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 ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE
ON THE TENTATIVE ORDER

The act of November 30, 2004 (P.L. 1672, No. 213), known as the Alternative Energy Portfolio Standards Act ("Act 213"), 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 submitted written comments and has participated in meetings as a member of the Working Group.

By Tentative Order adopted January 27, 2006, the Commission proposed standards and processes for qualifying alternative energy systems and certifying

alternative energy credits ("AECs"). Ordering paragraph 1 provides that comments on the issues addressed in the Tentative Order are due within 30 days of publication in the *Pennsylvania Bulletin*. The Proposed Policy Statement was published on February 11, 2006.

The OSBA offers the following comments in response to the Commission's invitation.

ANSWERS TO SPECIFIC QUESTIONS

The OSBA is limiting its comments to several specific questions raised in the Tentative Order.

1. Where must the electricity be generated in order to qualify under Act 213?

Based on a review of the Commission's legal analysis, the OSBA believes that the more accurate of the two possible statutory interpretations is that any electric distribution company ("EDC") in the Commonwealth may meet its Act 213 obligation by purchasing electricity generated from alternative energy sources located either in Pennsylvania or outside Pennsylvania but within the territory of any regional transmission organization ("RTO") which is operating and managing an electrical transmission grid in the Commonwealth.

The OSBA appreciates that the two possible interpretations of Act 213 outlined by the Commission offer competing advantages. On the one hand, requiring the electricity to be generated only within Pennsylvania or within the territory of the RTO to which the acquiring EDC belongs could encourage the construction of additional alternative energy systems in the Commonwealth. On the other hand, allowing electricity to qualify if it is generated anywhere in the territory served by PJM Interconnection, LLC

("PJM") or the territory served by Midwest Independent Transmission System Operator, Inc. ("MISO") would expand the supply of qualifying electricity, thereby potentially lowering the cost to ratepayers.

The Electricity Generation Customer Choice and Competition Act ("Competition Act"), 66 Pa. C.S. Ch. 28, provides that generation rates are to be set on the basis of prevailing market prices. In large part because of the energy price spike following Hurricanes Katrina and Rita, the ratepayers of Pike County Light and Power Company ("Pike") experienced a substantial increase in generation rates when the EDC's rate cap expired. Although energy prices have since declined somewhat, the Pike increase demonstrates that rate shock is a possibility as the generation rate caps of other EDCs expire. Limiting the supply of qualifying electricity could make that potential problem worse.

The General Assembly found and declared in the Competition Act that "[t]he cost of electricity is an important factor in decisions made by businesses concerning locating, expanding and retaining facilities in this Commonwealth." *See* 66 Pa. C.S. § 2802(6). The growing number of jurisdictions which are adopting renewable energy requirements should provide a significant incentive for the development of new alternative energy systems—in Pennsylvania or any other jurisdiction in which such projects are economically viable. Attempting to provide an additional incentive by limiting the supply of electricity qualifying under Act 213 would risk harm to Pennsylvania businesses far in excess of any economic development benefits which might accrue to Pennsylvania because of that additional incentive.

2. Where must the electricity be delivered in order to qualify under Act 213?

Based on a review of the Commission's legal analysis, the OSBA agrees with the Commission's tentative conclusion that AECs qualify for compliance with Act 213 as long as the related electricity is generated either within Pennsylvania or outside Pennsylvania but otherwise within PJM or MISO.

In Section 3(a)(1) of Act 213, the General Assembly specified that a designated percentage of "the electric energy *sold* . . . to retail customers in this Commonwealth shall be comprised of electricity generated from alternative energy sources." (emphasis added) Similarly, the General Assembly specified in Section 3(b)(1) that "at least 8% of the electric energy *sold* by an electric distribution company . . . to retail customers in that [EDC's] certificated territory" must be generated from Tier I alternative energy sources. (emphasis added) Furthermore, the General Assembly specified in Section 3(c) the designated percentages "[o]f the electrical energy required to be *sold*" from Tier II alternative energy sources. (emphasis added) Consequently, for electricity itself to qualify for compliance with Act 213, that electricity must be sold within the service territory of the Pennsylvania EDC which is seeking to count that electricity toward compliance.

In contrast, although Section 3(e)(4) of Act 213 allows an EDC to comply by purchasing AECs rather than electricity, Section 3(e)(4) does not specify where the electricity related to those AECs must be sold. The absence of language requiring the related electricity to be sold in Pennsylvania and the presence of language authorizing AECs to be traded separately from the related electricity, support the Commission's statutory interpretation.

3. When must the electricity be delivered in order to qualify under Act 213?

In order to count toward compliance with Act 213, the electricity must be generated within the "reporting period" for which the EDC or EGS is claiming that electricity or the related AECs. Section 2 of Act 213 defines the "reporting period" as the twelve months from June 1 through May 31. The definition also refers to this twelve-month period as a "reporting year."

Section 3(f)(2) of Act 213 requires the Commission to enforce Act 213 by levying an alternative compliance payment ("ACP") on any EDC or EGS which fails to meet its obligation to sell electricity from alternative energy sources or to purchase sufficient AECs to make up for the shortage. Section 3(f)(3) specifies the amount of the ACP to be charged for all shortages except solar photovoltaic, but Section 3(f)(3) does not expressly indicate the period in which the compliance is to be measured. However, Section 3(f)(4) does specify that the ACP "for the solar photovoltaic share shall be 200% of the average value of solar renewable energy credits sold during the *reporting period*." (emphasis added) If the ACP for the solar photovoltaic share is to be based on the "reporting period," it is reasonable to infer that the General Assembly also intended the ACP for the other alternative energy sources to be based on the "reporting period."

In support of that inference, it is noted that Section 3(e)(5) of Act 213 provides for a "reporting period as defined in section 2" for determining if an EDC or an EGS has met its Act 213 obligation. Although Section 3(e)(5) also provides for a "true-up period" in which an EDC or EGS may buy any additional AECs needed for compliance, nothing in

Section 3(e)(5) indicates that the make-up AECs may be related to electricity generated outside the "reporting period."

Furthermore, Section 3(e)(6) of Act 213 allows an EDC or EGS to "bank or place in reserve [AECs] produced in one *reporting year* for compliance in . . . subsequent *reporting years*." (emphasis added) Significantly, AECs may be banked only if they "were in excess of the [AECs] needed for compliance in the year in which they were generated" and if they "were produced by the generation of electrical energy by alternative energy sources and sold to retail customers during the year in which they were generated."

4. Must the electricity be generated in a facility which meets reasonable health and safety standards?

Yes. Section 6 of Act 213 requires the Department of Environmental Protection to "establish appropriate and reasonable health and safety standards to ensure uniform and proper *compliance with this act* by owners and operators of facilities generating energy from alternative energy sources." (emphasis added) Consequently, such owners and operators can not be in compliance with Act 213 unless their facilities generate energy in accordance with "appropriate and reasonable health and safety standards."

The only mechanism directly provided by Act 213 for assuring that owners and operators adhere to such standards is to make compliance a condition for allowing their electricity or related AECs to count toward an EDC's or EGS's Act 213 obligation. That is especially true in the case of facilities located outside the Commonwealth.

CONCLUSION

WHEREFORE, the OSBA respectfully requests that the Commission implement the Act in accordance with the foregoing comments.

Respectfully submitted,

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Dated: March 13, 2006