BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of the Alternative Energy	:	
Portfolio Standards Act of 2004	:	Docket No. M-00051865

COMMENTS ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE
ON THE IMPLEMENTATION ORDER

The act of November 30, 2004 (P.L. ____, No. 213), known as the Alternative Energy Portfolio Standards Act ("Act"), 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 the Act. 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 participated in Working Group meetings on March 3, 2005; March 15, 2005; April 19, 2005; and May 18, 2005. The OSBA also submitted written comments on April 1, 2005; April 14, 2005; and May 13, 2005.

By Order entered March 25, 2005 ("Implementation Order"), the Commission invited comments on a variety of issues relating to implementation of Act 213. Ordering

Paragraph No. 1 states that those comments are due within 60 days of the entry date of the Implementation Order. The OSBA submits the following comments in response to the Commission's invitation.

Banking of Alternative Energy Credits

Section 2 of the Act defines "alternative energy sources" to include 13 itemized categories of "existing and new sources for the production of electricity."[1] Because of the use of the word "existing" in the definition, it is reasonable to infer that the legislature intended that generation of electricity from any of the itemized sources is to count toward compliance with Act 213, regardless of whether the generating facility was in place on the effective date of the Act or entered service thereafter. Similarly, it is reasonable to infer that the reduction of electricity usage due to demand side management ("DSM") is to count toward compliance with Act 213, regardless of whether the associated facility, equipment, or program was in place on the Act's effective date or was constructed, installed, or implemented thereafter.

Under Section 2 of the Act, an "alternative energy credit" ("AEC") "equal[s] one megawatt hour of electricity from an alternative energy source." Therefore, both the production of electricity from an alternative energy source and the reduction in electricity usage due to DSM may give rise to an AEC, regardless of the in-service date of the facility, equipment, or program.

[1] The twelfth category itemized in the definition of "alternative energy sources" is demand side management ("DSM"). Despite the use of the word "production" in the definition of "alternative energy sources," DSM involves the reduction of electricity usage rather than the production of electricity. However, the General Assembly appears to have intended that DSM have the same status as electricity generated from each of the other 12 categories of sources. For example, Section 3(e)(10) of the Act states explicitly that "[a]ll verified reductions [in the use of electricity] shall accrue credits starting with the passage of this act."

Section 3(e)(7) of the Act allows "bankable credits" for only that amount of generation or for that amount of usage reduction which exceeds the amount during the 12 months immediately preceding the Act's effective date. However, this limitation is expressly applicable only to the banking of credits during the period an electric distribution company ("EDC") is recovering stranded costs or is under another approved generation rate plan. Therefore, it is reasonable to infer that the General Assembly intended Section 3(e)(7) to be a time-specific limitation on banking and not to be the general rule regarding what qualifies as an AEC.

Although only <u>incremental</u> production of electricity or reduction of electricity usage is eligible for banking during a rate cap period, the entire production of electricity and the entire reduction of electricity usage after the rate cap has expired are eligible to be counted toward compliance with Act 213. For example, after the relevant rate cap period, the <u>entire</u> output from a non-utility generating facility ("NUG") which was in operation on the effective date of the Act is to be counted toward compliance. Similarly, after the rate cap period has expired, the <u>entire</u> reduction in usage due to energy efficiency ("EE") or other DSM measures in place on the effective date of the Act is to be counted toward compliance.

During a discussion of this issue at the May 18, 2005, meeting of the Working Group, a question arose about credits which may be associated with facilities, equipment, or programs financed, at least in part, by tax breaks or other government assistance, by a sustainable energy fund, or by a utility initiative funded by ratepayers. A customer, aggregator, EDC, or electric generation supplier ("EGS") should not be permitted to sell any such credit without an offset to avoid unjust enrichment. For example, the price of a percentage of the credit could be set at zero, with that percentage determined by the proportion of the underlying investment which was financed at taxpayer or ratepayer expense.

<u>Energy Efficiency, Demand Side Management, Load Management</u>

As defined by Section 2 of the Act, "alternative energy sources" include demand side response ("DSR") within the DSM category.

- In theory, it might be possible for an EDC to meet its Tier II obligations under the Act simply by requiring default customers to accept interruptible service or hourly pricing. However, interruptible service has traditionally been an option for customers rather than a mandate. Furthermore, the lack of appropriate metering and the high administrative costs for the EDC make hourly pricing impractical for small business customers. Similarly, many small business customers of electric service can not readily shift their electric load from periods of higher demand to periods of lower demand; rather, they must consume electricity when necessary to accommodate their own customers. Accordingly, EDCs should be prohibited from complying with Act 213 by forcing small business default customers to utilize any type of DSM, including DSR.

- The Commission Staff and interested parties invested a substantial amount of time and effort in drafting a DSR Policy Statement before Act 213 won approval by the General Assembly and the Governor. The draft DSR Policy Statement would mandate that each EDC make DSR available to customers and would provide for recovery of the EDC's related costs.

Section 3 of the Act requires that EDCs include a specified percentage of alternative energy in the electricity they sell in Pennsylvania. Under Section 3(c), 10% of that total electricity sold must come from Tier II alternative energy sources, including DSR, beginning with the fifteenth year following enactment. However, the Act permits each EDC to decide for itself whether to include DSR as part of its alternative energy portfolio.

There is disagreement about whether this "EDC choice" aspect of the Act implicitly repeals the statutory authority for the proposed DSR Policy Statement. However, at a minimum, implementing both the Act and the Policy Statement would cause confusion.

For example, Section 69.1304(b) of the proposed DSR Policy Statement provides that an EDC "shall recover any direct or indirect costs" of an approved DSR program "on a full and current basis consistent with [the Act]." However, recovery on a "current" basis would not be consistent with the Act. Specifically, Section 3(a)(3) of the Act provides that costs incurred for alternative energy sources (including, by definition, DSR) during an EDC's rate cap period are to be deferred until the end of that period.

Similarly, Section 69.1305 of the proposed DSR Policy Statement requires EDCs to educate their customers about DSR and provides for the recovery of costs of a statewide educational program. However, because the Act does not mandate that an EDC include DSR as part of its alternative energy portfolio, mandating that an EDC educate its customers about DSR would be inconsistent with the Act.

Furthermore, because Section 3(a)(3) of the Act provides for the recovery of alternative energy costs (including DSR) on a provider-by-provider basis and in a manner consistent with 66 Pa. C. S. §§ 1307 and 2807, it would be contrary to the Act to provide some other mechanism for the measurement and recovery of costs related to DSR education.

In view of the foregoing, the proposed DSR Policy Statement should be tabled.

Pennsylvania Sustainable Energy Fund Board

Section 3(f) of the Act authorizes the Commission to impose an "alternative compliance payment" on an EDC or an EGS which fails to meet its obligations to sell a specified amount of electricity from alternative energy sources or to acquire adequate credits. Under Section 3(g) of the Act, those alternative compliance payments are to be made available to the regional sustainable energy funds created as part of the electric restructuring process.

Although alternative compliance payments could be collected from any EDC or from an EGS in any EDC's service territory, not every EDC has a sustainable energy fund. Specifically, there are funds for PPL, PECO, West Penn, MetEd, and Penelec. However, there are no sustainable energy funds for Duquesne, Penn Power, UGI, Citizens, Pike County, and Wellsboro. Therefore, any alternative compliance payments collected for the failure to meet obligations within the service territory of Duquesne, Penn Power, UGI, Citizens, Pike County, or Wellsboro should be utilized for the benefit of that service territory.

Furthermore, the alternative compliance payments should be allocated to the regional funds in a way which creates an incentive for those regional funds to draw down excessive surpluses, to establish sound criteria for the awarding of grants and loans, and to broaden membership on the fund boards well beyond the groups which originally appointed those members.

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

Respectfully submitted,

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Dated: May 24, 2005