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January 10, 2014

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Public Utility Commission Bonding Requirements for Electric Generation Suppliers;
Acceptable Security Instruments, Docket No. M-2013-2393141

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Retail Energy Supply Association's (RESA) Comments to the Tentative Order dated December 5, 3013 with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Deanne M. O'Dell

DMO/lww
Enclosure

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Public Utility Commission Bonding : Docket No. M-2013-2393141
Requirements for Electric Generation :
Suppliers; Acceptable Security Instruments :

**THE RETAIL ENERGY SUPPLY ASSOCIATION'S
COMMENTS TO TENTATIVE ORDER
DATED DECEMBER 5, 2013**

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Date: January 10, 2014

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I. INTRODUCTION

In its Tentative Order entered December 5, 2013,¹ the Commission seeks comments on its proposals to modify the current financial security requirements (“FSRs”) that electric generation suppliers (“EGSs”) who take title to electricity are required to maintain pursuant to Section 2809(c) of the Public Utility Code.² Presently, the Commission requires electric supplier and aggregator applicants to submit a bond or letter of credit in the amount of \$250,000 with the initial application. One year after licensure, the EGS is required to maintain security at a level equal to 10% of its reported annual gross receipts.³

The Retail Energy Supply Association (“RESA”)⁴ fully supports the Commission’s efforts here to reexamine current FSRs for EGSs. The current requirement that EGSs annually adjust their on-going FSR to 10% of gross receipts and the availability of only two security instruments to satisfy this requirement is burdensome and a potential barrier to entry because it is financially excessive and not reasonably tailored to protect against identifiable financial losses. Well-designed security requirements result in lower costs for EGSs and potentially better prices for consumers while still ensuring reasonable security is available for identifiable risks. To that end, RESA supports the Commission’s conclusion that the required amount for the on-going FSR should be decreased while allowing EGSs to rely on additional security instruments. Both

¹ *Public Utility Commission Bonding Requirements for Electric Generation Suppliers; Acceptable Security Instruments*, Docket No. M-2013-2393141, Tentative Order entered December 5, 2013 (“Tentative Order”).

² 66 Pa. C.S. § 2809(c)(requirements for electric generation suppliers – financial responsibility).

³ 52 Pa. Code § 54.40(d).

⁴ RESA’s members include: AEP Energy, Inc.; Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

of these modifications are an improvement over the current status quo and a positive step forward. Although RESA continues to believe a fixed \$250,000 security requirement and a significantly expanded list of security instruments as set forth in its informal comments is ideal,⁵ RESA recognizes that the Commission did not choose to accept these modifications in the proposals set forth in the Tentative Order. Therefore, rather than reargue its idyllic position, RESA urges that the Commission consider two changes to its tentative proposals.⁶ First, the Commission should implement a \$1 million cap on the on-going FSR. Second, the Commission should clarify that it intends to permit the use of a “corporate guarantee” that is not limited to just the parent/subsidiary corporate relationship. These proposed changes will not jeopardize the Commission’s ability to fulfill the purposes of the FSRs. They will, however, encourage the growth of the competitive retail market and lower costs borne by consumers. As such, they are in the public interest and would be a significant step forward.

The Commission also sought comments on the procedural process that may be utilized to effectuate these changes.⁷ RESA supports immediate implementation of modifications to the current FSRs. Notably, the calculation of an EGS’ on-going FSR is based on the licensee’s reported annual gross receipts information which is due April 30 of each year.⁸ Therefore, implementing changes prior to this deadline will enable EGSs to incorporate the changes in time to adjust their FSR requirements for 2014. The Commission has ample ability to implement this change expeditiously consistent with either the flexibility already set forth in the Commission’s current regulations or through the issuance of immediate industry-wide waivers if the

⁵ RESA’s June 3, 2013 Informal Comments are summarized on pages 8-11 of the Tentative Order.
⁶ If, however, the Commission concludes that adopting a specific dollar amount cap for the on-going FSR will not be implemented at this time, then RESA fully supports the recommendation in the Tentative Order to reduce the current requirement from 10% of gross receipts to 5% provided that the change is implemented expeditiously through the regulatory procedures recommended in Section II.C.3.
⁷ Tentative Order at 11-12.
⁸ 52 Pa. Code § 54.39(b).

Commission deems a further rulemaking process is needed. RESA also recommends that the Commission adopt a timely and administratively efficient process for permitting each EGS to modify its FSR consistent with the final determination in this proceeding. Implementation of these changes will be a positive benefit for Pennsylvania's retail electricity market as consumers will likely see improved competitive alternatives as EGSs elect to allocate more investment to the Commonwealth.

II. COMMENTS

A. RESA Supports Decreasing The Level Of On-Going Financial Security Requirements And Recommends Implementing A \$1 Million Cap

RESA applauds the recommendations in the Tentative Order to lower the current on-going FSR and, as a general matter, supports any policy that results in the expeditious reduction of the current FSRs to a more reasonable level. While the proposal in the Tentative Order to reduce the current financial security requirement to 5% of gross receipts is much preferable to the current 10% level, RESA would encourage the Commission to also adopt a \$1 million cap on the security requirements. Greater FSRs impose significant costs on EGSs that are ultimately borne by consumers. Therefore, establishing an appropriate FSR that balances the costs to consumers while satisfying the purposes for the FSR is in the public interest. While the Commission's proposal to decrease the on-going FSR from 10% to 5% of gross receipts is an improvement, imposing no limit on the on-going FSR perpetuates the over-securitization that currently exists. In comparison with other states' FSRs, Pennsylvania's current FSRs are significantly more onerous. While reliance on a percentage of receipts formula for on-going FSRs is not an ideal approach, limiting the FSR to \$1 million will further reduce costs that are borne by customers without materially increasing the risk of default or an EGS not meeting its obligations.

1. Significant financial security requirements have a negative impact on consumers

When evaluating what is an appropriate level of FSRs for EGSs, the impact of this requirement on consumers must be taken into consideration. FSRs are a cost-of-doing business; how these costs are treated and recovered by load-serving entities is heavily influenced by the amount and structure of the requirements. Percentage based FSRs increase costs to customers because they artificially drive up the cost of the product to the customer.

The point is best illustrated through the following hypothetical:

- Supplier A serves customers in Pennsylvania and New Jersey. In 2013, Supplier A had year-end revenues of \$100 million in each state.
- To provide a better sense of the scale of Supplier A, assume average prices of 9 cents per kilowatt-hour (“kWh”) in Pennsylvania and 12 cents per kWh in New Jersey which translates to approximately 1.1 million megawatt-hours (“MWh”) or 111,000 residential customer equivalents (“RCEs”)⁹ in Pennsylvania and approximately 833,000 MWh or 83,000 RCEs in New Jersey.
- In New Jersey, the FSR consists of a bond in the amount of \$250,000¹⁰ regardless of Supplier A’s in-state revenues. Assuming Supplier A pays 2% interest on the bond, the cost to the supplier is \$5,000 annually.
- Presently, Supplier A, now in its third year of operation in PA, would have a 2014 bond requirement of \$10 million (10% of 2013’s gross receipts). Again at a 2% interest rate, the annual cost of the bond to Supplier A is \$200,000 (or 0.2% of its gross receipts).

While approaches on how to recover the costs of the bond will vary among EGSs, the most likely scenario is for Supplier A to essentially “ignore” the \$5,000 annual cost associated with the FSR in New Jersey, treating it as overhead and not accounting for it when it calculates

⁹ Residential Customer Equivalent = 10 MWh or 10,000 kWh of annual usage.
¹⁰ N.J. Admin. Code § 14:4-5.4(f)(1).

the price of electricity. On the other hand, Supplier A could not ignore the \$200,000 in annual costs to meet Pennsylvania's FSR. This is because the cost will continue to increase as Supplier A's in-state gross receipts increase either due to: (1) an increase in the amount of electricity served; or, (2) an increase in the underlying energy prices. Because of this, Supplier A, as a component of its price, needs to account for the cost of the FSR and recover those costs directly from customers. In other words, Supplier A grosses-up the price of its electricity by 0.2% (10% requirement multiplied by the interest rate (2%) of the security instrument). On \$90/MWh retail power, this equates to \$0.18/MWh. This amount can quickly add up, especially for larger energy consumers. As of October 2013, the retail switched load in Pennsylvania is approximately 80,000,000 MWh.¹¹ Based on the conservative proxy values used herein, the impact of the present FSR to retail customers in the Commonwealth is \$14.4 million annually. Despite the huge annual expense, Pennsylvania consumers receive no discernible benefit. The greatest beneficiaries are the (typically, out of state) bonding companies, that are paid to over-insure a risk that is negligible. As the Commission notes in its Tentative Order, this amount "may be excessive in relation to the risk intended to be secured."¹² Meanwhile, in neighboring New Jersey, the impact of its FSRs to retail energy consumers is negligible, if not zero.

Also of note is that the percentage method of calculating FSRs results in an ever-increasing burden for growing EGSs regardless of size. EGSs which continue to increase their revenue each year are correspondingly required to maintain greater security at increasing costs. This may impede the ability of an EGS from achieving greater success because such result would

¹¹ Office of Consumer Advocate Electric Shopping Statistics as of Oct. 1, 2013 indicates 18,072 MW of switched load served. MW was converted to MWh using a load factor assumption of 50%. In other words, 18,072 MW multiplied by number of hours in a year (8760), then multiplied by 50%.

¹² Tentative Order at 11.

require it to dedicate substantial capital resources to meeting ever-increasing security requirements.

For these reasons, decreasing the current on-going FSR is a significant improvement for consumers in the Commonwealth. By proposing to reduce the subsequent (post year-one) FSR from 10% of annual gross receipts to 5%, the Commission is effectively saving consumers millions of dollars (\$7.2 million in the theoretical example outlined above) without materially increasing the risk of an EGS defaulting on its obligations.

While this is a good first step in addressing the current situation, a real opportunity to save Pennsylvania energy consumers even more money is possible by limiting the obligation to an amount not to exceed \$1 million. The effect of this would be to cap the cost of the bond to \$20,000 annually (assuming 2% interest) for the EGS. While the amount is not completely immaterial, for most EGSs, it would not rise to the level where the EGS would be compelled to explicitly account for it in its pricing model, thereby potentially saving an additional \$7.2 million to retail energy consumers in the Commonwealth.

2. Purpose of financial security requirements is still achieved with a \$1 million cap

The primary purpose of the on-going security requirement is to ensure payment of the Gross Receipts Tax (“GRT”) and to ensure the supply of electricity for the retail market in accordance with contracts, agreements or arrangements.¹³ However, even a 5% of gross receipts requirement still over-securitizes the risks that the FSR is purporting to address. Regarding the GRT liability, the Department of Revenue (“DOR”) already has requirements in place that sufficiently address the concern of a supplier default and the Commission’s collection of such a

¹³ 52 Pa. Code § 54.40(f)(2).

significant amount of additional security from an EGS is duplicative and unnecessary. This is illustrated in the below hypothetical offered in RESA's informal comments:

An EGS that had \$10 million in gross receipts for the prior year would have a \$590,000 GRT liability, assuming a 5.9% GRT rate. . . [O]n March 15th of every year, EGSs are required to make a payment that covers any amounts due from the prior year and 90% of the total GRT liability for the current year. That means that the EGS must pay at least \$531,000 of the \$590,000 owed, leaving only a GRT liability of \$59,000, which is the total "exposure" by the Commonwealth if the EGS is unable to pay its taxes when the bill comes due. Under this scenario, and the current security level of 10% of gross receipts, the EGS is required to post a bond or other security in the amount of \$1 million (10% of \$10 million). The Commission's current bonding requirement compels our hypothetical supplier to obtain a \$1 million security instrument to cover a potential GRT liability of \$59,000. Even under the modified proposal, the Commission would require \$500,000 in security to cover a possible \$59,000 GRT obligation.¹⁴

Beyond the GRT non-payment risk that is intended be addressed by the on-going FSR, the FSR is also intended to ensure the supply of electricity at retail in accordance with contracts, agreements or arrangements.¹⁵ In this regard, RESA notes that – in addition to the specific FSRs of each electric distribution company ("EDC") and the DOR prepayment requirements – EGSs are required to comply with PJM collateral requirements intended to ensure the supply of electricity for the retail market. PJM participants are required to maintain credit equal to the highest exposure experienced in the past year, which is generally the sum of the highest three consecutive weekly bills during that time.

According to the Tentative Order, the FirstEnergy Operating Companies expressed concerns about decreasing the on-going security requirements based on the fact that electric EDCs are given the lowest priority of payout under the bonds and the EDCs are required to pay

¹⁴ Tentative Order at 9.
¹⁵ 52 Pa. Code § 54.40(f)(2).

GRT on behalf of an EGS in the event of an EGS default.¹⁶ This argument, however, should not prevent the Commission from moving forward to decrease the requirements for several reasons. First, as illustrated above, the DOR already collects the majority of the GRT obligation on a prepaid basis from each EGS. Therefore, it is unlikely that any EDC would be faced with a significant liability in this regard.

Second, as the Commission noted when adopting the current regulations, an EDC may collect any GRT that it pays to the Commonwealth on behalf of an abdicating supplier from the supplier's former customers.¹⁷ Thus, if an EDC is required to cover a GRT liability for an exiting supplier, the amount due is not likely to be significant given the DOR prepayment; and, the EDC has the ability to recover the payment from the customers of the supplier.

Finally, each EDC has its own FSRs that any EGS operating on its system must satisfy.¹⁸ According to the EDCs, the purpose of these requirements is "to provide adequate coverage for market exposure and other fees in the event of an EGS default."¹⁹ There are on-going efforts at the Commission to comprehensively review these requirements to analyze the risk actually confronted by the EDCs and ensuring that the EDC's FSRs appropriately address these risks. Therefore, EDC specific concerns such as those offered by the FirstEnergy Operating Companies

¹⁶ Tentative Order at 6.

¹⁷ *Licensing Requirements for Electric Generation Suppliers*, Docket No. L-970129, Final Rulemaking Order adopted April 23, 1998, 28 Pa. Bull. 3760, 3768.; *See also* 66 Pa.C.S. § 2809(c)(2).

¹⁸ For example, the FirstEnergy Operating Companies have a security requirement of \$250,000. *See, e.g.,* Metropolitan Edison Company, Tariff Electric Pa. P.U.C. No. S-1, Section 4.14 (at Original Page No. 17). PPL Electric Utilities Corporation and PECO Energy Company base the required security amount on the value of coordination services charges that the EDC projects will be incurred during the next two billing periods, based on an EGS' forecasted load obligation. *See, PP&L, Inc., Tariff Electric Pa. P.U.C. No. 1s, Section 12.5; PECO Energy Company, Tariff Electric Pa. P.U.C. No 1S, Section 12.4* (at Original Page No. 39).

¹⁹ *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952, Final Order entered March 2, 2012 at 101.

can be addressed in that process and there is no reason to delay moving forward in this proceeding.

3. Pennsylvania and other states already rely on significantly lower and/or capped financial security requirement

There is current Commission precedent for utilizing a capped FSR. For example, the Commission requires a flat \$250,000 initial FSR for all EGSs who take title to electricity. For marketers and brokers who do not take title to the electricity, the Commission generally approves initial and on-going security requirements in the amount of \$10,000 rather than \$250,000.²⁰

Similarly, many other restructured states rely on flat FSRs. For example:

<u>State</u>	<u>Bond Amount</u>	<u>Reference</u>	<u>Interest Rate</u>	<u>Annual Cost of Bond to EGS</u>
Illinois ²¹	\$300,000	Ill. Adm. Code tit. 83, § 451.50	2%	\$6,000
Connecticut	\$250,000	Conn. Agencies Regs. § 16-245-4	2%	\$5,000
New Jersey	\$250,000	N.J. Admin. Code § 14:4-5.4(f)(1), 14:4-5.5(f)	2%	\$5,000
Maryland	\$250,000	Md. Code Regs. 20.51.02.08	2%	\$5,000
Delaware	\$100,000	26 Del. Admin. Code § 3001-2.0; Rule 2.1.1.5.8 – 2.1.1.5.9.8	2%	\$2,000
Michigan	\$100,000	Mich. Comp. Laws Ann. § 460.10q(3) (West 2014); See also <i>In the matter, on</i>	2%	\$2,000

²⁰ See, eg, *License Application of Co-eXprise, Inc. for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Consultant of Electricity Supply Services*, Docket No. A-110166, Order entered January 20, 2006 at 4. Co-eX proposed to operate as a consultant whereby it would provide its customers with an evaluation and selection process from which to select the best positioned licensed EGS and award business. See also *License Application of Premier Power Solutions, LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Consultant*, Docket No. A-110170, Order entered July 26, 2006 at 4-5. Premier requested an EGS license to become EDI certified with the utilities so that it could efficiently and effectively obtain electricity usage information for the customers to whom it provides consulting services. Premier intended to utilize the information to help its customers reduce their overall spending for electricity but would not take title to power.

²¹ Amount of bonding requirements vary based on which customer segments the EGS serves. The figure presented represents the highest requirement (EGS serving both residential/small commercial and large commercial segments).

		<i>the Commission's own motion, to implement a voluntary electric supplier licensing program, Case No. U-11915 (Order issued on June 19, 2000 and revised on December 20, 2012)</i>		
AVG	\$208,333		2%	\$4,167

The average bond amount in the six states listed above is \$208,000. Referring back to the hypothetical in Section II.A.1, Supplier A would have a \$5 million FSR requirement (based on 5% of gross receipts) in Pennsylvania. This is sixteen times higher than the \$300,000 bonding requirement the same supplier would have in Illinois, and twenty-four times higher than the six-state \$208,000 average FSR. If the Commission adopts RESA's proposal and caps the obligation to \$1 million, the FSR in Pennsylvania would still continue to be the most stringent FSR among restructured energy markets, with security amounts that are exponentially higher than the requirements EGSs must meet in other states.

Nonetheless, implementation of this cap would create market certainty for EGSs wishing to operate in Pennsylvania and lower costs for consumers while still ensuring that the risks intended to be addressed by the security requirements are addressed. For example, if an EGS is unable to serve its customers, current rules provide that affected customers can return to utility default service or select another supplier to avoid a disruption in service. If, as a result of this change of supplier, the customer experiences an increase in the price for electric supply, the risk of exposure could be covered by the FSR. Importantly, though, the exposure is potentially minimal as it would be limited to the difference between the EGS's price and the new price if the customer is charged a higher rate. There would be no exposure if the customer is transferred to another supplier that agrees to honor the initial price or offers a lower price. Given this,

establishing a cap on the on-going FSR at \$1 million is not likely to jeopardize consumers if they are required to switch to a new supplier for service due to a supplier default.

4. Commission retains ability to set higher standards as may be warranted by special circumstances

As Pennsylvania’s retail electricity market continues to develop, it is important to remain focused on the purpose of these current FSRs and the positive real-time impact that can be achieved by making modifications sooner rather than later. If the Commission chooses to make significant market changes in the future, such as transitioning current default service customers to EGSs, the FSRs that would be required for those EGSs receiving the default service customers could be reassessed. Importantly, RESA’s proposal does not remove the Commission’s current ability to increase the security requirements for a particular EGS if the Commission finds that such an increase is necessary to ensure the financial responsibility of the EGS and the supply of electricity at retail in accordance with 66 Pa. C.S. § 2809(c)(1)(i). This could take place at the time of licensure, if there is a concern over a particular applicant’s financial fitness, or in response to future changed circumstances of the EGS such as a change in the EGS’s ownership or financial condition.

B. RESA Supports Expanding The Types Of Security Instruments That May Be Used And Requests That The Commission Clarify That It Intends To Permit The Use Of A “Corporate Guarantee” That Is Not Limited To Just The Parent/Subsidiary Corporate Relationship

The Public Utility Code requires licensed EGSs to provide a bond “or other security approved by the Commission” to ensure financial responsibility.²² The types of security that the Commission may approve are not specified in the statute or in the Commission’s regulations.²³ In practice, however, the Commission has typically accepted only bonds or letters of credit to

²² 66 Pa. C.S. § 2809(c)(1)(i).
²³ *See, Id.*, 52 Pa. Code § 54.40.

meet the security requirement. In its Tentative Order, the Commission proposes to expand the security instruments it will accept to include:

- Parental guarantee, in a form acceptable to the Commission, where the parent maintains an investment-grade long-term bond rating from two of the four rating agencies:

Standard & Poors	BBB- or higher
Moody's Investors' Services	Baa3 or higher
Fitch IBCA	BBB- or higher
Duff and Phelps Credit	BBB- or higher

- Segregated cash accounts, held by federally insured financial institutions, specific to Pennsylvania customers and callable only by the Commission
- A mix of bonds; LOCs; Parental guarantees and/or segregated cash accounts as set forth above sufficient meet the required security in the amount of 5% of annual gross receipts.²⁴

RESA fully supports this expanded list of acceptable security instruments. While RESA believes additional security instruments should also be acceptable,²⁵ the Tentative Order recommendations represent a positive step forward that should be implemented as soon as possible. RESA requests, however, that the Commission clarify the type of financial guarantees that would be accepted. The Tentative Order references only "parental guarantee." However, RESA recommends that the Commission accept any guarantee provided by another entity provided that the guarantor satisfies the credit rating criteria established by the Commission. There are several reasons for this requested clarification.

First, competitive suppliers employ a variety of corporate structures that may involve a number of affiliates and subsidiaries that are not organized into a parent/subsidiary relationship.

²⁴ Tentative Order at 11-12.

²⁵ RESA supports the following security instruments: reliance on investment-grade long-term bond ratings from two of the four major rating agencies; a guarantee, issued by a corporation, co-partnership, or other person or association, or by a qualified subsidiary, affiliate of the EGS, or a qualified corporation holding controlling interests in the EGS; a copy of the security or agreement that was provided and approved by PJM or other RTO and used to serve as collateral; a combination of any or all of the types of the foregoing instruments. Tentative Order at 10.

If an affiliated company within the family of the EGS can satisfy the Commission's established criteria, then allowing the licensed EGS to rely on a corporate guarantee from that affiliated company is consistent with the concept of a parental guarantee.

Second, in addition to affiliated companies, competitive suppliers enter into various relationships with a wide scope of entities that could reasonably be relied upon to satisfy the Commission's security requirements consistent with the concept of a parental guarantee. For example, a wholesale supplier to the EGS could be reasonably relied upon to provide a corporate guarantee for the EGS. Based on a review of publicly reported financial earnings statements, many EGSs rely on wholesale suppliers such as, but not limited to BP, Shell, and Macquarie to meet collateral requirements at the independent system operators ("ISOs") and potentially state FSRs. Often these entities have credit ratings superior to the EGS that they are backing.

Alternatively, an EGS may enter into an arrangement with a creditworthy bank or financial institution to provide a financial guarantee for the EGS's obligations. Again, in many cases, such third party entities may have credit profiles that are even superior to the parent company of the licensed EGS. As such, permitting the use of these types of guarantees would promote the public interest by providing more secure and greater protection for the Commonwealth.

As noted in the Tentative Order, the Public Utility Commission of Texas ("PUCT") allows a "guarantor" to provide the guarantee forms required by the PUCT.²⁶ A guarantor may be a financial institution that maintains an investment-grade credit rating and maintains security instruments that support credit or collateral requirements associated with power purchase agreements for participation in [the ISO]; or the guarantor is a wholesale supplier to the EGS, or

²⁶ Tentative Order at 6.

one of the power provider's affiliates, and the entity maintains security instruments that support credit or collateral requirements associated with power purchase agreements for participation in [the ISO].²⁷ Likewise, Illinois permits an applicant to rely on a line of credit with an "unaffiliated wholesale suppliers for electric energy for delivery to the service territories of the utilities for which the applicant is seeking a certificate."²⁸

Limiting financial guarantees specifically to parent companies creates an un-level playing field. This is because EGSs with large corporate parents are given a competitive advantage because they can rely on their corporate parent. On the other hand, privately-held EGSs without such a corporate structure – regardless of their size or financial wherewithal – are unable to take advantage of a parent/subsidiary relationship or any other similarly situated corporate relationship. Allowing EGSs to rely on corporate guarantees without restricting the relationship to only a parent/subsidiary affiliation recognizes that EGSs have varying corporate structures and relationships with affiliated entities and corporations with whom they do business. To the extent that these corporations are able to satisfy the criteria established by the Commission to guarantee the security requirements placed on the EGS, the Commission should refrain from limiting this security instrument to a parent/subsidiary relationship.

C. RESA Supports Immediate Implementation Of The Commission's Changes And An Administratively Efficient Process To Implement The Changes

In the Tentative Order, the Commission asks for comments on how changes to the current security requirements may be accomplished procedurally. Specifically, the Commission asks whether: (1) the current regulations need to be changed and, if so, can the Commission temporarily waive the current regulations pending a final rulemaking process; and, (2) whether

²⁷ 16 TAC § 25.107(f)(4)(G)(Substantive Rules Applicable to Electric Service Providers)
²⁸ Ill. Adm. Code tit. 83, § 451.320(a)(2),

the proposed changes can be made within the context of the language of the current regulations that contemplates permitting Commission-approved modifications.²⁹

For all the reasons discussed previously, RESA supports immediate implementation of modifications to the Commission's EGS security requirements. From a practical perspective, the calculation of an EGS' on-going FSR is based on the licensee's reported annual gross receipts information which is due April 30 of each year.³⁰ Therefore, implementing changes prior to this deadline will enable EGSs to incorporate the changes in time to adjust their FSR requirements for 2014. To that end, RESA submits that the Commission has sufficient authority to either rely on the current regulatory language to immediately implement modifications or to temporarily waive the regulation pending formal changes. RESA also recommends that the Commission adopt a timely and administratively efficient process for permitting each EGS to modify its FSR consistent with the final determination in this proceeding.

1. The existing regulatory language contemplates modifications and may appropriately be relied upon to effectuate the changes ultimately approved

Commission-approved flexibility regarding the amount of security and the instruments to be utilized is already contemplated by the language of the current regulation. Regarding the amount of the initial FSR, the current regulation states: "Modifications of this amount commensurate with the nature and scope of business anticipated to be conducted in this Commonwealth may be granted where substantial evidence is submitted in support of the modification."³¹ Regarding on-going security requirements, the current regulation states: "A licensee may seek approval from the Commission of an alternative level of bonding

²⁹ Tentative Order at 12.
³⁰ 52 Pa. Code § 54.39(b).
³¹ 52 Pa. Code § 54.40(c).

commensurate with the nature and scope of its operations.”³² Finally, regarding security instruments to be utilized, the current regulation repeatedly refers to “a bond or other approved security.”³³ Given the flexibility that already exists in the text of the current regulations, the Commission can reasonably rely on this existing language to immediately implement the proposed modifications.

Importantly, the Commission has already exercised discretion in practice without revising the regulations. For example, the Commission has permitted marketers and brokers who do not take title to the electricity to rely upon a lower level of security.³⁴ For these entities, the Commission generally approves initial and on-going security requirements in the amount of \$10,000 rather than \$250,000. Likewise, the Commission has exercised flexibility regarding the acceptable security instruments by permitting letters of credit in addition to bonds. While the Commission noted its preference for bonds to other securities when adopting the current regulations, it did make clear that it would “accept a different form of security that can be shown to offer the same degree of safety as a bond and, in the case of a breach, the same relative ease of collection as a bond.”³⁵

For these reasons, the Commission already has significant flexibility with the current regulations to immediately implement modifications to the FSRs as approved in this process without undertaking a formal rulemaking process.

³² 52 Pa. Code § 54.40(d).

³³ 52 Pa Code § 54.40(a), (c), (d)(emphasis added).

³⁴ *See, eg, License Application of Co-eXprise, Inc. for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Consultant of Electricity Supply Services*, Docket No. A-110166, Order entered January 20, 2006 at 4. Co-eX proposed to operate as a consultant whereby it would provide its customers with an evaluation and selection process from which to select the best positioned licensed EGS and award business. *See also License Application of Premier Power Solutions, LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Consultant*, Docket No. A-110170, Order entered July 26, 2006 at 4-5.

³⁵ *Licensing Requirements for Electric Generation Suppliers*, Docket No. L-970129, Final Rulemaking Order adopted April 23, 1998, 28 Pa. Bull. 3760, 3768.

2. If the Commission deems necessary, waiving the current regulations pending a final rulemaking is appropriate and consistent with Commission precedent

As explained in the previous section, there is ample flexibility in the Commission's current regulations to obviate the need for formal regulatory changes. However, if the Commission determines that formal modification of the specific regulatory cite to an on-going security level of 10% is appropriate, then the Commission should issue an immediate blanket waiver of the regulations so that its modifications can be immediately implemented pending the approval of final regulatory language. This is consistent with long-standing Commission practice. When the Commission has determined that an existing regulation should be modified or waived, it has granted temporary waivers on an industry-wide basis pending the final rulemaking. For example, the Commission recently modified portions of 52 Pa Code §§ 57.173, 57.174, 59.93, and 59.94 to shorten the 10-day confirmation time period specified in the regulations to a 5-day confirmation period within which a customer can elect to cancel his or her switch to a competitive supplier.³⁶ The temporary modification applied on an industry-wide basis to the EDCs and natural gas distribution companies ("NGDCs"). Similarly, the Commission adopted a temporary blanket waiver of Section 63.137(2) which granted any jurisdictional telecommunications entity that implemented a call recording program a temporary partial waiver of the regulation that prohibited the recording of customer calls subject to the terms and conditions set forth in the order.³⁷ A final example of the Commission's use of

³⁶ *Interim Guidelines Regarding Standards For Changing a Customer's Electricity Generation Supplier*, Docket No. M-2011-2270442, Final Order entered October 25, 2012.

³⁷ *Guidelines for Waiver of the Call Recording Prohibition at 52 Pa. Code § 63.137(2) Pending Rulemaking*, Docket No. M-2008-2074891, Order entered July 23, 2009. Pending the final rulemaking, the Commission granted, on an industry-wide basis, additional waivers of the requirements set forth in the initial waiver order. See *Petition of Verizon Pennsylvania Inc. and Verizon North Retain Co. for Partial Waiver of the Commission's Call Recording Prohibition Under 52 Pa. Code § 63.137(2)*, Docket No. P-2010-2196242, Order entered October 21, 2010.

temporary waivers of current regulations is during its transition to electronic filing. In this process, the Commission issued temporary waivers regarding the filing of paper copies of various pleadings as well as the number of paper copies that needed to be filed regarding various contracts, applications, tariffs, insurance forms, activity reports, construction notices, planning reports, and reliability reports.³⁸

Here a waiver of the current regulations if the Commission chooses to pursue a change in regulatory language is appropriate. As explained in the previous section, the Commission has ample flexibility within the current text of the regulations. Moreover, the Commission's proposed modifications – even with RESA's suggested cap and clarification – remain consistent with the Public Utility Code's requirement that EGSs "furnish[] a bond or other security approved by the commission in the form and amount to ensure financial responsibility of the electric generation supplier and the supply of electricity retail in accordance with contracts, agreements or arrangements."³⁹

3. The Commission should adopt a streamlined and administratively efficient process for modifying each EGS's financial security requirements consistent with the final determinations

The Commission should adopt a timely and administratively efficient process for permitting each EGS to modify its FSR consistent with the final determination of the Commission in this proceeding. Pursuant to 52 Pa Code § 54.40(d), "maintenance of a license [is] contingent on the licensee providing proof to the Commission that a bond or other approved security in the amount directed by the Commission has been obtained." The Commission does

³⁸ See, eg, *Paper Filing – Elimination of Additional Paper Copy Filing Requirements*, Docket No. M-2012-2317481 & L-2012-2296005, Secretarial Letter dated August 16, 2012; and, *Paper Filing – Elimination of Additional Paper Copy Filing Requirements*, M-2012-2317481, L-2012-2296005 & L-2012-2324073 Secretarial Letter dated February 28, 2013.

³⁹ 66 Pa. C.S. § 2809(c)(1)(i).

not issue formal approval of this information provided by EGSs either through a Secretarial Letter or Commission order. Rather, Commission Staff reviews the information and, if there are questions or issues, then Staff works with the EGS to address them.⁴⁰ RESA recommends that the Commission utilize this established process to permit EGSs to provide the Commission proof that they have modified their FSRs in compliance with the final directives of this proceeding. Under this recommended implementation approach, the Commission would receive updated documentation and information concerning an EGSs form of financial security (such as the replacement of a bond with a new parental or third-party guarantee) without the additional burden of undertaking a time consuming approval process for each EGS's informational filing.

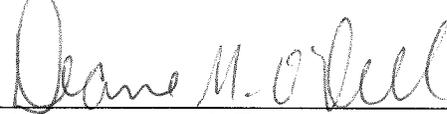
III. CONCLUSION

RESA appreciates the efforts of the Commission to review and consider modifications to the current EGS security requirements and recommends that the Commission implement the following recommended changes: (1) implement a \$1 million cap on the on-going security requirements; and, (2) clarify that the use of a "corporate guarantee" is not limited to just the parent/subsidiary corporate relationship. These proposed changes will not jeopardize the Commission's ability to fulfill the purposes of the FSRs, will encourage the growth of the competitive retail market, and would be a significant step forward. RESA also supports immediate implementation of modifications prior to the April 30 annual report filing deadline so that EGSs can adjust their FSRs for 2014. The Commission has ample authority to timely implement these changes consistent with either the flexibility already set forth in the Commission's current regulations or through the issuance of immediate industry-wide waivers if

⁴⁰ This is similar to how the Commission addresses ministerial notifications regarding changes to an EGS's license application. 52 Pa. Code § 54.34. The Commission does not require EGSs to file a new or amended application with the Commission.

the Commission deems a further rulemaking process is needed. Finally, RESA recommends that the Commission adopt a timely and administratively efficient process for permitting each EGS to modify its FSR consistent with the final determination in this proceeding.

Respectfully submitted,



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