

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION**
Harrisburg, PA. 17105-3265

Public Meeting held May 28, 2009

Commissioners Present:

James H. Cawley, Chairman
Tyrone J. Christy, Vice Chairman
Kim Pizzingrilli
Wayne E. Gardner
Robert F. Powelson

Implementation of Act 129 of 2008
Phase 4 – Relating to the Alternative
Energy Portfolio Standards Act

Docket No. M-2009-2093383

FINAL ORDER

BY THE COMMISSION:

This Final Order establishes procedures and guidelines related to this phase of the Pennsylvania Public Utility Commission's implementation of Act 129 of 2008. In addition to the creation of an energy efficiency and conservation program, Act 129 expanded the definition of alternative energy sources in the Alternative Energy Portfolio Standards Act that qualify as Tier I alternative energy resources.¹ The General Assembly also charged the Commission with increasing, at least quarterly, the percentage share of Tier I resources to be sold by electric distribution companies and electric generation suppliers to reflect the new Tier I resources. This Final Order establishes guidelines for qualifying the additional Tier I resources, reporting requirements and related procedures for the Commission to follow in making the required adjustments to the Tier I percentage requirements electric distribution companies and electric generation suppliers must meet.

BACKGROUND AND HISTORY OF THIS PROCEEDING

Governor Edward Rendell signed the Alternative Energy Portfolio Standards Act of 2004, P.L. 1672, No. 213, (“AEPS Act”) into law on November 30, 2004. 73 P.S. §§ 1648.1 *et seq.* The AEPS Act, which took effect on February 28, 2005, established an alternative energy portfolio standard for Pennsylvania. Generally, the Act requires that an annually increasing percentage of electricity sold to retail customers in Pennsylvania by electric distribution companies (“EDCs”) and electric generation suppliers (“EGSs”) be derived from alternative energy resources. The Commission has been charged with using its general powers to carry out, execute and enforce the provisions of the AEPS Act. The Pennsylvania Department of Environmental Protection (“DEP”) has been specifically charged with ensuring compliance with all environmental, health and safety laws and standards relevant to the AEPS Act’s implementation. The Commission and the DEP are to jointly monitor compliance with the Act, the development of the alternative energy market, the costs of alternative energy and to conduct an ongoing alternative energy planning assessment. The Commission and the DEP are to report their findings and any recommendations for changes to the Act to the General Assembly on a regular basis.

Governor Edward Rendell signed Act 129 of 2008, P.L. 1592, (“Act 129”) into law on October 15, 2008, which took effect 30 days thereafter on November 14, 2008. Section 5 of Act 129 adds Section 2814 to the Pennsylvania Public Utility Code. *See* 66 Pa. C.S. § 2814. Section 2814 expands the types of alternative energy sources that qualify as Tier I alternative energy sources under the AEPS Act to include specific categories of low impact hydropower and biomass energy. 66 Pa.C.S. § 2814(a) and (b). Section 2814 also requires the Commission to increase, at least quarterly, the percentage

¹ *See* Act 129 of 2008, section 5, codified in the Pennsylvania consolidated statutes at 66 Pa.C.S. § 2814.

share of Tier I resources to be sold by EDCs and EGSs to reflect any new Tier I resources added as a result of this amendment. 66 Pa.C.S. § 2814(c).

On April 16, 2009, the Commission adopted a Tentative Order² that proposed procedures and guidelines for low-impact hydropower facilities and generators utilizing by-products of pulping and wood manufacturing processes to follow in order to qualify as a Tier I resource. The Tentative Order also proposed reporting requirements and related procedures that the Commission will use to adjust the AEPS Act Tier I requirements EDCs and EGSs must meet to account for the newly qualified Tier I resources. The Tentative Order requested comments on the proposed procedures and guidelines and directed that the comments be submitted within 20 days of order entry.³ Comments were received from Constellation NewEnergy, Inc. (“Constellation”), Iberdrola Renewables, Inc. (“Iberdrola”), Pennsylvania Renewable Resources, Associates (“Pa. Renewable”), UGI Utilities, Inc. – Electric Division (“UGI”), and West Penn Power Co. d/b/a Allegheny Power (“Allegheny”).

DISCUSSION

With this Final Order the Commission establishes procedures and guidelines for low-impact hydropower facilities, and generators utilizing by-products of pulping and wood manufacturing processes to follow in order to qualify as an AEPS Act Tier I resource. This Final Order also establishes additional reporting requirements and related procedures that EDCs and EGSs must follow. The Commission also establishes procedures that will be employed to increase the AEPS Act non-solar photovoltaic (“PV”) Tier I percentage requirement on a quarterly basis to account for the newly eligible sources, as required under 66 Pa.C.S. § 2814. The procedures and guidelines

² Order entered on April 17, 2009 at the above-referenced docket number.

³ As the Tentative Order was entered on April 17, 2009, comments were due by May 7, 2009.

established in this Order are effective upon entry of this Order and shall be implemented during the 2009-2010 AEPS Act compliance year beginning June 1, 2009, and each subsequent compliance year.

A. Alternative Energy Resource Qualification

Section 2814 expands the type of alternative energy sources that qualify as Tier I resources under the AEPS Act by also including certain categories of low-impact hydropower and biomass energy. *See* 66 Pa.C.S. §§ 2814(a) and (b). The General Assembly established specific criteria these alternative energy sources must meet to qualify as a Tier I resource. The Commission is establishing the following specific reporting requirements and related procedures for qualifying the output of these sources as Tier I alternative energy credits (“AECs”).

1. Low-Impact Hydropower Facilities

Section 2814 expands the low impact hydropower category of “alternative energy sources” in Section 2 of the AEPS Act⁴ to include low-impact hydropower with a maximum capacity of 21 megawatts that were licensed by the Federal Energy Regulatory Commission (“FERC”) on or prior to January 1, 1984, and held, at least in part, by a Commonwealth municipality or electric cooperative on July 1, 2007. 66 Pa.C.S. § 2814(a)(1). The Commission interprets this language in Act 129 as supplementing the definition of qualifying low-impact hydropower, rather than replacing the existing definition of low-impact hydropower. As such, all previously qualified and any other low-impact hydropower that meets the definition of low-impact hydropower found in

⁴ 73 P.S. § 1648.2

Section 2 of the AEPS Act, 73 P.S. § 1648.2, will continue to qualify as a Tier I alternative energy resource.

In order to qualify as a Tier I low-impact hydropower alternative energy source, any facility that meets the criteria contained in 66 Pa.C.S. § 2814(a) must submit an application with supporting documentation to the Commission's AEPS program administrator. This application requirement applies regardless of whether the facility is already qualified as a Tier II resource. Allegheny recommended that once a qualifying low-impact hydro or biomass facility becomes a Tier I resource that facility can no longer be considered a Tier II resource. The Commission agrees and definitively establishes that once a facility qualifies as a Tier I resource, any output from the Tier I certification date forward can no longer be used to satisfy a Tier II requirement. In addition, each facility qualified under 66 Pa.C.S. § 2814(a) must comply with the reporting requirements outlined below in Section B of this order.

2. Biomass Facilities

Section 2814 supplements the definition of “biomass energy” in Section 2 of the AEPS Act⁵ to include electricity generated “utilizing by-products of the pulping process and wood manufacturing process, including bark, wood chips, sawdust and lignins in spent pulping liquors.” 66 Pa.C.S. § 2814(b). Section 2814 further states that “[e]lectricity from biomass energy under this subsection generated inside this Commonwealth shall be eligible as a Tier I alternative energy source.” *Id.* Finally, Section 2814 states that “[e]lectricity from biomass energy under this subsection generated outside this Commonwealth shall be eligible as a Tier II alternative energy source.” *Id.*

⁵ 73 P.S. § 1648.2

The Commission notes that Section 2 of the AEPS Act, 73 P.S. § 1648.2, defines Tier II alternative energy sources as including the “[g]eneration of electricity utilizing by-products of the pulping process and wood manufacturing process, including bark, wood chips, sawdust and lignin in spent pulping liquors.” Therefore, any facility located in this Commonwealth that generates electricity by utilizing by-products of the pulping process and wood manufacturing desiring to be qualified as a Tier I resource must submit an application with supporting documentation to the Commission’s AEPS program administrator. This application requirement applies regardless of whether the facility is already qualified as a Tier II resource. Again, as noted above, once a facility qualifies as a Tier I resource, any output from the Tier I certification date forward, can no longer be used to satisfy a Tier II requirement. In addition, each facility qualified under 66 Pa.C.S. § 2814(b) must comply with the reporting requirements outlined below in Section B of this order.

B. Adjustment to Tier I Alternative Energy Source Requirements

Section 2814(c) specifically requires this Commission to increase, at least quarterly, the percentage share of EDC and EGS Tier I requirements in Section 3 of the AEPS Act⁶ to reflect any new low-impact hydropower and biomass resources that qualify as a Tier I resource. 66 Pa.C.S. § 2814(c). Furthermore, Section 2814 states that no new qualifying low-impact hydropower or biomass facilities “shall be eligible to generate Tier I alternative energy credits until the Commission has increased the percentage share of Tier I to reflect these additional resources.” *Id.* In this section the Commission establishes its procedures for determining the amount and frequency of the increase in non-solar PV Tier I percentage requirements.

⁶ 73 P.S. § 1648.3(b)(1)

At the outset, we note that there are several steps that must be taken before we can adjust the percentage shares stated in Section 3 of the AEPS Act and Section 75.61(b) of the Commission's regulations on a quarterly basis. These steps are necessary as the AEPS Act's Tier I percentage shares apply to EDC and EGS sales of generation and not to the generation from qualified alternative energy sources.

The Commission believes that as the General Assembly required adjustments to the Tier I requirements on at least a quarterly basis, such adjustments must be based on the actual output of the newly qualified low-impact hydropower and biomass in relation to the actual EDC and EGS sales. As such, the Commission will initially be calculating each EDC's and EGS' non-solar PV Tier I requirements on at least a quarterly basis. This quarterly adjustment will coincide with the AEPS Act compliance year quarters.⁷ Each EDC's and EGS' quarterly non-solar PV Tier I requirements will be added together at the end of the compliance year to determine its total annual non-solar PV Tier I requirements.

UGI commented that Act 129 did not impose a new quarterly AEPS compliance requirement, stating that the annual Tier I requirement should equal the total of the quarterly requirements. The Commission agrees with UGI and stresses that EDCs and EGSs will not have to demonstrate compliance with the AEPS Act non-solar PV Tier I requirements until the compliance year true-up period, as outlined in 52 Pa. Code §§ 75.61(e) and 75.64(c). We also note that total Tier I solar PV and Tier II requirements will be computed only annually under existing procedures. *See* 52 Pa. Code § 75.61.

⁷ The quarters will be as follows: 1st quarter – June, July and August; 2nd quarter – September, October and November; 3rd quarter – December, January and February; and 4th quarter – March, April and May.

The Commission believes that it was not the intent of the General Assembly for Act 129 to increase the Tier I solar PV requirements, as the expanded Tier I eligible resources are non-solar resources. As such, the Commission will calculate each EDC's and EGS' Tier I solar PV requirements based on the annual Tier I solar PV requirements contained in 52 Pa. Code § 75.61(b). For example, for compliance year 2009-2010 the Tier I requirement is 2.5% of all retail sales, of which at least 0.0120% must come from solar PV. Assuming that EDC X had total annual retail sales of 4,800,000 MWh, EDC X would have a total annual Tier I solar PV requirement of 576.⁸

The Commission will determine each EDC's and EGS' new quarterly non-solar PV Tier I requirements as follows:⁹

1. The non-solar PV Tier I quarterly percentage increase equals the ratio of the available new Tier I¹⁰ megawatt-hour ("MWh") generation to total quarterly EDC and EGS MWh retail sales (New Tier I MWh generation/EDC and EGS MWh retail sales = non-solar PV Tier I % increase).
2. New quarterly non-solar PV Tier I requirement equals the sum of the new non-solar PV Tier I percentage increase and the annual non-solar PV Tier I percentage requirement in 52 Pa. Code § 75.61(b) (non-solar PV Tier I % increase + annual non-solar PV Tier I % = new quarterly non-solar PV Tier I % requirement).
3. EDC and EGS quarterly MWh retail sales multiplied by the new quarterly non-solar PV Tier I requirement (EDC and EGS quarterly MWh x new

⁸ 4,800,000 x 0.000120 = 576. As noted by UGI and Constellation, the solar PV calculation in the Tentative Order incorrectly calculated the solar PV requirement as a percentage of the Tier I requirement, as opposed to a percentage of total sales. The solar PV calculation in this Final Order calculates the annual solar PV requirement as a percentage of total annual sales, consistent with our regulations.

⁹ The three steps were revised as requested by Constellation to further clarify that these quarterly calculations apply only to determining each EDC's and EGS' non-solar PV Tier I requirements on a quarterly basis.

¹⁰ These are from the new Tier I facilities that qualify under 66 Pa.C.S. §§ 2814(a) and (b).

quarterly non-solar PV Tier I % = EDC and EGS quarterly non-solar PV Tier I requirement).

To demonstrate this quarterly adjustment calculation for the first quarter in the 2009-2010 compliance year, assume that the total EDC and EGS MWh retail sales for the quarter is 4,130,000 MWh and the total new non-solar PV Tier I MWh generation for the quarter is 132,000 MWh. Also assume that the total quarterly MWh retail sales of EDC X is 1,200,000 MWh. The quarterly adjustment calculation for EDC X would be as follows:

1. $132,000/4,130,000 = 0.032$ or 3.2%.
2. $0.032 + 0.02488^{11} = 0.05688$ or 5.688% of total retail sales.
3. $1,200,000 \times 0.05688 = 68,256$ total non-solar Tier I credits required for the quarter. (Prior to adjustment total no-solar PV Tier I credits required would have been 29,856 ($1,200,000 \times 0.02488$) for a difference of 38,400 non-solar PV Tier I credits.)

In the Tentative Order, we had proposed that EDCs and EGSs report sales figures on a monthly basis by the fifteenth day of the following month, to accomplish the quarterly adjustments as described above. Constellation recommended that as the Commission is computing the new Tier I requirements on a quarterly basis, sales figures should be reported on a quarterly basis as well. In addition, UGI requested that sales reports be provided by the twentieth day to allow EDCs and EGSs sufficient time to collect and consolidate meter data. The Commission agrees with Constellation and UGI in principal and notes that as there will be limited need to audit the EDC and EGS data, receipt of monthly data on a quarterly basis will be adequate to complete the quarterly calculations in a timely manner. The Commission is requiring monthly data to facilitate

¹¹ Pursuant to 52 Pa. Code § 75.61(b)(4) the following are the Tier I requirements for the 2009-2010 compliance year. The Tier I requirement is 2.5% of all retail sales. This includes 0.0120% solar photovoltaic. Therefore, the non-solar PV Tier I requirement is 2.488%.

further analysis of the effect the new Tier I facilities have on the non-solar PV Tier I AEC market, that may reveal a requirement for more frequent adjustments. Consequently, the Commission directs all EDCs and EGSs with AEPS compliance requirements to report monthly retail sales data to the Commission's AEPS program administrator on a quarterly basis. The monthly retail sales figures for each quarter are to be submitted to the AEPS program administrator by the Twentieth day¹² after the end of each quarter.

Allegheny suggested that the Commission consider using EDC and EGS total quarterly generation figures that include an average line-loss of 7.5 percent to calculate the quarterly adjustment. The Commission declines to follow Allegheny's suggestion as the AEPS Act requires that the Tier I and Tier II compliance requirements be based on electric energy sold to retail electric customers, not the total generation used by an EDC or EGS to meet customer demand. See 73 P.S. § 1648.3(b). In addition, if the Commission were to adopt Allegheny's suggestion, the Commission would be compelled to base total EDC and EGS Tier I and Tier II compliance requirements on total annual generation, plus line-loss, used by EDCs and EGSs to be consistent, which the Commission declines to do.

In addition, all facilities qualifying as a Tier I resource under 66 Pa.C.S. §§ 2814(a) and (b) must provide the Commission, on a monthly basis, sufficient information for the Commission to determine the amount of generation that qualifies for Tier I credits. This information will include at least the following:

1. The facility's total generation from qualifying alternative energy sources for the month in MWh, broken down by source;

¹² If the twentieth day falls on a weekend or holiday, the report is due the next business day.

2. The amount of AECs sold in the month to each EDC and EGS with a compliance obligation under the AEPS Act;
3. The amount of AECs sold in the month to any other entity, including utilities, suppliers and users for compliance with another state's alternative/renewable energy portfolio standard or sold on the voluntary market. Listing each AEC and the entity they were transferred to;
4. The amount of AECs created and eligible for sale during the month but not yet sold;
5. The sale or other disposition of AECs created in prior months and transferred in the month – broken down by compliance status (Pennsylvania AEPS, other state compliance, voluntary market).

The Commission intends to limit the Tier I percentage share modifications to exclude credits which are committed for compliance with another state's portfolio standard or are not otherwise available to be used for Pennsylvania compliance. *See* 73 P.S. § 1648.4 and 52 Pa. Code § 75.63(c). Credits unavailable to EDCs and EGSs for Pennsylvania AEPS Act compliance are no different than unused generation capacity and must therefore be excluded from consideration when increasing the Tier I percentage requirement. The Commission believes that it was the intent of the General Assembly that the addition of any new Tier I resources have a neutral impact on the value of Tier I credits. As such, including only those credits that are available for AEPS Act compliance in the calculation of the Tier I percentage requirement will accomplish this intent. The monthly reporting data listed above will be used to identify the amount of credits available for Pennsylvania AEPS Act compliance by subtracting from the total credits produced in a month, credits sold to entities for compliance with another state's alternative/renewable energy portfolio standard, sold on the voluntary market or not otherwise available for Pennsylvania compliance.

Iberdrola recommended that for the sake of simplicity and certainty, the Commission adjust the non-solar PV Tier I compliance requirement on the total eligible generation from the new Tier I facilities. Iberdrola suggested that it may be impossible to determine the ultimate use of AECs as the new Tier I facilities may sell their AECs to brokers or third-parties that may resell them to parties that will not use them for compliance with the AEPS Act. The Commission declines to follow Iberdrola's suggestion at this time as we anticipate the ability to adequately determine the ultimate use of AECs through GATS and the requested data provided by the new Tier I facilities. In fact, we are directing that these new facilities provide the data on a monthly basis to allow staff and the AEPS program administrator an opportunity to review and audit the data as necessary to verify and accurately identify the number of AECs that are available for Pennsylvania compliance.

Pa. Renewables requested that the Commission clarify when it considers a sales transaction to be complete for purposes of the reporting requirements. Pa. Renewables noted that a sale of an AEC may be deemed effective under the following conditions: upon a verbal agreement; execution of a written agreement; or when the AECs have been transferred to the buyer's account. All of these events may occur on different dates and in different months. The Commission recognizes the confusion this may cause and will define the date an AEC is considered sold to be the date it is transferred into the buyer's GATS account. The Commission believes this is the appropriate date as it takes affirmative action by both parties to effectuate the transfer of AECs between GATS accounts, which evidences the undisputed transfer of the AECs.

The new Tier I facilities must provide this information to the Commission's Bureau of Conservation, Economics and Energy Planning ("CEEP") and to the

Commission's AEPS program administrator by the twentieth day¹³ of the following month. CEEP may prepare a form (or a facility specific form) consistent with the order and direct each facility to report this information using such form(s). All such information is subject to audit by the Commission or its AEPS program administrator.

Pa. Renewables noted that its monthly information is typically received from GATS between the thirteenth and fifteenth day of the following month and requested that facilities be permitted to electronically report their data. The Commission appreciates Pa. Renewables situation and has extended the reporting deadline from the fifteenth day to the twentieth day of the following month. In addition, the Commission directs staff and the AEPS program administrator to work with facilities that have reporting requirements as a result of this Order to facilitate the timely and accurate reporting of the requested data.

These facilities must also provide the Commission's AEPS program administrator access to the facility's GATS account so that the program administrator can track and confirm the number of additional Tier I credits available for Pennsylvania AEPS compliance. Any alternative energy facility certified under 66 Pa.C.S. §§ 2814(a) and (b) that fails to report its qualifying generation for any given month will be disqualified from generating Tier I credits for the quarter in which that month falls. As directed in Section A above, these facilities can only be considered Tier I resources and are therefore precluded from generating either Tier I or Tier II credits during this period, even though they may have previously been qualified as a Tier II facility.

Pa. Renewables suggested that the Commission provide notice and a three to five day opportunity for a facility to cure its failure to provide the above-requested data. The

¹³ If the twentieth day falls on a weekend or holiday, the report is due the next business day.

Commission declines to follow Pa. Renewables' suggestion. However, the Commission directs the AEPS program administrator to notify the facility contact in writing that the facility has failed to comply with the directives of this Order and state the penalty to be imposed and the appeal process consistent with 52 Pa. Code § 5.44 (relating to petitions for appeal from actions of the staff).

An open and transparent Tier I credit market is essential to maintaining market integrity. In addition, all EDCs, EGSs and Tier I facilities will need to know what the quarterly requirements are in a timely manner to meet the AEPS Act requirements at a reasonable price. To facilitate the need for an open and transparent Tier I market, the Commission intends to post each new quarterly non-solar PV Tier I percentage requirement on the Commission's AEPS Web Site at <http://paaeps.com/credit/> and in the *Pennsylvania Bulletin* within 45 days of the end of each quarter.

Iberdrola recommended that the Commission and its AEPS program administrator work directly with the PJM-GATS administrator to ensure the timing of the creation of credits from newly qualified non-solar PV Tier I facilities is consistent with the first date on which the Commission adjusts the non-solar PV Tier I requirements. The Commission interprets Iberdrola's comment to preclude the creation of any Tier I credits from a newly qualified facility until after the Commission has actually accomplished at least one quarterly adjustment. The Commission declines to adhere to such a strict regimen for the reasons discussed below.

First, as described in detail above, the Commission must have data from the newly qualified facilities, EDCs and EGSs before it can even determine the quarterly adjustment. Second, the Commission cannot determine what facilities are eligible until these facilities actually apply to be certified as a Tier I resource, after which, they cannot generate Tier II credits. To prevent these new facilities from producing Tier I credits

during the initial three-month period would be unjust and unreasonable. Third, this Order establishes procedures that exclude any credits from uncertified facilities, from facilities that fail to report their data, or that are otherwise unavailable for Pennsylvania AEPS Act compliance. These procedures protect existing Tier I facilities from a precipitous drop in credit prices due to a flood of ineligible credits. Finally, it must be stressed that the AEPS compliance requirements are annual requirements. Total compliance requirements are not established until the end of the compliance year, after which, EDCs and EGSs have close to 90 days to purchase adequate credits to meet their requirements. As such, momentary increases in the availability of non-solar PV Tier I credits prior to any quarterly adjustment will, at most, have a limited and only momentary effect on Tier I credit prices.

CONCLUSION

The Commission believes that the procedures and guidelines established in this Order capture the General Assembly's intent for the limited expansion of qualifying non-solar PV Tier I alternative energy sources. In addition, the procedures contained in this Order for calculating the increase in the percentage share of non-solar PV Tier I requirements in proportion to the increase in the number of new non-solar PV Tier I resources available accurately captures the General Assembly's intent to allow for an expansion of qualifying non-solar PV Tier I resources without adversely affecting the previously established non-solar PV Tier I resources credit prices. **THEREFORE,**

IT IS ORDERED:

1. That the procedures outlined in this Order become effective upon the entry of this Order and be implemented beginning with the 2009-2010 Alternative Energy Portfolio Standards Act compliance year that starts June 1, 2009.

2. That all electric distribution companies and electric generation suppliers that have Alternative Energy Portfolio Standards Act compliance requirements comply with the procedures and reporting requirements established in this Order.

3. That all alternative energy facilities that qualify as a Tier I alternative energy source under 66 Pa.C.S. §§ 2814(a) and (b) comply with the reporting procedures and reporting requirements established in this Order.

4. That this Final Order be published in the *Pennsylvania Bulletin* and a copy served on all jurisdictional electric distribution companies, all licensed electric generation suppliers, the Office of Consumer Advocate, the Office of Small Business Advocate, the Office of Trial Staff, and the Pennsylvania Department of Environmental Protection, all parties upon which the Tentative Order, entered April 17, 2009, was served and any party that filed comments under this Docket Number.

BY THE COMMISSION

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: May 28, 2009

ORDER ENTERED: