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August 30, 2016

Rosemary Chiavetta, Esq., Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, Pennsylvania 17120

**Re: Proceeding to Evaluate Transition to Corrected  
Non-Solar Tier I Calculation Methodology  
Docket No. M-2009-2093383**

Dear Secretary Chiavetta:

Enclosed for filing please find the comments of the Energy Association of Pennsylvania to the Commission's Tentative Order Re: Proceeding to Evaluate Transition to Corrected Non-Solar Tier I Calculation Methodology at the above-referenced docket. If there are any questions involving the filing, please do not hesitate to contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Donna M. J. Clark", with a long horizontal flourish extending to the right.

Donna M. J. Clark  
Vice President and General Counsel

Enclosure

cc: Scott Gebhardt, Pennsylvania Public Utility Commission  
Kriss Brown, Pennsylvania Public Utility Commission

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Proceeding to Evaluate Transition to Corrected : M-2009-2093383  
Non-Solar Tier I Calculation Methodology :

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**COMMENTS OF THE ENERGY ASSOCIATION OF PENNSYLVANIA  
TO TENTATIVE ORDER TO EVALUATE TRANSITION TO CORRECTED NON-  
SOLAR TIER I CALCULATION METHODOLOGY**

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**I. INTRODUCTION AND BACKGROUND**

On August 11, 2016, the Pennsylvania Public Utility Commission (“PUC” or “Commission”) entered a *Tentative Order* seeking public input on proposed remedial action to correct and mitigate the impact of a mathematical error uncovered in the calculation of non-solar Tier I quarterly adjustments required under Act 129 of 2008, P.L. 1592 (“Act 129”).

Act 129, *inter alia*, expanded the types of alternative energy sources that qualify as Tier I under the Alternative Energy Portfolio Standards Act of 2004, P.L. 1672, No. 213 (“AEPS Act”) to include specific categories of low impact hydropower and biomass energy. 66 Pa.C.S. § 2814(a) and (b). Act 129 further added a requirement that the Commission increase, at least quarterly, the percentage share of Tier I resources that energy distribution companies (“EDCs”) and electric generation suppliers (“EGSs”) must achieve for compliance under the AEPS Act<sup>1</sup> to reflect the

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<sup>1</sup> The AEPS Act requires that “the electric energy sold by an electric distribution company or electric generation supplier to retail customers...shall be comprised of electricity generated from alternative energy sources and in the percentage amounts as described under subsections (b) and (c).” 73 P.S. §1648.3(a)(1).

output of these new sources. 66 Pa.C.S. § 2814(c). Following the effective date of Act 129, the Commission entered a *Final Order Re: Implementation of Act 129 of 2008 Phase 4 – Relating to the Alternative Energy Portfolio Standards Act*, Docket No. M-2009-2093383 (May 28, 2009) that established guidelines for these categories of facilities to qualify as Tier I resources and further set reporting standards and procedures to enable the calculation of the quarterly adjustment required under section 2814 (c).

In July 2016, after uncovering an error in the previous calculation of the quarterly adjustment, the Commission issued a Secretarial Letter providing notice to EDCs and EGSs of “an approximate seven percent increase in the otherwise anticipated annual AEPS Tier I obligation for the 2016 compliance year” which began on June 1, 2015 and ended on May 31, 2016. Notice to the EDCs and EGSs occurred during the statutory “true-up period” defined as “[t]he period each year from the end of the reporting year until September 1.” 73 P.S. § 1648.2. The “true-up period” provides a three month window for EDCs and EGSs to obtain the requisite number of alternative energy credits (“AECs”) or to make-up any shortfall of AECs needed to comply with the AEPS Act. 73 P.S. § 1648.3(e)(5).

A subsequent Secretarial Letter dated August 9, 2016 extended the current true-up period from September 1, 2016 until November 30, 2016 for that portion of the non-solar Tier I obligation subject to the quarterly adjustments required under Act 129. 66 Pa.C.S. § 2814. The Secretarial Letter further stated that, on or about July 15, 2016, the Alternative Energy Credit Project Administrator had provided “all EGSs and EDCs with their 2016 reporting year obligations for Tier II, solar Tier I and the adjusted non-solar Tier I.” *See*, 73 P.S. § 1648.3(e)(2) and 52 Pa. Code § 75.64(c)(1). It clarified that EDCs and EGSs would have until November 30, 2016 to retire the “adjustment obligations” or “adjustment AECs” representing the approximate seven percent

increase needed for compliance and indicated that the otherwise anticipated Tier I (solar and non-solar) and Tier II obligations were to be retired by September 1, 2016. *See also, Tentative Order* at p. 4 and fn. 2.

Having extended the true-up period, the Commission now seeks comments from stakeholders regarding two proposals outlined in the *Tentative Order* that aim to provide a means to meet the unanticipated increase in the non-solar Tier I obligations for the 2016 compliance year with minimal effect on stakeholders.<sup>2</sup> The first proposal places the onus for meeting the adjustment obligations on the EDCs. The Commission proposes to establish “for each EDC the number of adjustment AECs for procurement in its distribution zone for the 2016 AEPS Act compliance year.” *Tentative Order* at p. 5. The Commission would then require EDCs to file a petition along with pertinent tariff changes detailing protocols for EDCs to procure the AECs, to transfer them to all load serving entities that had operated in the EDC distribution zone during the 2016 compliance year and to recover the costs through a “preexisting non-bypassable charge”. *Id.* The first proposal alleviates EGSs from any compliance obligations relating to the unanticipated increase in the non-solar Tier I obligations for the 2016 compliance year.

In contrast, the second proposal supports a delay in the time period to settle the unanticipated increase until at least November 30, 2016 or some later date based on stakeholder comments. This would allow flexibility for each EDC and EGS to meet its individual compliance obligation under the AEPS Act and procure “adjustment AECs” either during the statutory or extended true-up period for the 2016 AEPS compliance year. The second proposal would

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<sup>2</sup> As stated in the *Tentative Order*, “[s]ome stakeholders conveyed a concern with the adverse impact of this unanticipated increase in non-solar Tier I AECs on their business models.” *Id.* at p. 3. EAP contends that any additional remedy provided should enable EDCs and EGSs to meet the adjusted compliance obligations prospectively in an efficient, cost-effective manner pursuant to the AEPS Act and should avoid overly complicated and costly proceedings in an attempt to protect the business models of some unregulated entities.

minimize the time and costs necessary for EDC proceedings to consider new protocols, new tariff filings and/or modifications to existing Commission-approved default service plans and current EDC contracts with suppliers. The second proposal minimizes cost, is efficient and, as set forth below, does not raise legal issues concerning the Commission's authority to modify the statutory obligation of EGSs to comply with the AEPS Act without first making a force majeure determination and/or to shift EGS compliance costs or EDC costs incurred to meet EGS compliance obligations to all ratepayers contrary to the plain language of the AEPS Act.

The *Tentative Order* provides interested parties with fifteen days from its entry on August 15 to file comments, i.e. on or before August 30, 2016. As a trade association representing the interests of EDCs operating in the Commonwealth, the Energy Association of Pennsylvania ("EAP" or "Association") respectfully submits these comments to supplement those filed individually by its member EDCs.<sup>3</sup>

## II. COMMENTS

### **A. The Commission Lacks the Authority to Excuse EGS Compliance under the AEPS Act and Cannot Shift that Compliance Obligation by Ordering EDCs to Procure Adjustment AECs for the Entire Zone, Transfer Adjustment AECs to EGSs and Recover Related Costs as Default Service Costs.**

The initial proposal outlined in the *Tentative Order* contemplates that EDCs will assume all responsibility to obtain the adjustment AECs and that compliance by EGSs for the 2016 compliance period is effectively waived or excused. EAP contends that it is beyond the scope of the Commission's statutory authority to relieve EGSs of their obligation to comply with the AEPS act in the context of trying to resolve a mathematical error and without a legal determination of

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<sup>3</sup> Citizens' Electric Company; Duquesne Light Company; Metropolitan Edison Company; PECO Energy Company; Pennsylvania Electric Company; Pennsylvania Power Company; Pike County Light & Power Company; PPL Electric Utilities Corporation; UGI Utilities, Inc.(Electric Division); Wellsboro Electric Company; and, West Penn Power Company.

force majeure. The AEPS Act mandates that from its effective date, electric energy sold by either an EDC or an EGS to retail customers in Pennsylvania shall be generated, in part, from specific and defined alternative energy sources in prescribed annually increasing percentages. 73 P.S. §1648.3(a)(1). The only statutory exception to this requirement occurs in the event that the Commission would determine that force majeure exists either in the reporting period or during the true-up period, which did not occur here.<sup>4</sup> 73 P.S. §§ 1648.3(a)(2) and (e)(5). *See also*, 52 Pa. Code § 75.66. EAP does not believe that the Commission has the legal authority to order the initial proposal detailed in the *Tentative Order*.

Additionally, even if the Commission were to make a determination of force majeure, the AEPS Act does not support a remedy that orders EDCs to procure the adjustment AECs attributable to the compliance obligation of EGSs and pass along those costs to customers through an existing EDC non-bypassable charge. A determination of force majeure does not provide for the shifting of compliance obligations between or among EDCs and EGSs; at most, it allows the Commission to fashion a remedy whereby a modified obligation is allowed or the Commission recommends “to the General Assembly that the underlying obligation is eliminated.” 73 P.S. § 1648.2. Further, in the situation where the Commission modifies the obligation, it is for a single compliance period and the Commission is encouraged to require that the reduced obligation be recouped in subsequent years. *Id.*

With respect to costs attributable to compliance, the AEPS Act is clear that EDCs alone have the ability to recover “on a full and current basis pursuant to an automatic energy adjustment

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<sup>4</sup> The definition of force majeure under the AEPS Act provides, in part, that force majeure exists if it is “determined that alternative energy resources are not reasonably available in sufficient quantities in the marketplace for the electric distribution companies and electric generation suppliers to meet their obligations under this act....” 73 P.S. § 1648.2. *See also*, 52 Pa. Code § 75.66(c) - (d). And, in making the determination that alternative energy resources are not available, the Commission, *inter alia*, must consider good faith efforts to acquire said resources, including ability to bank credits, acquire credits through competitive solicitations and long-term contracts and it must assess the availability of credits in GATS and other jurisdictions in the PJM Interconnection. *Id.*

clause under 66 Pa.C.S. § 1307 as a cost of generation supply under 66 Pa.C.S. § 2807.” 73 P.S. § 1648.3(a)(3). Recovery of costs from ratepayers for expenses of unregulated entities is not authorized under the AEPS Act nor the Public Utility Code.<sup>5</sup> For these additional reasons and in support of comments filed by its EDC members, EAP does not believe that the Commission should adopt a remedy that shifts the EGS compliance obligation and costs to EDCs and their customers.

**B. Extension of the True-Up Period Provides a Reasonable Means to Correct and Minimize the Impact of the Mathematical Error in the Calculation of Non-Solar Tier I Quarterly Adjustments.**

The second proposal set forth in the *Tentative Order* contemplates an extension of the true-up period and a delay in the retirement of adjustment AECs so as to provide more time to meet the unanticipated increase in the compliance obligation. EAP supports this suggested remedy as a practical response to the unforeseen circumstance, one that adheres to the dictate and spirit of the AEPS Act, and does not excuse or shift the compliance obligation or costs of EGSs to EDCs for the 2016 AEPS compliance period. EAP believes that extension of the true-up period will allow EDCs (and EGSs) time to work with the Alternative Energy Credit Program Administrator to determine the number of adjustment AECs and to obtain such credits in a cost-effective manner through existing contracts with suppliers and/or, in the case of EDCs, by means of Commission approved procurement plans.

EAP defers to the comments of its members with respect to suggestions for extending the 2016 true-up period beyond that established by the August 9 Secretarial Letter, i.e. November

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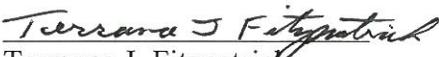
<sup>5</sup> Unregulated entities are free to charge prices that customers will pay and are not subject to price regulation. In an unregulated market, sellers are sometimes confronted with unexpected costs and, it is not government’s role to minimize that risk of loss or to protect the business model of the unregulated entity. Recovery of those costs may depend on how risks are allocated in agreements with customers and/or whether those costs can be recouped in future sales in the unregulated marketplace.

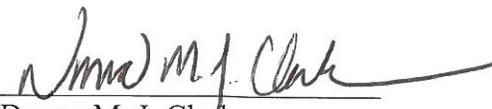
30, 2016 and to any suggestions regarding an extension of the 2017 true-up period as both EDCs and EGSs transition to the corrected non-solar Tier I calculation methodology and impact of quarterly adjustments in the 2017 reporting period.

### III. Conclusion

EAP supports the second option outlined in the Tentative Order, i.e. the extension of the true-up period, to remedy the unanticipated increase in annual AEPS Tier I obligations for 2016. EAP respectfully requests that the Commission consider these comments along with those of its individual member EDCs in crafting a remedy to correct and minimize the impact of the mathematical error uncovered in the calculation of non-solar Tier I quarterly adjustments.

Respectfully submitted,

  
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Date: August 30, 2016