

STATEMENTS OF POLICY

Title 4—ADMINISTRATION

PART II. EXECUTIVE BOARD

[4 PA. CODE CH. 9]

Reorganization of the Department of Conservation and Natural Resources

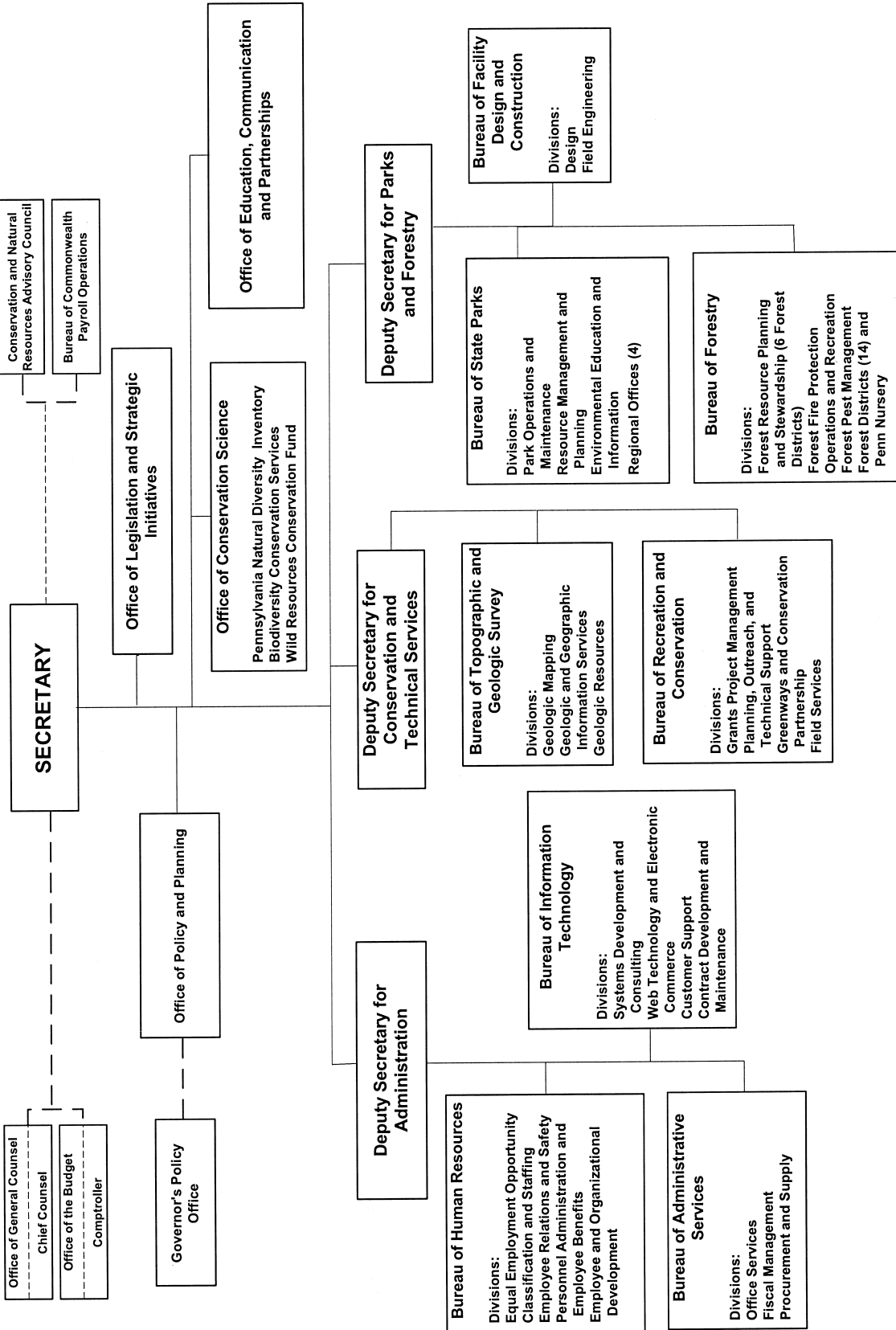
The Executive Board approved a reorganization of the Department of Conservation and Natural Resources effective November 28, 2006.

The organization chart at 37 Pa.B. 28 (January 6, 2007) is published at the request of the Joint Committee on Documents under 1 Pa. Code § 3.1(a)(9) (relating to contents of Code).

(Editor's Note: The Joint Committee on Documents has found organization charts to be general and permanent in nature. This document meets the criteria of 45 Pa.C.S. § 702(7) (relating to contents of Pennsylvania Code) as a document general and permanent in nature which shall be codified in the Pennsylvania Code.)

[Pa.B. Doc. No. 07-9. Filed for public inspection January 5, 2007, 9:00 a.m.]

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
November 28, 2006
OR-06-311



Title 52—PUBLIC UTILITIES

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 30, 2006, adopted a final policy statement order which provides guidance to developers, regulated industries and the general public as to 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 30, 2006

Commissioners Present: Wendell F. Holland, Chairperson; James H. Cawley, Vice Chairperson; Kim Pizzingrilli; Terrance J. Fitzpatrick

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

Final Policy Statement

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 systems, as defined in the Act.

The Commission has been charged with implementing, executing and enforcing the provisions of the Act, 73 P. S. § 1648.7(a). The Pennsylvania Department of Environmental Protection (“DEP”) is to assist the Commission by verifying that qualified alternative energy systems comply with applicable environmental standards and the standards set forth in Section 2 of the Act, 73 P. S. §§ 1648.2, 1648.7(b). The Commission and DEP will monitor compliance with the Act and deliver an annual report to the Pennsylvania General Assembly on the status of compliance, the costs of alternative energy, and recommendations for program improvements, 73 P. S. § 1648.7(c).

Act 213’s directive to the Commonwealth’s electric distribution companies and suppliers 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.

73 P. S. § 1648.2 (relating to definitions).

On November 10, 2005, the Commission issued a proposed policy statement to provide guidance to developers, regulated industries and the public concerning the types of alternative energy projects the Commission believed fell outside the Public Utility Code’s definition of a “public utility.”² The purpose of the proposed policy statement was to support and encourage the development of alternative energy resources and the use of alternative energy by reducing uncertainty about the jurisdictional status of certain viable alternative energy projects that might be developed in the Commonwealth.

The proposed policy statement was written to be consistent with PUC and Pennsylvania court precedents regarding the criteria that should be considered in determining whether a particular utility service is being offered or provided “to or for the public.” As explained in *Waltman v. Pa. Pub. Util. Comm’n*, 596 A.2d 1221, 1224 (Pa. Cmwlth. 1991), *aff’d per curiam*, 533 Pa. 304, 621 A.2d. 994 (1991), the fundamental principle is that the public or private character of an enterprise does not depend on the number of persons using the service but whether it is open to the use and service of all members of the public who may require it. *Borough of Ambridge*, 108 Pa. Super. 298, 304, 165 A. 47, 49 (1933), *allocatur denied*, 108 Pa. Super. xxiii (1933); *Drexelbrook Associates v. Pa. Pub. Util. Comm’n*, 418 Pa. 430, 434-435, 212 A.2d 237, 239 (1965) (“The public or private character of the enterprise [depends] . . . upon whether or not it is open to the use and service of all members of the public who may require it”) (quoting *Borough of Ambridge*) (emphasis in original).

Based on this fundamental principle and Pennsylvania case law, the policy statement identifies criteria that, if satisfied, would likely lead to a determination that the facility is not providing public utility service. The criteria and associated case law may be summarized as follows:

(1) The service being provided by the utility project is merely incidental to nonutility business with the customers which creates a nexus between the provider and customer. *Drexelbrook Associates v. Pa. Pub. Util. Comm’n* (a real estate owner/management company providing natural gas, electric and water utility service to its tenants in a garden-type apartment village containing 90 buildings is merely incidental to a nonutility business relationship and is not public utility service because “the corporation served only those who were selected as tenants—a special class of persons not open to the

¹ Act of November 30, 2004, P. L. 1672, No. 213, § 2, 73 P. S. § 1648.2.

² 66 Pa.C.S. § 102 (relating to definitions).

indefinite public"); *Brink's Express Co. v. Pub. Serv. Comm'n*, 117 Pa. Super. 268, 178 A. 346 (1935) (business of safeguarding money and securities and transportation of valuables is merely incidental to its business of guarding them); *Aronimink Transportation Co. v. Pub. Serv. Comm'n*, 111 Pa. Super. 414, 170 A. 375 (1934) (a landlord providing bus service to its tenants is not service to the public as the bus service is merely incidental to nonutility business relationship); *Erb v. Pub. Serv. Comm'n*, 93 Pa. Super. 421 (1928) (freight hauler is a common, not a contract, carrier when hauling is its only business and is not merely incidental to some other business or employment and performed by virtue of special contracts); *Protective Motor Service Co. v. Pa. Pub. Util. Comm'n*, 286 A.2d 30 (Pa. Cmwlth. 1972) (transportation of money from shipping offices or banks to vessels is incidental to the primary business of providing security services and thus outside PUC jurisdiction); *Society Hill Carriage v. Pa. Pub. Util. Comm'n*, 581 A.2d 702 (Pa. Cmwlth. 1990) (horse-drawn carriages are entertainment and so incidental transportation, not a public utility).

(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. Borough of Ambridge (selling of excess water by a manufacturer to a neighboring manufacturer through a line designed solely for that purpose is not for the public); *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").

(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. *Bethlehem Steel Corp. v. Pa. Pub. Util. Comm'n*, 552 Pa. 134, 713 A.2d 1110 (1998) (*Bethlehem Steel*) (the pipeline facility "Bessie 8" was designed and constructed to serve only a specific group of customers, and others could not be served without a significant revision to the project); *Re Megargel's Golf, Inc.*, 59 Pa. P.U.C. 517, 521 (1985) ("[W]e conclude that the term, 'defined, privileged and limited' group does not mean 'the residents of a particular development' but connotes a situation where the purveyor of . . . service has control over the persons selected to be provided . . . service") (the important consideration being the ability to select and control who will be served through contractual arrangements or otherwise) (emphasis in original). *Compare Dunmire Gas Co. v. Pa. PUC*, 413 A. 2d 1221 (Pa. Cmwlth. 1980) (no special relationship with customer where company provided gas service to the extent of its capacity to an indefinitely open class of customers) and *UGI Utilities, Inc. v. Pa. PUC*, 684 A.2d 225 (Pa. Cmwlth. 1996) (a public utility may have only a few customers).

The scope of the proposed policy statement was not limited to Act 213 alternative energy systems, however, but was intended to be equally applicable to other alternative energy systems, even if the output was not used for electric generation. See Annex A, *Proposed Policy Statement re: Implementation of the Alternative Energy Portfolio Standards Act of 2004*, § 69.1401(b).

The proposed policy statement³ was published for comment on December 24, 2005, at 35 Pa.B. 6906. Comments were due within 30 days of publication.

Comments were filed to the proposed policy statement by UGI Utilities, Inc. ("UGI"), Energy Association of Pennsylvania ("EAPA"), DEP, Office of Consumer Advocate ("OCA"), Office of Small Business Advocate ("OSBA"), Industrial Energy Consumers of Pennsylvania ("IECPA"), the Met-Ed Industrial Users Group ("MEIUG"), the Penelec Industrial Customer Alliance ("PICA"), the Philadelphia Area Industrial Energy Users Group ("PAIEUG"), the PP&L Industrial Customer Alliance ("PLICIA") (collectively, "IECPA") and the West Penn Power Industrial Intervenors ("WPPII"), Granger Energy of Honey Brook, LLC ("Granger Energy"), and Lawrence G. Spielvogel, Inc. ("Spielvogel"). Commentators also addressed questions posed by Commissioner Kim Pizzigrilli in a statement issued in connection with the order.

Discussion

The Commission's role in regard to the utility industry is established in the Public Utility Code.⁴ The Commission has the general authority to interpret the Code and to determine which entities fall within the definition of "public utility" in Section 102 of the Code and therefore those that will be subject to its jurisdiction. Determining the jurisdictional status of a utility service or project is necessarily fact-specific and each project must be evaluated individually.

The Commission's purpose in issuing this proposed policy statement was to provide guidance to alternative energy project developers regarding factors that would be considered by the Commission in deciding whether a particular project met the section 102 definition of "public utility," thus subjecting the project to regulation as a public utility. See 66 Pa.C.S. § 102. These factors are consistent with Pennsylvania legal precedent on issues relating to Commission jurisdiction over certain utility operations and service. The Commission expects that a project developer will consider these factors as guidance in designing an alternative energy project, including a business plan, so as to determine in advance the likelihood of the project being jurisdictional.

The comments submitted to this proposed policy statement represented two extremes. Either the commenter opposed the issuance of the policy statement in its entirety or the commenter argued in its favor and in fact, suggested revised language to broaden its scope and applicability. While we have not addressed all of the comments,⁵ we have carefully considered them all and have made appropriate revisions to the policy statement. Further, ministerial edits that do not have a substantive effect have been made to the final policy statement without specific discussion.

General Comments

In answer to those commentators who asserted that the Commission should not issue this proposed policy statement at all, an explanation as to the effect of a policy

³ A dissenting statement by Commissioner Fitzpatrick and a concurring statement by Commissioner Pizzigrilli were issued with the order. Commissioner Pizzigrilli's concurrence presented a number of questions she offered for consideration by interested parties in preparing their comments.

⁴ 66 Pa.C.S. § 101, et seq.

⁵ Comments related to matters not relevant to the finalization of this policy statement, such as providing natural gas distribution companies with cost recovery assurance for entering into long-term supply contracts for advanced coal gasification or liquifaction plant or with other alternative energy suppliers, implementation of rules related to the force majeure provision of Act 213, or the resolution of provider of last resort issues, have not been addressed here. See *UGI Comments*, pp. 9-10; *EAPA Comments*, pp. 13-14, 16. We note that these matters may be raised in other appropriate Commission proceedings.

statement may assuage their concerns. A policy statement is not a regulation, is not enforceable and has no binding effect on the agency, or on anyone else. The Pennsylvania Supreme Court in *Pa. Human Relations Comm'n v. Norristown Area School District*, 473 Pa. 334, 374 A.2d 671 (1977) ("*Norristown*"), distinguished the effect of a policy statement from a rule or regulation by adopting the "binding norm" test from Federal law:

An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications. . . .

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.

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.

Norristown, 473 Pa. at 349-350, 374 A.2d at 679 (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (1974) (footnotes and citations omitted)).

Consistent with the above discussion, the Commission is not establishing a binding norm when it finalizes this policy statement. Instead, the Commission is issuing this policy statement to provide guidance regarding the criteria it will use to evaluate the jurisdictional status of a utility project or service that is brought to the Commission's attention by application, petition, or complaint. These criteria are drawn from Pennsylvania case law so that application of the policy statement criteria will yield the same result as the application of established legal precedent. As such, and consistent with *Norristown*, the policy statement provides guidance as to "the course which the agency intends to follow in future adjudications." *Id.*, 473 Pa. at 350, 374 A.2d at 679.

By using the criteria in the policy statement, the project developer can evaluate the specific facts of each utility project or service to determine whether or not the project satisfies prior legal precedent for non-jurisdictional status. Thus, the value of this policy statement to a developer of, for example, an alternative energy project is that it provides some predictability in regard to the criteria that will be used to evaluate the project's jurisdictional status so that, in the planning stage, the developer can design the project to be exempt from, or subject to Commission jurisdiction as is desired.

Some commentators charged that issuing this policy statement represented an abdication and/or delegation of the Commission's duty to determine jurisdictional utility status of an alternative energy project to the project's

developer.⁶ To be clear on this point, this policy statement is not a delegation of any kind, nor is it an abdication of Commission authority. The Commission has the legal authority to determine the jurisdictional status of any utility enterprise and is therefore acting within its authority in promulgating this policy statement.

Again, the purpose of this policy statement is to provide guidelines for determining nonpublic utility status that will permit potential developers of utility service projects and their legal advisers to make judgments on how to design their projects and devise their business plans so that they can avoid or invite regulation as a public utility as they see fit. The policy statement is only a tool for developers to use in planning such projects. However, in any application, petition, or complaint proceeding regarding such a project, the Commission will remain the final arbiter, subject to judicial review, in regard to the nature of utility facilities and service that will be subject to its jurisdiction, based on the facts in each case.

Other commentators urge the Commission to broaden the scope of its policy statement to include other non-AEPS energy projects based on arguments of equal protection and public policy.⁷

The primary focus of the proposed policy statement was on AEPS projects to encourage investment and development of AEPS projects by reducing uncertainties as to the possible regulation as a public utility of such projects. However, the Commission did address non-AEPS projects in the Proposed Policy Statement Order wherein we discussed the value to the Commonwealth of alternative energy systems whose output is not used for producing electricity. *Proposed Policy Statement Order* (Order entered November 16, 2005), pp. 3-4.

Nevertheless, the legal basis for the guidance provided in this policy statement is settled case law on the jurisdictional status of different types of utility service providers. Accordingly, this legal precedent is equally applicable to all utility projects and services including alternative energy projects, and will be followed in any Commission proceeding in which the jurisdictional status of any utility service project is at issue. Given the purpose of this policy statement and the Commission's commitment to adhere to the applicable legal precedent in determining the jurisdictional status of all utility projects and services, we have amended the policy statement to reflect this change, and have included all utility projects and services.

Informal Determination of Jurisdictional Status

The Department of Environmental Protection comments that the policy statement should be clarified as to how an alternative energy project developer can receive confirmation of its nonutility status without going through the declaratory order process. DEP suggests that the joint DEP/PUC resource certification process for qualifying AEPS eligible resources can be a first step in this process. *DEP Comments*, p. 3.

While the Commission understands the utility of DEP's suggestion, the Commission is unable to adopt it. A request for the Commission to determine the jurisdictional status of a utility project is made through a petition for declaratory order submitted pursuant to 66 Pa.C.S. § 331(f) (relating to declaratory orders).

⁶ *EAPA Comments*, p. 18 (the delegation of the Commission's power to determine public utility status to a private entity is a violation of the authority delegated to the commission by the Legislature).

⁷ *IECPA Comments*, pp. 5-6 (broad application of the policy to all projects will ensure that non-AEPS projects are not treated any differently than AEPS projects).

See, e.g., *Phila. Auth. Indus. Dev. Petition for Declaratory Order*, Docket No. P-00001827 (Order entered December 20, 2000). Because a declaratory order affects the rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties involved, it is an adjudication under Section 101 of the Administrative Agency Law ("AAL"), 2 Pa.C.S. § 101 (relating to definitions). Under AAL Section 504, no adjudication is valid as to any party, unless the party has been provided with reasonable notice of a hearing and an opportunity to be heard. 2 Pa.C.S. § 504 (relating to hearing and record). Therefore, the Commission cannot adjudicate a final determination of an AEPS project's jurisdictional status without providing due process protection for all affected parties. Linking the AEPS certification process with this type of formal Commission proceeding would only serve to slow the process down.

Formal determinations of jurisdictional status are available from the Commission through several methods. These determinations have often been obtained through the filing of a Petition for Declaratory Order pursuant to 66 Pa.C.S. § 331(f). See, e.g., *Phila. Auth. Indus. Dev. Petition for Declaratory Order*. Jurisdictional determinations have also been made in proceedings initiated by formal complaints, filed either by Commission staff or private parties.

Moreover, an informal determination of the jurisdictional status of an alternative energy project, like any other utility project or service, can be obtained by requesting an opinion of counsel letter from the Commission's Chief Counsel. To request an opinion of counsel on the jurisdictional status of a particular utility project or service, a project developer may send a letter to the Commission's Chief Counsel describing the nature and scope of operations of its project including, inter alia, its location, capacity output and its projected number of customers, and explaining why it believes that the project does not constitute public utility service. The opinion of counsel would be provided based on the information provided.

While an opinion of counsel letter does not represent the final position of the Commission on the issue, 52 Pa. Code § 1.96 (relating to unofficial statements and opinions by Commission personnel), an opinion of counsel letter may be introduced into the record in any Commission proceeding in which the jurisdictional status of a utility project or service is at issue as evidence of the requestor's good faith in requesting and receiving such an opinion. See 52 Pa. Code § 5.408 (relating to official and judicial notice of fact); 66 Pa.C.S. § 331(g) (relating to official notice defined). This good faith may be taken into account as a mitigating factor persuading against the imposition of fines and penalties in future complaint proceedings alleging de facto public utility operations. See *Rossi v. Bell Atlantic-Pennsylvania, Inc.*, 94 Pa. P.U.C. 103 (Docket No. C-00992409, Order entered March 16, 2000).

A project developer may also demonstrate good faith by voluntarily filing with the Commission's Secretary a notice and disclosure statement asserting the non-jurisdictional status of its project or service. This voluntary notice and disclosure statement would provide constructive public notice of the project, its key parameters and its assertion of nonpublic utility status.⁸ Specifically, the project developer would file a statement describing

⁸ Note that the good faith value that can be claimed as a result of pursuing the opinion of counsel letter or by filing the notice and disclosure statement depends entirely on the project developer's candor in disclosing the facts of the project or service and its operation. For this reason, a project developer is advised to update

the nature and scope of operations of its project including, inter alia, its location, capacity output and its projected number of customers, and explain why, based on the criteria in the policy statement, it believes that the project does not constitute public utility service. The project developer would submit this statement to the Commission's Secretary for filing in a folder at this docket, thus providing for constructive notice to the public of the project. Public access to this folder, in which opinion of counsel letters also will be filed, will be provided upon request.

We believe that the constructive notice and public disclosure afforded by the opinion of counsel request or the voluntary notice and disclosure statement processes will provide a measure of comfort to project developers. Specifically, for alternative energy projects, this also will provide additional information to the DEP and this Commission about the activities of energy developers and the availability of such projects. This additional information may prove to be useful in the review of the "status of alternative energy technologies . . . and the capacity to add additional alternative energy resources" that the Commission is tasked with undertaking at the beginning of the 6th reporting year, approximately March 2011. See 73 P. S. § 1648.3(b)(3) (relating to alternative energy portfolio standards).

Finally, establishing these processes will address EAPA's comment that the Commission should not encourage the development of alternative energy systems without some regulatory oversight. EAPA *Comments*, p. 6 and fn 3. Information provided about alternative energy projects in opinion of counsel letters and voluntary notice and disclosure statements can be reviewed by staff from the Commission and other state agencies as well as the distribution companies and other interested parties. Where questions regarding Commission jurisdiction over the project or the safety of the project are raised, further investigation can be undertaken, and if warranted, enforcement and/or litigation as is appropriate may be pursued.

Accordingly, we have amended the policy statement to incorporate both the opinion of counsel letter request and the voluntary notice and disclosure statement filing described herein. See Annex A, Section 16.401(F) and (G). We also have incorporated into these subsections language explaining the potential value to project developers and service providers of the good faith demonstrated by observing these voluntary procedures.

Specific Comments

In its comments, IECPA states that the prohibition against resale of energy in Section 69.1401(a)(3) should be eliminated to be consistent with the exception in the definition of "electric distribution company" at 66 Pa.C.S. § 2803 (relating to definitions). The definition specifically exempts building and facility owner operators that manage an internal distribution system serving a building or other facility, such as malls, shopping centers and other facilities, from being regulated as a public utility. *IECPA Comments*, p. 4.

IECPA's point is well taken in regard to recognizing the exemption from the definition of "electric distribution company" in Section 2803, 66 Pa.C.S. § 2803, and also the exemption from the definition of "public utility" at Section 102, 66 Pa.C.S. § 102, of a building and facility owner/operator who holds ownership over and manages

notice and disclosure statements or to request a subsequent opinion of counsel where a material change in the nature or scope of operations of the project has taken place.

the internal distribution system serving occupants in a building or other facility. We will expressly recognize these exemptions in Section (C)(3) of the policy statement. We also recognize the exemption from the definition of "electric generation supplier" at 66 Pa.C.S. § 2803, for a building or facility owner/operator who manages the internal operating system of a building or facility and who supplies electric power and related services to its occupants.

IECPA also comments that the policy statement does not address additional circumstances that may arise. IECPA states that the Commission should revise the policy statement to address how an entity subject to a tariff that is in conflict with the policy statement would interpret the Commission's position. *IECPA Comments*, p. 5.

While the Commission acknowledges IECPA's concern, we cannot address the concern by revising the policy statement since policy statements are not regulations and cannot establish 'binding norms.' Instead, the Commission will advise project developers that a complaint may be filed with the Commission where a utility tariff's definition of "public utility" or "public utility service" is at odds with this policy statement or other applicable Pennsylvania case law. This legal precedent includes the case law discussed at pp. 9-13 of our proposed policy statement order (Order entered November 16, 2005). We also will paraphrase the advice that we gave to the established jurisdictional utilities in that November 16, 2005 Order at p. 7: given the clear legislative intent of Act 213 to promote alternative energy, we will look with particular disfavor on anti-competitive efforts⁹ to delay, discourage or prevent alternative energy system projects. Therefore, jurisdictional utilities should interpret their tariff provisions in light of this policy statement.

Granger Energy proposes the addition of language that it states will answer a concern expressed by Commissioner Fitzpatrick in his dissent: "that the alternative energy project needs to satisfy "any one" of the criteria to fall outside the definition of "public utility." *Granger Energy Comments*, p. 4. Granger Energy states that modifying the policy statement to provide that "an alternative energy system will not be considered to be a public utility if it satisfies, and is not inconsistent with, one or more of the criteria" will satisfy this concern. *Granger Energy Comments*, p. 4.

We decline to adopt this proposed revision because we believe that Granger Energy's specific proposed revision will create confusion in interpreting this policy statement. For example, the revision would allow the policy statement to be interpreted to mean that an alternative energy system would not be a public utility only if it would provide energy service that is merely incidental to a nonutility business relationship with its customers (Section (C)(1)) when it has already either designed its facilities to serve a specific group of individuals (Section (C)(2)) or has limited its supply service to a single customer or a defined, privileged or limited group (Section (C)(3)). Case law has identified any of these factors as being determinative of non-jurisdictional public utility status based upon the facts and circumstances of the specific project involved. Accordingly, we reject this proposed revision.

⁹ Note that this is not the first time that the Commission has warned parties against the use of litigation as a weapon against potential competitors. In both the electric generation supplier licensing regulations and the natural gas supplier licensing regulations, competitors were placed on notice that intentional misuse of competitive protests against supplier license applicants could result in sanctions against the protesters. See 52 Pa. Code § 54.36 (b) (relating to protests to applications) and § 62.108(b) (relating to protests to applications).

Granger Energy also suggests the addition of a provision that expressly rejects the criteria used by the Commonwealth Court in *C. E. Dunmire Gas Company v. Pa. Pub. Util. Comm'n*, 413 A.2d 473 (Pa. Cmwlth. 1980), "that one who offers to serve 'to the extent of its capacity' thereby becomes a public utility." *Granger Energy Comments*, p. 5. Other commentators who cited *Dunmire* in their comments for slightly different propositions were UGI at pp. 7-8 and EAPA at pp. 11-12.

Section 102 defines a "public utility" in terms of providing a utility service of some type "to or for the public for compensation." The exhaustion of capacity or supply is hardly determinative of whether a utility service provider is holding itself out to offer service to the public in general except under the unique circumstances that occurred in *Dunmire*. There must instead be a "holding out or readiness to serve the public," *Borough of Ambridge*, 108 Pa. Super. at 302, 165 A. at 48; "a public profession" as opposed to "private dealing" and "the readiness to serve all members of the public to the extent of capacity," *id.* at 304, 165 A. at 49; "[t]he test is whether he has invited the trade of the public." *Klawansky v. Pub. Serv. Comm'n ("Klawansky")*, 123 Pa. Super. 375, 382, 187 A. 248, 251 (1936).

The phrase "to the extent of capacity" describes the unlimited breadth of the provider's public profession: it will serve all comers as long as its supplies permit. The opposite is "private dealing" where, even if supplies are plentiful, the provider chooses to serve a privileged few, without "invit[ing] the trade of the public," even though many more could be served. In *Bethlehem Steel Corp. v. Pa. Pub. Util. Comm'n*, 552 Pa. 134, 713 A.2d 1110 (Pa. 1998), Justice Nigro explained in his concurring opinion that exhaustion of capacity was the only restriction that *Dunmire* had placed on its service: "[A]lthough *Dunmire* did not solicit residential customers, it provided gas service to the extent of its capacity to an indefinitely open class of customers. The company placed no restriction upon whom it served and thus was subject to regulation." 552 Pa. at 146, 713 A.2d at 1115-1116 (citations omitted).

Thus, the key element was *Dunmire's* unbridled willingness to serve all comers, not the extent of his supplies (they being only a measure of the extent of his willingness). As the Pennsylvania Superior Court said in *Klawansky*, "It follows that the use must be so extensive as to imply an offer to serve all of the public or that there be other circumstances from which it may be reasonably inferred that the carrier was undertaking to serve *all* to the limit of his capacity." 123 Pa. Super. at 381, 187 A. at 251 (emphasis original).

Granger Energy expresses agreement with the flexibility of the policy statement that permits a project to qualify as a nonpublic utility even though contractual provisions limiting service: (1) permit the developer to substitute customers if, for example, a customer goes out of business; or (2) permits 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 system turns out to be materially less or greater than the projected levels. *Granger Energy Comments*, p. 6. On the other hand, commenter UGI objects to this flexibility stating that the Commission's proposed reliance on private, self-serving and easily amendable contractual agreements to determine public utility status creates a large loophole that would exempt all alternative energy facilities. *UGI Comments*, p. 6.

After careful consideration, we have revised the policy statement so that it is clear that the presence of the types of contingency contract provisions described will not make the project a public utility. However, implementation of such contract provisions whereby customers are actually added or substituted, or the project is rearranged due to a material change in circumstances, may cause the project to attain jurisdictional status as a de facto public utility under the law. This revision is consistent with legal precedent established by the Pennsylvania Supreme Court in *Bethlehem Steel* where the Court reversed a Commission decision that a joint venture that constructed a pipeline to provide natural gas service to one customer was not a public utility even though the president of one of the joint venturers, acting on his own behalf, began discussions with other potential customers to build similar pipelines. The Court determined that these negotiations did not constitute “an offer of utility service to the public.” The Court stated that:

Until a specific contractual proposal is made or until the joint venturers altered their business in a way to engage in public utility activity, there is insufficient evidence to find that [one of the joint venturers] is or is not a public utility.

Bethlehem Steel, 552 Pa. at 144, 713 A.2d at 1114-1115.

This revision should eliminate the concerns expressed by some of the commentators who opposed the notion of Commission reliance on contract provisions to make a final determination of public utility status.¹⁰

Finally, the EAPA expresses concern about the broad language contained in the fourth element of the policy statement—other factors indicate an intention, expressed or implied, to serve private entities as opposed to the general public. *EAPA Comments*, p.17.

In light of the fine-tuning done to the other provisions of the proposed policy statement, the Commission agrees that proposed § 69.1401(a)(4) is so broad that it does not convey useful guidance regarding a specific factor that will be considered in making determinations about an entity’s jurisdictional status as a public utility. We therefore will delete this subsection. We have also altered the policy statement to reflect that the Commission will consider the status of utility projects or services based on the specifics facts of each project or service and will take into consideration each of these criteria when rendering its opinions and decisions.

Policy Considerations

A number of commentators raised public policy concerns about the potential for the development of small, unsafe, and unreliable utility systems and about the patrons who utilize these types of energy systems. A few missteps in the beginning of the alternative energy marketplace could harm the public and potentially destroy the market before it has an opportunity to grow. *EAPA Comments*, pp. 3-4. EAPA also comments that in *Petition of Granger Energy of Honeybrook, LLC for a Declaratory Order*, Docket No. P-00032043, the Commission conditioned its finding concerning “service to or for the public” upon several limitations, including that Granger Energy provide the Commission’s Bureau of Transportation and Safety with copies of its pipeline plans for review to confirm that the pipeline poses no danger to the public. *EAPA Comments*, p. 10.

UGI comments about pipeline safety and reliability issues for small unregulated pipeline projects. *UGI Com-*

ments, p. 9. Another commenter opposes the issuance of the policy statement in that it does not provide adequate and sufficient protection for customers of alternative energy project developers. *Spielvogel Comments*, p. 1.

The Commission believes that customers buying energy directly from an alternative energy system would be sophisticated enough to thoroughly investigate the developer and the system before contracting for its energy supply. This is especially true when the facility has been designed for and constructed to meet the customer’s particular needs. It is also anticipated that such customers would secure back-up supply to ensure reliability of their energy supply.

As to safety concerns raised about unregulated energy projects by commentators, we are acutely aware that safety and reliability issues are important, but we cannot address these concerns in this proceeding. This policy statement is not a regulation, but an expression of intent by the Commission to look at specific criteria in making determinations about the jurisdictional status of an alternative energy supplier. We cannot impose duties or responsibilities in regard to safety or reliability concerns on an entity in finalizing this policy statement.

While it is true that the Commission must ensure public safety for public utility facilities and service, the Commission does not have the legal authority to evaluate, or the duty to ensure, the safety aspects of facilities or service of a nonjurisdictional utility service project.¹¹ This authority and duty do not attach until after the Commission makes a determination that the project is in fact a jurisdictional public utility. Moreover, public safety and other policy concerns have no bearing on the legal tests that have been established to determine whether a utility service or facility is in fact a public utility. This view is supported by the Pennsylvania Supreme Court’s out-of-hand dismissal of policy concerns raised by the Commission 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.

Bethlehem Steel, 552 Pa. at 144, 713 A.2d at 1115.

¹¹ Opinion of counsel letters and notice and disclosure statements that are filed for projects with the Commission Secretary will be available for Commission staff and other interested parties to review. If safety issues are identified, Commission staff or other agencies with jurisdiction may be contacted to conduct further investigation. See 73 P. S. § 1648.5 (relating to interconnection standards for customer-generator facilities; DEP and Department of Labor and Industry charged with developing health and safety standards for alternative energy systems).

¹⁰ *UGI Comments*, p. 6; *EAPA Comments*, p. 12.

Therefore, the Commission's analysis of whether a utility project or service is a public utility cannot turn on public safety concerns.

Conclusion

The purpose of this policy statement is to provide guidance to utility project developers and service providers and their investors regarding the criteria the Commission will use to evaluate whether a given project qualifies as a "public utility" under section 102 of the Public Utility Code. The policy statement criteria are firmly grounded upon Pennsylvania case law and provide a convenient road map to the factors that govern public utility status in Pennsylvania. By compiling and announcing the criteria to be used in the form of a policy statement, the Commission intends to reduce uncertainty regarding the public utility status of alternative energy projects and, thereby, create conditions that can encourage their development. However, any final determination must rest upon a Commission adjudication based on the facts of each case.

In addition, based on the comments received to the proposed-form policy statement and as described in the body of this order, we have made modifications to recognize the resale exception in section 2803 of the Public Utility Code to clarify applicability of the criteria identified in the policy statement to all utility projects, to remind developers that changes to contract provisions may change the jurisdictional status of the project, and to explain that good faith actions to follow the guidance provided in the policy statement can serve to mitigate the penalties that may otherwise occur if a project is subsequently adjudicated as jurisdictional. Each of these modifications further serve to make the policy statement consistent with Pennsylvania law and to encourage compliance with Pennsylvania law by utility project developers and service providers; *Therefore,*

It Is Ordered That:

1. The regulations of the Commission, 52 Pa. Code Chapter 69, are amended by adding § 69.1401 to read as set forth in Annex A.

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. A copy of this order and Annex A shall be posted on the Commission's website and served upon the Office of Consumer Advocate, the Office of Small Business Advocate and parties filing comments at this docket.

5. This statement of policy shall be come effective upon publication in the *Pennsylvania Bulletin*.

6. Alternative formats of this statement of policy are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, (717) 772-4597.

JAMES J. MCNULTY,
Secretary

Fiscal Note: Fiscal Note 57-243 remains valid for the final adoption of the subject regulation.

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

GUIDELINES FOR DETERMINING PUBLIC UTILITY STATUS

§ 69.1401. Guidelines for determining public utility status—statement of policy.

(a) *Coverage.* This section applies to all utility projects or services, including alternative energy systems.

(b) *Purpose.* This section provides guidance to developers of all utility projects or services, including developers of alternative energy systems under the Alternative Energy Portfolio Standards Act (73 P. S. §§ 1648.1—1648.8), in facilitating the design of projects and business plans.

(c) *Fact based determination.* The Commission will consider the status of a utility project or service based on the specific facts of the project or service and will take into consideration the following criteria in formulating its decision:

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

(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, except to the extent that a building or facility owner/operator that manages the internal distribution system serving the building or facility supplies electric power and related electric power services to occupants of the building or facility. See 66 Pa.C.S. §§ 102 and 2803 (relating to definitions).

(d) *Contractual language permitting modifications.* The Commission will not deem a utility project or service that satisfies the criteria under subsection (c) to be a public utility based solely on the fact that the relevant contractual provisions between the utility service provider or project developer and end-user customers permit:

(1) The utility service provider or project developer to substitute customers or to rearrange the project.

(2) The service provider or utility project developer to revise the customer group as a result of a material change in circumstances, including an instance when the actual output from the project proves to be materially less than or greater than projected levels.

(e) *Modification of project or service.* Implementation of contractual provisions that result in an actual increase in the original customer number, an actual alteration to the nature of the relationship between the project developer and the original customer group, an alteration to the select nature of the original customer group or other

material change in regard to the original customer group may result in a change to the nonpublic utility status of the utility project or service.

(f) *Chief Counsel opinion letter.* A project developer may request informal advice from the Chief Counsel regarding the jurisdictional status of a utility project or service. The opinion of counsel letter will be issued under § 1.96 (relating to unofficial statements and opinions by Commission personnel).

(1) A request for opinion of counsel letter must be directed to the Commission's Chief Counsel and contain the facts necessary to render an opinion as to the jurisdictional status of the utility project or service. The opinion will be based solely on the facts provided and limited to the facts stated in the request.

(2) The Chief Counsel will file a copy of the opinion of counsel letter with the Commission's Secretary. The copy of the opinion of counsel letter will be filed at Docket No. M-00051865 F.0002 and will constitute constructive notice of the utility project or service that is the subject of the opinion. The Commission will publish public notice of the issuance of the letter in the *Pennsylvania Bulletin*. Opinion of counsel letters filed at the previous docket number will be available for public access upon request.

(3) The act of requesting an opinion of counsel letter may be considered as evidence of a good faith effort to operate in accordance with the law by the project developer of a utility project or service and may be considered as a mitigating factor in imposition of fines and penalties in future complaint proceedings alleging de facto public utility operations.

(4) A change in the nature or scope of the operation of the utility project or service may result in a change in the informal advice rendered by an opinion of counsel letter. When a change occurs in the facts stated in the request, a project developer may not rely on the existing Chief Counsel opinion letter but the project developer may request a supplemental Chief Counsel opinion letter.

(g) *Notice and disclosure statement.* A utility service provider or project developer may voluntarily file with the

Commission's Secretary a notice and disclosure statement describing the nature and scope of the operation of a utility project or service with an assertion of its nonpublic utility status.

(1) Information that will allow for a determination to be made as to the jurisdictional status of the utility project or service, including its location, capacity output and the projected number of customers served, should be provided in the notice and disclosure statement. The reasons that the utility project or service does not constitute a public utility facility or provide public utility service should be explained with reference to the criteria presented in this section.

(2) The notice and disclosure statement will be filed at Docket No. M-00051865 F.0002 and will be available for public access upon request. The Commission will publish public notice of the filing in the *Pennsylvania Bulletin*. The filed notice and disclosure statement will constitute constructive notice of the asserted nonpublic utility status of the utility project or service.

(3) The act of voluntarily filing a notice and disclosure of nonpublic utility status may be considered as evidence of a good faith effort to operate in accordance with the law by the project developer of a utility service or utility service provider and may be considered as a mitigating factor in imposition of fines and penalties in future complaint proceedings alleging de facto public utility operations.

(4) A notice and disclosure statement of nonpublic utility status may be amended to report a change in the nature or operation of the utility project or service that may affect its jurisdictional status. An amended notice and disclosure statement should be filed with the Commission's secretary as soon as practicable after a change takes place.

[Pa.B. Doc. No. 07-10. Filed for public inspection January 5, 2007, 9:00 a.m.]