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October 11, 2007

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Commonwealth Keystone Building
Harrisburg, Pennsylvania 17105-3265

**Re: Comments of the Energy Association of Pennsylvania on the
Implementation of the Alternative Energy Portfolio Standards
Act 35 of 2007 Amendments
Docket No. ~~M~~-00060180**

L-00060180

Dear Secretary McNulty:

The Energy Association of Pennsylvania, on behalf of its major member electric distribution companies, files the enclosed Comments on the Implementation of the Alternative Energy Portfolio Standards Act 35 of 2007 Amendments. Enclosed please find an original and fifteen (15) copies of the Association's Comments.

Cordially,

Donna M. J. Clark, Esquire
Vice President and General Counsel

Cc: Honorable Wendell F. Holland
Honorable James H. Cawley
Honorable Tyrone Christy
Honorable Kim Pizzingrilli

INDEPENDENT REGULATORY
REVIEW COMMISSION

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

Comments of Energy Association of Pennsylvania

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

I. Introduction

By Order entered July 25, 2006, the Public Utility Commission ("PUC" or the "Commission") issued a proposed rulemaking to codify prior Commission interpretations of the Alternative Energy Portfolio Standards Act of 2004¹ (the "Act") and resolve other issues relevant to its implementation. The Proposed Rulemaking Order was published in the Pennsylvania Bulletin on October 14, 2006. Comments on the Proposed Rulemaking Order were due within 60 days from the date it was published in the Bulletin or by December 13, 2006.

On July 19, 2007, Governor Rendell signed Act 35 of 2007 into law, which amends certain provisions of AEPS. On September 13, 2007, the Commission

¹ *Implementation of the Alternative Energy Portfolio Standards Act of 2004, Proposed Rulemaking Order, Docket No. L-00060180 (Order entered July 25, 2006) ("Proposed Rulemaking Order").*

issued a Secretarial Letter reopening the public comment period to allow interested parties the opportunity to advise the Commission how these amendments to AEPS should be reflected in the AEPS final rules. The Commission requested that the comments be limited to Act 35 amendments.

The Energy Association of Pennsylvania ("EAPA" or "Association") represents the interests of the Commonwealth's PUC-regulated electric and natural gas energy distribution companies. EAPA has previously filed comments under other captions at this docket relative to certain matters addressed in this Proposed Rulemaking Order.

EAPA commends the Commission for reviewing the proposed regulations set forth in its Proposed Rulemaking Order for consistency with the recent amendments to AEPS and appreciates the opportunity to provide comments in this regard.

II. Comments

EAPA's comments are limited to the general sections regarding (1) Electric Distribution Company ("EDC") and Electric Generation Supplier ("EGS") obligations, (2) alternative compliance payments, (3) force majeure, and (4) the integrity of the voluntary market. EAPA continues to support its December 13, 2006 Comments filed in this docket and believes that its proposed changes are even more pertinent in light of Act 35.

For the sake of efficiency, EAPA's comments follow the headings and numbering established by the Commission in its Order entered July 25, 2006.

A. Section 75.61. EDC and EGS obligations.

Act 35 amended AEPS by increasing the percentages of solar alternative energy credits that must be acquired by EDCs and EGSs. Section 75.61, which reflects the requirements in the original AEPS legislation, must be modified to reflect these changes. First, the percentages of energy that must be sold from solar photovoltaic technologies in each year of the compliance period must be increased, beginning with 0.0013% in the first year and increasing on an annual basis to 0.5000% in the fifteenth year and thereafter. Second, those percentages must be applied to all energy sold by the EDC or the EGS, not only the Tier I sales. It should be noted that, although Act 35 expands the definition of "Tier I Alternative Energy Source" to include solar thermal energy, the percentages cited above apply only to solar photovoltaic technologies.

B. Section 75.66. Alternative Compliance Payments.

In Act 35, the General Assembly added language to the definition of Alternative Compliance Payment that should be reflected in the Commission's final AEPS regulations. Act 35 requires the Commission, when setting an alternative compliance payment for the solar photovoltaic share, to include, "where applicable, the levelized up-front rebates received by sellers of solar renewable energy credits in other jurisdictions in the PJM Interconnection, LLC Transmission Organization (PJM) or its successor."

EAPA recommends the Commission amend the proposed Section 75.61 to include a specified date by which it will set alternative compliance payment

for the solar photovoltaic sources. Setting alternative compliance payment on a specific date as early as possible will enable EDCs and EGSs to develop appropriate market strategies.

EAPA recommends that Section 75.66 be changed to reflect the language added by Act 35 requiring the Commission to consider the rebates received by sellers of solar renewable energy credits in other jurisdictions in PJM. However, to implement this new requirement properly, the levelized rebates should be equal to the level of rebates over the useful life of a typical solar energy system. The Commission must add this definition of "levelized" in its final AEPS regulations in order to ensure that the alternative compliance payment for the solar portion can be properly measured. The AEPS program administrator, when requiring alternative compliance payments, must have guidelines in order to determine the appropriate level of payment. By stating that the levelized up-front rebates received by sellers in other PJM jurisdictions must be measured using the average useful life of a solar energy system, the Commission will be providing the requisite guidance.

Accordingly, EAPA proposes the following addition:

(1) For non-compliance with the solar photovoltaic requirements identified at § 75.61, an EDC and EGS shall make an alternative compliance payment equal to the number of additional alternative credits necessary for compliance times 200% the average market value for solar photovoltaic alternative energy credits sold during the reporting period in the RTO control area where the non-compliance occurred, including, where applicable the levelized up-front rebates received by sellers of solar photovoltaic alternative energy credits in the same RTO control area. The levelized up-front rebate is equal to the rebate spread over the useful life of a typical solar energy system.

C. **Section 75.67. General force majeure.**

Act 35 expanded the definition of force majeure in AEPS. Under the new language, the Commission is required, when determining whether or not force majeure exists in the alternative energy marketplace, to consider whether or not EDCs and EGSs have made a good faith effort to comply with their AEPS obligations. The provision sets forth some of the ways in which an EDC or EGS can establish that such efforts were made. Act 35 also requires the Commission, when making a force majeure determination, to assess the availability of alternative energy credits in the PJM Generation Attributes Tracking System (GATS), in Pennsylvania and other jurisdictions in PJM. The new provision also states that if the Commission modifies an EDCs or an EGSs obligation, the modification is limited to that compliance period only and the Commission may require an EDC or EGS to make-up any reduction in future compliance periods.

First, as set forth in Section 75.67(d) of the proposed rules, if the Commission finds that force majeure exists for a reporting period, EDCs and EGSs have the option of making alternative compliance payments in lieu of compliance with Section 75.61. A payment must be accompanied by an oath or affirmation that an EDC or EGS made a good faith effort to comply with the requirements of AEPS but was unable to procure a sufficient number of credits. This section of the proposed rules does not require any change. Act 35 clearly requires the Commission to consider whether EDCs and EGSs have made good faith efforts to comply with their obligations and provides specific examples of such efforts, including, but not limited

to, the banking of alternative energy credits during an EDCs transition period and seeking alternative energy credits through competitive solicitations.

EAPA believes that the Commission's proposed rule also complies with the new amendments by requiring an oath or affirmation to accompany the alternative compliance payment during a force majeure reporting period. However, the proposed rule envisions the Commission making a force majeure determination 30 days prior to the beginning of a reporting period but does not make clear when an alternative compliance payment must be made. In order for an EDC or EGS to make a good faith affirmation, it must be granted the opportunity to procure credits during the actual reporting period and potentially the true-up period, after a force majeure determination. It is even more important in light of the amendments promulgated in Act 35 that the Commission's final rules be clear that an alternative compliance payment made pursuant to Section 75.67 is due after the true-up period. This clarification will allow EDCs and EGSs the time contemplated by AEPS to comply with their obligations while also allowing EDCs and EGSs to meet the good faith requirement created by Act 35.

Second, the Association anticipates that the Commission will consider conditions existing in the alternative energy markets in other states included, in whole or in part, within the appropriate RTO control area and in the voluntary markets when making a force majeure determination. The amendments made by Act 35 now require the Commission, when determining whether or not force majeure exists, to assess the availability of alternative energy credits in the PJM GATS, in Pennsylvania and other jurisdictions in PJM. Act 35 also makes clear that alternative energy

sources located in PJM shall be eligible to fulfill the compliance obligations of all Pennsylvania EDCs and EGSs. In assessing the availability of alternative energy credits, the Commission must consider both the supply and the demand from other states within PJM that have renewable portfolio standards. The Commission must also be cognizant of the demand for credits generated by the voluntary market. Circumstances giving rise to an insufficient availability of alternative energy credits within Pennsylvania during a reporting period could begin outside of Pennsylvania and stem from programs other than AEPS. A provision that requires the Commission to consider both supply *and demand* from other states in PJM is consistent with AEPS as well as the Act 35 amendments that make clear that sources throughout PJM can be used for compliance.

Third, in subsection (d), if the Commission finds that force majeure exists in the market for solar credits, the proposed rule grants the Commission the flexibility to either require an alternative compliance payment, or reduce the level of solar photovoltaic compliance for that reporting period. The Commission must allow itself that same flexibility if it finds that force majeure exists for the remaining Tier I or Tier II obligations. There is no distinction between the Act's solar obligation and the other Tier obligations that would dictate that the Commission would only have this option for solar compliance. Act 35 added language to the force majeure section that discusses the Commission's reduction of an EDCs and EGSs obligations under AEPS. Act 35 *does not* limit the Commission's ability to reduce an AEPS obligation to the solar photovoltaic share. EAPA supports the proposed rule be revised to give the Commission the parallel option as to all compliance obligations and believes that

the amendments made by Act 35 make clear that the General Assembly envisioned the Commission having this ability as well. EAPA recommends that if the Commission requires an EDC or EGS to acquire additional alternative energy credits in subsequent years equivalent to the reduced amount, it must inform the affected EDC or EGS at the time the reduction is granted. This is the only way to ensure that an EDC or an EGS has sufficient time to prepare for its increased AEPS obligations in the future.

Consistent with the foregoing, EAPA proposes the following language be added to Section 75.67:

(b) The Commission may find that force majeure exists if there are insufficient alternative energy credits to satisfy the aggregate Tier I alternative energy source, Tier II alternative energy source, and solar photovoltaic obligation for all EDCs and EGSs pursuant to § 75.61 for that reporting period. In making this finding, the Commission will consider the alternative energy credit supply and demand existing within the service territory of Pennsylvania as well as in other jurisdictions throughout PJM Interconnection, L.L.C. The Commission may also find that force majeure exists if the price in the market for a Tier I (non-solar) or Tier II credit exceeds \$45. An EDC or EGS is not required to purchase a Tier I (non-solar) or Tier II credit in excess of the \$45 price cap.

...

(d) If the Commission determines that force majeure exists for a reporting period for, EDCs and EGSs shall have the option of making alternative compliance payments in lieu of compliance with § 75.61 for that reporting period. This payment shall equal \$45 for each alternative energy credit needed to satisfy the Tier I and Tier II requirements of § 75.61, or the Commission may choose to reduce the required level of Tier I (non-solar) and Tier II compliance for that reporting period. The Commission may require an EDC or EGS to acquire additional alternative energy credits in subsequent reporting periods equivalent to the obligation reduced due to a force majeure declaration. The Commission must inform the affected EDC or EGS at the time force majeure is declared of its new compliance obligation. For the solar photovoltaic requirement, EDCs and EGSs shall have the option of making an alternative compliance payment equal to the

average market value of solar photovoltaic credits in the applicable RTO service territory for the reporting period prior to the finding of force majeure, so long as there was no finding of force majeure for that prior reporting period, or the Commission may choose to reduce the required level of solar photovoltaic compliance for that reporting period. If at the conclusion of the true-up period, an EDC or EGS is unable to procure a sufficient amount of credits to meet its compliance obligations under § 75.61, or determines that the alternative compliance payment is the least cost method of compliance, the EDC or EGS shall make an alternative compliance payment to meet its compliance obligations for that reporting period. A payment shall be accompanied by a statement filed with the Commission and verified by oath of affirmation, consistent with § 1.36 (relating to verification), that the EDC or EGS has made a good faith effort to comply with the requirements of this chapter, that they are unable to acquire a sufficient quantity of alternative energy credits to meet their obligations under § 75.61, and that an alternative compliance payment is the least cost method of compliance. The option to make an alternative compliance payment in lieu of compliance with § 75.61 may not be available to EDCs and EGSs that have already acquired sufficient alternative energy credits for compliance with the requirements of that reporting period.

D. Section 75.68. Special force majeure.

As explained above, Act 35 states that the Commission may require an EDC or EGS to acquire additional alternative energy credits in subsequent years equivalent to the obligation reduced due to a force majeure declaration. As discussed above, Act 35 also requires that EDCs and EGSs make a good faith effort to comply with their AEPS obligations.

If the Commission requires an EDC or an EGS to acquire additional alternative energy credits in subsequent reporting periods, it must inform the EDC or EGS of its new compliance requirement at the time force majeure is declared. This is the only way for an EDC or EGS to adequately prepare and begin to take the steps necessary

to acquire additional alternative energy credits in a presumably tight market. In addition, Act 35 requires that EDCs and EGS make a good faith effort to comply with their AEPS obligations. EAPA believes that Section 75.68 captures this good faith requirement.

EAPA proposes the following language be added to Section 75.68:

(e) If the Commission determines that force majeure exists for the true-up period, the Commission may chose to reduce the required level of Tier I, solar and Tier II compliance for that reporting period. The Commission may also chose to require an EDC or EGS to acquire additional alternative energy credits in subsequent reporting periods equivalent to the obligation reduced due to a force majeure declaration. The Commission must inform the affected EDC or EGS at the time force majeure is declared of their new compliance obligation. If the Commission determines that force majeure exists for the true-up period, an EDC or EGS requesting a force majeure determination shall have the option of making alternative compliance payments in lieu of compliance with § 75.61 for the just concluded reporting period, consistent with the standard identified in § 75.67. Any payments shall be accompanied by a statement filed with the Commission and verified by oath or affirmation, consistent with § 1.36 (relating to verification), that the EDC or EGS has made a good faith effort to comply with the requirements of this chapter, that they were unable to acquire sufficient quantity of alternative energy credits to meet their obligations under § 75.61, and that an alternative compliance payment is the least cost method of compliance.

E. Section 75.70 Alternative energy market integrity

Act 35 clearly prohibits alternative energy credits purchased in the voluntary market from being used to comply with AEPS unless the purchaser resells those credits to an EDC or EGS with an AEPS obligation.

Subsection (a) of proposed Section 75.70 provides that all EDC and EGS sales of renewable energy to retail customers that exceed the EDCs or EGSs AEPS requirements should be represented by credits "separate from and in addition to" those credits used to satisfy their AEPS requirements. EAPA believes that the

proposed regulation as drafted could dampen the voluntary market and discourage EDCs and EGS from separately marketing alternative energy to their retail customers. Act 35 sends the clear message that voluntary credits are owned by the customer and should be kept separate from credits acquired for AEPS compliance. EAPA commends the Commission for keeping voluntary credits separate from credits used for AEPS compliance. However, EAPA believes that Commission should amend Section 75.70 to make voluntary purchases of alternative energy credits separate from AEPS compliance obligations, as codified in Act 35:

Accordingly, EAPA proposes the following changes to subsection (a):

(a) All sales of electricity by EDCs and EGSs to retail electric customers marketed as deriving from alternative energy sources shall be tracked and counted separately from alternative energy credits used to support compliance with the requirements of § 75.31. ~~exceed the requirements of § 75.31 at the time of the sale shall be supported by alternative energy credits separate from~~ **and in addition to** alternative energy credits.

F. Section 75.72 Alternative Energy Credit Registry.

Section 75.72 of the Commission's proposed regulations establishes procedures for registering and tracking the creation and transfer of AEPS credits. ~~Two provisions of Section 75.72 should be updated and modified to reflect the requirements of Act 35.~~

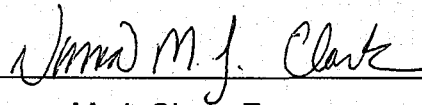
First, in the definition of "force majeure", Act 35 indicates that the Commission will assess the availability of AEPS credits using GATS or its successor. The Commission's proposed rules do not reflect the reliance on GATS contemplated

by Act 35 and currently in place. Rather, the rules direct the PUC to designate and alternative energy credit registry. To be consistent with Act 35, Section 75.72 of the regulations should be amended to reflect the role that GATS currently plays in tracking the creation and transfer of AEPS credits.

Second, Section 3 of Act 35 requires an EDC or EGS selling electricity in any other state to submit reports to the PUC listing that state's renewable energy portfolio requirements and indicating how the EDC or EGS satisfied those requirements. *If not properly implemented, this requirement could impose significant reporting burdens on EDCs and EGSs in Pennsylvania.* However, under the current mechanisms for implementation of AEPS requirements, these reports are unnecessary and redundant. Under the AEPS Act and Act 35, compliance with those statutory requirements requires the purchase of renewable resources from generators within PJM (or other RTOs with members located in Pennsylvania). Moreover, as discussed above, Act 35 contemplates the use of GATS to track AEP credits utilized within PJM. Compliance with GATS or the equivalent tracking system administered by other RTOs in Pennsylvania will satisfy the intent of the reporting requirements established by Act 35. Section 75.72 should be amended to explicitly state that participation in GATS will be deemed to fully satisfy the reporting requirements established by Section 3 of Act 35.

III. Conclusion

EAPA appreciates the opportunity to comment on the changes to the Commission's proposed regulations necessitated by Act 35. Based on the reasons set forth herein, EAPA, respectfully requests that the Commission adopt the recommendations proposed in these comments.



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Dated: October 11, 2007
Harrisburg, Pennsylvania