

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

TESTIMONY OF
SONNY POPOWSKY
CONSUMER ADVOCATE OF PENNSYLVANIA

REGARDING
SPECIAL *EN BANC* HEARING ON ALTERNATIVE
ENERGY, ENERGY CONSERVATION AND
EFFICIENCY AND DEMAND SIDE RESPONSE
DOCKET NO. M-00061984

HARRISBURG, PENNSYLVANIA
NOVEMBER 19, 2008

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048 Office
(717) 783-7152 Fax
Email: spopowsky@paoca.org
Website: www.oca.state.pa.us
00106254.doc

Introduction

Chairman Cawley, Vice Chairman Christy, and members of the Commission, thank you for holding this important hearing, and thank you for permitting me to testify here today. First, I would like to echo the comments made by Chairman Cawley at the Commission's Public Meeting of October 9, 2008, immediately after the passage of House Bill 2200 by the General Assembly. As Chairman Cawley stated: "What a momentous day for Pennsylvania! Thanks to the Governor and the Legislature, demand-side resources will now be a true part of Pennsylvania's energy future."

I could not agree more. While we have talked about the benefits of conservation, energy efficiency, and other demand-side resources for as many years as I have been appearing before this Commission, House Bill 2200 – now Act 129 – represents by far the clearest statement of Pennsylvania law that our electric utilities must include these programs as part of a portfolio of resources to provide service to their customers at the least cost and with the least negative impact on the environment.

The Declarations of Policy in Act 129 are particularly instructive as the Commission embarks on the vital and difficult task of implementing all the provisions of the Act in a cost-effective and coordinated manner. The General Assembly specifically recognized the following:

- (1) The health, safety and prosperity of all citizens of this Commonwealth are inherently dependent upon the availability of adequate, reliable, affordable, efficient and environmentally sustainable electric service at the least cost, taking into account any benefits of price stability, over time and the impact on the environment.
- (2) It is in the public interest to adopt energy efficiency and conservation measures and to implement energy procurement requirements designed to ensure that electricity obtained reduces the possibility of electric price instability, promotes economic

growth and ensures affordable and available electric service to all residents.

Act 129 (Declaration of Policy). It is clear from the Declaration of Policy, and the provisions of Act 129, that the General Assembly intends for Pennsylvania's electric distribution companies to provide least cost service to their customers through a combination of supply-side and demand-side resources. It is no longer permissible for Pennsylvania electric utilities to accept their load demands as a given, and then serve those loads by acquiring generation at "prevailing market prices." Rather, the electric utilities must now take affirmative steps to reduce and shape their loads for the benefit of all customers, and to provide needed generation to their non-shopping customers at the least cost over time through a prudent mix of long-term, short-term and spot market purchases.

The current docket was opened long before the General Assembly passed Act 129, and many questions that were initially proposed for consideration at this Hearing have been answered, at least in part, by the passage of that law. Our utilities, for example, now have an explicit set of energy efficiency and peak demand reduction goals that they must meet by a date certain. An overall framework for Commission consideration of the utility plans to meet those goals has also been established by the legislation. Needless to say, however, many important procedural and substantive determinations are still left to the Commission, and the utilities themselves also have a significant degree of discretion in determining how best to meet those goals for the benefit of their customers.

Most importantly, and most urgently, this Commission is required by Section 2806.1(A) of Act 129 to "adopt an energy efficiency and conservation program" that must then be implemented by each of the major electric distribution companies in the Commonwealth. The Commission must adopt this Program by January 15, 2009.

The Office of Consumer Advocate (OCA) already has filed with the Commission, on November 3, 2008, a set of detailed Comments in response to a Secretarial Letter that requested guidance from all interested parties on a number of critical procedural and technical issues arising under Section 2806.1 of the new law. In addition, attached to this testimony is a set of brief OCA responses to the questions submitted in this docket by the Commission's Bureau of Conservation, Economics and Energy Planning (CEEP), recognizing that many of those questions are directed primarily to the electric distribution companies that will be required to implement the programs under this section of the law.

In the remainder of this testimony, I will identify and discuss certain major policy issues that I believe the Commission must address in the January 15, 2009 Program that will establish the framework under which the utilities themselves must develop their own conservation, energy efficiency and demand response plans. This discussion is not at all intended to be comprehensive, but rather is designed to identify certain issues on which Commission guidance would be particularly helpful at this stage of the proceedings. As previously noted, the OCA already has filed more detailed Comments on November 3, 2008, in response to the Commission's Secretarial Letter, and the OCA intends to participate fully (and hopefully, constructively) in the Act 129 Working Group that is expected to begin to meet in the next month.

Let me state at the outset, however, that I do not view this as an adversarial process, but rather as a cooperative process in which the OCA looks forward to working with the Commission, electric distribution companies, conservation service providers, community based organizations, and other interested stakeholders in developing and implementing conservation, energy efficiency, and demand response measures that will provide the greatest benefit to

Pennsylvania electricity consumers and to the economic well-being of the Commonwealth as a whole.

The Commission Should Establish a Workable Process to Permit Timely Consideration of the Commission's January 15, 2009 Program and the Individual Utilities' July 1, 2009 Plans.

There is no question that the Commission faces a daunting task under Section 2806.1(A) of Act 129 to adopt by January 15, 2009, an energy efficiency and conservation Program that explicitly addresses 11 criteria ranging from procedures and evaluation to competitive bidding and cost recovery. As noted above, the Commission has already issued a Secretarial Letter and has begun to assemble comments from interested stakeholders – including the OCA -- in order to address these criteria.

In its November 3 Comments in response to the Secretarial Letter, the OCA noted that the Commission has been assigned another major time-urgent task under this legislation. That is the requirement under Section 2806.1(C) to develop load forecasts for each utility for the one-year period from June 1, 2009 through May 31, 2010. This task is critical because, as discussed further below, it is against these “base year” forecasts that the success or failure of each utility’s usage reduction plans will be measured. While these forecasts themselves are not required to be included in the January 15, 2009 Program, the OCA submits that, as a practical matter, the forecasts must be completed and provided to the utilities, prior to the submission by the utilities of their July 1, 2009 Plans. Without those base year forecasts, it is not clear how the utilities can ensure that the energy efficiency and conservation measures contained in their Plans will meet the statutory requirements.

Given the complexity and the difficulty of the task of preparing load forecasts for all of our major utilities in such a compressed time frame, the OCA suggested in its November 3

Comments that the Commission may wish to retain the services of an outside expert consultant to assist the Commission and Commission Staff in this effort. The OCA would note in this regard that the General Assembly has specifically provided in Section 2806.1(H) that the costs incurred by the Commission in implementing the Act are to be recovered from the electric distribution companies. In this area in particular, the Commission should consider retaining an independent outside expert to assist the Commission and its Staff in timely developing the load forecast for each electric distribution company, and the Commission should recover these costs from the Companies.

Once the Commission adopts its Program, and commences work on its load forecasts, each utility will have until July 1, 2009, to submit its own Plan in accordance with Section 2806.1(B). The Commission then has 120 days to approve or disapprove each utility's Plan, after public hearings and the receipt of recommendations from the Office of Consumer Advocate, the Office of Small Business Advocate, and other members of the public. Act 129, Section 2806.1(E).

In light of these short time frames, the OCA submits that the utilities should work cooperatively with the statutory advocates, conservation service providers, community based organizations, and other interested parties in the initial development of the utility-specific plans. After the Plans are filed on July 1, 2009, there will be little time for any meaningful discovery by the OCA and other parties who will seek to comment on the Plan. Rather than create a wholly adversarial procedure in which parties must essentially litigate all their differences and obtain Commission rulings on a broad array of issues for multiple utilities within a 120-day timeframe, the OCA submits that the public interest would be better served if the utilities obtain input from interested parties throughout the planning process, rather than solely at the end of the process.

The OCA acknowledges that the statutory requirements of the legislation ultimately fall on the electric distribution companies and that those companies bear the final responsibility for the contents of their Plans. Nevertheless, the OCA submits that it is much more likely that the abbreviated process envisioned in the Act can be accomplished in a reasonable manner if interested parties have an opportunity to provide input into the development of the Plan before it is filed rather than simply be presented with a virtual fait accompli when the Plans are filed on July 1, 2009.

Finally, in this regard, the OCA has urged the Commission in its November 3 Comments to make it clear at the outset that any computer models or calculations that are relied upon by the utilities in developing their plans must be made available to the Commission Staff, the OCA, and other parties on a “live” basis, subject to appropriate proprietary protections. There is simply not enough time for every party to develop their own models or to recalculate every estimate utilized by the utilities in developing their comprehensive plans. The OCA is certainly willing to accept reasonable confidentiality restrictions on the use of any proprietary models, but parties should not be forced to accept the results produced by such models on faith, or be required to guess the basis on which the utilities’ calculations have been made.

The OCA has submitted a proposed timeline for the cooperative process envisioned here at pages 13-14 of its Comments filed on November 3, 2008. Again, the OCA looks forward to working with the Commission, the electric distribution companies, and all interested parties in seeking to ensure the successful implementation of these provisions of Act 129.

The Commission Should Clarify the Manner In Which the Energy Usage Reduction Goals of Act 129 Will Be Measured.

Section 2806.1 (C) (1) states that: “By May 31, 2011, total annual weather-normalized consumption of the retail customers of each electric distribution company shall be reduced by a minimum of 1%.” The provision goes on to state that this “1% load reduction shall be measured against the electric distribution company’s expected load as forecasted by the Commission for June 1, 2009, through May 31, 2010, with provisions made for weather adjustments and extraordinary loads that the electric distribution company must serve.” Section 2806 (C)(2) contains the same general requirements, but states that, by May 31, 2013, the electric distribution company’s annual weather-normalized consumption “shall be reduced by a minimum of 3%.”

Based on the OCA’s review of the Comments filed by various parties on November 3, 2008, it appears that this provision has been interpreted in two different ways that can produce two very different results. Under one interpretation, a utility would comply with the first provision noted above if its Plan produces energy savings in the year ending May 31, 2011, that are equal to at least 1% of the energy load forecast by the Commission for the year ending May 31, 2010; and the utility would meet the second provision if the Plan produces energy savings in the year ending May 31, 2013, that are equal to at least 3% of the energy load in the base year forecast. In other words, even if a utility’s weather-normalized load increases from year to year due to load growth, the utility would still comply with the law as long as it implements energy efficiency and conservation measures that provide energy savings equal to 1% of the base year load in 2011 and 3% of the base year load in 2013.

An alternative interpretation of the Act is that these provisions require absolute reductions in energy usage below the base year forecast. Under that interpretation, the Act requires an overall reduction in weather-normalized energy consumption for each company’s

customers of 1% in the year ending May 31, 2011 and 3% in the year ending May 31, 2013, as compared to the weather-normalized usage that is forecast by the Commission for the year ending May 31, 2010. The only exception to this requirement would be for “extraordinary loads” that might arise during the applicable period. Under this interpretation of Act 129, a utility’s energy efficiency and conservation programs will therefore be required to offset any load growth that might occur under a “business as usual” scenario **AND** reduce annual energy usage by 1% below the 2009-2010 base year levels by May 31, 2011 and by 3% by May 31, 2013.

These differing interpretations produce dramatically different results in terms of the scope of the load reductions that the utilities would be called upon to meet. Given the importance of this decision, the OCA would urge the Commission to resolve this issue as soon as possible, and no later than its January 15, 2009, Program Order. Once the Commission sets forth its interpretation of this fundamental question, the electric distribution utilities will be in a position to develop the programs needed to meet the appropriate goal.

The Commission Must Also Clarify How It Intends to Measure Peak Load Reductions Under the Act.

In addition to the energy reductions set forth in Section 2806.1(C), Act 129 also contains an explicit requirement for an even greater percentage reduction in peak demand. Specifically, Section 2806.1(D) states that “By May 31, 2013, the weather-normalized demand of the retail customers of each electric distribution company shall be reduced by a minimum of 4.5% of annual system peak demand in the 100 hours of highest demand.” With respect to peak load reductions, this provision states that the reduction “shall be measured against the electric distribution company’s peak demand for June 1, 2007, through May 31, 2008.”

This provision also raises certain questions. First, while we can now determine the highest 100 hours of peak demand for each utility in the June 2007-May 2008 period, it is virtually certain that these 100 hours will not be the same hours in which peak demands will occur during the year ending May 31, 2013. Rather than try to track peak loads in individual hours, the OCA submits that the most reasonable way to implement this provision is to calculate the **average** demands of each utility for the highest 100 peak hours in the base year.

Again, however, the question arises in this provision whether the General Assembly is requiring an absolute reduction in peak demand from historic levels, or rather a 4.5% reduction from 2013 peak demands that includes normal load growth. In other words, does the Act require the utility to implement programs that will both offset any projected peak load growth during this period **and** reduce peak load below existing levels by at least 4.5%. The OCA urges the Commission to set forth its interpretation of this provision no later than its January 15 Order establishing the overall energy efficiency and demand response program.

The Commission Should State Whether Penalties For Failure To Meet The Energy and Demand Reductions Are Mandatory.

Section 2806.1(F)(2)(i) states that an electric distribution company “shall be subject to a civil penalty not less than \$1,000,000 and not to exceed \$20,000,000 for failure to achieve the required reductions” under Subsections C and D of the Act. These penalties may not be recovered from ratepayers. Id. In addition, Section 2806.1(F)(2)(ii) states that if the electric distribution company fails to achieve the required reductions, “responsibility to achieve the reductions shall be transferred to the Commission.”

While it is the sincere hope of the OCA that these penalty provisions never come in to play, the OCA submits that these penalties are mandatory in the event that the requirements of the Act are not met. That is, the Act uses the word “shall” rather than “may”, when it refers to these penalties.

The OCA would quickly note, however, that there is a substantial difference between the minimum and maximum monetary penalties under the Act and that the Commission therefore has great discretion as to the scope of any penalty. In determining the level of the penalty required under the Act, the Commission may consider the extent to which the Company exerted the utmost good faith effort to meet the goals of the Act and the extent to which the failure to achieve the goals were a result of events or actions that were wholly beyond the utility’s control.

It should be noted that the penalty provisions of this section of the Act are not ongoing, or daily, or even annual penalties. They are one-time penalties for each of the three mandated load reduction targets – the energy reduction requirements in 2011 and 2013, and the peak load reduction requirement in 2013. The total penalties for failing to meet all three of these provisions therefore could be as low as \$3 million. If those penalties are incurred, as noted above, further responsibility for implementing the program is shifted to the Commission.

Again, the OCA certainly hopes that the Commission never has to reach this issue, as the benefits of a successful load reduction program to consumers and to the Commonwealth far exceed any benefit that would be produced by the imposition of these fines. The OCA looks forward to working with the Commission and the utilities to seek to ensure that the Commission Program and individual utility Plans are successful in meeting the goals of Act 129.

Answers to CEEP Questions

The OCA answers to the specific questions presented by CEEP are attached to this testimony as Appendix A.

Conclusion

I would again like to thank the Commission for permitting me to testify at this hearing. I have only touched on a few of the myriad of issues that the Commission will have to address over the next year, but the OCA stands ready to work with the Commission, the utilities and all parties to seek to ensure that the promises of consumer benefits contained in these provisions of Act 129 become a reality.

106254.doc

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPENDIX A
TO THE
TESTIMONY OF
SONNY POPOWSKY
CONSUMER ADVOCATE OF PENNSYLVANIA

REGARDING
SPECIAL *EN BANC* HEARING ON ALTERNATIVE
ENERGY, ENERGY CONSERVATION AND
EFFICIENCY AND DEMAND SIDE RESPONSE
DOCKET NO. M-00061984

HARRISBURG, PENNSYLVANIA
NOVEMBER 19, 2008