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Solar Unified Network of Western Pennsylvania (SUNWPA)
c/o Energy Innovation Center, 1435 Bedford Avenue, Suite 140, Pittsburgh, PA 15219; Email: info@sunwpa.org

May 7, 2016

Sent by email

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101
irrc@irrc.state.pa.us

Re: Pennsylvania Public Utility Commission, Implementation of the Alternative Energy Portfolio Standards Act of 2004 (57-304), IRRC No. 3061

Dear Members of the Independent Regulatory Review Commission:

The Solar Unified Network of Western Pennsylvania respectfully submits the enclosed comments regarding the Pennsylvania Public Utility Commission's February 11, 2016, issuance of a Final Rulemaking Order concerning implementation of the Alternative Energy Portfolio Standards Act of 2004. The Final Order is scheduled for consideration by IRRC, under the above captioned docket, at IRRC's May 19, 2016 public meeting.

Sincerely,

s/ Ryan Hamilton

Ryan Hamilton, Esq.

Prepared and submitted on behalf of the
Solar Unified Network of Western Pennsylvania

Enclosures

BEFORE THE PENNSYVLANIA
INDEPENDENT REGULATORY REVIEW COMMISSION

Implementation of the Alternative Energy Portfolio Standards Act of 2004	)	Regulation # 57-304
	)	PUC Docket No. L-2014-2404361
	)	IRRC No. 3061
	)	

Comments of the Solar Unified Network of Western Pennsylvania

On February 11, 2016, the Pennsylvania Public Utility Commission ("Commission" or "PUC") issued a Final Rulemaking Order in Docket No. L-2014-2404361 (the "Order" or the "Final Order") concerning the implementation of the Alternative Energy Portfolio Standards Act of 2004 (the "Act"). As stated in the Commission's regulatory analysis form, the revisions pertain to net metering, interconnection, and portfolio standard compliance provisions of the Act. The Commission proposed the revisions pursuant to, 1) a statutory duty to implement and enforce the Act, 2) the Commission's duty to ensure default customer service rates at the least cost to customers, and 3) a duty to ensure that rates are just and reasonable under the Pennsylvania Public Utility Code. These goals are laudable, but the Commission's revisions overstate the PUC's statutory authority, limit opportunities for renewable energy development across the state, and will result in harm to the public interest.

The Solar Unified Network of Western Pennsylvania ("SUNWPA") is submitting these comments on behalf of the many customer-generators and solar businesses that will be impacted by these revisions. SUNWPA is a coalition of solar development and installation companies, support businesses, industry professionals, solar owners and non-profit trade associations that work collaboratively to promote the use of solar energy in western Pennsylvania through legislative and regulatory advocacy, education, and market development activities.

Pursuant to the Regulatory Review Act, the Independent Regulatory Review Commission ("IRRC") is charged with reviewing the Commission's Order to determine whether the

Commission, 1) has the statutory authority to promulgate the regulation, 2) whether the regulation conforms to the intention of the General Assembly in the enactment of the statute, and 3) whether the regulation is in the public interest based on eight (8) specific factors imposed by the Regulatory Review Act. 71 P.S. § 745.5b(a)-(b).[1] For the reasons outlined below, SUNWPA asks IRRC to carefully consider whether the Commission has overstepped statutory authority and whether the Commission has provided sufficient evidence demonstrating that these revisions will not result in harmful impacts to the public interest.

SUNWPA respectfully submits the following comments calling the IRRC's attention to important concerns with the Commission's Final Rulemaking Order, and urges IRRC to disapprove these revisions:

1. **The Commission's Order opens the door to new fees on residential and commercial solar owners in contradiction with the purpose of the Act and against the interests of the public.**

The Commission's Order proposes to amend § 75.13(k) to state that "[a]n EDC or DSP may not charge a customer-generator a fee or other type of charge unless the fee or charge would apply to other customers that are not customer-generators, *or is specifically authorized under this Chapter or by order of the Commission.*" (italics indicating new language proposed in the Order).

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[1] Specifically, the Regulatory Review Act states that, "Upon a finding that the regulation is consistent with the statutory authority of the agency and with the intention of the General Assembly in the enactment of the statute upon which the regulation is based, the commission shall consider the following in determining whether the regulation is in the public interest: (1) Economic or fiscal impacts of the regulation, which include the following: (i) Direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector. (ii) Adverse effects on prices of goods and services, productivity or competition. (iii) The nature of required reports, forms or other paperwork and the estimated cost of their preparation by individuals, businesses and organizations in the public and private sectors. (iv) The nature and estimated cost of legal, consulting or accounting services which the public or private sector may incur. (v) The impact on the public interest of exempting or setting lesser standards of compliance for individuals or small businesses when it is lawful, desirable and feasible to do so. (2) The protection of the public health, safety and welfare and the effect on this Commonwealth's natural resources. (3) The clarity, feasibility and reasonableness of the regulation to be determined by considering the following: (i) Possible conflict with or duplication of statutes or existing regulations. (ii) Clarity and lack of ambiguity. (iii) Need for the regulation. (iv) Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors. (v) Whether acceptable data is the basis of the regulation. (4) Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review. (5) Comments, objections or recommendations of a committee. (6) Compliance with the provisions of this act or the regulations of the commission in promulgating the regulation. (7) Whether the regulation is supported by acceptable data. (8) Whether a less costly or less intrusive alternative method of achieving the goal of the regulation has been considered for regulations impacting small business." 71 P.S. § 745.5b(b).

This amendment turns an unambiguous provision limiting the ability of EDCs and DSPs to impose fees on customer-generators into an open door allowing EDCs, DSPs, and the Commission to impose new fees. As an organization, SUNWPA opposes this amendment because it creates uncertainty and burdens on the regulated community, it is not justified by data, and it is inconsistent with the purposes of the Act.

The Commission suggests that these fees would only be imposed to recoup costs associated with virtual meter aggregation. The language as written, however, provides broad authority for the Commission to impose fees on any customer-generator, and possibly on any customer of an EDC or DSP. The revision provides broad authority to impose new fees, but limited guidance on how the fees would be calculated, what factors would be considered, and who would be responsible for these fees. It does not even limit these fees to recovering the administrative costs of virtual meter aggregation. The revision is harmful for the Pennsylvania solar industry because uncertainty creates an additional hurdle for customers in the already competitive market place and makes installer-side costs estimates of return-on-investment more complicated and uncertain. This is certainly the type of direct and indirect costs to the private sector that IRRC should consider, pursuant to § 745.5b(b)(1)(i).

The Commission's revision also places a burden on residential and small businesses customer-generators by requiring that they individually hire attorneys and file formal complaints with the Commission to ensure their ability to participate in a rate setting hearing if and when these newly authorized fees are imposed. This is a significant burden on these individuals and small businesses and IRRC should consider this burden in its analysis. § 745.5b (IRRC shall consider "the nature and estimated cost of legal… services which the public or private sector may incur.").

One important factor that the IRRC is required to consider in determining whether an amendment is in the public interest is "[w]hether the regulation is supported by acceptable data" § 745.5b(b)(7). In this instance, The Commission has not provided sufficient data supporting why these fees might be necessary. As suggested by previous commenters, the

Commission should prepare a study evaluating both the costs and benefits of net metered systems before simply adopting the position that undefined fees are necessary and authorized by the Act.

2. **The Order goes beyond the statutory authority of the Commission and negatively impacts the public interest by requiring that customer generators establish an independent load and restrict energy system capacity to 200% of annual electric usage before qualifying for net metering.**

The Commission's Order revises section 75.13 by amending the conditions imposed on customer-generators that must be met before the customer-generator will qualify for net metering. Of most concern to the businesses and solar-owners that are members of SUNWPA is the requirement for an independent load imposed by §75.13(a)(1) and the size limit of 200% imposed by §75.13(a)(3). These conditions unnecessarily restrict solar development in Pennsylvania, complicate the process for solar installers working with customer-generators, and introduce uncertainty into the regulatory process.

2.1. *An independent load requirement is not in the public interest*

The Commission's Order revises section 75.13 to add a new section "(a)" outlining conditions that customer-generators must meet in order to qualify for net metering. Section (a)(1) adds language requiring that customer-generator "[h]ave electric load independent of the alternative energy system, behind the meter and point of interconnection of the alternative energy system" to be eligible for net metering. This amendment is opposed by SUNWPA because it impacts residential and small business solar owners by severely limiting where they can install their virtually net-metered renewable energy systems. Consequently, this stifles the Pennsylvania solar industry's future growth.

Within the solar industry it is common knowledge that the size and location of any solar energy-based electric generation system will dramatically impact the electric generating potential and efficiency of the system. In western Pennsylvania, the most efficient systems are south facing and not impacted by shading from nearby buildings, trees, or other structures. When a system is installed properly in the ideal location, the system is an incredibly reliable,

clean, and efficient method of generating electricity. In many situations, however, an individual or small business has an energy need at one location and an opportunity to install solar, based on the above factors, at a different location nearby. Virtual meter aggregation ensures that the customer-generator can still take advantage of solar energy and furthers the purposes of the Act by encouraging renewable energy development.

The Commission's new independent load requirement, however, severely limits the opportunities for customer-generators to take advantage of virtual meter aggregation by restricting solar electric generation to sites with an existing energy need. This restriction will result in "direct and indirect costs to the... private sector" (§ 745.5b(1)(i)) by limiting the locations where customer-generators can install solar systems and therefore limiting the number of new solar projects brought online.

While the Commission asserts that this revision is necessary to prevent utilities, such as merchant generators, from qualifying for net metering, it has not provided any significant data demonstrating merchant generators have abused virtual meter aggregation rules to disguise themselves as customer-generators. IRRC is required to consider both the "need for the regulation" and "whether the regulation is supported by acceptable data." §§ 745.5b(b)(3)(iii), 745.5b(b)(7).

2.2. *A 200% system size limit is not in the public interest*

The Commission's Order revises § 75.13(a) by imposing an additional condition on the customer-generators wishing to qualify for net metering. Specifically, the revision states that in order to qualify for net metering, "[t]he alternative energy system must be sized to generate no more than 200% of the customer-generator's annual electric consumption...". This amendment is a dramatic and complicating departure from language of the statute which simply placed a hard kilowatt cap on systems that qualify for net metering. SUNWPA opposes this revision because the Act does not provide the Commission with authority to weigh the benefits and burdens of this type of policy decision and the creation of a percent of annual electric consumption limitation imposes a significant burden on the regulated community.

The first reason that IRRC should disapprove this revision is because it imposes a size limit on systems where the Act has already provided an unambiguous limitation. The Act sets maximum nameplate capacity limits for customer-generators by customer class, with 50 kilowatts for residential service, three megawatts at other service locations, and up to five megawatts under specific circumstances. See 73 P.S. § 1648.2 (defining the term "customer-generator" as the owner or operator of a net-metered distributed generation system of certain capacities). To alter this framework clearly represents "a policy decision of such a substantial nature that it requires legislative review." § 745.5b(b)(4).

As noted by the statement of Chairman Brown, "setting such a limit ignores the very specific size limitation provided in the AEPS Act." Statement of Chairman Gladys M. Brown at 1 (Feb. 11, 2016). Chairman Brown goes further, and states that "[b]ecause the AEPS Act very precisely provides that customer generators may size up to 50kw for residential systems and up to 3 or 5 MW for non-residential systems, this Commission commits legal error by imposing a different size limitation in our regulations." *Id.* Chairman Brown points to the recent Supreme Court decision in *Utility Air Regulatory Group v. E.P.A.*, where the Court stated that "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Id.* at n1.

In *Utility Air Regulatory Group*, the EPA attempted to rewrite the numeric thresholds at which the Clean Air Act requires PSD and Title V permitting. See *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (2014). The Court, however, found that EPA went beyond their statutory authority by replacing those numbers with others of its own choosing. In this instance, the Commission is similarly replacing clear numeric thresholds with limits of its own choosing and in doing so is going beyond the statutory authority granted to the Commission. Generally, agencies are afforded deference in reasonable interpretation of a statute, however, "such deference is appropriate only where '[the legislature] has not directly addressed the precise question at issue' through the statutory text." *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007)(quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council,*

Inc., 467 U.S. 837, 843 (1984). It is clear that the legislature recognized the need to limit the size of customer-generators, but it is also clear that the legislature squarely addressed that issue by limiting the nameplate capacity of customer-generators.

The second reason that IRRC should disapprove this revision is because limiting the size of alternative energy systems that qualify for net metering is harmful to solar owners, solar installers, and the public interest. The Act already provides a clear ceiling for residential and commercial installations. The 200% limit creates uncertainty, unnecessarily complicates the process required to qualify for net metering, and ultimately will be harmful to the growth of the solar industry in Pennsylvania.

The 200% limit creates uncertainty for the regulated community because it is based on annual electric consumption rather than nameplate capacity. Annual electric consumption is variable. In fact, consumption may change dramatically from year to year. The IRRC is required to consider the clarity, feasibility, and reasonableness of a regulation by assessing several factors including "clarity and lack of ambiguity," and reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors." See §§ 745.5b(b)(3)(ii), 745.5b(b)(3)(iv). It is unclear how the 200% limit will be implemented. It is also unreasonable to impose additional conditions on net metered customer generators that are already meeting the size limitations imposed by the Act.

This revision imposes an unnecessary and unreasonable burden on solar owners and installers for both new service location accounts and existing service locations. For new service locations, the procedure described in the Order requires calculation of annual energy consumption "based on the building type, size and anticipated usage of electric equipment and fixtures planned for the new service location." §75.13(a)(3)(II). Implementation of this procedure imposes significant costs and paperwork burdens on the regulated community. Either building developers or solar installers will be required to shoulder the costs of making these calculations and ensuring they accurately reflect future projections of building use. Otherwise, customer generators will be penalized for ill-sized systems by being prohibited from

net metering. These problems similarly arise in the case of existing service locations, where the procedure described in the Order requires calculation of annual energy consumption "based on electric usage data from any 12 consecutive month period occurring within 60 months prior to submission of the customer-generator's interconnection request." §75.13(a)(3)(I). For the many solar installers and owners that are SUNWPA members, implementation and enforcement of this requirement is entirely unclear. This uncertainty stems from the many situations in which a solar energy system may be installed on a residential or commercial building. The Commission's procedure assumes that a building's annual electric usage for a 12 month portion of the past five years will reflect future annual electricity need. This calculation punishes customer-generator locations that are abandoned or underutilized but are looking to implement a clean source of energy for the future, hampering revitalization efforts. This also punishes existing service locations where there is a drastic change in energy use due to different tenants or different electricity needs of an existing tenant. Finally, this additionally punishes those customer-generators who are making energy efficiency improvements. As efficiency gains are realized, this policy will continually reduce the amount of energy they can produce from an alternative energy system.

3. **The Commission's order is not in the public interest because it imposes uncertainty, burdensome costs, and restrictive limitations on solar owners and installers across Pennsylvania and the IRRC should disapprove the Order.**

SUNWPA strongly opposes several of the Commission's amendments found in this Final Rulemaking Order because they contravene the Commission's statutory authority and go against the public interest. The amendments set forth by the Commission also negatively impact the many small businesses and individuals that support, contribute to, and rely on Pennsylvania's solar energy industry. Before approving this rulemaking, however, IRRC must also consider "[t]he protection of the public health, safety and welfare and the effect on this Commonwealth's natural resources." § 745.5b(b)(2). Increasing solar energy development across the state provides a significant and measurable benefit the public health, safety, and welfare, not to mention the Commonwealth's natural resources. The revisions proposed by the

Commission, however, will only serve to limit the growth of solar energy in Pennsylvania. Therefore, for the reasons outlined above, SUNWPA asks that IRRC disapprove the Commission's Order.