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COMMONWEALTH OF PENNSYLVANIA



OFFICE OF SMALL BUSINESS ADVOCATE
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, Pennsylvania 17101

COPY

William R. Lloyd, Jr.
Small Business Advocate

(717) 783-2525
(717) 783-2831 (FAX)

October 11, 2007

HAND DELIVERED

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

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INDEPENDENT REGULATORY
REVIEW COMMISSION

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

Dear Secretary McNulty:

I am delivering for filing today the original plus 15 copies of the Comments on Proposed Rulemaking Order, on behalf of the Office of Small Business Advocate in the above-captioned matter.

If you have any questions, please contact me.

Sincerely,

William R. Lloyd, Jr.
Small Business Advocate
Attorney ID #16452

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Enclosures

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**COMMENTS ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE
ON PROPOSED RULEMAKING ORDER**

The act of November 30, 2004 (P.L. 1672, No. 213), known as the Alternative Energy Portfolio Standards Act ("AEPS Act"), requires that increasing percentages of the electricity sold in the Commonwealth be generated from designated alternative energy sources.

By Proposed Rulemaking Order entered July 25, 2006, at Docket No. L-00060180 ("Order"), the Commission issued proposed regulations regarding a variety of issues relating to the implementation of the AEPS Act. By Ordering Paragraph 6, the Commission set the deadline for the submission of comments as 60 days following publication of the Proposed Rulemaking in the *Pennsylvania Bulletin*. The Proposed Rulemaking was published on October 14, 2006. The OSBA submitted comments on December 13, 2006, in response to that publication.

The act of July 17, 2007 (P.L. ____, No. 35) amended the AEPS Act in numerous ways. By Secretarial Letter dated September 13, 2007, the Commission reopened the public comment period on the aforementioned Proposed Rulemaking in order to provide parties the opportunity to comment on any changes needed to bring the proposed regulations into conformity with Act 35. The Secretarial Letter set October 11, 2007, as the deadline for those comments.

The OSBA submits the following comments in response to the Secretarial Letter:

COMMENTS ON PROPOSED REGULATIONS

§75.51. EDC and EGS obligations.

Act 35 amended Section 3(b)(2) of the AEPS Act to increase the pace at which electric distribution companies (“EDCs”) and electric generation suppliers (“EGSs”) must sell electricity, or purchase alternative energy credits (“AECs”), from solar photovoltaic technologies. Therefore, it will be necessary to amend proposed Section 75.51(b) to conform to the new solar timetable under Act 35.

§75.53. Alternative energy system qualification.

As drafted, proposed Section 75.53(d) would not allow the Pennsylvania Power Company (“Penn Power”) or the Pike County Light & Power Company (“Pike”) to satisfy their AEPS requirements by buying electricity, or AECs associated with electricity, generated within PJM but outside Pennsylvania. Act 35 amended Section 4 of the AEPS Act to allow those two EDCs to satisfy their AEPS Act requirements by purchasing electricity generated anywhere within PJM or by purchasing the AECs associated with such electricity. Therefore, it will be necessary to amend proposed Section 75.53(d) to conform to the new statutory rule.

§75.55. Alternative energy credit program administrator.

§75.60. Alternative energy market integrity.

Proposed Section 75.55(d)(2) would prohibit using an AEC for compliance with the AEPS Act if that AEC has already been used to satisfy a similar requirement in

another state. This provision appears to have been based on the language of Section 4 of the AEPS Act at the time the regulation was proposed.

Act 35 amended Section 4 to impose an additional restriction on the use of AECs for compliance purposes. Specifically, an AEC purchased by an individual, business, or government body may not be used to meet the AEPS Act requirements of an EDC or an EGS unless the EDC or EGS purchases that AEC. The amendment presumably was intended, at least in part, to preserve the voluntary market contemplated by proposed Section 75.60. Therefore, both proposed Section 75.55(d)(2) and proposed Section 75.60(a) should be amended to reflect the new language in Section 4.

§75.56. Alternative compliance payments.

Proposed Section 75.56(b)(1) would specify how to calculate an alternative compliance payment (“ACP”) when an EDC or EGS is out of compliance with the AEPS Act requirements related to alternative energy from solar photovoltaic sources. The language setting forth this calculation was apparently based on Section 3(f)(4) of the AEPS Act at the time the regulation was proposed.

Act 35 amended Section 3(f)(4) to clarify how to determine the market value of solar renewable energy credits for purposes of calculating the ACP. Therefore, proposed Section 75.56(b)(1) should be revised to include the clarifying language from Section 3(f)(4).

§75.57. General force majeure.

§75.58. Special force majeure.

A. Criteria for Declaring Force Majeure

Proposed Section 75.57(d)(3) would require an EDC or EGS making an ACP after a Commission declaration of a “general force majeure” to allege a “good faith effort” to comply with the AEPS Act. Proposed Section 75.58(e) would impose a similar pleading requirement with regard to a “special force majeure.” In addition, Proposed Section 75.58(c) would spell out the findings the Commission must make before declaring a “special force majeure.”

Act 35 amended the definition of “force majeure” in Section 2 of the AEPS Act to specify what the Commission is to consider in determining whether or not to declare a force majeure. First, the Commission must decide whether an EDC or EGS has made a “good faith effort” to comply with the AEPS Act. The criteria set forth in the new definition for determining what constitutes a “good faith effort” appear to be relevant only to what the proposed regulations label as a “special force majeure.” Second, the Commission is specifically required to evaluate the availability of AECs in Pennsylvania and elsewhere within PJM. This requirement appears to be applicable to the declaration of what the proposed regulations label as a “general force majeure” as well as to a “special force majeure.” Third, the Commission is authorized to require the solicitation of alternative energy and non-alternative energy through a blended procurement before declaring that a force majeure exists. This requirement appears to be applicable only to the declaration of a “special force majeure.”

In view of the foregoing, it will be necessary to revise proposed Section 75.57(d)(3), proposed Section 75.58(e), and proposed Section 75.58(c) to incorporate the new language of Section 2.

B. Remedy Other Than ACPs

Proposed Sections 75.57(d) and 75.58(e) would authorize an EDC or EGS to meet its AEPS Act requirements during a force majeure by making ACPs. Act 35 amended the definition of “force majeure” in Section 2 of the AEPS Act to provide another option, *i.e.*, allowing the EDC or EGS to defer its AEPS Act requirements until one or more years after the end of the force majeure. Therefore, proposed Section 75.57(d) and 75.58(e) should be amended to incorporate this additional option. The Commission may also want to spell out criteria for determining when each remedy (*i.e.*, ACPs or deferral) will be used, but the Commission should note that deferral might have a significant effect on default service rates if the deferral is for several years and the entire quantity of AECs deferred must be made up in a single year.

OTHER AMENDMENTS REQUIRED BY ACT 35

A. Ownership of AECs

Act 35 added Section 3(e)(12) to the AEPS Act. Section 3(e)(12) provides that, unless a contract explicitly states otherwise, the sale of the electricity generated from an alternative energy source does not include the sale of the associated AECs.

Because of pending litigation, the Commission opted not to address this issue in the Proposed Rulemaking. *See* Docket No. L-00060180 (Order entered July 25, 2006), p. 5. In that litigation, the Commission reached a result which is inconsistent with the plain

language of new Section 3(e)(12). Specifically, the Commission held that, under a contract existing when the AEPS Act was enacted, the AECS are owned by the EDC which is obligated to purchase the underlying electricity, unless express language in the contract provides otherwise. *See Petition for Declaratory Order Regarding Ownership of Alternative Energy Credits and any Environmental Attributes Associated with Non-Utility Generation Facilities Under Contract to Pennsylvania Electric Company and Metropolitan Edison Company*, Docket No. P-00052149 (Order entered February 12, 2007; Reconsideration Order entered May 31, 2007).

In deference to the Commission's prior holding, Section 3.1 of Act 35 expressly provides that the addition of Section 3(e)(12) to the AEPS Act was not intended to reverse or modify the Commission's decision at Docket No. P-00052149.

Therefore, the proposed regulations should be amended to include the rule stated by Section 3(e)(12) for contracts entered after the enactment of Act 35 and to codify the Commission's decision at Docket No. P-00052149 for contracts entered prior to the enactment of Act 35.

B. Net Metering and Interconnection

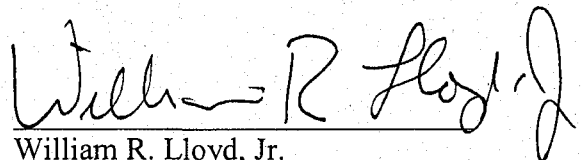
Act 35 amended the definition of "customer-generator" and the definition of "net metering" in Section 2 of the AEPS Act and also amended Section 5 of the AEPS Act regarding interconnection standards for customer-generators. Although these issues appear to be beyond the scope of the Proposed Rulemaking at Docket No. L-00060180, it will be necessary for the Commission to amend other regulations in order to incorporate the statutory changes.

RECOMMENDED AMENDMENT NOT REQUIRED BY ACT 35

The Secretarial Letter of September 13, 2007, states that "comments should be limited to the amendments to the Act." Despite that statement, the OSBA wishes to alert the Commission to the fact that proposed Section 75.61(e) would address the banking of AECs by an EDC or EGS during the EDC's rate cap period. That issue is the subject of pending litigation in *Petition of PECO Energy Company for Approval of (1) A Process to Procure Alternative Energy Credits during the AEPS Banking Period and (2) A Section 1307 Surcharge and Tariff to Recover AEPS Costs*, Docket No. P-00072260.

WHEREFORE, the OSBA respectfully requests that the Commission implement the AEPS Act in a manner consistent with the foregoing comments and with the comments previously filed at this docket by the OSBA on December 13, 2006.

Respectfully submitted,



William R. Lloyd, Jr.
Small Business Advocate
Attorney I.D. No. 16452

Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101
(717) 783-2525

Dated: October 11, 2007