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Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

IRRC #3061
PUC Docket #L-2014-2404361

May 9, 2016

IRRC Commissioners:

Sunrise Energy appreciates the opportunity to comment on the PUC's Final Order Rulemaking, which was sent to the Independent Regulatory Review Commission on March 22, 2016. We are also very grateful for the regulatory oversight provided by IRRC; which is crucial to maintaining a fair and sustainable business climate in Pennsylvania.

Among the many important components of the IRRC's regulatory review process is the mandate that agencies must provide acceptable data in support of a new regulation. The PA General Assembly insisted on this when they amended the Regulatory Review Act in 2011. They defined acceptable data as follows:

"Acceptable data." Empirical, replicable and testable data as evidenced in supporting documentation, statistics, reports, studies or research. (Def. added July 7, 2011, P.L.277, No.60)

The IRRC Regulatory Analysis Form (RAF) represents an agency's opportunity to provide compelling evidence in support of a proposed regulation. Unfortunately, the PUC has repeatedly failed to do that. The attached document illustrates the many areas where empirical, replicable and testable data is lacking. In some instances, no data is provided at all.

Section 5(a)(14) of the Regulatory Review Act states clearly that an agency must provide:

(14) A description of any data upon which a regulation is based with a detailed explanation of how the data was obtained and why the data is acceptable data. An agency advocating that any data is acceptable data shall have the burden of proving that the data is acceptable. (emphasis added)

After reading the attached comments, we believe you will agree that the PUC has not shouldered the burden of proof by providing acceptable data. For this reason, we request that you disapprove the rulemaking in its entirety.

Regards,

David N. Hommrich
President
Sunrise Energy, LLC

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I. Executive Summary

The Regulatory Review Act (RRA) was a landmark piece of legislation when it was signed into law in 1982. Prior to the Act, agencies would often "morph" a statute into something that was not intended by the legislature. With the signing of the Act, and the amendments that ensued, the legislature set up a system of checks and balances; a way of shining a bright light on the actions of our regulatory agencies. Pennsylvania is fortunate to have the protections provided under the RRA. Which is why the casual disdain that the PUC has shown for the regulatory review process is cause for serious concern.

Beyond the attempt to over-reach their authority, the PUC has consistently presented information that does not stand up under fact-checking. The consistent obfuscation in pursuit of their goals has not gone unnoticed. The information contained in the Regulatory Analysis Form, a key component of the regulatory review process, is littered with contradictory statements and outright misinformation. Pennsylvania can and should expect better than this from any of its regulatory agencies.

It is our hope that IRRC will disapprove this rulemaking for two reasons; the PUC has over-reached their authority, and they have presented entirely unacceptable data to support their claims.

II. PUC Attempts to Re-Define Customer-Generator

The PUC has made a lengthy argument in their rulemaking that customer-generators should not be allowed to generate "excessive energy". Their view is that an alternative energy facility should only be designed to produce enough energy for the customer's own use. This despite the fact that the statute contains no such constraint. After much pressure from stakeholders, they have allowed for some excess production in their final rulemaking. But regardless of what they allow, the point is that the AEPS Act sets the statutory limits for system size. The PUC is not empowered to create any limitations that conflict with the clear and unambiguous language of the Act.

Still, the PUC persists with the idea that "merchant generators are posing as customer generators" and causing harm to ratepayers. They allege that this problem is widespread and threatens millions of ratepayers. Setting aside this unproven statement, this is a relatively new point of view from the PUC. In the original 2005 rulemaking, the commissioners who were seated at that time provided a very concise definition for a customer-generator facility; one that is still in use today.

> *Customer-generator facility—The equipment used by a customer-generator to generate, manage, monitor and deliver electricity to the EDC. (emphasis added)*

This definition (which was created by the PUC) clearly contemplates that customer-generators will deliver power to the EDC, which is counter to the current argument they are making. Given the clearness of the definition, it is difficult to see how the PUC can now claim that anyone delivering electricity to the grid is somehow gaming the system.

This kind regulatory waffling causes tremendous regulatory uncertainty. Businesses should not have to be concerned that the regulatory climate can change based on who is seated on the PUC at any given time. The underlying statute is the foundation, and unless it is changed the PUC should restrain itself from meddling with legislative intent.

III. The AEPS Act and the Sale of Electricity

The AEPS Act has always contemplated the sale of renewable energy; which is why the PUC's position is so confusing. The sale of energy is a basic tenet of the statute, as can be seen in the excerpts below.

> **Preamble - 73 P. S. § § 1648.1—1648.8**
>
> *Providing for the sale of electric energy generated from renewable and environmentally beneficial sources, for the acquisition of electric energy generated from renewable and environmentally beneficial sources by electric distribution and supply companies and for the powers and duties of the Pennsylvania Public Utility Commission. (emphasis added)*

73 P. S. § § 1648.2 - Definitions

"Alternative energy system." A facility or energy system that uses a form of alternative energy source to generate electricity and delivers the electricity it generates to the distribution system of an electric distribution company or to the transmission system operated by a regional transmission organization. (emphasis added)

73 P. S. § § 1648.5 - Interconnection standards for customer-generator facilities

Excess generation from net-metered customer-generators shall receive full retail value for all energy produced on an annual basis. (emphasis added)

The PUC's position is that any renewable energy generator that sends power into the EDC's distribution system is somehow gaming the system. But the underlying statute, which should guide their steps when issuing regulations, specifically contemplates the sale of renewable energy.

IV. Virtual Meter Aggregation

Virtual meter aggregation is defined in the PUC regulations as follows:

Virtual meter aggregation—The combination of readings and billing for all meters regardless of rate class on properties owned or leased and operated by a customer-generator by means of the EDC's billing process, rather than through physical rewiring of the customer-generator's property for a physical, single point of contact. Virtual meter aggregation on properties owned or leased and operated by a customer-generator and located within 2 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.

None of the constraints that the PUC is proposing to implement are contained in this definition. On the contrary, the definition provides for a broad interpretation; which is what the legislature intended.

If a person or a business would like to install a renewable energy system, but they do not live/work at a location that is conducive to it (e.g. too many trees), virtual meter aggregation gives them an option to participate in renewable energy anyway. So long as they install a system within two miles of their meter, they can virtually join the power that is produced to their home meter.

The PUC has woven a tapestry of words to build the case that virtual meter aggregation can only exist when there is already a meter and a customer load at each location. Nothing in the statute (or their own regulation) requires this condition to exist. The PUC simply insists on it. Virtual meter aggregation is an invaluable way to allow Pennsylvanians to benefit from renewable energy who otherwise could not. The PUC fails to make any convincing argument that their previous actions and now this new rule to formalize their previous treatment should be allowed to supersede the clear mandate from the Pennsylvania legislature.

V. Acceptable Data – RAF, Section 10

Section 10 of the Regulatory Analysis Form is where the PUC is required to provide acceptable data in support of their new rulemaking. IRRC identified the lack of acceptable data as a deficiency in their comments on the proposed rulemaking. The PUC came back in the final rulemaking with inconsistent data that cannot be traced to any source. After review, it is easy to discover errors and internal inconsistencies in the data provided in the RAF.

A. Alleged net metering costs borne by EDC, EGSs and ratepayers

The PUC has claimed that their new regulation will balance the benefits to customer-generators with the net metering costs borne by EDCs, EGSs and ratepayers. This statement is incorrect in multiple ways.

First, EDCs do not bear any AEPS Costs. As a regulated utility in Pennsylvania, they are entitled to pass along all AEPS costs (direct and indirect) to ratepayers. In fact, it is this specific cost recovery that the PUC claims is harming ratepayers. It is impossible for an EDC to pass along costs to ratepayers, and also bear the burden. The

two scenarios are mutually exclusive. The PUC is incorrect in stating that EDCs bear the burden of net metering costs.

Second, the PUC claims that EGSs are also being burdened by high net metering costs. This makes no sense either, since EGSs are unregulated, and are not obliged to offer net metering. We are not aware of a single EGS that offers net metering in Pennsylvania. Therefore, the EGS are not being burdened by net metering costs; something that the PUC should already know.

That leaves the alleged millions of ratepayers that are being harmed by net metering. The PUC implies more than once that residential customers are being harmed by excessive net metering costs. Besides the fact that they provide no evidence of this, a residential customer cannot be affected by the net metering costs of large commercial systems (which are the cloaked "merchant generators" that the PUC often makes reference to). AEPS Act cost recovery is done by rate class, as the PUC knows. So even if commercial systems are getting a subsidy (which has not been proven), this can only be passed along to other commercial rate class customers; not to residential customers. Residential customers are on a residential tariff, and there is no cross-subsidy mechanism for them to bear any burden from commercial net metering costs.

B. Sources of Acceptable Data for AEPS Act Cost Recovery

There is only one source of acceptable data for determining the actual cost for net metering under the AEPS Act, and that is the 1307(e) report. This is a report provided by the EDCs to the PUC, and it includes all of their cost recovery data, including AEPS costs. Given that this is the sole repository for the data that could prove their case, it is puzzling that the PUC has chosen to ignore it entirely.

Part of their problem, no doubt, is that the report format that is submitted to the PUC varies by EDC, which sets the stage for the problems we currently have. Most EDCs do not break out their AEPS costs into categories (e.g. net metering expenses). So there is no way that the PUC can know what the net metering costs are. This is likely why the authors of the Regulatory Analysis Form chose their words carefully when they said *"...it appears that default rate customers are paying an approximate 40% premium"*. Since most EDCs do not break this data out in their report, it seems clear that the PUC has no idea what the cost recovery is. Since this cost is the underlying premise for their entire rulemaking, this should give us all cause for concern.

PPL Electric is one EDC that <u>does</u> break out their net metering expenses in their 1307(e) report (Appendix A). As a result, it is possible in that instance to glean some useful information about net metering costs. For example, if we assume that an average resident in PA uses approximately 900 kwh / month, we discover that PPL residential customers paid approximately 5 cents in 2015 for net metering costs. That is an astoundingly low number; particularly since it is an annual cost. If one could survey residential customers in PPL's service territory, it is easy to imagine them agreeing that paying 5 cents / year for a clean environment is a very good deal.

C. Overstating the Number of Impacted Ratepayers

The PUC's claim that millions of ratepayers are affected by net metering costs (and thus will benefit from the new regulation) are false and can be easily disproven. First we will address the notion that millions of people are affected. Since the largest class of ratepayers by far is the residential rate class (and likely the only one that numbers in the millions) we will start there.

The PUC contends that "merchant generators posing as customer-generators" are shifting excessive net metering costs onto residential ratepayers. But the kinds of facilities that they accuse of this behavior operate under a commercial tariff; completely different than the one used by residents. As a result, any net metering costs that may exist (which have yet to be proven) can only be shared with other ratepayers within that class. That is the way cost recovery is done (via the quarterly adjusted Price to Compare). **It is impossible for any residential customers taking default service from their EDC to bear any net metering costs from a different rate class.**

Then there's the issue of customers that receive their power from EGSs (via Customer Choice). Since EGS rates are totally unregulated, there is no way that any of those customers are feeling the burden of shifted net metering costs. That has been impossible ever since deregulation. So we have eliminated all residential customers

from the list, plus any other rate class that shops for electricity. **What's left is the pool of ratepayers that the PUC claims is being harmed. Which has shrunk dramatically from anything close to "millions".**

PPL Electric lists in their 2015 1307(e) report that approximately 97% of their small commercial and industrial customers shop for electricity. We will use their data as being representative of other service territories, since the data necessary for the analysis doesn't exist in the other reports. After eliminating the ratepayers that cannot be affected in the way that the PUC claims that they are, we are left with only 3% of the small commercial and industrial customers. This is surely a number that is more in the hundreds than in the millions as the PUC claims.

So presumably this group, however small, must be bearing the brunt of the net metering costs that the PUC is concerned about. However, upon review of the current rates in PPL Electric's service territory, these commercial accounts are paying only $0.07741 / kwh when they take default service from their EDC. In order for the PUC's theory to have merit, this rate should be skyrocketing because of the high cost being piled onto such a small group of ratepayers. But their rate is actually lower than PPL's current residential rate ($0.07918 / kwh). And as we have proven, residential customers are not impacted by the alleged subsidies that seem to concern the PUC. The bottom line is that the PUC premise of ratepayer harm is flawed and does not hold up under scrutiny.

D. Missing Net Metering Costs in PUC Annual Report

The PUC is required each year to produce an annual report of the state of the renewable energy market. This is a mandate from the Pennsylvania General Assembly. In their most recent Regulatory Analysis Form, the PUC uses the 2014 version of this report in an attempt to prove their case for excessive net metering subsidies. This despite the fact that the PUC does not discuss net metering costs in this annual report, or in any other year. The AEPS Act has been around since 2004, and regulations were promulgated in 2005. Eleven years later, and not one of their annual reports have addressed net metering expenses. Yet they point to this report as evidence of the problem. If there is truly a net metering problem of the magnitude that the PUC claims, how is it that they have never addressed in any of their annual reports?

E. Calculating Net Metering Costs

Based on the RAF that was filed, it appears that the authors are using the wrong formula for calculating net metering costs. The authors describe a formula for cost recovery where an average wholesale price is subtracted from the retail price. They claim that the difference between these two numbers is the net metering cost. This sounds simple enough, but it isn't how the statute says the costs are to be calculated. Nor does it reflect what happens in the real world.

EDCs bid out their default service to generation companies. The winning bidder(s) are responsible for delivering the power that the EDC needs to serve its customers. The EDC is not exposed to the variability of the wholesale market. That risk is borne by the companies that provide the default service energy. When a renewable energy system produces power that enters the EDCs distribution system, it is displacing power that would have been provided by the default service energy provider. The EDC simply uses this renewable energy to serve its customers instead of buying that amount from their default service supplier. The default service customers pay the then-current default service rate.

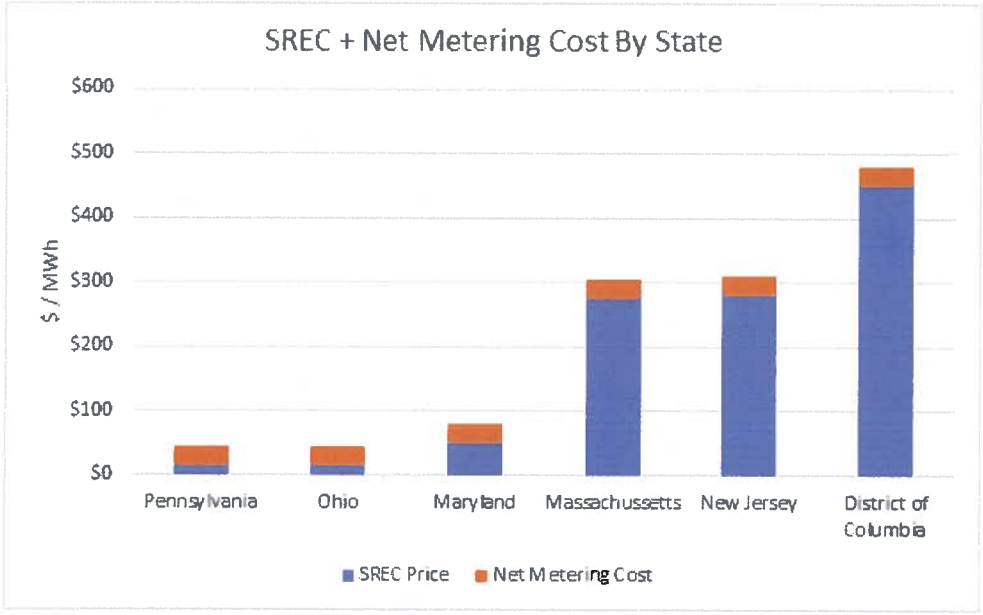
Throughout the year, the EDC continues to borrow electricity from renewable energy facilities in this manner, since they are only required by law to settle up with the renewable energy facility once per year. Then, on May 31st, the AEPS Act requires that the EDC pays the owner for the power they produced. The rate used is the default service rate, which is the same rate that they were charging their customers throughout the year. The net result is a wash transaction. Not only does the EDC not lose money on the trade, but they have the additional benefit of an interest-free loan of electricity for the entire year.

The heart of the PUC's case for ratepayer harm is that EDCs incur large costs, which are then passed on to their customers. But in the real world, this simply does not happen. Because of the way default service energy is purchased, it is impossible for the EDC to lose money. In fact, they are borrowing the energy throughout the year; which they in turn sell to their customers at the default service rate.

VI. Regulatory Analysis Form – Section 12

In comparing the PA AEPS Act with that of other states, the PUC picks only the information that they believe will help their case. They leave out important information regarding the total cost of the AEPS Act as compared to other states. The major contributor to the cost of portfolio standards in most states is the cost of renewable energy credits. Pennsylvania (unfortunately) bucks this trend by having the absolute lowest credit prices of our neighboring states. The graph below shows PA solar credit prices compared to other PJM states. Even if we were to believe the undocumented net metering costs presented by the PUC, when this is coupled with the ultra-low cost for renewable energy credits, Pennsylvania has by far one of the lowest cost programs in the region (tied with Ohio, which has temporarily suspended their program).

The PUC was tasked with implementing the AEPS Act, and with making sure it was successful. Their actions of late seem to show that they have an opposite goal in mind. If we are to have a renewables portfolio standard at all, then this graph shows that we clearly have the most cost-effective program around. Instead, the PUC wishes to cram the cost down still further, and doesn't seem to really worry about the impact it has on the renewable energy industry; the one they have a mandate to protect.



Graph 1: Renewables Portfolio Costs by PJM State

VII. Regulatory Analysis Form – Section 14

The PUC states that they met with representatives from the Farm Bureau, DEP, EDCs and solar developers to gather their input and perspectives on the new regulation. However, after having spoken to several solar developers, it has so far been impossible to locate anyone who attended these meetings from the solar developer community. An open records request was submitted, asking for the dates and times of the meeting and the attendees. The PUC refuses to provide this information, claiming that we are not entitled to it. It is our belief that once they use this information as the basis for their rulemaking, it becomes (by definition) a public document. It is difficult to imagine that a state agency would reference data in support of a rulemaking, yet refuse to share it. This relies on a form of the honor system that is not compliant with the Regulatory Review Act. Unless the PUC can produce evidence that these meetings even occurred (and who attended), they cannot use their alleged existence to prove that they sought industry feedback. So far, no evidence has been found that the alleged meetings took place.

VIII. Regulatory Analysis Form – Section 23

The table in Section 23 of the RAF is intended to summarize in one place the impact on the various stakeholders that will result from the proposed regulation (projected over 5 years). The PUC chose to populate this important table with the word "minimal" rather than providing acceptable data. Aside from the "minimal" effort that they expended in populating the table, the information actually conflicts with their own stated position.

The PUC claims that large subsidies are being paid to renewable energy system owners via net metering, and that ratepayers are shouldering this burden. Since this table represents the future, the row that shows Revenue Losses should have very large numbers for the Regulated Community. That would account for the alleged unfair subsidies that the PUC would have prevented, which would show up as revenue losses. But the PUC instead has put the word "minimal" in to reflect those loses. If revenue losses are minimal, that means the alleged subsidies were minimal too. This is basic math. And it begs a very important question. Why was the rulemaking necessary in the first place, if the subsidies are minimal?

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	$	$	$	$	$	$
Regulated Community	minimal	minimal	minimal	minimal	minimal	minimal
Local Government	minimal	minimal	minimal	minimal	minimal	minimal
State Government	minimal	minimal	minimal	minimal	minimal	minimal
Total Savings	minimal	minimal	minimal	minimal	minimal	minimal
COSTS:						
Regulated Community	minimal	minimal	minimal	minimal	minimal	minimal
Local Government	0	0	0	0	0	0
State Government	minimal	minimal	minimal	minimal	minimal	minimal
Total Costs	minimal	minimal	minimal	minimal	minimal	minimal
REVENUE LOSSES:						
Regulated Community	minimal	minimal	minimal	minimal	minimal	minimal
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Revenue Losses	minimal	minimal	minimal	minimal	minimal	minimal

Figure 1: Stakeholder Impact Table

IX. Regulatory Analysis Form – Section 24

In Section 24 of the Regulatory Analysis Form, the PUC was asked to explain the probable impact of the new regulation on small businesses. Their response was *"...the costs and impacts on small businesses are expected to be minimal. Many of these costs and impacts will be offset by more regulatory clarity and certainty, which should reduce development costs."* Small business owners do not look to the PUC for help in reducing development costs; they take care of that themselves. More importantly, businesses cannot make payroll using regulatory certainty; actual revenue is needed for that. This tone-deaf response by the PUC is indicative of a much larger problem. The PUC either doesn't know or doesn't care about the impact of their actions. Sunrise Energy is aware of $70 million in projects that will be halted by this regulation; and there are likely even more. The effect is hardly minimal.

The impact of even announcing this rulemaking has had a profoundly negative impact on renewable energy developers; the majority of whom are small businesses. Despite the Regulator Review Act's repeated mandate that agencies find ways to soften the regulatory blow for small businesses, the PUC has failed to even attempt to comply with this mandate.