

**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE
PUBLIC UTILITY COMMISSION**

In The Matter Of	:	
Implementation Of The Alternative	:	Docket No. M-00051865
Energy Portfolio Standards Act Of 2004	:	

COMMENTS OF THE YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY

On January 7, 2005, the Pennsylvania Public Utility Commission (“Commission”) issued a Notice of Technical Conference in the matter captioned above, providing, in pertinent part, for all parties interested in the proceedings in this docket to submit written comments to the Commission’s Secretary’s Bureau by close of business January 14, 2005. The York County Solid Waste and Refuse Authority (“YCSWA”) hereby files its Comments in response to the Commission’s Notice.

I. EXECUTIVE SUMMARY

The Commission’s Notice invited interested parties to comment on any topic of interest having to do with implementation of the Alternative Energy Portfolio Standards Act of 2004 (Act 213) (“Act”). To assist commenting parties, the Commission provided the following, non-exclusive list of prospective topics:

- Force Majeure (Availability and qualification of eligible alternative energy resources);
- Deferrals and cost recovery;
- Creation of alternative energy credits program and trading platform;
- Alternative compliance payments;

- Portfolio requirements of other states and regional coordination;
- Development of technical standards for verification of energy efficiency and demand side management activities, and proposed depreciation schedules for alternative energy credits resulting from such measures;
- Development of technical standards for net metering;
- Development of technical standards interconnection.

At this time, without waiving its right to address other topics later in these proceedings, the YCSWA submits these Comments addressing the following topics:

- Creation Of Alternative Energy Credits Program And Trading Platform
 - The Commission Should Set Guiding Standards And Objectives
 - The Qualifying Generating Facility Produces The Alternative Energy Reflected By The AEC And Is The Entity That Owns The AEC In The First Instance
 - Transfer Of Ownership Should Be Based On Concepts Of Contract Law As To The Intent Of The Parties
- Portfolio Requirements Of Other States And Regional Coordination
 - The Commission Should Make Use Of PJM GATS To Gain Maximum Benefit Of Regional Coordination

II. INTRODUCTION

On November 30, 2004, the Act was signed into law in Pennsylvania, to be effective on February 28, 2005. The Act assigns certain implementation responsibilities to the Commission and to the Department of Environmental Protection (“DEP”). To that end, the Commission’s Notice scheduled a Technical Conference on January 19, 2005, and requested Comments by interested parties.

A. THE YCSWA

The YCSWA is a public corporation organized and existing under the provisions of the Pennsylvania Municipality Authorities Act of 1945, 53 P.S. § 301, *et. seq.*, as amended. The YCSWA owns a solid-waste-fueled electric generator that is a QF under the Public Utilities Regulatory Policies Act of 1978,¹ with a certified net electric power production capacity of 37 MW.²

The output of the YCSWA’s QF is sold to Metropolitan Edison Company (“MetEd”) pursuant to a power purchase agreement (“PPA”) between the YCSWA and MetEd dated November 25, 1986, as amended on April 2, 1993, and June 22, 1994. The YCSWA-MetEd PPA will terminate on December 31, 2016.

III. COMMENTS

A. CREATION OF ALTERNATIVE ENERGY CREDITS PROGRAM AND TRADING PLATFORM

1. THE COMMISSION SHOULD SET GUIDING STANDARDS AND OBJECTIVES

In pertinent part, the Act requires the Commission to establish an Alternative Energy Credits (“AEC”) program with an independent entity, approved by the Commission, to serve as the administrator of the program. The administrator is to create a system to certify, track, and

¹ 16 U.S. Code §§ 2601- 45. To qualify for special treatment under PURPA, a QF must fall within a limited class of PURPA-approved co-generators or small producers using specifically approved energy sources that include biomass, waste, geothermal, or renewable sources such as wind and solar. [16 U.S.C. § 796(17)(A)(I).] Based on its use of municipal solid waste as its energy source for generating electricity, the YCSWA’s application for QF status was granted by the Federal Energy Regulatory Commission (“FERC”) on November 3, 1986. *York County Solid Waste and Refuse Authority*, 37 FERC ¶ 62,100 (1986).

² *York County Solid Waste and Refuse Authority*, 57 FERC ¶ 62,023 (1991).

report tradable AECs. An electric distribution company or electric generation supplier would be able to purchase sufficient AECs to comply with the program. One AEC would equal one-megawatt hour of qualified alternative electric energy.

The precise language of the Act does not assign to the Commission a direct responsibility to create an AEC program and trading platform. That responsibility is vested in the administrator that the Commission is to appoint. However, this implies that the Commission, in exercise of its regulatory duties and expertise, must review and approve any proposal made by the administrator for creation of an AEC program and trading platform. Therefore, the YCSWA urges the Commission to take this opportunity to set guiding standards and objectives for what ever party may be hereafter appointed as the administrator.

Such standards and objectives would serve several purposes. They would facilitate creation of the AEC program and trading platform in an efficient use of administrative and parties' time and resources. They would provide the Commission's guidance for creation of an AEC program and trading platform consistent with the intent of the General Assembly. They would facilitate balancing the interests of all parties. They would provide the fundamental building blocks on which Pennsylvania's AEC program and trading platform would be implemented in-state and coordinated regionally.

Threshold issues to be addressed in any such creation of an AEC program and trading platform must include:

- when is an AEC created;
- who owns the AEC, and
- when and how will ownership transfer.

2. THE QUALIFYING GENERATING FACILITY PRODUCES THE ALTERNATIVE ENERGY REFLECTED BY THE AEC AND IS THE ENTITY THAT OWNS THE AEC IN THE FIRST INSTANCE

The YCSWA's green energy exists because the YCSWA produces energy from municipal waste, and the Act recognizes energy from municipal waste as a Tier II Alternative Energy Source. Recognition of the YCSWA's energy as a Tier II Alternative Energy Source is recognition of the green nature of the YCSWA's energy. That green nature of the YCSWA's energy exists, both in fact and under the Act, with or without an attendant AEC being assigned to each megawatt hour of qualified alternative electric energy produced by the YCSWA.

The Act serves significant public policy interests by promoting generation of electric energy from alternative energy sources and, by implication, investment in qualifying generating facilities capable of producing such energy. Those public policy interests can be met only one way in relation to ownership of AECs: the AECs created in relation to electric energy produced by such qualifying generating facilities MUST be owned by the generating facilities as of the instant of generation of the energy. Any other result would be contrary to promotion of investment in and operation of generating facilities capable of producing electric energy from alternative energy sources.

AECs related to generation of a given quantum of electric energy from a qualified alternative energy source should be recognized at the moment of generation by the qualifying generating facility, and initial ownership of the AEC logically can and must vest in the qualified generating facility that produced the energy.

3. TRANSFER OF OWNERSHIP SHOULD BE BASED ON CONCEPTS OF CONTRACT LAW AS TO THE INTENT OF THE PARTIES

The AEC program and trading platform must also establish the parameters for transfer of ownership of the AEC. An AEC is a new creation of the General Assembly – a new, marketable, certificated, commodity. An AEC is a tradeable recognition, on a megawatt-hour basis, of the green aspect of electric energy generated by a qualifying generating facility such as the YCSWA's QF. An AEC could not be owned or marketed in Pennsylvania in the past because AECs did not legally exist in Pennsylvania in the past and will not legally exist until the Act is implemented. The question, then, is how should ownership of an AEC, once created and vested in the qualifying generating entity, be transferred.

The YCSWA believes that principles to be applied here are the fundamental concepts of contract law.

It is conceivable that ownership of an AEC will be transferred many times during the existence of that AEC. As has been discussed, ownership in the first instance must vest in the qualified generating entity. All transfers of ownership thereafter should be in accordance with concepts of contract law based on an offer, acceptance, and consideration. If there is no contract expressing the intent of the parties to transfer ownership of an AEC, the ownership of the AEC cannot be transferred by that contract and has not been transferred by that contract.

PPAs executed before passage of the Act by the General Assembly could not transfer ownership of AECs. It would have been legally impossible to do so since AECs did not

legally exist at the time those PPAs were negotiated and executed.³ The parties to pre-existing PPAs could not have or manifest an intent to transfer AECs at a time when AECs did not exist and the concept of a marketable credit reflecting green attributes of energy had not been contemplated by the contracting parties.

Furthermore, the General Assembly must be assumed to know and give full account to the law when passing new legislation. Given that the General Assembly did not carve out a legal fiction providing for any implied transfers of ownership of AECs, no such implied transfer should be created after the fact.

The law to be applied to determine whether ownership of an AEC has transferred, and the law to be applied to set up a program for transfers of ownership of AECs, is the general contract law of the Commonwealth of Pennsylvania. The question to be asked of any claim of a past, present, or future contractual transfer of ownership of AECs must be whether the parties expressed in the contract an intent to transfer ownership of AECs. If not, then no transfer occurred.

Such a policy will assure a consistent application of long standing concepts of contract law in implementing the AEC trading platform and program.

³ This is not to say that prescient parties, foreseeing the advent of AECs in the Commonwealth of Pennsylvania while negotiating a fairly recent PPA could not have contracted as to ownership of AECs if and when AECs came into existence. However, even in that situation, the parties would have had no way to know what renewables would be recognized as Alternative Energy Sources under the Act or what standards would be required of a generating facility seeking to qualify under the Act. The point to be made is that an even in such a contract the express intent of the parties to contract for transfer of ownership of AECs would be required.

B. PORTFOLIO REQUIREMENTS OF OTHER STATES AND REGIONAL COORDINATION

1. THE COMMISSION SHOULD MAKE USE OF PJM GATS TO GAIN MAXIMUM BENEFIT OF REGIONAL COORDINATION

The Commission would gain much by creating, to the greatest extent possible, a uniform regional process. To this end, the YCSWA recommends reasonable coordination by the Commission, or the administrator, with PJM.

Portfolio standard legislation has been enacted in other states, most notably for present purposes – Maryland⁴ and New Jersey.⁵ It is very likely that a qualifying generating facility in Pennsylvania will also be able to market AECs⁶ in Maryland and New Jersey. Thus the AEC “marketplace” will be a multi-state market regardless of the fact that each state will have its own regulations for AEC transactions and qualifications within its borders.

A reasonable degree of regional consistency will facilitate the fullest possible application, operation, and benefit of Pennsylvania’s Act. Qualifying generating facilities will follow the marketplace. Downstream owners of AECs will follow the marketplace. Overly restrictive regulations in one state would likely hinder full application of the renewable portfolio standards legislation in that state rather than protecting intra-state interests. Generating facilities otherwise

⁴ THE RENEWABLE ENERGY PORTFOLIO STANDARDS ACT, Maryland Code, Public Utilities Article, Title 7, §§ 7-701 – 7-713.

⁵ THE NEW JERSEY ELECTRIC DISCOUNT AND ENERGY COMPETITION ACT OF 1999, New Jersey Statutes Annotated, §§ 48:3-1, *et seq.*

⁶ The term, “Renewable Energy Credit” or “REC,” is the common term used for such a credit in Maryland and New Jersey. For ease of reference, in these Comments the Pennsylvania term, AEC, is uniformly used. However, the two terms are virtually identical, and no distinction is intended by use of the term AEC or REC unless specifically stated herein.

ready and able to market AECs in the restrictive state would instead look to market their AECs in other states with a less restrictive regulatory scheme.

This is not to suggest that Pennsylvania should “give away the farm.” Rather, the Commission should exercise reasonable sensitivity to the need to balance intra-state needs, goals, and objectives with the reality of a multi-state marketplace.

For this purpose, the Commission can and should consider PJM’s Generator Attributes Tracking System (“GATS”). GATS is intended to be an administratively simple and cost-effective means of demonstrating compliance with a variety of state policies and regulations.⁷ Nothing will be lost by the Commission considering GATS; it can be rejected if for some reason the Commission determines that GATS does not meet Pennsylvania’s needs. However, fully expecting that GATS would be a useful vehicle for implementation of the Act with a good degree of regional consistency, the YCSWA recommends consideration of GATS for the following reasons.

Use of GATS would give the Commission a uniform methodology for determination of the qualification of a given generator while also allowing for consideration of state-specific requirements. Similarly, GATS would provide a centralized generator registration site. This will instill a degree of stability into the AEC marketplace in that sellers and purchasers of AECs will have a central source to turn to for determining eligibility and validity of AECs being offered or purchased. Additionally, PJM, to a greater degree than Pennsylvania, Maryland, or New Jersey, is in a position to track energy across state lines in the PJM region and to verify AECs and prevent double counting of AECs marketed in one state and then offered in another.

⁷ PJM GATS CONCEPT PAPER, at 1 (March 17, 2004).

GATS offers the Commission economies of scale as well as efficiencies of effort that will apply during and after implementation of the Act.

IV. SERVICE

The Commission's Notice Letter of January 7, 2005, states that all Comments will be posted on the Commission's website. The Commission further stated that in view of the posting, service of Comments on parties other than the Commission and DEP is at the discretion of the Commenter. Accordingly, the YCSWA will not serve these Comments on any party other than the Commission and DEP. Copies of these Comments will be provided by electronic mail to any party requesting a copy. If any other Commenter decides to serve its Comments by electronic mail or by hard copy, the YCSWA requests that copies of such Comments be served on the following persons:

William Ehrman, Director
York County Solid Waste & Refuse Authority
2700 Blackbridge Road
York, PA 17402-7901
Email: w.ehrman@ycswa.com

Robert M. Strickler
Griffith, Strickler, Lerman, Solymos & Calkins
110 S. Northern Way
York, PA 17402-3737
Email: rstrickler@gslsc.com

Benjamin L. Willey
Law Offices of Benjamin L. Willey, LLC
7272 Wisconsin Avenue
Suite 300
Bethesda, Maryland 20814
Email: blw@bwilleylaw.com

V. CONCLUSION

For the reasons stated herein, the YCSWA requests that the Commission consider the issues and recommendations stated in these Comments as the Commission moves forward with its responsibilities for implementation of the Alternative Energy Portfolio Standards Act of 2004.

The YCSWA stands ready to respond to any questions the Commission may have in regard to these Comments.

Respectfully submitted,

Date: _____

Robert M. Strickler
Attorney Registration No. 07496
Griffith, Strickler, Lerman, Solymos & Calkins
110 S. Northern Way
York, PA 17402-3737
Telephone: 717-757-7602
Facsimile: 717- 757-3783
Email: rstrickler@gslsc.com

Benjamin L. Willey
Law Offices of Benjamin L. Willey, LLC
7272 Wisconsin Avenue
Suite 300
Bethesda, MD 21804
Telephone: 301-941-1972
Facsimile: 240-235-775
Email: blw@bwilleylaw.com

**Counsel for
York County Solid Waste and Refuse Authority**