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Hawke McKeon & Sniscak LLP
ATTORNEYS AT LAW

Thomas J. Sniscak
(717) 236-1300 x224
tjsniscak@hmslegal.com

Christopher M. Arfaa
(717) 236-1300 x231
cmarfaa@hmslegal.com

100 North Tenth Street, Harrisburg, PA 17101 Phone: 717.236.1300 Fax: 717.236.4841 www.hmslegal.com

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By E-Mail (irrc@irrc.state.pa.us) and Hand Delivery

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

Re: Public Utility Commission Regulation #57-304 - Final Regulation, IRRC No. 3061 (Implementation of the Alternative Energy Portfolio Standards Act of 2004, PUC No. L-2014-2404360); **COMMENTS OF THE PENNSYLVANIA STATE UNIVERSITY IN OPPOSITION TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION'S FINAL RULEMAKING ORDER REVISING REGULATIONS IMPLEMENTING THE ALTERNATIVE PORTFOLIO STANDARDS ACT OF 2004**

Dear Chairman Bedwick:

The Comments of The Pennsylvania State University in Opposition to the Pennsylvania Public Utility Commission's Final Rulemaking Order Revising Regulations Implementing The Alternative Portfolio Standards Act Of 2004 are enclosed for consideration by the Independent Regulatory Review Commission.

If you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,

Thomas J. Sniscak

Thomas J. Sniscak
Christopher M. Arfaa

Counsel for The Pennsylvania State University

TJS/CMA/das
Enclosure

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BEFORE THE
INDEPENDENT REGULATORY REVIEW COMMISSION

Pennsylvania Public Utility Commission Regulation #57-304 - Final Regulation Implementation of the Alternative Energy Portfolio Standards Act of 2004	IRRC No. 3061

COMMENTS OF THE PENNSYLVANIA STATE UNIVERSITY IN OPPOSITION TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION'S FINAL RULEMAKING ORDER REVISING REGULATIONS IMPLEMENTING THE ALTERNATIVE PORTFOLIO STANDARDS ACT OF 2004

Thomas J. Sniscak, Attorney I.D. 33891
Christopher M. Arfaa, Attorney I.D. 57047
HAWKE MCKEON & SNISCAK LLP
100 N. 10th Street
Harrisburg, PA 17101
(717) 236-1300
tjsniscak@hmslegal.com
cmarfaa@hmslegal.com

Counsel for
THE PENNSYLVANIA STATE UNIVERSITY

DATED: May 13, 2016

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I. INTRODUCTION AND SUMMARY OF PENN STATE'S COMMENTS

A. Introduction

At its meeting scheduled for May 19, 2016, the Independent Regulatory Review Commission (IRRC) will consider the final regulations (Final Regulation) proposed by the Pennsylvania Public Utility Commission (PUC) in its Final Rulemaking Order in *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, PUC No. L-2014-2404360 (entered Feb. 11, 2016), which was submitted to the IRRC and the House Consumer Affairs Committee and Senate Consumer Protection and Professional Licensure Committee on March 22, 2016.

The Pennsylvania State University (Penn State, PSU or the University), by its undersigned counsel, Hawke McKeon & Sniscak LLP, respectfully submits that certain provisions of the Final Regulation are inconsistent with the intent of the General Assembly in enacting the Alternative Energy Portfolio Standards Act (AEPS Act or Act), 73 P.S. §§ 1648.1-1648.8 and 66 Pa. C.S. § 2814, contravene express provisions of the Act, and otherwise do not serve the public interest. Therefore, they should be disapproved by the IRRC and, if necessary, the General Assembly.

The purpose of the AEPS Act is apparent from its title: "An Act to provide 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."[1] The PUC has correctly acknowledged that "[t]he fundamental intent of the Act is the expansion and increased use of alternative energy

[1] Alternative Energy Portfolio Standards Act, 2004 Pa. Legis. Serv. Act 2004-213 (S.B. 1030) (Purdon's).

systems and energy efficiency practices,"[2] and that the 2007 amendments to the Act[3] evidence and implement the Legislature's "clear intent" to provide customer-generators with "annual compensation for excess generation in a manner that encourages research, development and deployment of alternative energy systems."[4] Thus, as succinctly stated by the IRRC in its comments on the PUC's proposed regulation, "the intent of the Act, and the General assembly, is to promote alternative energy."[5]

The PUC initiated this rulemaking by issuing a Notice of Proposed Rulemaking Order on February 20, 2014 (2014 NPRM Order), which proposed promulgating a number of new requirements and restrictions pertaining to customer-generators and net metering.[6] Penn State and many other parties filed comments demonstrating that several of these new requirements and restrictions impermissibly contravened express provisions of the Act, frustrated the General

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[2] Final Rulemaking Re Net Metering for Customer-generators pursuant to Section 5 of the Alternative Energy Portfolio Standards Act, 73 P.S. § 1648.5, Docket No. L-00050174, Final Rulemaking Order at 21 (entered June 23, 2006).

[3] Act 35 of 2007, 2007 Pa. Legis. Serv. Act 2007-35 (H.B. 1203), § 1 (Purdon's).

[4] *Implementation of Act 35 of 2007; Net Metering and Interconnection,* Docket No. L-00050174, Final Omitted Rulemaking Order at 18 (entered July 2, 2008).

[5] Comments of the Independent Regulatory Review Commission, Pennsylvania Public Utility Commission Regulation #57-304 (IRRC #3061), *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, Pa. PUC No. L-2014-2404360, at 2 (as corrected Oct. 9, 2104) (IRRC 2014 Comments).

[6] See Implementation of the Alternative Energy Portfolio Standards Act of 2004, Notice of Proposed Rulemaking, Docket No. L-2014-2404361 (entered Feb. 20, 2014) (2014 NPRM Order).

Assembly's intent, and had not been shown to be in the public interest.[7] The IRRC subsequently filed comments raising many of the same concerns.[8]

One of the IRRC's suggestions was that the PUC issue an advanced notice of final rulemaking (ANFR) "to engage the regulated community in meaningful dialogue" as the PUC developed its final rulemaking in this matter.[9] Accordingly, on April 23, 2015, the PUC issued an Advanced Notice of Final Rulemaking Order (2015 ANFR Order),[10] which revised some of the provisions proposed by the 2014 NPRM Order. While the 2015 ANFR Order addressed some of the concerns raised by commenters such as Penn State and the IRRC, it erroneously dismissed or ignored others. Penn State and numerous other parties filed comments on the ANFR Order reiterating these concerns.

Unfortunately, the Final Regulation retains many of the flaws of the rules proposed by the NPRM and the ANFR, which are material and if approved by the IRRC will frustrate the fundamental purpose of the 2007 amendments to the Act. These flaws also impede Penn State's ability to fulfill its fundamental role as "a multi-campus public research university that educates students from Pennsylvania, the nation and the world, and improves the well-being and health of individuals and communities through integrated programs of teaching, research, and service."[11]

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[7] *See, e.g.,* Comments of The Pennsylvania State University, *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, Docket No. L-2014-2404361 (filed Sept. 3, 2014) (Penn State 2014 Comments).

[8] *See generally* IRRC 2014 Comments.

[9] IRRC 2014 Comments at 4.

[10] *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, Docket No. L-2014-2404361, Advance Notice of Final Rulemaking Order (entered April 23, 2015) (*2015 ANFR Order*).

[11] Amended and Restated Bylaws of The Pennsylvania State University, § 1.03 (adopted Nov. 14, 2014) (available at http://www.psu.edu/trustees/pdf/Bylaws%20November%202014.pdf),

B. Summary of Penn State's Comments

The PUC's Final Regulation is not in the public interest and should be disapproved pursuant to the Regulatory Review Act[12] for at least three independent reasons.

First, contrary to law, the rules continue to deviate from the express language of the Act and, if permitted to go into effect, would thwart achievement of its fundamental purpose, in contravention of Section 5.2(a) of the Regulatory Review Act.[13] The Act commands that "[e]xcess generation from net-metered customer-generators *shall receive full retail value for all energy produced* on an annual basis."[14] A "customer-generator" is the owner or operator of a distributed generation system with a nameplate capacity of not greater than 50 kilowatts if installed at a residential service location or not larger than 3,000 kilowatts (or 5,000 kilowatts in certain circumstances) if installed at other customer locations.[15] The customer-generator is "net metered," and thus entitled to receive full retail value for all energy produced, when "any portion of the electricity generated by the alternative energy generating system is used to offset part or all of the customer-generator's requirements for electricity."[16] The PUC's Final Regulation contravenes these provisions by inventing and imposing the PUC's own additional restrictions on the eligibility of alternative energy generating systems for net metering and thus limiting the

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[12] Act of June 25, 1982, P.L. 633, No. 181, § 5.2(a), as amended (codified at 71 P.S. §§ 745.1-745.9).

[13] 71 P.S. § 745.5b(a).

[14] 73 P.S. § 1648.5 (emphasis added).

[15] 73 P.S. § 1648.2 ("Customer-generator").

[16] 73 P.S. § 1648.2 ("Net metering").

ability of customer-generators to receive full retail value for energy produced. Specifically, the restrictions that illegally[17] re-write the 2007 amendment to the Act via regulations are:

- Section 75.13(a)(3) of the Final Regulation ***completely disqualifies*** a customer-generator from net metering if the alternative energy generating system generates more than 200% of the customer-generator's electricity requirements,[18] even when their system capacity is within the statutory limits (50kW residential; 3,000/5,000kW nonresidential).[19] This contravenes the Act's express command that such customer-generators shall receive full retail value for all energy produced by systems within the statutory limits.

- Section 75.13(a)(1) of the Final Regulation requires that a customer-generator "[h]ave electric load, independent of the alternative energy system, behind the

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[17] The PUC largely justifies its rewrite of the statute via regulations on the basis that it can do so under its general power to control rates and service. However, that justification has been expressly rejected by the courts where a more specific subsequent piece of legislation is involved, most recently by the Commonwealth Court in *Dauphin Cty. Indus. Dev. Auth. v. Pennsylvania Pub. Util. Comm'n*, as discussed below.

[18] 52 Pa. Code § 75.13(a)(3) (proposed). The 200% limitation is also imposed in the new definition of "Utility" in 52 Pa. Code § 75.1:

> Utility—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.
>
> Since this definition of "utility" disqualifies customer-generators who operate systems designed to produce more than 200% of their requirements, it, too, limits net-metering in direct contravention of the Act.

[19] For example, a customer-generator who requires 500kW of electricity builds a distributed alternate energy generation system with 2,000 kW capacity. Under the statute, the customer-generator's system qualifies for net metering and the customer-generator is entitled to ***full retail value*** for all electricity produced by the system. Under the PUC's 200% rule, the system is not qualified for net metering and the customer-generator gets ***nothing***.

> meter and point of interconnection of the alternative energy system," and Sections 75.12 and 75.14(e) extends the "independent load" requirement to each service location included in virtual meter aggregation. These requirements disqualify customer-generators from net metering where, due to noncontiguous sites, the "independent load" and the alternative energy generation system are in different locations. These requirements contravene the Legislature's command that customer-generators "***shall***" be compensated by net-metering when any part of their electrical requirements is offset by their alternative energy systems. Moreover, these limitations will discourage the deployment and use of alternative energy systems by customer-generators that, like Penn State, have multiple, varied, noncontiguous tracts of property. Thus, the Final Regulation frustrates the fundamental intent of the Act as well as violates its express terms.

These limitations are of particular concern to Penn State. Penn State is the Commonwealth's primary public institution for "research in agriculture, engineering, biological and physical sciences, earth and mineral sciences, health and human services, and other disciplines."[20] As the Commonwealth's designated land-grant university, Penn State owns and operates sites throughout the state to discharge this public purpose. The University is actively researching alternative energy generation systems. In order to progress beyond simple proof-of-concept testing, Penn State's researchers must be able to build systems of sufficient scope to test both load scalability and geographic scalability. This is precisely the kind of innovation the AEPS Act, as amended, was intended to encourage; unfortunately, it is also precisely the kind of innovation that the 200% capacity and independent load/behind-the-meter restrictions imposed by the PUC's Final Regulation will ***discourage.***

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[20] Governor's Executive Budget Proposal for FY2007-08, at E14.24 (available at http://www.budget.pa.gov/PublicationsAndReports/CommonwealthBudget/Pages/PastBudgets2015-16To2006-07.aspx#.VzSYmaTD-vF).

Second, the Final Regulation is not in the public interest because the PUC has failed to articulate any compelling need for several manifestly unreasonable new requirements.[21] Specifically:

- The PUC has failed to articulate any compelling need for the arbitrary two-mile limitation on virtual meter aggregation (52 Pa. Code § 75.14(3) (proposed)). To the contrary, the requirement that the properties be located within the service area of the same EDC renders the two-mile limitation unnecessary: if the properties sought to be virtually aggregated for net metering are situated in the same EDC service area, there is no reason to disqualify them because they are located more than two miles from the boundaries of the customer-generator's property.

- The PUC has failed to identify or articulate any compelling need for the completely new set of regulatory burdens imposed on prospective customer-generators with larger energy systems (52 Pa. Code. § 75.17 (proposed)). The added review time and administrative requirements create an undue burden and thus discourage the research, deployment and development of renewable energy systems.

Third, the Final Regulation is not in the public interest because it represents a policy decision of such a substantial nature that it requires legislative review[22]:

- The PUC asserts that the limitation of net metering to systems generating no more than 200% of customer-generator electricity requirements, and the "behind the meter" and "independent load" conditions added to the rules governing virtual meter aggregation, are necessary to promote the policies advanced by statutes other than the Act. Where, as in this case, the reconciliation of conflicting policies results in contravention of express statutory requirements, such reconciliation requires legislative review by the authors of the statutes.

  The Final Regulation therefore should be disapproved.

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[21] *See* Regulatory Review Act § 5.2(b)(3), 71 P.S. § 745.5b(b)(3).

[22] *See* Regulatory Review Act § 5.2(b)(4), 71 P.S. § 745.5(b)(4).

II. COMMENTS

A. The Final Regulation Does Not Conform To The Intention Of the General Assembly In The Enactment Of The AEPS Act.

The purpose of the AEPS Act is "to provide 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."[23] Its "fundamental intent . . . is the expansion and increased use of alternative energy systems and energy efficiency practices"[24] by providing customer-generators with "annual compensation for excess generation in a manner that encourages research, development and deployment of alternative energy systems."[25] The Final Regulation, however, will sharply ***reduce*** customer-generators' access to such compensation and thus will ***discourage*** research, development and deployment of alternative energy systems in the manner intended by the General Assembly.

The Act commands that "[e]xcess generation from net-metered customer-generators ***shall*** receive full retail value for all energy produced on an annual basis."[26] The only limitations imposed by the statute are (a) that the customer-generator's system have nameplate capacity of not greater than 50 kilowatts if installed at a residential service location or not larger than 3,000

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[23] Alternative Energy Portfolio Standards Act, 2004 Pa. Legis. Serv. Act 2004-213 (S.B. 1030) (Purdon's) (emphasis added).

[24] Final Rulemaking Re Net Metering for Customer-generators pursuant to Section 5 of the Alternative Energy Portfolio Standards Act, 73 P.S. § 1648.5, Docket No. L-00050174, Final Rulemaking Order at 21 (entered June 23, 2006) (emphasis added).

[25] *Implementation of Act 35 of 2007; Net Metering and Interconnection,* Docket No. L-00050174, Final Omitted Rulemaking Order at 18 (entered July 2, 2008) (emphasis added).

[26] 73 P.S. § 1648.5 (emphasis added).

kilowatts (or 5,000 kilowatts in certain circumstances) if installed at other customer locations,[27] and (b) that "any portion of the electricity generated by the alternative energy generating system [be] used to offset part or all of the customer-generator's requirements for electricity."[28] These provisions are clear and may not under Pennsylvania's Rules of Statutory Construction[29] be disregarded, limited or interpreted differently by an agency that believes the spirit of the law differs from its express language.[30] The Final Regulation restricts the availability of compensation to net-metered customer-generators in ways that not only thwart the General Assembly's fundamental intent to encourage the research, development, and deployment of renewable energy systems, but also directly contravene the express provisions of the Act.

1. The limitation of net metering to systems generating no more than 200% of customer-generator electricity requirements violates the Act (§ 75.13(a)(3)).

The 2014 NPRM Order proposed a new § 75.13(a)(3) of the PUC's AEPS regulations, which would have precluded compensation completely whenever the customer-generator's alternative energy system is capable of generating more than 110% of the customer-generator's annual electric consumption.[31] In its 2014 Comments, Penn State argued that this rule should be rejected because it is in conflict with the plain language of the Act, as amended.[32] The Act

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[27] 73 P.S. § 1648.2 ("Customer-generator").

[28] 73 P.S. § 1648.2 ("Net metering").

[29] 1 Pa. C.S. §§ 1921-1936.

[30] 1 Pa. C.S. § 1921(b) ("When 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."); *see, e.g., Implementation of Act 35 of 2007; Net Metering and Interconnection,* Docket No. L-00050174, Final Omitted Rulemaking Order at 10 (entered July 2, 2008) ("We cannot disregard the Legislature's clear direction under the pretext of pursuing its spirit, 1 Pa. C.S. § 1921(b).").

[31] *2014 NPRM Order*, Annex A at 7 (amending 52 Pa. Code § 75.13(a)).

[32] Penn State 2014 Comments at 11-13.

originally defined net metering as "the difference between the electricity supplied by an electric utility and the electricity generated by a customer-generator when the renewable energy generating system ***is intended primarily*** to offset part or all of the customer-generator's requirements for electricity."[33] In 2007, the Legislature amended this provision by deleting the highlighted language and inserting new language so that net metering is permitted "when ***any portion*** of the electricity generated by the alternative energy generating system is used to offset part or all of the customer-generator's requirements for electricity."[34]

The purpose of the 2007 amendment could not be clearer: Net-metering is ***not*** to be limited to situations where the primary purpose of the renewable energy system is to offset the customer-generator's load. Indeed, the PUC itself recognized this when it deleted the "intended primarily to offset" requirement from prior regulations in order to conform to the amended statutory definition of net metering.[35] Penn State's 2014 Comments argued that the effect of the proposed 110% condition would have been to reinstate the "primary purpose" requirement that the Legislature expressly rejected, and that, therefore, it was unlawful.[36] Noting this argument, the IRRC asked the PUC "to provide a citation to specific statutory language that would allow for the limitation being proposed" under subsection (a)(3) of § 75.13.[37]

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[33] Act 213 of 2004, 2004 Pa. Legis. Serv. Act 2004-213 (S.B. 1030) (Purdon's), § 2.

[34] 73 P.S. § 1648.2 (emphasis added). *See* Act 35 of 2007, 2007 Pa. Legis. Serv. Act 2007-35 (H.B. 1203), § 1 (Purdon's) (amending definition of "net metering").

[35] *Implementation of Act 35 of 2007; Net Metering and Interconnection,* Docket No. L-00050174, Final Omitted Rulemaking Order at 8-9 (entered July 2, 2008).

[36] "Where there is a conflict between the statute and a regulation purporting to implement the provisions of that statute, the regulation must give way." Penn State 2014 Comments at 12-13 (quoting *Heaton v. Commonwealth Department of Public Welfare*, 96 Pa. Cmwlth. 195, 506 A.2d 1350 (1986)).

[37] IRRC 2014 Comments at 6.

The 2015 ANFR Order increased the alternative energy system size limit from 110 percent to 200 percent.[38] Penn State and others reiterated the argument that such limits violated the express terms of the Act, as amended, because by disqualifying alternative energy systems that generate more than 200% of the customer-generator's load from net metering, the practical effect of the requirement still would be to disqualify nonutility alternative energy generating systems from net metering even though the system is within the Act's capacity limitations and some portion of the electricity they generate is used to offset part or all of the customer-generator's requirements for electricity.

The PUC responded to these concerns, not by providing "a citation to specific statutory language that would allow for the limitation being proposed," as requested by the IRRC in its comments, but by invoking its "legislative rulemaking authority" (citing 66 Pa. C.S. § 501(b)) and its "broad rulemaking authority to implement that AEPS Act" (citing 73 P.S. § 1648.7(a)), and by noting that both the Public Utility Code and the AEPS Act "relate to the purchase of electric generation for sale to retail customers."[39] Since the two statutes specifically refer to each other, the PUC concluded that they must be construed together "as one statute" under the *in pari materia* rule of statutory construction.[40] The PUC then reasoned:

> As the Public Utility Code and the AEPS Act must be construed as one statute, the Commission has broad and explicit legislative rulemaking authority, pursuant to the Public Utility Code and the AEPS Act to promulgate these regulations. *See* 66 Pa. C.S. § 501; 73 P.S. § 1648.7(a).[41]

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[38] *2155 ANFR Order*, slip op. at 11.

[39] Final Rulemaking Order, slip op. at 45.

[40] Final Rulemaking Order, slip op. at 46 (citing 1 Pa. C.S. § 1932).

[41] Final Rulemaking Order, slip op. at 46

The PUC concluded that the 200% restriction is "reasonable" and "gives meaning and effect to all provisions of both statutes."[42] Specifically, the PUC concluded that the 200% will "ensure that rates default service customers pay for generation is the least cost to customers over time and that they are just and reasonable, in compliance with Section 2807(e) and 1301 of the Public Utility Code, while at the same time permit the payment of full retail value for all excess energy produced on an annual basis."[43]

The PUC's legal analysis is wrong and does not support the Final Regulation's disqualification of customer-generators with systems that generate more than 200% limitation of their electricity usage. The PUC's assertion that "[t]his reasonable size limitation is not inconsistent with ... the AEPS Act" is similarly wrong. As Penn State explains above, *any* size limitation beyond those contained in the Act (50kW residential; 3,000kW/5,000kW nonresidential) is inconsistent with the Act's command that net metering shall be permitted "when ***any portion*** of the electricity generated by the alternative energy generating system is used to offset part or all of the customer-generator's requirements for electricity."[44] Thus, the PUC's statement of "not inconsistent" provides no basis in law to negate or rewrite the 2007 Amendment to the Act.

If the AEPS Act and the Public Utility Code are to be construed as "one statute" *in pari materia*, then the least cost and just and reasonable rates provisions of the Public Utility Code must be construed in a manner consistent with the express command of the AEPS Act. As the Commonwealth Court recently held in an analogous case, "[t]he statutory requirement that utility

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[42] Id.

[43] *Id.* (citing 66 Pa. C.S. §§ 131, 2807(e)).

[44] 73 P.S. § 1648.2 (emphasis added). *See* Act 35 of 2007, 2007 Pa. Legis. Serv. Act 2007-35 (H.B. 1203), § 1 (Purdon's) (amending definition of "net metering").

rates be just and reasonable ***does not authorize the Commission to ignore or alter other statutory directives***."[45] In *Dauphin County Industrial Development Authority v. Pennsylvania Public Utility Commission*, the PUC had approved a utility's Time-of-Use program that did not permit a customer-generator purchasing electricity at Time-of-Use rates to sell its excess electricity (via net metering) on the same terms and conditions. On appeal, the customer-generator argued that the PUC's decision violated the command of the AEPS Act that "[e]xcess generation from net-metered customer-generators *shall receive full retail value for all energy produced* on an annual basis."[46] In response, the PUC offered the same argument it offers here in support of its 200% rule: its interpretation of the statute in a manner that did not provide customer-generators "full retail value for all energy produced" was justified and fulfilled its statutory mandate to ensure that utility rates be "just and reasonable."[47] The Commonwealth Court disagreed:

> The statutory requirement that utility rates be just and reasonable does not authorize the Commission to ignore or alter other statutory directives. *Popowsky v. Pennsylvania Public Utility Commission*, 589 Pa. 605, 910 A.2d 38, 53 (2006). Utility rates are a function of many factors, such as the costs associated with environmental compliance, the cost to build a power plant and the cost to provide a return to the utility's shareholders. The cost of purchasing electricity from a customer-generator that has invested in the production of green energy is only one of many factors that goes into a tariff. The policy decision expressed in the Alternative Energy Act to encourage the production of renewable energy

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[45] *Dauphin Cty. Indus. Dev. Auth. v. Pennsylvania Pub. Util. Comm'n*, 123 A.3d 1124, 1135 (Pa. Commw. 2015), *reargument denied* (Oct. 30, 2015) (citing *Popowsky v. Pennsylvania Pub. Util. Comm'n*, 589 Pa. 605, 910 A.2d 38, 53 (2006); emphasis added).

[46] 73 P.S. § 1648.5 (emphasis added).

[47] 123 A.3d at 1133.

> sources is not conditioned on its producing the lowest possible tariff. [48]

The *Dauphin County Industrial Development Authority* holding confirms that the general mandate to ensure just and reasonable rates does not provide statutory authorization for the PUC to alter the specific command of the AEPS Act that net-metered customer-generators with systems within the statutory size limits "shall receive full retail value for all energy produced" by limiting net metering to customer-generators with systems that generate no more than 200% of their own electricity requirements. Since the 200% capacity restriction violates the express language of the Act, and the PUC lacks any specific statutory authority to impose such a limitation, the Final Regulation should be disapproved.

2. The "behind the meter" and "independent load" conditions added to the rules governing virtual meter aggregation, meters and metering violate the Act (§§ 75.12, 75.13(a)(1) and 75.14).

The proposed revisions to the definition of *Virtual Net Metering* would impose an "independent load" requirement on eligibility of a customer location for net metering.[49] The

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[48] *Id.* at 1135. There is no basis in the record for the PUC's assumption that the AEPS Act cannot be given full effect without contravening either the least cost or just and reasonable rates requirements of the Public Utility Code. As the Commonwealth Court observed in *Dauphin County Industrial Development Authority,* "Utility rates are a function of many factors, such as the costs associated with environmental compliance, the cost to build a power plant and the cost to provide a return to the utility's shareholders. The cost of purchasing electricity from a customer-generator that has invested in the production of green energy is only one of many factors that goes into a tariff." *Id.* However, if such an irreconcilable conflict existed, the specific command of the Act to permit net metering "when ***any portion*** of the electricity generated by the alternative energy generating system is used to offset part or all of the customer-generator's requirements for electricity" would control the general "least cost" and "just and reasonable rates" provisions of the Code. 1 Pa. C.S. § 1933 ("If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision . . . .").

[49] "*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

revisions to § 75.13(a)(1) would impose "behind-the-meter" and "independent load" conditions on a customer-generator's eligibility for net metering.[50] The amendments to § 75.14(e) would similarly require all properties to be aggregated in virtual metering arrangements to "receiv[e] electric generation service and have measureable load independent of any alternative energy system."

In its comments on the 2014 NPRM Order, Penn State demonstrated that these measures would severely curtail the deployment of alternative energy systems by customer-generators that, like Penn State, have multiple, varied, noncontiguous tracts of property. By requiring all properties participating in virtual net metering to have measureable electric load independent of the alternative energy system behind the meter and point of interconnection of the alternative energy system, the proposed rules would remove the economic incentive the Act gives property owners to install alternative energy systems on their undeveloped sites (i.e., sites without existing load) that are not contiguous with their developed sites (i.e., sites with existing load). The

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for a physical, single point of contact. Virtual meter aggregation on properties owned or leased and operated by **[a]** **the same** customer-generator and located within 2 miles of the boundaries of the customer-generator's property and within a single **[electric distribution company's]** **EDC's** service territory shall be eligible for net metering. **Service locations to be aggregated must be EDC SERVICE LOCATION ACCOUNTS, HELD BY THE SAME INDIVIDUAL OR LEGAL ENTITY, receiving retail electric service from the same EDC and have measureable electric load independent of the alternative energy system. To be independent of the alternative energy system, the electric load must have a purpose other than to support the operation, maintenance or administration of the alternative energy system."**

[50] "**To qualify for net metering, the customer-generator shall meet the following conditions: (1) Have electric load, independent of the alternative energy system, behind the meter and point of interconnection of the alternative energy system. To be independent of the alternative energy system, the electric load must have a purpose other than to support the operation, maintenance or administration of the alternative energy system."**

inevitable result will be to discourage the research, deployment and use of renewable energy systems in contravention of the Act's fundamental intent.

In its comments on the 2014 NPRM Order, the IRRC asked the PUC to explain why it believes such limitations do not conflict with the Act.[51] In response the PUC's 2015 ANFR did not address that issue. Instead, the ANFR's only response to the problem of non-contiguous properties presented by Penn State is a statement, without further explanation, that "various parties have presented scenarios to the Commission for virtual metering that did not comport with our intent to permit a limited amount of virtual meter aggregation."[52] In its 2015 comments, Penn State argued that the question is not whether the facts on the ground comport with the ***PUC's*** intent, but whether the PUC's regulations comport with the ***Legislature***'s intent. These provisions of the Final Regulation do not.

The Act permits net metering "when ***any portion*** of the electricity generated by the alternative energy generating system is used to offset part or all of the customer-generator's requirements for electricity." The statute could not be clearer: net metering is available when "any" portion of the electricity a customer-generator's alternative energy system generates is used to offset "part or all" of the customer-generator's requirements for electricity. Nothing in the Act suggests, much less requires that the "part" of the customer generator's load offset by the alternative energy system be either "behind the meter" or "independent" from the system. There is no requirement that each of the properties involved in virtual meter aggregation receive electric generation service, nor is there any requirement that each property have measurable load independent of any alternative energy system.

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[51] IRRC 2014 Comments at 2.

[52] *2015 ANFR Order*, slip op. at 13.

By imposing behind-the-meter and "independent load" requirements on net metering, the Final Regulation contravenes the Legislature's command that customer-generators "***shall***" be compensated by net metering when "***any part***" of their electrical requirements is offset by their alternative energy systems. The limitations on virtual meter aggregation will discourage the deployment and use of alternative energy systems by customer-generators that, like Penn State, have multiple, varied, noncontiguous tracts of property. The Final Regulation, if permitted to be promulgated, would thus frustrate the fundamental intent of the Act as well as violate its express terms.

Furthermore, as the Commonwealth's primary public institution for research, with sites scattered throughout the Commonwealth, Penn State is uniquely qualified to design, and deploy large-scale, distributed alternative energy generation systems, and thus to fulfill the Legislature's intent in enacting the AEPS Act. One of the PUC's reasons for restricting net metering is to discourage commercial exploitation. It is therefore ironic that, even if the PUC were permitted to amend the AEPS Act in this manner (which it is not), the effect of the restrictions would be to discourage Penn State, one of the largest ***non***-commercial, non-profit public institutions in the state from designing, developing and deploying innovative alternative energy generation systems.

B. The Final Regulation Is Not In The Public Interest.

1. The AEPS regulation is unreasonable.

a. The two-mile limitation on virtual meter aggregation is unnecessary and frustrates the purposes of the Act (§ 75.14(3)).

Section 75.14(3) of the Final Regulation limits virtual meter aggregation to properties located within two miles of the customer-generator's property. This limitation is not required by

the Act and, if retained, it will thwart the research, development and deployment of alternative energy systems as intended by the Legislature.

The PUC has failed to articulate a need for this limitation. To the contrary, the statutory requirement that the properties be located within the service area of the same EDC renders the two-mile limitation unnecessary. That is, if the properties sought to be virtually aggregated for net metering are situated in the same EDC service area, there is no reason to disqualify them because they are located more than two miles from the boundaries of the customer-generator's property.

Since the two-mile limitation thwarts achievement of the purposes of the Act without producing any countervailing benefit, the Final Regulation is unreasonable and not in the public interest.

b. The new procedure for obtaining PUC approval of customer-generator status unduly burdens prospective customer-generators and thus thwarts the goals of the Act (§ 75.17).

The Final Regulation creates a completely new set of regulatory burdens on prospective customer-generators with larger energy systems (500 kW or greater) by requiring them to seek and approve PUC approval of their customer-generator status. The PUC failed to identify any particular need for this additional layer of red-tape, expense, and potential delay. The Final Rulemaking Order does not adequately address the administrative, time and expense burdens that these procedures will impose on research, development and deployment of alternative energy systems. These added review time and administrative requirements create an undue burden and thus discourage the research, deployment and development of renewable energy systems. In the absence of any demonstrated countervailing benefit, they render the Final Regulation unreasonable and not in the public interest.

2. The AEPS regulation represents a policy decision of such a substantial nature that it requires legislative review.

The limitation of net metering to systems generating no more than 200% of customer-generator electricity requirements, and the "behind the meter" and "independent load" conditions added to the rules governing virtual meter aggregation, are the products of substantial policy decisions by the PUC. The PUC asserts that these requirements are necessary to promote the policies behind other provisions of the Public Utility Code. However, when the balancing of conflicting policies results in contravention of express statutory requirements, its implementation requires legislative review by the authors of the statutes.

III. CONCLUSION

For all of the foregoing reasons, Penn State respectfully submits that the Final Regulation violates the Act, frustrates the intention of the General Assembly, and is not in the public interest. Therefore, it should be disapproved.

Respectfully submitted,

Thomas J. Sniscak, Attorney I.D. 33891
Christopher M. Arfaa, Attorney I.D. 57047
HAWKE MCKEON & SNISCAK LLP
100 N. 10th Street
Harrisburg, PA 17101
(717) 236-1300
tjsniscak@hmslegal.com
cmarfaa@hmslegal.com

Counsel for
THE PENNSYLVANIA STATE UNIVERSITY

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