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January 23, 2006

VIA FEDERAL EXPRESS

James McNulty, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
2nd Fl., 400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Implementation of the Alternative Energy Portfolio
Standards Act of 2004 – Docket No. M-00051865
Comments of Granger Energy of Honey Brook, LLC

Dear Secretary McNulty:

Enclosed for filing are the original and fifteen copies of the Comments of Granger Energy of Honey Brook, LLC, in the above referenced matter.

If you have any questions regarding this filing, please contact me at your convenience.

Sincerely,



Kevin J. Moody

For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

KJM/jls
Enclosures

cc: Vice-Chairman James Cawley (w/enc)
Daniel Desmond (w/enc)
Patricia K. Burket, Esq. (via email)

HAR:63445.1/gra269-229807

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of the Alternative	:	
Energy Portfolio Standards Act of 2004	:	Docket No. M-00051865
	:	
Proposed Policy Statement	:	

**COMMENTS OF GRANGER ENERGY OF HONEY BROOK, LLC
IN SUPPORT OF
PROPOSED POLICY STATEMENT ADDRESSING "PUBLIC UTILITY" STATUS**

On November 10, 2005, the Pennsylvania Public Utility Commission ("PUC" or "Commission") proposed a policy statement to provide guidance to developers, regulated industries and the general public concerning what types of alternative energy projects the Commission believes fall outside the definition of "public utility." The purpose of the policy statement is to implement the goals of the Alternate Energy Portfolio Standards Act, Act 213 of 2004 ("Act 213"), of supporting and encouraging the development of alternative energy resources and the use of alternative energy by removing potential regulatory roadblocks to the development of viable alternative energy products in the Commonwealth. However, the order states that the scope of the proposed policy statement is not limited to Act 213 alternative energy sources. The order was published in the Pennsylvania Bulletin on December 24, 2005, 35 Pa.B. 6906, with comments due within 30 days of publication.

Granger Energy of Honey Brook, LLC ("Granger" or "Granger Energy"), having initiated the recently concluded landfill gas declaratory order proceeding discussed in the proposed policy statement order, has first hand experience of the adverse effects on alternative energy project development of the expense and delay of seeking a determination of "public utility" status upfront through the declaratory order process. Granger applauds the Commission's initiative and

fully supports the final adoption of a policy statement which sets forth clear standards "to reduce or eliminate the need for an alternative energy project developer to seek a declaration or other determination from this Commission that it is not required to obtain a certificate of public convenience before beginning service to an end-user customer or group of end-user customers."¹

Granger's previous experience in developing a landfill gas project in Pennsylvania provides graphic evidence of the need for the kind of policy statement being considered by the Commission. Granger first considered development of the Lanchester landfill gas project in the fall of 2002 and, along with several others, was awarded the bid by the Chester County Solid Waste Authority to develop this resource on May 1, 2003.² Granger also initiated a declaratory order proceeding with the Commission on May 1, 2003 seeking a declaration that it was not a public utility as defined in the Public Utility Code despite its plan to build and construct the project to serve a limited number of nearby private end users. Even though Granger was ready to proceed with the project in the summer of 2003, it had to await the conclusion of the PUC's declaratory order proceeding before doing so. Granger executed contracts for the design and construction of the pipeline and the landfill gas processing facility, but construction was delayed due to uncertainties related to the declaratory order proceeding.³ The Commission's order finally resolving the proceeding was adopted and entered on August 19, 2004 (a rewritten order was entered on September 8, 2004). In addition to delaying construction and the provision of service

¹ Proposed Policy Statement Order at 6.

² *Petition of Granger Energy of Honey Brook, LLC for a Declaratory Order*, Docket No. P-00032043, Main Brief of Granger Energy of Honey Brook, LLC, at 6.

³ *Id.*

to customers, these uncertainties increased the costs of the project and delayed the execution of contracts with prospective customers.⁴

While Granger committed itself to going forward with the project despite the delay and additional costs, many other developers might not be in a position to do so. Granger believes that the Commission was correct when it observed that the potential for such a long delay while the question of PUC jurisdiction is debated can and indeed does deter many developers from proposing worthwhile alternative energy projects. Indeed, if Granger had known just how long the delay was going to be it may well have decided not to go forward with the Lanchester project.

By setting forth the appropriate standards and putting the onus on interested parties other than project developers to challenge whether the facts of a particular project satisfy the standards, the policy statement will address the Commission's concern that the mere prospect of having to obtain an advance declaration from the Commission may dissuade a developer from proceeding with the project. Then-Chairman Fitzpatrick expressed the Commission's related concern in his concurring statement in Granger's declaratory order proceeding: "[A]n assertion of jurisdiction by the Commission would discourage what Granger is attempting to do."⁵

What is most important to remember is that the proposed policy statement does not establish new law, or any law for that matter, but merely sets forth in a clear and concise manner the standards of the Commission's and the appellate courts' established precedents on this issue. Commissioner Fitzpatrick faults the proposal as attempting "to do something that can only be

⁴ *Petition of Granger Energy of Honey Brook, LLC for a Declaratory Order*, Docket No. P-00032043, Recommended Decision at 17.

⁵ *Petition of Granger Energy of Honey Brook, LLC for Declaratory Order*, Docket No P-00032043, Statement of Chairman Terrance J. Fitzpatrick.

accomplished by a legislative amendment – to establish a bright line test for when service will not be considered 'public' in nature."⁶ Granger respectfully suggests that a bright line test may be established by Commission decision and case law⁷ as well as legislation, and that the proposed policy statement may be viewed as establishing a "bright line test" by relying upon established precedents. However, characterizing the policy statement as establishing a bright line test does not render the facts of a particular project irrelevant, or preclude examination of all the facts, or require a conclusion "in a vacuum" that a particular project or service is not public in nature.

Commissioner Fitzpatrick agrees that the four criteria set forth in the policy statement are relevant to a determination on this issue. He also points out that the proposed policy statement states that satisfying "one or more" of the criteria is sufficient – but he disagrees that satisfying "any one" of the criteria is sufficient because all the facts will not have been examined.⁸

Commissioner Fitzpatrick's concern can be addressed by modifying the policy statement to provide "that an alternative energy source will not be considered a public utility if it satisfies, and is not inconsistent with, one or more" of the criteria. The underlined language would make clear that all the facts must be examined in relation to each of the criteria before a determination could be made that the policy statement provides assurance to project developers of exemption from

⁶ Proposed Policy Statement Order, Dissenting Statement of Commissioner Terrance J. Fitzpatrick at 2.

⁷ *Complete Auto Transit v. Brady*, 430 U.S. 274, 280-81 (1977) (a state business tax on a multistate business comports with the Commerce Clause "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."); *Commonwealth v. Castillo*, 2005 Pa. LEXIS 3119, *2 (reaffirming bright-line rule of *Commonwealth v. Lord*, 719 A.2d 306 (1998), and *Commonwealth v. Butler*, 812 A.2d 631 (2002), under which failure to comply with Pa.R.A.P. 1925(b) results in automatic waiver of issues raised on appeal).

⁸ Proposed Policy Statement Order, Dissenting Statement of Commissioner Terrance J. Fitzpatrick at 2.

Commission regulation. This would be consistent with then-Chairman Fitzpatrick's position in Granger's declaratory proceeding:

Specifically, I agree with Granger that its proposed service is not "public" in nature due to: 1) Granger's restriction of the service to four named industrial customers [*No. 3 in proposed policy statement*]; 2) the design and sizing of Granger's facilities [*No. 2 in proposed policy statement*]; and 3) the fact that Granger has turned other potential customers away [*No. 4 in proposed policy statement*].⁹

The first factor in the proposed policy statement was not an issue in Granger's landfill gas proceeding, and it should be made clear in the final policy statement that the absence of such a relationship is not inconsistent with this factor.

A final policy statement if revised as suggested by Granger would address Commissioner Fitzpatrick's concerns and inform interested parties of the standards to be applied to the facts of a particular project so that resources are not wasted in litigation addressing what the appropriate standards are, and arguing whether the facts satisfy standards that are not appropriate. For example, in Granger's declaratory order proceeding, the parties addressed whether one of the appropriate standards is "that one who offers to serve 'to the extent of its capacity' thereby becomes a public utility."¹⁰ The ALJ concluded that this was not an appropriate standard to apply to Granger's landfill gas project.¹¹ Nonetheless, the parties addressed the issue in exceptions and reply exceptions, but the Commission's decision implicitly accepted the ALJ's position, and the proposed policy omits this standard from the criteria.

⁹ *Petition of Granger Energy of Honey Brook, LLC for Declaratory Order*, Docket No P-00032043, Statement of Chairman Terrance J. Fitzpatrick (bracketed material added).

¹⁰ *Petition of Granger Energy of Honey Brook, LLC for a Declaratory Order*, Docket No. P-00032043, Recommended Decision at 22 [addressing *C.E. Dunmire Gas Company v. Pa. P.U.C.*, 413 A.2d 473 (Pa.Cmwlt. 1980)].

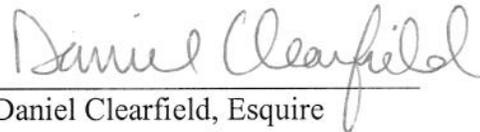
¹¹ "I am not convinced that it makes a difference if one offers to serve to the extent of one's capacity." *Id.*

Finally, the proposed policy statement provides flexibility by permitting a project to qualify as a nonpublic utility even though the contractual provisions limiting service: (1) permit the developer to substitute customers if, for example, a customer goes out of business; or (2) permit the developer to rearrange the project or revise the customer group due to a material change in circumstances, such as if the actual output from the alternative energy source turns out to be materially less or greater than the projected levels. Granger agrees that this flexibility is consistent with established precedents and will lend additional assurance to project developers.

CONCLUSION

Granger Energy requests that the Commission revise its proposed policy statement as suggested herein and adopt the revised policy statement as final to encourage and support the development of alternative energy projects and the use of alternative energy in Pennsylvania.

Respectfully submitted,



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Date: January 23, 2006

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