

**STATE OF NEW JERSEY  
BEFORE THE  
BOARD OF PUBLIC UTILITIES**

IN THE MATTER OF THE LONG-TERM )  
CAPACITY AGREEMENT PILOT ) DOCKET NO. E011010026  
PROGRAM )

**REPLY COMMENTS OF  
EXELON GENERATION COMPANY, LLC**

On February 23, 2011 the Agent approved by the Board of Public Utilities (“Board”) to implement the Long-Term Capacity Pilot Program (“LCAPP”) posted a proposed form of Standard Offer Capacity Agreement (“Agent’s SOCA”) on the LCAPP website. Exelon Generation Company, LLC (“ExGen”) hereby submits its reply comments on the proposed Agent’s SOCA pursuant to the Board’s Order Initiating Proceeding and Approving Agent, issued on February 10, 2011 in the above captioned matter (“Order”).

ExGen continues to maintain that the LCAPP Act is unconstitutional and that the LCAPP proceeding should be stayed. ExGen submits these comments subject to and without waiver of those objections, and expressly reserves all of its rights.

**I. Construction Security**

The Agent’s SOCA proposes to require generators to post Construction Period Security to support the generators’ obligations during the construction period.<sup>1</sup> However, the Agent’s SOCA nowhere describes what those obligations are or how the Construction Period Security operates to support those obligations. Other than the requirement to

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<sup>1</sup> Agent’s SOCA, Sec. 2.3.3(h).

achieve commercial operation within two years of the Awarded Commencement Date, the Agent's SOCA does not provide for any construction milestones or the payment of any liquidated or other type damages for the failure to meet any milestones. The Agent's SOCA does allow the utility to terminate the SOCA if the facility does not achieve commercial operation (which is nowhere defined) and the Commencement Date within two years of the Awarded Commencement Date.<sup>2</sup> However, the termination payment for such an event of default is limited to all Unpaid Amounts and the utility's out-of-pocket expenses of enforcing the termination.<sup>3</sup> Since the facility never achieved commercial operation, there will not be any Unpaid Amounts. So, all that is at risk for failing to achieve commercial operation is the payment of the utility's expenses.

These damages are inadequate for the amount of harm that the generator will have caused. PJM procures capacity resources three years in advance of the delivery year to ensure adequate locational capacity resources will exist to reliably meet load conditions for the forecasted summer peak, including reserves for outages and weather-related uncertainty. Should a generator offer capacity, but then fail to bring the facility on-line in a timely fashion, utilities in the region will be faced with some combination of lower reliability and/or increased prices for capacity. PJM will be forced to procure additional resources that may or may not exist at the SOCA price or in the locations required to support reliability. The amount of these damages over a long-term agreement can be significant, albeit difficult to quantify. It would be appropriate to require generators to pay liquidated damages equal to around 15-20% of the product of the standard offer

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<sup>2</sup> Agent's SOCA, Sec. 7.1.7.

<sup>3</sup> Agent's SOCA, Sec. 9.3.1.

capacity price (“SOCP”) and the Awarded Capacity Amount for each day beyond the Awarded Commencement Date that the Capacity Facility is delayed in order to remedy the harm caused by such a default.

Similarly, the amount of the Construction Period Security is inadequate and discriminatory performance assurance. The capacity payments associated with 700 MW of capacity in New Jersey could amount to \$50-60 million annually. The \$1 million security cap is only 2% of this payment. Moreover, the cap discriminates against bidders who will be offering smaller amounts of capacity and those who will be bidding multiple projects. Consistent with the liquidated damages proposal above, Construction Period Security in the range of 15-20% of the product of the SOCP, the Awarded Capacity Amount and 365 would be more effective in assuring a generators’ performance and in compensating the utility for the harm caused by a generator’s failure to perform. It is also fairer to all bidders.

Dated: February 25, 2011

Respectfully submitted,



Stephen B. Genzer