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INDEPENDENT REGULATORY REVIEW COMMISSION

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December 13, 2006

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

HAND DELIVERED

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

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

Dear Secretary McNulty:

I am delivering for filing today the original plus 15 copies of the Comments on Proposed Rulemaking Order, on behalf of the Office of Small Business Advocate in the above-captioned matter.

If you have any questions, please contact me.

Sincerely,

William R. Lloyd, Jr.
Small Business Advocate
Attorney ID #16452

Enclosures

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

COMMENTS ON BEHALF OF THE OFFICE OF SMALL BUSINESS ADVOCATE ON PROPOSED RULEMAKING ORDER

The act of November 30, 2004 (P.L. 1672, No. 213), known as the Alternative Energy Portfolio Standards Act ("Act 213"), requires that increasing percentages of the electricity sold in the Commonwealth be generated from designated alternative energy sources.

By Notice dated January 7, 2005, the Pennsylvania Public Utility Commission ("PUC" or "Commission") announced a January 19, 2005, technical conference to facilitate the implementation of Act 213. The Office of Small Business Advocate ("OSBA") submitted written comments prior to the conference, made an oral presentation at the conference, and subsequently filed written reply comments.

By Notice dated February 14, 2005, the Commission convened the Alternative Energy Portfolio Standards Working Group ("Working Group"). The OSBA has participated in meetings and submitted written comments on numerous issues as a member of the Working Group.

In addition, the OSBA has submitted comments in response to proposed rulemakings on net metering and interconnection. The OSBA has also submitted comments in response to orders at Docket No. M-00051865 regarding Demand Side Management ("DSM") and Energy Efficiency ("EE"); designation of a registry for

Alternative Energy Credits ("AECs"); types of alternative energy projects which fall outside the definition of "public utility"; voluntary alternative energy purchases; solar thermal energy; and compliance deadlines and determinations.

By Proposed Rulemaking Order entered July 25, 2006, at Docket No. L-00060180 ("Order"), the Commission issued proposed regulations regarding a variety of issues relating to the implementation of Act 213. By Ordering Paragraph 6, the Commission set the deadline for the submission of comments as 60 days following publication of the proposed rulemaking in the *Pennsylvania Bulletin*. The proposed rulemaking was published on October 14, 2006. The OSBA submits the following comments in response to that publication.

COMMENTS

§75.51. EDC and EGS obligations.

Proposed Section 75.51(d) contemplates measuring compliance with Act 213 by an electric generation supplier ("EGS") on a statewide basis rather than on an electric distribution company ("EDC") service territory by service territory basis. Allowing an EGS to measure compliance on a statewide basis while the EDC measures compliance only within the EDC's own service territory could distort the comparison of the EGS's rates within a particular service territory to the default service rates.

Such an approach would also appear to be inconsistent with Section 3(b)(1) of Act 213, which ties long-term Tier I compliance by *both* EDCs and EGSs to sales "in that certificated service territory."

§75.53. Alternative energy system qualification.

Proposed Section 75.53(h) recognizes that the Department of Environmental Protection ("DEP") may suspend or revoke the alternative energy system status of a facility for a major violation of environmental regulations. From the date of suspension or revocation until the date of restoration of alternative energy status, output from that facility can not be counted toward compliance with Act 213.[1]

Because of proposed Section 75.53(h), an EDC or EGS may find itself without adequate AECs despite having entered a contract for the offending facility's AECs. Replacing these lost AECs may result in higher alternative energy costs.[2]

To avoid additional alternative energy costs, the OSBA recommends that the suspension or revocation of a facility's alternative energy status apply to new contracts and the renewal of an existing contract but not apply to the period remaining on an existing contract. In that way, an EDC or EGS will be permitted to continue counting AECs from an offending facility toward Act 213 compliance until the end of the contract period.

§75.56. Alternative compliance payments.

The Commission's discussion of proposed Section 75.56 invites comments on whether "the traditional utility assessment mechanism" should be used to collect funds

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[1] If the facility is shut down because of the violation, there will be no output from that facility to earn AECs and the OSBA's recommendation will be inapplicable. However, because proposed Section 75.53 will apply to facilities inside and outside the Commonwealth, there may be instances in which DEP suspends or revokes the alternative energy status of an out-of-state facility even though the home state does not shut down the facility. Similarly, DEP may suspend or revoke the alternative energy status of an in-state facility but decide not to shut down the facility.

[2] A similar problem will arise if the EDC places the Act 213 compliance obligation on the wholesale supplier and the wholesale supplier relies on the output from the offending facility.

for the compensation of the alternative energy credits program administrator. Order, at 14. The OSBA assumes that the "traditional" mechanism refers to the assessment process under Section 510 of the Public Utility Code, 66 Pa. C.S. § 510.

Act 213 imposes the requirement to sell electricity from alternative energy sources on both EDCs and EGSs. However, because of *Delmarva Power & Light Co. t/a Conectiv v. Commonwealth of Pennsylvania*, 582 Pa. 338, 870 A.2d 901 (Pa. 2005), EGSs are not subject to assessment under Section 510. Therefore, if the program administrator were compensated through a Section 510 assessment, EGSs would be exempt from paying. To avoid this inequity, the OSBA recommends that the program administrator be compensated through a fee system applicable to both EDCs and EGSs.[3]

§75.57. Force majeure.
§75.58. Special force majeure.

The OSBA agrees with the Commission's decision to use $45 per MWh as a *de facto* cap on the amount to be paid for alternative energy credits ("AECs"). However, the OSBA is concerned about the mechanics of the Commission's proposal.[4]

First, both proposed Section 75.57 and proposed Section 75.58 assume that all EDCs will purchase alternative energy and non-alternative energy through separate procurements or will purchase AECs separately from electricity. However, several EDCs

[3] If the Commission determines that administrative costs should be spread, in the aggregate, to all EDCs and EGSs rather than collected on the basis of the specific costs caused by each particular EDC or EGS, an alternative would be to recover the administrative costs through a non-bypassable surcharge.

[4] In addition, the OSBA disagrees with the decision to require EDCs to make alternative compliance payments (with recovery from ratepayers) when the market price of alternative energy exceeds the market price of non-alternative energy by $45 or more. Section 3(f)(2) of Act 213 authorizes the Commission to impose alternative compliance payments when an EDC "has failed to comply" with the requirement to sell a designated percentage of electricity from alternative energy sources. A declaration of *force majeure* implies that meeting that obligation is not reasonably possible. Therefore, the OSBA questions the rationale for imposing what Act 213 envisions as a "penalty" for failure to comply.

have already indicated their preference to pay wholesale suppliers a blended price for alternative and non-alternative energy and to charge ratepayers a blended default service rate rather than collect the incremental cost of alternative energy through a surcharge under Section 1307 of the Public Utility Code, 66 Pa. C.S. § 1307.

Second, proposed Section 75.57 contemplates an annual determination of the existence of an economic *force majeure*. It could be costly for an EDC to comply with that annual determination if the EDC is operating (or has obtained Commission approval to begin operating) under multi-year default service contracts with wholesale suppliers. For example, if the Commission declares an economic *force majeure* for a reporting period which is the same as the first year of a three-year wholesale contract, the EDC might reasonably decide to acquire default service electricity for the entire three-year period without an alternative energy component. However, if the Commission subsequently decides that no economic *force majeure* exists in the second and/or third year of the wholesale contract, the EDC will then be required to conduct an additional competitive procurement for AECs. In the alternative, the EDC may attempt to avoid this type of mid-term correction by placing the risk of *force majeure* status on the wholesale supplier (and paying a risk premium) or by acquiring all default service electricity through one-year contracts.

Third, both proposed Section 75.57 and proposed Section 75.58 contemplate that an EDC will collect its alternative energy costs over the twelve months following the period for which the specific Act 213 requirement applied.[5] The lag between when the alternative energy costs are incurred and when they are collected from ratepayers might not be a major problem for those reporting periods in which the Act 213 percentage

[5] Proposed Section 75.59 implies the same thing.

requirement remains the same as for the previous reporting year. However, the lag could create a material mismatch between default service rates and prevailing market prices when the percentage requirement rises. One solution would be to allow the EDC to collect projected costs on a reconcilable basis, similar to what is done under Section 1307(f). However, a Section 1307(f)-type approach would invite litigation over the proper cost projection.

As an alternative to the Commission's proposal, the OSBA recommends the following:

1. The EDC solicits separate bids for electricity (for a designated procurement period) with an alternative energy component and electricity without such a component.

2. If the difference in the bids on an MWh basis exceeds $45 times the percentage of the load required by Act 213 to come from alternative energy sources, the EDC accepts the bid without an alternative energy component. Otherwise, the EDC accepts the bid with an alternative energy component.

For those EDCs choosing to acquire alternative and non-alternative energy on a blended basis, the OSBA's recommendation would eliminate the need to predict the market price of alternative energy, eliminate the need for reconciliation, and better match the period for collection of the cost of alternative energy with the period in which the associated electricity is being consumed. In addition, the OSBA's recommendation would enable the EDC to enter a load-following wholesale contract for the entire default service period, thereby placing the risk of load growth (and the associated growth in the quantity of AECs required) on the wholesale supplier.

§75.59. Alternative energy cost recovery.

The OSBA agrees with the Commission's decision to require acquisition of alternative energy through a competitive procurement process. However, the OSBA disagrees with *requiring* annual reconciliation.[6]

If an EDC chooses to acquire alternative energy (or AECs) separately and to recover the associated costs through a Section 1307 surcharge, then the OSBA agrees that annual reconciliation is necessary. However, if the EDC chooses to acquire default service electricity with an alternative energy component, the EDC will already be recovering alternative energy costs through blended default service rates. Consequently, there will be no explicit alternative energy costs and revenues to be reconciled.

§75.60. Alternative energy market integrity.

The OSBA is concerned that encouraging a voluntary alternative energy market will reduce the quantity of Tier I alternative energy (or AECs) available and increase the price, thereby making a *force majeure* declaration more likely.

§75.61. Banking of alternative energy credits.

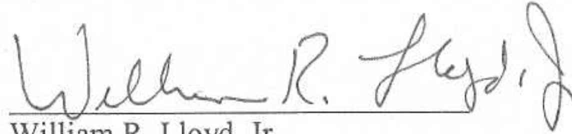
The OSBA agrees that Section 3(e)(7) of Act 213 permits banking of AECs from pre-Act facilities during the cost-recovery period only to the extent that the AECs are associated with incremental output. However, even if Section 3(e)(7) does cause EDCs and EGSs "to meet their initial requirements from resources located mostly outside of Pennsylvania," Order, at 21, the impact should be short-lived. Although Section 3(e)(7)

[6] Proposed Sections 75.59(a) and (e) imply that an EDC may forego a Section 1307 recovery mechanism. However, proposed Sections 75.57, 75.58, and 75.59(d) imply that such a mechanism must be used.

limits banking of AECs from existing facilities during the cost-recovery period, Act 213 allows the counting of *all* AECs arising out of generation by those facilities subsequent to the cost-recovery period.

WHEREFORE, the OSBA respectfully requests that the Commission implement Act 213 in a manner consistent with the foregoing comments.

Respectfully submitted,



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Dated: December 13, 2006