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May 12, 2016

VIA HAND DELIVERY

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

RE: Implementation of the Alternative Energy Portfolio Standards Act of 2004
Pennsylvania Public Utility Commission Regulation No. 57-304
Independent Regulatory Review Commission ("IRRC") No. 3061

Chairman Bedwick:

This letter is submitted on behalf of The Dauphin County Industrial Development Authority ("DCIDA" or "Authority"). As explained below, DCIDA recommends disapproval of the subject regulations[1] submitted by the Pennsylvania Public Utility Commission ("Commission" or "PUC").

Introduction

The DCIDA is concerned about how the subject regulations will affect existing alternative energy systems, such as DCIDA's existing Solar Facility.[2] The Commission did not give any assurance that said regulations will not affect existing customer-generator systems. **It did the**

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1 *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, PUC Docket No. L-2014-2404361, Final Rulemaking Order entered February 11, 2016 ("Final Rulemaking Order").

2 DCIDA's Solar Facility was described in DCIDA's comments to the proposed regulations, dated August 4, 2014 (which are on file with both the PUC and IRRC), and its comment to the proposed final regulations, dated May 28, 2015 (which are on file with the PUC). http://www.puc.state.pa.us/pcdocs/1362677.pdf. In summary, in building the Solar Facility, DCIDA sought to advance green energy generation and to position Dauphin County as a leader in the investment in and growth of alternative energy generation sources in the Commonwealth. DCIDA intended that the Solar Project would offer a power source for the County's emergency management systems in the case of a disaster. The Solar Facility is connected to Dauphin County's mobile emergency management unit (which is located at the site of the Solar Facility). So, the Solar Facility was sized (a) to satisfy the annual energy usage for Dauphin County's emergency management systems and (b) to generate excess electric energy. The Solar Facility operates in parallel with the PPL distribution system, and conforms to the then-applicable interconnection standards and regulations.

opposite. As explained in greater detail herein, the Commission strongly suggested that it will implement that definition in a way that will affect existing alternative energy systems. Such a result in not acceptable, and is not consistent with either the Regulatory Review Act or the public interest.

Definition of "Utility"

DCIDA submits that the Commission has not satisfied all of the criteria necessary to promulgate the proposed definition of "utility" and that said definition is not in the public interest.[3]

The Alternative Energy Portfolio Standards Act ("AEPS Act")[4] provides that net metering is available to "nonutility" energy generators.[5] The term "nonutility" is not defined in the AEPS Act, the Public Utility Code,[6] or the Commission's existing AEPS regulations.[7] However, since the passage of the AEPS Act, that term was applied and widely understood as being any person or entity that did not fall within the statutory definition of a "public utility."[8] For example, the term "public utility" excludes persons or entities that furnish services only to themselves. Since they do not fall within the definition of "public utility," such persons or entities can be fairly characterized as a "nonutility" within the meaning of the AEPS Act.

Now, several years later, the Commission is engaged in efforts to define who is, and who is not, a "nonutility" for purposes of the AEPS Act.[9] The Commission has proposed a definition of the term "utility" that (a) excludes anaerobic digesters, (b) excludes internal distribution systems, and (c) incorporates a 200% consumption limitation on all other net metered alternative energy

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3 71 P. S. §§ 745.5b(a), (b)(3), (b)(4), (b)(7), (b)(8).

4 The AEPS Act, which took effect on February 28, 2005, established an alternative energy portfolio standard for Pennsylvania. It was codified at 73 P.S. §§ 1648.1, *et seq.*

5 73 P.S. § 1648.2 (definition of customer-generator). Within the AEPS Act, the term "nonutility" only appears in the definition of "customer-generator," a key requirement of eligibility for net metering of alternative energy systems. *Id.; see also* 73 P.S. § 1648.5.

6 The Public Utility Code contains provisions relating, inter alia, to the establishment and jurisdiction of the PUC. It was codified at 66 Pa.C.S. §§ 101, *et seq.*

7 The PUC's AEPS regulations were first adopted in 2006, 36 Pa.B. 7523, 7562 (December 16, 2006), and amended in 2008, 38 Pa.Bull 6473 (November 29, 2008).

8 66 Pa.C.S. § 102 (definition of public utility). In 2006, the Pennsylvania Department of Environmental Protection ("DEP") expressed the concern that the term "nonutility" could be interpreted to exclude water utilities from participating in net metering. 36 Pa.B. 7523, 7562 (December 16, 2006). At that time, the Commission refused to act. It stated that if there was a problem it could be resolved through general Commission processes, utility tariffs, proposed regulations or other Commission action to address their specific circumstances. Id.

9 The Commission should be required to show the need for this definition and how it protects consumers by addressing a significant harm or problem. *See* 71 P. S. §§ 745.5b(b)(3)(iii).

systems.[10] With regards to the 200% limitation, alternative energy systems that generate 200% or less of a customer-generator's annual consumption are not a "utility," and systems that generate more than 200% of a customer-generator's annual consumption are a "utility." So, as written and explained by the Commission, that definition will apply to any net metered alternative energy system (except anaerobic digesters and internal distribution systems) – whether existing, proposed or future.[11]

In developing the proposed definition, the Commission is making a basic policy decision on who is, and who is not, eligible for net metering in the Commonwealth.[12] The Commission has determined that anaerobic digesters and internal distribution systems always constitute a "nonutility" for purposes of the AEPS Act. There is nothing in the statutory provisions or stated legislative intent which shows a desire on behalf of the General Assembly to treat said systems differently from other alternative energy systems in the Commonwealth. Yet, the Commission has proposed a definition - to be applied on a statewide basis - that will afford special treatment to such systems.[13]

Nothing was done to show why the 200% threshold/limitation is reasonable for all existing and future systems and in the public interest.[14] DCIDA submits that, from a logic and drafting standpoint, it is unreasonable and irrational to put a percentage threshold in the definition of a "utility." An entity is either a utility or it is not. The proposed definition confers different "utility" status upon (a) an entity that produces exactly 200% of its annual electric consumption and (b) an entity that produces exactly 200.01% of its annual electric consumption. Why is the first entity a non-utility, and the second entity a utility? No answers are found in the Final Rulemaking Order.

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10 *Final Rulemaking Order,* at pp. 12-23, at Annex A, p. 5 (Proposed Section 75.1, definition of utility). The proposed definition of "utility" provides: "A person or entity that provides electric generation, transmission or distribution services, at wholesale or retail, to other persons or entities. An owner or operator of an alternative energy system that is designed to produce no more than 200% of a customer-generator's annual electric consumption or satisfies the conditions under §75.13 (a)(3)(iv) (relating to general provisions) shall be exempt from the definition of a utility in this chapter. This term excludes building or facility owners or 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. .". *Final Rulemaking Order*, at Annex A, p. 5 (Proposed Section 75.1, definition of utility) (emphasis added).

11 *See Final Rulemaking Order*, at p. 23.

12 Regulations are not in the public interest if the agency (as opposed to the General Assembly) is making a substantial policy decision. *See* 71 P. S. § 745.5b(b)(4).

13 *See* footnote 19, *infra*, and the accompanying text.

14 The Commission should be required to show the need for this threshold and how it protects consumers by addressing a significant harm or problem. *See* 71 P. S. § 745.5b(b)(3)(iii).

If the proposed definition is approved, the Commission has stated that it cannot ignore the term "nonutility" and must enforce it.[15] In fact, the Commission explicitly refused to state that the definition of "utility" would only be applicable to new facilities.[16] Such comments highlight the DCIDA's concern that its existing (and grandfathered) Solar Facility will be unfairly, and retroactively, categorized as a "utility" under the Commission's proposed definition. It is a fundamental rule of due process that the rules are not changed after the game has been played. This is why both the United States Constitution[17] and the Pennsylvania Constitution[18] forbid *ex post facto* laws and the impairment of contracts. That being said, once within the scope of the "utility" definition, it could be argued that the owner/operator or alternative energy system no longer qualifies for net metering under Proposed Section 75.13(a)(2) ("The owner or operator of the alternative energy system may not be a utility.").[19] Such a result in not acceptable, and would violate both constitutional protections[20] and DCIDA's vested rights.

The 200% Limitation

No provision in AEPS Act or the Public Utility Code[21] - either explicitly or implicitly - authorizes the Commission to establish generation or consumption limitations on alternative energy systems. This is a specific concern of DCIDA.[22] IRRC acknowledged such concerns, and stated:

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15 *Final Rulemaking Order,* at p. 23.

16 *Final Rulemaking Order*, at p. 23.

17 Article I, Section 10 of the U.S. Constitution provides that: "No state shall pass any bill of attainder, ex post facto law or law impairing the obligation of contracts."

18 Article I, Section 17 of the Pennsylvania Constitution provides that: "No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."

19 This argument would not be applicable to existing (and grandfathered) anaerobic digesters and/or existing (and grandfathered) internal distribution systems. Such systems are (1) excluded and/or exempted from the definition of "utility" under Proposed Sections 75.1 and (2) grandfathered under Section 75.13(a)(3)(III) and/or (IV). *See Final Rulemaking Order*, at Annex A, p. 5, 6-7 (Proposed Sections 75.1 and 75.13(a)(2)).

20 The rules, regulations and standards of a regulatory agency must be reasonable, understandable, available, and must not violate the constitutional rights of any citizen. *See, e.g., Bortz Coal Co. v. Commonwealth, Air Pollution Commission*, 279 A.2d 388 (Pa. Cmwlth. 1971).

21 The Public Utility Code includes the Electric Generation Customer Choice and Competition Act ("Competition Act"), which took effect in 1996. The Competition Act established standards and procedures for the restructuring of the electric utility industry, and was codified in Chapter 28 of the Public Utility Code, 66 Pa.C.S. §§ 2801, *et seq.*

22 DCIDA Comments to Proposed Rulemaking Order, dated August 4, 2014, at Section III.B. http://www.puc.state.pa.us/pcdocs/1301982.pdf.

> Commentators have questioned the PUC's statutory authority for this provision and also how it will be implemented. Regarding statutory authority, the commentators believe there is nothing in the Act, Act 35 or Act 129 that would allow the PUC to impose such a restriction. We ask the PUC to provide a citation to specific statutory language that would allow for the limitation being proposed under this subsection. (emphasis added)[23]

This challenge remains unmet. The Commission did not provide any citation to specific statutory language. The Commission merely points to its broad rulemaking authority under the Public Utility Code[24] and the AEPS Act.[25] However, under the principles of statutory construction,[26] these general provisions cannot be relied upon to negate the specific requirements in the AEPS Act.

The Commission is attempting to prohibit – by regulation – alternative energy systems that are otherwise permissible under the AEPS Act.[27] As noted above, the decision to set the consumption limit at 200% is not explained by the Commission.[28] The Commission initially proposed a limit of 110%. The Commission now proposes a limit of 200%. However, the Commission is not interpreting any statutory language in the AEPS Act or the Public Utility Code, and the decision to implement a 200% limitation does not appear to be based on any provision in the in the AEPS Act or the Public Utility Code.

Rather, the Commission is acting out of general legal authority to promulgate regulations, which - as noted above - are not sufficient to justify the policy decision being made by the Commission to exclude future systems from the program – if the system is otherwise eligible for net metering under the provisions of the AEPS Act itself. Such rulemaking actions should be rejected as being beyond the scope of the Commission's statutory authority.[29] Further support for this

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23 IRRC, Notice of Comments Issued, *Pennsylvania Public Utility Commission Implementation of the Alternative Energy Portfolio Standards Act of 2004*, 44 Pa.B. 6449, 6730 (October 18, 2014) ("IRRC Comments"), at Comment 5.

24 66 Pa.C.S. § 501.

25 73 P.S. § 1648.7(a).

26 1 Pa.C.S. §§ 1921(a), 1921(b), 1933.

27 The AEPS Act provides that customer-generators may design, build and operate a facility up to a specified nameplate capacity. For a residential property, the nameplate capacity limit is 50 kilowatts. 73 P.S. § 1648.2 (definition of customer-generator). For non-residential properties (such as business or industry), the nameplate capacity limit is 3,000 kilowatts or 3 MWs. *Id.* But, if certain design criteria are satisfied, a non-residential facility can have a nameplate capacity of up to 5,000 kilowatts or 5 MWs. *Id.*

28 The Commission should be required to show the need for this threshold and how it protects consumers by addressing a significant harm or problem. *See* 71 P. S. §§ 745.5b(b)(3)(iii).

29 71 P. S. § 745.5b(a).

position can be found in DCIDA's comments to the Proposed Rulemaking Order and the Proposed Final Rulemaking Order,[30] which are incorporated herein by reference.

Conclusion

The concerns raised by DCIDA, which are limited to certain proposed regulations, are significant and justify the disapproval of the subject regulations in their entirety.

Sincerely,

Mark S. Stewart, Esquire
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MSS/jls

30 *See* footnote 2, *supra.*