

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Implementation of the Alternative	:	
Energy Portfolio Standards Act of	:	
2004: Standards and Processes for	:	Docket No. M-00051865
Alternative Energy System	:	
Qualification and Alternative Energy	:	
Credit Certification.	:	

**UNITED STATES STEEL CORPORATION'S
COMMENTS TO TENTATIVE ORDER.**

United States Steel Corporation ("US Steel") files these comments in response to the Public Utility Commission's ("Commission's") above captioned Tentative Order entered at this docket on January 31, 2006. These comments address the issues concerning alternative energy system qualification and credit certification under the Alternative Energy Portfolio Standards Act of 2004 ("Act 213"), 73 P.S. §§ 1648.1-1648.8. US Steel's Mon Valley Works is one of the largest consumers of energy in Pennsylvania and model energy conservation and recycling initiatives are currently employed at that site. US Steel has previously filed comments in Docket M-00051865 and participated as a member of the Commission's demand side management/energy efficiency working group. US Steel's Mon Valley Works has been issued an interim qualification as an alternative energy system under Act 213 by the Commission and Pennsylvania Department of Environmental Protection ("DEP") in January 2006. US Steel provides the following comments concerning tentative determinations identified in the January 31, 2006 Order.

I. The Tentative Order correctly determines that the Commission has principal responsibility to implement and enforce Act 213.

The Tentative Order identifies the Commission as the agency with principal responsibility to implement Act 213. The order determines that Section 1648.3(e) authorizes the Commission to promulgate regulations establishing standards and processes for resource qualification and alternative energy credit creation. (Order at page 6). US Steel submits that the Tentative Order correctly interprets Act 213 in determining that the Commission has principal responsibility to implement and enforce Act. Sections 1648.7(a) and (b) provide the Commission with the authority to certify alternative energy sources with some assistance of the DEP. The specific identifications of the duties and responsibilities of the alternative energy credits program administrator in Section 1648.3(e) indicates that the Commission is to have primary responsibility for implementing the Act by regulation and enforcing its provisions. DEP responsibility is secondary and limited. The Commission should include this determination in its final order

II. DEP certifications on environmental compliance and energy processes should be subject to responsive comment by Applicants requesting alternative energy source qualification.

Section 1648.7(b) requires DEP to ensure that all qualified energy sources meet applicable environmental standards and verify that the source meets the energy source standards contained in the Act 213 definitions. The Tentative Order states that DEP will make findings on these issues and certify them to the credit program administrator for use in his determination of whether a facility will be qualified as an alternative energy

source. The Order proposes that the Administrator would be bound by DEP's findings of fact or law on a particular application in its initial determination. (Order page 10). US Steel believes that this tentative conclusion could result in a violation of an applicant's due process rights to respond to evidence concerning its application for certification. The Commission should amend this conclusion in its Final Order to permit Applicant to respond to DEP's certification and for the Administrator to make an independent determination on the application.

Due process requires that the applicant for certification should have an opportunity to respond to the DEP certifications before they are applied by the program administrator. The DEP should be required to serve its certified findings on the applicant who then should be provided an opportunity to respond by comment and evidence if necessary. The administrator should be free to make his own evaluation of the DEP certifications and to reach an independent conclusion on the application. Section 1648.3(e)(2)(i) specifically provides the Administrator with authority to qualify alternative energy systems. Since the DEP certifications are presented as evidence concerning the requested alternative energy source qualification, the applicant should be permitted all due process opportunities to address the evidence on its application and the administrator should be free to act as an independent fact finder on all of the issues.

III. Revocation of alternative energy resource qualifications for environmental reasons are subject to due process requirements and must be reasonably applied.

The Tentative Order provides that compliance with environmental regulations is a condition for the grant of alternative energy system status under the Act. Failure to

maintain compliance with applicable environmental laws would therefore lead to a loss of qualified status for a facility. (Order page 11). US Steel submits that the power to revoke alternative energy system status for environmental compliance reasons is subject to due process requirements and should be reasonably applied. Review of environmental compliance issues should be closely related to the purposes of Act 213. Unrelated environmental violations should not provide a basis for revocation of a facility's alternative energy resource qualification. Revocations for environmental compliance issues should be subject to the following limitations.

A. Loss of qualified status for environmental compliance issues must be tied to violations directly related to the operation of the alternative energy system.

The Order tentatively finds that compliance with environmental regulations is a condition for the grant of alternative energy system status and that the failure to maintain compliance with applicable environmental laws will lead to a loss of qualified status for a facility. (Order at page 11). US Steel submits that the Commission should clarify this tentative finding in its Final Order to state that for a facility to lose its qualified status as a result of an environmental violation, the violation must be directly related to the operation of the alternative energy facility. Section 1648.7(b) provides that “[t]he department shall ensure that all qualified energy sources meet all applicable environmental standards and shall verify that an alternative energy source meets the standards set forth in Section 2.” This section clearly applies to the qualified alternative energy sources meeting the applicable environmental standards. Any revocations of qualifying status for environmental compliance violations should be tied directly to violations by the applicant's facility which has been qualified as an alternative energy

source. This distinction is important for industrial customers whose qualified alternative energy source may be located at a site with other facilities subject to environmental standards or requirements whose operation or status is not directly related to the production of alternative energy as that term is defined in the Act. An interpretation which would revoke a facility's alternative energy status because of an unrelated environmental violation at the site is unfair to industrial alternative energy producers and inconsistent with the purpose of the Act. US Steel submits that Act 213's purpose is to encourage the development and production of alternative energy in Pennsylvania. There is no language in the Act which would support a conclusion that it is also intended to provide DEP with another tool for general environmental compliance unrelated to alternative energy production. US Steel therefore submits that the Commission should clarify this tentative determination on the scope of environmental compliance in its Final Order.

B. Any threatened loss of alternative energy system certification for an environmental reason requires the Commission to provide the facility with a due process opportunity to contest the proposed revocation beforehand.

Revocation of an alternative energy system certification constitutes an adjudication under Act 213 which requires the due process protections of an opportunity to be heard before the revocation is effective. US Steel submits that any proposed revocation should be the subject of a complaint by the Commission naming the alternative energy provider as the respondent with a complete description of the alleged environmental violation. US Steel submits that the provider should have a full opportunity to respond to the complaint with evidence prior to a final action of the Commission.

C. Alternative energy system certification should be restored to the facility upon resolving the environmental issue without requiring the facility to go through the complete recertification process.

US Steel submits that the alternative energy system certification which has been suspended or revoked because of an environmental compliance issue should be restored upon resolving that issue without requiring the facility to go through a complete recertification process. If the environmental compliance issue can be resolved in a short period, it would be contrary to the public interest to delay the restoration of the certification for an extended period while the facility is recertified. If the alternative energy credits are not available because of a lack of certification, the operator may not operate the facility while the certification is not in place. Since Act 213 is designed to encourage the production of alternative energy in Pennsylvania, it is consistent with that purpose that certifications should be restored to a facility directly upon resolving the environmental issue without a lengthy complete recertification process.

IV. Procedures for approval of alternative energy system qualifications should be straightforward and not subject to appeal or protest for competitive reasons.

The Tentative order provides that the Program Administrator would render a decision on the alternative energy system qualification in a paper proceeding involving the application and supporting documentation. Notice of the application would be provided to the public. The Administrator's decision would be subject to appeal and review by the Commission which could decide the challenge or refer the matter to an ALJ for hearing as necessary. The Commission's decision could be appealed to the Commonwealth Court. (Order page 12). US Steel submits that the procedures for the approval of alternative energy system qualifications should be straightforward and not

subject to protests or appeals for competitive reasons. The Commission should adopt the following principles in establishing this procedure.

- A. Ability of third parties to oppose applications should be restricted. Protests or interventions based on competitive issues should not be permitted.**

US Steel agrees that notice should be provided to the public of an application for alternative energy system qualification. The ability of third parties to oppose applications, however, should be restricted and not permitted if they are based on competitive issues alone. US Steel submits that it would be inconsistent with the purposes of Act 213 to allow alternative energy system qualification proceedings to be subject to protest and litigation before an ALJ for competitive issues. Specifically, a third party should not be allowed to protest or appeal to the Commission a qualification simply because it has a competitive interest as another qualified alternative energy system. In the Commission's order implementing the Telecommunications Act of 1996¹, the Commission limited the ability of a third party to protest the applications of new market entrants on the basis that it was inconsistent with the Telecommunications Act's prohibition against market entry barriers. US Steel submits that a similar reasoning should apply here. Protests or appeals by third parties should be strictly limited to the issues identified in the requirements of the Act 213 qualification process and should not provide third parties an ability to protest or appeal applications solely for competitive reasons.

¹ In re: Implementation of Telecommunications Act of 1996, Docket No. M-00960799 (Order entered June 3, 1996).

B. Applicants should have a right to respond to any evidence submitted by the DEP or an intervening party prior to the administrator's decision.

Since qualification as an alternative energy system is an adjudication under Act 213, applicants should have a right to respond to any evidence submitted by the DEP or any intervening party prior to the Administrator's decision. Since the applicant has the burden of proof to establish that it qualifies as an alternative energy system, it must have the ability to respond to any evidence submitted by a third party concerning the application.

C. The Program Administrator should have the power to make an independent decision on the alternative energy system qualification application and materials before her.

Section 1648.3(e)(2)(i) provides that the alternative energy credits Program Administrator has authority to administer the process for qualifying alternative energy systems. US Steel submits that this section provides the administrator with the power to make independent decisions on alternative energy system qualifications based on the application and the materials before her. The authority to make this determination is clearly placed by Act 213 in the Administrator. DEP certifications on environmental compliance and fuel source issues should be received as evidence but not binding on the Administrator's determinations on these issues. As explained above, due process requires that the applicant have an opportunity to provide responsive comments and possibly evidence in response to the DEP certifications or other evidence submitted by third parties.

V. Revocation of a facility's alternative energy system qualification must be subject to due process requirements.

The Tentative Order proposes that a facility could lose alternative energy system status as a result of failing to file forms to the DEP or because of a material adverse change in its operations. (Order at page 13). US Steel submits that decisions concerning the maintenance of a project's alternative energy system qualification amounts to an adjudication which is subject to all due process protections. All decisions concerning the status of a facility as an alternative energy system should be made by the Administrator and the Commission. Due process opportunities should be provided prior to revoking an alternative energy system status either by the filing of a complaint by the Administrator or Commission alleging the failure to file forms or maintain facility integrity with an opportunity for response and hearing if necessary before the facility's qualification is terminated.

VI. All alternative energy system qualification standards adopted by the Commission should be contained in regulations subject to the procedures of the Regulatory Review Act and the Commonwealth Documents Law.

The fuel source standards for energy system qualification are defined in Section 2 of Act 213. The Tentative Order proposes to incorporate the DEP draft technical guidelines for the fuel source requirement into the Commission's Act 213 regulations. (Order page 14). US Steel submits that the DEP draft technical guidelines should be subject to comment by interested parties either as DEP regulations or as part of Commission's Act 213 rulemaking. DEP intends the guidelines to be binding norms of general application which are in the nature of regulations and subject to the Regulatory Review Act and the Commonwealth Documents Law.

To the best of US Steel's knowledge, the DEP draft technical guidelines for fuel source requirements have not been published as proposed regulations in the Pennsylvania Bulletin. Since the guidelines are designed to be a binding norm legislative in nature, they should be promulgated as a regulation under the Regulatory Review Act, Act of June 25, 1982. P.L. 633, as amended, 71, P.S. §§ 745.1-745.15 and the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, as amended, 45 P.S. §§ 1102-1208. The Commonwealth Court has previously recognized that binding requirements which are legislative in nature and designed to be of general application must be promulgated as regulations to be enforceable. See Bell Atlantic-Pennsylvania Inc. v. Pennsylvania Public Utility Commission, 763 A.2d 440, 467 (Pa. Commonwealth Ct. 2000). US Steel submits that the DEP draft technical guidelines should be issued as regulations either by the DEP or as part of the Commission's Act 213 rulemaking.

VII. DEP should not promulgate new health and safety standards for facilities generating electricity from alternative energy sources.

Section 1648.6 of the Act requires DEP to establish reasonable health and safety standards for owners and operators of facilities generating electricity from alternative energy sources. The tentative order requests comments on whether the DEP, as part of the alternative energy source qualification procedures, must examine health and safety standards at the facility prior to issuing an alternative energy source certification. (Order pages 24-5).

US Steel submits that the Department of Labor and Industry has primary jurisdiction over developing health and safety standards for workers at industrial facilities such as alternative energy sources. Promulgation of new standards by DEP

would be duplicative and unnecessary. Compliance with this section could be satisfied by having the DEP require applicants to certify that they are in compliance with all Department of Labor and Industry worker safety requirements. Any additional actions by DEP are duplicative and unnecessary to comply with the Act.

US Steel appreciates the opportunity to have provided these comments in response to the Commission's Tentative Order.

WHEREFORE, United States Steel Corporation respectfully requests the Commission to consider these comments in adopting final standards and processes for alternative energy system qualification and alternative energy credit certification.

Respectfully submitted,

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