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May 10, 2016

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

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

Dear Members of the Independent Regulatory Review Commission:

The Pennsylvania Department of Environmental Protection (DEP) appreciates the opportunity to comment on the Pennsylvania Public Utility Commission's Implementation of the Alternative Energy Portfolio Standards Act of 2004 Regulation No. 57-304 (IRRC No. 3061). Please find DEP's comments enclosed.

If you have any questions, please feel free to contact Patrick McDonnell, Policy Director, by e-mail at pmcdonnell@pa.gov or by telephone at 717.783.8727.

Sincerely,

A handwritten signature in black ink, appearing to read "John Quigley".

John Quigley
Secretary

Enclosure

**BEFORE THE
INDEPENDENT REGULATORY REVIEW COMMISSION**

Regulation #57-304: Implementation of the Alternative Energy Portfolio Standards Act of 2004

**COMMENTS OF THE
PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION**

The Pennsylvania Department of Environmental Protection (DEP) appreciates the opportunity to comment on the Pennsylvania Public Utility Commission's (PUC) Implementation of the Alternative Energy Portfolio Standards Act of 2004 Final Rulemaking (AEPS Rulemaking) as it is being considered by the Independent Regulatory Review Commission (IRRC). While the PUC has worked to improve the regulation throughout the rulemaking process, DEP continues to believe that the AEPS Rulemaking in its current form directly contradicts the statutory requirements of the AEPS, and should therefore be disapproved by IRRC.

Background on the Alternative Energy Portfolio Standards Act of 2004

The AEPS was passed in 2004, in a groundbreaking effort to increase the percentage of the Commonwealth's energy usage being derived from clean and renewable sources. The AEPS places various types of clean energy sources—such as photovoltaic energy, wind, hydro, landfill gas etc.— into one of two “tiers” and sets escalating targets for the percentage of the Commonwealth's use that must come from each tier through 2020. The overall percentage began at 4.7% in 2007 and rises to 18% at the end of the phase-in. Electric suppliers (including default service providers) are responsible for complying with the requirements of the AEPS by purchasing the output of renewable generation plants, and a credit system allows this output to be tracked to ensure suppliers are meeting the requirements. In contrast to neighboring states, these credits may be generated either through in-state resources, or from resources anywhere within the PJM regional electric grid footprint, which includes much of the mid-Atlantic and stretches as far west as Illinois.

In addition, the legislature included within the AEPS a number of provisions designed to provide additional market incentives to encourage the development of clean and renewable energy sources. Among these incentives is the so-called “net-metering” rule at issue in this rulemaking, which mandates that excess electric generation produced by “customer-generators shall receive full retail value for all energy produced on an annual basis.” 73 P.S. § 1648.5.

While this language is intentionally quite broad, there are limitations built in to the AEPS, which the legislature inserted in order to prevent so-called “merchant-generators” from posing as customer-generators in order to take advantage of the benefits of net-metering. In particular, the definition of

“customer-generator,” under the AEPS is limited to distributed generation systems with a “nameplate capacity of not greater than 50 kilowatts if installed at a residential service or not larger than 3,000 kilowatts at other customer service locations.” 73 P.S. § 1648.2. In certain other limited instances, the legislature also allowed systems of up to 5,000 kilowatts to qualify as customer-generators.

These limits were carefully established to delineate the line between “customer-generators” who must be paid full retail value for excess energy they produce, and larger scale generating facilities, which the legislature did not believe should qualify for net metering benefits.

While the net-metering provisions of the AEPS statute have supported the legislature’s goal of encouraging additional renewables development, other provisions of the bill have been less effective. In particular, because as noted above, credits toward the AEPS requirements can be purchased from any resource within the PJM footprint (resulting in an abundance of credits), credit prices in Pennsylvania have been significantly lower than in surrounding states, and leading to less investment in Pennsylvania.

Last year, Pennsylvania installed less than 5 megawatts of new solar-photovoltaic capacity, even as surrounding states install hundreds of megawatts per year. To put that in perspective, 5 MW is enough to power roughly 800 homes. No utility scale wind was added last year and there are currently no significant wind projects under construction in the Commonwealth. There is significantly less solar energy capacity installed in Pennsylvania than necessary to meet current AEPS targets, but including out of state capacity, the 2020 targets have already been exceeded.

Meanwhile, last year New York added 170 MW of solar, and its Public Service Commission announced plans to invest \$5 billion in clean energy projects over the next ten years. Employment in Pennsylvania’s solar industry has declined by 30% since 2012, even as the rest of the nation is seeing double-digit growth. Pennsylvania, which was once fifth in overall solar jobs and growing steadily, has fallen to twentieth.¹

Given market failures in other areas of the AEPS, and the stagnation that exists in Pennsylvania’s clean energy sector, our relatively robust net-metering provisions are among the most important means of ensuring that this critical market sector survives, and the purpose of the AEPS is achieved. Any proposal which would thwart the legislative intent embodied in the AEPS by adding additional impediments to the development of clean energy should be viewed with great skepticism.

The AEPS Rulemaking

The PUC’s AEPS Rulemaking adds language which imposes an additional limitation on the amount of energy for which customer-generators are entitled to receive full retail value, beyond those provided for in the Act. In particular, the new language would require that net metered distributed generation systems “be sized to generate no more than 200% of the customer generator’s annual electric consumption.” Implementing this restriction appears to be an attempt by the PUC to prevent merchant-generators from receiving the benefits of net metering under the guise of being customer-generators.

¹ <http://www.thesolarfoundation.org/solar-jobs-census/solar-jobs-compendium-pa/>

While we appreciate the concerns raised by the PUC in this regard, we believe that the system size limitations in the AEPS were selected by the legislature for this very purpose, and provide the necessary backstop to prevent merchant generators from taking advantage of the program. A further limit on the ability to benefit from net metering is not authorized by law.

Under the AEPS Rulemaking, customer-generators who generate more than 200% of their annual consumption will not “receive full retail value” as required by the Act for the portion of generation exceeding the 200% limit, despite complying with the Act’s capacity limits. This is a contravention of the clear text of the AEPS, and is unsupported by any other provision of that Act.

It is important to note that the definition of net metering in the Act provides no limitation on the amount of electricity a customer generator may have. It states:

“The means of measuring the difference between the electricity supplied by an electric utility and the electricity generated by a customer-generator 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.” (Emphasis added)

73 P.S. § 1648.2

A plain reading of the definition above requires only that a portion of the electricity generated offsets the customer-generator’s requirements for electricity. It does not authorize a cap on the amount of electricity that may be generated under net metering, beyond those specified in the statute. A determination by the PUC to set such a limit is arbitrary, contravenes the clear language of the Act, and will have a negative impact on alternative energy deployment in Pennsylvania.

The PUC attempts to avoid the clear limitation in the Act by linking it to requirements in the Public Utility Code that default service customers pay the least cost over time and that default service rates are just and reasonable. 66 Pa. C.S. §§ 1301, 2807(e). The implicit claim is that by reading the statutes together, the PUC has the authority to modify the net metering requirements of AEPS with a least cost over time modifier. We believe that PUC misconstrues the law.

There is an easy way to read the AEPS and Public Utility Code together in a way that affords both their full effect. The provisions of the Public Utility Code referenced specifically relate to an electric distribution company’s obligations to procure default service contracts. The reference to the AEPS within the Public Utility Code is specific to the requirement that default suppliers must procure alternative energy credits sufficient to meet their AEPS obligation as a supplier. There is no indication that the General Assembly intended that the least cost standard be applied to net metering. Indeed, the PUC’s interpretation would lead to a conclusion that the PUC can ignore the provisions of any law in order to meet a least cost over time standard. The legislature established the limitations upon net metering customer-generators with full awareness of the impact they would have on rates, and those rates are therefore *de facto* just and reasonable.

Chairman Gladys M. Brown notes these points in her dissenting statement upon the PUC's passage of the AEPS Rulemaking:

Because 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. The statutory requirement that utility rates be just and reasonable does not authorize the Commission to ignore or alter other statutory directives.

Statement of Chairman Brown, pp. 1-2.

The Department agrees with the Chairman's assessment.

It is also important to note that the Commonwealth Court rejected the arguments made by the PUC as recently as September 2015. In *Dauphin County Industrial Development Authority v. Pennsylvania Public Utility Commission*, the Commonwealth Court reversed and remanded the PUC's decision in a net metering case related to time of use rates. In her Opinion remanding the case, Judge Mary Hannah Leavitt writes:

We are similarly unpersuaded by the Commission's argument that its interpretation of [the time of use requirement] is justified by the statutory mandate to ensure that every rate made, demanded, or received by any public utility . . . shall be just and reasonable . . . The statutory requirement that utility rates be just and reasonable does not authorize the Commission to ignore or alter other statutory directives. 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.

Dauphin Cnty. Indus. Dev. Auth. v. Pa. PUC, 123 A.3d 1124, 1135 (Pa. Commw. Ct. 2015) (citation omitted).

If further safeguards are needed to ensure that merchant-generators are not taking advantage of the benefits of net-metering by posing as customer-generators, and we have seen scant evidence this is the case, these limits should be implemented through the legislative process, and not written into the AEPS by regulation. Again as Judge Leavitt states:

In short, the Commission's tariff argument is a red herring. If green energy production increases rates, service customers may be encouraged to choose a Time-of-Use rate, which encourages conservation, another policy goal of the legislature. If the mandate that default service providers purchase excess electricity places excessive pressure on tariffs, then it is for the legislature to address that problem.

Id. at 1136-7.

Finally, while any decision to amend the AEPS should happen through the legislative process as opposed to the PUC rulemaking process, it is worth noting that concerns about net-metering customers imposing significant costs on other customers are entirely illusory. According to the Energy Information Administration, in 2014, net-metered customers in Pennsylvania sold 288 megawatt hours of electricity into the grid.² The PUC has provided no evidence that any significant impacts are occurring to ratepayers that would necessitate contravening clear statutory language. While concerns about cross-subsidization have become contentious in states with more developed renewable and particularly solar sectors, after more than a decade with the AEPS in place, Pennsylvania is very far from the threshold at which the legislature might need to consider action. Even if the PUC had the legislative authority to take this action (which they do not), they have provided no proof that the problem being addressed in fact exists.

Ultimately, the intent of the net-metering and virtual metering provisions of the AEPS is to encourage the installation of distributed alternative energy generation and we urge the IRRC to disapprove these regulations which will make that goal more difficult in contravention of the clear intent of the legislature.

Sincerely,

A handwritten signature in black ink, appearing to read 'John Quigley', with a stylized, cursive flourish at the end.

John Quigley
Secretary

² <https://www.eia.gov/electricity/data/eia826/xls/f826netmetering2014.xls>