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ECKERT SEAMANS
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC
213 Market Street
8th Floor
Harrisburg, PA 17101

TEL 717 237 6000
FAX 717 237 6019
www.eckertseamans.com

Mark S. Stewart
717.237.7191
mstewart@eckertseamans.com

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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

Even after the removal of the proposed 200% limitation, DCIDA is deeply concerned about the proposed definition of "utility" and about how the subject regulations will affect existing alternative energy systems, such as DCIDA's existing Solar Facility.[2] The Commission's

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1 *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, PUC Docket No. L-2014-2404361, Amended Final Rulemaking Order entered June 9, 2016 ("Amended 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), 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), and its comments on the final regulations, dated May 12, 2016 (which are on file with IRRC). 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

regulations are directly at odds with and in contravention of The Alternative Energy Portfolio Standards Act ("AEPS Act").[3] The AEPS Act entitles non-utility generators to engage in net metering. Yet, the PUC's regulation defines the term "utility" in a way that captures anyone who engaged in net metering and has **any** excess generation to sell back to its electric distribution system. Such a definition inexplicably replaces the 200% limitation with a **0% or zero tolerance** restriction, thereby eliminating a vast number of persons and entities that would otherwise be eligible for net metering under the AEPS Act.

Moreover, the Commission did not give any assurance that said regulations will not affect existing customer-generator systems. **It did the 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.

The AEPS Act provides that net metering is available to "nonutility" energy generators.[4] The term "nonutility" is not defined in the AEPS Act, the Public Utility Code,[5] or the Commission's existing AEPS regulations.[6] 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."[7]

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operates in parallel with the PPL distribution system, and conforms to the then-applicable interconnection standards and regulations.

3 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.*

4 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.

5 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.*

6 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).

7 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.

Several years after the passage of the AEPS Act, the Commission is engaged in efforts to define who is, and who is not, a "nonutility" for purposes of the AEPS Act.[8] Rather than define the term as used in the statute (non-utility), the Commission is proposing to define the term "utility" and to make eligibility for net metering contingent upon the customer-generator not being a "utility."[9]

The Commission has proposed a definition of the term "utility" that departs from statutory definitions,[10] published guidelines and established precedent. Specifically, the Commission now proposes to define a "utility" as:

> A person or entity that provides electric generation, transmission or distribution services, at wholesale or retail, to other persons or entities. 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.[11]

The proposed definition does <u>not</u> fully respond to IRRC's 2014 comments. To be clear, the proposed definition reflects the removal of the 200% limitation (and related references to digesters). But, it does not fully respond to IRRC's 2014 comments. Back in 2014, the definition of utility was limited to the first sentence of the above-referenced definition. At that time, IRRC challenged the Commission "to provide a more precise definition of this term and to consider using the statutory term 'public utility.'"[12] The Commission has clarified that landlords would not be deemed to be a "utility," but otherwise said challenge was unmet.

The proposed definition will gut the AEPS' net metering provisions. The AEPS Act entitles non-utility generators to engage in net metering. Yet, the PUC's regulation defines the term "utility" in a way that captures anyone who engaged in net metering and has <u>any</u> excess generation to sell back to its electric distribution system. Such a definition inexplicably replaces the 200% limitation with a <u>0% or zero tolerance</u> restriction, thereby precluding persons and entities that generate excess electricity from being eligible for net metering under the AEPS Act. A vast number, if not all, of the persons and entities eligible for net metering under the AEPS Act would produce excess electricity in one or more months of any given year.

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8 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).

9 *See* Amended Final Rulemaking Order, at Annex A, Proposed Sections 75.1 and 75.13(a)(2).

10 66 Pa.C.S. § 102 (definition of "public utility").

11 *Amended Final Rulemaking Order,* at Annex A, Proposed Sections 75.1.

12 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 3.

The Commission rationale is <u>not</u> consistent with the proposed definition. The Commission has explained that:

> A customer-generator is one who is not in the business of providing electric power to the grid or other electric users. As such, we have defined a utility in this context as a person or entity whose primary business is electric generation, transmission, or distribution services, at wholesale or retail, to other persons or entities.[13]

But, that is not what the proposed definition actually says. The definition, as proposed, is not limited to businesses. Nor does it require a sale (either at retail or wholesale). This means that the criteria that the Commission intends to apply to customer-generators is not available to the public (or the General Assembly). Moreover, it is not clear how the definition and explanation will work given that any excess electricity – consistent with other Commission regulations[14] - will be purchased and/or used by other persons or entities. It follows that existing, proposed and future customer-generators are left to wonder how will the Commission determine when it considers sales of excess generation to be "business" or "primary business."

This proposed definition is overly broad and circular. A person or entity could fall within the definition of "utility," but be excluded from the statutory definitions of public utility.[15] The lack of certainty over who is a "utility" versus who is a "public utility" is likely to be confusing. For example, as proposed, to be eligible for net-metering a customer-generator cannot provide electric generation (electricity) to others. Because the customer-generator is not generating any electricity, it cannot be deemed to be a "utility." That being said, the Commission could reach a different result if that same customer-generator produces excess electricity. The excess electricity will be purchased and/or used by other persons or entities connected to the grid. This means that every customer generator who energy could be deemed to be a "utility," and thus not eligible for net metering. Simply put, the proposed definition is not understandable.

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13 *Amended Final Rulemaking Order*, at p. 17.

14 *See, e.g., Amended Final Rulemaking Order*, at Annex A, Proposed Section 75.12(d), (e), (f).

15 For example, an EGS would fall within the proposed definition of "utility," by virtue of its provision of generation and transmission services, but an EGS is not a public utility (except for limited purposes) *See, e.g., Delmarva Power & Light Co. v. Commonwealth*, 870 A.2d 901 (Pa. 2005). The Pennsylvania Public Utility Code's definition of "public utility" states plainly and clearly that the term does not include electric generation suppliers (EGSs), except for the limited purposes as described in 66 Pa. Cons. Stat. §§ 2809 (relating to requirements for electric generation suppliers) and 2810 (relating to revenue neutral reconciliation). 66 Pa. Cons. Stat. § 102. Based on this unambiguous language, the Pennsylvania General Assembly did not intend for EGSs to be characterized as public utilities for most purposes.

Nothing was done to show why the proposed definition is reasonable. 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.[16] The Commission has determined that landlords are eligible for net metering, and can provide electricity to tenants and the grid. But, anyone else who is providing electricity to another or to the grid could be deemed to be a "utility," and not eligible for net metering. Why the different treatment?

DCIDA is concerned that it will be unfairly categorized as a "utility." The definition of "utility" will be used in conjunction with the definition of customer-generator. By deeming that a person or entity is a "utility," the Commission can impact that person's or entity's eligibility to participate in net metering. Nothing in the proposed definition or the rulemaking provides any assurances to DCIDA that the Commission will not retroactively apply the proposed definition to DCIDA (or others) with existing facilities. Rather than give assurances that said definition will not affect existing customer-generator systems, the Commission did the opposite.

If the proposed definition is approved, the Commission has stated that it cannot ignore the term "nonutility" and must enforce it.[17] In fact, the Commission explicitly refused to state that the definition of "utility" would only be applicable to new facilities.[18] 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[19] and the Pennsylvania Constitution[20] 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.").[21]

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16 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).

17 *Amended Final Rulemaking Order,* at p. 27-28.

18 *Amended Final Rulemaking Order*, at p. 27-28.

19 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."

20 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."

21 This argument would not be applicable to landlords and internal distribution systems because they are excluded and/or exempted from the definition of "utility" under Proposed Sections 75.1. *See Amended Final Rulemaking Order*, at Annex A, Proposed Sections 75.1 and 75.13(a)(2).

Such a result is not acceptable, and would violate both constitutional protections[22] and DCIDA's vested rights.

Conclusion

The concerns raised by DCIDA are significant and justify the disapproval of the subject regulations in their entirety. Rather than certainty, the proposed definition of "utility" – if adopted – is likely to create chaos and litigation for years to come.

Sincerely,

Mark S. Stewart, Esquire
Counsel for The Dauphin County Industrial Development Authority

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22 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).