

COPY



RECEIVED

LAW OFFICES OF
BENJAMIN L. WILLEY, LLC

OCT 18 PM 2:08

INDEPENDENT REGULATORY
REVIEW COMMISSION

RECEIVED

OCT 11 2007

October 9, 2007

Pennsylvania Public Utility Commission
Attn: James J. McNulty, Secretary
P.O. Box 3265
Harrisburg, PA 17105

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: Implementation of the Alternative Energy Portfolio Standards Act of 2004,
Docket No. L-00060180

Dear Secretary McNulty:

In response to the letter issued in this docket by the Secretary of the Pennsylvania Public Utility Commission ("PUC" or the "Commission") on September 13, 2007, the York County Solid Waste and Refuse Authority ("YCSWA") respectfully submits, in original form with fifteen copies, the following comments.

On July 19, 2007, Governor Edward Rendell signed into law Act 35 of 2007,¹ amending the Alternative Energy Portfolio Standards Act as that Act had been previously enacted on November 30, 2004 ("AEPS Act").² In view of the amendment of the AEPS Act by Act 35, the Commission has reopened the public comment period in this docket to allow time for interested parties to advise the Commission on how the amendments found in Act 35 should be reflected in the Commission's final form rule in regard to implementation of the AEPS Act.

The YCSWA appreciates the Commission's extension of this opportunity to submit comments in regard to incorporation of the provisions of Act 35 into the final form rule implementing the AEPS Act. The YCSWA will comment only on the appropriate time for the

¹ By Act 35, the General Assembly enacted House Bill 1203, Printer's No. 2343, of the Session of 2007. Act 35 was entitled, in part, "An act providing for the sale of electric energy generated from renewable and environmentally beneficial sources, for the acquisition of electric energy generated from renewable and environmentally beneficial sources by electric distribution and supply companies and for the powers and duties of the Pennsylvania Public Utility Commission." HB 1203, PN 2343, page 1, lines 1-7.

² ALTERNATIVE ENERGY PORTFOLIO STANDARDS ACT OF 2004, 73 P.S. §§ 1648.1-1648.8.

7272 WISCONSIN AVENUE, SUITE 300, BETHESDA, MD 20814
TELEPHONE: 301-941-1972 FACSIMILE: 301-656-0183 (OFFICE - GENERAL)
CELLULAR: 202-365-2713 FACSIMILE: 240-235-7775 (OFFICE - DIRECT)
EMAIL: BLW@BWILLEYLAW.COM

Commission's final form rulemaking and on limited portions of Act 35 having to do with ownership of Alternative Energy Credits ("AECs").

I. THE COMMISSION SHOULD REFRAIN FROM ISSUING A FINAL FORM RULE AT THIS TIME

The Commission commenced its rulemaking in this docket as part of its implementation of the AEPS Act. That initial rulemaking effort included a comment period that terminated in January of 2007. However, despite the initial comment period and the breadth and depth of comments received, the Commission wisely refrained from issuing a final form rule in January 2007 because the General Assembly was still considering amendments to the AEPS Act.

We are in precisely the same situation today. Although Act 35 provides one set of amendments of the AEPS Act, the General Assembly continues its deliberations at this time regarding further amendment of the AEPS Act. Therefore, for the same reason that the Commission refrained from issuing a final form rule in January 2007, it should follow that course now. The statutory foundation on which any rule would necessarily be based is not yet complete. Due to continuing deliberations on the legislative side, this is not the time for a final rule or a rulemaking proceeding on the administrative side.

In a similar vein, in its Proposed Rulemaking Order in this docket in July 2006,³ the Commission noted that administrative litigation was pending before it at that time regarding ownership of AECs attributable to energy sold pursuant to pre-existing power purchase agreements ("PPAs") that had been entered into under the Public Regulatory Policies Act of 1978, ("PURPA").⁴ The Commission noted that litigation pertaining to the ownership of AECs attributable to energy sold pursuant to such PURPA-based PPAs could continue for several years, and to the extent that a regulation would be necessary on the point of AEC ownership, it could be added later.⁵

We are in essentially the same situation today. There is no administrative litigation actively pending before the Commission on the subject of the ownership of AECs attributable to energy sold pursuant to pre-existing PURPA-based PPAs. However, the Commission's decision

³ *Proposed Rulemaking Order*, IMPLEMENTATION OF THE ALTERNATIVE ENERGY PORTFOLIO STANDARDS ACT OF 2004, at 5 (adopted July 20, 2006; entered July 25, 2006).

⁴ 16 U.S.C. §824a-3 (2000)

⁵ *Proposed Rulemaking Order*, IMPLEMENTATION OF THE ALTERNATIVE ENERGY PORTFOLIO STANDARDS ACT OF 2004, at 6.

in that proceeding is pending appeal before the Commonwealth Court of Pennsylvania.⁶ Therefore, for the same reason that the Commission refrained from issuing a final form rule, or regulation, on AEC ownership in July 2006, it should follow that course now. The judicial foundation on which any rule would necessarily be based is not yet complete. Due to continuing deliberations on the judicial side, this is not the time for a final rule, rulemaking proceeding, or regulation on the administrative side.

There are pending legislative and judicial proceedings that render the question of a final form rule on ownership of AECs inappropriate for consideration. Following its chosen course of action in July of 2006, as to pending litigation, and in January 2007, as to pending legislation, the Commission should refrain from a final form rule, rulemaking proceeding, or regulation at this time.

II. AEC OWNERSHIP IS VESTED IN THE FIRST INSTANCE IN OWNERS OF ALTERNATIVE ENERGY SYSTEMS, AND AEC OWNERSHIP REMAINS WITH THE OWNERS OF ALTERNATIVE ENERGY SYSTEMS UNTIL THE AECs ARE TRANSFERRED VOLUNTARILY AND EXPLICITLY

Act 35 amends the AEPS Act as to the definitions of an Alternative Energy Credit, a Customer Generator, Force Majeure, Net Metering, and a Tier I Alternative Energy Source; in addition to definitional amendments, there are amendatory provisions of the AEPS Act as to Alternative Energy Portfolio Standards, Portfolio Requirements in Other States, and Interconnection Standards for Customer-Generator Facilities.⁷ The YCSWA's comments will be limited to Alternative Energy Credits.

AECs are dealt with at three places in Act 35: Section 1, amending certain Definitions, Section 2, amending certain provisions dealing with Alternative Energy Portfolio Standards, and Section 3, amending Sections 4 and 5 of the AEPS Act. The first two amendatory provisions deal directly with initial ownership and transfer of ownership of AECs; the third limits the scope of the second amendatory provision but not the first.

The three amendments dealing with Alternative Energy Credits must be read together to discern their proper treatment by the Commission in any rulemaking.

⁶ ARIPPA V. PENNSYLVANIA PUBLIC UTILITY COMMISSION, Docket No. 1198 C.D. 2007 (Commonwealth Court).

⁷ HB 1203, PN 2343, at page 1, lines 11- 16.

Act 35, at Section 1, defines an Alternative Energy Credit as follows:

“Alternative Energy Credit.” A tradable instrument that is used to establish, verify and monitor compliance with this Act. A unit of credit shall equal one megawatt hour of electricity from an Alternative Energy Source. The Alternative Energy Credit shall remain the property of the Alternative Energy system until the Alternative Energy Credit is voluntarily transferred by the Alternative Energy System.^[8]

Subsequently, Act 35, adds the following as Section 3(E)(12), to the AEPS Act:

(E) Alternative Energy Credits. --

(12) Unless a contractual provision explicitly assigns Alternative Energy Credits in a different manner, the owner of the Alternative Energy System or a Customer-Generator owns any and all Alternative Energy Credits associated with or created by the production of electric energy by such facility or customer, and the owner or customer shall be entitled to sell, transfer or take any other action to which a legal owner of property is entitled to take with respect to the credits.^[9]

Finally, as to Alternative Energy Credits, Act 35 provides:

Section 3.1. Notwithstanding the addition of Section 3(E)(12) of the Act, nothing in this Act is intended to reverse or modify the Pennsylvania Public Utility Commission’s Order Docket Number P-00052149.^[10]

Based on the amended definition of an AEC, the Commission must provide in any final form rule that AECs are the property of the Alternative Energy System that generates the electric energy on which those AECs are based, and the AECs remain the property of the Alternative Energy System until such time as the Alternative Energy System voluntarily transfers the AECs.

⁸ *Id.* at page 15, line 26 – page 16, line 2.

⁹ *Id.* at page 24, line 27 – page 25, line 7.

¹⁰ *Id.* at page 28, lines 24 – 27.

In consonance with that position is the added requirement under Section 3(E)(12) that only an **explicit** contractual provision will suffice to transfer the AEC from the owner of the Alternative Energy System to a successor owner of the AEC.

Act 35 clearly establishes that the initial ownership of AECs is vested in the owner of the Alternative Energy System that generates the electric energy on which those AECs are based. Act 35 also establishes that any transfer of the AEC from the Alternative Energy System to any successor owner must be both voluntary and explicit. Thus, the Commission's final rule must follow suit in explicitly providing that:

- (1) ownership of AECs is vested in the owner of the Alternative Energy System that generates the electric energy on which those AECs are based, and
- (2) any transfer of ownership of AECs from the Alternative Energy System to any successor owner must be both voluntary and explicit.

Act 35 also carries the caveat that notwithstanding the addition of Section 3(E)(12) of the Act, nothing in Act 35 is intended to reverse or modify the Commission's Order in Docket No. P-00052149. The Commission's Order in the docket in question is pending appeal at the Commonwealth Court, which is why the YCSWA recommends that the Commission refrain from issuing a final form rule at this time. However, if the Commission elects to proceed, any final form rule must deal with Section 3.1 of Act 35 in a manner that is consistent with the amended definition of an AEC, the addition of Section 3(E)(12), and the limitation that is applied to Section 3(E)(12) by Section 3.1.

The Commission's order in Docket No. P-00052149 provides that the purchasers of electric energy under long-term, PURPA-based PPAs are the owners of AECs attributable to that energy. The effect of the Commission's order is either to (1) divest the owners of Alternative Energy Systems of the AECs attributable to their generation of electric energy or (2) conclude that the owners of Alternative Energy Systems never owned, in the first instance, the AECs attributable to their generation. Neither proposition can stand in the face of Act 35.

Act 35 must be read to give full effect to all provisions of the Act so as to not render any portion of Act 35 a nullity. The rules of statutory construction also assume that the General Assembly intended the whole statute to be effective and certain.¹¹ Accordingly, every statute is

¹¹ COMMONWEALTH, DEPARTMENT OF ENVIRONMENTAL RESOURCES V. PENNSYLVANIA MINES CORPORATION, 102 Pa.Cmwlth. 452, 457-60, 519 A.2d 522, 525-26 (Pa. Cmwlth. 1986),

to be construed to give effect to all of its provisions.¹² Therefore, the Commission, in dealing with Section 3.1 and its effect on Section 3(12)(E) of Act 35, must interpret Act 35 in a manner that is also consistent with the amended definition of an AEC.

In Act 35, the General Assembly only provided that notwithstanding the addition of Section 3(E)(12) of the Act, nothing in Act 35 is intended to reverse or modify the Commission's Order in Docket No. P-00052149. The General Assembly made no similar provision in regard to limitation of the effect to be given to the amendment of the definition of an AEC. Therefore, the Commission's Order in Docket No. P-00052149 should be given credence as the Commission's final form rule deals with explicit transfer of ownership of AECs (under Section 3(E)(12)), but there is no such directive from the General Assembly for the Commission's final rule to ignore Act 35's mandate, found in the amended definition of an AEC, that:

- (1) AECs are the property of the owners of the Alternative Energy System that generated the electric energy on which the AECs are based, and
- (2) AECs remain the property of the Alternative Energy System until voluntarily transferred.

Therefore, if the Commission elects to proceed to a final form rule at this time for implementation of the AEPS Act, as amended by Act 35, the Commission's final form rule must be consistent with the mandate of Act 35 in the following respects:

- clearly identifying the owner of Alternative Energy Systems as the owner of AECs attributable to electric energy generated by that Alternative Energy System;
- stating unequivocally that the owner of an Alternative Energy System is the owner of AECs attributable to electric energy generated by that Alternative Energy until such AECs are voluntarily transferred;
- stating that, with the exception of AECs associated with energy generated by an Alternative Energy System where such energy was previously sold pursuant to a PURPA-based contract, a transfer of the AECs from the

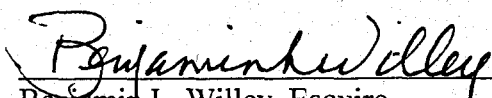
citing, the Statutory Construction Act of 1972, 1 Pa.C.S. § 1922(2).

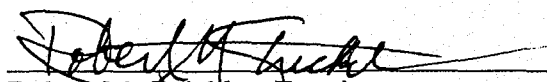
¹² COMMONWEALTH V. BIDDLE, 411 Pa.Super. 210, 601 A.2d 313, 317 (1991), *citing*, 1 Pa.C.S. § 1921(a).

Alternative Energy System must also be accomplished by an **explicit** contractual provision.

The YCSWA stands ready to provide any additional information or comments desired by the Commission in the proceedings in this docket.

Respectfully submitted,


Benjamin L. Willey, Esquire
Law Offices of Benjamin L. Willey, LLC
7272 Wisconsin Avenue, Suite 300
Bethesda, MD 20814
Telephone: 301-941-1972
Telefax: 240-235-7775
Email: blw@bwilleylaw.com


Robert M. Strickler, Esquire
Pennsylvania Attorney Registration No. 07496
Griffith, Strickler, Lerman, Solymos & Calkins
110 S. Northern Way
York, PA 17402-3737
Telephone: 717-757-7602
Telefax: 717-753-3783
Email: rstrickler@gslsc.com

Counsel for
York County Solid Waste and Refuse Authority

cc:
William A. Ehrman
Executive Director
York County Solid Waste and Refuse Authority