



3061.

RECEIVED
IRRC

2014 JUL 17 PM 12: 26

Pennsylvania Public Utility Commission
400 North Street
Commonwealth Keystone Building, 2nd Floor
Harrisburg, Pennsylvania 17120

April 9, 2014

To the Pennsylvania Public Utility Commission:

This letter is in response to your proposed rulemaking regarding the AEPS Act (Docket # L-2014-2404361). It is a brief commentary on the Commission's proposed changes. There will be more comments in the coming weeks that address specific sections of the proposed rulemaking.

After reading the document multiple times, it seems clear that it is nothing more than an attempt to circumvent the PA General Assembly, and to amend the AEPS Act without actually going through the formality of the legislative process. The Commission is seeking wholesale changes that are not "clarifications" as they are described in the proposed rulemaking. Instead, they alter the clear intent of the statute, and strip away provisions that protect the renewable energy industry in Pennsylvania.

Pennsylvania renewable energy advocates have many questions, but so far very few answers. For example, what prompted this flurry of changes? It has been ten years since the AEPS Act was signed. Many of the proposed changes relate to statutory language that has been in place for a decade. **What prompted the changes after all this time?**

The Commission's proposal reads like a page from the electric utility industry's playbook. Are they pressing for change? One would hope not, since the AEPS Act was written specifically to protect the renewable energy industry from the unfair practices of the electric utility industry. PA legislators knew that without clear statutory protections under the law, renewable energy would never flourish. The electric utility industry has opposed the AEPS Act since it was created. Who else but the electric utility companies would want to change the rules? The question is on everyone's mind. **Who is asking for these changes?**

And finally, there is the Commission's notion that ratepayers are being harmed. This reason is given often as the impetus for the proposed changes. Sunrise Energy has done quite a lot of analysis, and has yet to find the harm that the Commission refers to. We have shared our information with PUC staff, but so far no reply. Given the very real, immediate and quantifiable harm that will occur if the Commission succeeds with its plans, we insist that proof be produced (facts and figures). **Where is the ratepayer harm?**

Please give these questions some thought. They are on the minds of most renewable energy advocates these days. The questions will not go away, and we insist that you answer them.

Regards,

A handwritten signature in black ink, appearing to read "D. Hommrich".

David N. Hommrich
President
Sunrise Energy, LLC



Pennsylvania Public Utility Commission
400 North Street
Commonwealth Keystone Building, 2nd Floor
Harrisburg, Pennsylvania 17120

July 3, 2014

To the Pennsylvania PUC:

The Commission is proposing a new interpretation of the AEPS Act whereby customer-generator system sizes would be limited to 110% of the prior year's annual consumption for purposes of net metering. This new rule should be rejected in its entirety, since it is in conflict with the plain language of the AEPS Act as amended in 2007. The role of the PUC is to regulate, not legislate. *"Where there is a conflict between the statute and a regulation purporting to implement the provisions of that statute, the regulation must give way."* *Heaton v. Commonwealth Department of Public Welfare, 96 Pa.Cmwlth. 195, 506 A.2d 1350 (1986).*

Listed below are several excerpts from and aspects of the AEPS Act that confer upon customer-generators the statutory right to create renewable energy and the limits that are to be imposed. The AEPS Act clearly delineates the conditions under which net metering is allowed. Nowhere is there a reference to constraining system size to a percentage of onsite consumption. The PUC has not cited any statutory references in support of their position. On the contrary, in 2008 the Commission removed the single constraint in their regulations that might have limited the size of a renewable energy system based on a mandate from the PA legislature (see #5 below). When the legislature expanded the definition of net metering in 2007, the PUC was forced to comply by updating their regulations appropriately.

In proposing the 110% rule, the PUC is essentially stating that a customer-generator's system must primarily offset their requirement for electricity. That specific language was removed from the AEPS Act in 2007, and was replaced with *"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"*. As a result, the PUC's proposed 110% Rule is in direct conflict with the amended definition of net metering in the AEPS Act, and it should be removed from the proposed rulemaking.

Regards,

A handwritten signature in black ink, appearing to read "D. Hommrich", written in a cursive style.

David N. Hommrich
President
Sunrise Energy, LLC



AEPS Act References

1. Descriptive Title of the AEPS Act

"Providing 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 and for the powers and duties of the Pennsylvania Public Utility Commission."

2. 73 P.S. § 1648.2 – Definition of Alternative Energy System

"ALTERNATIVE ENERGY SYSTEM." A facility or energy system that uses a form of alternative energy source to generate electricity and delivers the electricity it generates to the distribution system of an electric distribution company or to the transmission system operated by a regional transmission organization.

3. 73 P.S. § 1648.2 – Definition of Customer Generator

"CUSTOMER-GENERATOR." A nonutility owner or operator of a net metered distributed generation system 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, except for customers whose systems are above three megawatts and up to five megawatts who make their systems available to operate in parallel with the electric utility during grid emergencies as defined by the regional transmission organization or where a microgrid is in place for the primary or secondary purpose of maintaining critical infrastructure,

3. 73 P.S. § 1648.2 – Definition of Customer Generator (continued)

such as homeland security assignments, emergency services facilities, hospitals, traffic signals, wastewater treatment plants or telecommunications facilities, provided that technical rules for operating generators interconnected with facilities of an electric distribution company, electric cooperative or municipal electric system have been promulgated by the Institute of Electrical and Electronic Engineers and the Pennsylvania Public Utility Commission.

4. 73 P.S. § 1648.2 – Definition of Net Metering

"NET METERING." 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. Virtual meter aggregation on properties owned or leased and operated by a customer-generator and located within two miles of the boundaries of the customer-generator's property and within a single electric distribution company's service territory shall be eligible for net metering.

5. Implementation of Act 35 of 2007; Net Metering and Interconnection – FINAL OMITTED RULEMAKING ORDER (Docket #L-00050174)

Net Metering - The definition of net metering in these regulations has been revised to conform to the definition as amended by Act 35. Specifically, the Commission has deleted the requirement that the system be intended to primarily offset the customer's electricity requirements and added language noting that net metering is available when any portion of the electricity generated is used to offset part or all of the customer-generator's requirements for electricity



Pennsylvania Public Utility Commission
400 North Street
Commonwealth Keystone Building, 2nd Floor
Harrisburg, Pennsylvania 17120

July 4, 2014

To the Pennsylvania PUC:

In the latest proposed rulemaking, the Commission routinely refers to “unfair ratepayer subsidies” as the impetus for some of their proposed changes. This term is used multiple times, but never backed up with data. Given the profound and chilling impact these changes will have on renewable energy in Pennsylvania, the Commission cannot use vague terms as justification for their actions. It is incumbent upon them to provide an accurate accounting in support of their claims.

Attached to this letter is the relevant section of the AEPS Act that spells out the mechanism to be used by EDCs to recover costs associated with AEPS Act compliance. This is the sole means by which an EDC can recover their AEPS expenses. Sunrise Energy submitted multiple requests to the PUC to review these reports from the EDCs, since they clearly must contain the information pointing to unfair subsidies. It turns out that the Commission cannot produce the reports, nor do they even audit this important aspect of the AEPS Act. In short; they have no idea how much cost recovery is actually occurring (if any). Therefore, their proposed notion of ratepayer harm is essentially based on a “hunch”.

Renewable energy providers are held to a high standard when it comes to reporting their data. In fact, the proposed rulemaking provides for penalties when Alternative Energy Credits are reported improperly. It is the height of hypocrisy for the PUC to demand such attention to detail of customer-generators, but allow themselves the luxury of “shooting from the hip”. This situation cannot stand.

Any aspect of the proposed rulemaking that is based on alleged “unfair subsidies” should be rescinded until the PUC can produce data backing up their claims. Given what is at stake, no one in the renewable energy industry is prepared to simply take their word for it. Surely the Commission wants to provide the highest levels of transparency, and will comply with this request.

Regards,

A handwritten signature in black ink, appearing to read "D. Hommrich", written in a cursive style.

David N. Hommrich
President
Sunrise Energy, LLC



AEPS Act References

73 P.S. § 1648.3. Alternative energy portfolio standards

(3) All costs for:

(i) the purchase of electricity generated from alternative energy sources, including the costs of the regional transmission organization, in excess of the regional transmission organization real-time locational marginal pricing, or its successor, at the delivery point of the alternative energy source for the electrical production of the alternative energy sources; and

(ii) payments for alternative energy credits,

in both cases that are voluntarily acquired by an electric distribution company during the cost recovery period on behalf of its customers shall be deferred as a regulatory asset by the electric distribution company and fully recovered, with a return on the unamortized balance, pursuant to an automatic energy adjustment clause under 66 Pa.C.S. § 1307 (relating to sliding scale of rates; adjustments) as a cost of generation supply under 66 Pa.C.S. § 2807 (relating to duties of electric distribution companies) in the first year after the expiration of its cost-recovery period. After the cost recovery period, any direct or indirect costs for the purchase by electric distribution of resources to comply with this section, including, but not limited to, the purchase of electricity generated from alternative energy sources, payments for alternative energy credits, cost of credits banked, payments to any third party administrators for performance under this act and costs levied by a regional transmission organization to ensure that alternative energy sources are reliable, shall be recovered on a full and current basis pursuant to an automatic energy adjustment clause under 66 Pa.C.S. § 1307 as a cost of generation supply under 66 Pa.C.S. § 2807.

Statutory Problems With The Pennsylvania Public Utilities Commission's New "110% Rule"

Prepared by:

David N. Hommrich

President

Sunrise Energy, LLC



dhommrich@sunrise-energy.net

412-527-5072

Statutory Problems With The PUC's 110% Rule

Introduction

On February 20th, 2014 the PA Public Utilities Commission (PUC) submitted for comment a proposed rulemaking that will fundamentally harm the renewable energy industry in Pennsylvania (if it passes). The document provided by the PUC contains a flurry of changes to portions of the Alternative Energy Portfolio Standards (AEPS) Act that have stood unchanged and unchallenged for nearly a decade.

This whitepaper is one in a series that covers the various changes being proposed by the PUC. In this paper we analyze the so-called "110% Rule" being proposed by the Commission. It is an arbitrary limit on system size that was recently introduced by the PUC, and is in clear conflict with the plain language of the underlying AEPS Act. In fact, by enforcing this limit, the PUC will put itself in direct conflict with the central components of renewable energy law in the state.

Fortunately, Pennsylvania has safeguards that protects its citizens from governing bodies that attempt to subvert legislative intent. The rules are simple. The Commission is not allowed to legislate. They may only regulate. The legislative intent controls (below) are the bedrock of how laws are routinely enforced in Pennsylvania. They were put in place to prevent any regulatory body from altering the fundamental intent of our laws. Only our elected officials are allowed to write / amend laws (via the PA General Assembly). We do not elect the PUC, and we do not grant them that power.

1 Pa. Cons. Stat. § 1921. Legislative intent controls

(a) Object and scope of construction of statutes.--The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.

Every statute shall be construed, if possible, to give effect to all its provisions.

Given the Commission's proclivity for testing the boundaries of legislative intent, it is likely that their proposed rulemaking will need to be resolved in court. Unfortunately, the PUC is likely to push this new rule through despite the fundamental flaws that are exposed below.

Defining the 110% Rule

In order to assess their new rule, we must first define it. The Commission believes that our legislature did not intend for there to be renewable energy facilities that produce significantly more power than they consume. That is essentially the basis of their 110% Rule. They have taken to calling these customer-generators "merchant generators", and claiming that they over-generate. Over-generation is an erroneous concept, since the statute clearly states system limits. The PUC claims that anyone producing more than 110% of their annual onsite needs is subverting the intent of the AEPS Act and may not participate in net metering. The proposed rule would use the prior year's consumption at a customer location as the base year, and no facility could be installed that might generate more than 110% of the prior year's need for electricity. Besides the obvious logistical problems involving new facilities (no prior year's load, so what happens?), the Commission's proposed new rule is flawed. It is in direct conflict with the plain language of the AEPS Act.

Statutory Problems With The PUC's 110% Rule

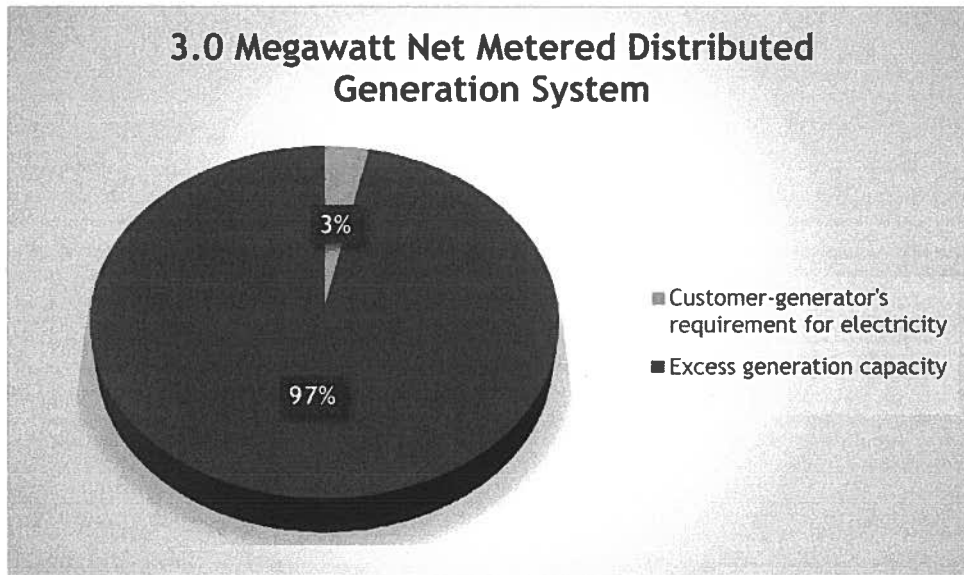
Dismantling the 110% Rule

The definition of net metering in the AEPS Act tells us all we need to know about the PUC's 110% Rule.

Net metering—The means of measuring the difference between the electricity supplied by an electric utility or EGS 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.

This definition was amended in 2007 by our legislature. Prior to that, the definition included language that the alternative energy system may be net metered when "...the renewable energy generating system is intended primarily to offset part or all of the customer-generator's requirements for electricity." By eliminating "primarily to offset" and replacing it with "any portion", the legislature clearly conveyed their intent to expand the potential for net metering; not constrain it. This is where the Commission will have trouble with their new rule to arbitrarily cap system size. It is as if their rule is written with the old definition in mind. The amended net metering definition (along with the definition of customer-generator) defines the statutory boundaries for renewable energy systems.

Using a pie chart is useful in understanding the statutory boundaries for renewable energy systems that are defined in the amended AEPS Act. In the chart below, a 3 MW alternative energy facility is shown as a pie. This represents the statutory limit for most non-residential renewable energy facilities. "Any portion" in this case would mean any slice of the pie. The word "any" clearly means that the slice of the pie could be very large or very small and still be in compliance with the statute. In fact, any portion means that any amount of power between zero and the maximum statutory limit would work.



The Commission is attempting to cap system size as 110% of the green slice in this pie. The 97% slice in blue would be regulated out of existence. The 110% Rule makes no sense in this context, and is in direct conflict with the plain language of the AEPS Act.

Statutory Problems With The PUC's 110% Rule

Underlying Driving Forces

Probably the most important question (so far unanswered) for the PUC is simply this. "Who is asking for these changes, and why?" Presumably the Commission would agree that regulation for the sake of regulation is wasteful and counter-productive. The AEPS Act was created to provide specific protections to those who wish to invest in renewable energy projects. The protection was necessary because of the predatory practices of the electric utility industry in the state, which would have forever kept renewable energy from flourishing here. It seems clear that the EDC's in Pennsylvania are likely to support many of the changes promoted by the PUC in their proposed rulemaking. But who else is expressing interest? If the electric utility companies are the only interested parties, their motives are very clear. It is absurd that the PUC would willingly dismantle the AEPS Act at the behest of the electric utility industry; the group that spawned the need for renewable energy reform in the first place.

Conclusion

When submitted for analysis, the 110% Rule does not withstand scrutiny. It is clearly in conflict with the statutory limits granted by the PA legislature. The PUC is attempting to alter the fundamental statutory provisions of the AEPS Act. They have no basis for this action, and it is in conflict with the law. As a result, the rule will ultimately fail.

The premise of this whitepaper is that the Commission (like all regulatory bodies) must abide by rules handed down by the PA legislature. Any time the Commission proposes a regulation that conflicts with the underlying statute, the statute will win. The following court case is one of many that sets the precedent in these matters.

"Where there is a conflict between the statute and a regulation purporting to implement the provisions of that statute, the regulation must give way." Heaton v. Commonwealth Department of Public Welfare, 96 Pa.Cmwlth. 195, 506 A.2d 1350 (1986).

When it suits their needs, the PUC will often rely on legislative intent. The following text can be found in Commission documents as their basis for imposing a given rule.

"The PUC cannot disregard the Legislature's clear direction under the pretext of pursuing its spirit, 1 Pa.C.S. § 1921(b).", Docket #L-00050174, Final Omitted Rulemaking Order, May 22nd, 2008.

The Commission is not allowed to only comply with this statute when it suits their needs. They may not impose regulations that are in conflict with the statute, which is what they are attempting to do with the 110% Rule. For that reason, the PUC should remove this provision from their proposed rulemaking.