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RECEIVED

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James J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

RE: Implementation of the Alternative Energy
Portfolio Standards Act of 2004
Docket No. L-00060180

Dear Secretary McNulty:

Enclosed please find the original and fifteen (15) copies of the Comments of the
Office of Consumer Advocate, in the above-referenced proceeding.

Sincerely,

David T. Evrard
Assistant Consumer Advocate
PA Attorney I.D. # 33870

Enclosure

cc: Shane Rooney, Law Bureau
Douglas L. Biden, Electric Power Generation Association

00095942

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of the Alternative : Docket No. L-00060180
Energy Portfolio Standards Act of 2004 :

COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE
IN THE REOPENED COMMENT PERIOD

I. INTRODUCTION

The Public Utility Commission (Commission) opened the above-captioned rulemaking docket by way of an Order issued July 20, 2006. The Order invited public comment on the rules proposed therein and directed that comments should be submitted within sixty (60) days of the publication of the Order in the *Pennsylvania Bulletin*. Publication occurred on October 14, 2006 and comments were due by December 13, 2006. The OCA filed comments on December 13, addressing issues surrounding force majeure, alternative compliance payments, program funding, credit banking, the harmonization of the proposed regulations with the Commission's default service regulations, and the use of credits to support excess sales of alternative energy.

Subsequently, the Pennsylvania General Assembly began to consider possible amendments to the underlying statute, the Alternative Energy Portfolio Standards Act (AEPS Act), 73 P.S. §§ 1648.1 *et seq.*, and the Commission withheld moving to final rulemaking in this docket while the General Assembly deliberated. Those deliberations culminated in the passage

of a new act, Act 35 of 2007, which amended the AEPS Act in a number of respects. Act 35 was signed by the Governor on July 17, 2007 and took effect immediately.

In view of the passage of Act 35, the Commission, on September 13, 2007, issued a Secretarial Letter that referenced the passage of the Act and stated that it was appropriate to reopen the public comment period in this docket in order to address how the amendments made by Act 35 should be reflected in the Commission's final form rule. The Commission emphasized that the comments submitted in this reopened comment period were to be limited to discussing the effect of the Act 35 amendments.

The Office of Consumer Advocate (OCA) has reviewed Act 35, assessed the impact of its provisions on the regulations proposed in this docket, and offers in the comments below, its view of the changes necessary to the regulations. The OCA has organized its comments by first identifying the section of Act 35 that is being addressed and summarizing its provisions, then identifying the section of the proposed regulations that is impacted, and finally, offering its comment on how the regulations should be modified. It should be noted that in identifying the various sections of the proposed regulations, the OCA has adopted the numbering sequence identified in the Notice of Correction published in the Pennsylvania Bulletin on October 21, 2006. That Notice identified the numbering sequence for these regulations as §§ 75.61- 75.72.

II. COMMENTS ON SPECIFIC ACT 35 AMENDMENTS

1. Act 35, Section 1 – amends the definition of “customer-generator” in 73 P.S. § 1648.2.

Proposed Regulation Affected -- None

OCA Comment: By way of a Secretarial Letter issued October 4, 2007, the Commission has indicated that the effect of this change to the AEPS Act will be addressed in a separate docket(s): M-00051865, L-00050174 and L-00050175.

2. Act 35, Section 1 – amends definition of “force majeure” in 73 P.S. § 1648.2

Proposed Regulation Affected -- Section 75.67

OCA Comment: As part of the definition of “force majeure,” the AEPS Act originally provided that for any particular reporting period, the Commission, upon its own initiative or upon request by an EDC or EGS, may determine whether alternative energy resources are reasonably available in sufficient quantities in the marketplace to enable EDCs and EGSs to meet their alternative energy portfolio obligation for that reporting period. If the Commission determines that sufficient quantities are not available, it is authorized to modify the obligation or recommend such modification to the General Assembly.

Act 35 amended this provision to establish certain criteria the Commission must consider in making the determination as to whether sufficient quantities of alternative energy resources are reasonably available in the marketplace. A principal criterion is whether EDCs and EGSs have made a “good faith effort” to acquire sufficient alternative energy to meet their AEPS obligations. In this regard, the Commission is to look to whether EDCs banked alternative energy credits during their transition period, whether EDCs and EGSs have sought credits through competitive solicitations and whether they have sought to procure alternative energy or credits through long-term contracts.

The Commission is also directed by Act 35 to assess the availability of credits in PJM’s Generation Attribute Tracking System (GATS) as well as the availability of credits throughout the PJM region.

Act 35 further amends the definition of “force majeure” to make clear that any modifications made to AEPS obligations under a force majeure declaration for a given reporting period are to apply to that period only. The Commission is specifically authorized, but not mandated, to require additional alternative energy requirements in future years equal to the reduction made under a force majeure declaration, provided the Commission determines sufficient alternative energy credits are available.

Finally, Act 35 authorizes the Commission to require that solicitations for alternative energy credits be made before an EDC or EGS can request a force majeure determination.

The OCA submits that Section 75.67 of the proposed regulations should be modified to incorporate certain of the provisions added by Act 35. In particular, Section 75.67(f), which, as proposed, requires EDCs and EGSs to provide the Commission information necessary to allow it to render a force majeure determination, should be expanded to require EDCs to indicate the extent to which credits were banked during their transition period, and to require EDCs and EGSs to report their use of competitive solicitations and long-term contracts for acquiring alternative energy or alternative energy credits.

Proposed section 75.67(b), which provides that the Commission may declare force majeure if there are insufficient credits available in a given reporting year to satisfy the aggregate Tier I, Tier II and solar photovoltaic requirements, should be amended to include Act 35’s requirements that the Commission assess the availability of credits in the PJM GATS and the availability of credits throughout the PJM region.

In addition, Section 75.67 should be amended to add a provision setting forth the conditions under which the Commission may require EDCs and EGSs to conduct competitive

solicitations for alternative energy credits as a prerequisite to requesting a force majeure determination.

3. Act 35, Section 1 – amends the definition of “net metering” in 73 P.S. § 1648.2

Proposed Regulation Affected -- None

OCA Comment: By way of a Secretarial Letter issued October 4, 2007, the Commission has indicated that the effect of this change to the AEPS Act will be addressed in a separate docket(s): M-00051865, L-00050174 and L-00050175.

4. Act 35, Section 2 – amends requirements related to the solar photovoltaic share obligation under 73 P.S. § 1648.3(b).

Proposed Regulation Affected -- Section 75.61(b)

OCA Comment: Prior to enactment of Act 35, the AEPS Act provided for the solar photovoltaic share of Tier I alternative energy requirements to be increased in four stages over 15 years. The first stage encompassed years 1 through 4, the second stage, years 5 through 9, the third stage, years 10 through 14, and the fourth stage, year 15 and beyond. Act 35 eliminated the four stages and in its place provided specific year-by-year increases in the thresholds for the solar photovoltaic share.

Proposed Section 75.61(b) of the regulations must be amended to reflect the new year-by-year solar photovoltaic thresholds and the amended language related to the solar photovoltaic share.

5. Act 35, Section 2 – amends the provision that sets forth the alternative compliance payment to be made for failure to attain the solar photovoltaic share obligation, 73 P.S. § 1648.3(f).

Proposed Regulation Affected -- Section 75.66(b)(1)

OCA Comment: The AEPS Act originally provided that the alternative compliance payment that must be made for failure to meet the solar photovoltaic share requirement in a given reporting period is to be 200% of the average market value of solar renewable energy credits sold during that reporting period in the service territory of the Regional Transmission Organization (RTO) in which the noncompliance occurred.

Act 35 amended this provision to specify that in determining the average market value of solar renewable energy credits sold in an RTO service area, the Commission is to include in the calculation, where applicable, any levelized up-front rebates received by sellers of these credits in other jurisdictions within the PJM region.

This addition to the calculation of the alternative compliance payment for the solar photovoltaic share should be recognized in proposed Section 75.66(b)(1) of the regulations, the section that currently specifies the solar photovoltaic alternative compliance payment.

6. Act 35, Section 3 – amends the provision that governs which sources of alternative energy or alternative energy credits can be used to satisfy the Act’s requirements, 73 P.S. § 1648.4.

Proposed Regulation Affected -- Sections 75.63(d) and 75.64(c)

OCA Comment: As originally enacted, the AEPS Act required that alternative energy that is sold in another state and is used to satisfy the alternative energy portfolio requirements of the other state may not be used to satisfy Pennsylvania’s requirements. Act 35 added a further requirement that EDCs and EGSs may not use alternative energy credits that have already been purchased by individuals, businesses or government bodies, that do not have a compliance requirement under the Act *unless* those credits have been sold to the EDC or EGS.

Proposed Section 75.64(c) of the regulations provides for the prohibition on using alternative energy credits that have already been used to satisfy another state’s alternative energy

portfolio requirements. It should be modified to add the prohibition on using credits that have been purchased by individuals, businesses or government bodies that do not have a compliance obligation, unless the credits have been sold to an EDC or EGS.

With respect to the question of which alternative energy credits can be used to satisfy the AEPS Act requirements, Act 35 amended the law to provide that “energy derived from alternative energy sources located outside the geographical boundaries of this Commonwealth but within the service territory of a regional transmission organization that manages the transmission system in any part of this Commonwealth shall only be eligible to meet the compliance requirements of electric distribution companies or electric generation suppliers located within the service territory of the same regional transmission organization.” This requirement is already reflected in Section 75.63(d).

Act 35 added a further clarification with respect to alternative energy sources located within PJM. Specifically, it provides that sources within PJM can be used to satisfy the compliance obligations of *all* Pennsylvania EDCs and EGSs. Thus EDCs whose transmission facilities are under the control of RTOs other than PJM will be permitted to count alternative energy generated within PJM toward their compliance requirements. Under the current language of proposed Section 75.63(d) this would not be permitted. Therefore, Section 75.63(d) should be modified to provide for the clarification related to alternative energy sources located within PJM.

7. Act 35, Section 3 – amends the provision of the AEPS Act that provides for the development of net metering interconnection rules for customer-generators to require that net metered customer-generators are to be compensated for excess generation on an annual basis “at the full retail value for all energy produced.” 73 P.S. § 1648.5.

Proposed Regulation Affected -- None

OCA Comment: By way of a Secretarial Letter issued October 4, 2007, the Commission has indicated that the effect of this change to the AEPS Act will be addressed in a separate docket(s): M-00051865, L-00050174 and L-00050175.

III. CONCLUSION

The OCA commends the Commission for reopening public comment in this docket in light of the passage of Act 35 and appreciates the opportunity to offer its comments. The OCA will continue to work with the Commission and all interested parties to arrive at a set of regulations that carries out the intent of the AEPS Act as amended by Act 35.

Respectfully Submitted,



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Dated: October 11, 2007

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