

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held June 15, 2023

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
Stephen M. DeFrank, Vice Chairman
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Talen Energy Marketing, LLC Request for
Renewal of a Reduction in Level of Security
for Electric Generation Supplier

A-110098

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission or PUC) for consideration and disposition is a Petition for Reconsideration from Staff Action (Petition) regarding Talen Energy Marketing, LLC (Talen or the Company) filed on April 21, 2023. The Petition is in response to a Secretarial Letter issued by the Commission on April 20, 2023 (*April 2023 Secretarial Letter*). For the reasons stated herein, we shall grant the Petition and refer this matter to the Commission's Bureau of Technical Utility Services (TUS) for further review as deemed necessary, consistent with this Opinion and Order.

I. History of the Proceeding

On February 15, 2023, the Company filed a Compliance Filing with the Commission requesting permission to maintain its Electric Generation Supplier (EGS) financial security level of 5% of its most recent four quarters of gross revenue (5% Annual Compliance Filing).

The *April 2023 Secretarial Letter* advised the Company that the 5% Annual Compliance Filing was denied.¹ The reason for the denial of the 5% Annual Compliance Filing was stated as follows:

The financial security is designed “to ensure the financial responsibility of the electricity generation supplier and the supply of electricity at retail in accordance with contracts, agreements or arrangements².” The Commission finds considerable uncertainty regarding Talen Energy’s ability to fulfil its future annual obligations under Section 2809 due to its ongoing Bankruptcy Proceeding. In particular, we have concerns regarding Talen Energy’s ability to fulfil its obligations related to gross receipts taxes, Alternate Energy Portfolio Standards (AEPS) and the Commission’s Annual Fee levied on EGSs. The Commission has determined it is prudent to require Talen Energy to increase its current financial security level from 5% to 10% of its most recent four quarters of revenue because of these uncertainties.

April 2023 Secretarial Letter at 1.

¹ The *April 2023 Secretarial Letter* noted that the Company filed notice with the Commission on May 10, 2022, that it has undergone a material change in its organization under Chapter 11 of the United States Bankruptcy Code on May 9, 2022.

² 66 Pa. C.S. § 2809(c)(1)(i).

In addition, the *April 2023 Secretarial Letter* notified the Company that the action contained therein would be deemed the final action of the Commission unless a petition for reconsideration is filed with the Secretary within twenty days. *Id.* at 2.

As stated, *supra*, on April 21, 2023, the instant Petition was filed by the Company. No response to the Petition has been filed.

On May 19, 2023, Talen submitted a Notice of Material Change to the Commission stating that the Company has undergone a material change in operations by emerging from bankruptcy on May 17, 2023.

II. Background

The Public Utility Code (Code), and the Commission's Regulations promulgated thereunder, require EGSs doing business in Pennsylvania to maintain financial security at levels meant to ensure the financial responsibility of the EGS.³ 66 Pa. C.S. § 2809(c); 52 Pa. Code § 54.40. The specific purposes of the security requirement are: (1) to ensure payment of the Gross Receipts Tax (GRT) owed to the Department of Revenue; (2) to ensure the supply of electricity at the retail level in accordance with contracts, agreements, or arrangements; and (3) to ensure payment of any alternative compliance payments owed to the Pennsylvania Sustainable Energy Funds under the Alternative Energy Portfolio Standards Act of 2004 (AEPS Act).⁴

³ On September 15, 1998, the Company received its initial license, at Docket No. A-110098, to operate as an EGS and provide electric generation supplier services to customers in Pennsylvania.

⁴ Alternative compliance payments may be imposed by the Commission if an EGS fails to comply with the requirements in the AEPS Act for electric energy sold to be comprised of prescribed percentages from certain types of alternative energy sources. 73 P.S. § 1648.3.

66 Pa. C.S. §§ 2809(c)(1)(i) and (ii) and 2810; 52 Pa. Code § 54.40(f)(2); *See*, 73 P.S. § 1648.3(f) and (g).

The Commission's authority to establish, and determine the form and amount, of financial security requirements for EGSs is set forth in the Code.

Section 2809(c) provides, in pertinent part:

In order to ensure the safety and reliability of the generation of electricity in this Commonwealth, no energy supplier license shall be issued or remain in force unless the holder...[f]urnishes a bond or other security approved by the Commission in form and amount to ensure the financial responsibility of the electric generation supplier and the supply of electricity at retail in accordance with contracts, agreements or arrangements.

66 Pa. C.S. § 2809(c)(1)(i).

The Commission's Regulations at 52 Pa. Code § 54.40 provide specific details regarding the amount and form of bonds or other security for EGSs. The initial security level for each EGS operating in Pennsylvania is \$250,000. After the first year of an EGS' operation, its security level is reviewed annually and modified, if necessary, primarily based on its reported annual gross receipts. The default security level that an EGS must maintain after its first year of operation is 10% of its reported annual gross receipts or \$250,000, whichever is higher. However, a licensee may seek approval from the Commission of an alternative level of bonding, commensurate with the nature and scope of its operations. 52 Pa. Code § 54.40(c) and (d).

As a result of the Commission's Investigation of Pennsylvania's Retail Electric Market at Docket No. I-2011-2237952, the feasibility of reducing the security amount EGSs were required to maintain after their first year of operation from 10% of annual gross receipts to 5% of annual gross receipts was reviewed. Following this

review, the Commission issued an Order permitting an EGS, after its first year of operation, to seek a security level of 5% of its most recent twelve months of revenue or \$250,000, whichever is higher. *Public Utility Commission Bonding/Security Requirements for Electric Generation Suppliers; Acceptable Security Instruments*, Docket No. M-2013-2393141 (Order entered July 24, 2014). The Commission concluded that, among other things, requiring an EGS to post a bond or security in the amount of 10% of gross receipts after the first year of operation “may be excessive in relation to the risk intended to be secured, unnecessarily burdening EGSs, and presenting a potential barrier to entry into Pennsylvania’s retail electric market.” *Id.* at 10. Ultimately, the Commission felt that the 5% security level was adequate in most circumstances to cover the liabilities the security was meant to insure. Going forward, an EGS seeking to reduce its security level was required to file a formal petition, and certain supporting information, with the Commission and the authority to review uncontested requests for a reduction in the level of bonding was delegated to TUS. *Id.*⁵

The Commission further streamlined the process for EGSs to obtain reductions in their annual security obligations in an Order entered on September 20, 2018. This revised process allowed for the submittal of a Compliance Filing for the renewal of security rather than a formal Petition for EGSs that have received prior approval for a reduced financial security amount of 5%. The previous requirement that a Secretarial Letter be issued approving the bond reduction renewal was also rescinded. *Petition of the Retail Energy Supply Association to Simplify the Financial Security 5% Renewal Process*, Docket No. P-2017-2608078 (Order entered September 20, 2018).

⁵ In a Secretarial Letter issued on April 8, 2016, TUS provided guidance on the process to renew the reduced security level, noting that a reduction in an EGS’ security level to 5% is effective only for one year and subject to annual renewal by the Commission.

Talen was initially approved for a 5% financial security reduction by Secretarial Letter on July 11, 2019. Thereafter, the Company has maintained its financial security at that level.

III. Discussion

A. Legal Standards

Petitions for Reconsideration from Staff Action are governed by Section 5.44(a) of the Commission's Rules of Administrative Practice and Procedure, which provides the following:

Actions taken by staff, other than a presiding officer, under authority delegated by the Commission, will be deemed to be the final action of the Commission unless appealed to the Commission within 20 days after service of notice of the action, unless a different time period is specified in this chapter or in the act.

52 Pa. Code § 5.44(a).

Before addressing the Petition, we are reminded that we are not required to consider, expressly or at great length, each and every contention raised by a party to our proceedings. *University of Pennsylvania, et al. v. Pa. PUC*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984). Any argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

B. Talen's Petition

In its Petition, the Company requests that the Commission reconsider the Commission Staff's denial to maintain its EGS financial security level of 5% of its most

recent four quarters of revenue. Petition at 1, 4. The Company states that its responses to two data requests from Commission Staff regarding Talen’s bankruptcy status and demonstrating that it had made its most recent tax pre-payment provide proof that Talen is current on its AEPS obligations, its tax obligations, and its payment of the Commission’s required annual fees and supplemental annual fees. In addition, Talen avers that it has been in bankruptcy for less than a year after filing for Chapter 11 protection on May 9, 2022, and during that time the Company’s ability to make timely payments of its taxes, fees and other obligations has not been impacted. *Id.* at 2.

The Company states that it has received regulatory approvals from the Federal Energy Regulatory Commission and the Nuclear Regulatory Commission, and it expects to receive final regulatory approval associated with Hart-Scott-Rodino on or around May 15, 2023. Talen avers that it expects to emerge from bankruptcy soon thereafter, on or around May 17, 2023. *Id.* at 3.⁶ Furthermore, Talen submits that its “[C]hapter 11 plan, which was confirmed on December 15, 2022, by the overwhelming majority of creditors across Talen’s capital structure, contemplates a clear and certain post-emergence future for Talen, including the infusion of up to \$1.9 billion of new equity capital pursuant to a common equity rights offering, \$1.55 billion of which is backstopped by various leading financial institutions, new ownership, a \$3 billion reduction in Talen’s debt, full repayment of Talen’s first lien funded debt, and the consensual equitization of all of Talen’s existing unsecured notes.” *Id.* The Company

⁶ As noted, *supra*, Talen submitted a Notice of Material Change to the Commission on May 19, 2023, stating that the Company has undergone a material change in operations by emerging from bankruptcy on May 17, 2023. *See, In re Talen Energy Supply, LLC*, Chapter 11 Case No. 22-90054 (Bankr. S.D. Tex. May 17, 2023) (MI), Document No. 2060. Talen also notes that it does not currently serve any residential customers in Pennsylvania and that it will maintain its EGS license for service to affiliated entities and industrial customers that provide services to the affiliated entities now that it has emerged from bankruptcy. Talen further avers that it intends to satisfy all PUC reporting and other regulatory requirements to maintain its license. Notice of Material Change, May 19, 2023.

argues that the Commission's claim of uncertainty pertaining to its bankruptcy is unfounded and the bond should not be doubled to the financial detriment of a company on the brink of emergence from bankruptcy because the bankruptcy proceeding will continue for only a couple of days following the requested bond upsize. *Id.*

Finally, the Company states that it only has contracts, agreements or arrangements with its own plants, plants affiliated with Talen, and a few entities that provide service for those plants. Talen argues that the public interest does not require that Talen's bond be doubled at this time because it has a limited number of customers, most of whom are affiliated with the Company. *Id.* at 4.

C. Disposition

Upon review, we will grant the Petition, rescind the *April 2023 Secretarial Letter*, and refer this matter to TUS for further consideration. We acknowledge receipt of the Notice of Material Change submitted by Talen on May 19, 2023, indicating that the Company emerged from bankruptcy on May 17, 2023. Based upon this new development, we find that it is reasonable to refer this matter to TUS for further review as deemed necessary.

Such a review will allow TUS to determine whether there continues to be any uncertainty regarding the Company's ability to fulfill its future annual obligations as an EGS operating in Pennsylvania under 66 Pa. C.S. § 2809, or whether these new circumstances alleviate those concerns. Now that the proceeding filed by Talen for reorganization under Chapter 11 of the U.S. Bankruptcy Code on May 9, 2022, appears to be resolved, and since the Company has announced its emergence from bankruptcy, referring this matter to TUS will provide the Commission with the opportunity to review if, or how, the Bankruptcy Proceeding has impacted, or may affect going forward, the Company's business, its operations and financial conditions, and relationships with other

parties such as customers, vendors and contractors of any business. In addition, while Talen states that it is current on its GRT, Commission fees, and AEPS Act obligations, further review by Staff will assist the Commission in determining whether the Bankruptcy Proceeding, or Talen's emergence therefrom, may impact its financial ability to satisfy its annual GRT commitment, the Commission's required annual regulatory fees, and its AEPS Act obligations.

By law, the Commission is tasked with, *inter alia*, ensuring the continuation of safe and reliable electric service to all consumers in the Commonwealth. 66 Pa. C.S. § 2804(1).⁷ Therefore, we will refer this matter to TUS for further review as deemed necessary to determine whether it is reasonable and appropriate for Talen to maintain its EGS financial security level at 5% of its most recent four quarters of gross revenue, or if the financial security amount for the Company should be set at 10% of its most recent twelve months of gross receipts. In addition, as long as Talen maintains the existing 5% financial security, we will direct TUS to refrain from placing Talen on a License Cancellation Tentative Order while this matter is pending and until Talen has a reasonable opportunity to comply with the Commission's final determination in this matter.

⁷ We note that in prior situations, the Commission has taken action to protect customers and the public interest against potential risks due to financial uncertainty associated with bankruptcy and insolvency proceedings. *See, Commodore Gas and Electric, Inc. Petition for Waiver of 52 Pa. Code § 54.40 Bonding Requirement; Petition for Waiver of Notice Requirements for Abandonment of Electric Generation Supplier License*, Docket No. A-110080 (Order entered May 4, 2001) (cancellation of EGS license due to the expiration of financial security and EGS's inability to renew bond due to bankruptcy action); *Office of Consumer Advocate, et al. v. Utility.Com, Inc.*, Docket No. C-00014851, et al. (Order entered July 12, 2001) (addressing claims against financial security bond for liabilities of EGS that defaulted on financial obligations and subject to out-of-state insolvency process); *Hudson Energy Services LLC Request for Renewal of a Reduction in Level of Security for Electric Generation Supplier*, Docket No. A-2010-2192137 (Order entered November 18, 2021) (denying request to reduce level of financial security bond due to considerable uncertainty as a result of pending bankruptcy proceedings).

IV. Conclusion

For the reasons set forth above, we shall grant the Petition for Reconsideration from Staff Action regarding Talen Energy Marketing, LLC, rescind the *April 2023 Secretarial Letter*, and refer this matter to the Commission's Bureau of Technical Utility Services for further review as deemed necessary, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Reconsideration from Staff Action regarding Talen Energy Marketing, LLC, filed on April 21, 2023, is granted, consistent with this Opinion and Order.
2. That the Secretarial Letter issued on April 20, 2023, at Docket No. A-110098, is hereby rescinded.
3. That this matter be referred to the Commission's Bureau of Technical Utility Services for further review as deemed necessary.
4. That, as long as Talen Energy Marketing, LLC maintains the existing 5% financial security, the Commission's Bureau of Technical Utility Services shall refrain from placing Talen Energy Marketing, LLC on a License Cancellation Tentative Order while this matter is pending and until Talen Energy Marketing, LLC has

a reasonable opportunity to comply with the Commission's final determination in this matter.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive style with a large initial "R".

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: June 15, 2023

ORDER ENTERED: June 15, 2023