PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
http://www.irrc.state.pa.us

INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

January 12, 2007

Honorable Wendell Holland, Chairman
Pennsylvania Public Utility Commission
Keystone Building, 3rd Floor
400 North Street
Harrisburg, PA 17105

Re: Regulation #57-252 (IRRC #2569)
Pennsylvania Public Utility Commission
Implementation of the Alternativce Energy Portfolio Standards Act of 2004

Dear Chairman Holland:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. We will send a copy to the standing committees when they are designated.

If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

Comments of the Independent Regulatory Review Commission

on

Pennsylvania Public Utility Commission Regulation #57-252 (IRRC #2569)

Implementation of the Alternative Energy Portfolio Standards Act of 2004

January 12, 2007

We submit for your consideration the following comments on the proposed rulemaking published in the October 14, 2006 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Pennsylvania Public Utility Commission (PUC) to respond to all comments received from us or any other source.

Note: The section numbers used in this document are consistent with the correction published in the October 21, 2006 *Pennsylvania Bulletin* (36 Pa.B. 6409).

1. Section 75.61. EDC and EGS obligations. – Economic impact; Need.

Monthly reporting

Subsection (f) states:

> EDCs shall provide monthly reports to the program administrator documenting total deliveries of electricity to all retail electric customers within their service territory. Separate totals shall be reported for each load serving entity active in the EDC's service territory. Reports shall be submitted to the program administrator within 45 days from the end of each month.

In the Preamble, the PUC states Subsection (f) "proposes a new standard for the reporting of monthly retail sales data...." The PUC asked parties to identify technical limitations and whether estimated data could be used. Commentators stated some companies would have to provide estimates to meet the 45-day requirement and others requested an extension of the 45-day period.

It is questionable what value these reports will have if they amount to a series of estimates or hurried collection of data solely for the purpose of meeting the 45-day deadline. The PUC should work closely with the commentators to develop a reporting process that will produce timely and reliable data. Additionally, the PUC should explain how the data will be used.

Cost of report preparation

The PUC has not provided any cost estimate of the reporting procedure. What is the estimated cost of these reports for the EDCs? How do the benefits of these reports justify the cost?

Who must report?

Why does Subsection (f) apply only to EDCs?

Load serving entity

The term "load serving entity" is vague. The regulation should include a definition of "load serving entity."

2. Section 75.62. Fuel and technology standards for alternative energy sources. – Statutory authority; Consistency with statute; Need; Reasonableness; Clarity.

Role of the Department of Environmental Protection

The Alternative Energy Portfolio Standards Act (73 P.S. §§ 1648.1 to 1648.8) (Act) discusses the roles of the PUC and the Department of Environmental Protection (DEP). Specifically, 73 P.S. § 1648.7 *Interagency responsibilities*, addresses the roles of the two agencies as follows:

> (a) **Commission responsibilities.**--The commission will carry out the responsibilities delineated within this act. The commission also shall, in cooperation with the department, conduct an ongoing alternative energy resources planning assessment for this Commonwealth....
>
> (b) **Department responsibilities.**--The department shall ensure that all qualified alternative energy sources meet all applicable environmental standards and shall verify that an alternative energy source meets the standards set forth in section 2.
>
> (c) **Cooperation between commission and department.**--The commission and the department shall work cooperatively to monitor the performance of all aspects of this act....

Section 75.62 of the PUC's proposed regulation interprets Section 2 of the Act. We recognize that the PUC must carry out the responsibilities delineated in the Act under 73 P.S. § 1648.7(a). However, the definition of "alternative energy sources" in Section 2 of the Act (73 P.S. § 1648.2) contains environmental assessments such as Subparagraph (5)(iii) which requires any incremental development of low-impact hydropower to provide "an adequate water flow for protection of aquatic life and for safe and effective fish passage."

The Act (73 P.S. § 1648.7(b)) assigns DEP two responsibilities: first, to ensure sources meet environmental standards; and second, to "verify" that an "**alternative energy source** meets the standards set forth" in the definition of that phrase in Section 2 of the Act. (Emphasis added.)

DEP's responsibility is to verify compliance with the Act, not with the PUC's regulation. We find it distressing that DEP has submitted several comments on this section in disagreement with the PUC's interpretation of the Act. These divergent views will compound the difficulty of approving alternative energy sources. The Act's provisions quoted above mandate cooperation between the PUC and DEP. How has the PUC attempted to resolve these differences? Has the PUC entered into a Memorandum of Understanding (MOU) with DEP?

In conclusion, we question whether Section 75.62 of the PUC regulation could be used or enforced. The PUC should delete Section 75.62. If the PUC decides not to do so, it must explain its authority to include an interpretation of Section 2 of the Act in regulation, specifically the definition of "alternative energy sources" under 73 P.S. § 1648.2 and to enforce this provision.

If the PUC believes it is within its jurisdiction to implement Section 75.62, we have the following additional concerns:

On or after February 28, 2005

The statutory definition of "Alternative energy sources" begins with the statement that "the term shall include the following existing or new sources...." Paragraph (5) relating to low-impact hydropower includes five limitations regarding "such incremental hydroelectric development." In the Preamble, the PUC explains:

> For low impact hydropower, we observe that the statutory definition restricts **qualification** to "incremental" development. We interpret this language to find that the Act limits eligibility to those facilities permitted on or after February 28, 2005 (i.e., the Act's effective date) or capacity additions or efficiency improvements to preexisting plants that were implemented on or after February 28, 2005. (Emphasis added.)

Hence, the PUC included Section 75.62(a)(4)(i) which limits low-impact hydropower sources to those permitted or implemented "on or after February 28, 2005." Commentators argue that Section 75.62(a)(4)(i) is inconsistent with the Act and should be deleted. We agree that the Act can be read to allow all "existing or new sources" and only imposes the five limitations on "incremental environmental development." The PUC should explain why it is proper to impose this time limit on all low-impact hydropower. The PUC should also explain what sources would be excluded by this limitation and the impact of this limitation on those sources being excluded.

Biologically derived methane gas

A commentator noted that Paragraph (a)(7) of the regulation substantively differs from the Act (73 P.S. § 1648.2, definition of "alternative energy sources," Paragraph (8)). The Act includes, but is not limited to methane from anaerobic digestion. Specifically, the Act states that biologically derived methane gas "shall **include** methane from anaerobic digestion of organic materials...." (Emphasis added.) However, the regulation is limited to methane produced from anaerobic digestion. The regulation should be amended to allow methane from other sources, consistent with the Act.

Large scale hydropower

Commentators suggested that a cross-reference to Paragraph (a)(4) should be included in Paragraph (b)(1). We agree that the Act (73 P.S. § 1648.2, definition of "alternative energy sources," Paragraph (4)) cross-references "the requirements of low-impact hydropower under paragraph (5)." To be consistent with the Act, we recommend adding a cross-reference to low-impact hydropower requirements in the regulation.

Petition for waste coal

The Act (73 P.S. § 1648.2, Definition of "Alternative Energy Source," Paragraph (10)) directs that in addition to the waste coal defined in the Act, other waste coal combustion is included when it meets "alternate eligibility requirements **established by regulation**." (Emphasis added.) Section 75.62(b)(2) of the regulation states:

> ...Applicants may petition for waste coal from nonpermitted sites to be qualified for alternative energy resource status. The Commission may grant the petitions at its discretion.

We have two concerns.

First, the Act does not specifically designate the PUC as the agency who would promulgate this regulation. If the PUC elects to put a provision in regulation to establish alternate eligibility requirements for waste coal, the PUC should explain why it is the proper agency to do so given the statutory provision for DEP to verify a source meets Section 2 of the Act (73 P.S. 1648.7(b)).

Second, the portion of Section 75.62(b)(2) quoted above does not establish requirements by regulation as directed by the Act. This approach would allow the PUC to bypass the formal regulatory review process and the laws that govern the promulgation of regulations. If the PUC proceeds with promulgation of this provision, it needs to establish specific alternate eligibility requirements in the regulation.

Demand-side management

The Act (73 P.S. § 1648.2, definition of "alternative energy sources," Paragraph (12)) describes demand-side management as "consisting of the management of customer consumption of electricity or the demand for electricity...." The regulation differs by describing demand-side management as "the conservation of electricity...." We recommend amending the regulation to be consistent with the language of the Act.

Distributed generation system

Paragraph (b)(4) quotes the Act, but is vague. The regulation is not clear regarding what constitutes "small-scale power" or "useful thermal energy." We recommend replacing this provision with quantifiable terms.

3. Section 75.63. Alternative energy system qualification. – Consistency with statute; Duplication; Reasonableness; Clarity.

Timeframe for and coordination of qualification

The assessment of an application for alternative energy system status involves multiple assessments by the PUC and DEP. The regulation does not provide a timeframe for review of the application by either agency or specify how the two agencies will coordinate their respective reviews. These are vital considerations for those trying to get an alternative energy source qualified and included in the percentage of retail sales. We recommend that the final-form regulation specify the timeframe for review of applications and how the review will be coordinated between the PUC and DEP.

Subsection (b)

This subsection requires that an application "...shall be filed with the alternative energy credit program administrator, and any other party designated by the Commission." This provision should require a submittal to DEP consistent with its duties in 73 P.S. § 1648.7(b).

"A facility shall be qualified...."

Subsections (c), (e) and (f) begin with the phrase "A facility shall be qualified...." Given the many requirements, considerations and application procedures in the Act and these regulations, this definitive statement is inaccurate. We recommend amending these subsections to cast their provisions as a requirement for qualification.

Subsection (d)

Under 73 P.S. § 1648.4, the Act states:

> ...Energy derived only from alternative energy sources inside the geographical boundaries of this Commonwealth or within the service territory of any regional transmission organization that manages the transmission system in any part of this Commonwealth shall be eligible to meet the compliance requirements under this act....

It is not clear what this subsection of the regulation provides in addition to the provisions in Subsection (c). The PUC should explain how Subsection (d) is consistent with the Act and why it is needed in addition to Subsection (c).

Subsection (e)

Consistent with our comment on Section 75.62 regarding the role of DEP, this subsection should include the requirement that DEP must verify the alternative energy system "meets the standards set forth in Section 2" of the Act. See 73 P.S. § 1648.7(b).

Subsection (g)

We question the authority of the PUC to require the alternative energy system applicant to provide information to DEP or enforce this provision. We agree with DEP's comment that this subsection should be deleted.

Subsection (h)

Under 73 P.S. § 1648.7(b), DEP has the responsibility to ensure that all qualified alternative energy sources meet all applicable environmental standards and to verify that an alternative energy source meets the standards set forth in Section 2 of the Act. We have four concerns with this subsection.

First, under what authority would the PUC hear or determine "major violations of environmental regulations" that cause "significant harm"? Also, how can the PUC suspend or revoke status for failure to comply with Section 75.62?

Second, at what point would the PUC take action? There are many levels of review and appeal that can occur after DEP issues a compliance order or penalty. This provision should allow alternative energy system status to be revoked only after the Environmental Hearing Board has issued a ruling.

Third, this subsection is vague. Specifically, the terms "major violations" and "significant harm to the environment" do not provide clear guidance on the scope or severity of violation that would result in revoking status. Revocation of alternative energy system status has many implications for compliance with the Act and in most instances would not be the fault of the EDC or EGS who must ultimately comply. As one example, could a violation unrelated to energy production result in revocation? The regulation needs to provide clear guidance regarding what circumstances would result in revoking alternative energy system status.

Finally, the PUC and DEP must clearly delineate how they will carryout their roles in cooperation as mandated by the Act under 73 P.S. § 1648.7(c). This could be done by a MOU.

4. Section 75.64. Alternative energy credit certification. – Clarity.

Subsection (b)

For clarity, this subsection should include a reference to demand-side management.

Subsection (c)

The PUC should explain its determination that credits may be certified from the date of the Act's passage on November 30, 2004.

Subsection (f)

This subsection includes the phrase "…under standards approved by the Commission." Where and how are these procedures established? They should be set forth in the final-form regulation or a cross-reference to the appropriate provisions should be added.

5. Section 75.65. Alternative energy credit program administrator. – Statutory authority; Reasonableness.

DEP role

Many commentators express concern with the role that the DEP is given under this section. We also have a concern with this, which is expressed under Section 75.62. Specifically, we question how the provisions in Paragraphs (b)(5) and (6) are consistent with 73 P.S. § 1648.7(b). Also, Paragraphs (b)(4), (5) and (6) are not clear regarding the process and timeframe expected from DEP in order for the PUC to meet the obligation placed on the program administrator by Paragraph (b)(8) to complete review in 30 days. The PUC should provide its authority and clearly state its reasoning behind these provisions that delineate DEP's involvement with the program administrator. Additionally, the PUC should explain how the process used to develop these procedures meets 73 P.S. § 1648.7(c).

Subsection (d)

Subsection (d)(2) outlines the program administrator's duties with regard to the non-certification of alternative energy credits (AECs). Commentators have questioned whether this subsection would permit credits purchased in the voluntary market to be "double counted" or be used to satisfy the portfolio standard. The PUC should explain how double counting is prevented.

6. Section 75.66. Alternative compliance payments. – Reasonableness; Clarity.

Program administrator compensation

The Office of Small Business Advocate (OSBA) states that if the program administrator is compensated under Section 510 of the Public Utility Code (66 Pa.C.S. § 510), the EGSs would be exempt from paying the compensation. OSBA suggests that the program administrator be compensated through a fee system applicable to both EDCs and EGSs. Why didn't the PUC impose administrative fees as allowed under 73 P.S. § 1648.3(e)(9)?

Procedures and standards

Under Subsection (e), what are the "procedures and standards proposed by the Pennsylvania Sustainable Energy Board"? In the final-form regulation, the PUC should add a cross-reference to these procedures and standards approved by the PUC.

Alternative compliance payments

Commentators suggest that the alternative compliance payments (ACPs) mentioned in Subsection (f) should be used to subsidize projects from the same Tier. For example, Tier I ACPs should be used to subsidize Tier I projects, Tier II ACPs should subsidize Tier II projects and solar ACPs should be used to subsidize solar projects. How will these funds be used to comply with 73 P.S. § 1648.3(g)?

7. Section 75.67. General force majeure. – Consistency with statute; Need; Clarity.

Long-term contracts

OSBA has a concern with how EDCs could be affected if they enter into long-term contracts during which force majeure would exist in one year but not in subsequent years of the contract. Is this intended to limit the utilization of long-term contracts by EDCs? The PUC should clearly state how it intends EDCs to handle long-term contracts when force majeure exists during one year of the contract and not in others.

Alternative energy credits

A commentator is concerned that AECs purchased prior to a finding of force majeure will be unrecoverable. This section should be amended to clearly state whether a finding of force majeure will render the cost of AECs, purchased prior to such a finding, are recoverable.

8. Section 75.68. Special force majeure. – Consistency with statute; Need.

"Force majeure" is defined in 73 P.S. § 1648.2. It can be invoked upon PUC initiative or upon the request of an EDC or EGS. The PUC has 60 days to determine if alternative energy sources are available in sufficient quantity for EDCs and EGSs to meet their obligations under the Act. We have the following concerns with limitations in this section of the regulation.

Limitation to PUC not finding force majeure

Subsection (a) limits filing for force majeure to a PUC finding that force majeure does not exist for all three categories (i.e., Tier 1, Tier 2 **and** photovoltaic). The Act is far more flexible and allows force majeure for any circumstance when the EDC or EGS cannot meet their obligations under the Act. Also, there is no limitation in the Act related to a PUC predetermination or category. Since these limitations are not in the Act, they should be deleted from the regulation.

Time limitation

Subsection (a) limits filing for force majeure to "…within 45 days of the conclusion of a reporting period…." This limitation is not in the Act. Why is it appropriate and needed in regulation?

"Special" force majeure

This section establishes provisions for a "special force majeure." Section 1648.2 of the Act defines the term "Force majeure" but does not include "special" force majeure. The PUC, the EDC and the EGS all have equal standing to begin the process of determining whether force majeure exists. We see no need for the term "special" with regard to force majeure.

9. Section 75.69. Alternative energy cost-recovery. – Reasonableness; Clarity.

Cost recovery mechanisms

The Office of Consumer Advocate believes that there should be consistency between cost recovery mechanisms used for alternative and traditional sources of energy purchased to meet the default service load in order to avoid complication and to ensure that these procurement processes are not conducted separately. The PUC should consider making these cost recovery mechanisms comparable to each other.

10. Section 75.70. Alternative energy market integrity. – Reasonableness; Clarity.

Traditional vs. alternative

In the Preamble to the proposed regulation, the PUC requests comments that will help it to determine how EDCs and EGSs are to distinguish between "traditional and alternative energy offerings." Commentators have offered numerous suggestions. In its response, the PUC should describe how it chose the method used in the final-form regulation.

11. Section 75.71. Banking of alternative energy credits. – Consistency with statute; Reasonableness; Clarity.

We have two recommendations for this section.

First, the final-form regulation should clearly set forth the restrictions on the banking of AECs and provide a detailed explanation of how those restrictions meet the Act. In the Preamble of the proposed regulation, the PUC solicits comments on this section that will help it interpret the Act with regard to the banking of AECs. OSBA asserts that the Act allows the counting of AECs arising out of generation by facilities subsequent to the cost-recovery period. Other commentators state that they would like to see banking of AECs to occur in time periods ranging from two to five years.

Second, the PUC should clarify the restrictions under which banking of credits can occur during a cost-recovery period. Commentators have requested that this section state that any AECs that meet the requirements of the Act can be used within the time limits set forth in the regulation. We will evaluate the PUC's response to these concerns.

12. Section 75.72. Alternative energy credit registry. – Clarity.

Subsection (b)

Under this subsection, what are "the rules, policies, and procedures of the designated alternative energy credit registry" that the EDCs and EGSs must comply with? The PUC should clearly state what these policies consist of and provide a cross-reference to these "rules, policies, and procedures."

Facsimile Cover Sheet

Phone: (717) 783-5417
Fax #: (717) 783-2664
E-mail: irrc@irrc.state.pa.us

INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

To: Sherri A. DelBiondo
Regulatory Review Coordinator
Law Bureau
Agency: Pennsylvania Public Utility Commission
Phone: 2-4597
Fax: 3-3458
Date: January 12, 2007
Pages: 10

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Pennsylvania Public Utility Commission's regulation #57-252 (IRRC #2569). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: S. DelBiondo **Date:** 1-12-07

Fax5