



RECEIVED

800 North Third Street, Suite 301 • Harrisburg, Pennsylvania 17102
Telephone (717) 901-0600 • Fax (717) 901-0611 • www.energypa.org

2010 DEC 27 PM 4: 28

PA PUC
SECRETARY'S BUREAU
December 27, 2010

VIA HAND-DELIVERY

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

**RE: COMMENTS of THE ENERGY ASSOCIATION of PENNSYLVANIA
IMPLEMENTATION OF THE ALTERNATIVE ENERGY PORTFOLIO
STANDARDS ACT OF 2004: STANDARDS FOR THE PARTICIPATION OF
DEMAND SIDE MANAGEMENT RESOURCES –
TECHNICAL REFERENCE MANUAL 2011 UPDATE
(DOCKET NO. M-00051865)**

Dear Secretary Chiavetta:

Enclosed for filing please find an original and 15 copies of the Energy Association of Pennsylvania's Comments in the above-referenced docket.

Sincerely,

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

Donna M. J. Clark
Vice President and General Counsel

DMJC

CC: Hon. James H. Cawley, Chairman (via hand-delivery)
Hon. Tyrone J. Christy, Vice Chairman (via hand-delivery)
Hon. Robert F. Powelson, Commissioner (via hand-delivery)
Hon. John F. Coleman, Commissioner (via hand-delivery)
Hon. Wayne E. Gardner, Commissioner (via hand-delivery)
Gregory A. Shawley (electronic copy to gshawley@state.pa.us)
Kriss Brown (electronic copy to kribrown@state.pa.us)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED
DEC 27 2010
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Implementation of the Alternative Energy :
Portfolio Standards Act of 2004: : Docket No. M-00051865
Standards for the Participation of :
Demand Side Management Resources - :
Technical Reference Manual 2011 Update :

COMMENTS OF THE
ENERGY ASSOCIATION OF PENNSYLVANIA

I. **INTRODUCTION.**

In conjunction with the Alternative Energy Portfolio Standards Act of 2004 (“AEPS Act”), 73 P.S. §§ 1648.1-1648.8, the Pennsylvania Public Utility Commission (“PUC” or “Commission”) adopted a Technical Reference Manual (“TRM”) to be used as a standard for tracking and verifying utility Demand Response/Energy Efficiency (“DR/EE”) measures undertaken for purposes of complying with the AEPS Act.¹

Then, in January 2009, pursuant to the Act 129 Energy Efficiency and Conservation (“EE&C”) Program Implementation Order,² the Commission determined that it would rely upon the TRM to measure and verify applicable DR/EE measures employed by electric distribution companies (“EDCs”) to meet Act 129 consumption reduction and peak demand reduction targets. *See Implementation Order at pp. 13 - 15.* The Bureau of Conservation, Economics and

¹ See *Energy Efficiency & DSM Rules for Pennsylvania’s Alternative Energy Portfolio Standard. Technical Reference Manual. Order at PUC Docket No. M-00051865, entered on October 3, 2005.*

² See *Energy Efficiency and Conservation Program Implementation Order, at PUC Docket No. M-2008-2069887, entered on January 16, 2009.*

Energy Planning (“CEEP”) was directed to oversee the TRM update process. Subsequently, CEEP initiated a collaborative process to review and update the TRM for the purpose of supporting both the AEPS Act and the Act 129 EE&C plans, culminating in the adoption of a revised version of the TRM in May 2009. In the Order adopting the 2009 TRM, the Commission recognized the importance of updating the TRM on an annual basis³ while simultaneously establishing certain evaluation, measurement and verification program parameters which Pennsylvania EDCs subject to Act 129 relied upon in developing EE&C plans. EE&C plans were then filed pursuant to Act 129 in August 2009.

On February 1, 2010, the Commission entered a Tentative Order for the first annual TRM update which sought, *inter alia*, “to clarify existing protocols and algorithms...and to provide values that were referenced in TRM algorithms but not previously provided.”⁴ Generally, comments submitted by EDC parties to the 2010 Tentative Order addressed difficulties that may be encountered if changes were approved to the manner in which existing program savings were measured and discussed limited retroactive application of modifications in discrete and narrow circumstances. EDCs supported broadening the scope of the TRM to reflect additional energy efficiency and conservation measures which were part of approved EE&C plans. The EDCs as well as the Energy Association of Pennsylvania (“EAP” or “Association”) stressed the need for a collaborative approach to annual TRM modifications given the statutorily mandated reductions, the short timeframe established in the legislation for implementation and the severity of the

³ See *Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standards for the Participation of Demand Side Management Resources – Technical Reference Manual Update*, Order at PUC Docket No. M-00051865, entered on June 1, 2009 at pp. 17-18.

⁴ See, *Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standards for the Participation of Demand Side Management Resources – Technical Reference Manual Update*, Tentative Order at Docket No. M-00051865, entered on February 2, 2010 at p. 5.

penalties for failure to achieve legislative goals. The Final Order, entered on June 8, 2010,⁵ recognized industry concerns and allowed EDCs to apply for a waiver of the retroactive application of specified modifications if necessary.⁶

Then on November 19, 2010, the Commission issued the instant 2011 TRM Annual Update Tentative Order for public comment, providing a twenty day comment period upon publication of the 2011 Tentative Order in the *Pennsylvania Bulletin* followed by a ten day period for reply comments.⁷ The 2011 Tentative Order was published in the *Pennsylvania Bulletin* on December 4, 2010, establishing a due date for comments on December 27, 2010. The Association welcomes the opportunity to comment on the proposed 2011 TRM modifications and additions and submits these comments on behalf of its member electric distribution companies subject to Act 129.⁸

II. COMMENTS.

A. SUMMARY.

EAP applauds the major goals of the proposed modifications as set forth on page four of the Tentative Order. These comments first address technical concerns with a number of the “significant proposed changes” identified in the 2011 Tentative Order and second raise a number of legal and policy arguments that mitigate against applying significant TRM changes to approved EDC EE&C plans on June 1, 2011 as contemplated in the current Tentative Order.

⁵ See *Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standards for the Participation of Demand Side Management Resources – Technical Reference Manual Update*, Order at PUC Docket No. M-00051865, entered on June 8, 2010.

⁶ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company Requesting a Waiver Of Certain Application of the Technical Reference Manual*, at Docket No. P-2010-2202621/M-00051865, Approved Nov. 16, 2010; and, *Petition of West Penn Power Company d/b/a Allegheny Power - Partial Waiver of the Application of the Technical Reference Manual*, at Docket No. P-2010-2202952, approved at Nov. 16, 2010 PUC Public Meeting.

⁷ *Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standards of Participation of Demand Side Management Resources – Technical Reference manual Update*, at Docket No. M-00051865, entered November 24, 2010.

⁸ Allegheny Power; Duquesne Light Company; Metropolitan Edison Company, *A FirstEnergy Company*; PECO Energy Company; Pennsylvania Electric Company, *A FirstEnergy Company*; Pennsylvania Power Company, *A FirstEnergy Company*; and PPL Electric Utilities Corp.

This filing does not address specific EE&C measures added to the proposed 2011 TRM and does not comment on what may be labeled as “minor” changes, clarifications and corrections in the proposed 2011 TRM. EAP supports the comments filed by its member EDCs regarding additions and “minor” modifications, clarifications and corrections to the proposed 2011 TRM and generally incorporates those comments herein by reference.

In large part, the changes and additions proposed have been discussed and debated in the Technical Working Group (“TWG”) formed to provide guidance to the Statewide Evaluator (“SWE”) on issues relating to its role in reviewing and suggesting possible revisions and additions to the TRM.⁹ For those proposed changes and additions cleared through the TWG process, a 2011 TRM effective date of June 1, 2011 was generally expected and appropriate.

EAP notes, however, that certain proposed changes to baseline data for residential compact fluorescent lamp (“CFL”) lighting and refrigerator/freezer retirement and recycling measures (i.e., “significant proposed changes”) were not vetted in the TWG setting. As discussed below, EAP questions whether the data relied upon for these proposed modifications accurately reflects the Pennsylvania residential consumer and market. *See infra. at pp. 9 – 15.* These proposed TRM modifications will result in a significant reduction of consumption and peak load savings for those measures as compared to projections included and approved in EDC EE&C plans. Applying these changes in June of 2011 may force plan amendments that can neither be budgeted for nor accomplished in light of the statutory spending cap and specified time frame for achieving mandated reductions. A June 1, 2011 effective date for residential CFL

⁹ The Commission retained GDS Associates Inc. Engineers and Consultants (“GDS”) in June 2009 to serve as its Statewide Evaluator. Pursuant to its Contract, GDS is charged, *inter alia*, with developing audit approaches in accordance with the TRM or other approved evaluation, measurement and verification plans; coordinating EDC studies which identify additional EE&C measure deemed savings to be included in the TRM updates; and annually reviewing TRM information and savings values to provide suggestions for possible revisions and updates. See Act 129 SWE RFP at pp. 31 – 34.

lighting and refrigerator/freezer retirement measures could neither have been expected nor anticipated.

Moreover, even assuming the studies relied upon to support the suggested changes (such as the 2010 KEMA study from California)¹⁰ accurately reflect the Pennsylvania market, the Association believes that the prescriptive nature of Act 129 will encumber any effort by the Commission to implement modified baseline assumptions for existing measures in the middle of a plan cycle and may raise due process concerns, both procedural and substantive. The Commission identified the conundrum posed by substantial modification to the TRM baselines and sought comments on “how to fairly address the tradeoff between the use of baseline data derived from more recent data that reflects a more accurate assessment of current energy savings and the possibility that such adjustments may require greater market penetration to meet mandated goals.” *2011 Tentative Order at p. 5*. EAP is concerned as to whether the “tradeoff” can be resolved “fairly” given the legislation and the absence of flexibility accorded the regulator on a myriad of issues, including the compressed timing for plan development, filing and implementation; the budget limitations; the mandated reductions by dates certain; and the amount and application of statutory penalties.

Concurrently, EAP underscores that the industry is collectively spending over a billion dollars of ratepayer money over a four year period to implement and meet Act 129 EE&C statutory goals and directives. The Association and its member EDCs mirror the Commission’s objective to ensure cost effective programs which provide actual benefits to customers. In order to achieve this objective and to accommodate market appropriate substantive changes to the TRM mid-stream, EAP suggests that the development of an expedited process to amend plans so as to deploy additional measures, achieve greater market penetration or adjust spending between

¹⁰ KEMA. 2010. “*Results from California’s Residential Lighting Metering Study*.”

measures and among classes of customers is essential. Even then, the time constraints of the legislation could thwart the best efforts of the Commission, the SWE, the EDCs and other stakeholders to achieve compliance.

Looking to avoid a circumstance wherein baseline savings are adjusted in the midst of implementing Commission approved plans such that compliance is no longer possible under the statutory construct, EAP alternatively suggests either that significant TRM modifications do not become effective until after the conclusion of the current EE&C plan term (i.e., after June 1, 2013) OR are phased in over the remaining plan years.¹¹ Timing the effective date of significant changes to the TRM could allow for the approval and implementation of new measures, the shifting of financial resources, and greater market penetration within the limitations of the legislation. On the other hand, forcing EDCs to amend EE&C plans in order to effectuate significant changes to the TRM may ultimately give rise to a legal challenge to the underlying legislation.

B. MODIFICATIONS THAT SIGNIFICANTLY CHANGE THE SAVINGS FOR EXISTING TRM MEASURES SHOULD NOT BECOME EFFECTIVE ON JUNE 1, 2011.

EAP agrees that the TRM should be updated annually to accurately and fairly reflect energy savings achieved when a customer participates in a specific Act 129 EE&C measure. EAP strongly supports broadening the scope of the TRM to include energy efficiency and conservation measures being implemented by EDCs under Commission approved EE&C plans. It is equally essential, however, for the Commission to recognize that any significant

¹¹ EAP notes that a "phased-in" approach would work only after resolving its concerns over the validity of the significant proposed changes identified in the 2011 Tentative Order. Not all EDCs support a "phased-in" approach if the proposed reduction to CFL HOU is not modified. Under that circumstance, the change in HOU to 1.9 should not become effective until June 1, 2013.

modifications¹² to the TRM may have far reaching effects, particularly significant changes to existing energy savings measures embedded in Commission approved Act 129 EE&C plans. Significant changes to the manner in which savings are calculated for existing TRM measures will likely impact the ability of EDCs to comply with legislatively-mandated energy savings targets and peak load reduction targets, particularly given the statutory deadlines and budget restrictions.

A direct correlation exists between current TRM baseline measurements and the success of Commission approved EDC Act 129 EE&C plans. Changing baseline measurements may significantly impact the ability of an EDC to reach its mandated goals. EDC EE&C plans meet mandated targets based on the TRM savings as calculated in the 2009 TRM in place at the time the plans were developed and approved. Changing the baseline for determining TRM deemed savings midstream is unfair particularly where significant changes have not been vetted in the TWG. Additionally, significant midcourse changes may lead to situations where EDCs are faced with exceeding budgetary caps, falling short of mandated targets, becoming subject to penalties and facing loss of public confidence in energy efficiency and conservation programs in an effort to adhere to a standard which was not in place at the time the EE&C plan was approved by the Commission.

EAP believes it is important for the EDC's verified gross savings as measured under the TRM to fairly represent the savings realized by customers. As such EAP expects the TRM to change over time to incorporate current data, reflecting changes in national or state energy efficiency codes and standards, changes in market or consumer preferences and practices, market transformation and other factors. However, the timing of the effective date of approved TRM

¹² Significant changes could be those that substantially impact deemed savings found in the 2009 TRM, restrict measure eligibility, hinder program implementation or otherwise jeopardize an EDC's ability to comply with the savings mandates, budget or deadlines of the Act.

changes requires careful consideration, particularly where it significantly impacts the results expected if an EDC otherwise complies with a Commission approved EE&C plan. For example, the proposed reduction of CFL burn time from the current 3.0 hours to 1.9 hours based on a study of the California market, if adopted, should give rise to a consideration of the timing of the effective date for that modification inasmuch as it may preclude compliance under the current statutory construct for certain EDCs.

EAP recognizes that some of the savings protocols and associated assumptions incorporated in the 2009 TRM for purposes of Act 129 may not have been perfect given the limited time available for the Commission to refine the TRM before EDCs were required to develop and file EE&C plans. However, significant changes to savings and other information in the TRM should not be implemented without adequate discussion of those changes. In particular, sufficient lead time is essential for EDCs to evaluate the impact of those changes and recommend changes to EE&C plans to accommodate the TRM changes; to seek Commission approval of those plan changes; to communicate the changes to customers and Trade Allies; and to implement those plan changes in time to permit compliance allowing time for market adjustments.

EAP strongly recommends that if significant changes to the TRM are required, they should be identified and approved with sufficient lead time to incorporate those changes in a complete EE&C plan that becomes effective for a future 4-year program cycle, with a minimum of two years before those programs become effective. For example, all significant changes to the TRM could be “packaged” so that they are approved by May 31, 2011, are the basis for new EE&C plans that are submitted and approved by May 31, 2012, and become effective with programs implemented on June 1, 2013. If the Commission does not think that schedule and

lead time is possible, EAP recommends significant TRM changes become effective two years after they are approved, coincident with the beginning of a program year. For example, significant TRM changes approved by May 31, 2010 would become effective no earlier than June 1, 2012.

As currently proposed by the Commission, these significant changes to the 2011 TRM would become effective within 4-5 months (changes approved in January/February 2011 become effective June 1, 2011) which provides no real opportunity for plan modifications to introduce new measures and/or shift financial resources AND no real opportunity for additional market penetration. The disconnect between the assumptions underlying approved EE&C plans and significant changes to the TRM will become more problematic in subsequent TRM updates closer to the May 2013 final compliance deadline. Significant changes to the TRM create a “moving target” and do not provide EDCs enough time to adjust plans to meet compliance targets or budgets.

1. Changes to the CFL Hours of Use as Proposed in 2011 TRM are Flawed.

Regardless of the effective date for this change, EAP does not agree with the 1.9 hours of use (“HOU”) proposed for residential CFLs (reduced from 3.0 to 1.9 hours) for several reasons.

First, the recommended value (1.9 hours per CFL) was based on a recent study for California that cannot be reasonably applied to Pennsylvania and a U.S. Department of Energy (“DOE”) study which is fundamentally flawed. While the California Public Utility Commission (“CPUC”) study is robust (it included the metering of CFLs and incandescent lamps in 1,200 households), EAP does not believe it is reasonable or appropriate to apply the California HOU value as a deemed value for Pennsylvania because of the following fundamental differences between California and Pennsylvania that impact CFL HOU.

- CFL Saturation and Market Transformation/Maturity. The California utilities have some of the longest running CFL programs in the country, so the state has a higher saturation of CFLs than many others including Pennsylvania. There is evidence that as CFL saturation increases and market transformation progresses, consumers who have already installed CFLs in high use sockets begin installing CFLs in a greater variety of locations in the home, including locations with fewer hours of use. Therefore, the average HOU for all CFLs in a house will tend to decrease over time.
- Geography. The CPUC lighting evaluation does not account for differences in latitude (impacts hours of daylight) or annual differences in cloud cover.¹³
- Electricity Pricing. The CPUC lighting evaluation does not account for variations in price between California and Pennsylvania. A higher cost of electricity will drive consumers to use less lighting, and certainly more efficient lighting. Residential electricity prices in California are 18% to 50% higher than Pennsylvania. That difference clearly would drive lighting behavior and fewer hours of use in CA.
- Customer Behaviors and Environmental Consciousness. Customers in different states or parts of the United States may have different levels of awareness or commitment to environmental issues, including energy conservation.

Further, the DOE study relies on the California study and a separate 2002 DOE study based on data from Oregon and Washington which was collected in 1996. The 2002 DOE study does not provide any information on the type of CFL installed, was isolated to one small region of the country and covered only several months. The lack of information on the type of lamp installed, the limited scope of the data and the age of the data (over 10 years

¹³ Metering for the California Public Utilities Commission study was conducted in the three major IOUs' service areas (PG&E, SCE, and SDG&E); the study did not include any metering in California's northern—i.e., darker and wetter—counties.

old) raise serious questions as to why this study should be the basis of a 40% reduction in HOU for residential CFL measures in Pennsylvania.

Second, recent initial market research conducted by PECO and PPL concluded that current CFL HOU in Pennsylvania is considerably higher than 1.9 hours. The preliminary study conducted by PECO demonstrated that the overall estimated average daily HOU for the PECO residential customers surveyed was 2.23 hours on an annualized basis. *See discussion in PECO Comments at pp. 7-8.* The PPL research found that CFLs are more frequently installed by PPL Electric customers in high use sockets. That is to be expected given the relatively low CFL socket penetration rates in Pennsylvania. Further, the PPL research found that the average HOU for all CFLs in the 5 main rooms of the home was 3.8 hours. *See discussion in PPL Comments at pp. 11-12.* While both of these studies are preliminary, the results underscore the need for Pennsylvania specific research prior to adopting the significant change proposed in the 2011 TRM based on California data.

Moreover, several studies in other states determined that CFL HOU were much greater than 1.9. Clearly, data differs significantly from state to state and further analysis is required to determine if these conclusions are applicable to Pennsylvania. Hours of use in other states can vary depending on the nature of their CFL program; for example, upstream discount programs can have different results than coupon-based programs. Additionally, factors such as demographics, latitude, cloud cover, market maturity, electricity prices, customer awareness, environmental consciousness, and the study method (i.e., surveys, logging, etc.) can also impact results. Below is a sample of CFL HOU from other states:

- A 2009 GDS Associates study conducted in New England (with 657 installed meters) found an average of 2.8 HOU for CFLs.¹⁴
- Cadmus, the PPL independent Act 129 evaluator, is currently working on several residential lighting program evaluations in other parts of the country that include metering. Preliminary results from these studies all find HOU greater than 1.9. The studies' preliminary results are all in the 2.0 to 2.9 range, most at the higher end of that range. Cadmus expects results from these studies will become publicly available in early- to mid-2011.
- Vermont Energy Investment Corporation's draft document for Ohio specified 2.85 HOU per day for residential CFLs.
- NEEP's 2010 TRM specifies 2.77 hours of use per day.
- Vermont's Technical Reference Manual (February 2010) specified 3.4 hours of use per day for residential CFLs.

Additionally, The Cadmus Group, PPL's independent Act 129 evaluator, recently provided the Environmental Protection Agency ("EPA") with similar information to assist EPA in assessing whether the California result (1.9 HOU) is an appropriate value to use in CFL savings calculations nationwide. While EPA has not made a final decision regarding the HOU in their revised CFL calculator, EPA is presently evaluating the Cadmus data based on the preliminary research conducted in the PPL service territory.

EAP acknowledges that three hours of burn time may not be the precise value for Pennsylvania and that it is not easy to compare the results of one state to another. Therefore,

¹⁴ NMR, RLW Analytics, GDS Associates. *Residential Lighting Markdown Impact Evaluation*. Prepared for Markdown and Buydown Program Sponsors in Connecticut, Massachusetts, Rhode Island, and Vermont. January 2009.

EAP suggests that the Pennsylvania EDCs conduct a statewide lighting study (logging of hours for CFLs in each specific EDC territory) to determine the most realistic estimated CFL burn hours for the Commonwealth by December 31, 2011. As an alternative, the Commission can coordinate a statewide lighting study, funded by the EDCs using the same funding and cost collection mechanisms as the Statewide Evaluator contract. The results of that study would be used to determine the HOU value (or a different HOU value for each year) for residential CFLs effective June 1, 2013. That will provide enough time for EDCs to incorporate new CFL savings assumptions in future EE&C Plans for post-June 1, 2013.¹⁵

2. Changes to the Refrigerator/Freezer Retirement and Recycling Savings in the Proposed 2011 TRM Should Not Be Adopted.

Similarly, EAP does not agree with the proposed changes to the refrigerator/freezer retirement and recycling TRM protocol found in Section 2.23 of the TRM. As with the CFL HOU discussion, deemed savings per refrigerator/freezer should remain constant for the duration of the EDC EE&C plans or until June 1, 2013. The significant changes to savings proposed should not become effective until after June 1, 2013 when the Commission is reviewing the next iteration of EE&C plans so as to allow sufficient time for EDCs to adjust.

Regardless of the effective date as discussed above, EAP does not agree with the updated savings estimate proposed in the 2011 TRM. The 2011 TRM references the Refrigerator Retirement Savings Calculator¹⁶ on the ENERGY STAR website for the updated savings estimate of 1,659 kWh. The calculator, which aggregates appliance sizes (e.g., 19.0 – 21.4 cubic feet) and ages (e.g. 1993-2000), is an end-user (consumer) tool meant to provide end users with

¹⁵ Finally with respect to the question posed in the 2011 Tentative Order regarding the new national lighting standards slated to become effective in 2012 which certainly will reduce CFL savings (because the energy consumption of the baseline incandescent lamps will decrease), EAP strongly recommends that those changes also become effective in the TRM beginning June 1, 2013 for the same reasons discussed above for CFL HOU.

¹⁶ <http://www.energystar.gov/index.cfm?fuseaction=refrig.calculator>

general guidance and information about energy usage. It is not designed as a professional evaluation resource. Specifically, the calculator lacks the detail needed to accurately evaluate an entire appliance program. In addition, no information is provided as the source of the energy savings estimates used by the calculator.

EAP contends that the best approach to determining energy savings associated with an appliance recycling program is a statewide (possibly with EDC-specific results) *in situ* metering study since it relies on participating appliances used in customers' homes. Where an *in situ* metering study is not included in an evaluation plan and budget, EAP recommends basing the savings estimate on one of the most robust available appliance consumption databases; specifically, the California Energy Commission's database.¹⁷ It must be noted that the database utilizes time of manufacture consumption data which needs to be degraded and relies on energy consumption estimates determined using Department of Energy testing protocol. Both add uncertainty, and the latter – as detailed in the cited CPUC report – has been shown to overestimate savings relative to *in situ* metering, given its inability to account for environmental and usage factors.

Even with these concerns, EAP believes that reliance on the California Energy Commission database in this circumstance is preferable to reliance on a calculator developed to assist retail consumers with appliance purchasing decisions. Clearly, at a minimum, the significant changes proposed here should be the basis of discussion in the TWG prior to inclusion in an annual TRM update.

In addition to changing the deemed savings value for refrigerator/freezer recycling, the 2011 TRM proposes to add the following measure eligibility requirements:

¹⁷http://www.energy.ca.gov/appliances/database/historical_excel_files/2009-03-01_excel_based_files/Refrigeration/

- The refrigerator/freezer must be at least 10 years old
- The refrigerator/freezer must be a secondary unit that is not replaced.

Again, EAP does not support these program changes which were not debated in the TWG because they will restrict participation by customers, potentially reduce energy savings, and are generally impractical to implement. Customers will not necessarily know the age of their refrigerator/freezer, would not always determine it correctly (before pick-up), or would not be willing to look it up (on the label or the ENERGY STAR database) before pick-up. Customers will likely schedule a pick-up with the appliance recycling contractor only to find out at pick-up that the unit is not eligible. This will increase EDC program costs for compliance, inconvenience and frustrate customers, and will likely result in complaints to the EDCs and to the Commission.

In addition, the appliance recycling contractor may not be able to determine if a refrigerator/freezer was a secondary or primary unit. For example, the customer installs a new refrigerator on Monday, moves the old one to the garage at the same time, and arranges pick-up of the old refrigerator (for recycling) for the next day. The old refrigerator appears to be “secondary” unit (for 1 day) when, in effect, it was replaced with a new one the day before. Even if the customer reports it as a secondary unit, there is no way for the appliance recycling contractor, the EDC, or the EDC’s independent evaluator to verify this fact.

For the reasons set forth above and because such proposed changes to program eligibility will create de facto amendments to EDC EE&C plans, EAP opposes the proposed modifications contained in the 2011 TRM update to the refrigerator/freezer retirement and recycling program.

C. THE PROPOSED 2011 TRM UPDATE, IF ADOPTED, WILL REQUIRE REVISIONS TO PREVIOUSLY APPROVED EE&C PLANS.

As discussed above, EAP believes that a number of the proposed significant changes to the 2011 TRM are flawed and should not be included in the final update for 2011. EAP has further suggested that, if these significant changes are included, the Commission set the effective date for June 1, 2013 at the outset of new EE&C plans or, alternatively, phase in these significant changes over the remaining term of the current EE&C plans. EAP is concerned that to do otherwise, i.e. adopt the significant changes as of June 1, 2011, could be considered a de facto amendment to EDC EE&C plans precluding compliance and exposing EDCs to the risk of substantial penalties AND would be substantively flawed and create poor public policy.

Specifically, proposed significant changes modify existing deemed savings calculations and/or the manner in which EDCs implement existing measures in EE&C plans and, consequently, amount to de facto amendments to EE&C plans previously approved by the Commission. EE&C plans are thereby modified without adherence to the process established under Act 129 for plan amendment or to procedural due process considerations generally. Moreover, given the prescriptive nature of Act 129 with its mandated reductions, firm deadlines and substantial penalties, forcing substantial EE&C plan amendments in the middle of the plan term creates substantive due process flaws. Each of the EDCs subject to Act 129 relied upon the 2009 TRM to develop its EE&C Plan. In turn, the Commission used the 2009 TRM to evaluate and approve each EDC EE&C plan. If the Commission now requires that EDCs modify the deemed savings calculations and other operating components of existing EE&C Plan measures and programs, it may jeopardize the ability of EDCs to meet Act 129 obligations as detailed in the individual comments filed by each EDC to the 2011 Tentative Order.

Failure to achieve statutorily mandated reduction targets will subject EDCs to a non-recoverable civil penalty ranging from \$1,000,000 to \$20,000,000 and will transfer the responsibility to meet the reductions to the Commission. 66 Pa.C.S. 2806.1(f)(2)(ii). As detailed below, it is unlawful and improper for the Commission to fundamentally modify assumptions and projections derived from the 2009 TRM which were relied upon by the EDCs to develop and obtain approval for existing EE&C plans. Such action by the Commission via a modification to the TRM would be unlawful and improper, would not have been subject to an evidentiary proceeding and would not be based on substantial evidence.

D. APPLICATION OF THE PROPOSED 2011 TRM MODIFICATIONS TO EXISTING EDC EE&C PLANS IS PROCEDURALLY AND SUBSTANTIVELY FLAWED.

1. Requiring EDCs to Modify Existing EE&C Plans to Comply with the 2011 TRM Violates Section 703(g) of the Public Utility Code.

Section 703(g) of the Public Utility Code provides that the Commission “may...after notice and opportunity to be heard...rescind or amend any order made by it.” 66 Pa. C.S. § 703(g). In a proceeding under 703(g), a party must be provided notice and an opportunity to be heard on the change in a previous order. *Armstrong Telecommunications, Inc., Petitioner v. Pennsylvania Public Utilities Commission*, 835 A.2d 409, 419 (Pa Cmwlth 2003).

By its Act 129 *Implementation Order*, the Commission established the process by which approved EDC EE&C plans will be evaluated and modified. Specifically, the Commission required EDCs to submit an annual report documenting the effectiveness of their EE&C plans, the measurement and verification of energy savings, and the evaluation of cost-effectiveness of expenditures. In addition, the Commission required EDCs to file petitions in the event a modification was proposed to the current EE&C plans.

Despite the Commission's delineated process to evaluate EDC EE&C plans and the statutorily required method to amend these plans, the Commission appears to be abandoning these processes. By its 2011 Tentative Order, the Commission now seeks to modify the EDCs' previously approved EE&C plans through the 2011 TRM update. Specifically, the Commission seeks to require EDCs to apply revised CFL and refrigerator/freezer deemed savings calculations to Commission-approved EDC EE&C plans. The Commission's Tentative Order, however, does not state that the Commission intends to amend EDC EE&C plan orders. Therefore, no provision has been made for an evidentiary proceeding as it specifically relates to the Commission's prior orders approving EDC EE&C plans. If the Commission intends to modify approved EDC EE&C plans through the application of the proposed modifications to the 2011 TRM, EDCs must first be granted the opportunity for a full evidentiary hearing.

2. The Commission May Not Retroactively Apply the Proposed 2011 TRM Modifications to Existing EDC EE&C Plans.

Section 1926 of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1926, provides that “[n]o statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.” Additionally, a change in a statute may be retroactively applied only where it is merely procedural and does not alter any substantive rights. *Montgomeryville Airport, Inc. v. Workmen's Compensation Appeal Board (Weingrad)*, 541 A.2d 1187 (Pa. Cmwlth. 1988). A substantive right is implicated when the retroactive application of a statute imposes new legal burdens on past transactions. *McCormick v. Workers' Compensation Appeal Board (City of Phila.)*, 734 A.2d 473 (Pa. Cmwlth. 1999).

This rule has been applied to the regulations of administrative agencies. See *Jenkins Unemployment Compensation Case*, 162 Pa. Superior Ct. 49, 56 A.2d 686 (1948). “Statutory construction rules apply equally to the interpretation of administrative regulations.” *Wheeling-*

Pittsburgh Steel Corp. v. Department of Environmental Protection, 979 A.2d 931, 937 (Pa. Cmwlth. 2009). See also *Riley v. Workers' Compensation Appeal Board (DPW/Norristown State Hosp.)*, 997 A.2d 382, 390 (Pa. Cmwlth. 2010). It is also axiomatic that administrative agencies may adopt retroactive regulations only so long as they do not destroy vested rights, impair contractual obligations, or violate the principles of due process of law and *ex post facto* laws. *Ashbourne School v. Department of Education*, 403 A.2d 161 (Pa. Cmwlth. 1979).

The proposed significant changes to the 2011 TRM and the requirement that these changes be applied to approved EDC EE&C plans is not merely procedural in nature. As addressed above and in comments separately filed by EDCs, the Commission's proposed significant modifications to the 2011 TRM update which, *inter alia*, reduce deemed savings for residential CFL and refrigerator/freezer measures may substantially impact EDC EE&C plans and could jeopardize compliance with Act 129 requirements. Application of these proposed changes to current approved EE&C plans violates rules of statutory/regulatory construction and should not be permitted.

3. Requiring EDCs to Implement the Proposed Modifications in the 2011 TRM Update Amounts to a Commission Directed Modification to EE&C Plans in Violation of Section 2806.1(b)(2) of Act 129.

A Commission requirement that the EDCs utilize the proposed modifications contained in the 2011 TRM Tentative Order in evaluating the effectiveness of previously approved EE&C plans would likely require revisions to existing EE&C plans in an attempt to replace lost deemed savings included in plans based on the 2009 TRM. It is improper for the Commission to modify previously approved EE&C plans through the general 2011 TRM update order.

Section 2806.1(b)(2) of Act 129 establishes the procedure by which the Commission may direct an EDC to modify or terminate any part of an approved EE&C plan. 66 Pa. C.S. §

2806.1(b)(2). Section 2806.1(b)(2) of Act 129 requires the Commission, prior to directing an EDC to modify its approved EE&C plan to first make a determination that a measure in an EDC's EE&C plan will not achieve the required reductions in consumption. In proposing amendments to the TRM relative to the residential CFL programs, the Commission has cited to a study on CFL programs in California and a DOE study.

The Commission has not evaluated approved EDC EE&C plans and determined that the existing measures will not achieve the mandated reductions in consumption or peak demand. The Commission has made no evidentiary findings relative to the operation of current EDC plans or the effectiveness of existing CFL and Appliance Recycling Programs. The Commission may not rely on a general order such as the 2011 TRM update to avoid the necessity of requiring substantial evidence to support its action in a particular case. *Aizen v. Pennsylvania Public Utility Commission*, 60 A.2d 443, 449. (Pa. Super. 1948). Absent the Commission undertaking an independent analysis of each EDC EE&C plan to determine whether existing measures now fail to meet required reductions, the 2011 TRM update may not serve as the basis by which the Commission indirectly modifies approved EDC EE&C plans.

4. The Commission's Proposed Modifications to the 2011 TRM Are Not Supported by Substantial Evidence.

The Commission, by its own admission, is proposing substantial and significant changes to the TRM that could, if applied to existing approved EE&C plans as of June 1, 2011, require substantive changes to those EE&C plans in order to provide an opportunity to meet Act 129 obligations. *2011 Tentative Order at p. 5*. However, the proposed modifications to deemed savings calculations for residential CFLs and refrigerator/freezer replacements and retirements is not supported by substantial evidence.

In an administrative proceeding, any finding of fact necessary to support a determination by an administrative agency must be based upon substantial evidence. *Met-Ed Indus. Users Group v. Pa. P.U.C.*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704). In order to satisfy the substantial evidence test, fact finding must be based exclusively on the evidence admitted to the record in the proceeding. *Kyu Son Yi v. State Board of Veterinary Medicine*, 960 A.2d 864, 870-871 (Pa. Cmwlth. 2008) (holding that extra-record evidence cannot sustain an adjudication). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm'n*, 942 A.2d 274, 281 (Pa. Cmwlth. 2008). Substantial evidence must be “more than a scintilla and must do more than create a suspicion of the existence of the fact to be established.” *Kyu Son Yi*, 960 A.2d at 874 (citation omitted).

As discussed in detail above and in the comments filed by individual EDCs subject to Act 129, the Commission is proposing to modify the CFL hours of use based on inapplicable studies and flawed assumptions relevant to the Pennsylvania market and consumer. Likewise, proposed modifications to the refrigerator/freezer replacement and recycling programs are suspect. *See discussion supra at pp. 9-15.*

EAP challenges the validity of those studies and assumptions relied upon by the Commission to support the proposed significant modifications. Substantial doubt exists as to the applicability of those studies to Pennsylvania and to the measures approved under the current EDC EE&C plans. Therefore, the Commission lacks substantial evidence to support approval and application of certain modifications proposed in the 2011 TRM. EAP believes that these significant modifications to the CFL and refrigerator/freezer programs should be rejected or, alternatively, not made effective until June 1, 2013.

5. Application of the Proposed Modifications to the 2011 TRM Is Not Sound Public Policy.

Application of the significant modifications identified in industry comments to current approved EDC EE&C plans is poor public policy, unjust and unreasonable and an abuse of administrative discretion. Again, Act 129 is an unusually prescriptive section of the Pennsylvania Public Utility Code as it establishes usage reduction targets, a total cost cap and civil penalties, seemingly affording the Commission with little to no discretion. Pennsylvania EDCs consistent with Act 129, the Commission's *Implementation Order*, and in reliance on the 2009 TRM, developed and filed their initial EE&C plans for Commission review and approval. Following evidentiary proceedings, the Commission approved EDC EE&C plans which under Act 129 have a four year term, ending on May 31, 2013. For the Commission to now dictate substantial modification to current approved plans by means of a general order updating the TRM in the middle of the plan term, without a hearing and without substantial evidence in support of the modifications, is an abuse of discretion¹⁸ and is poor public policy.

As stated throughout these comments, EAP does not oppose the Commission's annual review and update of the TRM. However, the Commission may not require that subsequent revisions to the TRM be retroactively applied to previously approved EE&C plans without affording EDCs due process where the changes may alter substantive rights of EDCs. Any and all significant revisions to the 2009 TRM should apply only to the next iteration of EDC EE&C plans, beginning on June 1, 2013.

¹⁸ An abuse of discretion occurs when the judgment is manifestly unreasonable, where the law is not applied, or where the record shows that the action is a result of partiality, prejudice, bias, or ill will. *Payne v. W.C.A.B. (Elwyn, Inc.)*, 928 A.2d 377, 379 (Pa. Cmwlth. 2007). An abuse of discretion also "occurs when the findings are not supported by substantial evidence in the record." *Coal Gas Recovery, L.P. v. Franklin Twp. Z.H.B.*, 944 A.2d 832, 838 (Pa. Cmwlth. 2008).

E. SHOULD THE COMMISSION ADOPT THE PROPOSED 2011 TRM SIGNIFICANT MODIFICATIONS DISCUSSED ABOVE, IT SHOULD CONSIDER ALTERNATIVE APPLICATIONS OF SAID MODIFICATIONS.

If Commission adopts the proposed significant modifications contained in the 2011 TRM and determines that it has the legal authority to require the EDCs to apply these modifications to current approved EE&C plans, EAP recommends that the Commission consider the following alternative approaches:

- If adopted, the 2011 TRM update should not become effective until the EDC's next 4-year program cycle (starting no earlier than June 1, 2013); or
- If the Commission adopts the 2011 TRM update and determines that the current approved EDC EE&C plans are to be evaluated based upon these standards, EDCs should not be subject to civil penalties for not meeting their Act 129 obligations based upon the lost savings associated with the 2011 TRM; or
- If the Commission adopts the proposed significant modifications contained in the 2011 TRM update and determines that the modifications are applicable as of June 1, 2011, EDCs should be provided an opportunity to request a waiver from complying with the imposition of the revised deemed savings calculations from June 1, 2011 through May 31, 2013.

Each of the above alternatives would result in the modification of the TRM as proposed in the 2011 TRM Tentative Order. The suggested alternatives would then provide either the Commission or an individual EDC with the flexibility necessary to avoid either the application of these modifications to the current approved EDC EE&C plan or the imposition of a civil penalty on the EDC for its failure to meet its Act 129 obligations due to the identified TRM modifications.

III. CONCLUSION.

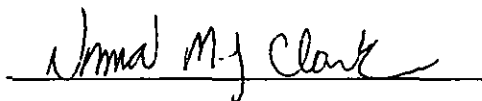
As detailed in the instant comments as well as those filed by individual EDCs subject to Act 129, EAP contends that a number of the significant modifications proposed in the 2011 Tentative Order were neither vetted in the TWG nor supported by substantial evidence and

should be excluded from the 2011 TRM Annual Update Order. If, however, the identified significant modifications to, *inter alia*, the residential CFL and refrigerator/freezer measures are adopted by the Commission, EAP asserts that they should not be applied to current approved EDC EE&C plans.

EAP reasons that to apply these significant modifications to current approved EDC EE&C plans as of June 1, 2011 may amount to a de facto EE&C plan amendment in violation of the established statutory and Commission procedures for modifying an EE&C plan. In turn, the de facto amendment may substantially impact the operation of EE&C plans and, given the prescriptive construct of Act 129, may jeopardize the ability of Pennsylvania EDCs to meet Act 129 obligations. A failure to meet statutory requirements subjects an EDC to a civil penalty ranging between \$1,000,000 and \$20,000,000 and requires the Commission to achieve the legislatively mandated reductions in consumption and demand response. EAP submits that such a result would fail legal scrutiny, is both procedurally and substantively flawed under concepts of due process and represents poor public policy.

For these reasons, EAP respectfully requests that the Commission modify the 2011 TRM Annual Update Tentative Order consistent with its comments.

Respectfully Submitted,



Donna M. J. Clark
Vice President & General Counsel
Energy Association of Pennsylvania
800 North Third Street, Suite 301
Harrisburg, PA 17102
(717) 901-0631
dclark@energypa.org

Dated: December 27, 2010