy’s claims that customers with facilities in two or more EDC service territories may be unwilling to participate in the energy efficiency programs of the EDC with lower rates, , the FirstEnergy witness could not identify the number of customers in West Penn’s service territory that might actually be in that situation. Tr. at 51-52. According to the CAC/SC, FirstEnergy did not provide any data on, or even a single example of, any such customers that actually did fail to participate in an Act 129 energy efficiency program in one EDC territory in favor of participation in another EDC territory as it has claimed in this proceeding. *Id.* at 7-8.

 Next the CAC/SC explains that, with regard to FirstEnergy’s claims that future changes in the TRM will require lower reduction targets, FirstEnergy’s witness testified that he had no idea what those future TRM changes may entail or what impact they would have. Tr. at 54. The CAC/SC states that, while FirstEnergy speculates that the impact of future TRM changes will be 10% each year, FirstEnergy applies this incorrectly. According to the CAC/SC, FirstEnergy wrongly assumes that TRM changes in year three of Phase II would retroactively undo savings banked in years one and two. The CAC/SC avers that the total impact to the Phase II program would be less than the cumulative total of the changes since reductions occur continuously over the program. The CAC/SC maintains that the Companies have failed to explain how their desired new reduction targets are calculated, or to present evidence supporting their derivation. *Id.* at 8-9.

 The CAC/SC maintains that, despite the protestations of FirstEnergy to the contrary, the evidence in the record demonstrates that the Phase II reduction targets set by the Commission are readily achievable. First, the CAC/SC claims that the dollars-per-megawatt hour acquisition costs calculated for the FirstEnergy Companies are well in line with acquisition costs experienced in other jurisdictions. The CAC/SC notes that the acquisition costs provided for the FirstEnergy EDCs in the *Phase II Implementation* *Order* are higher than those experienced in other jurisdictions, while the costs calculated by FirstEnergy are significantly greater and out of line with those experienced in other jurisdictions. Furthermore, the CAC/SC notes that they are also significantly higher than the actual costs experienced by other Pennsylvania EDCs during Phase I. *Id.* at 12-13.

Next, the CAC/SC points out that the Companies testified that they had gained institutional knowledge from their experience in Phase I, and that they know more now than they did four years ago about administering energy efficiency plans under Act 129. Tr. at 48. The CAC/SC avers that this knowledge is likely to translate to lower acquisition costs in Phase II, yet this possibility was not addressed by the Companies. Therefore, the CAC/SC maintains that the Companies have failed to sustain their burden to demonstrate that alterations are needed to the energy efficiency targets set for them in the *Phase II Implementation Order*. *Id.* at 13-14.

## 2. Disposition

 Based upon our review of the evidence of record, we are persuaded by the averments of the OCA, PennFuture and the CAC/SC that we should maintain the energy efficiency reduction targets set forth in our *Phase II Implementation Order* for the FirstEnergy EDCs. We find that the FirstEnergy Companies have not met their burden of proof that the targets recommended by the SWE and adopted by the Commission within the *Phase II Implementation Order* should be modified. While FirstEnergy criticizes the SWE for the recommendation of, and the Commission for the adoption of, the alleged arbitrary 25% adjustment factor to acquisition costs to account for future uncertainties, they have failed to provide convincing evidence that would warrant the rejection of this allowance and the adoption of the FirstEnergy proposals. To the contrary, and as succinctly stated by the CAC/SC, the FirstEnergy proposals are supported by hypothetical discussions of potential mechanisms without providing factual information. We conclude that the FirstEnergy proposals are not based upon substantial and credible evidence and, thus, cannot form a basis for this Commission to alter the energy efficiency reduction targets established in our *Phase II Implementation Order.*

 Therefore, we shall affirm our finding within the *Phase II Implementation Order* that the energy efficiency consumption reduction targets for the FirstEnergy EDCs shall be 1.6% for West Penn, 2.0% for Penn Power, 2.2% for Penelec and 2.3% for Met-Ed. We conclude that these energy consumption reduction targets for the FirstEnergy Companies are reasonable and readily achievable as the 25% adder to the cost per MWh of energy savings provides the Companies ample flexibility and resources to plan and design programs to meet the Phase II requirements. Accordingly, the Petition filed by FirstEnergy is denied.

# C. FirstEnergy’s Energy Reduction Targets were Adopted Consistent with Due Process and the Public Utility Code

FirstEnergy argues that 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, such as subsequent changes in the TRM, violates their constitutional due process rights and provisions of Act 129 and the Public Utility Code. According to the Companies, if the Commission does not adjust the Companies’ goal in this proceeding, it must allow the Companies to have the opportunity to request modifications to their goals when future changes that affect savings are approved and mandated. FirstEnergy avers that absent remediation, the conclusion reached by the Commission in the *Phase II* *Implementation Order* violates due process requirements. FirstEnergy states that the future changes in the TRM, among other items, 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. The Companies opine that the *Phase II Implementation Order* has serious due process deficiencies that must be addressed and rectified in this proceeding. FirstEnergy M.B. at 28-31.

 Initially, we point out that the Commission has provided all interested stakeholders, including the EDCs, adequate due process in adopting additional required incremental reductions in consumption that are required by Act 129. *See,* 66 Pa. C.S.
§ 2806.1(c)(3). All interested parties were put on notice and given an opportunity to be heard on the proposed consumption reduction requirements for each EDC. In the *Phase II Reconsideration Order*, we set forth the timeline of notices provided and opportunities for interested parties to be heard. In addition, all covered EDCs, including the Companies, were given an opportunity to request a hearing at which the EDC and other interveners could present evidence, cross-examine the SWE experts whose studies and reports the Commission relied upon in tentatively adopting the reduction targets for each EDC, and present argument in briefs and reply briefs. FirstEnergy did in fact petition for such hearing and, as discussed above, did provide evidence and arguments on the Phase II required reductions in consumption for each of the FirstEnergy utilities. The above clearly demonstrates that the Commission provided all interested parties, including the Companies, adequate due process in adopting the Phase II consumption reduction requirements for all covered EDCs.

Regarding FirstEnergy’s assertions related to future TRM changes and possible impacts on an EDC’s ability to meet the required consumption reductions, we previously addressed those concerns in prior TRM update orders, as well as the *Phase II Reconsideration Order*.[[4]](#footnote-4) We adopt our reasoning and conclusions contained in those Orders as part of this Order. In particular, as we stated in the *Phase II Reconsideration Order,*[[5]](#footnote-5) we find that there are many factors, beyond and including the TRM, that could impact, both positively and negatively, the amount of electric energy savings attributable to an EDC’s EE&C plan. Thus, if we were to adopt FirstEnergy’s proposal to allow future challenges to the established consumption reduction requirements, we would create a scenario where such requirements would be constantly subject to increases and decreases as the many factors that affect an EDC’s ability to obtain consumption reductions become known. As such, for the reasons expressed in this Order and based on the facts and arguments presented in the Petition, we decline to subject the EDCs, statutory advocates, this Commission and its staff, and all other interested parties, to what would invariably result in perpetual proceedings on the consumption reduction requirements the Commission was mandated to establish.

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

# IV. Conclusion

For the reasons set forth above, we will deny the Petition of FirstEnergy and affirm the energy efficiency benchmarks established for the Companies in the *Phase II Implementation Order,* consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the 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, filed on August 20, 2012, is denied.

2. That the Energy Efficiency Benchmarks established in *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411 and
M-2008-2069887 (Order entered August 3, 2012) for the Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company are affirmed.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: December 5, 2012

ORDER ENTERED: December 5, 2012

1. Although the Scheduling Order stated that main briefs were due on October 31, 2012, due to weather-related office closings on October 29, 2012, counsel for the Companies requested an extension of the brief deadline to November 2, 2012. As there was no objection, this request was informally granted on October 29, 2012, and the brief deadline was extended for all parties until noon on November 2, 2012. [↑](#footnote-ref-1)
2. *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 (Order entered September 13, 2012). [↑](#footnote-ref-2)
3. “DRIPE is a measurement of the value of efficiency in terms of the reduction of wholesale energy prices seen by all retail customers.” PennFuture M.B. at 6. [↑](#footnote-ref-3)
4. *See,* *Phase II Reconsideration Order* at 17, 18 and n. 31. [↑](#footnote-ref-4)
5. *See,* *Phase II Reconsideration Order* at 18. [↑](#footnote-ref-5)