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March 17, 2006

**VIA FED EX**

James McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, Second Floor  
Harrisburg, PA 17120

**Re: Implementation of the Alternative Energy Portfolio Standards Act of 2004:  
Standards And Processes for Alternative Energy System Qualification and  
Alternative Energy Credit Certification - Docket No. M-00051865**

Dear Secretary McNulty:

Enclosed please find an original and fifteen copies of the Comments of the Exelon Companies to the Pennsylvania Public Utility Commission's Tentative Order in the above-referenced docket.

If you have any question please contact me at 215-841-5974.

Kind Regards,

Adrian D. Newall  
Assistant General Counsel

ADN:yaw  
Enclosure

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Implementation of the Alternative Energy  
Portfolio Standards Act of 2004: Standards  
And Processes for Alternative Energy  
System Qualification and  
Alternative Energy Credit Certification**

**Docket No. M-00051865**

**COMMENTS OF THE EXELON COMPANIES**

On January 31, 2006, the Pennsylvania Public Utility Commission (“Commission” or “PUC”) entered a Tentative Order seeking comments on proposed Standards and Processes for Alternative Energy System Qualification and Alternative Energy Credit Certification (“Tentative Order”). PECO Energy Company (“PECO”) and Exelon Generation Company, LLC (“ExGen”) (collectively, “Exelon”), hereby provide their comments regarding the issues raised in the Tentative Order.

**I. Introduction**

The Commission appropriately recognizes in its Tentative Order that the Alternative Energy Portfolio Standards Act of 2004 (“AEPS”, “Act 213” or “Act”) is a complex law that must be construed in a manner that gives effect, if possible, to all of its provisions. In its Tentative Order, the Commission asks for comments regarding its interpretation of several of the provisions of Act 213, including the provisions concerning the role of the Pennsylvania Department of Environmental Protection’s (“DEP”) in implementing AEPS, the process for approval and review of alternative energy system qualification decisions, maintaining alternative energy system status, and the alternative energy credit

certification standard. Exelon supports a majority of the Commission’s conclusions regarding the processes and standards discussed in the Tentative Order. Exelon does have a concern regarding the role of the DEP, as is discussed more fully below.

## **II. Comments**

### **A. Allocation of Agency Responsibility and the Role of DEP in the Qualification of Alternative Energy Systems**

#### **1. Allocation of Agency Responsibility**

Exelon concurs with the Commission’s conclusion regarding its authority under AEPS to promulgate regulations establishing standards and processes for resource qualification and alternative energy credit creation. Exelon believes that Act 213 vests the Commission with the ultimate authority to determine what resources qualify under the Act. Exelon and the Commission both recognize that the DEP has certain responsibilities in implementing AEPS, namely to ensure that all qualified alternative energy sources meet all applicable environmental standards. However, as stated in the Tentative Order, the Commission or its agent, the program administrator, must make all final determinations regarding resource qualification.

#### **2. DEP’s role in Qualification of Alternative Energy Systems**

In its Tentative Order, the Commission states that the role of the DEP is to “ensure that alternative energy systems comply with all environmental standards” and to “verify” that sources comply with the standards in Section 2 of Act 213, which includes the definitions for the various “alternative energy sources.” Tentative Order, p. 8. The Commission interprets this language in Act 213 as directing it to utilize DEP’s environmental expertise as part of the resource qualification process. Id. The Commission goes on to discuss the two different ways the Commission can rely on DEP

in this regard, either as certifying questions to the DEP or utilizing the DEP as an expert witness.

The Commission first describes a role for the DEP that can be viewed as sharing responsibility under the Act, requiring the Commission or the AEPS program administrator, once designated, to certify questions of fact or law to the DEP. This approach would envision the program administrator reviewing an application from a generator applying for alternative energy status and determining whether the resource was geographically eligible. The administrator would then certify to the DEP the question of whether or not the resource was consistent with the definition of “alternative energy source.” Once DEP reviewed the application, it would report its findings to the program administrator. Under this scenario, the administrator would be bound by the DEP’s findings. The Commission recognizes in its Tentative Order that by certifying a question to DEP, the Commission would be delegating some of its statutory authority to another state agency. Exelon does not agree with this delegation approach and believes that the more appropriate role for DEP would be to act as an expert witness, providing technical guidance to the Commission and/or the AEPS program administrator. The most important difference between the two roles is that as an expert witness, DEP’s findings would not be binding and could ultimately be rejected by the program administrator. Exelon finds that this is a more suitable role for the DEP under Act 213.

Exelon believes that the Commission should maintain the primary role in qualifying resources under AEPS. The DEP should not be granted the broad authority to make final determinations regarding the qualification of a source. Although the DEP does have the technical and environmental expertise required to determine whether or not

an alternative energy meets the definitions in Section 2 of AEPS, the Legislature has not delegated to the DEP the authority to “carry out the responsibilities delineated within this act”; the Commission has been delegated that authority. DEP’s role in this regard is limited to one where it is to “ensure” that alternative energy sources satisfy all applicable environmental standards and to “verify” that an alternative energy source meets the definitions set forth in Section 2 of the Act. As the Commission has been delegated the primary role in enforcing the requirements of the Act, DEP should have no more than an adjunct role in assisting the Commission on these issues. This interpretation of Act 213 is consistent with the plain language as well as the intent of the legislature.

### 3. Compliance with Environmental Regulations

In its Order, the Commission tentatively concludes that compliance with environmental regulations is a condition precedent to receiving “alternative energy system” status. Tentative Order, p. 11. The Commission goes on to find that “failure to maintain compliance with applicable environmental laws would therefore lead to a loss of qualified status for a facility.” *Id.* Exelon is concerned about the practical implications of such a finding. First, the Commission must keep in mind that there are multiple environmental laws that regulate the activities of all generators. Each of these regulations has its own set of consequences should a generator violate them. Moreover, Exelon finds it difficult to support the proposition that a generator would be disqualified under Act 213 for a minor violation or for an infraction that is rectified within a reasonable time frame. The Commission must place parameters around this rule so as not to permit automatic disqualification for minor violations or for violations that are promptly corrected by the generator. Failure to place such limitations on this rule could potentially impact

Pennsylvania Electric Distribution Companies' ("EDC's") who depend on these resources to comply with AEPS. Exelon believes that as long as a generator can legally operate and therefore, produce energy and the associated AECs, the status of the system under the Act should not be jeopardized. If the facility were to be shut down for failing to comply with environmental regulations, then it would not be producing energy or AECs. If a generator is shut down and therefore, disqualified, an EDC may fall short of its AEPS obligations and a claim of force majeure may be necessary. The Commission must be mindful of these implications should it apply the disqualification rule in such a strict manner.

#### **B. Process for Approval and Review of Alternative Energy System Qualification Decisions**

Exelon supports the Commission's process for approval and review of alternative energy system disqualification process as set forth in its Tentative Order. Exelon agrees that the program administrator's decision regarding qualification should be subject to appeal and review by the entire Commission. The Commission can accomplish such review either on the pleadings or through hearings held by the Office of Administrative Law Judge if necessary. Exelon believes that this process is adequate to protect the rights of all interested parties to the Commission's qualification decisions.

#### **C. Maintaining Alternative Energy System Status**

The Commission states in its Tentative Order that a generator will be provided with notice and opportunity to be heard prior to revocation of "alternative energy system" status. Exelon agrees that such an opportunity is vital to protecting the rights of affected owners and operators. However, Exelon believes that EDCs and other potentially affected parties must also be given notice prior to a generator being disqualified as an

alternative energy system. As stated previously in these comments, a generator losing its status as an eligible resource under AEPS may impact an EDCs or EGSs compliance with the Act and precipitate a finding of force majeure. In light of the importance of these potential consequences, the Commission must provide all interested parties with notice and the opportunity to be heard before it revokes a generator's alternative energy system status, preferably through the hearing process.

#### **D. The Alternative Energy System Qualification Standard**

##### **1. Fuel Source Requirement**

The Commission lists on page 13 of its Tentative Order the new and existing resources whose use will qualify a generation facility for alternative energy status. The Commission includes low-impact hydropower as an eligible Tier I resource, however parenthetically references "incremental development only." Exelon would like to clarify that Section 1648.2 of Act 213 includes existing and new low-impact hydropower in its definition of "alternative energy source." Act 213 does include other criteria for incremental hydroelectric development to qualify as an eligible resource, however the definition of alternative energy source is clearly not limited to incremental development only. Exelon urges the Commission to clarify this list in any final Order concerning alternative energy system qualification standards.

##### **2. Geographic Requirement**

In its Tentative Order, the Commission discusses the geographic criteria that must be met by applicants seeking alternative energy system status. Act 213 sets forth the geographic requirement as follows:

Energy derived only from alternative energy sources inside the geographic boundaries of this Commonwealth or within the service territory of any regional transmission

organization that manages the transmission system in any part of this Commonwealth shall be eligible to meet the compliance requirements of this act.

Section 1648.4. The Commission tentatively finds that this provision should be interpreted broadly and states that all alternative energy systems physically located within Pennsylvania as well as the PJM and MISO service territories would meet the geographic test.

At a minimum, Exelon believes that an EDC should be permitted to rely on a resource if it is located in Pennsylvania or the in the RTO where the EDC operates. For example, PECO at a minimum could seek to satisfy its AEPS obligations with any resource located in Pennsylvania or within PJM.

#### **E. Alternative Energy Credit Certification Standard**

The Commission in its Tentative Order raises the restrictions placed on the creation of alternative energy credits (“AECs”) in Act 213. First, the same alternative energy may not be used to satisfy both Pennsylvania’s and another state’s alternative energy or renewable portfolio standard. Section 1648.4. Secondly, the energy must also satisfy a “delivery” requirement. The Commission describes this requirement as mandating that the energy associated with an alternative energy system must be delivered to a particular boundary in order to be eligible for credits. The Commission recognizes that this delivery requirement may be interpreted in several different ways.

A restrictive interpretation would require that energy must be delivered to retail customers in Pennsylvania in order to generate a credit. Exelon believes that this interpretation is wholly inconsistent with the current operation of the renewable energy credit market and would create barriers to creating and trading AECs produced through compliance with Act 213, in other words, it runs counter to the market that the Act seeks



to develop. Exelon does recognize that there is a deliverability requirement in the Act. The Commission correctly interprets this requirement to mean that the energy generated need only be delivered to or consumed in a Pennsylvania EDC's distribution system or to a transmission system managed by an RTO that manages a portion of the Pennsylvania transmission system in order for a credit to be created. As for solar resources, the Commission must presume that they meet this delivery requirement if they are interconnected to an EDC's distribution system or transmission system managed by a regional transmission organization located in any part of the Commonwealth. Once the credit is created, it can be purchased by an EDC or EGS in order to achieve compliance. Exelon believes that PJM Environmental Information Services, Inc.'s ("PJM EIS") Generation Attribute Tracking System ("GATS"), which has been designated by the Commission as the credits registry, serves to track the credits and determine whether or not they are tradable in accordance with the Act. The operation of GATS is consistent with the Commission's conclusions in its Tentative Order regarding the certification of AECs.

As the Commission recognizes, Act 213 on its face clearly permits compliance to be satisfied by the acquisition of credits separable from the energy. Exelon believes that any market rules adopted by the Commission that attempt to link AEC sales to physical sales to a specific EDCs customers -- in the sense that a company cannot sell an unbundled AEC to another company unless the sale is accompanied by a commensurate quantity of physical energy -- are counter to the way the market trades in all jurisdictions. Exelon concurs with the Commission's position that an entity's AEPS obligations can be met through the purchase of AECs separate from the energy.

## **F. Health and Safety Standards**

Exelon does not believe that additional health and safety standards are necessary for facilities that would like to qualify as alternative energy systems under Act 213. There already exists a body of health and safety regulations applicable to the operation of generating facilities. There is no need for the DEP to duplicate these standards, which already protect the health and safety of workers at generating stations. Unless the facility is shut down for violating these standards, neither the qualification of the facility nor the eligibility of the AECs created should be affected.

## **III. Conclusion**

Exelon commends the Commission for considering these difficult AEPS issues and commits to continuing to work through the implementation of the Act.

Respectfully submitted,

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March 17, 2006