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George D. Bedwick
 Chairman
 Independent Regulatory Review Commission
 333 Market Street, 14th Floor
 Harrisburg, PA 17101

May 6, 2016

Re: ID Number 57-304
 PUC Docket No. L-2014-2404361

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IRRC

Dear Chairman Bedwick,

The Pennsylvania Public Utility Commission (“PUC”) has recently finalized changes to the implementation of the Alternative Energy Portfolio Standards Act of 2004 (“AEPS Act”). After reviewing this proposed amendment to the regulations, a coalition of interested stakeholders including Citizens for Pennsylvania’s Future (“PennFuture”), Clean Air Council, Reinvestment Fund, Mid-Atlantic Renewable Energy Association, Sierra Club, Environmental Defense Fund, Solar Unified Network of Western Pennsylvania, Environmental Entrepreneurs, and the Pennsylvania Solar Energy Industries Association, (hereinafter “Solar Energy and Environmental Advocates”) strongly oppose this rulemaking.

As set forth in the attached documents, we reviewed the PUC’s Regulatory Analysis Form (“RAF”) and concluded that that the PUC has failed to establish it has the statutory authority to make the changes to the rule. We further conclude that the changes introduce confusing and unworkable standards that will cause particular difficulty for small businesses and individuals who seek to generate their own clean energy. We urge the Independent Regulatory Review Commission (“IRRC”) to disapprove of this regulation because it is not in the public interest.

Sincerely,



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encl: Comments of Solar Energy and Environmental Advocates in Opposition to PUC's
Revisions to the AEPS Act

Comments of Solar Energy and Environmental Advocates in Opposition to PUC's Revisions to the AEPS Act

As shown by the following analysis, the final order promulgated by the Pennsylvania Public Utility Commission ("PUC") on February 11, 2016 (the "Final Order"), revising 25 Pa. Code § 75.1 – 75.72 (the "Regulation") fails to meet the criteria established under the Regulatory Review Act.¹ For these reasons, we urge the Independent Regulatory Review Commission ("IRRC") to disapprove of this regulation.

I. The PUC does not have the statutory authority to promulgate the regulation

A. The PUC lacks the authority to limit the size of renewable energy systems beyond what the Legislature established in the Alternative Energy Portfolio Standards Act ("AEPS Act").

We agree with PUC Chairman Gladys Brown's assessment that "because the AEPS Act very precisely provides that customer generators may size up to 50 kilowatts ("kW") for residential systems and up to 3 or 5 megawatts ("MW") for non-residential systems, this Commission commits a legal error by imposing a different size limitation."²

The term "customer generator" is defined by the AEPS Act³ as "A nonutility owner or operator of a net metered distributed generation system with a nameplate capacity of not greater than 50 kilowatts if installed at a residential service or not larger than 3,000 kilowatts at other customer service locations..."⁴ with certain exceptions for allowing larger systems up to 5MW. The PUC attempts to restrict installations beyond what was intended by the General Assembly by considering residential and business customers to be utilities unless they qualify for an exemption by designing their alternative energy system to produce no more than 200% of their annual electric consumption.⁵

¹ 71 P.S. 745.5b.

² Statement of Chairman Gladys M. Brown, (Feb. 11, 2016).

³ Act 213 of 2004 as amended by Act 35 of 2007.

⁴ 73 P.S. § 1648.2 regarding "customer generator".

⁵ 52 Pa. Code § 75.1 (final rule).

The Statutory Construction Act establishes that “[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.”⁶ To determine this intent, one of the factors to be considered is the object to be attained.⁷ Testimony in the current docket has established that “the General Assembly believed as a matter of public policy that the Commonwealth should encourage the development of sources of energy that utilize renewable fuels.”⁸ This is further confirmed by contemporaneous testimony that the AEPS Act was viewed as “a good start to encouraging use of and investment in renewable energy”⁹ and that “developing reliable, affordable, and clean energy is an investment that also pays tremendous dividends in the local economy.”¹⁰ The PUC’s action to restrict and discourage the deployment of renewable energy is contrary to this intent.

The PUC attempts to justify its newly-added restrictions on the size of systems by claiming “it ensures that the customer generator is not *acting like a utility or merchant generator*...”¹¹ This is not the appropriate standard. The unambiguous plain language of the AEPS Act is that the customer generator be a “nonutility.” Courts have repeatedly held that “[w]hen interpreting provisions of the Public Utility Code, and the language of the statute is clear and unambiguous, a court need go no further to discern the legislature’s intent.”¹² While the PUC states that it believes its interpretation “captures the intent of the AEPS Act,”¹³ its arbitrary expansion of the definition of utility is directly contrary to the expressed intent of the Legislature¹⁴ and also violates the Statutory Construction Act’s requirement that “[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”¹⁵

The PUC claims to find authority to add these restrictions in the provisions of the Public Utility Code arguing its “general administrative power and authority to supervise and regulate all public utilities”¹⁶ compels it to “balance the benefits” between net-metered customers and public utilities. This is a circular argument—the PUC claims its authority regarding regulation of public utilities so broad it may redefine the term “utility” itself and thus what falls under its “general administrative power and authority.” This rationale provides no practical limit on the

⁶ 1 PA.C.S. § 1921(a).

⁷ § 1921(c).

⁸ Comments of Representatives Fee, Hickernell, Denlinger, Cutler, Aumet, Mentzer, and Greiner, PUC Docket No. L-2014-2404361 (August 21, 2014).

⁹ Testimony of Rep. Rubley, Pennsylvania House Journal, 2257 (Nov. 20, 2004).

¹⁰ *Id.*

¹¹ Final Rulemaking Order at 38. *Emphasis added.*

¹² *Elite Industries v. PUC*, 832 A.2d 428, 431 (Pa. 2003).

¹³ *Id.*

¹⁴ *Supra* n.8 – n.10.

¹⁵ 1 PA.C.S. § 1921(b).

¹⁶ Final Rulemaking Order at 45.

PUC's authority and violates the principle "that the power and authority exercised by administrative agencies must be conferred by legislative language that is clear and unmistakable."¹⁷

Even if the general administrative power and authority of the PUC were interpreted to allow it to expand the legal definition of what is considered a utility, the PUC would still lack the authority to promulgate additional restrictions on the size of facilities. Pennsylvania's Statutory Construction Act specifies that "Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute...the special provisions shall prevail and shall be construed as an exception to the general provision."¹⁸ Here therefore, the specific size limitations set by the Legislature must prevail over limits based on any pre-existing general authority of the PUC.

B. The PUC's use of the terminology "oversized customer generators" presumes the existence of a standard not found in the statute.

In Block 10 of the RAF, the PUC relates several claims made by some Electric Distribution Companies ("EDCs") about payments to what it characterizes using the pejorative term "oversized customer generators." Assuming the alleged facts are true, and if those generators are indeed oversized according to the statutory size limits set by the Legislature, adding additional limits to the regulation is unnecessary. If those generators are following the law, they are simply "customer generators" under the statute and the PUC lacks the authority to substitute its judgment for that of the Legislature by creating additional limitations.

C. The approval of new fees on customer generators that do not apply to other customers within a rate class is not permissible.

The PUC's "full ratemaking authority"¹⁹ to set utility rates does not relieve it of the specific statutory requirement that customer generators receive the "full retail value" for electricity they provide.²⁰ While the AEPS Act does not define "full retail value," the PUC has used the market

¹⁷ *Cmmw. v. Beam*, 788 A2.d 357, 359 (Pa. 2002).

¹⁸ 1 PA.C.S. § 1933.

¹⁹ *See*: Final Order at 78 citing 66 Pa.C.S. § 1301.

²⁰ 73 P.S. § 1648.5.

price of electricity as a surrogate.²¹ The PUC took this approach in the regulation guaranteeing customer generators receive the “full retail rate” and specified:

“[it] shall include generation, transmission and distribution charges...up to the total amount of electricity used by that customer during the billing period” with excess generation “carried forward and credited against the customer generator’s usage in subsequent billing periods at the full retail rate” and then, “[a]t the end of each year, the EDC shall compensate the customer generator for any excess kilowatt-hours generated by the customer generator over the amount of kilowatt hours delivered by the EDC during the same year at the EDC’s price to compare.”²²

The regulations further tie value to the retail rate specifying that “[a]n EDC shall provide net metering at nondiscriminatory rates identical with respect to rate structure, retail rate components and any monthly charges to the rates charged to other customers that are not customer generators.”²³ And that, “[a]n EDC may not charge a customer generator a fee or other type of charge unless the fee or charge would apply to other customers that are not customer generators.”²⁴ We agree with this interpretation that “full retail rate” is an appropriate surrogate for “full retail value.”

The Final Order is problematic in that the PUC includes several justifications for raising rates on customer generators without clarifying that the PUC must ensure such customers continue to receive the full-retail value for any excess generation. For example, the PUC claims that ratemaking proceedings may reveal “intra- or inter-class subsidies that require changes in the fees imposed on specific customer classes.”²⁵ While the PUC has a general responsibility to ensure that rates remain “just and reasonable,”²⁶ it has been established that “[t]he statutory requirement that utility rates be just and reasonable does not authorize the Commission to ignore or alter other statutory directives.”²⁷ As the legislature specifically required that customer generators receive the full retail value for generation, as opposed to the Locational Marginal Price, it was clearly the intent of the legislature to create an “intra- or inter-class subsidy” encouraging installation of alternative sources of generation. The PUC lacks the power to substitute its judgment for that of the legislature and remove or weaken such an inducement.

²¹ See generally: *Moffett Estate*, 369 Pa. 159, 163 (Pa. 1952).

²² 52 Pa. Code § 75.13 (c), (d).

²³ § 75.13(j).

²⁴ § 75.13(k).

²⁵ Final Order at 78.

²⁶ 66 PA C.S. § 1301.

²⁷ *Dauphin Cnty. Indus. v. PUC*, 123 A. 3d 1124, 1135. (Pa Cmmw., 2015).

The PUC also suggests that language in 53 Pa. Code § 75.14(e), making customer generators responsible for incremental expenses associated with virtual meter aggregation,²⁸ justifies a claim of broad authority to set fees. This is not the case. If there were an actual conflict with the statutory requirement that customers receive the full retail value for the energy they generate, the statute would prevail. In this case, there is no conflict. In cases of virtual meter aggregation, a customer has at least two accounts and could elect to net-meter his or her generation in the standard manner on the account to which the alternative energy system is attached, thus receiving the full retail rate as described above. When, however, the customer chooses to aggregate the accounts in a non-standard manner, it is reasonable that the customer pay for such a service and be liable for incremental administrative expenses “entailed in processing his account on a virtual meter aggregation basis.”²⁹

D. The PUC’s attempt to require an independent load for virtual meter aggregation is an impermissible interpretation of the AEPS.

The AEPS provides that “[v]irtual meter aggregation on properties owned or leased and operated by a customer generator and located within two miles of the boundaries of the customer generator's property and within a single electric distribution company's service territory *shall be eligible for net metering*.”³⁰ The PUC adds an additional condition not found in the statute saying that each of the meters involved in such aggregation must have “an electric load, independent of the alternative energy system.”³¹

The PUC claims that “[w]ithout independent electric load, there would be no establishment of a retail electric customer at a residential or other electric service location.”³² In other words, according to the PUC if one does not have an independent electric load on each meter, the individual is not a customer with respect to each meter and, therefore, cannot be a customer generator. This is an impermissible construction of the term “customer.”

Pennsylvania’s Statutory Construction Act governs the interpretation of words and phrases and requires “[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition.”³³

²⁸ Final Order at 73.

²⁹ 52 Pa. Code § 75.14(e).

³⁰ 73 P.S. § 1648.2.

³¹ Annex A. § 75.13(a).

³² Final Order at 32.

³³ 1 Pa.C.S. § 1903(a).

In common usage, an individual who purchases goods and services from one register within a store or one location of a retail chain such as Wal-Mart, Home Depot, or Best Buy, is considered a customer of that chain. They can receive support for, return, or exchange products they purchased at any other location. To the extent that an electric meter is analogous to a retail service location, an individual is similarly a customer of a utility if he or she takes service at any location as opposed to all possible locations.

Also, if an individual has a contract with Verizon, AT&T, or another cellular carrier, that person can have multiple phones on his or her account. Once they sign the contract and begin taking service, they are considered a customer. Such companies do not assume that individuals are not customers with respect to each individual phone until they have actually made or received a call on that phone. Because an electric meter is point of delivery for a service, much like a cellular phone, once again common usage does not suggest an “individual load” requirement—only the capacity to receive service. The Pennsylvania Supreme Court has further echoed this usage noting that “although a single exchange can qualify one as a ‘customer’, the word connotes at least a *capacity to regularly engage in transactions*.”³⁴

Assuming that “customer” in this case is a technical term, we must look instead to its interpretation in a technical context. In PPL’s tariff, for example, the supply of basic utility supply service “referred to in [PPL’s] rules, rate schedules and in contracts with customers means *readiness and ability of the Company to provide electric capacity*.”³⁵ In this case PPL considers it is supplying services once it has the ability to provide capacity, whether or not it actually provides electricity. Duquesne Light takes a similar approach defining customer to include “[a] retail electric customer or *potential customer of retail electricity service*.”³⁶ Met Ed, takes a different approach and requires that someone take delivery service to be a customer, but it specifically defines customer to include “who occupies or is the ratepayer for *any* premises, building, structure, etc.”³⁷, thus fitting with the common usage of the term that service need not be provided at every possible location to be a customer.

The PUC also claims to find legislative intent for its independent load requirement in the language in the AEPS requiring it to “develop technical and net metering interconnection rules for customer generators intending to operate renewable *onsite generators* in parallel with the grid.” (PUC’s emphasis)³⁸ The discussion that follows this claim in the Final Order focuses on

³⁴ *Matthews v. Konieczny*, 515 Pa. 106, 116, (Pa. 1987).

³⁵ PPL Electric Utilities Corp. Electric P.U.C. No. 201, General Tariff, Rule 1(B)(1). *Emphasis added*.

³⁶ Duquesne Light Co. Electric P.U.C. NO. 24, Electric Service Tariff, pg. 7.

³⁷ Metropolitan Edison Co. Electric P.U.C. No. 52, pg. 14. *Emphasis added*.

³⁸ Final Order at 33, citing 73 P.S. § 1648.5.

the difference between “virtual net metering” and “virtual meter aggregation.” The PUC does not explain how a requirement that generators be “onsite” leads to a requirement for an independent load. Once again, this fails to meet the established standard “that the power and authority exercised by administrative agencies must be conferred by legislative language that is clear and unmistakable.”³⁹

II. The regulation is inconsistent with the intent of the General Assembly

A. The Legislature did not intend to give the PUC authority to rewrite provisions of the AEPS as a tool to control electricity rates.

Implicit in the PUC’s analysis of the need for this regulation is the claim that if it is not permitted to make the requested changes, electricity rates for consumers will raise significantly.

The Legislature was aware of the risk that unintended consequences following implementation of the AEPS Act could result in higher electricity rates. In one case, it responded to the risk that insufficient alternative energy resources would drive up the cost of renewable energy credits by inserting a *force majeure* provision allowing the PUC to “modify the underlying obligation of the electric distribution company or electric generation supplier or recommend to the General Assembly that the underlying obligation be eliminated.”⁴⁰ The Legislature could have delegated more authority to the PUC by making the scope of the *force majeure* provision more broad or including a similar provision allowing the PUC to modify obligations regarding net metering, but it chose not to in spite of having opportunities to amend the Act prior to its passage in 2004 and once again during the process of amending the Act in 2007. Our courts have consistently rejected attempts to “usurp the legislative powers and declare an additional exception which the Legislature has not seen fit to declare.”⁴¹

The fact that the Legislature intended to reserve such powers to itself was further established during the floor debate in the House of Representatives when the following exchange occurred:⁴²

Mr. BOYD. “.... from a legislative standpoint, we can always go back and review these numbers, and if in fact what we see occurring is that the net effect on rates is an

³⁹ *Cmmw. v. Beam*, 788 A2.d 357, 359 (Pa. 2002).

⁴⁰ 73 P.S. § 1648.2.

⁴¹ *Delaware River Port Auth. v. PA. PUC*, 393 Pa. 639, 648 (Pa. 1958).

⁴² Testimony of Reps. Boyd and Ross, Pennsylvania House Journal, 2256 (Nov. 20, 2004).

increase, we have the ability legislatively to roll back some of these requirements. True?”

Mr. ROSS. “Yes, Mr. Speaker. If there seems to be a very substantial problem out there, we obviously can intervene on our own.”

B. The General Assembly Clearly intended to use market-based means to encourage alternative generation.

Because the AEPS guarantees that customers receive the “full retail value” for excess electricity generated,⁴³ the express language specifies customer generators are to be compensated at the retail value rather than wholesale cost of generation. This clearly signals the legislative intent of AEPS was to encourage the installation of more renewable energy generation. Using market-based methods to achieve this goal is a perfectly reasonable policy choice.

The PUC refers to this difference as a “premium” paid to customer generators and seeks to “balance the benefits”⁴⁴ between those generators and the EDCs. We note that if there were no “premium” there would be no incentive to install alternative generation and the legislative intent would be frustrated.

III. The regulation is not in the public interest

A. The PUC’s claims regarding the “premium” allegedly paid to customer generators significantly overstates any actual premium.

The PUC claims that the generation is resulting in default rate customers paying above-market rates at “an approximate 40% premium for the excess energy produced.”⁴⁵ Specifically, the PUC is claiming that certain customer generators received over \$.10 per kWh for their generation when the wholesale price of energy averaged \$.04665 per kWh.⁴⁶ This claim is misleading in significant respects and, even if true and supported with acceptable data, it would not provide sufficient legal authority for the PUC to act.

⁴³ 73 P.S. § 1648.5 (*Note*, 52 Pa. Code § 75.13(c), requires customer generators receive “full retail rate”).

⁴⁴ RAF block 10.

⁴⁵ *Id.*

⁴⁶ *Id.*

Under the AEPS customer generators are guaranteed the “full retail value” for the energy produced.⁴⁷ The regulations achieve this by providing that excess generation from a customer in a given month will offset their later months’ bills including both price to compare (comprised of generation and transmission charges) and the distribution charges. After carrying a balance forward one year, customers are then paid for any excess generation at the price to compare.⁴⁸

According to the U.S. Energy Information Administration's data, in 2014 the average retail price across Pennsylvania was 13.32¢ per kWh for residential customers and 9.73¢ for commercial customers.⁴⁹ By claiming that customer generators were paid over 10¢ per kWh, the PUC is saying that customer generators are using generation in one month to offset the next month’s bill, thus receiving the full retail rate for their generation, as opposed to the lower price-to-compare paid at the end of a year.

The PUC’s response in the RAF implies this is a significant premium by comparing prices received by customer generators to the wholesale prices for generation—that is not an appropriate comparison. In the PJM grid, the price for purchases and sales of electricity in the wholesale market is the Locational Marginal Price (LMP). As PJM describes it, the cost of generation is only one part of the actual wholesale price:

“The calculations used to determine LMPs take into account electricity demand, generation costs and the use of and limits on the transmission system. The price tells PJM market participants the cost to serve the next megawatt of load at a specific location.”⁵⁰

Since a customer generator is delivering power to the EDC at a specific location. The appropriate wholesale value for comparison is the LMP at that location, not the average cost of generation at power plants potentially hundreds of miles away and assuming it would be delivered for free.

As will be described below, depending on the LMP at the time of generation, the \$8.6 million the PUC claims was paid to 10 large customer generators may actually have been less than the wholesale price the EDCs would otherwise have had to pay.

⁴⁷ *Supra* n.43.

⁴⁸ 52 Pa. Code § 75.13(c) – (d).

⁴⁹ US Energy Information Administration, *Average Price by State by Provider* (EIA-86) (Oct. 21, 2015).

⁵⁰ PJM Fact Sheet, Locational Marginal Pricing. Available at:

<http://www.pjm.com/~media/about-pjm/newsroom/fact-sheets/locational-marginal-pricing-fact-sheet.ashx>.

B. The PUC's use of average prices in calculations further distorts the actual value of solar power.

For customer generators with solar power, much of their excess generation takes place during high demand times on summer days when wholesale energy costs are significantly higher than average. For example, real-time LMPs at certain locations in the PPL zone in June of 2015 exceeded 60¢ per kWh.⁵¹ Such generation, carried forward to the following month, would be used to offset a residential bill that averaged closer to 14¢ per kWh. At the end of the year, the residential customer generator would be paid for the excess generation at just over 9¢ per kWh. In this case, a residential customer generator would be selling power to the utility at a discount of between 46¢ – 51¢ per kWh below the PJM wholesale price the utility would otherwise need to pay.

Even reliance on the LMP alone likely underestimates the full retail value of solar generation. We note that a recent study on the value of solar in Vermont “determined that the value of solar to the grid—and ratepayers on the grid—ranges from 19¢ – 23¢ per kWh with additional societal values of approximately 7¢ per kWh.”⁵² That finding suggests that providing the full retail rate to customer generators likely falls short of providing the required full retail value.

We agree with PUC Vice Chairman Andrew Place who stated that “the public, including ‘customer generators’ and retail customers, would be better served if the Commission were to focus on reevaluating ‘retail value’ rather than adding further constraints to those already contained in the statutory definition of customer generators.”⁵³ This value should consider the real-time value of the energy sold to utilities, but should also consider fair valuation for the ancillary benefits of clean renewable generation to include avoided costs of public health and environmental impacts.

The PUC recently held a *en banc* hearing on alternative ratemaking methodologies “to seek information from experts regarding the efficacy and appropriateness of alternative ratemaking methodologies, such as revenue decoupling, that remove disincentives that might presently exist for energy utilities to pursue aggressive energy conservation and efficiency initiatives.”⁵⁴ That investigation could be expanded to consider how alternative ratemaking methodologies can

⁵¹ PJM Data Miner, available at: <https://dataminer.pjm.com/dataminerui/pages/public/lmp.jsf>.

⁵² Acadia Center, Value of Solar in Vermont, (July 2015), available at http://acadiacenter.org/wp-content/uploads/2015/07/AcadiaCenter_GridVOS_Vermont_FINAL_2015_0730.pdf.

⁵³ Statement of Vice Chairman Andrew G. Place, Docket No. L-2014-2404361 (Feb. 11, 2016).

⁵⁴ Secretarial Letter, PUC Docket No. M-2015-2518883, (Dec. 31, 2015).

ensure customer generators receive the full value of the generation they provide while utilities are adequately compensated for the services they provide.

C. It is not necessary or in the public interest to apply the promulgated size limits on residential systems.

After analyzing the size of installed systems and comparing the size of residential rooftops with the capacity of available solar systems the PUC concludes “the new regulation will not restrict or discourage, in any way, the development of rooftop solar photovoltaic systems.”⁵⁵

There is no practical value in applying the 200 percent restriction to residential systems. Even if the PUC had the authority to redefine “utility” to include those who are not public utilities but are instead “acting like a utility or merchant generator” it is unlikely such a company or individual would qualify for a residential rate from their local utility. It is also unlikely that a company or individual intending to enter the business of selling electricity would subject themselves to the 50kw residential limit when commercial accounts may be sized up to 3 megawatts.

We disagree with the PUC’s conclusion that the regulations will not discourage installation. As a result of this regulation, there will be additional procedures established by utilities to verify and certify that systems will not exceed 200 percent of a residents historical or anticipated annual usage. The PUC admits “there may be a minor increase in the cost of future small photovoltaic systems” because of “administrative burdens on the system owners”⁵⁶ but has stated such costs are “anticipated to be minimal.” No attempt has been made to quantify or limit these costs.

While any added costs can be damaging to customers and small businesses who install alternative energy systems, this regulation also introduces the likelihood that different utilities will implement significantly different compliance procedures. Businesses that operate in multiple service territories will, therefore, incur additional costs in researching all of the possible procedures and added administrative costs to ensure compliance. With no benefits to outweigh the costs, applying such limits to residential systems is not in the public interest.

D. The PUC’s claim that the changes to the regulation will result in more regulatory clarity and certainty are unfounded

The PUC justifies this saying costs will be offset with “more regulatory clarity and certainty,” but has failed to justify how the new, more complex regulations provide more clarity and certainty for installers and customers than the current statutory limits on nameplate capacity.

⁵⁵ RAF block 10, pg. 4.

⁵⁶ RAF block 17.

The existing 110% size limit on third-party ownership⁵⁷ gives us an opportunity to validate a claim that such standards increase clarity and regulatory certainty. The PUC claims that “four years of operating under this policy” leads it to conclude that such a restriction will not “be burdensome or a barrier to development of alternative energy systems.”⁵⁸ Dr. Vera Cole, President of the Mid-Atlantic Renewable Energy Association, contacted all of the EDCs in March and April of 2016 with a written request (and often follow-up phone calls and emails) asking “what supporting data are [small business developers] required to submit to demonstrate that the system design complies with the generation limit (110% of annual load) on net-metered systems with 3rd party ownership?” Seven EDCs replied to Dr. Cole’s request but did not know, could not find, or could not direct her to an individual that knew the answer and several EDCs did not reply at all.

In one case where Dr. Cole received an answer, she was told that the “historical consumption will be used for existing locations, regardless of any changes in expected usage due to number of occupants, etc.” For new construction, the company asked for data regarding the type, size, and location of the building as well as information on the equipment and fixtures and was told the EDC would “estimate annual consumption using similar existing locations as references.” The result of that process is objectively less clear and certain than the existing method where an installer only needs to verify that the nameplate capacity of the system is less than the statutory size limit.

E. The changes to the regulation reduce regulatory clarity and certainty with respect to fees.

The current regulation specifies that “[a]n EDC may not charge a customer generator a fee or other type of charge unless the fee or charge would apply to other customers that are not customer generators.”⁵⁹ The PUC now revises that clear and unambiguous standard by creating an exception where extra fees can be charged on customer generators “by order of the Commission.”⁶⁰

The PUC justifies this change by saying it “has a well-established process for setting electric public utility rates that affords all interested parties ample notice and opportunity to be heard.”⁶¹

⁵⁷ *Net Metering—Use of Third Party Operators*, Final Order at Docket No. M-2011-2249441.

⁵⁸ RAF block 22.

⁵⁹ 52 Pa Code § 75.13(j).

⁶⁰ Annex A at 9.

⁶¹ Final Order at 78.

This justification completely ignores how reducing regulatory clarity and certainty impacts small businesses.

Under the existing rule, if a consumer or developer were to estimate the return on investment for a particular project, there would be a reasonable assurance that any additional fees levied specifically on customer generators would only be incurred following a the full regulatory review process. This would make it highly unlikely that new fees would be incurred for at least a year and possibly more than two years. Without this regulatory limitation, a utility could change its rate in a much shorter time, between 60 days and six months.⁶²

This creates a significant burden. Under the existing rules customers and businesses would only need to be aware of changes being made to Title 52 of the *Pennsylvania Code* and the resulting standards would be uniform statewide. Under the new regulation, businesses now need to monitor each rate proceeding for every EDC in whose territory they are considering doing business.

The bar to participation in the public process to challenge any changes is also significantly higher. A business owner may file comments in a regulatory docket and represent his or her business before the IRRC. Should the business find it necessary to intervene in a rate case, that business must be represented by an attorney admitted to practice in Pennsylvania.

⁶² 66. PA C.S. § 1308(a).