Constellation
An Exelon Company

March 1, 2021

Via Electronic Filing

Pennsylvania Public Utility Commission
Rosemary Chiavetta, Secretary
Keystone Building
400 North Street
Harrisburg, PA 17120

Re: In the Matter of Proposed Implementation of Act 114 of 2020 - Docket No. M-2020-3023323; Comments of Constellation NewEnergy, Inc. and Exelon Generation Company, LLC

Dear Secretary Chiavetta:

Pursuant to Ordering Paragraphs (1) and (4) of the Commission's Tentative Implementation Order (the "TIO"), published in the *Pennsylvania Bulletin* on January 30, 2021, Constellation NewEnergy, Inc. ("Constellation") and Exelon Generation Company, LLC ("ExGen") (together, "Constellation/ExGen") offer the following comments regarding the Commission's interpretation and proposed implementation of Act 114 of 2020.

I. Introduction and Background

ExGen and Constellation are both wholly owned subsidiaries of Exelon Corporation, a holding company headquartered at 10 South Dearborn Street, Chicago, Illinois, with operations and business activities in 48 states, the District of Columbia and Canada. Among its business activities, ExGen participates in auctions held by electric distribution companies ("EDCs") to provide default service supply to EDC customers in the Commonwealth ("Default Service Supply"), and currently provides Default Service Supply to multiple EDCs. As part of ExGen's Default Service Supply obligations, it is required to provide Alternative Energy Credits ("AECs") necessary for the EDCs to comply with the Alternative Energy Portfolio Standard Act ("AEPS") with respect to the Default Service Supply load.

Constellation is a competitive energy company providing power, natural gas, renewable energy and energy management products and services to homes and businesses across the continental United States. As a licensed electric generation supplier ("EGS") in Pennsylvania, Constellation is subject to the AEPS with respect to the load it serves within the Commonwealth.

House Bill 2536, also known as Act 114, was a budget bill into which provisions closing the Pennsylvania borders for purpose of Tier II resource qualification under the AEPS were inserted in an amendment published on Friday, November 20, 2020. These provisions were included in Sections 10 and 14 of the Act, which amend the Pennsylvania

Fiscal Code, 72 P.S. §§ 1 *et seq.*, by adding Sections 1728-E and 1799.10-E. The bill was passed by both the Pennsylvania House and Senate the same day the amendment was published, signed by the Governor the following Monday, November 23, 2020, and effective immediately.

Although Act 114 prevents most out-of-state facilities from qualifying to provide Tier II resources after its effective date, it allows those out-of-state Tier II facilities with a binding written contract for the sale and purchase of AECs as of that effective date to continue to produce qualifying Tier II certificates until the end of their current contract term. The TIO provides the Commission's proposed interpretation and implementation plan for that portion of Act 114 related to the Tier II border closing, including the ability of some out-of-state resources to continue to produce qualifying AECs, and seeks comment from the industry regarding this interpretation and implementation.

II. Comments

The Constellation/ExGen comments relate to that portion of the TIO interpreting and implementing Sections 1799.10-E(a)(2)(ii) and (b) regarding AEC contracts that existed as of November 23, 2020. We appreciate the Commission's use of the procedure developed following enactment of Act 40 of 2017, *Implementation of Act 40 of 2017*, Docket No. M-2017-2631527 (Order Entered May 3, 2018) ("Act 40 FIO"), which similarly closed the Commonwealth's borders for solar AECs while exempting certain out-of-state facilities with existing contracts. Using an established procedure helps provide stakeholders with a level of certainty regarding which out-of-state Tier II facilities may continue to maintain their qualification and for how long. At the same time, however, the TIO fails to incorporate important clarifications to the Act 40 process that were included after multiple stakeholders filed requests for reconsideration and clarification based on the Act 40 FIO. We request that these clarifications, which apply equally to the circumstances in this proceeding, be included in the Act 114 Final Implementation Order. In addition, further clarifications are warranted in the case of Act 114, specifically with respect to the form of binding written contracts and the transferability of qualifying out-of-state AECs following the effective date of Act 114, as further described below.

A. The Final Implementation Order Should Incorporate Important Clarifications Provided to the Act 40 Implementation Process

When the Commission issued the Act 40 FIO, it was followed by a Secretarial Letter that included the requirements for petitions seeking to confirm that AECs generated by out-of-state facilities still qualified for the AEPS based on pre-existing contracts with EDCs or EGSs, for the remaining term of such contracts. *See* Act 40 Petition Secretarial Letter, Docket No. M-2017-2631527 (May 16, 2018) ("Act 40 Secretarial Letter"). The provisions of the TIO describing the content of similar petitions to be filed in response to Act 114 track those of the Act 40 Secretarial Letter. In so doing, however, the TIO neglects to incorporate certain important clarifications the Commission provided at the request of multiple parties who filed requests for clarification and reconsideration in response to the Act 40 FIO and the Act 40 Secretarial Letter. These clarifications, which relate to the ability to file a chain of contracts with a petition, the ability of a wholesale provider of Default Service Supply to file

a petition, and the ability of petitioners to redact pricing information from their contracts, apply equally to Act 114 petitions and accordingly should be included as clarifications in the Final Implementation Order issued in this proceeding.

The TIO provides that "any EDC or EGS seeking to use Tier II AECs generated after November 2020 from AESs located outside the Commonwealth that were acquired through contract entered into prior to November 23, 2020, to meet their Tier II share requirements file a petition with the Commission" in order to get those AECs recognized as eligible to be used "by the EDC or EGS" to meet is AEPS Tier II requirements. As the Commission recognized in its Opinion and Order on various motions for clarification, reconsideration and rehearing in response to the Act 40 FIO, *Order and Opinion*, Docket No. M-2017-2631527 (Order entered August 2, 2018) ("Act 40 Clarification Order"), contracting for AECs is rarely accomplished through a single contract between a facility and an EGS or EDC. *See* Act 40 Clarification Order at 17 ("[W]e clarify that all contract with EGSs, EDCs and/or their wholesale suppliers, as well as any other entity holding contracts entered into prior to October 30, 2017, and within the chain of production of the solar AECs supplying those contracts may file a petition."). This clarification applies equally to contracts for AECs supplied by out-of-state Tier II facilities in this case, and accordingly we request the Commission incorporate it into the Act 114 Final Implementation Order.

The Act 40 Clarification Order similarly recognized that, although the EDC is technically the entity with a compliance obligation for Default Service Supply load, it is the wholesale supplier of Default Service Supply that has committed as part of that supply obligation to provide AECs sufficient to allow the EDC to meet that compliance obligation. To address this issue, the Commission clarified that wholesale suppliers serving EDC Default Service Supply could file petitions seeking to have out-of-state AECs qualified based on existing contracts, just like EGSs and EDCs could. *See id.* ("AECs directly attributable to an EGS serving load in Pennsylvania, an EDC serving load in Pennsylvania *or its wholesale supplier* will be eligible . . .") (emphasis added). This clarification also applies equally to Tier II compliance obligations, and we therefore request the Commission incorporate it into the Act 114 Final Implementation Order.

Finally, the TIO requires that petitions include "[c]omplete and unredacted contracts of all contracts . . .." TIO at 11. Recognizing the sensitivity of pricing information and understanding that it would not normally be relevant to a facility's AEC eligibility status, the Commission in the Act 40 Clarification Order clarified that petitioners could redact pricing information from filed contracts, provided that if such pricing "becomes an issue in the proceeding" then it would need to be provided "under appropriate confidentiality safeguards." Act 40 Clarification Order at 18. Pricing in the contracts to be provided in the Act 114 petitions will be similarly sensitive, so we request the Commission provide a similar clarification in the Act 114 Final Implementation Order.

The above-described clarifications served to remove uncertainty and improve the filing and approval process with respect to petitions filed under Act 40 and will similarly improve the Act 114 filing and approval process.

B. Further Clarifications of Act 114 are Warranted

In addition to the clarifications provided with respect to Act 40 petitions, in the case of Act 114 additional clarifications are warranted. Specifically, in contrast to Act 40, where the solar border-closing amendment was published with ample time for market participants to react before its effective date, the Tier II border-closing portions of Act 114 were published less than one business day before the Act became effective, potentially leaving stakeholders with binding written contracts not fully executed and unbalanced portfolios. Although the legislature had discretion to enact the Act in this manner, this timing warrants a more flexible approach to implementation of Act 114's treatment of existing contracts to prevent the stranding of a significant number of AECs under valid contracts, which Act 114 by its terms did not intend to disrupt. Specifically, we request the Commission clarify (i) that it will demonstrate flexibility in the acceptance of evidence of binding written contracts; and (ii) that EGSs, EDCs or wholesale providers with qualifying out-of-state AECs may transfer those AECs to other EGSs, EDCs or wholesale providers after the effective date.

The solar border-closing amendment to Act 40 was published on July 26, 2017, signed in the Pennsylvania House nearly three months' later on October 18, 2017, signed in the Senate nearly a week later on October 23, 2017, and approved by the Governor a week later on October 30, 2017. As a result, market participants had ample notice of, and opportunity to react to, the border closing by making sure any agreed-upon trades were fully executed and that portfolios containing AECs generated by out-of-state resources were reasonably balanced against expected load.

In contrast, the Tier II border closing amendment to Act 114 was effective almost immediately upon publication, leaving EGSs, EDCs and wholesale providers with little notice or time to react. As a result, companies may have executed trades with a trade date on or prior to November 23, 2020, which are evidenced by binding written broker confirms. These broker confirms contain all essential terms of an agreement and, although they are typically followed by a transaction confirmation executed by both parties days, weeks or possibly months after the trade date, the broker confirms represent a binding written contract delineating the essential terms of the parties' agreement. These confirms are considered binding agreements under Pennsylvania law, and accordingly should be accepted by the Commission as binding written agreements under Act 114.[1]

Similarly, the timing of Act 114's passage likely resulted in an imbalance in the portfolios of many EGSs, EDCs and wholesale providers. Such entities with compliance obligations typically purchase AECs based on expected load, refining their portfolios as the compliance year approaches and estimates of required AEC volumes become more accurate. In this case, because EGSs, EDCs and wholesale providers had no notice of the Tier II border closing, they were unable to ensure the volume of out-of-state Tier II AECs they had under contract was no greater than their expected obligations for the applicable compliance years.

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[1] *See Shovel Transfer & Storage v. Pa. Liquor Control Bd.*, 559 Pa. 56, 63 (1999) ("If the parties agree upon essential terms and intend them to be binding, 'a contract is formed even though the intend to adopt a formal document with additional terms at a later date.'") (quoting *Johnston v. Johnston*, 346 Pa. Super. 427, 499 (Pa. Super. 1985)); *see also* 13 Pa.C.S. § 2201(b) (describing writing in confirmation of a contract as sufficient to create a binding contract even if UCC statute of frauds applies).

As a result, restricting transfer of qualifying out-of-state AECs following Act 114's effective date could result in millions of dollars of qualifying out-of-state AECs' value being stranded, increasing costs for entities with compliance obligations. Such increased costs would be reflected in future EGS pricing and wholesale supplier bids for Default Service Supply procurements, ultimately increasing costs for Commonwealth consumers.

To prevent these losses, Constellation/ExGen requests the Commission clarify that out-of-state AECs that retain qualification after the effective date of Act 114 under a binding written contract may be transferred to other compliance entities – that is, other EGSs, EDCs or wholesale providers – provided that the period of time the facility is certified to produce qualifying AECs will be limited to the term of the original contract based on which such qualification was granted. Constellation/ExGen is not proposing that such AECs be freely transferrable to any party, just to other compliance entities for purposes of the typical portfolio balancing that happens as compliance years approach. Nor is Constellation/ExGen proposing anything that is inconsistent with Act 114, which provides only that facilities can continue to produce AECs for the duration of a binding written contract in effect as of the effective date of the Act, but does not limit the ability to transfer such AECs after the effective date.

Clarifying that (i) the Commission will demonstrate flexibility in the acceptance of evidence of binding written contracts entered into on or before November 23, 2020 for purposes of qualifying out-of-state AECs for certification under Section 1799.10-E(A)(2)(ii); and (ii) certified out-of-state AECs may be transferred to other compliance entities after the effective date of Act 114, is consistent with the language of Act 114 and Pennsylvania law. These clarifications will prevent millions of dollars in AEC value from being stranded as a result of market participants effectively having no notice of the Tier II border closing, in the process protecting Pennsylvania customers from ultimately facing increased costs as a result of such losses.

III. Conclusion

For the reasons explained above, Constellation/ExGen requests that the Commission include the following findings in the Final Implementation Order regarding implementation of Act 114:

- EGSs, EDCs and/or their wholesale suppliers, as well as any other entity holding contracts entered into prior to November 23, 2020, and within the chain of production of the Tier II AECs supplying those contracts may file a petition;

- Tier II AECs directly attributable to an EGS serving load in Pennsylvania, an EDC serving load in Pennsylvania or its wholesale supplier will be eligible to be used for the AEPS Act Tier II requirement;

- To facilitate the filing of contracts by parties seeking to have the AECs associated with those contracts approved for use to meet the AEPS Act Tier II

requirement, parties may redact the price per credit from contracts included in such filings;

- Broker confirms or similar evidence of parties' binding agreement to trades entered into prior to November 23, 2020 may qualify out-of-state AECs for certification under Section 1799.10-E(A)(2)(ii);

- EGSs, EDCs or wholesale providers with qualifying out-of-state AECs may transfer those AECs to other EGSs, EDCs or wholesale providers to be used for AEPS Act compliance.

CNE/ExGen appreciates the opportunity to submit these comments on the TIO. Please do not hesitate to contact me at jesse.rodriguez@exeloncorp.com if you have any questions.

Sincerely,

/s/

Jesse A. Rodriguez
Director, Energy Policy Analysis
Exelon Corporation