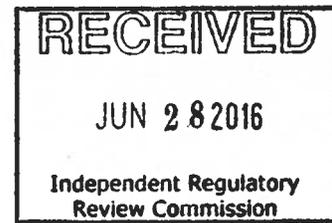


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George D. Bedwick  
Chairman  
Independent Regulatory Review Commission  
333 Market Street, 14th Floor  
Harrisburg, PA 17101

June 27, 2016

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

Dear Chairman Bedwick,

We, 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") applaud the Independent Regulatory Review Commission ("IRRC") for its disapproval order issued on June 2, 2016 regarding Regulation #57-304: *Implementation of the Alternative Energy Portfolio Standards Act of 2004*. We also thank the Pennsylvania Public Utility Commission ("PUC") for removing the size restrictions on net metering in its *Amended Final Rulemaking Order* issued on June 9, 2016 (the "Amended Final Order") revising 25 Pa. Code § 75.1 – 75.72 (the "Regulation").

While the Amended Final Order is a significant improvement, after review we find it still fails to meet the criteria established under the Regulatory Review Act. Because the regulatory changes will cause particular difficulty for small businesses and individuals who seek to generate their own clean energy. We once again urge the IRRC to disapprove of this regulation as not in the public interest.

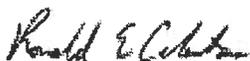
Sincerely,



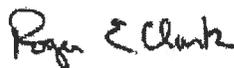
Robert C. Altenburg, Esq.  
Director, Energy Center,  
Citizens for Pennsylvania's Future



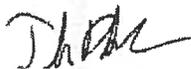
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Director, Midwest Clean Energy,  
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President,  
Mid-Atlantic Renewable Energy Association  
(MAREA)



Sharon Pillar  
President,  
Solar Unified Network of Western PA  
(SUNWPA)



Bob Keefe,  
Executive Director,  
Environmental Entrepreneurs (E2)

**encl: Comments of Solar Energy and Environmental Advocates in Opposition to PUC's Amended Final Order**

## Comments of Solar Energy and Environmental Advocates in Opposition to PUC's Amended Final Order

We applaud the Independent Regulatory Review Commission (“IRRC”) for its disapproval order issued on June 2, 2016 regarding Regulation #57-304: *Implementation of the Alternative Energy Portfolio Standards Act of 2004*. We also thank the Pennsylvania Public Utility Commission (“PUC”) for removing the size restrictions on net metering in its *Amended Final Rulemaking Order* issued on June 9, 2016 (the “Amended Final Order”) revising 25 Pa. Code § 75.1 – 75.72 (the “Regulation”).

While the Amended Final Order is a significant improvement, after review we find it still fails to meet the criteria established under the Regulatory Review Act.<sup>1</sup> For these reasons, we urge the IRRC to disapprove of this regulation.

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

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

The PUC continues to include language allowing EDC's to charge additional fees to customer generators when “specifically authorized under this chapter or by order of the Commission.”<sup>2</sup> **The PUC has no such authority.** The controlling statute requires customer generators “shall receive full retail value for all energy produced on an annual basis.”<sup>3</sup> If customer generators are subject to charges not shared by other customer generators in the rate class, they are not receiving the full retail value for that energy. As such, the PUC's justification for this language is flawed.

The PUC argues that this change is necessary for consistency with other regulatory language.<sup>4</sup> This justification is backwards since “regulations, in order to be valid, must be consistent with the statute under which they are promulgated.”<sup>5</sup> If the PUC is aware of existing regulatory

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<sup>1</sup> 71 P.S. 745.5b.

<sup>2</sup> Revised § 75.13(k), Annex A at 8.

<sup>3</sup> 73 P.S. § 1648.5. *Emphasis added.*

<sup>4</sup> Amended Final Order at 73.

<sup>5</sup> *US v. Larionoff*, 431 U.S. 864 (1977).

language that results in the customer generators receiving less than the full retail value for their electricity, such language is inconsistent with the statute and it is incumbent upon the PUC to propose revisions to the regulation to correct their error. Adding fees to customer generators not shared by others in the rate class only exacerbates the problem.

The PUC's second justification is a claim that it has "full ratemaking authority"<sup>6</sup> to set utility rates. **The PUC has no such authority** and the citation it provided to support that claim says no such thing. The statutory language the PUC cites says that rates "shall be just and reasonable, and in conformity with regulations or orders of the commission."<sup>7</sup> It is axiomatic that regulations and orders of the PUC cannot exceed the authority given to it in statute, and courts have held that "[t]he statutory requirement that utility rates be just and reasonable does not authorize the Commission to ignore or alter other statutory directives."<sup>8</sup>

While the PUC claims that this language doesn't actually create fees, but "puts all parties on notice of the possibility of fees,"<sup>9</sup> there are real negative consequences that result from even the suggestion of a fee increase.

B. 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*."<sup>10</sup> **The Amended Final Order continues to violate the statute** as it adds an additional condition saying that each of the meters involved in such aggregation must have "an electric load, independent of the alternative energy system."<sup>11</sup>

PUC relies on an interpretation that unless there is an independent load on the meter with the renewable generation system, the customer generator isn't a "customer" with respect to that meter.<sup>12</sup> As was explained in our prior comments, both the common usage and technical usage

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<sup>6</sup> See: Amended Final Order at 73 citing 66 Pa.C.S. § 1301.

<sup>7</sup> 66 Pa.C.S. § 1301.

<sup>8</sup> *Dauphin Cnty. Indus. v. PUC*, 123 A. 3d 1124, 1135. (Pa Cmmw., 2015).

<sup>9</sup> Amended Final Order at 74.

<sup>10</sup> 73 P.S. § 1648.2.

<sup>11</sup> Amended Final Order, Annex A. § 75.13(a)(1).

<sup>12</sup> Amended Final Order at 36--38.

of the word “customer” indicates an individual with a measurable load on any meter. Any other interpretation is a violation of Pennsylvania’s Statutory Construction Act which says:

“[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.”<sup>13</sup>

We note that PUC has not responded to this issue of its faulty statutory construction in either the *Amended Final Order* or in oral testimony on May 19, 2016.

The PUC continues to claim that the use of the term *onsite generators* in Section 5 of AEPS indicates legislative intent to give the PUC authority to restrict virtual meter aggregation to those sites with an independent load.<sup>14</sup> This interpretation requires a tortured stretch of the imagination and certainly 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.”<sup>15</sup>

The PUC has also spent a considerable amount of time in testimony discussing the difference between *virtual net metering* and *virtual meter aggregation*. We agree that “virtual meter aggregation” is the term used by the AEPS Act. To the extent we have used the colloquial term *virtual net metering* in comments or testimony related to this docket, we were referring to *virtual meter aggregation* as defined by the statute. In either case, the particular terminology used in comments is irrelevant because the statute itself provides for no independent load requirement.

It is also far from clear what a restriction on virtual meter aggregation accomplishes. Any customer with a commercial account can install a system which interconnects at their existing meter, that customer only runs into an issue when it is more convenient to locate the generation system at a remote location without an independent load. The PUC has failed to explain why a rule that limits its restriction to such remote systems is necessary and in the public interest.

C. The PUC’s definition of utility is not in accordance with legislative intent.

The PUC claims the independent load requirement is “critical in preventing utilities, such as merchant generators, from qualifying for net metering.”<sup>16</sup> This is a ridiculous assertion. **Utilities**

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<sup>13</sup> 1 Pa.C.S. § 1903(a).

<sup>14</sup> Amended Final Order at 37, 38.

<sup>15</sup> *Cmmw. v. Beam*, 788 A.2.d 357, 359 (Pa. 2002).

<sup>16</sup> Amended Final Order at 36.

**are prevented from qualifying for net metering because the AEPS Act defines a customer generator as “[a] nonutility owner or operator of a net metered distributed generation system”.<sup>17</sup>**

The term *merchant generator* is neither found nor defined in either the AEPS Act or the Public Utility Code. To the extent that merchant generators are a subset of utilities, as implied by the PUC’s statement, no additional language is required to prevent them from being a customer generator. If a *merchant generator* is not a utility, any additional restriction added by the PUC is an attempt to “usurp the legislative powers and declare an additional exception which the Legislature has not seen fit to declare.”<sup>18</sup> Additional language is, therefore, far from critical. It is either unnecessary or impermissible.

The *Electricity Generation Customer Choice and Competition Act*,<sup>19</sup> which became law in 1996, made it clear that “[t]he generation of electricity will no longer be regulated as a public utility function.”<sup>20</sup> After that point, generators have been termed *electric generation suppliers* (EGS) and not utilities. We note that when the Legislature passed the Alternative Energy Portfolio Standards Act more than seven years later, it used the term “electric generation supplier” thirty-one times, but only chose to exclude “utilities” from being customer-generators and not EGSs.

Now, the PUC is attempting to rewrite the legislation and insert a provision the legislature did not see fit to include. In fact, a significant part of the definition of *utility* the PUC is now using<sup>21</sup> has been copied verbatim from the definition of EGS in the 1996 Act.<sup>22</sup> This is an abuse of agency authority.

The PUC may believe that the failure of the legislature to exclude EGSs from the definition of customer generators was a mistake. For the majority of installations, there is no issue. No customer on a residential rate can be an EGS, and the vast majority of EGSs exceed the capacity limits established for customer generators under the Act. For any cases that remain, the solution is for PUC to seek a legislative remedy.

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<sup>17</sup> 73 P.S. § 1648.2 *emphasis added*.

<sup>18</sup> *Delaware River Port Auth. v. PA. PUC*, 393 Pa. 639, 648 (Pa. 1958).

<sup>19</sup> P.L.802, No.138, effective January 1, 1997.

<sup>20</sup> 66 Pa.C.S. § 2802(14).

<sup>21</sup> Annex A, at 5.

<sup>22</sup> See 66 Pa.C.S. § 2803 specifying the term EGS “excludes building or facility owner/operators that manage the internal distribution system serving such building or facility and that supply electric power and other related power services to occupants of the building or facility.”