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April 7, 2006

James J. McNulty
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Re: Rulemaking Re Electric Distribution Companies' Obligation to Serve Retail Customers at the Conclusion of the Transition Period Pursuant to 66 Pa. C.S. §2807(e)(2)
Docket No. L-00040169

Implementation of the Alternative Energy Portfolio Standards Act of 2004
Docket No. M-00051865

Dear Secretary McNulty:

Enclosed for filing are an original and fifteen (15) copies of the Reply Comments of the Office of Consumer Advocate in Response to the Commission Secretarial Letter of February 8, 2006, in the above-referenced proceeding.

Copies have been served as required on the parties of record as indicated on the enclosed Certificate of Service.

Sincerely,

Tanya J. McCloskey
Senior Assistant Consumer Advocate

Enclosure
cc: Chairman Wendell F. Holland
Vice Chairman James H. Cawley
Commissioner Kim Pizzingrilli
Commissioner Bill Shane
Commissioner Terrance J. Fitzpatrick
00088278.DOC

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY COMMENTS OF THE OFFICE OF CONSUMER ADVOCATE IN RESPONSE TO THE COMMISSION SECRETARIAL LETTER OF FEBRUARY 8, 2006

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Dated: April 7, 2006

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I. INTRODUCTION

On March 8, 2006, Comments were filed by numerous parties in response to the Commission's Secretarial Letter of February 8, 2006 and its Order of November 18, 2005. In its Order and Secretarial Letter, the Commission sought comments on three general areas: (1) the interplay between the requirements of the Alternative Energy Portfolio Standards Act (AEPS) and default service; (2) the timing of the completion of the default service rulemaking; and (3) the impact of the Energy Policy Act of 2005 (EPAct 2005) on the default service rulemaking. As to the interplay of the Alternative Energy Portfolio Standards and default service, the Commission raised specific questions as to the use of long term contracts to support alternative energy resource development and the proper interpretation of the phrase "prevailing market prices" if such long term contracts are employed. At least 27 parties filed Comments in response to the Commission's request. In general, the parties filing comments included the electric distribution utilities (EDCs), the customer representatives and statutory parties, the electric generation suppliers (EGSs), and developers (and those working with developers) of alternative energy resources.

While the list of those filing comments may seem broad and diverse, there was significant agreement on some key issues. Of particular note to the questions presented by the Commission regarding AEPS, there was agreement among all but the EGS parties that long term contracts to support alternative energy resources were permitted under the Electric Choice Act and should be allowed. See, *e.g.*, PPL Comments at 4; Duquesne Comments at 10; IECPA Comments at 12; US Steel Comments at 3; OSBA Comments at 3; PennFuture Comments at 2-4; and DEP

Comments at 2. In addition, there was also substantial agreement that long term contracts would be needed to develop the alternative resources called for by the AEPS Act. See, *e.g.*, PPM Energy Comments at 3; PV Now Comments at 2; US Windforce Comments at 1-2; BP Solar Comments at 2; DTE Energy Comments at 2; PennFuture Comments at 3; and DEP Comments at 2. As the developer of the projects commented, long term contracts are needed to provide the certainty for financing and to ensure the lowest cost for the alternative resources. See, *e.g.*, PPM Energy Comments at 3; PV Now Comments at 2; US Windforce Comments at 1-2; BP Solar Comments at 2; and DTE Energy Comments at 2.

The recognition that long-term contracts will be needed for a portion of default supply dovetails well with another key point the OCA has made consistently throughout the Commission's POLR proceeding, *i.e.,* that the best approach for acquiring default supply is for default service providers to competitively procure a portfolio of resources, consisting of resources purchased under contracts of varying lengths, a diversity of fuel types, and including both supply-side and demand-side resources. Numerous commenters also addressed the need for a balanced portfolio of procurements and purchases, including the contracts and purchases needed for AEPS. See, e.g., DTE Energy Comments at 4; Conservation Services Group Comments at 2; IECPA, *et al.* Comments at 13; and PPL Comments at 4-5. Conservation Services Group (CSG) identified the key benefits of this approach as follows:

> CSG urges the PUC to give Default Service Providers the tools to adopt a comprehensive portfolio management strategy including an appropriate balance of long term contracts, short term contracts and current year contracts. Combining the security of long term contracts with the competitive price advantage of short term and current year

> contracts results in a comprehensive portfolio that provides the following: hedging value to protect consumers; due diligence of price discovery; and access to markets that increases generator confidence.

Conservation Services Group Comments at 2. The OCA submits that a portfolio approach can best provide reliable service at reasonable and relatively stable rates.

Finally, there was substantial agreement among the commenters that final regulations should be issued without further delay. See, OSBA Comments at 9-10; PennFuture Comments at 10; US Steel Comments at 4; IECPA Comments at 2; PPL Comments at 13; Exelon Comments at 11; FirstEnergy Comments at 5-6. As the OCA discussed in its Supplemental Comments of March 8, 2006, EDCs need to begin planning and taking actions now to acquire a reasonable portfolio of resources, even if their obligation does not begin until 2010 or 2011. EDCs should be taking advantage of market opportunities that are presented as early as possible. PPL echoed this point when it stated:

> Promulgating final regulations well before compliance is required may encourage development of the competitive market and enable EDCs to begin developing comprehensive and cost-effective compliance strategies.

PPL Comments at 13. The need to begin planning and acquiring contracts now for alternative energy resources may be especially acute as many alternative resources have long development schedules. Additionally, alternative energy projects may face development hurdles as new technology can delay projects. PennFuture Comments at 4-5. An earlier start to the process will benefit developers, EDCs and ratepayers.

The OCA strongly urges the Commission to complete this rulemaking as expeditiously as possible. The Comments have made clear that compliance with the Alternative Energy Portfolio Standards Act can be integrated into the default service framework through the use of a portfolio of resources of varying contract lengths, fuel types, and product types. The Comments have also made clear that the use of long term contracts for a component of these purchases is consistent with the Electric Choice Act and will allow for the development of the alternative resources needed to meet the requirements of the Act. In the end, the OCA submits that establishing a framework that requires the provision of reliable service at reasonable, affordable and stable prices to consumers is of critical importance to the Commonwealth. Default service regulations that allow for the development of resources needed to provide reliable service as well as resources needed to comply with the Alternative Energy Portfolio Standards Act at reasonable prices should be implemented.

II. REPLY COMMENTS

A. The Use Of Long Term Contracts By Default Service Providers

1. Long Term Contracts May Be Necessary To Meet The Requirements Of AEPS.

Of the numerous questions raised by the Commission in the February 8 Secretarial Letter, one which the OCA regards as key is, "Do prevailing market conditions require long-term contracts to initiate development of alternative energy resources?" The OCA has consistently been of the view that if alternative energy projects are to receive adequate financing, it will require that they be able to enter long-term contracts for the sale of their energy and credits. On the basis of the comments received by the Commission in response to this question, this view is shared by many commenters. See, *e.g.*, PPM Energy Comments at 3; PV NOW Comments at 2; US Windforce Comments at 1-2; PennFuture Comments at 3; DTE Energy Comments at 2; PPL Comments at 4; Duquesne Comments at 5; IECPA et al. Comments at 12; and DEP Comments at 2.

The developers of alternative projects, in particular, spoke to the need for long term contracts to provide certainty for financing projects and to ensure the lowest cost for alternative energy resources. See, *e.g.*, PPM Energy Comments at 3; PV NOW Comments at 2; US Windforce Comments at 1-2; and DTE Energy Comments at 2. The Comments of US Windforce captured the essence of these points as follows:

> [C]urrent market conditions do require utilities to be able to enter into long-term contracts in order to initiate the development of alternative energy projects, and more specifically in our case, wind power generation projects. Without long-term commitments for the power offtake, the necessary capital for project development simply isn't

> available, or at least isn't affordable, because the risks to the equity investor are significantly higher. Investors usually are not willing to make the necessary capital investment on a merchant project, meaning building a project where prices received for the energy and green attributes are realized through the spot or short term market.
>
> * * *
>
> If an EGS or EDC is only able to procure the energy/attributes under short term contracts, the equity investors will have to be willing to invest in merchant projects or other credit worthy wholesale marketers will have to take the merchant risk (be willing to step up to offer a project owner long-term contracts), or else the projects will not get built. If the projects are not built, the project development capital will wither. If this occurs, there is a reasonable probability the mandated AEPS requirements will outstrip available supply of alternative energy and significantly drive up the price of energy and attributes available to the end user. This will serve to both defeat the purpose of the AEPS and lead to price volatility for energy and attributes.

US Windforce Comments at 1-2.

The use of long term contracts for alternative energy resources by a default service provider as part of a portfolio of resources to meet its load obligations will spur the development of alternative energy resources allowing for cost-effective compliance with the AEPS Act. The OCA submits that the Commission should allow for long term contracts as one of the purchases a default service provider may make to meet its obligations under the AEPS Act as well as its obligations under the Electric Choice Act.

2. The Use Of Long Term Contracting Is Consistent With The Electric Choice Act.

Some EGSs have suggested that the use of long term contracts would be inconsistent with the "prevailing market prices" standard contained in the Electric Choice Act. See, *e.g.*, Constellation Comments at 6-7. The OCA strongly disagrees. As the OCA has stated, the term "prevailing market prices" as used in the Electric Choice Act in Section 2807(e)(3) clearly contemplates the acquisition of a variety of products and services by the default service provider. Prevailing market prices are the prices for the products that are acquired from the market to meet the default service obligation. PPL explained in its Comments the variety of products available:

> PPL Electric believes that "prevailing market price" does not necessarily equate to a short-term or spot-market price. The electricity market is actually made up of various markets and products; each characterized by the nature of the service provided (i.e. firm load, load following, customer segment, etc.), the term of service (i.e., daily, monthly, annual, multi-year, etc.), the pricing of the service (i.e., spot-market, day-ahead market, indexed price, fixed price, etc.), and other attributes (i.e., with or without associated alternative energy credits, with or without capacity, with or without ancillary services, etc.).

PPL Comments at 5.

PennFuture, in recognizing the need for long term contracts, also recognized that the "prevailing market prices" will reflect all of these resources. PennFuture explained as follows in its comments:

> To build a power plant of any sort in the current period, a long-term power purchase agreement must be in place. The term "prevailing market prices" in the electricity competition and customer choice Act speaks to the time of the price and not the length of the contract or type of product. A prevailing market price is a price that is

> available now for the purchase of a product. A prevailing market price could be for a spot purchase now, or it could be for a 6-month purchase made now, or a 2-year purchase made now, or a much longer purchase such as a 10 to 20 year purchase made now.

PennFuture Comments at 2. See also, Duquesne Light Comments at 4 (The statutory provision of "prevailing market prices" should not be interpreted to limit default service prices to short-term prices established by auctions).

The OCA submits that the statutory term "prevailing market prices" does not preclude the use of long term contracts by a default service provider. In fact, the use of the plural term of "prices" clearly contemplates the acquisition of a variety of products. Long term contracts should be considered as one of those products.

3. Conclusion

The OCA submits that the Commission's default service regulations should call for a default service implementation plan that includes a portfolio of resources, including long term resources that are needed to meet the default service obligation. The blended price of these resource acquisitions will represent the default service price for customers. Through this approach, the development of alternative resources will be stimulated so that the requirements of the AEPS Act can be met in the least costly manner, and reasonable, stable default service rates can be developed. The Commission should timely issue regulations allowing for a portfolio of purchases that can include long term contracts.

B. The Use Of Long Term Contracts Does Not Require Irrevocable Orders Or Other Extraordinary Ratemaking Measures.

With the recognition that long-term contracts may be needed to support alternative energy projects and, in turn, to comply with the AEPS, has come the

suggestion by some EDCs that recovery of alternative energy purchase costs should occur through a cost recovery mechanism, supported by irrevocable Commission orders, similar to the Qualified Rate Orders authorized under Section 2812 of the Public Utility Code, 66 Pa.C.S. § 2812. UGI-Electric Comments at 3; EAP Comments at 4. The EDCs also urge that the Commission avoid any "after-the fact" prudence review. FirstEnergy Comments at 3; EAP Comments at 4; Duquesne Comments at 11. The concern expressed is that, if at some point in the future the amounts paid under the contract are found to be "above-market," recovery of the above-market portion will be disallowed and become a "stranded" cost to the EDC.

The OCA understands the EDCs' concern and agrees that we must avoid creating stranded cost when entering into long term contracts. The OCA submits, however, that the EDCs' concern may be misplaced given the statutory standards of the AEPS, the use of competitive procurement processes, the review of the default service implementation plan, and the fact that long term contracts will only be one component of a comprehensive portfolio of resources.

As an initial matter, the call for the use of irrevocable orders such as a Qualified Rate Order, cannot be adopted in the absence of explicit legislative authority. The extraordinary measure of allowing the Commission to issue an irrevocable order was added to the Public Utility Code at Section 2812 only as a means of providing for stranded cost recovery through specific types of transition bonds. 66 Pa.C.S. § 2812. The OCA submits that the Commission can only issue such irrevocable orders pursuant to a direct and specific grant of statutory authority as was given in the case of the Qualified Rate Orders authorized under Section 2812 of the Code. Inasmuch as there is

no statutory grant of power to issue irrevocable orders under AEPS, the OCA submits that any use of such orders in the implementation of the AEPS Act would be unlawful. Use of such orders, however, should not be necessary.

In the OCA's view, the combination of the Commission's review and monitoring of an EDC's default service implementation plan, the procurement of resources through a competitive process, and the language on cost recovery that is already contained in Section 1648.3(a)(3) of the AEPS, is sufficient assurance of cost recovery for the component of the portfolio of resources that will be under long term contracts. 73 P.S. §1648.3(a)(3). As the Commission and EDCs are aware, in the past, prudence reviews have resulted in adjustments primarily where there has been no "up-front" Commission involvement in a course of action taken by a utility. The situations where prudence was raised also did not involve acquisitions of electricity through a competitive procurement process. Here, the Commission's proposed default service regulations require EDCs to submit for approval their implementation plans for acquiring default supply and to use competitive processes for procuring those resources. In addition, the proposed regulations provide for Commission verification of compliance with the plan after acquisition of resources is made. Since the default service rates reflect the blended price of all the competitive acquisitions made in furtherance of the plan over an extended period of time, the Commission should not look to individual contract price comparisons at different points in time in assessing the resource plan.

Further, the language of Section 1648.3(a)(3) of the AEPS makes it clear that the costs of alternative energy or alternative energy credit purchases are to be recovered "on a full and current basis." 73 P.S. § 1648.3(a)(3)(Emphasis added). This

cost recovery provision, together with the up-front approvals by the Commission and the competitive process, should mitigate concerns about after-the fact prudence reviews and adjustments by the Commission.

C. Both EDCs and EGSs Should Satisfy The Requirements Of The Act.

Strategic and Dominion propose that the electric distribution company (EDC) be required to purchase alternative energy credits for the load of all EDC customers, both shopping and non-shopping, rather than having the electric generation suppliers (EGSs) comply with the requirements of AEPS for customers who buy their power from an EGS. Strategic Comments at 3; Dominion Comments at 3. Strategic and Dominion then propose that the cost of this compliance be recovered from all customers through a separate, non-bypassable line item charge. Strategic Comments at 3; Dominion Comments at 3. The OCA submits, however, that such a proposal does not follow the plain language of the statute.

Compliance with the AEPS is required of all electric distribution companies and all electric generation suppliers. 73 P.S. § 1648.3(a)(1). Section 1648.3(a)(1) provides:

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

73 P.S. §1648.3(a)(1). Section 1648.3(a)(2) then states:

> Electric distribution companies and electric generation suppliers shall satisfy both requirements set forth in subsections (b) and (c), provided, however, that an electric

> distribution company or electric generation supplier shall be excused from its obligations under this section to the extent that the commission determines that a force majeure exists.

73 P.S. §1648.3(a)(2). It is clear from the language of the AEPS Act that the electric generation suppliers are to satisfy the requirements of the Act for their load.

The OCA would also note that under the proposal of Strategic and Dominion, an EDC could only use separately traded credits, *i.e.*, credit purchases separate from the energy, to satisfy the Act's requirements for the EGS load since the EGS is already meeting the energy requirements of the load. Since the market for separately traded credits has not yet been established, it is difficult to assess the impact of this structure. It is possible that limiting the compliance methodology to a purchase of separate credits could increase the cost of compliance.

The proposal to have the EDC purchase credits for all customers and then pass through the costs as a separate, non-bypassable line item does not appear to be consistent with the structure of the Act. The OCA submits that this approach should not be pursued at this time.

D. Direct Energy's Arguments In Support Of Its Monthly Pricing Proposal Are Flawed.

Direct Energy focused its comments on its proposed default service structure of monthly pricing for residential customers. Direct Energy did not address the requirements of AEPS. The OCA has responded to Direct Energy's arguments in its Reply Comments of June 27, 2005. OCA Reply Comments of June 27, 2005 at 3-5; 8-11. As set forth therein, it is the OCA's position that volatile pricing for residential

customers is not an appropriate default service design. Default service should provide residential customers with reasonable, stable and affordable rates.

Direct Energy makes two arguments in its Comments in support of its monthly pricing proposal that require a response. First, Direct Energy argues that POLR rates that are changed monthly to reflect indexed prices will produce savings as compared to longer term contracts for POLR service. Second, Direct Energy points to the increases in gasoline prices for support of its proposition that residential customers can tolerate variable prices and respond to them. Both arguments are flawed.

Direct Energy bases its assertion that monthly pricing will produce savings, in part, on a study performed by Direct Energy of the monthly spot market prices in PECO Electric Company's service territory compared to the POLR rate in effect from 2000 through 2004. Direct Energy Comments at 9-10. From this comparison, Direct Energy asserts that PECO residential customers would have realized savings of as much as $171.6 million over a 4-year period if they had been subject to monthly average pricing. Direct Energy Comments at 9-10. The OCA submits that Direct Energy's study is seriously flawed.

The Direct Energy study does not present a comparison of monthly pricing to a competitively procured portfolio of default service resources. In its study, Direct Energy compared the monthly costs of energy at PJM's spot market prices to PECO's administratively established POLR rate. The PECO POLR rate during this time period, however, was not a "market" rate as Direct Energy implies. The PECO POLR rate being compared to PJM monthly prices in the Direct Energy study was administratively set by taking PECO's embedded costs, and subtracting out costs related to distribution,

transmission, and stranded cost recovery, as determined during the PECO restructuring proceeding. The POLR rates established at the time of restructuring were intentionally set at a level that was expected to be well above wholesale market prices in order to permit "headroom" for competitive marketers. Application of PECO Energy Co. for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code, et al., Docket No. R-00973953, 1998 Pa. PUC LEXIS 116 at *10, 29 (1998). Comparing a "market price" with an administrative rate intentionally set high to allow competition is no comparison at all.

Even if stable POLR rates do not provide absolute dollar savings in the long run over the cumulative cost of paying volatile spot market prices, residential customers require stable rates for budgeting and affordability purposes. Most residential customers do not pay their monthly electric bills "in the long run." Rather, they need to pay their bill in full each month. The monthly income for middle and lower income families does not change based on the short term wholesale market price of energy. The usage of households also cannot be easily shifted from month to month based on energy prices since most of it is non-discretionary, essential usage. The OCA submits that volatile, monthly pricing for residential customers is not a reasonable default service approach.

Direct Energy also tries to use an example of increasing gasoline prices to demonstrate that residential customers can modify their behavior in response to volatile prices. Direct Energy argues that in the fall of 2005, consumers responded to increased gasoline prices by altering their driving behavior, resulting in dramatic decreases in prices. Direct Energy Comments at 8-9. The OCA submits that Direct Energy's

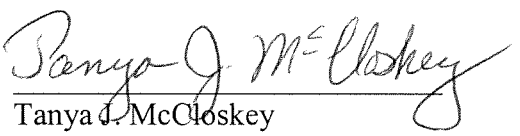
argument is flawed in two respects. First, electric service is an essential service. Doing without electricity, even for a short term, can raise serious health and safety concerns. You can take a bus to work, but you still need to turn the lights on when you get home. Second, the current price of gasoline belies this argument. Gasoline prices have continued to increase despite Direct Energy's assertion of a customer response to the high prices.

The OCA submits that residential customers should not be placed on volatile rates, with only the vague hope that stable service will be offered by retail competitors, as Direct Energy asserts. Electric service is an essential service, necessary for the health and safety of the public. Reasonable, stable and affordable rates should be the goal of the design of any default service plan.

III. CONCLUSION

The structure of default service and the process to procure supply are critical issues for all Pennsylvania consumers. The Commission should move forward with this rulemaking in an expeditious manner and in a manner that will integrate the requirements of the Alternative Energy Portfolio Standards Act and will provide reasonable, stable and affordable default service rates for consumers.

Respectfully Submitted,



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DATED: April 7, 2006
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CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of document, Reply Comments of the Office of Consumer Advocate in Response to the Commission Secretarial Letter of February 8, 2006, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 7th day of April 2006.

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