COMMONWEALTH OF PENNSYLVANIA

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June 23, 2005

James J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary McNulty:

Enclosed are an original and fifteen (15) copies of the Reply Comments of the Office of Consumer Advocate on the March 25th Implementation Order, in the above-referenced proceeding.

Sincerely,

Tanya J. McCloskey
Senior Assistant Consumer Advocate

Enclosures
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY COMMENTS OF
THE OFFICE OF CONSUMER ADVOCATE
ON THE MARCH 25th IMPLEMENTATION ORDER

I. INTRODUCTION

On March 25, 2005, the Pennsylvania Public Utility Commission ("Commission") entered an Implementation Order addressing some of the immediate implementation issues related to the Alternative Energy Portfolio Standards Act of 2004 ("Act 213" or the "Act"). The primary issues addressed by the Commission in the March 25th Implementation Order were the schedule by which the Commission will meet its obligation to develop rules and regulations necessary to implement the Act and the schedule for compliance with the mandates of the Act for electric distribution companies ("EDCs") and electric generation suppliers ("EGSs"). March 25th Implementation Order at 1. Specifically, the Commission addressed the compliance schedule for EDCs and EGSs; the schedule for the creation and banking of alternative energy credits during the cost-recovery period; the working group on interconnection and net metering; the working group on energy efficiency, demand side management and load management; and the

Pennsylvania Sustainable Energy Board. In general, the OCA was in agreement with the Commission's March 25th Implementation Order.

On May 24, 2005, the Office of Consumer Advocate (OCA) and numerous other parties filed Comments in response to an Implementation Order. As found on the Commission's website, in addition to the OCA Comments, Comments were provided by the Department of Environmental Protection (DEP); the Office of Small Business Advocate (OSBA); PPL Electric Utilities (PPL); Exelon Corporation (Exelon); Duquesne Light Company (Duquesne); Citizens' Electric Company and Wellsboro Electric Company; the Energy Association of Pennsylvania (EAP); PJM Interconnection, L.L.C.; PJM Environmental Information Services, Inc.; Citizens for Pennsylvania's Future (PennFuture); the Energy Coordinating Agency (ECA); the Pennsylvania Environmental Council; the Harrisburg Authority; Pennsylvania Renewable Resources, Associates (PRRA); and the Integrated Waste Services Association (IWSA).

The Comments were generally supportive of the Commission's decision, with some clarifications, and supported the Working Group process to address many of the more complex issues. The OCA also supports the use of the Working Groups to address various issues regarding the implementation of the Alternative Energy Portfolio Standards Act .

Two issues raised by the parties require a brief reply. Several commenters that were owners or operators of non-utility generating projects with full requirements contracts with EDCs pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA) argued in their comments that the Commission should decide that the alternative energy credits under Act 213 belong to the owner of the non-utility generating (NUG) project. See, Comments of Harrisburg Authority, PRRA, and IWSA. The OCA strongly disagrees with these arguments and will briefly discuss this issue below. Importantly, however, the Commission is considering this issue in

another docket that has been fully noticed and is proceeding before an Administrative Law Judge. See, *Petition for a Declaratory Order Regarding the Ownership of Alternative Energy Credits and any Environmental Attributes Associated with Non-Utility Generation Facilities under Contract to Pennsylvania Electric Company and Metropolitan Edison Company*, Docket No. P-00052149. The OCA submits that the Commission should not address this issue as part of this initial Implementation Order. If the Commission does address this issue, it should find that the ownership of the AECs lies with the EDCs that are purchasing the full requirements of these projects and that the EDCs must use these AECs to benefit their customers.

The second issue that requires further comment concerns the cost recovery of the alternative compliance payments, an issue raised by EAP. EAP recommends that the Commission allow cost recovery of the alternative compliance payments that are made when an EDC does not meet the requirements of the Act. It is important to note that there are two different alternative compliance payments – one for failure to meet the solar requirements and one for failure to meet the non-solar requirements. The two alternative compliance payments differ in size and structure, and may have different purposes. Given the differences between the two alternative compliance payments, and the uncertainty as to their purpose, the OCA agrees that this issue warrants further consideration and clarification.

The OCA hereby offers these Reply Comments for the Commission's consideration.

II. REPLY COMMENTS

A. The Ownership Of Alternative Energy Credits Associated With NUG Projects Under Contract With EDC's Pursuant To PURPA Should Be Decided In The On-Going Declaratory Order Proceeding.

Several commenters that are owners of NUG projects with contracts under PURPA have requested the Commission to find that the Alternative Energy Credits (AECs) that might result under the Act belong to the NUG owner. See, Comments of Harrisburg Authority, PRRA, and IWSA. The NUG owners argue that the Federal Regulatory Energy Commission has ruled that contracts entered into under PURPA do not convey title of the AECs to the purchasing EDC, absent an express provision to the contrary. The OCA disagrees with the Comments of the NUG owners.

Importantly, FERC concluded that renewable energy credits exist outside of the confines of PURPA and thus PURPA does not address the ownership of the RECs. FERC reasoned as follows:

> As noted above, RECs are relatively recent creations of the States. Seven States have adopted Renewable Portfolio Standards that use unbundled RECs. What is relevant here is that the RECs are created by the States. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. And contracts for the sales of QF capacity and energy, entered into pursuant to PURPA, likewise do not control the ownership of RECs (absent an express provision in the contract).

American Ref-Fuel, Id., Order at paragraph 23. FERC then concluded that: "***States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA.***" Id. (emphasis added). FERC reiterated this position in its Order Denying Rehearing entered April 15, 2004.

It is clear that the Commonwealth of Pennsylvania must make the decision regarding the ownership and transfer of the alternative energy credits under Act 213. The OCA is aware of three other states that have considered the issue of the ownership of renewable energy credits for NUG projects. The Commissions of Maine, Connecticut and New Jersey have all concluded that renewable certificates and environmental attributes, which are akin to alternative energy credits in Pennsylvania under Act 213, inured to the benefit of the utilities purchasing the power from the NUG. See, *Application of Minnesota Methane, LLC Regarding the Sale of Electricity Generated at the Hartford Landfill to the Connecticut Light and Power Company*, Connecticut Docket No. 96-07-21RE01 (March 19, 2004) (In concluding that the renewable attributes belong to the purchasing utility explained that the NUGs renewable source of fuel was the necessary condition for the regulatory treatment under PURPA); *Investigation of GIS Certificates Associated with Qualification Facility Agreements*, Maine Docket No. 2002-506 (September 6, 2002) (In finding that renewable certificates inured to the benefit of ratepayers explained that depriving utilities and their ratepayers of the benefits of the attributes would seem fundamentally unfair and contrarty to restructuring principle that the benefits of the contracts be maintained); and *I/M/O the Ownership of Renewable Energy Certificates Under the Electric Discount and energy Competition Act, as it pertains to Non-Utility Generators and the Board's Renewable Energy Portfolio Standards*, N.J. BPU Dkt. No. EO-04080879 (Motion of January 12, 2005)(For existing NUG contracts, the renewable credits belong to the purchaser). The OCA submits that this Commission must reach the same conclusion.

It is important to note that under PURPA, a qualifying small power production facility, which is an approved cogenerator or a small facility which "produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources,

geothermal resources, or any combination thereof," may compel an electric utility to enter into a long-term contract to purchase all of the output of the facility at the full avoided cost of the utility. 16 U.S.C.S. §796(17)(A)(i). The resources that qualify a facility under PURPA are many of the same resources identified in Pennsylvania's Alternative Energy Portfolio Standards Act. See, Act 213, Section 2. The avoided cost pricing received by the NUG under the long-term contract provided the developers sufficient revenue to finance the construction and operation of the facilities and earn a return on their investment. The costs that the Companies incur under these long-term contracts are fully recovered from ratepayers through the rates charged by the Companies.

At the time of the restructuring of the electric industry, it was recognized that the avoided cost pricing contained in the long-term contracts with the NUGs was well above expected market prices. As a result, it was determined that the NUG contracts resulted in stranded costs. Ratepayers, through generation rates and stranded cost awards, are now paying billions of dollars of costs incurred by EDCs under power purchase agreements with NUGS pursuant to PURPA.

It is the OCA's position that ownership of the alternative energy credits and other environmental attributes associated with the energy from the NUGs belongs to the purchaser of the energy, the EDC, and must be used for the benefit of the EDC's customers. As noted, ratepayers are paying all of the costs of these NUG projects through both stranded cost awards and generation rates. Alternative energy credits created under state law for these resources must be used as a credit for the benefit of ratepayers who are paying for these projects. Any other interpretation under Act 213 would be unreasonable.

The OCA, however, submits that this issue should be decided in the pending proceeding concerning the Petition for Declaratory Order regarding the ownership of the alternative energy credits at Docket No. P-00052149. That proceeding has been properly noticed and is now before an Administrative Law Judge for consideration and recommendation. As such, the OCA recommends that at this time, the Commission not address the Comments of the Harrisburg Authority, PRRA and IWSA regarding this issue.

B. The Commission Should Consider The Issue Of If, And When, Cost Recovery Of Alternative Compliance Payments Is Appropriate.

In its Comments, the Energy Association of Pennsylvania ("EAP") raised the issue regarding cost recovery of alternative compliance payments under Act 213. EAP requests that the Commission assure full and current recovery of all alternative compliance payments. EAP argues that without such recovery, EDCs will be forced to pay whatever cost is necessary for credits, thus exerting upward pressure on rates. EAP Comments at 8. The EAP Comments, however, do not distinguish between the two different types of alternative compliance payments. The two types of alternative compliance payments, one for failing to meet solar requirements and one for failing to meet non-solar requirements, are very different in size and structure, and seem to have different purposes.

The OCA discussed this issue in its initial Comments on the implementation of Act 213 filed on January 14, 2005 and will not repeat that discussion at length here. See, OCA Comments of January 14, 2005 at 12-14. As the OCA noted in its Comments, however, the structure and size of the solar alternative compliance payment appears to act clearly as a fine or penalty. The OCA submits that there is no basis to allow recovery of a fine or penalty. On the other hand, the alternative compliance payment for failure to meet the requirements for non-solar

resources could function as an alternative compliance strategy in some circumstances but as a fine or penalty in other circumstances. A case by case review may be necessary.

The OCA agrees that the Commission should address the question of whether, and under what circumstances, recovery of alternative compliance payments could be allowed. Clarification of these provisions will be important to facilitate compliance with Act 213 in a manner that does not excessively increase the cost to ratepayers of meeting the Act's requirements.

III. CONCLUSION

The OCA looks forward to continuing to work with the Commission, the Department of Environmental Protection, the Working Groups and the stakeholders on the many details necessary to the implementation of Act 213. The OCA offers these Reply Comments to assist the Commission in finalizing its March 25th Implementation Order. The OCA expects to continue to offer Comments in the Working Groups, in rulemakings and in response to other requests by the Commission.

Respectfully Submitted,

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