STATEMENTS OF POLICY

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 69]

[M-00051865]

Implementation of the Alternative Energy Portfolio Standards Act of 2004

The Pennsylvania Public Utility Commission, on November 10, 2005, adopted a proposed policy statement order which provides guidance to developers, regulated industries and the general public as top what types of projects the Commission believes fall outside the definition "public utility," thus removing roadblocks to the development of viable alternative energy products in this Commonwealth.

Public Meeting held
November 10, 2005

Commissioners Present: Wendell F. Holland, Chairperson; James H. Cawley, Vice Chairperson; Bill Shane; Kim Pizzingrilli, concurring in result, statement follows; Terrance J. Fitzpatrick, dissenting statement follows

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

Proposed Policy Statement

Order

By the Commission:

On November 30, 2004, Governor Edward G. Rendell signed Act 213 of 2004, 73 P. S. §§ 1648.1—1648.8 (Purdon's Supp. 2005) ("Act 213" or "the Act") into law. Act 213, which took effect on February 28, 2005, established alternative energy portfolio standards for Pennsylvania. Generally, the Act requires that an annually increasing percentage of electricity sold to retail customers in Pennsylvania by Electric Distribution Companies (EDCs) and Electric Generation Suppliers (EGSs) be derived from alternative energy sources, as defined in the Act. The Commission has been charged with using its general powers to carry out, execute, and enforce the provisions of the Act. The Department of Environmental Protection (DEP) has been specifically charged with ensuring compliance with all environmental, health and safety laws, and standards relevant to the Act's implementation. The Commission and the DEP are jointly to monitor compliance with the Act and the costs of the alternative energy market, oversee and foster the development of the alternative energy market, and conduct an ongoing alternative energy planning assessment. The Commission and the DEP are to report their findings and any recommendations for changes to the Act to the General Assembly on a regular basis.

Act 213's directive to the Commonwealth's electric distribution companies and suppliers clearly reflects a strong policy goal of supporting and encouraging the development of alternative energy resources in Pennsylvania. The Act defines an alternative energy source as one of the following, for the production of electricity:[1]

"*Tier I alternative energy source.*" Energy derived from:

(1) Solar photovoltaic energy;

(2) Wind power;

(3) Low-impact hydropower;

(4) Geothermal energy;

(5) Biologically derived methane gas (including landfill gas);

(6) Fuel cells;

(7) Biomass energy;

(8) Coal mine methane.

"*Tier II alternative energy source.*" Energy derived from:

(1) Waste coal;

(2) Distributed generation systems;

(3) Demand-side management;

(4) Large-scale hydropower;

(5) Municipal solid waste;

(6) Generation of electricity utilizing by-products of the pulping process and wood;

(7) Integrated combined coal gasification technology.

While it appears that many alternative energy developers may look to produce electricity from the alternative energy source and sell the output into the wholesale grid, others may find it more economically attractive to supply the energy directly to a limited number of end-user customers. They may choose to do this either by using the alternative energy source to generate electricity on-site for their own use and for the use of a limited number of end-users located at or close by the facility, or by producing energy in some other form (e.g., methane gas, artificial gas, or steam) and delivering the energy to an end-user customer for heating or a manufacturing process, thereby displacing the use of electric generation or conventional natural gas supply. For example, both landfill/methane gas projects and Integrated Gasification Combined Cycle Technology ("IGCC") projects—both included in the definition of an alternative energy source—may find it more economical to produce energy in the form of gas and deliver the gas to an end-user via a pipeline, rather than use the gas to manufacture electricity for sale at wholesale or directly to end-users.

Regardless of how the alternative energy developer displaces conventional energy production, the benefits of the use of these alternative energy sources will accrue to the Commonwealth. For example, when Governor Rendell signed Act 213 into law, he cited results of a Black & Veatch Corporation study that found considerable economic benefits from promoting the development of alternative energy sources listed in the legislation. The benefits as described by the report included $10 billion in increased economic output for Pennsylvania, $3 billion in additional earnings and between 3,500 and 4,000 new jobs for residents over the next 20 years. The study also indicated that for every 1% decrease in conventional natural gas demand there would be a corresponding $140 million in savings to natural gas and electricity consumers.[2] Accordingly, encouragement of alternative energy development will not only provide environmental and

[1] Act of November 30, 2004, P. L. _____, No. 213, § 2, 73 P. S. § 1648.2.

[2] The Black & Veatch Report is available at: http://www.bv.com/energy/eec/renewpennstudy.htm.

economic development benefits, but also potentially will lessen the need to increase the rates of electric and natural gas service from conventional sources, a longstanding goal of this Commission.

As a result, the Commission believes that Pennsylvania's energy industry and the ratepayers of the state will all benefit from policies that promote the development and use of alternative energy projects. Therefore, in the proposed policy statement the Commission will articulate the circumstances under which it will consider an alternative energy project to be exempt from the definition of "public utility" under the Public Utility Code.

Generally, entities that offer a "public utility" service "to or for the public for compensation," as defined in section 102 of the Public Utility Code, are found to be public utilities within the Commission's jurisdiction. Such entities are required to obtain a certificate of public convenience pursuant to section 102 of the Code, prior to providing service to a customer, and to comply with traditional regulatory requirements such as tariffs, reports, affiliated interest filings, compliance with service adequacy standards, assessments, and the like.

The Commission has often been faced with determining whether a particular utility project constitutes jurisdictional public utility service under the Code. In some cases, the project developer seeks to be jurisdictional and in others the project developer desires the project to be non-jurisdictional. There are numerous decisions in which this Commission and reviewing courts have reviewed the term "public utility."

Those developers arguing in favor of non-jurisdictional status assert that compliance with regulation would not only be time consuming and expensive but restrict their ability to offer innovative pricing or service arrangements needed to make their product competitive with conventional alternatives. Some have asserted that the mere prospect that a project could be found subject to Commission regulation would serve to render a potentially beneficial project uneconomic or operationally infeasible by interested developers.

The Commission has a declaratory order process by which a developer may request a declaration that a particular project does or does not constitute a public utility subject to the jurisdiction of the Commission.[3] Developers have used this process in the past to determine, at the outset, whether a project was subject to the Commission's jurisdiction.[4] Others may believe the time and expense associated with such an effort may well serve to act as an impediment to potential development. The Commission is concerned that the mere prospect of having to obtain a declaration from the Commission as to whether the sale of energy directly to an end-user customer, or a group of such customers, will result in the developer (or the project itself) being found to be a public utility could dissuade the developer from going forward with the project.

Therefore, to encourage and support the development of alternative energy projects in Pennsylvania, we believe it proper to provide additional guidance to developers, the regulated industries, and to the general public as to what types of projects the Commission believes fall outside the definition of "public utility" and, thus, not subject to Commission regulation. By setting forth this guidance, consistent with prior Commission and court determinations, potential roadblocks to the development of viable alternative energy projects in the Commonwealth will be removed. This will help to advance the goals of the General Assembly in enacting Act 213, as well as the Commission's duty to encourage use of Pennsylvania's alternative energy sources.

The Commonwealth Documents Law defines a statement of policy as "any document, except an adjudication or a regulation, promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof, and includes, without limiting the generality of the foregoing, any document interpreting or implementing any statute enforced or administered by such agency."[5] The Pennsylvania Supreme Court described the critical distinction between a duly promulgated regulation ("substantive rule") and a statement of policy as follows:

> The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. A properly adopted substantive rule establishes a standard of conduct which has the force of law. . . . The underlying policy embodied in the rule is not generally subject to challenge before the agency.
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> A general statement of policy, on the other hand, does not establish a "binding norm". . . . A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.[6]

By issuing the proposed policy statement, we intend 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. We note that our Supreme Court stated in *Bethlehem Steel Corp. v. Pennsylvania Public Utility Commission* that "where the main activity which occurs is negotiation concerning the *possibility* of public utility activity, there has been no public utility activity. To hold otherwise would unreasonably restrict the right of those engaged in business to discuss with others and to explore the possibilities of legitimate business activity."[7]

Any claims that an alternative energy source project constitutes a Commission-jurisdictional public utility would likely be made by the filing of a formal complaint pursuant to sections 701—703 of the Code.[8] Given the clear legislative intent to promote the use of alternative energy sources, we shall look with particular disdain on effectively anti-competitive efforts by jurisdictional public utilities to delay, discourage, or prevent alternative energy source projects by the filing of complaints based merely on the anticipated loss of sales of public utility service. Arguments that a proposed alternative energy source project: (1) would be contrary to the historic roots and purpose of public utility regulation (including the

[3] 66 Pa.C.S. § 331(f); see also 52 Pa. Code § 5.42.

[4] See *Petition of Granger Energy of Honey Brook, LLC for a Declaratory Order*, Docket No. P-00032043, Order entered August 19, 2004, 2004 Pa. LEXIS 33; *Petition of East Stroudsburg Area Sch. Dist. for Declaratory Order*, Docket No. P-900442, Order entered Aug. 13, 1990.

[5] Commonwealth Documents Law, Act of July 9, 1976, P. L. 877, No. 160, § 1, 45 Pa.C.S. 501 et seq. ("statement of policy").

[6] *Pa. Human Relations Comm'n v. Norristown Sch. Dist.*, 473 Pa. 334, 350, 374 A.2d 671, 679 (1977) (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

[7] *Bethlehem Steel Corp. v. Pa. Pub. Util. Comm'n*, 552 Pa. 134, 143-44, 713 A.2d 1110, 1114 (1998) (emphasis in original).

[8] 66 Pa.C.S. §§ 701—703.

argument that regulation has as a goal the spreading of significant capital costs associated with public utility facilities over "the widest customer base"); (2) must compete on a "level playing field" with public utilities; (3) would cause a public utility to lose margins from the loss of an existing customer or customers; and (4) would be just the "tip of the iceberg," causing other public utilities to experience losses of customer load from other such projects, are misplaced. As our Supreme Court held in *Bethlehem Steel*:

> The lower tribunals appear to be concerned that the business activity of Energy Production and Bessie 8 may undermine or in some way threaten the integrity of the public utility system in Pennsylvania. The concurring opinion in the PUC finds it ominous that the joint venturers attempted to avoid government regulation and that some of them are affiliated with public utilities in Pennsylvania and New Jersey. The PUC in its brief contends that it is not in the public interest to allow Bessie 8 to place its pipeline in public rights of way outside the regulatory purview of the PUC. These concerns are misplaced. It is for the legislature, not the PUC or this court to determine what business activity comes within the purview of the PUC. Because the legislature has determined that businesses which do not provide service to or for the public are not public utilities, and the businesses at issue in this case do not provide service to or for the public, we are constrained to determine that they are not subject to regulation by the PUC. If the legislature determines that such businesses should, in fact, be regulated by the PUC, it can always amend the Public Utility Code to that effect.[9]

As noted, the Act establishes the policy of the Commonwealth to encourage the development of alternative energy sources, as defined in the Act, and empowers the Commission to "establish an alternative energy credits program as needed to implement this act."[10] In addition section 7 of the Act requires the Commission to:

> conduct an ongoing alternative energy resources planning assessment for this Commonwealth. This assessment will, at a minimum, identify current and operating alternative energy facilities, the potential to add future alternative energy generating capacity, and the conditions of the alternative energy marketplace. The assessment will identify needed methods to maintain or increase the relative competitiveness of the alternative energy market within this Commonwealth.[11]

We conclude from these provisions that the General Assembly has entrusted the Commission with the responsibility and duty to encourage and enhance the development of alternative energy resources in Pennsylvania. Providing this guidance as to how we intend to rule when faced with a request to determine the public utility status of an alternative energy source project provides such positive support and is therefore in the public interest.

What Constitutes a Public Utility under the Public Utility Code

Numerous Commission and court decisions have analyzed the factual circumstances that result in a determination that an entity is not providing service to or for "the public" and therefore is not a "public utility" within the meaning of section 102 of the Code. *In Re Certification of Resellers of Telecommunications Services*,[12] the Commission provided a succinct statement of the circumstances which, if present, will cause the Commission to find that the project is not a jurisdictional public utility:

> The question of what constitutes utility service "for the public" is not defined by statute but has been the subject of extensive Commission and appellate review:
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> "The public or private character of the enterprise does not depend . . . upon the number of persons by whom it is used, but upon whether it is open to the use and service of all members of the public who may require it . . ." *Drexelbrook Associates v. Pennsylvania Public Utility Commission*, 418 Pa. 430, 435, 60 PUR3d 175, 212 A.2d 237, 239 (1965); *Borough of Ambridge v. Public Service Commission*, 108 Pa. Super. Ct. 298, 304, PUR1933D 298, 165 Atl. 47, 49 (1933). "[T]he test is whether or not such person holds himself out expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals." Drexelbrook; *Merchants Parcel Delivery, Inc. v. Pennsylvania Public Utility Commission*, 150 Pa. Superior Ct. 120, 28 A.2d 340 (1942); *Masgai v. Public Service Commission*, 124 Pa. Superior Ct. 370, 188 Atl. 599 (1936).
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> After thorough review, the two factors which have been determined by the Commission and the courts to be relevant to consideration of whether the service provider holds himself out to serve the public or a limited portion thereof are: 1) whether the utility service being provided is merely incidental to non-utility business with the customers which creates a nexus between the provider and the customer. Drexelbrook (a landlord providing fixed utility service to its tenants is not for the public); *Aronimink Transportation Co. v. Public Service Commission*, 111 Pa. Superior Ct. 414, 5 PUR NS 279, 170 Atl. 375 (1934) (a landlord providing bus service to its tenants is not for the public); and 2) whether the utility facility was designed and constructed only to serve specific individuals such that the resulting service is not properly considered to be for the public. Borough of Ambridge (the selling of excess water by a manufacturer to a neighboring manufacturer through a line designed solely for that purpose is not for the public); *Re Hazelton Associates Fluidized Energy, Inc.*, 62 Pa. PUC 619 (1986) (a hot temperature water system designed and constructed specifically to serve three customers is not for the public).
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> Although not addressed explicitly in court cases or Commission orders, a third factor which has been considered by the Commission from a policymaking standpoint is whether a utility service provider is only serving a small number of customers in the immediate geographic vicinity of a production facility.[13]

[9] *Bethlehem Steel*, 552 Pa. at 144, 713 A.2d at 1115. To the same effect, see *Drexelbrook Associates v. Pa. Pub. Util. Comm'n*, 418 Pa. 430, 440-441, 212 A.2d 237, 242-243 (1965).

[10] Act 213, § 3(e), 73 P. S. § 1648.3(c).

[11] Id., § 7, 73 P. S. § 1648.7.

[12] *Re Certification of Resellers of Telecommunications Services*, 73 Pa. P.U.C. 124 (1990), aff'd, *Waltman v. Pa. Pub. Util. Comm'n.*, 596 A.2d 1121 (Pa. Cmwlth. 1991), aff'd per curium, 533 Pa. 304, 621 A.2d 994 (1993).

[13] *Re Certification of Resellers of Telecommunications Services*, 73 Pa. P.U.C. at 131. The Pennsylvania Supreme Court in *Bethlehem Steel* determined that "[b]y definition, a single user is not 'the public.' " 552 Pa. at 142 n.8, 713 A.2d at 1114 n.8; accord *Peter Daniels Realty, Inc. v. Northern Equity Investors Group, Inc.*, 829 A.2d 721 (Pa. Super. 2003).

Furthermore, as our Supreme Court explained in the seminal case of *Drexelbrook Associates v. Pennsylvania Public Utility Commission*,[14] service to a "defined, privileged, and limited group" is private in nature if the provider reserves its right to select its customers by contractual arrangement such that no one among the public outside of the selected group is privileged to demand service.[15] Elucidating this rule, Justice Nigro in his concurring opinion in *Bethlehem Steel*[16] cited *Aronimink Transportation Co. v. Public Service Commission*,[17] *Dunmire Gas Co. v. Pennsylvania Public Utility Commission*,[18] and *Waltman v. Pennsylvania Public Utility Commission*.[19]

More recently, the Commission found that a project which provides landfill-derived methane gas (a Tier I source under the Act) to a limited number of customers did not constitute public utility service:

> Having determined that landfill gas service can reasonably be considered as a public utility service under 66 Pa.C.S. § 102, we nonetheless recognize that regulation of this service may slow the growth of the evolving landfill gas market. The Commonwealth and this Commission support the use of alternate fuels especially renewable resources such as landfill gas. We understand that some form of disposal of landfill gas is necessary for safety and environmental reasons, and that the utilization of landfill gas as a fuel converts a pollutant into a beneficial energy source. (Granger St. 2 at 7-9). While large scale landfill gas service may be subject to our Code and Regulations, we recognize that it is a unique fuel source and wish to regulate this industry in a manner which encourages growth and development of the market for this renewable resource.
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> The facts presented in this case, where service will be provided to four sophisticated industrial customers that wish to receive landfill gas, knowing that jurisdictional natural gas service is also available, warrants a determination that Granger is not subject to our regulation except with regard to pipeline safety. In the past, we have held that utility service to a limited number of customers constitutes service to the public. However, we base our determination here on the unique facts of this case. There are a limited number of customers, the identities of these industrial customers are known, and regulation of landfill gas would inhibit the growth of a still developing renewable resource.[20]

Using the Commission's and the appellate courts' established precedents, clear standards may be ascertained as to when an alternative energy project will not be considered a public utility and thus not subject to the jurisdiction of the Commission. We intend this guidance to apply to any energy project that is listed as an alternative energy source pursuant to section 3 of the Act without regard to whether the source is being used to produce electricity.

We believe that encouraging the development of the alternative energy sources listed in the Act will create significant energy conservation and environmental benefits, as well as significant job-creation opportunities, whether the energy from the project is used to produce electricity or to provide energy in some other form directly to an end-user, thereby displacing or reducing the end-user's demand for electric energy or conventional natural gas (as opposed to methane gas produced from landfills or gas from a coal gasification project, two alternative energy sources listed in Act 213).

A project will not be considered a public utility it satisfies one or more of the following criteria:

1) The service being provided by the alternative energy source is merely incidental to non-utility business with the customer which creates a nexus between the provider and the customer;

2) The facility is designed and constructed only to serve specific individuals or entities, and others cannot feasibly be served without a significant revision to the project;

3) The service is provided to a single customer or to a defined, privileged, and limited group of customers where the provider reserves its right to select its customers by contractual arrangement such that no one among the public outside of the selected group is privileged to demand service, and resale of the service is prohibited;

4) Any other factors indicate an intention, express or implied, to serve private entities as opposed to the general public.

Our proposed policy would permit a project to qualify as a non-public utility under these standards even though the limiting contractual provisions permit the developer to substitute customers if a customer goes out of business, for example. It would also permit the developer to rearrange the project, and revise the customer group if, for example, the actual output from the alternative energy source proves to be materially less than or greater than projected levels. We believe that these clarifications are consistent with generally applicable Commission precedents, as well as relevant appellate cases. Moreover, there is little chance that a project, once constructed, could be reconfigured to such a degree that it would cause it to lose its non-public utility status.[21] The output of most alternative energy sources is limited in the first instance and could not, in any event, sustain a service that is open to the public in general.

We hasten to clarify that the issuance of the proposed policy statement does not preclude a determination of non-public utility status for projects that are not included in the Act's definition of an alternative energy source. It is especially appropriate to provide this advance declaration for alternative energy sources so as to enhance the potential that developers will go forward with projects that utilize these sources, thereby advancing the specific goals of the Commonwealth as recently expressed in Act 213.

[14] *Drexelbrook Associates v. Pa. Pub. Util. Comm'n*, 418 Pa. 430, 435, 212 A.2d 237, 239 (1965).

[15] *Drexelbrook Associates*, 418 Pa. at 436, 212 A.2d at 239-240 (landlord-tenant relationship established the only persons who could demand utility service); *Bethlehem Steel*, 552 Pa. at 147, 713 A.2d at 1116 (Nigro, J., concurring) ("Like in *Drexelbrook*, the only one who can demand utility service from Bessie 8 is Bethlehem Steel—the entity with a contractual relationship with Bessie 8").

[16] 552 Pa. at 145—147, 713 A.2d at 1115—1116 (Nigro, J., concurring).

[17] *Aronimink Transp. Co. v. Pub. Serv. Comm'n*, 111 Pa. Super 414, 170 A. 375 (1934) (landlord-tenant relationship established the only persons who could demand utility service).

[18] *Dunmire Gas Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 473 (1980) (no special relationship because the company "provided gas service to the extent of its capacity to an indefinitely open class of customers").

[19] *Waltman v. Pa. Pub. Util. Comm'n*, 596 A.2d 1221 (Pa. Cmwlth. 1991), aff'd, 533 Pa. 304, 621 A.2d 994 (1993) (no special relationship because service was made available to any and all commercial customers who demanded service).

[20] *Petition of Granger Energy of Honey Brook, LLC for a Declaratory Order*, Docket No. P-00032043, Order entered August 19, 2004, 2004 Pa. LEXIS 33 at *17-*18.

[21] See *Hazleton Associates Fluidized Energy, Inc.*, 62 Pa. P.U.C. 619 (1986) (the provider "physically would not be able to serve any significant, additional load without a major overhaul and upgrading of its system's capacity").

All interested parties are invited to submit comments on the proposal set forth in Annex A. We propose to amend Chapter 69 by adding 52 Pa. Code § 69.1401 as set forth in Annex A, which establishes a policy statement defining the public utility status of alternative energy source projects under 66 Pa.C.S. § 102. Accordingly, pursuant to section 501 of the Public Utility Code, 66 Pa.C.S. § 501, and the Commonwealth Documents Law, 45 P. S. § 501 et seq., and regulations promulgated thereunder at 1 Pa. Code §§ 7.1—7.4, we propose to amend the regulations at 52 Pa. Code Chapter 69 as previously noted and as set forth in Annex A; *Therefore*,

It Is Ordered That:

1. The proposed statement of policy to 52 Pa. Code Chapter 69, as set forth in Annex A, is issued for comment.

2. The Secretary shall submit this order and Annex A to the Governor's Budget Office for review of fiscal impact.

3. The Secretary shall certify this order and Annex A and deposit them with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

4. Interested persons may submit an original and 15 copies of written comments to the Office of the Secretary, Pennsylvania Public Utility Commission, P. O. Box 3265, Harrisburg, PA 17105-3265 within 30 days from the date this order is published in the *Pennsylvania Bulletin*.

5. A copy of this order shall be posted on the Commission's website and served on the Office of Consumer Advocate and Office of Small Business Advocate.

6. The contact person for this matter is Patricia Krise Burket, Assistant Counsel, Law Bureau, (717) 787-3464, pburket@state.pa.us.

JAMES J. MCNULTY,
Secretary

Fiscal Note: 57-243. No fiscal impact; (8) recommends adoption.

Dissenting Statement of Commissioner Terrance J. Fitzpatrick

Implementation of the Alternative Energy Portfolio Standards Act of 2004; Public Meeting November 10, 2005; NOV-2005-C-0011*; Doc. No. M-00051865

This matter involves the Commission's adoption of a proposed policy statement that attempts to establish "clear standards" as to when an alternative energy project that provides electricity or fuel directly to customers will *not* be considered a public utility because the service is not "to or for the public." 66 Pa.C.S. § 102 (definition of "public utility"). Because I believe that the proposed policy statement attempts to oversimplify an analysis that requires the Commission to weigh the facts of each case, I respectfully dissent.

The proposed policy statement provides that an alternative energy source will not be considered a public utility if it satisfies *one or more* of the following criteria:

> 1) The service being provided by the alternative energy source is merely incidental to non-utility business with the customers which creates a nexus between the provider and customer;
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> 2) The facility is designed and constructed only to serve a specific group of individuals or entities, and others cannot feasibly be served without a significant revision to the project;
>
> 3) The service is provided to a single customer or to a defined, privileged, and limited group when the provider reserves its right to select its customers by contractual arrangement such that no one among the public, outside of the selected group, is privileged to demand service, and resale of the service is prohibited.
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> 4) Other factors indicate an intention, express or implied, to serve private entities as opposed to the general public.

(Annex A, proposed § 69.1401(a)(1-4)). The proposed policy statement order states that the intent here is to set forth "clear standards" that will "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-use customers." (p. 6)

My disagreement with the proposed policy statement does not mean that I am eager to regulate alternative energy sources as public utilities. In fact, I concluded in a previous case that an alternative energy developer was not a public utility where the developer proposed to provide landfill gas via a pipeline to four industrial customers. *Petition of Granger Energy of Honey Brook, LLC*, Dkt. No. P-00032043 (Order entered September 8, 2004, 2004 Pa. PUC Lexis 33). (Hereinafter cited as "Granger"). My concurring opinion in that case, however, clarified that this conclusion was based upon all the circumstances. In addition, I stated that in making a determination whether a proposed utility service is public in nature "[t]here is no bright line test, and the facts of each case must be considered." *Granger* 2004 Pa. PUC Lexis 33.

In a nutshell, I believe that the proposed policy statement attempts to do something that can only be accomplished by a legislative amendment—to establish a bright line test for when service will not be considered "public" in nature. While I agree that the four criteria listed above are relevant to a decision on this issue—each of them has some basis in prior decisions of the courts or this Commission—I disagree that it is possible to analyze a project under any one of these factors and, in a vacuum, conclude that the service is not public in nature.

To illustrate this point, the first standard provides that the Commission lacks jurisdiction over utility service that is "merely incidental to non-utility business with the customers." This is derived from cases where the utility service was deemed incidental to a landlord/tenant relationship. *Drexelbrook Associates v. Pa. PUC*, 418 Pa. 430, 212 A.2d 237 (1965). However, it is unclear what other types of business relationships might warrant the application of the incidental exception, and I do not believe a conclusion could be reached on this issue without examining all the facts.

In addition, the third standard provides that the Commission lacks jurisdiction over utility service to "a single customer or to a defined, privileged, and limited group" of customers. Again, this language has a basis in prior decisions, but it cannot be used to form a conclusion separate from the facts of a particular situation. For example, what if a developer wanted to serve twenty customers—would that still be a "defined, privileged, and limited group" of customers? Moreover, this standard does not address the intent of the developer-even service to a

single customer might constitute service to the public if the developer intends to make the service available to others.[22]

Finally, I question whether the Commission may adopt a policy for determining the "public utility" status of alternative energy providers that does not also apply to conventional energy sources. The Commission attempts to justify this disparate treatment on public interest grounds, citing the policy underlying the Alternative Energy Portfolio Standards Act, 73 P. S. § 1648.1 et seq. However, as the Order also recognizes, the courts have explained that a determination whether service is public in nature is not driven by public interest considerations. *Bethlehem Steel Corp. v. Pa. PUC*, 552 Pa. 134, 144, 713 A.2d 1110, 1115.

Accordingly, alternative energy developers would be taking a risk if they relied exclusively on this statement of policy to determine their legal obligations. It would be more prudent for them to examine past decisions of the courts and the Commission, and to seek a declaratory order from the Commission if there is reasonable doubt as to their legal status.

For the reasons set forth above, I respectfully dissent.

Statement of Commissioner Kim Pizzingrilli

Implementation of the Alternative Energy Portfolio Standards Act of 2004; Public Meeting November 10, 2005; NOV-2005-C-0011; Doc. No. M-00051865

Today, the majority of the Commission releases a proposed policy statement intending to provide guidance on when the Commission will exempt an alternative energy project from the definition of "public utility" under the Public Utility Code. 66 Pa.C.S. § 102. Specifically, the proposed policy statement identifies criteria upon which the Commission would determine the non-utility status of alternative energy projects. The Commission would not review these operations absent a formal complaint being filed by another party. While I do not object to the initiation of a discussion on these matters, I will concur in result only and reserve judgment on the merits of the proposed policy statement until after reviewing all filed comments.

The successful development of alternative energy technologies in the Commonwealth is undoubtedly of paramount importance to all us - Commissioners, jurisdictional utilities, electric generation suppliers, consumer and environmental representatives, entrepreneurs - indeed all Pennsylvanians. Clearly, Act 213 marks not only a significant change in how retail electric service will be provided in Pennsylvania but an important step in encouraging the development of new cleaner generation sources.

I have supported and continue to support the development of new technologies, particularly in light of the passage of Act 213. In August 2004, the Commission unanimously approved a motion I offered in *Petition of Granger Energy of Honey Brook, LLC for a Declaratory Order*[23]. After completing a thorough review of Granger's Petition for Declaratory Order the Commission permitted Granger to initiate the provision of landfill gas service to a limited number of identified customers finding that Granger's proposed operations did not constitute "service to or for the public." However, the Commission placed limitations on the service, namely, that the service be limited to the identified commercial customers; that the customers are not permitted to resell the landfill gas and that Granger is subject to regulation by the Commission's Gas Safety Division. By its decision in *Granger* the Commission signaled that it is cognizant that new technologies present new issues for the Commission to consider and responded by striking a balance between the needs of the alternative technology provider and the public interest.

Therefore I offer the following issues for consideration by interested parties as they prepare their comments:

- Will the issuance of a policy statement on these matters provide greater certainty to potential developers than the existing case law?

- Past decisions on whether a particular utility service met the definition of a "public utility" per the Public Utility Code were largely decided on fact specific findings. What specific facts should any Commission policy statement on this matter contain to ensure adherence to prior decisions?

- What impact, if any, will the proposed policy statement have on the ability of Electric Distribution Companies and Electric Generation Suppliers to meet Act 213 Tier I standards? (i.e., use of landfill gas for direct sales rather than for electric generation and AEPs compliance)

- Should the force majeure provision of Act 213 and the Commission's future implementation of said provision be integrated into any potential policy statement on this topic?

- Are safeguards warranted to ensure that any proposed project by an alternative energy developer provide the Commission with sufficient knowledge of and information on the project's operations and that the project will not unduly impose a risk to the public?

I continue to support the Commission's efforts to strike such a balance and therefore offer my support of the commencement of a discussion on the issues raised in the proposed policy statement.

Fiscal Note: 57-243. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 69. GENERAL ORDERS, POLICY STATEMENTS AND GUIDELINES ON FIXED UTILITIES

IMPLEMENTATION OF THE ALTERNATIVE ENERGY PORTFOLIO STANDARDS ACT OF 2004

§ 69.1401. Nonpublic utility status of alternative energy source projects.

(a) *General.* The Commission will interpret 66 Pa.C.S. § 102 (relating to definitions) as not applying to utility service produced by an alternative energy source when the alternative energy source satisfies one or more of the following criteria:

(1) The service being provided by the alternative energy source is merely incidental to nonutility business with the customers which creates a nexus between the provider and customer.

[22] The Commission dealt with this concern in *Granger* by accepting the developer's commitment to seek Commission approval if it wished to substitute or add a customer. *Granger, slip op. p. 19.*

[23] Docket No. P-00032043 (Order entered August 19, 2004).

(2) The facility is designed and constructed only to serve a specific group of individuals or entities, and others cannot feasibly be served without a significant revision to the project.

(3) The service is provided to a single customer or to a defined, privileged and limited group when the provider reserves its right to select its customers by contractual arrangement so that no one among the public, outside of the selected group, is privileged to demand service, and resale of the service is prohibited.

(4) Other factors indicate an intention, express or implied, to serve private entities as opposed to the general public.

(b) *Coverage.* Alternative energy sources covered by this section will be those defined by section 2 of the Alternative Energy Portfolio Standards Act (73 P. S. § 1648.2), except that an otherwise qualified alternative energy source shall be covered by this section, even if the output of the alternative energy project is not used for the production of electricity, so long as the output is used as an energy source by an end-user customer for some or all of its energy needs.

(c) *Modifications.* An alternative energy project qualifies as a nonpublic utility under subsection (a) and is not a public utility subject to the Commission's jurisdiction notwithstanding the fact that the relevant contractual provisions:

(1) Permit the alternative energy developer to substitute customers or to rearrange the project.

(2) Revise the customer group as a result of a material change in circumstances, including an instance when the actual output from the alternative energy source proves to be materially less than or greater than projected levels.

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