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December 13, 2006

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd floor
Harrisburg, PA 17120

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

Dear Mr. McNulty:

Enclosed are an original and fifteen copies of the Comments of PECO Energy Company in the above-referenced docket.

Please return a time-stamped copy in the self-addressed stamped envelope. If additional information is needed about this matter, please feel free to contact me directly at 215-841-4635.

Sincerely,

Anthony E. Gay
Assistant General Counsel

AEG/zr

Enclosures

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INDEPENDENT REGULATORY REVIEW COMMISSION

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

COMMENTS OF PECO ENERGY COMPANY

Introduction

PECO Energy Company ("PECO") hereby files its comments on the Pennsylvania Public Utility Commission's ("Commission") proposed regulations to implement the Alternative Energy Portfolio Standards Act of 2004.[1]

PECO appreciates the Commission's efforts to develop Alternative Energy Portfolio Standards ("AEPS") regulations that are: (1) consistent with the AEPS Act (the "Act"); (2) conducive to private sector alternative energy investment; (3) environmentally sound; (4) administratively efficient; and (5) favorable to reasonable, market-based retail rates.[2] Indeed, without this implementation approach, the Act's intended economic and environmental benefits could not be fully realized.

PECO believes that many of the Commission's proposed AEPS regulations are consistent with the above criteria. However, some of the proposed regulations, as drafted, need to be modified in order to accomplish the intent of the Act. PECO therefore respectfully submits the following comments, and recommends alternative language, to assist the Commission in further amending the proposed regulations to fulfill the Act's intent.

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[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").

[2] Proposed Rulemaking Order at 7, setting forth the Commission's goals for the regulations based on its reading of the Act.

Discussion

I. Proposed Section 75.61 (EDC and EGS obligations)

Recommendation: The Commission should amend subsection (f) of the proposed regulation to change the reporting time for retail electric sales totals from 45 days from the end of the month to a 60-day rolling period.

Summary of the Proposed Regulation

Proposed Section 75.61(a) requires EDCs and EGSs to comply with the Act by acquiring certified alternative energy credits ("AECs"). Subsection (a) also tracks the language of the Act by providing that each AEC will represent one megawatt hour of qualified alternative electric generation or conservation "whether self-generated, purchased along with the electric commodity or separately through a tradable instrument."[3]

Subsections (b)–(c) of proposed Section 75.61 set forth the percentage quantities of AECs that EDCs and EGSs must acquire for each reporting period under the Act and exempt EDCs from these requirements during their restructuring cost-recovery period. Similarly, subsection (d) exempts EGSs from these requirements in the service territories of EDCs that are in their cost-recovery periods.

Subsection (e) codifies the Act's 90-day true-up period for EDCs and EGSs to make up any shortfall of AECs they are required to obtain under the Act. Finally, subsection (f) adds what the Commission acknowledges to be a "new standard for the reporting of monthly retail sales data."[4] This standard requires EDCs to provide monthly reports to the AEC program administrator documenting their total retail electricity sales within 45 days of the end of each month. Subsection (f) also requires EDCs to provide separate monthly totals for each load serving entity (*i.e.*, electricity supplier) active in their service territories.

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[3] *See* 73 P.S. § 1648.3 (e)(4)(ii).

[4] Proposed Rulemaking Order at 9.

PECO's Comment

PECO commends the Commission's decision to track the Act's language permitting AECs to be unbundled from the underlying energy generated by the alternative energy system. Not only is this decision consistent with the letter and intent of the Act to encourage increased procurement of alternative energy resources, it also appears to be consistent with the way that the renewable energy market operates.

As PECO stated in its May 24, 2005 comments on the Commission's Implementation Order, renewable energy credits ("RECs") trade in two markets: the over-the-counter market and the bilateral market. In each of these markets, RECs may be sold as financial products only and are not bundled with physical energy sales.[5] Because proposed Section 75.61(a) is consistent with the Act and the realities of the REC market, PECO supports this section as it is drafted.

PECO also supports subsections (b) through (e) of proposed Section 75.61 because they are consistent with the Act. However, PECO does not support subsection (f) of the proposed regulation because it requires EDCs to provide monthly retail sales reports to the program administrator within 45 days of the end of each month. The Commission itself correctly recognized that this proposed time frame "will be very difficult under current practices".[6] Doing so is more than just difficult, however. It is technically and administratively infeasible for the following reasons.

First, many EDCs, and PECO in particular, do not read all of the hundreds of thousands of meters across their service territories on the same day after a calendar month has concluded. Instead, meters are read on a rolling schedule by billing route.

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[5] Comments of Exelon Corporation Regarding the Pennsylvania Public Utility Commission's Implementation Order, Docket No. M-00051865, Section C.

[6] Proposed Rulemaking Order at 8.

Second, while the majority of customers' usage is metered (measured) monthly, in order to match usage to the calendar month, PECO must use approved algorithms to translate metered monthly usage into hour-by-hour usage. Under this method, it takes 60 days to do a final accounting of load. Consequently, only a portion of an EDC's actual retail sales data will be available 45 days after the end of a particular calendar month.

Third, as the Commission also noted, many meters may not be read until the end of the month following the billing month[7] – in other words, they will not be read until thirty days into the 45-day period under the proposed rule. To compile the sales information from these meters in a reportable form within the remaining 15-days provided by the rule is simply not possible given that even automated meter readings require manual checks for accuracy.

For these reasons, PECO recommends that the Commission amend subsection (f) of the proposed regulation to change the reporting time for EDC and EGS retail electric sales totals from a 45-day period to a 60-day rolling period. In addition to being a technically feasible, administratively efficient solution to the problems noted above, a benefit of this approach is that the program administrator will have ongoing, actual data by which it can monitor the level of an EDC's or EGS's retail electricity sales. With this information, the program administrator will be able to assess the supply available in the market and whether any EDC or EGS is falling short of its obligations.

PECO also recommends that the Commission add a confidentiality provision to subsection (f) for supplier retail sales information similar to the language in Proposed Section 75.72(d).[8] Supplier market share data traditionally has been accorded confidential protection due

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[7] *Id.*

[8] "The prices paid for individual credits will be treated as confidential information by the Commission. Aggregate pricing data on alternative energy credits will be made available to the public by the Commission or the program administrator on a regular basis."

to the competitive nature of this information. Therefore, PECO recommends that subsection (f) make clear that the program administrator and the Commission will keep this information confidential.

Accordingly, PECO recommends that the Commission amend Proposed Section 75.61(f) as follows:

> (f) EDCs shall provide monthly reports to the program administrator documenting total deliveries of electricity to all retail electric customers within their service territory. ~~Separate totals shall be reported for each load serving entity active in the EDC's service territory.~~ Reports shall be submitted to the program administrator on a rolling schedule with all totals for each month submitted within 60 ~~45~~ days from the end of the ~~each~~ month. Separate totals shall be reported for each load serving entity active in the EDC's service territory. The program administrator and the Commission shall treat the totals for load serving entities as confidential information. The Commission may make aggregate totals for load serving entities available to the public.

In the alternative, should the Commission wish to maintain the 45-day limit on reporting, the only way to meet that time frame would be to provide estimates to the program administrator based on the EDC's scheduled wholesale energy load. Indeed, the Commission requested comment on "the degree of exactness the Act requires in measuring compliance, or if a certain margin of error is acceptable."[9] In view of the fact that a key rule of statutory construction is to avoid results that are impossible to execute or unreasonable,[10] PECO believes that the use of estimated data in this instance is acceptable and consistent with effectuating the goals of the Act. PECO therefore proposes the following alternative regulatory language should the Commission choose this option:

> (f) EDCs shall provide monthly reports to the program administrator documenting estimated total deliveries of electricity to all retail electric customers within their service territory. Separate estimated totals shall be reported for each

[9] Proposed Order at 9.

[10] 1 Pa.C.S. § 1922 ("In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others may be used: (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.")

load serving entity active in the EDC's service territory. Reports shall be submitted to the program administrator within 45 days from the end of each month.

II. Proposed Section 75.62 (Fuel and technology standards for alternative energy sources)

Recommendation: The Commission should delete subsection (a)(4)(i) of the proposed regulation, which restricts alternative energy system status for low-impact hydropower facilities to facilities permitted or improved on or after February 28, 2005.

Summary of the Proposed Regulation

Proposed Section 75.62 lists the fuels and technologies that will qualify for alternative energy system ("AES") status. Subsection (a) lists the fuels and technologies that will qualify for Tier I status and adds solar thermal energy to the Tier I category.[11] The significant provision of this proposed regulation is subsection (a)(4)(i), which restricts low-impact hydropower AES status to only those low-impact systems that were "permitted on or after February 28, 2005, or represent[] capacity additions or efficiency improvements to . . . preexisting facilit[ies] implemented on or after February 28, 2005." Finally, subsection (b) lists the fuels and technologies that will qualify for Tier II status.

PECO's Comment

The Commission has correctly listed the types of alternative energy the Act designates as Tier I and Tier II resources, and has appropriately included solar thermal energy in the Tier I category. However, the proposed regulation is inconsistent with the Act with regard to its restriction of low-impact hydropower AES status to systems permitted or improved on or after February 28, 2005.

The Commission provided the following rationale for inserting this limitation into the proposed regulation:

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[11] *See* Proposed § 75.62 (a)(2); *see also* Proposed Rulemaking Order at 10 ("[W]e are assigning the 'solar thermal [fuel source]' to the Tier I category . . . . We conclude that as this resource relies on solar energy, and its use has negligible environmental impact, solar thermal more appropriately belongs in Tier I than Tier II.").

> For low impact hydropower, we observe that the statutory definition restricts qualification to "incremental" development. We interpret this language to find that the Act limits eligibility to those facilities permitted on or after February 28, 2005 (i.e., the Act's effective date) or capacity additions or efficiency improvements to preexisting plants that were implemented on or after February 28, 2005.[12]

A review of the Act shows that it does not include such a limitation.

As a threshold matter, the Act defines "Alternative Energy Sources", including low-impact hydropower, to include "***existing*** and new sources for the production of electricity".[13] The Commission's interpretation incorrectly reads the word "existing" out of the Act.

In addition, the Act goes on to defines "low-impact hydropower" as

> hydropower consisting of any technology that produces electric power and that harnesses the hydroelectric potential of moving water impoundments, provided such ***incremental hydroelectric development:*** (i) does not adversely change existing impacts to aquatic systems; (ii) meets certification standards established by the Low Impact Hydropower Institute and American Rivers, Inc., or their successors; (iii) provides an adequate water flow for protection of aquatic life and for safe and effective fish passage; (iv) protects against erosion; and (v) protects cultural and historic resources.[14]

Reading these definitions together indicates the General Assembly intended that ***existing*** low-impact hydropower facilities would qualify as alternative energy sources but that ***incremental*** – *i.e.*, new – hydroelectric development would not qualify unless it met the requirements of subparts (5) (i)–(v) of Section 2 of the Act.

Moreover, a review of the Act's definition of AES eligible waste coal supports the conclusion that the General Assembly did not intend to place a date restriction on the eligibility of low-impact hydropower systems. That definition explicitly states that AES eligible waste coal "shall include the combustion of waste coal in facilities in which the waste coal ***was disposed or***

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[12] Proposed Rulemaking Order at 10.

[13] 73 P.S. § 1648.2 (emphasis added).

[14] 73 P.S. § 1648.2 (5) (emphasis added).

abandoned prior to July 31, 1982. . ."[15] As shown by this definition, the General Assembly clearly knew how to – and did – provide for a resource eligibility date restriction when it deemed it necessary to further the goals of the Act.

Finally, the proposed regulation's restriction is inconsistent with the two fundamental rules of statutory construction established by Pennsylvania's legislature and courts. The first rule is that a statute's plain language should be used to determine legislative intent.[16] The second is that the purpose of "all interpretation and construction of statutes is to ascertain and ***effectuate*** the intention of the General Assembly."[17]

The regulation's proposed hydropower facility limitation is inconsistent with the plain language of the Act for the reasons noted above. It is also inconsistent with the intent of the General Assembly, which was to provide for the sale and acquisition "of electric energy from renewable and environmentally beneficial resources."[18] In fact, the proposed regulation frustrates that intent by barring facilities permitted or improved prior to the Act's effective date (*i.e.*, existing facilities) from AES eligibility. For these reasons, PECO recommends that the Commission delete Proposed Section 75.62(a)(4)(i) from the AEPS regulations and renumber the remaining provisions of the section accordingly.

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[15] 73 P.S. § 1648.2 (10) (emphasis added).

[16] 1 Pa.C.S. § 1903(a) ("Words and phrases shall be construed according to rules of grammar and according to their common and approved usage. . ."); *Fritz v. Wright*, 907 A.2d 1083, 2006 Pa. LEXIS 2026 (Pa., Oct. 18, 2006) at *16 ("[W]e are mindful that [a] statute's plain language generally provides the best indication of legislative intent.").

[17] 1 Pa.C.S. § 1921(a) (emphasis added); *Commonwealth v. Gilmour Mfg. Co.*, 573 Pa. 143, 148 (2003) (same).

[18] Preamble to Senate Bill 1030.

III. Proposed Section 75.63 (Alternative energy system qualification)

Recommendation: The Commission should add language to Proposed Section 75.63 providing that a facility's loss of alternative energy system status may qualify as special force majeure.

Summary of the Proposed Regulation

Proposed Section 75.63 sets forth the standards for alternative energy system qualification. Subsections (a) and (b) describe the application and filing standards for qualification. Subsection (c) provides that a facility will be qualified for AES status if it is located within Pennsylvania or within the control area of a regional transmission organization ("RTO") managing a portion of Pennsylvania's electric transmission system.

Proposed subsection (d) adds the restriction that "alternative energy credits associated with a qualified alternative system located outside of Pennsylvania shall be eligible for compliance purposes only in the portions of Pennsylvania within the boundaries of the same RTO control area as that alternative energy system." Proposed subsections (e) through (g) link qualified AES status to the generation of Tier I and Tier II resources, compliance with Department of Environmental Protection ("DEP") regulations, and compliance with state and federal permit requirements. Lastly, subsection (h) sets forth the provisions under which the Commission may suspend or revoke a facility's AES status.

PECO's Comment

PECO recommends that the Commission add language to this section providing that when the Commission revokes a facility's AES status, EDCs and EGSs that have contracted to obtain credits from the facility may petition the Commission for a special force majeure determination. This added language is necessary because many EDCs and EGS may choose, as the Commission has noted with approval, to "enter into . . . long term contracts to satisfy [their]

obligations under § 75.61."[19] If a qualified facility that EDCs and EGSs have contracted with to obtain some or all of their alternative energy supply subsequently loses its AES status during a reporting period the EDCs and EGSs may not be able to obtain sufficient credits to meet their AEPS requirements. To address this potential problem, PECO proposes that the following language be added to section 75.63(h):

> (h) The Commission may suspend or revoke the alternative energy system status of a facility, after notice and opportunity to be heard, for major violations of environmental regulations, or failure to satisfy the requirements of an alternative energy source at § 75.62. Major environmental violations shall be defined as those that cause significant harm to the environment or public health and result in a compliance order or penalty assessed by the Department. Alternative energy credits may not be certified for that facility for a period beginning with the suspension or revocation of alternative energy system status, as evidenced by formal Commission action, through the time that alternative energy system status is restored. EDCs and EGSs that have contracted to purchase alternative energy credits from a facility whose alternative energy status has been suspended or revoked may petition the Commission for a force majeure determination pursuant to the provisions of § 76.68.

IV. Proposed Section 75.64 (Alternative energy credit certification)

Recommendation: PECO does not oppose this section as it is currently drafted.

Summary of the Proposed Regulation

Proposed Section 75.64 sets forth the certification start dates and standards for AECs from qualified alternative energy systems. Subsections (a) and (b) provide the certification dates for generation and conservation AECs, respectively. Subsection (c) provides that AECs used to satisfy another state's renewable portfolio standards may not be certified for use in Pennsylvania, and is intended to prevent duplicate use of credits used in another state to satisfy Pennsylvania's AEPS requirements. Subsection (d) provides that an AEC will be certified for the portion of a qualified alternative energy system's generation that is consumed within, or delivered to, the

[19] Proposed Rulemaking Order at 19.

distribution system of a Pennsylvania EDC or the control area of an RTO that manages a portion of Pennsylvania's transmission system.

Subsection (e) provides that when an alternative energy system relies on more than one fuel source or technology, AECs will be certified for that portion of the generation that is derived from an alternative energy source identified in section 75.62. Subsection (f) requires that AEC certification be verified by metered data pursuant to Commission standards. Finally, subsection (g) provides that energy attributes unrelated to compliance with section 75.61 may be bundled with an alternative energy credit or sold, assigned or traded separately.

PECO's Comment

PECO does not oppose this proposed section.

V. Proposed Section 75.65 (Alternative energy credit program administrator):

Recommendation: The Commission should delete the language of Proposed Section 75.65 requiring the program administrator to reject an AES application if DEP decides the application does not comply with environmental and AEPS regulations. The Commission should also revise the compliance notification deadlines of the proposed regulation consistent with PECO's comments on Proposed Section 75.61.

Summary of the Proposed Regulation

Subsection (a) of Proposed Section 75.65 provides for the Commission's selection of a program administrator to implement the AEPS regulations. Subsection (b) sets forth the powers and duties of the program administrator and requires that for facilities applying for AES qualification, the administrator must refer verification of the facility's compliance with applicable environmental regulations and section 75.62 to DEP.[20] In addition, subsection (b)

[20] Proposed § 75.65 (b)(4) & (5).

requires that the program administrator must "[r]eject applications that [DEP] advises to be non-compliant with environmental regulations or § 75.62."[21]

Subsections (c) and (d) set forth the program administrator's powers and duties with regard to verifying EDCs and EGSs AEPS compliance and notifying them and the Commission of their compliance. Subsection (e) provides for appeal of the program administrator's decisions, and subsection (f) provides for the Commission to delegate additional responsibilities to the program administrator.

PECO's Comment

Alternative Energy System Qualification

PECO agrees with Commissioner Fitzpatrick's statement that subsections (4) – (6) of the proposed rule improperly give DEP a decision-making role in the approval of a facility's application for AES qualification.[22] Although the Act provides that DEP will have a cooperative role with the Commission to ensure that alternative energy sources meet applicable environmental and AEPS regulations,[23] there is nothing in the Act that gives DEP what amounts to a veto power over alternative energy system applications. Moreover, there are important statutory and practical reasons why DEP should not have such an adjudicatory role.

As a statutory matter, the Act clearly states that "***the commission*** will carry out the responsibilities delineated within this act."[24] In addition, Section 3(f)(1)-(2) of the Act further indicates that the General Assembly's intent was that only the program administrator and the

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[21] *Id.* at (b)(6).

[22] Proposed Rulemaking Order, Dissenting Statement of Commissioner Terrence J. Fitzpatrick (July 20, 2006).

[23] 73 P.S. § 1648.7(b).

[24] 73 P.S. § 1648.7(a) (emphasis added).

Commission should make adjudicatory decisions regarding compliance with the Act's requirements:

> At the end of each program year, the program administrator shall provide a report to the commission and to each covered electric distribution company showing their status level of alternative energy acquisition.
>
> ***The Commission*** shall conduct a review of each determination made under the [alternative energy portfolio provisions of the Act]. If, after notice and hearing, ***the commission*** determines that an electric distribution company or electric generation supplier has failed to comply with [these provisions], the commission shall impose an alternative compliance payment on that company and supplier.[25]

Furthermore, as a practical matter, the Commission is well aware that DEP has taken specific positions on alternative energy resource qualification in Pennsylvania Power Company's provider of last resort litigation.[26] Because of DEP's clear positions on these issues, PECO agrees with Commissioner Fitzpatrick's statement that DEP should not have a decision-making role in the AES qualification process.

DEP's role should be to provide expertise to the Commission on the environmental regulations related to compliance with the Act, but not to act as an arbiter of an applicant's qualifications. It is the program administrator who should determine whether the applicant is qualified to be designated an alternative energy system. If DEP disagrees with the administrator's decision, it should then pursue the appeal process set forth in section 75.65(e).[27]

Therefore, PECO recommends that the Commission amend subsections (b)(4) – (6) and (8) of the proposed regulation as follows:

> (b) The program administrator will have the following powers and duties in regard to alternative energy system qualification:

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[25] 73 P.S. § 1648.3 (f)(1)-(2) (emphasis added).

[26] *See Petition of Pennsylvania Power Company for Approval of Interim POLR Supply Plan*, Docket No. P-00052188, (Orders Entered April 28, 2006 & May 4, 2006); *see also Department of Environmental Protection v. Pennsylvania Public Utility Commission*, 1085 CD 2006 (Pa. Cmwlth Ct.).

[27] "A decision of the program administrator may be appealed consistent with the provision of 52 Pa. Code § 5.44 (relating to petitions for appeal from actions of staff)."

. . .

(4) ~~Refer verification~~Certify questions of the application's compliance with applicable environmental regulations to the Department.
(5) ~~Refer verification~~ Certify questions of the application's compliance with § 75.62 to the Department.
~~(6) Reject applications that the Department advises to be non-compliant with environmental regulations or § 75.62.~~
. . .
(8) The program administrator will provide written notice to applicants and DEP of its qualification decision within 30 days of receipt of a complete application form.

Notification Deadlines

Consistent with PECO's comments above modifying the retail reporting requirements of Proposed Section 75.61, PECO recommends that the Commission modify Section 75.65, subsection (c)(1) as follows:

(1) At the end of each reporting period, the program administrator shall verify EDC and EGS compliance with § 75.61, and provide written notice to each EDC and EGS of their compliance status within 15 days of receiving their final retail sales figures for ~~45 days of the end of~~ the reporting period.

VI. Proposed Section 75.66 (Alternative compliance payments)

Recommendation: The Commission should amend Proposed Section 75.66 to add a fee to alternative energy credit transactions to recover program administrator costs.

Summary of the Proposed Regulation

Subsections (a) and (b) of Proposed Section 75.66 set forth the standards for alternative compliance payments ("ACPs"). Subsection (c) provides the appeal procedures for EDCs and EGSs who have been directed to make such payments. Subsections (e) and (f) require that ACPs be made available to sustainable energy funds and set forth standards for how the sustainable energy funds should use the payments. Finally, subsection (g) provides that the Commission may use up to five percent of the ACPs for administrative expenses associated with implementing the AEPS regulations.

In discussing this proposed rule, the Commission requested comment on whether it would be appropriate for the Commission to recover the cost of compensating the program administrator through an add-on fee to alternative energy credit transactions, or whether it should recover these costs through traditional utility assessment mechanisms.[28] PECO responds to this question below.

PECO's Comment

PECO recommends that the Commission recover the cost of compensating the program administrator through an add-on assessment to alternative energy credit transactions. PECO makes this recommendation because this type of cost recovery mechanism would most closely track the language of the Act set forth in 73 P.S. § 1648.3(e)(9), which already provides for recovery of the costs of processing alternative energy transactions.[29] Accordingly, PECO proposes that the following subsection be added to Section 75.66:

> (h) The Commission may also impose an administrative fee on alternative energy credit transactions to pay the direct cost of processing alternative energy transactions, including the cost of the program administrator.

[28] Proposed Rulemaking Order at 14.

[29] "The commission may impose an administrative fee on an alternative energy credit transaction. The amount of this fee may not exceed the actual direct cost of processing the transaction by the alternative energy credits administrator."

VII. Proposed Section 75.67 (General force majeure)

Recommendation: The Commission should amend Proposed Section 75.67 to make it clear that a finding of force majeure will not render the cost of alternative energy credits purchased prior to such a finding unrecoverable. The proposed rule should also be amended to permit the Commission to determine the "market price" for solar photovoltaic credits before a force majeure crisis exists and to maintain the discretion to lower the requirements for all Tier I and Tier II resources in the event of force majeure. The proposed rule should also be amended to specifically address the purchase and use of AECs for voluntary programs during a force majeure period.

Summary of the Proposed Regulation

Section 75.67 puts forward proposed standards for general force majeure. Subsection (a) provides that at least 30 days before the beginning of a reporting period, the Commission will issue an order declaring whether force majeure exists for that reporting period for each Tier I, solar photovoltaic, and Tier II alternative energy source. Subsections (b) and (c) delineate the circumstances that will trigger a force majeure determination.

Subsection (d) provides that EDCs and EGSs will have the option of making alternative compliance payments to satisfy their AEPS obligations if the Commission determines that force majeure exists for a reporting period. For Tier I and Tier II obligations, the alternative compliance payment is $45 for each alternative energy credit needed to satisfy the obligations. For solar photovoltaic requirements, the regulations propose that EDCs and EGSs will either have to make "an alternative compliance payment equal to the market value of solar photovoltaic credits in the applicable RTO service territory; or the Commission may choose to reduce the required level of solar photovoltaic compliance for the reporting period." Subsection (d) also includes a requirement that the EDC or EGS making the alternative compliance payment certify that they made a good faith attempt to comply with their AEPS obligations and that the alternative compliance payment is the least cost method of compliance.

Subsection (e) of the regulation provides for EDC cost recovery of alternative compliance payments. Subsection (f) requires EDCs and EGSs to provide the Commission with "all information necessary" for it to render a force majeure determination.

PECO's Comment

PECO commends the Commission for reassessing its prior position that the costs of alternative compliance payments should not be recoverable by EDCs. Proposed Section 75.67 addresses many of the concerns raised previously by PECO and other commenters on this issue and their position that a force majeure cost recovery provision is essential to the successful operation of an alternative energy credit market.[30] PECO proposes the following amendments to this regulation to further ensure that it is an effective remedy for alternative energy credit shortages and/or exorbitant AEC prices.

First, the proposed rule should include a provision stating that a finding of force majeure for a reporting period will not render the cost of credits purchased in the applicable reporting period, but prior to the finding of force majeure, unrecoverable. The purpose of this provision is to ensure that an EDC that was a "first -mover" in the alternative energy market and purchased or arranged for the purchase of alternative energy credits well in advance of a reporting period is not penalized for its compliance efforts. EDCs that undertake efforts to obtain their alternative energy supply early should not face the risk of a "Monday morning quarterback" decision that the price they paid for these credits was too high. In short, the effect of a force majeure determination must be forward-looking only.

Second, as to the timing of a force majeure determination, the subsection (a) of the proposed rule envisions the Commission making such a finding " at least 30 days prior to the

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[30] *See, e.g., Reply Comments of Exelon Corporation Regarding the Pennsylvania Public Utility Commission's Implementation Order*, Docket No. M-00051865, Section C.

beginning of a reporting period." However, the proposed rule is not clear when an alternative compliance payment, accompanied by an oath or affirmation that an EDC or EGS was unable to procure a sufficient number of credits to meet its obligation and that the alternative compliance payment is the least cost method of compliance, must be paid. PECO agrees with the Commission's decision to declare force majeure prior to a specific reporting period. However, in order for an EDC or EGS to attest to the information required in its oath or affirmation, it must be granted the opportunity to procure credits during the actual reporting period and potentially the true-up period, even after a force majeure determination. Therefore, the Commission's final rules must 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 permitted by the Act to comply with its obligations.

Third, subsection (d) of the proposed regulation should be revised to enable the Commission to put a dollar value on the market price for solar photovoltaic credits ***before*** a force majeure crisis exists. The proposed regulation currently provides that solar photovoltaic alternative compliance payments "will be equal to the market value of the solar photovoltaic credits in the applicable RTO service territory" during the reporting period for which the Commission has made a force majeure determination. The practical effect of this language would be to render the force majeure determination useless, because it ties the price of solar photovoltaic alternative energy compliance payments to the market price of solar credits during the force majeure period. At that point, it is likely that the cost of the credits would be prohibitively high.

In the Proposed Rulemaking Order, the Commission stated its preference for a market price standard for solar photovoltaic alternative compliance payments as opposed to a price cap

for such payments. To avoid the result noted above, and in an effort to be consistent with the Commission's stated market price preference, PECO recommends that the Commission link the force majeure solar photovoltaic alternative compliance payment to the average market price of solar photovoltaic credits in the applicable RTO for the reporting period prior to a finding of force majeure.

Also 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 required level of solar photovoltaic compliance for that reporting period. The Commission should 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 I and Tier II obligations that would dictate that the Commission would only have this option for solar compliance. PECO recommends that the proposed rule be revised to give the Commission the parallel option as to all compliance obligations.

Fourth, the Commission should make clear that in making a force majeure determination, the Commission will consider conditions existing in the alternative energy markets in other states and in the voluntary markets. In determining whether or not force majeure exists, the Commission must consider the demand from other states within the applicable RTO that have renewable portfolio standards. The Commission must also be cognizant of the demand 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 other programs besides AEPS. Such a provision would be consistent with Act's language in Section 1648.4.[31]

Fifth, PECO interprets the Commission's language in Sections 75.67(c) and 75.68(d) as establishing a de facto price cap for both Tier I (non-solar) and Tier II credits. PECO agrees with this approach. Based on these sections and the Commission's finding that a price exceeding $45 for a Tier I (non-solar) or Tier II credit is unreasonable, PECO requests that the Commission include specific language that prohibits an EDC or EGS from purchasing any Tier I (non-solar) or Tier II credit above $45. Such a statement would formalize the presumption that force majeure should be declared for the market should the prices exceed the cap.

Finally, Proposed Section 75.67 should include a provision stating that if a utility purchased alternative energy credits specifically for a voluntary conservation program, it may continue to sell those AECs through the voluntary program, even during a period of force majeure. This provision would be critical to the viability of voluntary programs like PECO Wind. Indeed, in the absence of such a provision, a voluntary program would not be able to be based on Pennsylvania credits, or credits from RTOs managing portions of Pennsylvania's transmission system, because of the potential that those credits could be required to be used to satisfy AEPS obligations. This would leave the utility with no AECs to serve its voluntary program – a result that would either make the voluntary program infeasible in Pennsylvania or would force the program to sell AECs generated from outside the PJM or MISO regions. Neither result would be consistent with the intent of the Act.

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[31] "Energy derived only from alternative energy sources inside the geographical boundaries of this Commonwealth ***or within the service territory of any regional transmission organization that manages the transmission system in any part of this Commonwealth*** shall be eligible to meet the compliance requirements under this act." (Emphasis added.

Consistent with the forgoing, PECO proposes the following amendments to Proposed 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 demand existing within the service territory of any RTO that manages the transmission system in any part of Pennsylvania. 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. 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.

(e) Alternative compliance payments made by EDCs pursuant to § 75.67(d) shall be deemed a cost of compliance with this chapter and may be recovered pursuant to § 75.69. A finding of force majeure for a reporting period will not render the cost of credits purchased or contracted for delivery in that reporting period, but prior to the finding of force majeure, unrecoverable.

...

(g) An EDC that has purchased alternative energy credits specifically for a voluntary program may continue to sell those credits through the voluntary program during a period of force majeure.

VIII. Proposed Section 75.68 (Special force majeure)

Recommendation: The Commission should revise Proposed Section 75.68(f) to be consistent with PECO's comments on Proposed Section 75.67(e).

Summary of the Proposed Regulation

This section provides a special force majeure mechanism for reporting periods in which the Commission did not make a general force majeure determination.

Subsection (a) provides that an EDC or EGS that is not in compliance with its AEPS obligations may petition the Commission for a special force majeure determination within 45 days of the conclusion of a reporting period for which the Commission did not make a force majeure determination. Subsection (b) provides for public notice of such requests. Subsections (c)–(g) track and/or refer back to the standards set forth in Proposed Section 75.67 addressing force majeure determinations, cost recovery, and the information to be provided to the Commission to assist it in making a special force majeure decision.

PECO's Comment

Consistent with PECO's comments above concerning cost recovery and voluntary conservation programs, PECO proposes the following amendment to subsection (f) and the addition of a subsection (h) to Proposed Section 75.68:

(f) Alternative compliance payments made by EDCs pursuant to § 75.68(e) shall be deemed a cost of compliance with this chapter and may be recovered pursuant to § 75.69. A finding of special force majeure for a reporting period will not render the cost of credits purchased or contracted for delivery in that reporting period, but prior to the finding of force majeure, unrecoverable.

...

(h) An EDC that has purchased alternative energy credits specifically for a voluntary program may continue to sell those credits through the voluntary program during a period of special force majeure.

IX. Proposed Section 75.69 (Alternative energy cost recovery)

Recommendation: The Commission should track the Act's alternative energy cost recovery language, which permits the recovery of "any direct or indirect costs" of acquiring alternative energy resources.

Summary of the Proposed Regulation

Section 75.69 sets forth the proposed alternative energy cost-recovery provisions the Commission drafted to comply with the Act.

Subsection (a) provides that a default service provider may recover eight categories of "reasonable and prudently incurred costs" from its default service customers resulting from its compliance with the Act. Subsections (b) and (c) require the default service provider to comply with the AEPS obligations set forth in the regulations, the default service provider provisions of the Pennsylvania Code, and to implement a competitive procurement process for acquiring alternative energy and alternative energy credits.

Subsection (d) provides that the cost of compliance with the Act shall be recovered through an automatic adjustment clause consistent with the requirements of 66 Pa.C.S. § 1307 and restates the cost recovery standards set forth in Section 3(a)(3) of the Act. Subsection (e) provides that the Commission will perform annual fuel cost audits for each default service provider implementing the automatic adjustment clause.

PECO's Comment

In the Proposed Rulemaking Order, the Commission stated that it interprets the Act to require that EDCs use competitive processes to meet their AEPS obligations.[32] The Commission

[32] Proposed Rulemaking Order at 19.

further stated: "[h]owever, this interpretation does not preclude the use of long-term, bilateral contracts between an EDC and an alternative energy generator as part of a reasonably balanced portfolio of alternative generation supply resources."[33] While PECO does not read the Commission's statement, or the proposed regulation, to require EDCs to enter into multi-year contracts, PECO commends the Commission for its flexible, common sense approach to the procurement of AEPS eligible resources.

With regard to the language of the proposed regulation, PECO notes that subsection (a) does not fully track the language of the Act. The Commission's proposed Section 75.69(a) states that: "[a] default service provider may recover from default service customers the following reasonable and prudently incurred costs for compliance with [the Act]" and sets forth eight categories of recoverable costs. In contrast, Section 3(a)(3)(ii) of the Act, states in relevant part that:

> ***any direct or indirect costs*** for the purchase by electric distribution [companies] of resources to comply with this section, including, but not limited to, [certain specified costs], shall be recover[able] . . . [34]

PECO recommends that the Commission revise its subsection (a) to track the Act and proposes the following regulatory language:

> (a) A default service provider may recover from default service customers <u>any</u> ~~the following~~ reasonable and prudently incurred <u>direct or indirect</u> costs for compliance with 73 P.S. §§ 1648.1 – 8, <u>including but not limited to</u>:

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[33] *Id.*

[34] 73 P.S. § 1648.3(a)(3)(ii) (emphasis added).

X. Proposed Section 75.70 (Alternative energy market integrity)

Recommendation: The Commission should amend Proposed Section 75.70 to make voluntary retail purchases of alternative energy separate from AEPS compliance requirements.

Summary of the Proposed Regulation

This proposed section reflects the Commission's efforts to preserve Pennsylvania's voluntary retail market for alternative energy. Subsection (a) of the regulation provides that all EDC and EGS sales to retail customers that exceed the EDC's or EGS's AEPS requirements should be represented by credits "separate from and in addition to" those credits used to satisfy their AEPS requirements. Subsection (b) requires that EDCs and EGSs be able to substantiate that the alternative energy they market comes from specific alternative energy sources, and that the alternative energy attributes sold to a particular customer have only been sold once.

PECO's Comment

While PECO appreciates the Commission's efforts to preserve the viability of the voluntary market for alternative energy resources, Proposed Section 75.70(a) would likely have the opposite effect. Indeed, as drafted, this regulation would likely dampen voluntary customer demand and also discourage EDCs and EGSs from separately marketing alternative energy to their retail customers.

Proposed subsection (a) currently provides that:

> (a) All sales of electricity by EDCs and EGSs to retail electric customers marketed as deriving from alternative energy sources ***that exceed*** the requirements of § 75.61 at the time of the sale shall be supported by alternative energy credits separate from ***and in addition to*** alternative energy credits counted for compliance with the requirements of § 75.61.

(Emphasis added). The problem with this language is that it appears to only permit sales of alternative energy to voluntary retail purchasers after the EDC or EGS has met its AEPS

requirements. Not only would this have a chilling effect on voluntary purchases (because alternative energy might not be available when requested by the customer), it would make it virtually impossible for an EDC or EGS to maintain a consistent retail alternative energy-marketing program.

PECO is aware that some commenters on the Commission's Implementation Order expressed concern that counting voluntary retail purchases toward EDC and EGS AEPS requirements would result in these retail customers paying twice for their alternative energy attributes – once for the premium on the alternative energy and a second time when the costs for the energy is recovered from ratepayers through the automatic adjustment clause.[35] However, in most voluntary programs, PECO Wind included, the customers own the credits purchased. This allows the customers the option of either selling the credits or retiring them. In contrast, AEPS credits purchased to comply with the Act are owned and then retired by the EDC. These AEPS credits will be procured due to a separate regulatory obligation of the EDC. Therefore, the cost of the AEPS credits must be recoverable from all customers as a non-bypassable surcharge consistent with the Act. This is the only way to maintain the viability of the voluntary market while allowing EDCs to comply with the Act. PECO recommends that voluntarily purchased alternative energy credits be kept completely separate from credits counted toward EDC and EGS compliance obligations.

Consistent with the foregoing, PECO recommends that subsection (a) be amended as follows:

> (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 and in addition to alternative energy credits used to support compliance with the requirements of § 75.61. ~~exceed the requirements of § 75.61~~

[35] *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, Implementation Order II, Docket No. ML-00051865 (Order entered July 18, 2005).

~~at the time of the sale~~ shall be ~~supported by alternative energy credits separate from~~ ***~~and in addition to~~*** ~~alternative energy credits counted for compliance with the requirements of § 75.61.~~

XI. Proposed Section 75.71 (Banking of alternative energy credits)

Recommendation: The Commission should amend Proposed Section 75.71 to make it clear that any alternative energy credit that meets the requirements of Act can be used within the time limits set forth in the regulation.

Summary of the Proposed Regulation

Proposed Section 75.71 sets forth the Commission's interpretations of the alternative energy banking provisions of the Act. Subsection (a) provides that EDCs and EGSs can bank alternative energy credits certified in one reporting period for use in either or both of the two immediately following reporting periods. Subsection (b) provides that EDCs and EGSs may bank alternative energy credits certified during a cost recovery period for use in either the remainder of the reporting period in which their cost recovery phase expires and the following reporting period, or in the first two full-year reporting periods following the expiration of their cost recovery period.

Subsection (c) provides for the expiration of alternative energy credits not used within these time periods. Subsection (d) requires EDCs and EGSs to satisfy their AEPS obligations before banking alternative energy credits. Finally, subsection (e) provides that the Commission will determine the volume of sales for EDCs and EGSs for the 12-month period preceding the effective date of the Act for purposes of allowing them to determine the amount of credits they may bank.

PECO's Comment

PECO has two comments on this proposed rule, one amending its language and one responding to the Commission's request for comments concerning what the Commission believes may be a banking restriction in the Act.

With regard to the text of the rule, PECO notes that while proposed subsection (c) provides a deadline for EDCs and EGSs to use their alternative energy credits, the regulation is silent as to whether alternative energy credits that otherwise comply with the Act's requirements have an expiration date. Stated differently, the regulation does not clarify how long an AEC can be used during an EDC's or EGS's compliance period before it expires.

PECO believes that if an alternative energy credit complies with the requirements of the Act when purchased it should be usable throughout the applicable compliance period. PECO proposes that the following language be added to subsection (c) to codify this "if good when purchased, then good for cost recovery" standard:

> (c) All alternative energy credits acquired by EDCs and EGSs that comply with 73 P.S. § 1648.3(e)(7) shall be valid for purposes of compliance with § 75.61 throughout the time periods identified in subsections (a) and (b). Alternative energy credits acquired by EDCs and EGSs not used within the time limits identified in subsections (a) and (b) shall be retired within the alternative energy credits registry and not available for the compliance requirements of this chapter.

With regard to the Commission's request for comment on whether the Act bars the banking of credits from existing alternative energy systems in quantities equal to their Pennsylvania retail sales (as opposed to the EDC's total alternative energy sales) for the year prior to the Act's effective date, PECO believes there is no such restriction in the statute and that the Commission's proposed language in Section 75.41 is consistent with the requirements of the Act.

The Commission referred to Section 1648.3(e)(7) of the Act as possibly placing this restriction on alternative energy systems.[36] However, Section 1648.3(e)(7) provides, in relevant part, that:

> An ***electric distribution company or an electric generation supplier*** with sales that are exempted under subsection (d) [*i.e.*, during the EDC's cost recovery period], may bank credits for retail sales of electricity generated from Tier I and Tier II sources made prior to the end of the cost-recovery period and after the effective date of this act. Bankable credits shall be limited to credits associated with electricity sold from Tier I and Tier II sources during a reporting year which exceeds the volume of sales from such sources ***by an electric distribution company or electric generation supplier*** during the 12-month period immediately preceding the effective date of this act.

(Emphasis added).

As shown above, the language of this section of the Act places no restriction on credits generated by alternative energy systems. Instead, it provides that EDCs and EGSs may not bank credits for retail sales of electricity from alternative energy resources made during their cost recovery period and after the effective date of the Act unless the credits are associated with electricity sold from such sources over and above the volume of their retail sales for the year prior to the effective date of the Act. The Act's purpose here is to reward EDCs and EGSs that have increased their alternative energy resource sales since the effective date of the Act. Accordingly, the Commission's proposed regulation is correct as drafted.

[36] Proposed Rulemaking Order at 20-21.

XII. Proposed Section 75.72 (Alternative energy credit registry)

Recommendation: PECO has no comments on this proposed section.

Summary of the Proposed Regulation

This section proposes standards by which the Commission will comply with the Act's requirement that it develop a registry information relating to all available alternative energy credits and credit transactions.

Subsection (a) provides that the Commission will designate an alternative energy registry and requires EDCs and EGSs to record the prices paid for alternative energy credits in the registry. Subsection (b) provides that the Commission may direct EDCs and EGSs to enter into agreements with the registry to verify their compliance with the AEPS regulations and the Act, and requires them to comply with the registry's rules.

Subsection (c) requires EDCs and EGSs to provide the Commission and the program administrator with access to the registry of information so that they may verify EDC and EGS compliance with the Act. Subsection (d) provides that the Commission will treat the prices paid for individual credits as confidential but will make aggregate pricing data available to the public.

PECO's Comment

PECO has no comments on this section as proposed.

CONCLUSION

PECO commends the Commission's development of the draft AEPS regulations and the progress that it has made on the regulations thus far. Moreover, PECO shares the Commission's goal of establishing AEPS regulations that are consistent with the Act and conducive to the establishment of a successful alternative energy market. For this and all of the foregoing reasons, PECO requests that the Commission amend the proposed regulations as it has recommended above.

Respectfully submitted,

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