BEFORE THE
PENNSYLVANIA PUBLIC UTILTY COMMISSION

Implementation of the Alternative Energy Portfolio Standards Act of 2004	**Docket No. M-00051865**
Rulemaking Re Electric Distribution Companies' Obligations to Serve Retail Customers at the Conclusion of the Transition Period Pursuant to 66 Pa. C.S. § 2807(e)(2)	**Docket No. L-00040169**

REPLY COMMENTS OF THE EXELON COMPANIES

On February 8, 2006, the Pennsylvania Public Utility Commission ("Commission") circulated an Issues List in order to elicit comments from interested stakeholders regarding cost-recovery issues raised by the Alternative Portfolio Standards Act of 2004 ("AEPS" or "Act 213") and the Commission's default service rulemaking ("POLR Rulemaking"). PECO Energy Company ("PECO") and Exelon Generation Company, LLC ("ExGen") (collectively, "Exelon") submitted their initial responses on March 8, 2006. Exelon hereby provides comments to the responses submitted by other interested parties on that same date.

I. Executive Summary

Exelon continues to urge the Commission in its Reply Comments to promulgate final AEPS and POLR rules as soon as possible. As can be seen by the Initial Comments filed in response to the Commission's Issues List, an overwhelming majority of stakeholders agree that further delay is unwarranted and that certainty will assist all market participants in developing their compliance strategies. A majority of initial

comments also support the idea that multi-year contracts, as a method of procuring AEPS resources and/or AEPS credits, should be permitted but not mandated by the Commission. Exelon continues to encourage the Commission to find that such multi-year contracts are acceptable, in conformance with the prevailing market price standard of the Electric Choice and Competition Act and allow for all associated costs to be fully recovered. Although some initial comments submitted argue that multi-year contracts would be in direct violation of the prevailing market price standard, Exelon believes that the standard is met if the price included in the agreement is reasonable based on the market price at the time the agreement was signed. Removing this option would render a potential tool for jumpstarting the development of various alternative energy projects nonviable.

The development of solar resources is another area where many stakeholders put forth creative and innovative ideas. Exelon believes that the state administrator concept may be worth further discussion. In addition, Exelon agrees with the Pennsylvania Department of Environmental Protection's proposal to extend to up to five years the period that solar credits may be banked.

Force majeure also received an abundance of comments, validating Exelon's position that final force majeure rules are crucial to the successful implementation of AEPS. As described in more detail below, Exelon maintains that the Commission must consider both physical and economic availability of resources when assessing the availability of force majeure protections.

II. Exelon's Reply to Comments Submitted by Other Parties in Response to the February 8th Issues List

Exelon's responses to the specific issues raised by the other stakeholders are set forth below.

1. Should Act 213 cost recovery be addressed in the Default Service regulations as opposed to a separate rulemaking? Is it necessary to consider Act 213 cost recovery regulations on a different time frame in order to encourage development of alternative energy resources during the "cost recovery period"?

The responses to this question by stakeholders varied, however, the overwhelming majority of comments support the timely issue of both final AEPS and final POLR regulations. Exelon continues to believe that although it would be advantageous to have the Commission consider Act 213 cost-recovery in the POLR Rulemaking, it does not believe that final POLR regulations should be further delayed. Exelon urges the Commission to resolve AEPS cost-recovery issues expeditiously as well.

Exelon disagrees with the comments submitted by PV Now and UGI regarding this point. UGI claims that the POLR Rulemaking should be delayed until more information is available from other customer choice states. UGI Initial Comments at 4.[1] PV Now states that default service and AEPS cost-recovery issues are separate and distinct issues. PV Now Initial Comments at 1,2. Exelon disagrees and asserts that final POLR regulations must be promulgated immediately and be sufficiently robust to allow for the cost-recovery of both default service and AEPS costs in a coordinated fashion. As OCA correctly states in its comments, AEPS cost-recovery is an integral part of the

[1] All citations found herein are references to the party name and specific page number of their initial comments where their position can be found.

planning and procurement of resources necessary to meet default service obligations. OCA Initial Comments at 11. In addition, the Commission should ultimately allow for the reconciliation of all POLR-related costs in its final POLR regulations. To do otherwise would effectively deny EDCs the option of consolidating their POLR and AEPS procurement activities (or, at a minimum, would introduce unnecessary complexity and cost).

2. **Do the prevailing market conditions require long-term contracts to initiate development of alternative energy resources? May Default Service Providers employ long-term fixed price contracts to acquire alternative energy resources? What competitive procurement process may be employed if the Default Services Provider acquires alternative energy resources through a long-term fixed price contract?**

A majority of the comments submitted by stakeholders state that multi-year contracts to procure AEPS resources (AEPS credits alone and/or energy generated from AEPS resources) should be permitted by the Commission, but not mandated. Exelon urges the Commission to allow EDCs to satisfy their AEPS obligations either directly from the market or from alternative energy developers through multi-year contracts, or through other means such as by bundling the AEPS requirement with its associated load in a default service supply auction process. Exelon continues to urge the Commission to first establish clear and binding AEPS cost-recovery and other rules as soon as possible. These rules should neither prohibit, nor mandate, any particular procurement methodology or contract term for obtaining AECs. Further, the Commission should establish criteria that must be met in order for an EDC's procurement strategy to be considered permissible, such as the procurement method must be fair, competitive and transparent. If the EDC meets these thresholds, they should be granted latitude regarding the specifics of their procurement methodologies.

Exelon disagrees with the position that multi-year contracts violate the "prevailing market price" standard as argued by various suppliers in their comments. For example, Constellation Energy specifically states that any multi-year contract entered into for purposes of procuring AEPS resources would be in direct violation of the Electric Choice and Competition Act. Constellation Energy Initial Comments at 6. Exelon believes that the prevailing market price standard is met so long as the pricing in the multi-year contract is shown to be reasonable based on prevailing market prices for the product at the time the contract is signed. If this test is met, then the Commission should find that the price in a multi-year agreement is consistent with the "prevailing market price" standard and therefore guarantee full cost recovery.

PennFuture raises two additional issues points that are of concern to Exelon. First, PennFuture suggests that EDCs must submit at least two years in advance of the end of their transition period Requests for Qualified Bidders (RFQs) or Requests for Proposals (RFPs) in order to justify engaging in multi-year contracts to meet their AEPS obligations. PennFuture Initial Comments at 4. Although Exelon believes that EDCs may find such early credit acquisition necessary, it may not be possible until cost-recovery and force majeure rules are finalized. In addition, depending on expected customer load and the supply market an EDC's plans can change over those two years. While a two-year requirement for RFQs and RFPs is not necessary, EDC planning for credit acquisition to meet the requirements is the very reason why Exelon urges the Commission to finalize both its AEPS and POLR regulations promptly.

PennFuture also suggests that EDCs should be required to procure 20-30% in excess of their AEPS requirement due to the historical failure rate of renewable projects

in states that have renewable portfolio requirements. PennFuture Initial Comments at 5. Exelon maintains that it is imperative that the Act has laid out the requirements and that the Commission should not mandate the excess procurement requested by PennFuture. In addition, the Act provides the EDC with the ability to bank credits to manage the acquisition of AEPS credits. The Commission must be mindful that mandating such a surplus procurement requirement would most likely lead to higher prices for consumers by creating an artificially high demand for such generation, create potential excess capacity questions related to cost recovery and raise questions as to the appropriate capacity factor to use for planning purposes in procuring alternative energy.

Exelon also takes issue with the response submitted by OCA to this question. OCA contends that multi-year contracts should be utilized to procure both AEPS resources and resources necessary to meet default service load. OCA at A-2. Exelon continues to advocate the auction model as the most competitive and cost-effective method of procurement to meet default service obligations. Exelon believes that as the AEPS market develops, default service providers may utilize the auction as the preferred method to simultaneously procure both POLR and associated AEPS resources on a bundled basis. However, the Commission should not mandate the use of multi-year contracts in any circumstance.

3. Should the force majeure provisions of Act 213 be integrated into the Default Service procurement process? Should Default Service Providers be required to make force majeure claims in their Default Service implementation filing? What criteria should the Commission consider in evaluating a force majeure claim? How may the Commission resolve a claim of force majeure by an electric generation supplier?

As is evident from the initial comments submitted on March 8, 2006, force majeure is a critically important issue for implementing AEPS that must be addressed

promptly by the Commission. There are many facets associated with this issue that make it complex, and therefore the Commission must take a comprehensive approach in formulating force majeure rules.

As to the timing of force majeure claims, Exelon maintains that during its annual evaluation of the state of the AEPS market, the Commission will have insight as to whether or not a particular AEPS resource (e.g. Tier 1-Non-Solar, Tier 1-Solar, Tier II) is reasonably available at competitive-market-based prices and is best suited to determine whether or not a force majeure condition exists for all participants with AEPS obligations. If the Commission determines that a force majeure condition exists for any or all AEPS resources, then the Commission has the statutory authority under AEPS to preemptively adjust the obligations of that resource on a pro rata basis. This preemptive obligation adjustment will benefit bidders or other suppliers who have the ultimate AEPS obligation and will allow them to plan their procurement strategies accordingly. Also, a unilateral preemptive adjustment levels the playing field for all market participants, EDCs and EGSs alike, and, in some scenarios, precludes the procurement of unreasonably prices resources, thereby benefiting consumers, ultimately.

Moreover, force majeure claims do not necessarily need to be made in a default service implementation filing. Claims for force majeure might not materialize until after the Commission reviews AEPS market conditions and potentially even after default service implementation filings are effective. Therefore, in addition to the preemptive determination described above, the Commission also must permit force majeure claims to be made on a case-by-case basis.

Certain parties make assertions in their initial comments that force majeure should be "skeptically received" (PennFuture Initial Comments at 5) or even go as far as to state that "any argument that compliance was too expensive should be ruled an unjustifiable claim." BP Solar Initial Comments at 3. Exelon disagrees with these comments and argues that, first and foremost, the General Assembly in passing AEPS specifically allowed for force majeure claims. Moreover, there must be an economic threshold related to the procurement of AEPS resources and/or alternative energy credits ("AECs"), which should be considered individually for the two Tier I and Tier II resources EDCs, EGSs and ultimately, retail customers across Pennsylvania should not be forced to pay just any price demanded by sellers for AECs. In the event that prices for AECs reach unreasonably high levels, the Commission must declare force majeure for those resources. As OCA asserts in its comments, when the Commission is considering force majeure claims, it should evaluate both physical and economic availability of the resources. OCA at A-3. Exelon asserts that the General Assembly did not intend for the implementation of AEPS to be compliance at any cost. Some may argue that by setting the penalty price for solar at 'twice the market price', that is exactly what was intended. However, Exelon believes the intent here was to recognize that the $45/MWH penalty threshold for the non-solar resource obligations was not sufficiently high to apply to solar resources because of the higher costs of solar compared to other Tier I resources. The 'twice the market price' threshold was intended to drive solar procurement processes to pay 'reasonably high' prices for solar RECs, but not 'unreasonably high' prices.

In addition to the points raised above, Exelon strongly disagrees with PennFuture's assertion that if a supplier is unable to meet its obligation in one year, they

should be required to make up for those deficient AECs in the next year. PennFuture Initial Comments at 7. Penn Future's position is unreasonable. If a supplier is unable to meet its AEPS obligation and a force majeure is declared and/or the supplier is required to make alternative compliance payments, it is highly unlikely that it would be able to procure enough credits in the next year to make up for this shortage. Moreover, PennFuture's suggestion is inconsistent with Act 213. Act 213 is clear that EDCs have two means of complying with AEPS, either through the procurement of credits and getting cost-recovery or by paying an alternative compliance payment that is not recoverable. Nowhere in the Act is there a requirement to pay the ACP and still have the obligation to procure credits.

It is more tenable to permit the EDC or EGS to have a cure period – a reasonable amount of time, prior to the assessment of penalties, whereby they could meet their entire AEPS obligation for that year. The Commission should consider such a cure period when it develops its force majeure rules. A cure period of one to two years could allow sufficient time to significantly close the compliance resource gap at reasonable prices and actually result in procurement of credits.

4. Given that Act 213 includes a minimum solar photovoltaic requirement as part of Tier I, should these resources be treated differently from other alternative energy resources in terms of procurement and cost recovery?

Many parties expressed concerns regarding the development of the solar market and whether or not the Commission should treat solar AEPS resources differently. Exelon believes that a variety of noteworthy ideas were expressed regarding the treatment of AEPS' solar requirement. For instance, Exelon believes that the concept of a standard solar AEC contract is worth pursuing further. Exelon maintains that a standardized

contract is a competitive method of procurement and therefore, is a suitable means for EDCs and EGSs to obtain solar AECs. Exelon agrees with OSBA that ultimately, the procurement of all default service should be accomplished through a competitive method. Exelon asserts that the standardized solar contract would meet this goal. Exelon encourages the Commission to initiate a stakeholder process requesting input from the industry to develop such an agreement. However, EDCs and EGSs should be permitted to utilize their own form of agreement, if they choose such a method, while a standardized version is being developed.

Exelon also thinks that PennFuture's proposal for a state sanctioned administrator that would be responsible for the procurement of all solar credits to meet solar AEPS obligations in the state has some merit. One major concern raised by PennFuture's plan is if the administrator fails to procure enough AECs to meet the statewide obligation, PennFuture appears to suggest that the obligation would remain with the EDC or EGS. Therefore, the EDC or EGS would be responsible for any penalties if a force majeure was not granted by the Commission.[2] This defeats the purpose of having a centralized method of procurement of solar AECs. In the centralized procurement model, if the state administrator is unable to procure enough solar resources to meet the aggregate statewide AEPS obligation, then a force majeure declaration for solar resources would be the logical outcome. The Pennsylvania Department of Environmental Protection ("DEP") also puts forth innovative ideas regarding solar, including encouraging the Commission to develop a solar program, as well as the expansion of the banking rules for solar credits for up to five years. DEP Initial Comments at 8-9. Exelon agrees that the Commission

[2] Exelon maintains that if a statewide administrator is appointed and is unable to procure a sufficient amount of solar AECs, force majeure should be declared.

should examine forming a solar program in order to encourage investment in this industry. In addition, due to the sharp step change in the number of MWs necessary to meet the solar requirement in years five, ten and fifteen, Exelon agrees with the DEP that the banking rules could be modified for the solar credits to accommodate these five year step changes. Exelon commits to assisting the Commission in this regard.

Exelon does take issue, however, with the concept put forth by BP Solar regarding the determination of the average value of a solar AEC for purposes of determining the level of alternative compliance payments. BP Solar contends that the average value of the solar credit must take into account other factors such as the levelized value of capital rebates received by the solar project owners. BP Solar Initial Comments at 7. Exelon asserts that the average market price for solar credits is what should be relied upon to calculate any alternative compliance payments, not an adjustment to the market price as suggested by BP Solar. Section 3(f)(4) of Act 213 states specifically that

> [t]he alternative compliance payment for the solar photovoltaic share shall be 200% of the average market value of solar renewable energy credits sold during the reporting period within the service region of the regional transmission organization.

Nowhere in Act 213 is there a reference to an adjusted market-value, only to the average value of the solar AECs sold. Any adjustment would be inconsistent with the Act and lead to uncertainty and the potential for any party to claim that the market price should be adjusted up or down for one reason or another. The Commission must disregard this concept and determine that the market price is just that, the price paid by the market. There is of course, as Exelon discusses above, an economic threshold for force majeure and Exelon is in no way suggesting that unreasonably high prices for solar credits should be permitted.

Exelon also believes that although it is not necessary for the Commission to treat solar procurement and cost-recovery differently from other Tier I resources, it does believe that additional effort will be required to develop solar resources. This is due to several distinguishing characteristics of solar resources, including the small scale of the projects and the impact of consumers in the development decision process because of the retail price driver and the use of consumer's property. In addition, consumer education, communication and targeted promotions may be necessary to develop the solar market. Such strategies will increase the consumers' awareness and level of knowledge, which is not as high when compared to the development community's knowledge and awareness of wind and other Tier I products. Exelon maintains that this outreach may be crucial to the development of solar resources and therefore, must be recoverable under Act 213 as costs of procurement.

5. Should the Commission integrate the costs determined through a §1307 process for alternative energy resources with the energy costs identified through the Default Service Provider regulations? How could these costs be blended into the Default Service Providers Tariff rate schedules?

Exelon reiterates its position that the Commission could integrate AEPS and default service energy costs through the POLR regulations but ultimately, should permit costs associated with both default service and alternative energy procurement to be fully reconcilable through a §1307 process. As set forth by Citizens' and Wellsboro, a single, reconcilable charge will allow EDCs the option to procure for their default service customers both traditional generation and AEPS resources through a full requirements contract that places the obligation on the wholesale supplier to confirm AEPS compliance. Citizens' and Wellsboro Initial Comments at 5.

The position advanced by Dominion Retail that the Commission should require EDCs to procure AEPS requirements for all customers and then charge all customers accordingly, must be rejected. Dominion Retail Initial Comments at 6. The Act is clear that the obligation to procure AECs rests upon the EDC or the EGS serving the load. Specifically, Section 3(a)(1) of AEPS states:

> From the effective date of this Act through and including the 15th year after enactment of this act, and each year thereafter, the electric energy sold by and electric distribution company or electric generation supplier to retail electric customers in this Commonwealth shall be comprised of electricity generated from alternative energy sources, and in percentage amounts as described in Subsections (B) and (C).

The General Assembly clearly and unequivocally placed the AEPS obligation on both on EDCs and EGSs and the Commission cannot promulgate any rules inconsistent with this directive.

6. **May a Default Service Provider enter into a long-term fixed price contract for the energy supplies produced by coal gasification based generation if the resulting energy costs reflected in the tariff rate schedules are limited to the prevailing market prices determined through a competitive procurement process approved by the Commission?**

Various parties argue that the "prevailing market price" standard is not met if a multi-year contract is entered into by a supplier to purchase energy supplies or credits produced by any AEPS resource, including coal gasification. Exelon asserts that if a default service provider chooses to procure alternative energy or credits alone through multi-year contracts and the price is shown to be reasonable based on prevailing market price of the product at the time the contract is negotiated, the Commission should find that the price is consistent with the "prevailing market price" standard and guarantee full cost recovery. Coal gasification-based generation should be treated in a like-manner and should not be distinguished from other alternative energy supply resources in the Tier. As OSBA states

in its initial comments, the Commission should not prohibit nor mandate multi-year agreements. Suppliers also should be able to place their AEPS obligations on the winning bidder in an auction or other competitive method of procurement if they so choose. This method would be consistent with the prevailing market price standard as well.

7. **Should the Commission delay the promulgation of default service regulations until a time nearer the end of the transition period, as suggested by the Independent Regulatory Review Commission in its comments on the proposed regulations?**

Exelon strongly supports the prompt promulgation of final default service regulations. The transition periods of some EDCs have already ended and some are set to expire in the near future. The Commission must issue its POLR regulations so that EDCs and all suppliers can plan accordingly. Although delay is supported by some parties, namely, UGI, Duquesne and Direct Energy, it is unclear from their comments what purpose such a delay would serve. Exelon submits a delay would only create uncertainty and lead to piecemeal rules. The Commission must rely on the well-developed record in the POLR rulemaking docket and issue final default service regulations as soon as possible.

8. **Does the Commission need to make any revisions to its proposed default service regulations to reflect the mandates of the Energy Policy Act of 2005?**

The Energy Policy Act of 2005 ("EPAct 2005") requires certain issues to be considered by state commissions within specific time frames. Exelon supports the submission of OCA and agrees that the Pennsylvania Commission has already met its EPAct 2005 obligations. OCA Initial Comments at A –9. The default service regulations as currently drafted do not have to be altered in order for the Commission to be compliant with the directives of EPAct 2005.

III. Miscellaneous Issues

Exelon also would like to reply to an issue raised by the Industrial Energy Consumers of Pennsylvania, et al. ("IECPA") in their initial comments. IECPA proposes that the Commission permit customers who create and register their own AECs to receive an exemption from the flow-through of costs related to the procurement of AECs by an EDC. IECPA Initial Comments at 20-21. Exelon believes that such an exemption would be administratively burdensome and unnecessary. Creating a self-exemption tracking system would be both duplicative and complex. In addition, the costs to administer a "self-exemption" program would likely be more than any benefits generated by the program itself. The Commission has appropriately identified GATs as the program administrator. Exelon submits that customers who create their own AECs should register them on GATs and sell them in the market once a trading platform is established.

IV. Conclusion

Exelon thanks the Commission for the opportunity to file reply comments on these important issues. Exelon looks forward to working with the Commission in the timely implementation of both AEPS and its final POLR regulations.

Respectfully submitted,

/s/ Adrian D. Newall_

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