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 IMPLEMENTATION ORDER II

The act of November 30, 2004 (P.L. 1672, 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 has participated in meetings and submitted written comments on numerous issues as a member of the Working Group.

By Order entered March 25, 2005 ("Implementation Order I"), the Commission invited comments and reply comments on a variety of issues relating to the implementation of Act 213. The OSBA submitted written comments on May 24, 2005, and written reply comments on June 23, 2005.

On July 18, 2005, the Commission entered Implementation Order II, which invited additional comments on voluntary alternative energy purchases and solar thermal energy. The deadline for submission of comments is 60 days after publication in the Pennsylvania Bulletin. Implementation Order II was published on July 30, 2005, at 35 Pa.B. 4280. The OSBA submits the following comments in response to the Commission's invitation.

COMMENTS

1. Voluntary Alternative Energy Purchases

Advocates of preserving the so-called "voluntary alternative energy market" seek to enable a customer to buy electricity from alternative energy sources through that customer's electric distribution company ("EDC") or electric generation supplier ("EGS") without having the electricity count toward compliance with Act 213. The OSBA appreciates the desire to preserve the voluntary market and recognizes the key role which that market played in building the political support for the approval of Act 213. However, the OSBA questions whether voluntary alternative energy purchases can be preserved as a separate and distinct market after the end of the "cost recovery period," as defined in Section 2 of the Act.[1]

[1] The OSBA also questions whether EGSs would view the offering of a "green-power" option by an EDC to be unfair competition and to be inconsistent with "plain vanilla" default service. However, as discussed below, assuming arguendo that an EDC is legally able to provide the option and is willing to do so, the EDC will not be permitted to charge ratepayers as a whole for any alternative energy premium above the overall prevailing market price of electricity.

a. Legal Constraints

As the Commission recognized in Implementation Order I, at 6-7, each electric distribution company ("EDC") is currently operating under a generation rate cap.[2] While an EDC is under such a cap, the utility has considerable discretion regarding the sources from which it acquires electricity, but the EDC is not permitted to raise its rates above the cap. In other words, the EDC typically has the discretion to pay more for alternative energy than the overall market price for electricity and more than the capped rates. However, if the price exceeds the capped rates, the EDC must either absorb the premium or pass it on to the specific customer or customers on whose behalf the alternative energy was acquired.

When an EDC's generation rate cap expires, the EDC will be required to "acquire electric energy at prevailing market prices to serve [default service customers]." See Section 2807(e)(3) of the Public Utility Code, 66 Pa. C.S. § 2807(e)(3). The EDC will also be required to purchase a designated percentage of the electricity for default service customers from alternative energy sources. See Section 3(b), (c), and (d) of the Act.

Section 3(a)(3) of the Act entitles an EDC to recover alternative energy costs through an automatic energy adjustment clause under Section 1307 of the Public Utility Code, 66 Pa. C.S. § 1307, after the expiration of the generation rate cap. However, that entitlement will be available only for the recovery of "any direct or indirect costs for the purchase by electric distribution of resources to comply with this section [Section 3 of the

[2] Pennsylvania Power Company ("Penn Power"); West Penn Power Company ("West Penn"); PPL Electric Utilities, Inc. ("PPL"); Pennsylvania Electric Company ("Penelec"); Metropolitan Edison Company ("MetEd"); and PECO Energy Company ("PECO") are subject to generation rate caps because they have not completed recovery of stranded costs. Duquesne Light Company ("Duquesne"), Pike County Power and Light ("Pike"), Citizens Electric of Lewisburg ("Citizens"), Wellsboro Electric Company ("Wellsboro"), and UGI Utilities Inc.-Electric Division ("UGI") have completed recovery of stranded costs but are under generation rate caps pursuant to interim default service plans.

Act]." Therefore, because purchases for the voluntary market would not be credited toward compliance with the Act, the cost of those purchases could not be collected through a Section 1307 surcharge from ratepayers as a whole.

In addition to requiring the EDC to acquire default service electricity at "prevailing market prices," Section 2807(e)(3) allows the EDC to "recover fully all reasonable costs." Any above-market premium paid by an EDC for alternative energy could not be deemed "reasonable" if the alternative energy did not count toward the EDC's compliance with Act 213. Therefore, the EDC could not recover that above-market premium under Section 2807(e)(3) from ratepayers as a whole.

In view of the foregoing, an EDC which pays an above-market premium (after the expiration of the generation rate cap) for alternative energy not credited toward compliance with Act 213 will have two choices: absorb the above-market premium or recover it from the specific customer or customers for which the electricity is acquired.

b. Economic Constraints

The OSBA questions the ability of the voluntary market to absorb the additional costs associated with purchasing alternative energy or alternative energy credits ("AECs") which would not count toward compliance with Act 213.

The Act is intended to create a broader market for alternative energy products. As a consequence of creating this broader market, the price of alternative energy products will be equalized across the would-be voluntary market and the "mandatory market." More specifically, the price of alternative energy products will reflect the full (i.e., market) value of the AECs underlying those products.

If AECs associated with purchases for the voluntary market were not transferable, it follows that the price of alternative energy in the voluntary market would increase so that the EDC or EGS would be able to recover 100% of the associated AEC market value. Because of this increase in price, fewer consumers would be willing to purchase electricity in the voluntary market, thereby undermining the size and/or growth of that market. The result would be the exact opposite of what parties such as Community Energy, Inc., are seeking.

Furthermore, a requirement that AECs associated with the voluntary market not be transferable would reduce the overall supply of AECs otherwise available to satisfy the Act at any given point in time. Therefore, an EDC or EGS would have to pay a higher price for AECs and the cost of complying with the Act would increase for *all* ratepayers.

2. Solar thermal energy

"Solar thermal energy" is included by Section 2 of the Act within the definition of "alternative energy sources" but is not included in the definition of either "Tier I alternative energy source" or "Tier II alternative energy source."

Section 1922(2) of the Statutory Construction Act, 1 Pa. C.S. § 1922(2), provides that, in determining the legislative intent, it is to be presumed "[t]hat the General Assembly intends the entire statute to be effective and certain." Unless the Commission assigns "solar thermal energy" to either Tier I or Tier II, the Commission will not be giving effect to the legislature's decision to include "solar thermal energy" in the definition of "alternative energy sources."

As the Commission pointed out, "solar thermal energy" is similar to "solar photovoltaic energy," which is listed as part of Tier I. Therefore, the OSBA believes that the Commission's proposal to assign "solar thermal energy" to Tier I is reasonable.

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

Respectfully submitted,

_____

William R. Lloyd, Jr.
Small Business Advocate

Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101
(717) 783-2525

Dated: September 28, 2005