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September 9, 2016

**Via Electronic Filing**

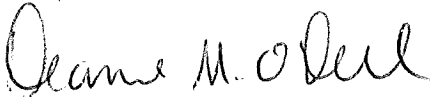
Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Reply Comments to the Tentative Order dated August 15, 2016 of the Retail Energy Supply Association ("RESA") with regard to the above-referenced matter.

Sincerely,



Deanne M. O'Dell

DMO/lww  
Enclosure

cc: Scott Gebhardt, TUS, w/enc. (via email only)  
Kriss Brown, Law Bureau, w/enc. (via email only)

## CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of RESA's Reply Comments upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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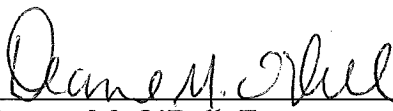
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Dated: September 9, 2016

  
Deanne M. O'Dell, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**REPLY COMMENTS OF  
THE RETAIL ENERGY SUPPLY ASSOCIATION  
TO TENTATIVE ORDER ENTERED AUGUST 15, 2016**

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**I. INTRODUCTION**

In its Tentative Order entered August 15, 2016, the Commission invited comments on remedial actions that can be taken to minimize the effect on the market of requiring all electric distribution companies (“EDCs”) and electric generation suppliers (“EGS”) (collectively, load serving entities or “LSEs”) to determine how to recover the costs of an unexpected seven percent increase in a portion of the non-solar Tier I obligations. While these obligations are required by the Alternative Energy Portfolio Standards (“AEPS”) Act<sup>1</sup> and the Electricity Generation Customer Choice and Competition Act,<sup>2</sup> the Commission explained that a mathematical error in calculating the required obligation had been discovered. As a result, the Commission utilized the correct calculations to determine the AEPS 2016 compliance year obligations and will use the same corrected calculation for future compliance years. Recognizing the potential negative market impacts as LSEs determine how to recover the unanticipated costs of AEPS compliance resulting from the error correction, the Commission offered two possible solutions: (1) require

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<sup>1</sup> 73 P.S. § 1648.3.

<sup>2</sup> 66 Pa. C.S. § 2814(c).

the EDC to procure the AEC credits, transfer them to all LSEs and then recover the costs through a preexisting non-bypassable charge; and, (2) delay the compliance true-up period.

Initial comments were received by numerous stakeholders. In its comments, the Retail Energy Supply Association (“RESA”)<sup>3</sup> – a trade association of competitive suppliers many of which are licensed in Pennsylvania – detailed why remedial action is necessary given the way EGSs contract with customers. While RESA supports either recommended solution as appropriate, RESA explained why AEC procurement and non-bypassable cost recovery by the EDC is the optimal way to fairly and equitably recover the unanticipated costs of correcting the flawed calculation of AEPS requirements from all customers and recommended that it be implemented for the 2017 and 2018 compliance years as well as the 2016 compliance year. If, however, the Commission elects to delay the true-up period, then RESA recommended that the delay would need to extend until at least the 2018 AEPS compliance year to provide any meaningful relief.

Most parties generally support (or at least do not oppose) the Commission’s second recommended solution – a delay in the true-up period. The non-EGS parties oppose the Commission’s first recommended solution – AEC procurement and non-bypassable cost recovery by the EDC. For the reasons discussed further below, the opposition raised to the first recommended solution does not preclude the Commission from implementing it as it is the optimal way to address this situation. Whichever approach is ultimately adopted, however,

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<sup>3</sup> The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at [www.resausa.org](http://www.resausa.org).

RESA urges the Commission to recognize the contracting timing issues that confront EGSs and either implement the first recommended option for AEPS compliance years 2016, 2017 and 2018; or, delay the true-up period until at least the 2018 AEPS compliance year.

## **II. REPLY COMMENTS**

### **A. Nature Of Cost And Impact On EGSs**

Some commentators take the view that the cost impact of the AEPS error correction is “simply a cost of doing business” and EGSs should be required to just “absorb” that cost.<sup>4</sup> Attempts to somehow cast “blame” on the EGSs for not anticipating this increased compliance obligation are nothing more than a distraction away from finding a solution. This proceeding involves an unanticipated cost due to a mathematical error that could not have been foreseen by any LSE in the marketplace. As explained in RESA’s Comments, since the inception of the AEPS Act there has been a tried and true system in place to enable EGSs to fairly accurately anticipate and recover the costs of AEPS compliance.<sup>5</sup> To the extent there were variances during the true-up period between estimated and actuals costs, they were minor and could easily be managed. That is not the situation here. As the Commission has reasonably narrowed this proceeding to just the cost impacts of the unanticipated error amount (which RESA supports), arguments that the cost of this unknown error was something the EGSs should have anticipated or should “just absorb” are not factually accurate and should not be given any credence. The cost of AEPS compliance ultimately resides with Pennsylvania electricity consumers, not the

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<sup>4</sup> See, e.g., OSBA Comments at 2 (“the EGS has voluntarily absorbed the risks associated with AEC requirements and should be prepared to absorb the cost of the adjustment AECs for the 2016 compliance year as a cost of doing business.”); Energy Association of Pennsylvania Comments at 6, n. 5 (“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 protect the business model of the unregulated entity.”)

<sup>5</sup> RESA Comments at 4.

EDCs or EGSs, and the Commission is correct to seek the most fair and equitable way to collect from consumers the cost of the unanticipated error amount.

**B. Negative Market Impacts Result Because Of EDC Right To Full Cost Recovery**

All the EDCs are very critical of the Commission’s recommended solution number one which would require the EDCs to recover the costs of the error calculation from all customers. The EDCs support this view in a variety of ways including lamenting that “EGSs should not be excused from their statutory obligations”<sup>6</sup> and that EGS obligations cannot be “shifted” to the EDCs as doing so will “constitute a windfall of savings [to the EGSs] paid by EDC customers.”<sup>7</sup>

EGSs are not seeking to be excused from their statutory obligations. As discussed in the previous section, this case involves an unanticipated increase in the cost of AEPS compliance resulting from an error that was not in the control of the EGSs and for which EGSs had no reason to factor into pricing. Moreover, the cost of AEPS compliance falls to all Pennsylvania consumers – it is not something that EDCs or EGSs are required to pay.<sup>8</sup> In the normal course, this is exactly what occurs. EDCs recover the cost of AEPS from default service customers as approved in their default service plans and EGSs recover the cost of AEPS compliance from shopping customers in their retail contracts. When – as in the past – there are no unanticipated changes to the compliance obligation, there is nothing that needs to be done. All customers regardless of what entity provides their generation service pay for the costs of AEPS compliance.

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<sup>6</sup> PPL Comments at 6-7

<sup>7</sup> PECO Comments at 4.

<sup>8</sup> 73 P.S. § 1648.3(a)(1)(“the electric energy sold by an electric distribution company or electric generation supplier to retail electric customers in this Commonwealth shall be comprised of electricity generated from alternative energy sources. . . .”)(emphasis added).

The problem here, however, is that an unanticipated increase in obligations is being imposed<sup>9</sup> and both EDCs and EGSs are required to determine how to recover the costs from customers. Because EDCs alone have the ability to recover the costs of the error calculation “on a full and current basis,”<sup>10</sup> the increased costs of AEPS compliance will be fully recovered from default service customers through the various mechanisms available to the EDC.<sup>11</sup> EGSs, however, do not have a similar right to full cost recovery. Rather, they are required to embed the costs of these government required obligations in retail contracts. Retail contracting is not a static concept. There are varying contract lengths and types. Customers can and do switch suppliers meaning that the customers receiving supply with a particular EGS during a particular AEPS compliance period may no longer be receiving supply from that EGS in the next AEPS compliance period. The AEPS 2016 compliance year ended May 31, 2016. Prior to the discovery of the increased 2016 AEPS obligations resulting from flawed calculations, EGSs were already entering into contracts with customers for supply terms for the 2017, 2018 and 2019 AEPS compliance periods. What this means practically is that because EGSs do not have the right of full cost recovery, the recovery of this unanticipated costs from shopping customers will be inconsistent among shopping customers, among EGSs, and as between shopping and

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<sup>9</sup> In its comments, PPL advocates that the error correction should not apply to the 2016 AEPS compliance period but only prospectively. PPL Comments at 12-15. RESA would support such an outcome.

<sup>10</sup> Energy Association of Pennsylvania Comments at 5-6.

<sup>11</sup> In fact, both FirstEnergy and PECO have already taken steps to recover the cost impacts to them. FirstEnergy made additional spot market purchases of non-solar Tier I AECs and understands that no further adjustment will be made to FirstEnergy’s AEPS 2016 compliance obligations. FirstEnergy Comments at 4-5. Likewise, all of PECO’s wholesale default service suppliers were required to and did transfer AECs to PECO to satisfy the increase and PECO has no need to conduct any AEC procurements to meet the increased AEPS obligations arising from the 2016 adjustment. PECO Comments at 3.



default service customers and will result in skewed market pricing.<sup>12</sup> An EGS's ability to participate in the various standard offer customer referral programs ("SOP") will be impacted.<sup>13</sup> Because the Commission's first recommended solution would recover the costs of the increased compliance from all customers at the same time and on an equal basis, RESA continues to support it as the optimal way to address the situation.

Moreover, recommended solution number one is the best way to satisfy the requirements of the Competition Act regarding equal and nondiscriminatory access. Requiring the EDC to assume the cost responsibility for the error amount enables the EDC to advantage its right to full cost recovery of those charges for the benefit of all customers which ensures that all customers only pay the actual costs of error correction.<sup>14</sup> Importantly, all the distribution customers of the EDC were either receiving default service or EGS service during the AEPS compliance period. For the reasons already discussed, a particular EGS's customer base at any one time is subject to change which creates difficulty for a particular EGS to ensure that the costs of the error calculation are being assessed to the correct customer. By leveraging the right to full cost recovery of the EDCs, this issue is avoided completely and all customers pay the costs of the

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<sup>12</sup> OCA expresses the view that "any additional charge for energy supply will be unfair and unexpected, and could result in consumers questioning the value of contracting for energy supply when the Commission can unilaterally add additional supply charges to their bills." OCA Comments at 3. This further highlights the potential negative consequences of EGSs attempting to recover the costs of this unanticipated increase from existing customers as RESA further explained in its comments. RESA Comments at 5-7.

<sup>13</sup> As explained in RESA's comments, the greater the costs imposed on EGSs, the less likely they will be able to participate in a program where they must offer the customers a price that is 7% off the then-existing price-to-compare and pay a referral fee to the EDC to serve that customer. RESA Comments at 6-7.

<sup>14</sup> 66 Pa. C.S. § 2807(e)(3.9).

error correction. In addition, this approach also ensures that all LSEs receive nondiscriminatory access to the EDC's right of cost recovery.

Concerns about EGSs somehow receiving a "windfall" by implementing this approach make no sense. PECO's "understanding" that most EGSs "wait until the AEPS true-up period to satisfy their AEPS compliance obligations"<sup>15</sup> is simply wrong. While EGSs may not formally retire AECs or utilize banked AECs until the true-up period when their actual costs of compliance are finalized, EGSs are factoring into their retail pricing their anticipated costs of compliance well in advance of the true-up period. There was no reason for EGSs to factor into their pricing the costs at issue here because those costs could not have been anticipated and were the result of an error. Thus, not requiring any EGS to incur the additional, unanticipated costs of the increased obligations equally impacts all EGSs without creating any "windfalls" to one EGS and not another. Ironically, not equally addressing this issue for all EGSs is what could lead to disparate outcomes for EGSs as some EGSs will be able to more easily "absorb" the cost impact than others.

### **C. Timing Of Remedial Action**

RESA urges the Commission to recognize the contracting timing issues that confront EGSs. The AEPS 2016 compliance year ended on May 31, 2016; the AEPS 2017 compliance year will end May 31, 2017; and, the AEPS 2018 compliance year ends on May 31, 2018. Importantly, before the Commission's announcement of the flawed calculations, EGSs entered into supply contracts extending into the AEPS 2018 compliance year. All of these contracts would have been priced using the known AEPS assumptions at that time (before notice of the

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<sup>15</sup> PECO Comments at 3.

flawed calculations) and consistent with past practice. Because of this, providing relief for the increased costs for the AEPS 2016 compliance year only does not address the financial risk for these forward contracts. Again, EGSs could not have factored into these contracts the impact of the error calculation here. As such, if no relief is provided for all three compliance years (2016, 2017, and 2018), then price distortions between EGS prices and default service pricing will likely extend into these years as well.

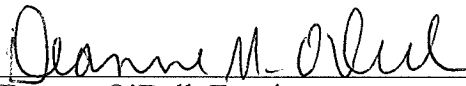
For this reason, whatever approach the Commission adopts should be extended to the 2017 and 2018 AEPS compliance years. Under the first recommended solution, EDCs would acquire AECs equal to the amount resulting from correcting the calculations for all LSEs and recover the costs from all customers on a non-bypassable basis. Under the second recommended solution, the delay in the true-up period would extend until at least the 2018 AEPS compliance year. By that time, all EGSs will have had the opportunity to incorporate the costs of compliance into their retail contracts.

### **III. CONCLUSION**

RESA fully supports the Commission taking remedial action to address the situation caused by correcting the formula used to determine non-solar Tier I requirements. As explained above, EGSs are in a uniquely difficult position regarding how to recover these unanticipated costs that are being imposed on them due to a flawed calculation. Although RESA prefers the Commission's recommended solution number one, either recommended solution would mitigate some of the potential negative market consequences of doing nothing. Moreover, whichever approach is ultimately adopted, RESA urges the Commission to recognize the contracting timing issues that confront EGSs and either implement the first recommended option for AEPS

compliance years 2016, 2017 and 2018; or, delay the true-up period until at least the 2018 AEPS compliance year.

Respectfully submitted,



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Date: September 9, 2016

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