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June 24, 2016

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

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 AND REVISED FINAL REGULATIONS IMPLEMENTING THE ALTERNATIVE ENERGY 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 and Revised Final Regulations Implementing The Alternative Energy 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

cc: Gladys M. Brown, PUC Chairman (*via hand delivery*)
Andrew G. Place, PUC Vice Chairman (*via hand delivery*)

Robert F. Coleman, Jr., PUC Commissioner (*via hand delivery*)
John F. Powelson, PUC Commissioner (*via hand delivery*)
David W. Sweet, PUC Commissioner (*via hand delivery*)

BEFORE THE
INDEPENDENT REGULATORY REVIEW COMMISSION

Regulation #57-304 - Final Regulation Implementation of the Alternative Energy Portfolio Standards Act of 2004, Pennsylvania Public Utility Commission Dkt. No. L-2014-2404361	IRRC No. 3061

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

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DATED: June 24, 2016

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I. INTRODUCTION AND SUMMARY

The Pennsylvania State University (Penn State, PSU or the University), by its undersigned counsel, Hawke McKeon & Sniscak LLP, respectfully submits these Comments in opposition to the Pennsylvania Public Utility Commission's amended final rulemaking order and revised final regulations implementing the Alternative Energy Portfolio Standards Act of 2004.

Simply put, the regulations that the PUC now wants to rush into Title 52 of the Pennsylvania Code will effectively chill if not preclude the very activity the AEPS Act and in particular the 2007 Amendment to that Act seek to promote: the development and deployment of alternative energy systems. The PUC continues to offer no evidence or reasons as to why these overly restrictive regulations are necessary, and its attempt to nullify the 2007 Amendment by means of regulation will lead only to future appellate litigation and, sadly, a huge step backward regarding clean and environmental friendly alternative energy.

On May 19, 2016, the Independent Regulatory Review Commission (the IRRC) disapproved the final regulation (#57-304) (the Final Regulation) issued by the Pennsylvania Public Utility Commission (the PUC)[1] to implement the Alternative Energy Portfolio Standards Act[2] (the AEPS Act or Act).[3] The IRRC disapproved the regulation primarily because by limiting net-metering or imposing caps on entities that net meter electricity to entities with alternative energy systems sized to generate no more than at 200% of their annual consumption, the PUC

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[1] *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, PUC Dkt. No. L-2014-2404360, Final Rulemaking Order (Feb. 11, 2016).

[2] 73 P.S. §§ 1648.1-1648.8 and 66 Pa. C.S. § 2814.

[3] *See Regulation #57-304 - Final Regulation, Implementation of the Alternative Energy Portfolio Standards Act of 2004, Pennsylvania Public Utility Commission Dkt. No. L-2014-2404361*, IRRC #3061, Disapproval Order (June 2, 2016) (*Disapproval Order*).

exceeded its statutory authority.[4] The IRRC also disapproved the regulation for the additional reasons that the PUC had failed to show any need for the modifications and that the PUC's proposal appeared to be a change in policy of such a substantial nature that consultation with the General Assembly was warranted.[5] Anticipating that the PUC might proceed with the rulemaking by deleting the 200% capacity limit, the IRRC specifically cautioned the PUC to "ensure that other provisions of the regulation do not limit a customer-generator's ability to net-meter excess generation it produces."[6] While the PUC has eliminated the 200% condition, its regulations continue to limit net metering in a manner that contravenes the AEPS Act.

At its June 9, 2016 Public Meeting, the PUC revised and re-issued the rejected Final Regulation (as so revised, the Revised Regulation) with two types of revisions.[7] First, the PUC removed references to the 200% cap on the size of net metering facilities, giving the appearance of compliance with the IRRC's primary objection. However, in contravention of the IRRC's express direction, the PUC not only failed to "ensure that other provisions of the regulation do not limit a customer-generator's ability to net-meter excess generation it produces,"[8] it adopted provisions (such as the definition of "utility," and the "independent load" and "behind the meter" requirements for virtual meter aggregation) expressly *because* they will limit a customer-generator's ability to net-meter excess generation. Second, even though the IRRC had found that the PUC had failed to establish a sufficient factual basis of need for the regulations, the PUC did

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[4] *Disapproval Order* at 1-2.

[5] *Disapproval Order* at 3.

[6] *Disapproval Order* at 2.

[7] *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, Docket No. L-2014-2404361, Amended Final Rulemaking Order (entered June 9, 2016) (*Amended Rulemaking Order*).

[8] *Disapproval Order* at 2.

not augment its demonstration of need but instead, without explanation, *removed* the information from the regulatory impact packet that had accompanied the Final Regulation that purported to show the need for the regulations.

Other than the 200% capacity limitation, the Revised Regulation continues to suffer from all of the shortcomings the IRRC and PSU previously identified. 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."[9] 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.[10] 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."[11] The PUC's Revised Regulation continues to contravene these provisions by inventing and imposing the PUC's own additional restrictions on the eligibility of alternative energy generating systems for net metering *for the express purpose* of limiting the ability of customer-generators to receive full retail value for energy produced.

First, 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 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.

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[9] 73 P.S. § 1648.5 (emphasis added).

[10] 73 P.S. § 1648.2 ("Customer-generator").

[11] 73 P.S. § 1648.2 ("Net metering") (emphasis added).

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.

Second, with the removal of the 200%-of-capacity condition, the definition of "Utility", and thus the definition of customer generators who are *ineligible* for net-metering, now includes *any* "person or entity that provides electric generation, transmission or distribution services, at wholesale or retail, to other persons or entities," except where the customer generator owns or operates the internal distribution system and supplies the power used to meet its own demand. This definition is so broad that it appears to encompass, and thus disqualify from net metering, any person involved in providing any form of electricity generation to anyone else. Certainly, larger systems that rely on partnerships with third parties will no longer be eligible for net metering.

Third, the Revised Regulation's procedure for obtaining PUC approval of customer-generator status[12] unduly burdens prospective customer-generators and thus thwarts the goals of the Act.

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 Revised Regulation frustrates the fundamental intent of the Act as well as violates its express terms. Furthermore, the PUC once again has failed to articulate any compelling need for these new requirements.[13] The PUC's *de facto* amendment

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[12] *Amended Rulemaking Order*, Annex A (amending 52 Pa. Code § 75.17).

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

of the AEPS Act continues to represent a policy decision of such a substantial nature that it requires legislative review.[14]

The PUC's error in failing to address these defects has been compounded by its moving forward when the Legislature is occupied with debating and achieving a budget for the Commonwealth and members of the General Assembly will soon be returning to their districts. PSU respectfully submits that the important issues presented by PSU and identified by IRRC deserve a full discussion as opposed to the PUC not addressing the issues or developing actual evidence to support its apparent view, perhaps advocated by the electric utility industry, that the actual plain language of the AEPS Act is somehow not good for the public and ratepayers.

With all due respect, it is not the job of the PUC to second guess or amend a statute through regulations; rather, any change to the AEPS Act should only occur by action of the Legislature. Similarly, the undertone of the regulations is that they are necessary to protect ratepayers. This allegation remains unproven, and it is no basis to gut the 2007 Amendment. First, from a legal perspective, the Legislature has spoken and the PUC cannot under the guise of its general powers under the Public Utility Code to ensure just and reasonable rates depart from specific statutory commands such as the 2007 AEPS amendment.[15] As the Commonwealth Court recently held in an analogous case, "[t]he statutory requirement that utility rates be just and reasonable ***does not authorize the Commission to ignore or alter other statutory directives***."[16]

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

[15] If the AEPS Act and the Public Utility Code are to be construed as "one statute" *in pari materia*, as the PUC has argued, 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. 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 . . . .").

[16] *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.*

Second, just because a statutory amendment may have an impact on rates is no basis to eviscerate it under the banner of protecting ratepayers. Many programs due to statutory amendments to the PUC's statute, other statutes, or PUC Orders have rate impacts such as Energy

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Comm'n, 589 Pa. 605, 910 A.2d 38, 53 (2006); emphasis added). In *Dauphin County Industrial Development Authority*, 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." 73 P.S. § 1648.5 (emphasis added). In response, the PUC argued that 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." 123 A.3d at 1133. 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 sources is not conditioned on its producing the lowest possible tariff.

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 . . . .").

Efficiency & Conservation Program required by Act 129 of 2008,[17] environmental requirements such as clean air[18] and waste handling, universal service, customer assistance (such as LIHEAP), as the costs of those programs are passed through to ratepayers. However, it must not be forgotten that the Legislature decided that the benefits from the legislation are important enough to allow for its funding through rates. Here, the Legislature has in the 2007 Amendment allowed and promoted alternative energy and it is not the PUC's decision to revisit the Legislative wisdom of that Act. It is equally clear that the 2007 Amendment provides net public benefits.[19]

The overbroad nature of the PUC's approach to these regulations is presumably aimed to preclude profiteering by what the PUC calls a "merchant generator." However, as discussed later in these comments, in attempting to address that the PUC's regulations essentially prevent non-profit education and research institutions such as PSU from participating, promoting and developing the very projects and technology that the 2007 Amendment wanted to promote.

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

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[17] 66 Pa. C.S. §§ 2806.1 and 2806.2.

[18] For example, ratepayers could have lower rates if utilities did not have to comply with the Clean Air Act, but obviously that is not a trade-off that Congress and our Legislature would want or, more importantly, have authorized. Those decisions are for our elected representatives and senators, not for the PUC.

[19] *See, e.g.,* M. Muro and D. Saha, "Rooftop solar: Net Metering is a net benefit," Brookings Institute Advanced Industrial Series No. 91 (May 23, 2016), *available at* http://www.brookings.edu/research/papers/2016/05/23-rooftop-solar-net-metering-muro-saha (visited June 23, 2016) (copy attached as Appendix I) ("So what does the accumulating national literature on costs and benefits of net metering say? Increasingly it concludes — whether conducted by PUCs, national labs, or academics — that the economic benefits of net metering actually outweigh the costs and impose no significant cost increase for non-solar customers. Far from a net cost, net metering is in most cases a net benefit—for the utility and for non-solar rate-payers.").

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 independent load/behind-the-meter requirements and restrictive definition of "Utility" imposed by the PUC's Revised Regulation will ***discourage.*** Contrary to the IRRC's express direction, the Revised Regulation continues to "limit a customer-generator's ability to net-meter excess generation it produces" and thus continues to contravene both express terms and the intent of AEPS Act. It therefore should be disapproved.

II. COMMENTS

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."[21] Its "fundamental intent . . . is the expansion and increased use of alternative energy systems and energy efficiency practices"[22] by providing customer-generators with "annual

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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).

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

[22] 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).

compensation for excess generation in a manner that encourages research, development and deployment of alternative energy systems."[23] The Revised 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."[24] 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 kilowatts (or 5,000 kilowatts in certain circumstances) if installed at other customer locations,[25] 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."[26] These provisions are clear and may not under Pennsylvania's Rules of Statutory Construction[27] be disregarded, limited or interpreted differently by an agency that believes the spirit of the law differs from its express language.[28] The Revised Regulation restricts the availability of compensation to net-metered

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[23] *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).

[24] 73 P.S. § 1648.5 (emphasis added).

[25] 73 P.S. § 1648.2 ("Customer-generator").

[26] 73 P.S. § 1648.2 ("Net metering").

[27] 1 Pa. C.S. §§ 1921-1936.

[28] 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).").

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.

A. 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(e))

The revisions to the definition of *Virtual Net Metering* impose an "independent load" requirement on eligibility of a customer location for net metering.[29] The revisions to § 75.13(a)(1) impose "behind-the-meter" and "independent load" conditions on a customer-generator's eligibility for net metering.[30] The amendments to § 75.14(e) similarly require all properties to be aggregated in virtual metering arrangements to "receiv[e] electric generation service and have

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[29] "*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] 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.**" *Amended Rulemaking Order*, Annex A at 5-6 (amending 52 Pa. Code § 75.12).

[30] "**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.**" *Amended Rulemaking Order*, Annex A at 5-6 (amending 52 Pa. Code § 75.13(a)(1)).

measureable load independent of any alternative energy system."[31] 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 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.[32] 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."[33] In its 2015 comments, Penn State argued

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[31] "Virtual meter aggregation on properties owned or leased and operated by **[a]** **the same** customer-generator shall be allowed for purposes of net metering. Virtual meter aggregation shall be limited to meters located on properties owned or leased and operated **by the same customer-generator** within 2 miles of the boundaries of the customer-generator's property and within a single EDC's service territory. **All ~~properties~~SERVICE LOCATIONS to be aggregated must be EDC SERVICE LOCATION ACCOUNTS HELD BY THE SAME INDIVIDUAL OR LEGAL ENTITY receiving RETAIL electric ~~generation~~ service FROM THE SAME EDC and have measureable load independent of any alternative energy system.**" *Amended Rulemaking Order*, Annex A at 8-9 (amending 52 Pa. Code § 75.14(e)).

[32] IRRC 2014 Comments at 2.

[33] *2015 ANFR Order*, slip op. at 13.

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 Revised 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.

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.

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 Revised Regulation's Definition of "Utilities" Precluded from Net-Metering Will Effectively Preclude Deployment Of Many Alternative Energy Projects, In Contravention of The AEPS Act.

The expanded definition of "utility" in § 75.1 of the Revised Regulation,[34] together with § 75.13(a)(2)'s disqualification of customer-generators from net metering where the alternative energy system is owned or operated by a "utility" as defined by the PUC[35] will preclude prospective customer-generators from partnering with third-party owner-operators to deploy alternative energy systems to serve the customer-generators' load. This, in turn, will sharply curtail the ability of prospective customer-generators to deploy and use such systems as intended by the Act, in contravention of the legislation and contrary to the IRRC's express directive to

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[34] "***Utility***—**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.**" *Amended Rulemaking Order*, Annex A at 5 (amending 52 Pa. Code § 75.1).

[35] "**To qualify for net metering, the customer-generator must meet the following conditions: . . . The owner or operator of the alternative energy system may not be a utility.**" *Amended Rulemaking Order*, Annex A at 6 (amending 52 Pa. Code § 75.13(a)(2)).

"ensure that other provisions of the regulation do not limit a customer-generator's ability to net-meter excess generation it produces."[36]

Coupled with the newly imposed PUC review and approval of all net metering applications for facilities over 500 KW, it becomes clear that the PUC will not approve what it perceives to be "merchant generators" (an undefined term) to participate in net metering. This is potentially a total ban. Whomever the PUC determines to be "providing electric generation or distribution service [also undefined terms] to the public or other entities," will be branded a "merchant generator" and will be disqualified. It also appears that the PUC and Pennsylvania's electric utilities intend to apply this provision retroactively to existing projects, thus raising the very real specter of unconstitutional regulatory takings and/or inverse condemnation actions.

Most businesses, and certainly most non-profit institutions, do not have the financial resources to deploy renewable energy projects.[37] In order to develop such projects, prospective customer-generators commonly provide the land, and third-parties install, own and operate the alternative generation facilities.[38] The compensation provided by net metering for energy generated by these facilities in excess of the customer-generator's load is essential for the financial viability of such projects.[39] Such arrangements are clearly prohibited by the Revised Regulation. Section 75.13(a)(2) of the Revised Regulation provides that in order for a customer generator to qualify for net-metering, "[t]he owner or operator of the alternative energy system may not be a

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[36] *Disapproval Order* at 2.

[37] *See, e.g.*, Comments of Oregon Dairy, Inc. on Proposed Rules, at 1-2 (filed Aug. 1, 2014); Comments of Crayola LLC on Proposed Rules, at 2 (filed Aug. 8, 2014)

[38] *See id.*

[39] *See id.*

utility,"[40] that is, it may not be "[a] person or entity that provides electric generation, transmission, or distribution services, at wholesale or retail, to other persons or entities."[41]

As Penn State explained in its NOPR comments, by withholding net metering compensation from customer-generators that engage third-party "utilities" (as defined by PUC) to own or operate alternative energy projects on the customer-generators' land, the Revised Regulation, if adopted, will render such projects uneconomic. The result will be dramatically fewer alternative energy projects to serve the energy needs of the Commonwealth. While the effect of these restrictions, if adopted, will be to discourage research, development and deployment of alternative energy systems by all prospective customer-generators, the effect will be more pronounced in the case of public and not-for-profit institutions such as PSU. Alternative, renewable energy sources such as photovoltaic systems require capital investment that ordinarily would require decades to recover in the form of saved energy costs. To remove this disincentive to research, development and deployment of renewable energy systems, owner-operators are provided significant subsidies by means of tax incentives such as accelerated depreciation deductions[42] and corporate tax credits[43] for renewable energy investments.

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[40] *Amended Rulemaking Order*, Annex A at 6 (amending 52 Pa. Code § 75.13(a)).

[41] *Id.*, Annex A at 5 (amending 52 Pa. Code § 75.12).

[42] The federal Modified Accelerated Cost-Recovery System (MACRS) provides businesses with accelerated depreciation tax deductions for a variety of renewable energy properties such as solar-electric and solar-thermal technologies, fuel cells and microturbines, geothermal electric, direct-use thermal and geothermal heat pumps, wind, and combined heat and power (CHP). *See* 26 U.S.C. § 48(a)(3)(A); *see also* http://www.dsireusa.org/solar/incentives/allsummaries.cfm?State=US&SolarPortal=1&re=1&ee=1 .

[43] The federal Business Energy Investment Tax Credit (ITC) provides tax credits equal to 30% of expenditures on solar generation equipment, fuel cells, and small wind turbines, and 10% of other systems. *See generally* http://www.dsireusa.org/solar/incentives/allsummaries.cfm?State=US&SolarPortal=1&re=1&ee=1 .

The subsidies provided by these tax incentives are unavailable to public education institutions such as PSU and other nonprofit, tax-exempt entities, thus rendering their deployment of most renewable energy systems uneconomic. Thus, as a practical matter, in order to convert to and promote the research and use of renewable energy sources, PSU and similarly-situated customer generators must partner with private, third-party system developers that can utilize available tax incentives to develop and deploy capital-intensive alternative energy systems. The Revised Regulation would effectively prohibit such partnerships and thereby severely curtail or eliminate the ability of PSU and other tax-exempt institutions to install renewable energy systems.[44] The effect of the Revised Regulation would thus be to curtail the research, development and deployment of alternative energy systems by the very institutions that, in many cases, would otherwise be at the forefront of such initiatives.

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[44] Another public institution, the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Allenwood, raised similar concerns in its comments to the PUC's proposed rules:

> In many cases, power consumers do not have sufficient access to the capital required or the ability to use tax subsidies for renewable energy projects. Additionally, realizing the value of any environmental attributes (RECs or other credits) can also be difficult for entities that do not normally participate in these markets. Renewable facilities built, owned, and operated by experienced generation companies provide valuable services to the energy consumer. By selling renewable energy under a power purchase agreement, third party generators secure the necessary financing, reduce the retail customer's exposure to operating and resource risks, and monetize the environmental benefits more efficiently. Recognizing these services, it would be a serious mistake to disqualify a project simply for third party participation by a company that provides electric services . . . .

U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Allenwood, on Proposed Rules, at 1 (filed Aug. 4 2014).

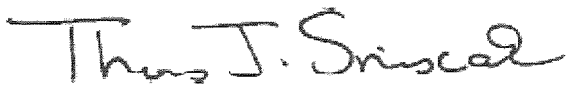
C. The Revised Regulation's Procedure For Obtaining PUC Approval Of Customer-Generator Status Unduly Burdens Prospective Customer-Generators And Thus Thwarts The Goals Of The Act

The Revised 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 Amended 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 Revised Regulation unreasonable and not in the public interest.

III. CONCLUSION

For all of the foregoing reasons, Penn State respectfully submits that the Revised 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,



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