BEFORE THE
PENNSYLVANIUA PUBLIC UTILITY COMMISSION

Comments Of
Citizens for Pennsylvania's Future
(PennFuture)

Regarding

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

And

Docket No. L-00040169
Rulemaking Re Electric Distribution Companies' Obligation to Serve Retail Customers at the Conclusion of the Transition Period Pursuant to 66 Pa. C.S. § 2807(e)(2)

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March 7, 2006

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PennFuture is a statewide public interest membership organization working to enhance Pennsylvania's environment and economy, with offices in Harrisburg, West Chester, Philadelphia and Pittsburgh. We appreciate the opportunity to provide comments on the Commission's Order entered on November 18, 2005, reopening the comment period for its default service rulemaking in consideration of the Alternative Energy Portfolio Standards Act of 2004 (Act 213).

PennFuture has been working for over 3 years to pass a state law that set portfolio standards for renewable and alternative electricity generation technologies. We provided testimony to the Pennsylvania Senate and House of Representatives as they worked to craft legislation. We have had numerous conversations about this topic with the Governor and his representatives as well as many Republican and Democrat members of the General Assembly. PennFuture enjoyed a close working relationship with key members of the General Assembly such as Senator Erickson, Senator White, Senator Musto, Representative Adolph, Representative Ross, and Representative Veon as they played decisive roles in writing and passing Act 213.

PennFuture has also been involved in the implementation of Act 213, assuring the Commission's rulemaking process reflects the legislative intent of the Act and is favorable to the clean energy industry. We helped shape the Energy-Efficiency and Demand Side Management rules for Act 213; provided comments to the net metering and interconnection working groups; and submitted comments to the Commission on: Docket No. M-00051865 - Implementation of the Alternative Energy Portfolio Standards Act of 2004.

While heavily involved in the regulatory and policy aspects of Act 213, PennFuture also has an imprint in the private clean energy sector. We are helping to create solar projects to jumpstart the solar Renewable Energy Credit market, demonstrate the enterprise model that will enable further solar availability, and provide a highly visible Pennsylvania retailer with clean solar energy that will be of strong media and consumer interest. We also work collaboratively with the wind industry, commonwealth agencies and various stakeholders on such key issues as local ordinances, tax policy and wildlife interaction with wind projects.

As a result of our work in policy, regulation and markets, PennFuture understands what policy makers intended Act 213 to accomplish and what the clean energy industry needs to help fulfill the goals of the Act.

Our response to the Commission's questions below is based on the following principles:

- Act 213 requires a substantial diversification of the technology and fuels that provide electricity to retail customers in Pennsylvania.
- If implemented as the General Assembly and Governor intended, Act 213 will lead to the construction of more than 4,000 megawatts of new, clean generation that benefits Pennsylvania's electricity customers, at least $5 billion of investment, greater reliability within Pennsylvania and PJM, more economic development in Pennsylvania, less pollution, and better public health.
- Act 213 creates its own cost recovery process that allows electric distribution companies that must comply with its requirements to recover their costs of doing so, including costs

for long-term contracts. Act 213 must allow recovery of long-term contracts and any reading of it that does not do so is incorrect.

- The Provider of Last Resort/Default Service regulations and the "prevailing market prices" language of the Electricity Competition and Customer Choice Act cannot be implemented in a manner that denies full recovery of AEPS costs, including long-term contracts for which AEPS allows recovery.
- Act 213 requires active market development by electric distribution companies. Passive response will not make the alternative energy market.
- Both alternative energy sources and traditional energy sources require long-term contracts in order to be built.
- The solar share is treated separately in Act 213, because the General Assembly particularly wanted to insure that solar power is developed in Pennsylvania. Cost recovery for solar power must be done in a manner that boosts solar development within PJM and Pennsylvania.

1 - A. Should Act 213 cost recovery be addressed in the Default Service regulations as opposed to a separate rulemaking?

Act 213 cost recovery should be addressed in its own rulemaking and remain separate from the Default Service regulations.

Act 213 was passed by the General Assembly in November 2004 or 8 years after the passage of the Electricity Competition and Customer Choice Act. The General Assembly rightly expects that this Act will be given full effect and passed it fully aware that the Electricity Competition and Customer Choice Act had been enacted. The Electricity Competition and Customer Choice Act and the Default Service regulations cannot be read or implemented in a manner that repeals or hinders any portion of Act 213.

Act 213 expressly allows for the recovery of all costs "direct or indirect… for the purchase by electric distribution of resources to comply with this section, including, but not limited to, the purchase of electricity generated from alternative energy sources, payments for alternative energy credits, costs of credits banked…" We interpret "all costs" to mean cost recovery is available for all forms of power purchase agreements for electricity generated from alternative energy sources whether they are short term, spot market or long-term contracts. Specifically long-term contracts must be recoverable under Act 213. Nothing done in the Default Service regulations must prevent the recovery of long-term contracts of 5, 10, 15 or 20 years that are concluded to comply with Act 213.

To build a power plant of any sort in the current period, a long-term power purchase agreement must be in place. The term "prevailing market prices" in the electricity competition and customer choice Act speaks to the time of the price and not the length of contract or type of product. A prevailing market price is a price that is available now for the purchase of a product. A prevailing market price could be for a spot market purchase now, or it could be for a 6-month purchase made now, or a 2-year purchase made now, or a much longer purchase such as a 10 to 20 year purchase made now. For these reasons, we encourage the reconsideration of the statement in the

September 10, 2004 Order on the Petition of Duquesne Light Company for Approval of Plan for Post-Transition Period Provider of Last Resort Service (Docket No. P-00032071): “A six-year term is too long a period of time for the proposed POLR III Plan. The Excepting Parties are correct that one cannot establish a fixed price for a six-year term and comply with the Act’s mandate that POLR supply must be acquired at *prevailing* market prices.”

Indeed the passage of the AEPS that took place after the September 10, 2004 Order in Duquesne Light is a powerful reason to reconsider the language of that Order.

But no matter whether that language is reconsidered or reaffirmed, and no matter how the Commission interprets the prevailing market prices language of the Electricity Competition and Customer Choice Act, the Commission must allow recovery of long-term contract costs incurred to comply with Act 213. Again Act 213 must be given full force and effect and cannot be effectively repealed or hindered by an interpretation made in the Default Service regulation.

1 - B. Is it necessary to consider Act 213 cost recovery regulations on a different time frame in order to encourage development of alternative energy resources during the "cost recovery period"?

Yes. Act 213 cost recovery regulations need to be addressed on a different time frame to expedite their implementation and provide utilities with a structured time frame.

It is vital to the economic and environmental success of Act 213 that utilities take an active role in developing and procuring alternative energy resources. The faster the implementation of Act 213’s cost recovery provisions occurs, the faster utilities will be able to begin banking alternative energy credits and complying with the Act. Finalizing the Default Service regulations has been an arduous, lengthy process, and we encourage the Commission to expedite the Act 213 cost recovery provision separately and in timely manner to assure the development of alternative resources.

2 - A. Do the prevailing market conditions require long-term contracts to initiate development of alternative energy resources?

Yes. Prevailing market conditions absolutely require long-term contracts to initiate development of alternative energy resources or to build any type of power plant, whether it is gas-fired, nuclear, coal or wind. Today a long-term contract needs to be in place for the construction of any power plant. Without this assurance, investors are not willing to put the upfront capital into a project.

Alternative energy sources especially need minimum contract lengths of 15 to 20 years as they are still developing in the marketplace. Investors will not be willing to finance a project, unless there are credit worthy institutions committed to purchasing the power and Alternative Energy Credits produced.

Since Default Service providers are required to obtain electricity from alternative energy sources and costs for obtaining this electricity can be fully recovered, they must be permitted to employ long-term fixed price contracts to acquire alternative energy resources.

2 - B. May Default Service Providers employ long-term fixed price contracts to acquire alternative energy resources?

Yes. Default Service Providers or utilities provide more than 90% of the electricity sold to retail customers and must be allowed to employ long-term fixed price contracts.

2 - C. What competitive procurement process may be employed if the Default Services Provider acquires alternative energy resources through a long-term fixed price contract?

The way in which the competitive procurement process is employed will determine how effective Act 213 is in achieving its stated goals of increasing economic development in Pennsylvania, lowering emissions, protecting the health of citizens and increasing the supply of generation.

First and foremost, utilities need to actively participate in making the market and failure of them to do so would indicate absence of reasonable effort to comply with the AEPS in the event of any force majeure proceeding. Utilities should submit Request for Qualified Bidders (RFQ) well in advance of the end of their cost recovery period. Utilities should then hold a bidders meeting where they will discuss: the amount of electricity needed, procurement process, and all terms and conditions. If utilities wait to send out RFQs or Request for Proposals (RFP) until 2 years prior to the end of their cost recovery period, they will not be able to meet the requirements of Act 213, and they should not be excused from those requirements, given such inaction or tardy action.

The RFP process needs to be competitive, transparent and open to all qualified bidders. Utilities should choose the winning bidder based not only on the most competitive price but also through a strict set of qualifications that assures the proposed project comes to fruition. Bidders must be able to demonstrate the following in order to prove they offer a legitimate project:

- In the event of a wind project, a completed preliminary wind assessment;
- Project has a position in the PJM interconnection queue;
- Completed permitting and approval requirements;
- Working on environmental and/or siting assessments;
- Preliminary design completed;
- High likelihood of project completion;
- Firm procurement target.

Even if a bidder can meet the above qualifications, contract failure is still a possibility. A recent study prepared by KEMA, Inc. for the California Energy Commission surveyed investor-owned utilities in states with Renewable Portfolio Standards requirements and discovered a typical contract failure rate of 20-30% over multiple years. As a new technology, alternative energy sources may experience siting and permitting issues, developer financing troubles, capital costs increases and transmission and interconnection issues. We, therefore, recommend that the Commission require utilities to take the following precautions to assure that alternative energy resources are developed on track with the Act 213 requirements:

- Modest application fees and forfeitable performance security fee (A bond of $5,000/megawatt is reasonable) to help deter speculative or immature projects;
- Proper EDC and EGS due-diligence;
- A contingency list of back up suppliers should the wining bidder fail to produce;
- Require the financers to submit letters acknowledging requirements;
- Over-procurement of 15-20% above Act 213 requirements. Any excess supply could potentially allow for an undersupply the following year.

We understand that the RFP process cannot be so strict that it deters potential bidders. However, it has been shown that adhering to a business as usual bid process will lead to contract failure. A failure of 20 to 30% to meet the requirements of Act 213 will mean less economic, health and environmental benefits to the citizens of Pennsylvania and must be addressed by the Commission.

We also want to reiterate that utilities must begin the RFP process well in advance of the beginning of their compliance with Act 213. If a utility waits until 2 years before the end of their cost recovery period to have an RFP process and cannot meet the requirements of Act 213, the Commission should not allow a claim of force majeure.

3- A. Should the force majeure provisions of Act 213 be integrated into the Default Service procurement process?

No. The Act 213 force majeure provisions should be addressed in a process separate than that of Default Service procurement. The principles and rules that come out of the Act 213 process should flow down into the Default Service regulations.

3- B. Should Default Service Providers be required to make force majeure claims in their Default Service implementation filing?

No. Any claim of force majeure must be addressed in a separate docketed item, where that vital subject alone would be decided.

3- C. What criteria should the Commission consider in evaluating a force majeure claim?

Act 213 clearly allows for full recovery of all costs incurred through the procurement of electricity from alternative energy sources. Since cost recovery is allowed, any force majeure claim should be skeptically received. The General Assembly passed this Act and fully expects that it will be fully implemented. Only in extraordinary situations that are beyond the control of those who must comply with the Act, and only after those who must comply with the Act have shown that the Act could not be complied with, should the Commission consider a force majeure claim.

In addition, the requirements of Act 213 are relatively modest, especially in the first years and it should not be difficult for any utility to comply. For instance, Act 213 requires that Tier II qualifying resources supply 10 percent of total electricity demand by 2020. Yet, the current supply of electricity that meets the Tier II alternative energy source definition exceeds 10 percent of Pennsylvania's total demand. Consequently, there can be no basis for Force Majeure in Tier II.

Act 213 also requires that Tier I qualifying resources supply eight percent of total electricity demand by 2020, with 1.5 percent of electricity demand two years after the effective date of the Act from Tier I resources. The current supply from Tier I resources is approximately less than one percent. The Act, therefore, requires the annual construction of about 300 megawatts of new Tier I supply, although that number could vary slightly depending on capacity factors and demand growth over the next 15 years. The three largest Pennsylvania utilities (FirstEnergy, Exelon, and PPL) will each need to buy roughly 75 to 125 megawatts of new Tier I supply every year. These construction and purchase requirements are important, since they will increase the amount of electricity made from Tier I renewable resources more than eight-fold. Yet they can easily be met. The United States Department of Energy estimates that 5,000 megawatts of new wind energy capacity alone can be developed just in Pennsylvania. Even more capacity exists when the other eligible technologies are considered and when sites in PJM, the Mid-Atlantic region power pool, are part of the calculation. For a major Pennsylvania utility, obtaining approximately 100 megawatts of new renewable supply each year is not an onerous requirement.

Special attention should be given to Act 213’s solar photovoltaic shares requirement that we address in response to Question 4 below.

For these reasons, if utilities file for force majeure, the Commission should carefully scrutinize the steps utilities made to meet the requirements of Act 213. We recommend at a minimum the Commission consider the following:

- Was significant effort shown by the utility to procure resources?
- Was there an effective, open bidding process?
- Were RFPs reasonably drafted with realistic terms?
- Were RFPs distributed well in advance of their need to comply with Act 213?
- Did the utility utilize long-term contracts?
- If one utility was able to meet the requirements, others should be able to do the same.
- Was the price of a renewable energy credit (REC) below the price of the Alternative Compliance Payment? If so, than no force majeure.
- What will the utility do to correct problem going forward?

- What is the utility’s plan to procure the resource requirements carried forward along with the next year’s requirement? (Commission shouldn’t “excuse” a supplier’s obligation in one year but add the deficiency in alternative energy credits in that year to the supplier’s subsequent years’ requirements.)

We ask that the Commission enforce the requirements of Act 213, and require any utility that is allowed to claim force majeure to submit a plan for how it will make up for the resources it did not procure.

We cannot stress enough how important it is that the Commission carefully examines any claim of force majeure. The Commission should pay extra attention to those utilities that are not scheduled to comply with the Act until 2010 and 2011. There are four utilities that do not have to begin compliance with the Act until years 4 and 5. The Act states that, when such utilities come into compliance, they must meet that year’s procurement percentage. For example, a utility coming on board in year 5 (2010) must have at least 9.2% of the energy sold to retail customers to be derived from alternative energy resources (3.0% from Tier I, 6.2% from Tier II and .0203% from solar PV).

Since such utilities are coming into compliance during the later years of Act 213, they are starting with a higher procurement requirement than if they had started in year one. However, it is unacceptable for any utility to sit idly by and wait for their compliance period to begin. They know the compliance period is coming. If they think they will have trouble meeting those requirements, they are allowed under the constructs of Act 213 to bank credits that can be used up to two years after the beginning of their compliance period.

Utility inaction or tardy action or half-hearted action cannot be allowed to create a claim for force majeure.

3- D. How may the Commission resolve a claim of force majeure by an electric generation supplier?

Each claim of force majeure needs to become its own docket item at the Commission. Notice of the force majeure docket should be sent to all stakeholders including the public and be determined through a public hearing and comment process. Similar to other docketed items the Commission should review its own criteria for determining a claim of force majeure and any comments of the public before making any decision.

If the Commission approves any claim of force majeure, the company involved must create a plan as to how they will make up for the deficiency going forward.

4. Given that Act 213 includes a minimum solar photovoltaic requirement as part of Tier I, should these resources be treated differently from other alternative energy resources in terms of procurement and cost recovery?

The creators of Act 213 thought advancing the solar photovoltaic market was important enough for it receive a set aside requirement under Tier I. PennFuture, therefore, believes that the terms of procurement and cost recovery for solar photovoltaics should also be distinct.

We urge the Commission to use even greater scrutiny when reviewing a force majeure claim for the solar share requirement. Some may argue that force majeure should be triggered through "rational economics" or a price trigger for the solar share. We strongly recommend that the Commission take into account both price per kilowatt-hour and the number of kilowatt-hours in making any decision on force majeure. For example, Act 213 requires that in the first four years the total percentage sold from solar photovoltaic technologies equal 0.0013 percent, which translates to roughly 1 megawatt per year of installed capacity. However, this 1 megawatt will be distributed across each of the Commonwealth's utilities and will only equal approximately 150 to 200 kilowatts for each of the first four years per utility. At a cost of $7.30 per watt, the cost of compliance should be minimal at only $1.5 million per utility territory and cannot create a basis for force majeure.

Going forward it may be appropriate to create a single statewide solar renewable energy credit (SREC) market, with a standard contract, that should operate regardless of the geography of any particular default provider. A designated administrator should be appointed to manage the SREC procurement process every six months. The Administrator shall establish minimal criteria for bidders in the auction and would establish criteria for analyzing auction responses. The Administrator would establish the auction rules and procedures and conduct the auctions. Having a single entity to oversee the solar photovoltaic requirements of the Act will help to better promote compliance with the Act. However, should the Commission not choose an Administrator program; the utilities must still be required to take similar steps to actively develop the market. A passive mode of simply issuing an RFP is not adequate.

PennFuture also shares concerns with the solar industry regarding the calculation of solar photovoltaic share Alternative Compliance Payments (ACP).

In calculating the ACP level for Act 213, based on a comparison to prices of solar renewable energy credits (SREC's) in New Jersey or other PJM states, it is important to account for the fact that solar project owners in New Jersey or other states may receive both an up-front capital rebate, as well as revenue from the sale of SREC's. In Pennsylvania, solar project owners are not in most cases expected to receive an up-front capital rebate and, therefore, must finance their solar projects solely on the basis of the sale of SREC's from the project.

This difference becomes significant because of the statutory language on how the ACP should be calculated:

> (4) The alternative compliance payment for the solar photovoltaic share shall be 200% of the average value of solar renewable energy credits sold during the reporting period within the service region of the regional transmission organization.

The AEPS rule should make clear that the "average value" used in this calculation should include not only the SREC value received by solar project owners but also the levelized value of capital rebates received by the solar project owners. For example, in New Jersey an SREC trading for 20 cents/kWh actually has an average value of two-times that amount or 40 cents/kWh because of the subsidy that was provided.

5. Should the Commission integrate the costs determined through a §1307 process for alternative energy resources with the energy costs identified through the Default Service Provider regulations? How could these costs be blended into the Default Service Providers Tariff rate schedules?

If the Commission can find a way to have the costs associated with Act 213 compliance, including recovery of long-term contract costs incurred to comply with the AEPS, recovered through a §1307 process in the Default Service regulations, then a "blended" mechanism would be acceptable. If not, a separate mechanism needs to be established in order to preserve the cost recovery of long-term contracts in Act 213.

Act 213 allows for the recovery of all costs associated with meeting the requirements set forth in the Act. Such costs include the costs of entering into short term, spot market and long-term contracts to obtain alternative energy resources. Allowing for the cost recovery of long-term contracts is vital to the success of Act 213 as many projects need to obtain a power purchase agreement for a minimum of 15 to 20 years.

The Commission needs to understand that any action taken that would limit cost recovery for long-term contracts would essentially kill Act 213. At a minimum, if long-term supply contracts are not recoverable, the supply of qualifying electricity will be reduced and the price of alternative energy credits will increase.

An unsuccessful implementation of Act 213 cost recovery would mean Pennsylvania would not receive the full benefits of the Act that include the avoidance of 67 million tons of carbon dioxide (CO_2), 59,000 tons of nitrogen oxide (NOx) and 589,000 tons of sulfur dioxide (SO_2) by 2020. The Commonwealth would also no longer be able to enjoy the economic benefits that Act 213 can bring including: $10 billion in increased output and $3 billion in additional earnings over 20 years; wind development between 3,000 to 4,000 megawatts and 3,500 more jobs over 20 years compared to business as usual.

6. May a Default Service Provider enter into a long-term fixed price contract for the energy supplies produced by coal gasification based generation if the resulting energy costs reflected in the tariff rate schedules are limited to the prevailing market prices determined through a competitive procurement process approved by the Commission?

Yes. Long-term contracts should be allowed for coal gasification based generation.

The Act does not indicate that cost recovery should be any different for Tier I than it is for Tier II. The Act allows for long-term fixed price contracts for both Tier I and Tier II resources and, therefore, coal gasification should be allowed to enter into long-term fixed price contracts.

Act 213 allows for the costs of long-term contracts to provide supply to be fully recovered. Separating out individual Tier I or Tier II resources or trying to lump Act 213 into Default Service Regulations cannot trump this fact.

7. Should the Commission delay the promulgation of default service regulations until a time nearer the end of the transition period, as suggested by the Independent Regulatory Review Commission in its comments on the proposed regulations?

No. The Commission should not delay the promulgation of default service regulations.

The transition period has already ended for some utilities such as Pike County Power and Light which expired on December 31, 2005 and is about to end for others including Citizens Electric of Lewisburg and Wellsboro Electric Company that were set to expire on February 28, 2006.

If Act 213 cost recovery remains separate from the Default Service regulations, this point is moot. However, if Act 213 cost recovery is combined with the Default Service regulations than there should not be any delay.

8. Does the Commission need to make any revisions to its proposed default service regulations to reflect the mandates of the Energy Policy Act of 2005?

Yes. Section 1252 (a) (14) of The Energy Policy Act of 2005 requires that electric utilities in each state offer time-based rates and related metering technology, to each customer class upon request, within 18 months of enactment. The time-based rate schedule will help the electric customer to manage its energy use and costs through advanced metering and communications technology.

Real-time pricing meters will allow consumers to defer electricity use to cheaper times by detailing the actual cost of using electricity. This in turn will help the utilities to accomplish peak load demand, which in turn reduces the need for transmission/distribution infrastructure expansion. Therefore, we strongly encourage the Commission to issue a decision, implementing regulations to require default service providers to install modern, real-time electricity meters in all buildings by 2010.

Other Issues:

In the context of Act 213 cost recovery, PennFuture would like to take this opportunity to request that the Commission adhere to the original legislative intent of the Act regarding Alternative Compliance Payments (ACP). In order to reap the full economic and environmental benefits of Act 213, it is vital that the Commission not allow utilities to receive cost recovery for ACPs. The Act clearly indicates what costs can be recovered:

> “(I) The purchase of electricity generated from alternative energy sources, including the costs of the regional transmission organization, in excess of the regional transmission organization real-time locational marginal pricing, or its successor, at the delivery point of the alternative energy source for the electrical production of the alternative energy sources; and (II) payments for alternative energy credits, in both cases that are **voluntarily acquired** by an electric distribution company during the cost recovery period on behalf of its customers”

Alternative compliance payments are neither costs “for the purchase of electricity generated from alternative energy sources” and are not costs incurred for “payment for alternative energy credits.” They are an alternative to both and are not listed as one of those costs that can be recovered.