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November 3, 2008

James J. McNulty, Esq., Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
P.O. Box 3265  
Harrisburg, Pennsylvania 17105-3265

**RE: COMMENTS of THE ENERGY ASSOCIATION of PENNSYLVANIA  
on the COMPONENTS of the ENERGY EFFICIENCY and CONSERVATION  
PROGRAM which the COMMISSION WILL ADOPT UNDER ACT 129 of 2008  
DOCKET NO. M-2008-2069887**

Dear Secretary McNulty:

Enclosed for filing are an original and 10 copies of the Association's Comments on behalf of its electric distribution company members in the above-referenced docket. We are also enclosing an electronic version on CD.

Sincerely,

Donna M. J. Clark  
Vice President and General Counsel

Enclosures

- CC: James H. Cawley, Chairman (w/ enclosure via hand-delivery)  
Tyrone J. Christy, Vice Chairman (w/ enclosure via hand-delivery)  
Robert F. Powelson, Commissioner (w/ enclosure via hand-delivery)  
Kim Pizzingrilli, Commissioner (w/ enclosure via hand-delivery)  
Wayne E. Gardner, Commissioner (w/ enclosure via hand-delivery)  
Robert F. Wilson, Director, Fixed Utility Services (w/ enclosure via hand-delivery and electronically)  
Paul Diskin, Manager, Fixed Utility Services (w/ enclosure via hand-delivery and electronically)  
Wayne L. Williams, Director, Conservation, Economics, and Energy Planning (w/ enclosure via hand-delivery and electronically)  
Cal Birge, Conservation, Economics, and Energy Planning (w/ enclosure via hand-delivery and electronically)  
Bohdan R. Pankiw, Chief Counsel (w/ enclosure via hand-delivery and electronically)  
Robert F. Young, Deputy Chief Counsel (w/ enclosure via hand-delivery and electronically)

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customers to adopt and implement “cost-effective energy efficiency and conservation plans to reduce energy demand and consumption within the service territory of each electric distribution company in this Commonwealth.” Id. The Energy Association of Pennsylvania (“EAPA”)<sup>1</sup> offers the following comments to the PUC request for “stakeholder input on likely procedural, technical, interpretative, and implementation issues; measurement of EDC compliance; and the level of detail required for providing adequate direction to EDCs in regard to their plans.”<sup>2</sup> Secretarial Letter at p.1.

## II. Comments

EAPA will offer comments on each of the eleven (11) statutory requirements of the EE&C program and looks forward to the exchange of stakeholder ideas and positions at the working group meeting scheduled for mid-December.<sup>3</sup>

### A. Procedures for the approval of plans submitted under subsection (B). (66 Pa.C.S. § (a)(1)).

Procedures for the approval of EDC plans are set forth in the legislation at 66 Pa.C.S. § 2806.1(e) which requires that, with respect to each plan, the Commission shall conduct a public hearing and allow for the

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<sup>1</sup> EAPA is a trade association representing the interest of the major regulated electric and natural gas distribution companies in Pennsylvania. These comments are submitted on behalf of the electric distribution company members subject to Act 129, including Allegheny Power, Duquesne Light Co., Metropolitan Edison Co., PECO Energy Co., Pennsylvania Electric Co., Pennsylvania Power Co., and PPL Electric Utilities Corp.

<sup>2</sup> EDC plans filed under Section 2806.1(b) of Act 129 are due on or before July 1, 2009.

<sup>3</sup> EAPA commends the Commission and staff on initiating a measured and organized approach to the implementation of Act 129. The timelines imposed by the legislation are aggressive and underscore the need for all stakeholders to work cooperatively and in a collaborative fashion. The potential penalties for failure to achieve mandated reductions in consumption and peak demand are severe and EAPA believes that a practical and flexible manner of implementation will greatly improve the chances of successfully achieving the legislative goals of reducing consumption and peak demand so as to impact the rising cost of energy.

submission of recommendations by the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”) and by members of the public “as to how the electric distribution company could improve its plan or exceed the required reductions in consumption under subsections (c) and (d).” 66 Pa.C.S. § 2806.1(e)(1). The Commission shall approve or disapprove an EDC plan within 120 days of submission. 66 Pa.C.S. § 2806.1(e)(2). If not approved, the Commission shall detail the reasons, the EDC shall have 60 days to file a revised plan, addressing the deficiencies, and the Commission shall then have an additional 60 days to approve or disapprove the revised plan. 66 Pa.C.S. § 2806.1(e)(2)(i) and (ii).

In implementing the statutory procedures for approval, EAPA asks the Commission to recognize that time is of the essence: mandated reductions in consumption must be met by May 31, 2011 and mandated reductions in peak demand must be met by May 31, 2013. 66 Pa.C.S. § 2806.1(c) and (d). If the mandated reductions are not met, the statute provides for penalties at 66 Pa.C.S. § 2806.1(f)(2). Act 129, however, also allows for interim corrections if “after an adequate period for implementation, the Commission determines that an energy efficiency or conservation measure included in the plan will not achieve the required reductions in consumption in a cost-effective manner under subsections (c) and (d).” 66 Pa.C.S. § 2806.1(b)(2).<sup>4</sup>

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<sup>4</sup> The legislation also encourages EDCs to adjust plans on a “going-forward basis” as a result of third party evaluations. See, 66 Pa.C.S. § 2806(b)(1)(J). EAPA recommends that such adjustments to a plan requested by an EDC be allowed via petition on an expedited basis so as to encourage a modification which will result in reduced consumption and peak demand.

While the legislation establishes mandated reductions for consumption and peak demand in a relatively short time frame, it also provides for flexibility in the EDC plan approval and modification process. EAPA suggests, therefore, that an EDC plan should be approved so long as the plan meets the requirements set forth at 66 Pa.C.S. § 2806.1(b). Approval should not be withheld based on EDC choice of technology or of a particular energy efficiency/conservation/demand response measure or of a specific conservation service provider. The underlying goal of a plan proposed by the EDC under 66 Pa.C.S. § 2806.1(b) will be to achieve the legislatively mandated consumption and peak demand targets in a cost-effective manner and avoid imposition of penalties. The approval process should support this goal and not become mired down in disputes concerning, for example, choice of conservation measures or projections of savings. If it appears that the statutory reductions will not be met, the plan can be modified by the Commission and/or the EDC. Thus, the approval process should be streamlined so as to allow maximum opportunity for success within the tight time-frame established under the legislation.

- B. An evaluation process, including a process to monitor and verify data collection, quality assurance and results of each plan and the program. (66 Pa.C.S. § 2806.1(a)(2)).

With respect to developing an evaluation process which will determine whether an individual EDC plan has adopted cost-effective energy efficiency and conservation programs for its consumers so as to meet the mandated targets for reduction of consumption and peak demand,

EAPA would start with the EDC plan requirement set forth at 66 Pa.C.S. § 2806.1(b)(1)(J). The legislation provides that the EDC plan “shall require an annual independent evaluation of its cost-effectiveness and a full review of the results of each five-year plan required under subsection (c)(3) and, to the extent practical, how the plan will be adjusted on a going-forward basis as a result of the evaluation.” 66 Pa.C.S. § 2806.1(b)(1)(J).

The legislation anticipates that each EDC will obtain an annual independent evaluation to determine cost-effectiveness and subsequently a full review of each five-year plan. The legislation requires, “to the extent practical”, that the EDC adjust its plan “on a going-forward basis as a result of the evaluation.” Id. The obligation of the EDC to conduct an evaluation using an independent third party together with the ability of the Commission to direct interim modifications to an EDC plan highlights the legislative intent to promote flexibility (and creativity) so as to meet legislative goals to reduce energy usage and demand, thus impacting cost.<sup>5</sup>

EAPA strongly recommends that the evaluation process include the use of a Technical Reference Manual, such as the one approved by the Commission in the course of implementing the AEPS. See, Order entered October 3, 2005 at Docket No. M-00051865 (Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standards for the Participation of Demand Side Management Research). By using a Technical Reference Manual, the evaluator and/or the Commission could

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<sup>5</sup> EAPA wishes to stress the need to ensure that any customer data collected as part of the evaluation must remain confidential.

readily calculate the “deemed” energy savings for each program established under the EDC plan, review implementation by the EDC, obtain cost information and then compare the potential consumption and/or peak demand reduction with the mandated reduction which each EDC must achieve under Sections 2806.1 (c) and (d). Such an approach to evaluation could establish standards applicable across the state to measure potential plan success. Moreover, use of a Technical Reference Manual would ensure objective standards and avoid the impossible task of determining in the context of plan approval, whether individual consumers would actually use proposed energy efficiency and conservation measures. The EDC should not be held accountable for actual customer behavior and/or usage pattern.<sup>6</sup>

- C. An analysis of the cost and benefit of each plan submitted under subsection (B) in accordance with a Total Resource Cost Test approved by the Commission. (66 Pa.C.S. § 2806.1)(a)(3)).

EAPA recommends that the Commission adopt a Total Resource Cost Test similar to that set forth by California in its Standard Practice Manual. EAPA contends that the California Total Resource Cost Test can meet the Pennsylvania definition as set forth at 66 Pa.C.S. § 2806.1(m) with appropriate modifications to reconcile such standards to Pennsylvania’s unique circumstances.

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<sup>6</sup> EAPA believes that consumer behavior will be difficult to predict but consumers may be more motivated to participate in energy efficiency, conservation and demand measures if they are charged market prices. Exposing consumers to the market price under fixed price, time-of-use and real time pricing structures will be a major factor impacting whether the mandated reductions can be met.

- D. An analysis of how the program and individual plans will enable each electric distribution company to achieve or exceed the requirements for reduction in consumption under subsections (C) and (D). (66 Pa.C.S. § 2806.1(a)(4)).

This component of the Commission program requires development of an analytical framework to evaluate whether the EDC plan will achieve the reduction targets. Again, EAPA recommends the use of a technical reference manual which includes calculations for both energy efficiency and demand reduction for a given measure such as replacing inefficient appliances, using CFL light fixtures, using smart thermostats, and improving heating and/or cooling systems. The technical reference manual must include savings calculations based not only on efficiency, but also on demand reduction which could include allowing interruptible service or changing from an electric hot water heater to one run by natural gas. Straight forward mathematical calculations of energy savings and demand reduction will provide the best opportunity for determining whether a plan can achieve or exceed statutory mandates. Moreover, it will be a source of clear information for consumers seeking to reduce bills by making changes in their energy usage.

- E. Standards to ensure that each plan includes a variety of energy efficiency and conservation measures and will provide the measures equitably to all classes of customers. (66 Pa.C.S. § 2806.1(a)(5)).

Any standards developed to meet this component of the EE&C program must allow for a variety of different measures, suitable to a particular rate class of customers which measures are cost-effective in the

context of the EDC plan. See, 66 Pa.C.S. § 2806.1(b)(1)(I). The use of the word “equitably” in the legislation should not result in a formulistic evaluation of either the number of “measures” provided in a given EDC plan for a particular rate class or in a measure by measure application of the Total Resource Cost Test to determine whether a particular program within an EDC plan is cost-effective.

- F. Procedures to make recommendations as to additional measures that will enable an electric distribution company to improve its plan and exceed the required reductions in consumption under subsections (C) and (D). (66 Pa.C.S. § 2806.1(a)(6)).

The targets set for reductions in overall energy and demand are aggressive and will be difficult to achieve due to current consumer practice. The U.S. Department of Energy, Energy Information Administration has projected that electric demand will steadily increase by 30% by 2030.<sup>7</sup> In Pennsylvania, the Commission, the EDC and most importantly its electric consumers, are being asked to dramatically depart from the past (steady increase in electric demand) and the foreseeable future (steady increases in electric demand).

The legislation however, asks the Commission to develop a process to improve upon contemplated EDC plans and exceed required reductions in consumption prior to achieving the statutory goal. Recognizing this

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<sup>7</sup> Sources: U.S. Department of Energy, Energy Information Administration, Annual Energy Review 2006 and Annual Energy Outlook 2008 Early Release. Electricity demand projections based on expected growth between 2006-2030.

herculean task to improve upon a plan not yet developed and sanctioned, the EAPA offers the following:

1. Accord deference and flexibility to the EDCs to develop and implement plans. The EAPA asks the Commission to refrain from altering EDC plans that in part reflect approved agreements with Conservation Service Providers' ("CSP"), customers and others. Contractual interference may not be in the public interest; and

2. Consider a procedure whereby the Commission examines its own policies, procedures and rules to eliminate obstacles to the achievement of the Act 129 goals of reduced consumption and peak demand.

G. Procedures to require that electric distribution companies competitively bid all contracts with conservation service providers. (66 Pa.C.S. § 2806.1(a)(7)).

The EAPA believes that a competitive bid process should be established by each EDC as part of its compliance plan to be filed on or before July 1, 2009. Again, the Commission can rely on its previous approaches to competitive procurement in default service and AEPS by setting forth appropriate general categories and then reviewing the filed specifics.

In general, previously approved processes including by auction or by RFP should be accepted now by the Commission. Accompanying a RFP or an auction could be a contract for signature with the winning CSP or CSPs. As in the default service and AEPS areas, the Commission should have a

brief time-frame, possibly as short as 3 days, to approve the competitive bid process and CSP or CSPs selected.<sup>8</sup>

The important overriding goal is to keep the Commission, industry and its consumers on a road to greater energy efficiency and conservation. The Commission has precedents that work toward guiding it through the competitive bid process.

- H. Procedures to review all proposed contracts prior to the execution of the contract with conservation service providers to implement the plan. The Commission may order the modification of a proposed contract to ensure that the plan meets the requirements for reduction in demand and consumption under subsections (C) and (D). (66 Pa.C.S. § 2806.1(a)(8)).

Preferably, contract modification would be limited particularly if the EDC plan were approved prior to review of the contract. Changes ordered after plan approval could lower the effectiveness of any contemplated measure or program and might be premature. Alternatively, an EDC could present a contract with a CSP along with its plan for approval. In this fashion, contract modifications would not require modification of a previously approved plan. Again, EAPA requests that, given the very tight time frames for plan approval, implementation and reduction of consumption and demand, the Commission look to establish a streamlined process for contract approval.

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<sup>8</sup> It is essential that the CSP/EDC contract pricing be kept confidential and free from public access to protect the competitive processes.

Further in implementing legislation, the Commission has a monitoring function and an education function. In the final analysis, corrections are not undertaken by contract modifications, but rather modifications in customer behavior brought about by Commission education, by Commission approved EDC plans and by influencing overall energy policy at the legislative level.

I. Procedures to ensure compliance with requirements for reduction in consumption under subsections (C) and (D). (66 Pa.C.S. § 2806.1(a)(9)).

EDC compliance is governed, in part, by penalties set forth at 66 Pa.C.S. § 2806.1(f). Section 2806.1(f) consists of two "paragraphs", (1) and (2): within paragraph (1) are three "subparagraphs", (i), (ii) and (iii); and paragraph (2) contains two "subparagraphs", (i) and (ii). This structure terminology has significance relative to how the penalties language should be interpreted.

Paragraph (1) of the penalties section provides that an electric distribution company is subject to a civil penalty of \$100,000 per day for each day it fails to file a plan after July 1, 2009. 66 Pa.C.S. § 2806.1(f)(1). In the event an electric distribution company fails to file a revised plan to correct plan deficiencies within 60 days of those deficiencies being identified by the Commission, the company is also subject to a \$100,000 per day penalty under subparagraph (ii). 66 Pa.C.S. § 2806.1(f)(1)(ii). Subparagraph (iii) states that penalties collected under "this paragraph", i.e. paragraph (1) of section (f), shall be deposited in the electric distribution company's low-income electric customer's assistance program. Therefore

under paragraph (1) of section (f), there is a clearly identified direct beneficiary of any financial penalties imposed under this paragraph, the low income customers eligible for the customer assistance program.

In contrast, paragraph (2) of section (f), which states that an electric distribution company “shall be subject” to a subparagraph (i) civil penalty of not less than \$1 million, nor more than \$20 million, establishes no direct beneficiary of this financial penalty for failure to achieve section (c) or (d) consumption and peak demand reductions. Rather, the essence of a Commission finding that the section (c) and (d) consumption and peak demand reductions were not met is that responsibility to achieve the reductions “shall be transferred” to the Commission under paragraph (2), subparagraph (ii), and the Commission must then implement a plan to achieve the required reductions under subparagraph (a).

Paragraph (2) which establishes a \$1 to \$20 million penalty for failing to achieve specified electric consumption reduction objectives indicates the electric distribution company “shall be subject” to this penalty and does not, explicitly, distinguish between companies that followed the Commission-approved plan, and those that did not. But the only energy efficiency plans that should be approved by the Commission are those that are expected to meet the consumption reduction requirements of subsections (c) and (d). 66 Pa. C.S. § 2806.1(b)(1). When the Commission reviews proposed contracts with conservation service providers, it can order the modification of those contracts “to *ensure* that the plan meets the requirements for reduction in

demand and consumption under subsections (c) and (d).” 66 Pa.C.S. §2806.1(a)(8). Moreover the Commission “shall direct an electric distribution company to modify or terminate any part of an approved plan if it determines an efficiency or conservation measure will not achieve the required consumption reductions. 66 P.A. § 2806.1(b)(2). The Commission is also authorized to correct any deficiencies in plans proposed by the electric distribution company. 66 Pa. C.S. § 28806.1(e)(2). Therefore, the Commission has direct responsibility to ensure that a plan, if implemented, in fact will achieve the intended consumption reductions.

#### Mandatory versus Directory Interpretation of the Penalty Provisions

EAPA recognizes that the penalty specified by section (f), paragraph (2) uses the word “shall.” The general rule of statutory construction is that when the word “shall” is used, the requirement is mandatory and not directory.<sup>9</sup> However, there are exceptions to this rule. Whether a provision is mandatory or directory depends on the intent of the General Assembly, as ascertained from a consideration of the entire Act, its nature; its object and the consequences that would result from how it is construed.<sup>10</sup> Thus, the controlling question in determining whether a provision is mandatory or directory is what the legislature intended when drafting the statute, which

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<sup>9</sup> *Oberneder v. Link Computer Corp.*, 548 Pa. 201, 696 A.2d 148. When a statute or statutory provision is mandatory, it is “imperative,” and an affirmative duty is imposed upon the party to whom the statute is directed. *Cmwth. v. Baker*, 690 A.2d 164 (Pa. 1997). In contrast, when a statute is directory, no such mandatory duty is created. Of note, the result of holding a provision in a statute to be directory means that where the provision is not followed, the proceedings are not invalidated as they would be with a failure to follow mandatory provisions. 45 P.L.E., STATUTES § 141.

<sup>10</sup> *Appeal of Crossley*, 432 A.2d 263 (Pa. Cmwth. 1981); *Cmwth v. Kowell*, 228 A.2d 50 (Pa. Super. 1967). Similarly, “may” can mean “shall” for the sake of justice. *Matter of Columbia Borough*, 354 A.2d 277 (Pa. Cmwth. 1976); *Melnik v. Melnik*, 25 A.2d 11 (Pa. Super. 1942).

includes considering the consequences of interpreting "shall" one way or the other.

An interpretation of the Act that finds the imposition of the penalty mandatory, rather than directory amounts to what is essentially a strict liability standard. Such a consequence is unconstitutional. If the Commission interprets section (f), paragraph (2), subparagraph (i) to require the imposition of a penalty that ranges from \$1 million to \$20 million, even where the electric distribution utility followed the plan approved, or as modified and approved by the Commission, the imposition of such a significant cost penalty that is non-recoverable from ratepayers is so arbitrary and fundamentally unfair that it violates substantive due process.<sup>11</sup> Due process problems are evident by, *inter alia*, the fact that the fine would be imposed, even though the utility followed a Commission-approved plan, and by the fact that the targeted energy reductions require a modification of customer behavior that is largely beyond the control of the utility.

Also, "shall" may be construed to mean "may" when no right or benefit to anyone depends on its imperative use; when no advantage is lost, when no right is destroyed, no benefit is sacrificed, either to the public or to any individual, by giving it that construction.<sup>12</sup> Here, no right or benefit to anyone is lost if the Commission refrains from imposing a penalty where the

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<sup>11</sup> Substantive due process rights protect a person from a deprivation by the government of its property interest and against arbitrary and unreasonable government action. See, *Levine v. Cmwlth. Dep't of Educ.*, 468 A.2d 1216 (Pa. Cmwlth. 1984). Substantive due process rights under both the Pennsylvania and federal constitutions (article 1, sections 1, 9, and 10 of the Pennsylvania constitution and the 5<sup>th</sup> and 14<sup>th</sup> amendments of the federal constitution) also require legislation to be fair and reasonable in content and to further a legitimate government objective. See C.J.S. *Constitutional Law*, §§ 964, 970-975; 11 P.L.E., CONSTITUTIONAL LAW § 322.

<sup>12</sup> *Com. ex rel. Bell v. Powell*, 249 Pa. 144 (1915).

electric distribution company and the Commission made their best efforts to implement a plan that was expected to meet the consumption reduction goals of the Act, but did not in fact reach the objective. Regardless of the amount of penalty imposed, \$1 million, \$20 million or no penalty at all, if the consumption reduction goals are not met, the Commission is still required to assume responsibility to achieve the reduction, implement a plan that will achieve the reductions and contract with service providers to implement any portion of the plan.<sup>13</sup> Moreover, in contrast to the penalty provision of section (f)(1), where low income customers benefit from an imposed penalty, no party directly benefits from a penalty imposed by the Commission under section (f)(2).

An additional constitutional problem could arise if a penalty of sufficient magnitude was imposed on an electric distribution company that jeopardized its financial condition under the Hope Doctrine<sup>14</sup> to the point where its property could be considered confiscated or its ability to provide service was jeopardized.

An interpretation that the (f)(2) penalty provision was directory would not defeat any purpose of the Act and would avoid the absurd result of a company being fined without any unreasonable or unlawful conduct being established, as well as avoiding constitutionality issues. The Commission

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<sup>13</sup> 66 Pa. C.S. § 2806.1(F)(2)(II)(A)(B).

<sup>14</sup> Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944). Under the Hope Doctrine, rates that do not provide a utility the opportunity to recover its prudently incurred costs and a fair return on its investment used for public service are confiscatory and violate rights protected by both the Takings and Due Process Clauses.

should indicate in its order on program requirements that the (f)(2) penalty is directory and not mandatory.

#### Standards for Penalty Determinations

If the Commission determines (f)(2) is directory, it requires a standard to determine if any penalty is warranted. And, even if the Commission decides the (f)(2) penalty is mandatory, which the EAPA argues against, it still needs a standard to determine where in the range of authorized penalties a penalty should be set. The EAPA submits that the following factors should be adopted to determine whether a penalty under (f)(2) is warranted and if so, at what level the penalty should be set within the authorized range of penalties:

1. Was physical or economic force involved in the failure to achieve the consumption reduction objective and whether failure to meet the consumption reduction goals was within the control of the electric distribution company?
2. Did the electric distribution company follow the Commission-approved plan?
3. Did the electric distribution company adequately monitor their plan and propose appropriate modifications for the Commission's review and approval?
4. Does evidence exist that similarly situated companies were able to achieve equivalent consumption reduction objectives?
5. To what extent was the consumption reduction goal not met?
6. The harm that arose due to failure to achieve the consumption reduction objective.
7. Other factors relevant to the penalty issue.

The Commission should determine that the (f)(2) penalty is directory rather than mandatory, and adopt the foregoing standard to decide the issue of whether, and to what extent, a penalty pursuant to (f)(2) should be set.

J. A requirement for the participation of conservation service providers in the implementation of all or part of a plan. (66 Pa.C.S. § 2806.1(a)(10)).

The Act requires, pursuant to 66 Pa.C.S. § 2806.1(m), that a conservation service provider is an entity that provides information and technical assistance on measures to enable a person to increase energy efficiency or reduce energy consumption that has no direct or indirect ownership, partnership or other affiliated interest with an EDC.

As the Commission is aware, it has the obligation under 66 Pa.C.S. § 2806.2(a) to establish a registry of CSPs that meet certain requirements of experience and ability. Finally, an EDC must include in its plan a contract with one, or possibly more than one, CSP selected by competitive bid to implement the EDC's plan or portion thereof, and then have said plan and CSPs approved by the Commission. 66 Pa.C.S. § 2806.1(b)(1)(E)

The EAPA would offer the following additional thoughts for the Commission to consider in addressing both this subsection of Act 129 and its responsibility to create a registry of CSPs. EAPA suggests that in addition to a CSP assisting consumers, a CSP could be engaged for multiple purposes by an EDC, including: (a) functions essential to the deployment and the delivery of EE&C measures once the plan is approved;

(b) measuring and verifying deployment (c) plan development and; (d) assuring quality control. EAPA strongly recommends that the function of CSPs be clarified in the initial phase of implementation to allow EDCs the opportunity to utilize a CSP in the plan development.

K. Cost recovery to ensure that measures approved are financed by the same customer class that will receive the direct energy and conservation benefits. (66 Pa.C.S. § 2806.1(a)(11)).

The EAPA again would urge the Commission not to reinvent the wheel. Each EDC has been through proceedings in which cost of service principles were applied to their respective costs. To meet the vigorous legislative mandatory time-frame, the EDCs' plans should be approved as acceptable if they comply with reasonable cost of service principles. By applying cost of service principles, the Commission and industry will be able to move forward more expeditiously to meet the conservation and energy efficiency goals to reduce usage and peak demand.

Cost of service principles should be used for assigning the administrative costs recoverable pursuant to 66 Pa.C.S. § 2806.1(b)(1)(H). The direct rate class costs should be directly assessed to each rate class as occurs in all cost of service studies.

EAPA would urge the Commission to apply these same cost of service principles to assign the direct benefits of the program to each customer class. 66 Pa.C.S. § 2806.1(a)(11). Where the benefits are not easily assignable, then similar to administrative costs, they should be

assigned under generally acceptable cost of service principles to all customer classes.

The EDCs have the right pursuant to 66 Pa.C.S. § 2806.1(k) to full and timely recovery of their costs pursuant to options which include a Section 1307 rate reconciliation process. Recovery of these costs is critical to ensure that plans are developed and implemented to achieve the mandated reductions in consumption and peak demand. Because the statutory targets lead to statutory penalties, and the recovery mechanism is authorized by statute, the Commission is not permitted to interrupt the recovery of these costs or the assignment of benefits.

### **III. Other Issues**

#### **A. Definition of Weather-Normalized**

Again in keeping with the suggestion that the Commission not re-invent the wheel, EAPA addresses the issue of defining “weather-normalized” as used in 66 Pa.C.S. §§ 2806.1(c) and (d). The term weather-normalized has been litigated in cases throughout this Commission’s regulatory history. As to bring greater reliability to plans, the EAPA suggests that the Commission permit each EDC to use the weather-normalized definition from its most recent rate proceeding wherein weather was an issue.

In terms of another key definition, “extraordinary load”, the EAPA would offer 5 general qualifying components of what should be included in that definition:

B. Definition of Extraordinary Load

First, consists of Tax Breaks which encourage energy usage. A clear example is the soon to be phased-in tax incentives related to electric cars;

Second, A Technology Shift where behavior, work or process was performed, manually or by some other energy form and due to efficiency or cost reduction, the task moves to electricity;

Third, Regulatory or Statutory Shift where either the Commission, FERC or state and federal government mandates more use of electricity. An example is greater saturation of street lighting to fight crime or the introduction of electric car incentives or an expansion of the CAP program;

Fourth, Economic Development, the state, a county or a city entices a new manufacturing plant to move into the state or authorizes a new electronic casino to be constructed; and

Fifth, Behind the Meter such as the increasing generation base, the clearest example of which is a cogeneration unit.

If an EDC has a cogeneration unit that is serving a large load behind the meter, then obviously a shutdown of that unit is extraordinary in both its

impact on the customer who will receive energy from the EDC that will be unplanned for and should not be counted as part of either overall consumption or demand.

C. Definition of 100 Highest Peak Hours

Another definition that will need to be established at this point of implementation is the 100 highest peak hours in the test year of June 1, 2007 to May 31, 2008. This is particularly important because the legislation contemplates a comparison to ascertain whether there has been a 4.5% reduction in 2013, just three years following the time at which an EDC plan can be first approved by the Commission.

The specific dates contained in the statutory test year of the 100 highest peak hours will not easily translate into the future. For example, a weekday summer peak on July 13, 2007 compared to July 13 in 2013 or 2014 will match a summer weekday versus a summer weekend.

Thus, the comparison of exact days and hours won't work. What will work is the averaging of the 100 highest peak hours. The focus of the legislation is to reduce the overall demand in the 100 highest peak hours.

Our suggestion is to average the 100 highest peak hours in the test year and compare that average with the average of the 100 highest peak hours in future years and calculate the difference from averages. The

difference needs to be a 4.5% reduction adjusted for the language contained in Act 129.

Measurement of each individual peak does not work. If 70 peak hours experience a 6% reduction or more and 30 peaks experience an overall 4% reduction, is that important or not? This example demonstrates why an average of the electricity test year 100 highest peak hours as compared to the average of the statutory test year 100 highest peak hours adjusted by statutory language is the appropriate measurement tool.

#### **IV. Conclusion**

The legislature has charged the Commission to implement a statute which requires EDCs to develop plans that reduce electricity consumption and peak demand in very tight time frames. The legislative intent in mandating those reductions is to contain rising energy costs. EDCs seek a streamlined approval process so that implementation is not delayed. Concurrently, EDCs need assurance that compliance with approved plans will not result in penalties if consumer behavior does not change.

As the EAPA discusses in Section II of these comments, the penalty provisions are severe. An interpretation of Act 129 that finds the imposition of the penalty mandatory rather than directory amounts to what is essentially a strict liability standard. Such a conclusion is unconstitutional. If the Commission interprets section (f), paragraph 2, subparagraph (i) to require the imposition of a penalty that ranges from \$1 million to \$20 million, even

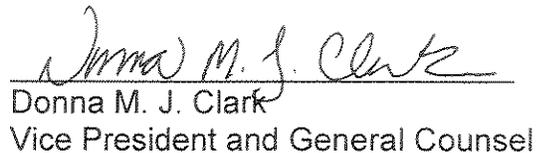
where the electric distribution utility implemented the plan approved by the Commission, the imposition of such a significant cost penalty (non-recoverable from rate payers who fail to change their energy usage sufficiently) is so arbitrary and fundamentally unfair that it violates substantive due process. Due process problems are evident by the fact that the fine would be imposed even though the utility followed a Commission-approved plan and the fact that the targeted demand and energy reductions require a modification of customer behavior which is, for the most part, beyond the control of the utility.

EAPA asks the Commission from the outset to provide guidance with respect to the penalty provisions of the legislation so that the focus of implementation is the successful attainment of the mandated reductions in consumption and peak demand.

Respectfully submitted,



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