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March 23, 2010

VIA HAND DELIVERY

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

RE: Policy Statement in Support of Pennsylvania Solar Projects; Docket No. M-2009-2140263

Dear Secretary McNulty:

Please find enclosed for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") an original and fifteen (15) copies of the Reply Comments of the Industrial Energy Consumers of Pennsylvania ("IECPA"), the Duquesne Industrial Intervenors ("DII"), the Met-Ed Industrial Users Group ("MEIUG"), the Penn Power Users Group ("PPUG"), the Penelec Industrial Customer Alliance ("PICA"), the Philadelphia Area Industrial Energy Users Group ("PAIEUG"), the PP&L Industrial Customer Alliance ("PPLICA") and the West Penn Power Industrial Intervenors ("WPPII") (collectively, "Industrial Customer Groups") in the above-referenced proceeding.

Please date stamp the extra copy of this transmittal letter and the Reply Comments, and kindly return them to our messenger for our filing purposes. Thank you.

Very truly yours,

McNEES WALLACE & NURICK LLC

By 
Shelby A. Linton-Keddie

Counsel to the Industrial Customer Groups

SLK/lmc
Enclosure

c: Scott Gebhart, Energy Program Specialist (via E-mail)
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Policy in Support of Pennsylvania Solar Projects

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Docket No. M-2009-2140263

**REPLY COMMENTS OF INDUSTRIAL ENERGY CONSUMERS OF
PENNSYLVANIA, DUQUESNE INDUSTRIAL INTERVENORS, MET-ED
INDUSTRIAL USERS GROUP, PENELEC INDUSTRIAL CUSTOMER ALLIANCE,
PENN POWER USERS GROUP, PHILADELPHIA AREA INDUSTRIAL ENERGY
USERS GROUP, PP&L INDUSTRIAL CUSTOMER ALLIANCE, AND WEST PENN
POWER INDUSTRIAL INTERVENORS**

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Alliance, and West Penn Power Industrial
Intervenors

Dated: March 23, 2010

I. INTRODUCTION

On December 10, 2009, the Pennsylvania Public Utility Commission ("PUC" or "Commission") issued an Order seeking comments on the Proposed Policy Statement and Regulations in Support of Pennsylvania Solar Projects ("Solar Policy Statement" or "Policy Statement"). This Order was published in the *Pennsylvania Bulletin* on February 6, 2010. In accordance with the established schedule, various parties submitted Comments on March 8, 2010, to present preliminary positions and recommendations regarding the Commission's proposed policy statement.

Pursuant to the established schedule in this proceeding, the Industrial Energy Consumers of Pennsylvania ("IECPA"), Duquesne Industrial Intervenors ("DII"), Met-Ed Industrial Users Group ("MEIUG"), Penelec Industrial Customer Alliance ("PICA"), Penn Power Users Group ("PPUG"), Philadelphia Area Industrial Energy Users Group ("PAIEUG"), PP&L Industrial Customer Alliance ("PPLICA") and West Penn Power Industrial Intervenors ("WPPII"), (collectively, "Industrial Customer Groups") submit these Reply Comments to address specific areas of concern to Large Commercial and Industrial customers with respect to other parties' proposals submitted in response to the Commission's Solar Policy Statement.¹

¹ IECPA is an ad hoc group of energy-intensive industrial companies operating facilities across Pennsylvania. IECPA's members annually consume in excess of 25% of the industrial electricity in Pennsylvania and employ approximately 75,000 workers at nearly 120 facilities across the Commonwealth. Also sponsoring these Reply Comments are coalitions of industrial customers receiving service from most of the Commonwealth's electric distribution companies ("EDCs"): Duquesne Industrial Intervenors ("DII"), Met-Ed Industrial Users Group ("MEIUG"), Penelec Industrial Customer Alliance ("PICA"), Penn Power Users Group ("PPUG"), Philadelphia Area Industrial Energy Users Group ("PAIEUG"), PP&L Industrial Customer Alliance ("PPLICA") and West Penn Power Users Group ("WPPII").

COMMENTS

These Reply Comments center on various stakeholders' positions as articulated in the Comments submitted in this proceeding on March 8, 2010.² The Industrial Customer Groups also reserve the opportunity to address additional issues in subsequent phases of this proceeding as necessary.

A. Developers Should Not Be Shielded From Regulatory Risk.

Through Comments, both Community Energy, Inc. ("CEI") and the Solar Alliance voice concern over regulatory or change-in-law risk. Specifically, CEI and the Solar Alliance argue that experience in other states has shown that finance companies generally reject contracts that contain exposure to regulatory risk. As a result, CEI and the Solar Alliance recommend that regulatory risk be placed with utilities, rather than with solar developers. *See* CEI Comments at 1; Solar Alliance Comments at 4. Specifically, the Solar Alliance notes:

...[C]ontracts which do not protect developers and finance companies from regulatory risk may be rejected, eliminating or significantly increasing the cost of the commercially financed segment of the solar industry – an undesirable outcome for ratepayers and new investment in Pennsylvania. Different from national finance parties or lenders, the utilities that operate in Pennsylvania have both in-depth knowledge and experience with the legislative and regulatory environment in the state. They also have the benefit of precedence, knowing that long-term contracts such as the often cited PURPA Agreements have been upheld over time. For these reasons, regulatory risk should be identified and placed with the utilities who are better equipped to understand the risk, manage the implications, and receive relief (if needed) from state commissions.³

The Industrial Customer Groups recognize how avoiding regulatory risk may further the business plans of solar developers; however, the Industrial Customer Groups respectfully

² The Industrial Customers' failure to address a specific proposal raised by any party does not represent the Companies' support for, or acquiescence to, such proposal.

³ Solar Alliance Comments at 4.

question whether it is in the public interest to place this risk on utilities, which, in turn, will attempt to place this risk on ratepayers. Solar advocates argue that public opinion supports the purchase of electricity from renewable sources, including solar. If this is true, then a market for their products will exist even if the governmental mandates created by the Alternative Energy Portfolio Standards ("AEPS") Act are removed. Presumably because solar advocates are not confident that the market will support solar power as a competitive "choice," they ask to be insulated from the risk that statutory provisions in the AEPS Act may be modified in the future; however, shifting regulatory risk to utilities when fashioning these long term deals could lead to the creation of "stranded costs" that may unnecessarily raise costs and be collected from ratepayers. This result is not in the public interest.

The PURPA Agreements cited by the Solar Alliance are a case in point. Specifically, while the Industrial Customer Groups agree that many PURPA Agreements have been upheld over time, it must be conceded that changes in the market price for electricity after many PURPA Agreements were executed resulted in the creation of "stranded costs," which were collected from ratepayers. Given advances in technology, which have already reduced the price to install solar facilities by approximately 30% in 12 years as claimed by the Solar Alliance, a similar scenario may result here. If that occurs, it is likely that ratepayers will be left holding the proverbial bag. Rather than forcing utilities (and ultimately ratepayers) to shoulder regulatory risk for the creation of solar projects, the Industrial Customer Groups believe that such risk is rightfully placed with solar developers. Solar developers, like any other private entity entering a "competitive" market, should bear the risk that law or regulations might change over time.

B. The Expansion of the Policy Statement to Provide More Binding Long-Term Solar AEC Purchase Obligations May Impact the Availability and Pricing of Solar AECs for Customers Purchasing Supply From Electric Generation Suppliers ("EGSs").

If current law and policy continues, the members of the Industrial Customer Groups anticipate that they will most likely purchase generation supply from EGSs rather than relying on the Electric Distribution Companies' ("EDCs") default service. As a result, and given the non-binding nature of the Policy Statement, the Industrial Customer Groups did not submit Comments on March 8, 2010.

Some parties to this proceeding (*e.g.* ConEdison) have suggested that EDCs should be required to procure Solar AECs for both EDCs and other load serving entities in their service territories, which would include EGSs that are currently serving the Industrial Customer Groups' members. *See* ConEdison Comments at 2. Similarly, Statutory Advocates such as the Office of Small Business Advocate ("OSBA") have suggested that the Commission should consider a statewide procurement process for all Solar AECs. *See* OSBA Comments at 6-7. Finally, various parties have suggested that the Policy Statement contain more binding requirements for EDCs to enter into long term Solar AEC contracts.⁴ The Industrial Customer Groups have concerns about all of these proposals.

Through this Policy Statement, the Commission is establishing procurement expectations for EDCs that may impact customers purchasing supply from EGSs. Although the Commission may be correct that long term contracts are necessary to finance and construct solar facilities, as the PUC becomes more aggressive in requiring EDCs to enter into those long term contracts, the risk increases that sufficient Solar AECs may not be available for EGSs' customers. In other

⁴ *See, e.g.* Constellation Comments at 9-10. (suggesting that the Commission clarify "whether each EDC *must* procure a fixed amount of Solar AECs from Small-Scale Solar Projects if bilateral purchases are employed") (emphasis in original); *see also* PASEIA/MSEIA Comments at 3, citing Solar Alliance Comments ("...[E]ach utility *shall* submit a plan to the PUC for their Solar AEPS needs over a three year planning horizon....")(emphasis added).

words, the Commission may inadvertently create a situation where available Solar AECs for the next 10-15 years are committed to EDCs for default service customers, while an insufficient number of Solar AECs remain in the market for EGSs and their customers.

Some of the Industrial Customer Groups' members are already procuring competitive generation supply from EGSs. Based on those experiences, some EGSs include AEPS compliance costs (including Solar AECs) in their price quotes, while other EGSs treat these costs as a passthrough. If sufficient supply does not exist or may not exist because EDCs have exhausted the available Solar AECs via long term contracts, then EGSs may tend to rely on the Alternative Compliance Payment ("ACP") to meet their Solar AEC obligations. Such costs are ultimately passed on to the customer either through an inflated bid or a passthrough mechanism. Under either scenario, an EGS has no motivation to request a Force Majeure.

Under the AEPS Act, customers are not entitled to petition the PUC to declare a Force Majeure. *See* 73 P.S. § 1648.2. As a result, if the Commission adopts the Policy Statement, the Industrial Customer Groups recommend that the Commission vigilantly monitor EGSs' Solar AEC compliance and determine how many EGSs are paying an ACP rather than procuring their required Solar AECs at a market-based cost. If the PUC detects a trend toward reliance on ACP payments that indicates a shortage of Solar AECs, then the Commission should declare a Force Majeure in accordance with 73 P.S. § 1648.2.

To remedy the situation where all available Solar AECs are held by the EDCs, some parties, such as ConEdison, suggest that the EDCs should be required to procure Solar AECs for "other load serving entities" in addition to the default service customers. As drafted, the AEPS Act clearly contemplates that EDCs and EGSs will each individually be responsible for complying with the AEPS requirements. *Id.* Philosophically, and assuming that a workably

competitive market exists, the Industrial Customer Groups agree that EDCs should be responsible for meeting the obligations for default service customers, while EGSs should be responsible for meeting the obligations for competitive supply customers. As a result, the Industrial Customer Groups urge the Commission to pursue the "EDC procures all" approach only if sufficient Solar AECs are not available in the market to meet both EDC and EGS needs, and to condition this approach on the ability of individual customers to self-supply Solar AECs. The Industrial Customer Groups are concerned that Pennsylvania currently lacks and in the future will lack sufficient resources to meet the statutory Solar AEC requirements. The absence of sufficient Solar AECs raises issues regarding the competitiveness of pricing for Solar AECs, and the ability of larger developers to exercise market power. If the Commission creates a system where the majority of Solar AECs are "reserved" for default service customers through the "encouragement" of long term contracts, customers purchasing supply from EGSs may be inadvertently harmed. Thus, despite the Industrial Customer Groups' philosophical opposition to having EDCs procure Solar AECs for both EGSs and default service supply, from a practical perspective, the "EDC procures all" approach may be necessary to ensure appropriate Solar AEC pricing and to confirm whether a Force Majeure due to lack of Solar AECs should be declared.

As previously mentioned, an "EDC procures all" approach must include the opportunity for large customers to "opt-out" in order to contract for and/or construct their own SRECs. Commercial and industrial sites are often prime locations for solar facilities. In addition, some customers may view the installation of solar facilities as a method to control future Solar AEC and energy price exposure. If customers were able, on an individual basis, to opt out of the EDC program by constructing solar facilities or procuring their own SRECs, it would greatly encourage new solar projects in Pennsylvania and be cost effective at the same time.

C. As More SRECs Become Available Over Time, the Industrial Customer Groups Support PPL's Suggestion That the Commission Revisit its Solar Policy

Like the Industrial Customer Groups who believe that Pennsylvania's Solar AEC market is only beginning to evolve, the PPL Companies, in Comments, recommend "that as more solar generation is brought on-line and the market for solar generation and Solar AECs mature, regulatory intervention must be lifted and the market must be allowed to work in order to provide the maximum benefit to Pennsylvania consumers at the lowest possible cost." PPL Comments at 4. Accordingly, PPL suggests that the Commission institute a sunset date for the Solar Policy Statement at three (3) years from its final adoption.

While the Industrial Customer Groups can not foresee the status and strength of Pennsylvania's Solar AEC market in the near future, it is reasonable to assume that as more projects are developed and come online, prices for Solar AECs may be lower due to competition. The Industrial Customer Groups therefore support PPL's recommendation to revisit this Policy in three years' time in order to determine whether regulatory intervention should be lifted "in order to provide the maximum benefit to Pennsylvania consumers at the lowest possible cost."

D. The Industrial Customer Groups Object to Solar AEC Limitations in the AEPS Act Because the Geographic Limitations May Violate the Commerce Clause

The Mid-Atlantic Renewable Energy Association ("MAREA") note that, consistent with the Alternative Energy Portfolio Standards ("AEPS") Act, Solar AECs need not come from Pennsylvania generators. *See* MAREA Comments at 4. Specifically, MAREA states:

Under the AEPS provisions, EDCs buy out-of-state SRECs using PA ratepayer dollars, which is hard enough to explain...but now they are also doing it while SRECs *generated in their own service territory* are left in the lurch.

Id. (emphasis in original). MAREA appears to imply that only Pennsylvania-based projects should be eligible for procurement through the Policy Statement.

The plain language of the AEPS Act limits the purchase of AECs to the following three sources: (1) alternative energy sources located inside the geographical boundaries of Pennsylvania; (2) alternative energy sources located outside Pennsylvania, provided that both the source and procuring entity are located within the service territory of the same Regional Transmission Organization (such as PJM Interconnection, L.L.C. ("PJM")); and (3) any alternative energy source located within PJM's service territory regardless of whether the procuring entity is located within PJM. *See* 73 P.S. § 1648.4. The Industrial Customer Groups believe that the limitations contained in the AEPS regarding AEC procurement may violate the Commerce Clause of the U.S. Constitution. *See* U.S. Const. art I., § 8, cl.3. Specifically, the AEPS Act as written favors alternative energy systems located in states that are within the PJM service territory and discriminates against alternative energy systems located in other non-PJM (or Midwest Independent Transmission System Operator, Inc. ("MISO")) states. The Commission should not further exacerbate this by limiting AEC procurement to projects only located in Pennsylvania, especially when this is not required by the statute.

II. CONCLUSION

WHEREFORE, Industrial Energy Consumers of Pennsylvania, Duquesne Industrial Intervenors, Met-Ed Industrial Users Group, Penelec Industrial Customer Alliance, Penn Power Users Group, Philadelphia Area Industrial Energy Users Group, PP&L Industrial Customer Alliance and West Penn Power Industrial Intervenors respectfully request that the Pennsylvania Public Utility Commission consider and adopt, as appropriate, the foregoing Reply Comments.

Respectfully submitted,

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Dated: March 23, 2010