Energy Association of Pennsylvania

800 North Third Street, Suite 301, Harrisburg, Pennsylvania 17102
Telephone (717) 901-0600 • Fax (717) 901-0611 • www.energypa.org

March 17, 2006

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

COMMENTS of the ENERGY ASSOCIATION of PENNSYLVANIA
DOCKET NO. M-00051865

Dear Mr. McNulty:

Enclosed for filing please find the original and fifteen (15) copies of the Comments of the Energy Association of Pennsylvania on the Implementation of the Alternative Energy Portfolio Standards Act of 2004: *Standards and Processes for Alternative Energy System Qualification and Alternative Energy Credit Certification.*

Please do not hesitate to contact the undersigned with any questions.

Cordially,

Donna M. J. Clark
Vice President and General Counsel

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standards and Processes for Alternative Energy System Qualification and Alternative Energy Credit Certification	:	**Docket No. M-00051865**

COMMENTS of the ENERGY ASSOCIATION of PENNSYLVANIA

I. INTRODUCTION

By Tentative Order, dated January 31, 2006, the Commission seeks comments on proposed Standards and Processes for Qualifying Alternative Energy Systems and Certifying Alternative Energy Credits. As the Commission correctly observed, there has been a considerable amount of activity undertaken to date pursuant to the Alternative Energy Portfolio Standards Act of 2004, 73 P.S. §§1648.1-1648.8 ("the Act") and it is anticipated that this docket will remain active over the foreseeable future. (Tentative Order at pp. 2-3.) The Commission further noted that the Act is a complex law (Tentative Order at p. 3), that the provisions of the Act should be read in concert with the rules of statutory construction, (Tentative Order at pp. 4-5), and that the Act is in *pari materia* with the Public Utility Code. (Tentative Order at p. 6).

The Tentative Order requests input from interested persons on a number of areas affecting implementation of the Act, including the allocation of agency responsibility regarding

alternative energy system qualifications and credit certification processes, the role of the Pennsylvania Department of Environmental Protection ("DEP") in the qualification of alternative energy systems, the process for approval and review of alternative energy system qualification decisions, the process for maintaining alternative energy system qualification status, identification of the standard applied in qualifying alternative energy systems, identification of the standard applied in certifying alternative energy credits, and identification of a health and safety standard.

The Energy Association of Pennsylvania ("EAPA" or "Association") represents the interests of the Commonwealth's PUC-regulated electric and natural gas distribution companies and has been an active participant in this docket on behalf of its member electric distribution companies ("EDCs").[1] As an interested person, EAPA submits the following comments to the instant Tentative Order.

II. COMMENTS

A. Allocation of Agency Responsibility and the Role of DEP in the Qualification of Alternative Energy Systems.

1. Allocation of Agency Responsibility.

EAPA supports the conclusion reached by the Commission that Section 7(a) of the Act, as amended, 73 P.S. §1648.7(a), does not provide DEP with an adjudicatory role in the process of determining whether an alternative energy system is qualified. Rather, the statutory language is clear that the role of DEP is limited to ensuring that "qualified alternative energy systems" meet all "applicable environmental standards" and to verifying that an "alternative energy

[1] The Association's EDC members include Allegheny Power, Citizens' Electric Co., Duquesne Light Co., Metropolitan Edison Co., *A FirstEnergy Company,* PECO Energy Co., Pennsylvania Electric Co., *A FirstEnergy Company,* Pennsylvania Power Co., *A FirstEnergy Company,* Pike County Light & Power Co., PPL Electric Utilities, UGI Utilities, Inc.—Electric Division, and Wellsboro Electric Co.

source" meets the definitional standards set forth at Section 2 of the Act. 73 P.S. §1648.2. Further, EAPA agrees that the General Assembly vested the Commission with the power to promulgate regulations and adjudicate issues relating to the standards and processes for qualifying alternative energy systems and creating alternative energy credits. Section 3(e) of the Act, as amended, 73 P.S. §1648.3(e). As stated in its Tentative Order, "[f]inal determinations on resource qualification will therefore be made by the Commission or its agent, the program administrator." (Tentative Order at p. 8).

2. Role of DEP in Qualification of Alternative Energy Systems.

EAPA contends that the role of DEP with respect to the qualification process is clearly established through the statutory language which provides, in pertinent part, that "[t]he department...shall verify that an alternative energy source meets the standards set forth in Section 2." Section 7(b) of the Act, as amended, 73 P.S. §1648.7(b).[2] The Tentative Order proposes that DEP's role in verifying that an alternative energy source meets the standards set forth in Section 2 of the Act should be likened to DEP's role in determining water purity upon Commission certification to the department. (Tentative Order at p. 9). The Commission supports a certification process whereby DEP would resolve questions of law and fact to determine whether a particular "alternative energy source" falls under Section 2 of the Act. DEP's subsequent conclusion would then bind the program administrator reviewing the application.

[2] EAPA acknowledges that DEP also has a role in ensuring that "all qualified alternative energy sources meet all applicable environmental standards". The scope of that role must be clearly defined in this Order and subsequent rules. EAPA notes that it could cause uncertainty for EDCs if a technical violation of an applicable environmental standard would lead to an automatic disqualification of an otherwise qualified alternative energy system. Future rulemaking must clarify the impact of a finding by DEP that a violation has occurred on the alternative energy system, and on the certified alternative energy credits which have been created through that system.

EAPA asserts that, under this proposal, DEP's role becomes adjudicatory in nature and thus is not analogous to the situation found at 66 Pa. C.S. §318(b) which provides that a question of fact involving water purity may be certified to DEP. EAPA believes that DEP's role in verifying that a proposed source falls within the parameters established in Section 2 of the Act, should be a straightforward process and not necessitate testing or studies such as may be warranted in determining water purity. Essentially, DEP would fulfill its verification role by comparing the proposed source with the "alternative energy sources" identified in the Act.

Section 2 of the Act contains those definitions and, with respect to the term "alternative energy sources", the statutory language provides varying degrees of specificity describing any particular source. The Tentative Order acknowledges this situation and proposes reliance on certain technical guidelines "released" by DEP which purport to set forth standards to be used in determining whether a particular "source" meets the definition of "alternative energy source". Unfortunately, these technical guidelines remain in a draft form as of this time. Moreover, the draft technical guidelines offer guidance beyond that necessary for DEP to fulfill its verification role with respect to whether a proposed source meets the definition. In particular, the draft technical guidelines address issues relating to resource delivery and geographic eligibility criteria, neither of which falls within the purview of DEP's role. See, Department of Environmental Protection, Alternative Energy Portfolio Standards Act, Act 213, Section 2, Technical Guidance (Draft) at p. 2.

While EAPA and its member EDCs may agree in the abstract that DEP's role is to verify that the "alternative energy system" seeking qualification under the Act uses a resource listed/defined at Section 2 of the Act, it is difficult to support a position whereby the Commission delegates statutory authority to another state agency to apply technical guidelines

which have yet to be fully vetted through a public process allowing for input from interested parties. At this point, EAPA requests that first the technical guidelines referenced in the Tentative Order be made readily available and finalized prior to their identification in any Final Order; and second, that DEP's role be advisory in nature rather than adjudicatory.

3. Timeliness of DEP Review.

EAPA further maintains that definitive timeframes for action must be established in the Final Order with respect to the qualification process, so that any application may be efficiently processed by the program administrator. It is suggested that a forty-five (45) day timeframe for a review by DEP of whether an applicant's "alternative energy system" utilizes an "alternative energy source" as defined in the statute would be appropriate. The Commission may also want to consider including language in the Final Order which would provide that the "alternative energy source" is deemed to have met the statutory definition if DEP fails to report findings to the program administrator within the forty-five (45) day timeframe suggested for DEP review. This would ensure a prompt review by DEP, a prompt decision by the program administrator, and availability of energy generated from alternative energy sources for purchase in the marketplace.

4. Compliance with Environmental Standards.

As the Act provides, DEP is authorized, inter alia, through the legislation to ensure that "all qualified alternative energy sources meet all applicable environmental standards..." 73 P.S. §1648.7(b). EAPA notes that the use of the defined term "alternative energy sources" in the legislation differs from the use of the term "alternative energy facilities" in the Tentative Order.

Further, the statutory language states that DEP's role in ensuring compliance arises following qualification of a particular "alternative energy source"; not, as suggested by the Tentative Order, in the qualification process itself.

Moreover, EAPA maintains that the Act is silent on the issue of whether a finding by DEP that an "alternative energy source" does not meet environmental standards necessitates an automatic ruling that the "alternative energy system" utilizing that source is no longer qualified under the Act. EAPA is not convinced that disqualification would be warranted in the case of a single violation or of a technical violation. Disqualification could possibly jeopardize the certification status of credits originating from that system, as well as impact contracts which EDCs have with a qualified system for supply that meets the Act's requirements. Disqualification based on single, minor or technical infractions could precipitate proceedings seeking a determination that a force majeure condition exists in the marketplace.

The Act promotes development of alternative energy sources and mandates that EDCs purchase specific percentages of power emanating from such sources. Moreover, all of this is to be accomplished in a market not yet mature. It is important that implementation of the Act not create unnecessary impediments to market development. EAPA maintains that a rigid compliance approach cannot be adopted in dealing with new technology if the statutory timeframes are to be met. For these reasons, EAPA requests that the Commission not endorse an approach whereby a finding by DEP that an "alternative energy source" is not compliant with environmental standards automatically acts to disqualify an otherwise qualified system. At a minimum, time must be provided to the generator to correct the violation or to challenge DEP's finding during which the "alternative energy source" would remain qualified and credits created could still be certified and used by EGSs and EDCs for compliance purposes under the Act.

Additionally, assuming the violation became final and the source was no longer qualified, the entities which contracted with that source to meet portfolio standards must have an opportunity to find another means of compliance prior to being penalized.[3]

B. Obtaining and Maintaining Qualification Status.

EAPA concurs with the process for approval and review of applications for alternative energy system qualification as set forth in the Tentative Order at p. 12, with one request. EAPA believes that a more appropriate timeframe for filing a petition to challenge an administrator's decision before the Commission would be twenty (20) days, so as to assure adequate notice to interested parties.

Additionally, with respect to maintaining qualification status, EAPA agrees that due process requires that prior to the revocation of qualification status, notice and an opportunity to be heard must be provided to the owner/operator of the alternative energy system. EAPA further believes that due process rights must be provided to those parties impacted by a revocation determination, i.e., EDCs or others who own credits originating from that system or EDCs who have contracted with that system to meet the Act's requirements or customers. EAPA supports a process where issues impacting qualification status are decided in a hearing prior to revocation, rather than the reverse.

[3] Based on a report prepared for the California Energy Commission titled "Building a Margin of Safety Into Renewable Energy Procurements: A Review of Experience with Contract Failure", it is likely that contracts for renewable energy will not always yield operational projects for a number of reasons which will in turn affect the ability of entities to meet alternative energy portfolio standards. Accordingly, it is imperative that disqualification not result from minor infractions. http://www.energy.ca.gov/2006publications/CEC-300-2006-004/CEC-300-2006-004.PDF

C. Standard for Qualification of an Alternative Energy System.

1. Fuel Source.

As noted above, EAPA requests that the technical guidelines become final prior to incorporation in any Commission orders or regulations. Moreover, a determination that a fuel source meets the requirements set forth at Section 2 of the Act, as amended, 73 P.S. §1648.2, should be a straightforward paper process without much opportunity for delay. Development of the market necessitates availability of alternative energy. The Commission's Order and rules should encourage new technologies and not create impediments.

In this respect, EAPA questions the references in the Tentative Order to "Low-Impact Hydropower (incremental development only)" and to "Municipal Solid Waste (existing facilities only)." EAPA does not read the Act to restrict the use of these two sources as noted. Low-Impact Hydropower is defined under the term "alternative energy source" which generally "includes... the following existing and new sources for reproduction of electricity...." 73 P. S. §1648.2. Further, the use of the phrase "include energy from existing waste-to-energy facilities" to define "municipal solid waste" should not be read to exclude energy generated at newly-built municipal solid waste facilities. Id.

2. Geographic Requirement.

EAPA and it EDC member companies support a reading of Section 4 of the Act, as amended, 73 P.S. §1648.4, which provides that any qualified alternative energy system located within PJM or MISO service territories meets the geographic eligibility criteria such that energy

derived from those systems can be used by an EDC to meet the requirements of the Act. EAPA contends that based on the rules of statutory construction, the restraints imposed by the "Commerce Clause" of the U.S. Constitution on any action of a state to restrict interstate commerce, and the direction set by the Commonwealth's General Assembly to obtain energy at competitive market prices, the Final Order should support an inclusive, broad interpretation of the geographic eligibility criteria over an exclusive, narrow reading of the statutory language.

In this respect, EAPA strongly supports the analysis set forth in the Tentative Order concerning the application of the "Commerce Clause" to the use of a "geographic qualification test" generally. It is questionable whether the desire to encourage development of alternative energy systems within Pennsylvania for economic reasons would withstand Constitutional challenge. Further, the Act must be read in conjunction with the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§2801-2812 so that both choice and the use of "alternative energy sources" is supported. As noted by the Commission, larger markets should result in more competitive pricing. Thus, EAPA supports a broad interpretation of the geographic requirement set forth at Section 4 of the Act, as amended, 73 P.S. §1648.4.

Furthermore, and contrary to the assertion by some, the General Assembly clearly intended that credits be available from a broad geographical footprint by the language found at Section 4 of the Act, as amended, 73 P.S. §1648.4. Simply stated, the statutory language provides that in order to meet the compliance requirements under the Act, energy derived from A or B shall be eligible: (A) Energy derived from alternative energy sources physically located within the boundaries of the Commonwealth or, (B) Energy derived from alternative energy sources physically located within the service territory of any regional transmission organization that manages the transmission system in any part of this Commonwealth. Nowhere in the Act is

there language supporting the notion that the availability of alternative energy sources to a particular EDC should be limited to the regional transmission organization serving any particular EDC.

D. Standard for Certification of an Alternative Energy Credit.

Preliminarily, EAPA notes that an "alternative energy credit" need not result from generation as recognized in its definition at Section 2 of the Act, as amended, 73 P.S. §1648.2.[4] In fact, certain Tier II alternative energy sources, such as demand-side management, do not envision the creation of a credit through the generation of one megawatt hour of electricity; rather, the credit will arise from conservation. On the other hand, Section 3(e)(4)(ii) of the Act provides, in pertinent part, that "[f]or purposes of this subsection, one alternative energy credit shall represent one megawatt hour of qualified alternative energy generation...." 73 P.S. §`648.3(e)(4)(ii) (Emphasis added). EAPA assumes that credits arising from conservation like those arising from generation can be "banked" and used under Section 3 of the Act, as amended, 73 P.S. §1648.3, to demonstrate compliance with alternative energy portfolio standards, and accordingly, must be certified.[5]

The Tentative Order discusses two additional restrictions on the creation of credits which owners may seek to have certified. First, EAPA agrees that the statutory language set forth at Section 4 of the Act, as amended, 73 P.S. §1648.4, clearly mandates that energy used to satisfy another state's renewable energy portfolio standards cannot be used to satisfy the Pennsylvania

[4] "Alternative energy credit" is defined as "[a] tradable instrument that is used to establish, verify and monitor compliance with this Act. A unit of credit shall equal one megawatt hour of electricity from an alternative energy source." 73 P.S. §1648.2 (Emphasis added).

[5] EAPA notes that the Tentative Order uses the term "generated" and "generation" in describing an alternative energy credit at p. 1 and p. 20, respectively, and respectfully requests that the Final Order reflect that a bankable, certified credit can arise from conservation as well.

standard. Second, with respect to a "delivery requirement", EAPA concurs with the Commission's tentative finding that, for purposes of credit certification, the energy emanating from an alternative energy source must be consumed within or delivered to a Pennsylvania EDC's distribution system or to a transmission system managed by a regional transmission organization located in any part of the Commonwealth. In other words, for a credit to be certified, that megawatt hour of qualified alternative energy need not be delivered into Pennsylvania *per se* if it has been delivered to or consumed within a Pennsylvania EDC, PJM or MISO control area. It cannot, however, have been used to meet two different state's renewable energy portfolio standards.

Finally, EAPA and its EDC member companies agree that, in order to give effect to Sections 3(e)(4)(i) and (ii) of the Act, as amended, 73 P.S. §1648.3(e)(4)(ii) as well as the definition of "alternative energy system", certified credits purchased separately from the associated energy may be counted towards compliance.

E. Health and Safety Standard.

EAPA and its EDC member companies do not support the use of existing health and safety standards or the use of new health and safety standards as a benchmark in the process of verifying an alternative energy source or qualifying an alternative energy system. Nor should lack of compliance in this area lead to the revocation of qualification status. While DEP can develop such standards as needed and necessary so as to comply with the Act, those standards should not be used to prevent qualification of alternative energy sources or to disqualify those sources.

III. CONCLUSION

In finalizing the instant Tentative Order, EAPA requests the following:

1. That DEP's role in the qualification process be advisory, not adjudicatory, in nature;

2. That the referenced DEP Technical Guidelines be finalized through a process permitting public input prior to inclusion in any PUC Order or regulation;

3. That timeframes be established within which DEP must act on an application submitted to qualify an alternative energy source (45 days proposed), and within which an objector must petition the Commission to challenge the administrator's qualification decision (20 days proposed);

4. That a minor or technical violation of an applicable environmental standard not result in the automatic disqualification of an alternative energy source;

5. That the standards set for qualifying an alternative energy system or certifying an alternative energy credit be broadly applied to promote the development of alternative energy in a young marketplace while simultaneously adhering to the General Assembly's direction to provide competitive pricing; and

6. That any Health and Safety standard set by DEP under the Act not be used to prevent qualification of or disqualification of alternative energy sources.

J. Michael Love
President and CEO

Donna M. J. Clark
Vice President and General Counsel

Date: 3/17/06

CERTIFICATE of SERVICE

I hereby certify that I have served a copy of the foregoing ***"Comments of the Energy Association of Pennsylvania Re Implementation of the AEPS Act: Standards and Processes for Alternative Energy System Qualification and Alternative Energy Credit Certification "*** relating to Docket No. M-00051865, on the persons listed below, by means of hand-delivery, first-class mail or electronic mail, as indicated:

By Hand-Delivery:

Hon. Wendell F. Holland, Chairman
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

Hon. James H. Cawley, Vice Chairman
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

Hon. Bill Shane, Commissioner
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

Hon. Kim Pizzingrilli, Commissioner
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

Hon. Terrance J. Fitzpatrick, Commissioner
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

By First-Class Mail Delivery:

Irwin A. Popowsky
Office of the Consumer Advocate
555 Walnut Street
Forum Place, Fifth Floor
Harrisburg, PA 17101-1923

William R. Lloyd, Jr., Esquire
Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

J. Edward Simms, Esq.
Office of Trial Staff
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17101-3265

Scott Perry, Esq.
Assistant Counsel, DEP
RCSOB, Ninth Floor
400 Market Street
Harrisburg, PA 17101-2301

Electronic Mail:

cbeale@state.pa.us

March 17, 2006
Date

Donna M. J. Clark
Vice President and General Counsel