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August 4, 2014

Via Electronic Filing
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Implementation of the Alternative Energy Portfolio Standards Act of 2004
Docket No. L-2014-2404361

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Comments of The Dauphin County Industrial Development Authority ("DCIDA") on the Proposed Regulations with regard to the above-referenced matter.

Sincerely,

Mark Stewart

Mark S. Stewart

MSS/jls
Enclosure

cc: Kriss Brown w/enc. (via email only)

3061

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of the Alternative Energy Portfolio Standards Act of 2004	:	Docket No. L-2014-2404361

COMMENTS OF THE
DAUPHIN COUNTY INDUSTRIAL DEVELOPMENT AUTHORITY
TO THE PROPOSED REGULATIONS

The Dauphin County Industrial Development Authority ("DCIDA" or "Authority") submits these Comments to the proposed regulations set forth in Annex A to the Proposed Rulemaking Order entered on February 20, 2014 ("Proposed Rulemaking Order") by the Pennsylvania Public Utility Commission ("Commission" or "PUC") concerning proposed revisions to the Commission's current regulations that implement the Alternative Energy Portfolio Standards Act of 2004 ("AEPS" or "AEPS Act"). The notice published in the *Pennsylvania Bulletin* requested comments on the proposed regulations by August 4, 2014. *Notice; Proposed Rulemaking; Implementation of the Alternative Energy Portfolio Standards Act of 2004*, 44 Pa.B. 4157, 4179 (Saturday, July 5, 2014).

I. INTRODUCTION

As a threshold matter, the proposed changes involving net metering and customer-generators are inconsistent with the AEPS act and beyond the enabling authority extended to the Commission by the General Assembly. Specifically, DCIDA opposes the imposition of the 110% consumption limitation. There is no basis in the text or spirit of the AEPS Act for the consumption limitation. The regulation should explicitly state, as the Commission's commentary does, that the 110% consumption limitation is prospective and applies only to "new

customer-generators." Proposed Rulemaking Order, at p. 12. Indeed, this should be true for all of the proposed net metering revisions.

II. BACKGROUND

DCIDA is a net metering customer that may be impacted by changes to the net metering regulations. The Commission's proposed consumption limitation is not a cosmetic change or a new interpretation of the AEPS Act. It is, essentially, a new statutory standard being unlawfully created by the Commission under the guise of regulation to severely restrict the customer-generator's right to use net metering and will effectively discourage the creation of large-scale solar projects, such as DCIDA's Solar Facility. This proposed consumption limitation will decimate the viability of net metered solar projects in the Commonwealth, and has the potential to impact DCIDA's vested rights under the AEPS Act.

In 2009, DCIDA began the planning and development process to construct a solar energy farm (the "Solar Project" or "Solar Facility") within the service area of PPL Electric Utilities Corporation ("PPL") in Dauphin County, Pennsylvania. DCIDA built the Solar Facility in two phases. In October 2011, it completed and began operating Phase I, which had approximately one megawatt ("MW") of generating capacity. It completed and began operating Phase II in October 2013. Phase II added approximately one MW of generating capacity to the facility, which now has slightly more than two MW of generating capacity.

In building the Solar Facility, DCIDA sought to advance green energy generation and to position Dauphin County as a leader in the investment in and growth of alternative energy generation sources in the Commonwealth. DCIDA intended that the Solar Project would offer a power source for the County's emergency management systems in the case of a disaster. The Solar Facility is connected to Dauphin County's mobile emergency management unit (which is

located at the site of the Solar Facility). So, the Solar Facility was sized (a) to satisfy the annual energy usage for Dauphin County's emergency management systems and (b) to generate excess electric energy. The Solar Facility operates in parallel with the PPL distribution system, and conforms to the applicable interconnection standards and regulations.

The ability to recover costs and derive revenue for its public projects significantly incentivized DCIDA's investment in the Solar Project. DCIDA recognized that the Solar Project, thereby, offered it a unique source of revenue. DCIDA understood that PPL would credit and compensate it for the Solar Farm's excess generation in compliance with applicable law and PPL's tariff. DCIDA believed that it could derive revenue from this system, allowing it to service any debt associated with the project and ultimately to facilitate DCIDA's public mission of fostering community and economic development. DCIDA invested $8.5 million in the Solar Project, incurring approximately $2.5 million in debt in the process. DCIDA anticipates a ten to eleven year payoff period for the debt.

Since October 2011, DCIDA has taken net-metered service from PPL. In April 2013, DCIDA elected to take PPL's Time-Of-Use ("TOU") rate option as a net-metered customer, rather than net-metering with a fixed-price default service rate. Regardless of election on TOU rates, as a net-metered customer, DCIDA offsets its on-site power consumption from PPL with the kilowatt-hours (kWh) of power that the Solar Facility generates, pursuant to PPL's tariff, the Commission's Regulations and the AEPS Act.

The Solar Facility operates in parallel with the electric utility grid. DCIDA's supply provides a backup to PPL's system and in the event it ever became necessary for PPL to buy power at spot market prices, PPL would be able to offset that cost using the cheaper power DCIDA generates. In addition, to the extent the Solar Facility generates power that services

local demand, this is less costly to PPL and involves less loss of energy than would be involved in PPL transmitting power over long distances.

III. COMMENTS OF DCIDA

DCIDA offers the following comments on the proposed changes to the Commission's net metering regulations.

A. Net Metering In Pennsylvania

DCIDA begins by noting the fundamental proposition that it is beyond the authority of the Commission to promulgate a regulation that is inconsistent with the AEPS Act. The Commission is obligated to establish and promulgate rules and regulations. See 73 P.S. §§ 1648.5. But, those regulations must be a reasonable and proper interpretation of AEPS Act. *See, e.g., Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Review*, 603 Pa. 374, 983 A.2d 1231, 1241 (Pa. 2009) ("Indeed, all regulations, whether legislative or interpretive 'must be consistent with the statute under which they were promulgated.'").

The Energy Policy Act of 2005 requires all electric utilities to offer net metering. 16 U.S.C. § 2621(d)(11) ("Each electric utility shall make available upon request net metering service to any electric consumer that the electric utility serves."). Consistent with that federal mandate, the AEPS Act contains the basic policy and structure of net metering in the Commonwealth. To be clear, the AEPS Act provides for the statutory right of customer-generators to interconnect and net meter alternative energy systems. *See* 73 P.S. §§ 1648.2, 1648.5. It specifies which power sources that qualify for net metering, the allowable size of individual systems, the rate at which excess generation from customer-generators is credited by the electric distribution company ("EDC"), and the time over which credits may accrue. *Id.*

The Commission has read the AEPS Act as establishing a clear policy of promoting the construction of small-[1] and large-scale[2] solar projects in this Commonwealth. 52 Pa. Code § 69.2901(c). The AEPS Act did this by creating a market for Alternative Energy Credits ("AECs") and by creating the statutory right to net metering. Even though that policy was clearly articulated, the Commission was concerned customers and those interested in developing solar projects of any size would be impeded by barriers in the market. So, in 2010, the Commission adopted a policy to promote funding of future solar projects that benefit electric consumers in this Commonwealth. *Policy Statement in Support of Pennsylvania Solar Projects,* PUC Docket No. M-2009-2140263, Final Policy Statement Order entered September 16, 2010; 52 Pa. Code §§ 69.2901 to 69.2904. Through its Proposed Rulemaking Order, the Commission has done a 180 degree reversal, and now proposes to erect such barriers, despite their inconsistency with the AEPS Act and past Commission decisions.

B. Section 75.13(a)(2); 110% Consumption Limit - Need for Grandfathering for Existing Customer-Generator Facilities

The AEPS Act limits the nameplate capacity of a customer-generator facility. For a residential property, the nameplate capacity limit is 50 kilowatts. 73 P.S. § 1648.2 (definition of customer-generator). For non-residential properties as business or industry), the nameplate capacity limit is 3,000 kilowatts or 3 MWs. *Id.* But, if certain design criteria are satisfied, a non-residential facility can have a nameplate capacity of up to 5,000 kilowatts or 5 MWs. *Id.*

The proposed consumption limit is not consistent with the AEPS Act. The consumption limit would materially, and illegally, alter and limit the statutory eligibility conditions for net

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1 A "small-scale solar project" is an "alternative energy generation system employing solar photovoltaic technology with a nameplate capacity of less than 200kW." 52 Pa. Code § 69.2902.

2 A "large-scale solar project: is an "alternative energy generation system employing solar photovoltaic technology with a nameplate capacity of 200 kW or more." 52 Pa. Code § 69.2902.

metering in the Commonwealth. The AEPS Act gives customer-generators the statutory right to design, build and operate an alternative energy system up to a specified nameplate capacity. There are no consumption limits within the AEPS Act. However, the Commission has proposed a consumption limit for all customer-generator facilities. Proposed Regulations, at Section 75.13(a)(3). This consumption limit would be in addition to the nameplate capacity limits in the AEPS Act. Proposed Rulemaking Order, at p. 13. Stated otherwise, a customer-generator facility must be designed to generate no more than 110% of the customer-generator's annual electric consumption, provided that its nameplate capacity does not exceed the size limits defined in the AEPS Act.

The proposed consumption limitation contradicts the AEPS Act itself. The AEPS Act is permissive in nature. The proposed regulations are prohibitory in nature. The proposed regulations would prohibit alternative energy system(s) that are permissible under AEPS Act. By adopting more stringent and restrictive standards than those set forth in the AEPS Act, the Commission would be materially altering the statutory eligibility conditions beyond recognition. The proposed regulations would prohibit alternative energy system(s) that are permissible under the AEPS Act. This should not be done, and is patently unlawful. *See* 1 Pa. C.S. § 1921(b).

The proposed consumption limit is not consistent with the underlying policy of the AEPS Act. The basic policy of the Commonwealth encourages the use of alternative energy sources. At the legislative level, that basic policy does not include consumption limits. The Commission has sought to encourage solar projects. The proposed consumption limit is designed to ensure that a customer-generator will not be able to generate excess electricity. This will severely restrict the customer-generator's right to use net metering and will effectively discourage large-

scale solar projects. So, the consumption limits are wholly contradictory to basic policy of the AEPS Act and the prior stated intentions of the General Assembly and the Commission.

The rulemaking suggests that the Commission has already implemented a consumption limitation in this Commonwealth. To support this suggestion, the rulemaking points to the a policy statement adopted by the Commission in 2012. *Net Metering – Use of Third Party Operators*, Final Order at Docket No. M-2011-2249441 (entered March 29, 2012). That policy statement is not a regulation and is not binding on the Commission.[3] Moreover, that policy statement places a 110% consumption limitation on third parties who both owned and operated the alternative energy system. The policy was issued because, under a restrictive reading of the AEPS Act, such systems may not be allowed because the customer-generator must be the "owner or operator" of the system. However, the Commission is now going far beyond allowing that specific business model (albeit with said consumption limitation). The policy does not justify the Commission's decision to extend the consumption limitation to all customer-generators and all alternative energy systems.

The allowance of such systems by the Commission was conditioned on the system being sized to generate no more than 110% of the customer-generator's annual electric consumption. So, that allowance (even with the consumption limitation) permits the maximum development of alternative energy sources in the Commonwealth.

DCIDA is concerned that the Commission will proceed with promulgating a consumption limitation, despite the objections raised above. If the Commission does proceed with promulgating a consumption limitation, it should be required to explain how existing projects

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[3] A general statement of policy does not establish a binding norm. A policy statement merely announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. *See, e.g., Central Dauphin School District v. Department of Education*, 608 A.2d 576, 582 (Pa. Commw. 1992).

will be treated under the "new" requirement. This is necessary and appropriate because the application of the "new" requirement to exiting projects would violate the vested rights of DCIDA (and others) under the AEPS Act.[4] It would impair existing contracts, such as DCIDA's interconnection agreement with PPL. For example, if DCIDA's Solar Facility is not eligible for net metering, nearly all of the value in the $8.5 million project will be negated,[5] and the ability of the Solar Facility to generate funds to pay the incurred debt will be decimated. Indeed, the Commission states in the Proposed Rulemaking Order that a consumption limitation "should apply to all **new** customer-generators." Proposed Rulemaking Order, at p. 12 (emphasis added).

DCIDA believes that the Commission does not intend such an drastic and extreme result. However, the proposed regulations do not contain an explicit provision that preserves prior rights or otherwise acts as a savings clause. It is, therefore, unclear if the proposed regulations could be construed to terminate any rights of a customer who is actually engaged in the practice of net-metering at the time of the final passage of 110% consumption or similar limitation. If the right to engage in net-metering is not preserved for customer generators who are actually engaged in the practice of net metering at the time of the final passage of such limitation, their facilities may be deemed ineligible for net metering on or after said final passage. *See Larry Moyer v. PPL Electric Utilities Corp.*, PUC Docket No. C-2011-2273645, Opinion and Order entered January

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4 The lack of a savings or similar clause could substantially impair the pending and existing interconnection agreements, and would disturb the vested right of the customer generators, such as DCIDA, who are engaged in net metering. For example, DCIDA secured the right to engage in net metering under the AEPS Act and the Commission's regulations. DCIDA's Solar Facility was designed, and has been operating under, all of those design constraints. Those constraints allowed the Solar Facility to be designed to generate more than 110% of the DCIDA's on-site power consumption. Arguably, if the 110% consumption limitation is applied to DCIDA's Solar Facility, the entire Solar Facility would be deemed ineligible for net metering – because the limitation is based on design or size, and not output of the facility.

5 If the proposed regulations are deemed valid (despite the elimination of DCIDA's vested rights), it could be argued that the retroactive application of the proposed regulations to DCIDA results in a taking.

9, 2014, at 20 (wherein the Commission suggested the Mr. Moyer's prospective eligibility for net metering or virtual meter aggregation was subject to future changes in applicable laws or tariffs).

The Commission should clearly explain in the regulations itself that the Commission does not intend,[6] and will not apply, the "new" consumption limitation and the other requirements in the rulemaking to existing projects, such as the DCIDA's Solar Facility. This can be easily done with a savings clause or other provision that provides for the grandfathering and exemption of existing projects from the application of the proposed regulations.

Simply put, DCIDA does not agree that the proposed 110% consumption (or similar) limitation should be created by the Commission and applied to any customer-generator. If any such limitations are created by the Commission, DCIDA submits that DCIDA and any other existing customer-generator who is actually engaged in the practice of net-metering should be grandfathered and exempted from the application of any such limitation.

C. Section 75.1; Definition of "Utility"

The AEPS Act uses the adjective "nonutility" as part of the statutory definition of a customer-generator. That definition specifically identifies a customer-generator as a "nonutility owner or operator" of the distributed generation system. The AEPS Act does not define the term nonutility, and the Commission does not propose one as part of the Proposed Rulemaking.

Rather than define the term "nonutility," the Commission proposes to define the term "utility." The rulemaking defines a utility as: "A person or entity that provides electric

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[6] Elimination of DCIDA's (and others') right to engage in net metering is not supported by the nature and strength of the public interest articulated by the Commission. The Legislative intent behind the AEPS Act was to encourage the use of alternative energy sources. *See, Final Rulemaking Re Net Metering for Customer-generators pursuant to Section 5 of the Alternative Energy Portfolio Standards Act*, 73 P.S. § 1648.5; *Implementation of the Alternative Energy Portfolio Standards Act of 2004: Net Metering*, PUC Docket No. L-00050174; M-00051865, Final Order entered June 23, 2006; 2006 Pa. PUC LEXIS 20 (the AEPS Act's intent is to remove barriers to net metering and provide appropriate treatment to customer-generators who wish to net meter).

generation, transmission, or distribution services, at wholesale or retail, to other persons or entities." Proposed Rulemaking, at Section 75.1. To justify this definition, the Commission engages in linguistic gyrations. The Commission, the body with the duty to regulate public utilities in this Commonwealth, turns to Webster's Dictionary for the definition of the word "utility." That definition requires the purchase of a "service," so the Commission concludes that a "nonutility" does not provide "electric service in the context of the AEPS Act." Proposed Rulemaking Order, p. 8. This newly defined term will be used as a part of the proposed second condition on eligibility for net metering. That condition provides: "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." Proposed Rulemaking, at Section 75.13(a)(2).

There is no need for that tortured analysis. There is an obvious meaning for the term "utility." The term "utility" is a shorthand term of art expressing the concept of a "public utility," which is a term defined by Section 102 of the Public Utility Code, 66 Pa. C.S. § 102. In fact, the Commission published guidelines on the subject of public utility status. 52 Pa. Code § 69.1401. Simply put, public utility status is a fact-based determination and includes examination of the following key elements: (1) The furnishing of a specified commodity or service (such as steam, natural gas, water or wastewater) (2) to (or for) the public (3) for compensation. 66 Pa. C.S. § 102; 52 Pa. Code § 69.1401.[7]

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[7] To be clear, under well-established precedent, a person (such as a customer generator) would not be considered a public utility. None of the attributes of "service to the public" are present with a customer generator who is interconnected to the grid and can only provide excess electric energy to only the EDC or an EGS. *See, e.g., Bethlehem Steel Corp v. PUC*, 713 A.2d 1110 (Pa. 1998) ("Bessie 8") (dedicated service to one customer is not "service to the public"); *Drexelbrook Associates v. PUC*, 212 A.2d 237, 239 (Pa. 1965) ("Drexelbrook") (provision of electric and water service by a landlord to limited group, the landlord's own tenants, was not service to the public); *Overlook Development Co. v. Public Service Commission*, 101 Pa. Superior Ct. 217, *aff'd per curiam*, 158 A. 869 (Pa. 1932) (provision of water service by developer to the property owners the development - owned by the developer - as well as to four adjacent property owners was not service to the public); *Petition of Granger Energy of Honey Brook, LLC*, PUC

The Commission should be wary of abandoning such precedent, which it seems to be doing with the proposed definition. The proposed definition of "utility" makes no reference to statutory definition, published guidelines or established precedent. *See* Proposed Rulemaking, at Section 75.1. It follows that a person could fall within the definition of "utility," but be excluded from the statutory definitions of public utility.[8] The lack of certainty over who is a "utility" versus who is a "public utility" is likely to be confusing for EDCs, EGSs, and customer generators.

The proposed definition of "utility" is circular and confusing. As noted, a customer generator is allowed to provide excess electric generation to other entities, e.g., the customer-generator's EDC or EGS, who then resell that electric energy to others. The credit or compensation terms for excess electricity produced by the customer-generator are set forth in the Commission's regulations. 52 Pa. Code §§ 75.13(d)-(f). But, the proposed definition of "utility" is not dependent on a sale. As written, the proposed definition only requires that a "service" (electric energy) be provided by customer generator to others (the EDC or the EGS). Grid benefits of private alternative energy systems include reduced need for centralizing power plants and reduced strain on the EDC's distribution system. Such benefits could be deemed to be a

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Docket No. P-00032043, Opinion and Order issued September 8, 2004 (provision of landfill gas service to four industrial users was not service to the public).

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

"service." This means that every customer generator who produces excess electric energy could be deemed to be a utility, and thus not eligible for net metering.

The potential for confusion is magnified by the fact that the proposed definition of "utility" is inconsistent with existing statutory definitions of public utility. As noted, the proposed definition of "utility" only requires that a "service" (electric energy) be provided by customer generator to others (the EDC or the EGS). That definition is, therefore, inconsistent with the definition in Section 102 of the Public Utility Code, 66 Pa. C.S. § 102, [9] and in Section 201 of the Federal Power Act, 16 U.S.C. § 824(e).[10] Each of these statutory definitions requires a sale (either a retail or at wholesale), which is an element missing from the proposed definition of "utility." It appears, therefore, that a "public utility" would satisfy the proposed definition of "utility." It further appears that a person not otherwise a public utility, such as a landlord providing electric service to his tenants, would satisfy the proposed definition of "utility."

In conclusion, DCIDA is concerned that it will be unfairly categorized as a "utility." As written, the proposed term and definition are likely to be confused with the term "public utility." The potential for confusion is increased by the fact that the Commission has departed from statutory definitions, published guidelines and established precedent to create the proposed

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9 The Public Utility Code defines a "public utility" as: "Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for ... producing, generating, transmitting, distributing or furnishing ... electricity ... for the production of light, heat, or power to or for the public **for compensation**." 66 Pa. C.S. § 102 (emphasis added). The term does not include: "Any person or corporation, not otherwise a public utility, who or which furnishes service only to himself or itself." *Id.*

10 Generally, the term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC). 16 U.S. Code § 824(e). FERC's jurisdiction over sales of electricity is limited to sales for resale (i.e., wholesale sales) in interstate commerce. Section 201(b) of the Federal Power Act (FPA) states that FERC's jurisdiction applies to "the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy." 16 U.S. Code § 824(b).

definition.[11] To remedy the DCIDA's concerns, the proposed definition of "utility" should be abandoned by the Commission. Alternatively, the definition of "utility" should be tied to the existing statutory definitions of public utility.

D. Section 75.13(a)(7) and Section 75.17; Commission Approval of Applications

The Commission has imposed a requirement that all alternative energy systems with a nameplate capacity of 500 kilowatts or greater obtain Commission approval for net metering. Proposed Regulations, at Section 75.13(a)(7) and Section 75.17.

The need for this costly burden is not clear. The Commission expresses the need for "uniform application of the net metering rules throughout the Commonwealth." Proposed Rulemaking, at p. 14. But, notes that it will only review and approve only a "relatively small" number of such applications. *Id.* Nothing explains why review and approval of only the largest alternative energy systems will ensure that the rules are uniformly applied to all customer-generators and alternative energy systems in the Commission.

That being said, there is little for the Commission to actually approve. In the normal course, the Commission does not review applications to begin service. And, there is nothing in the AEPS Act which suggests that the Commission should be reviewing applications to use net metering. The AEPS Act sets the statutory eligibility criteria. There is simply no basis for the Commission to deny net metering to a customer-generator and alternative energy system that

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[11] This appears to be contrary to the Commission's stated intentions in 2004. In its 2004 Implementation Order, the Commission stated that it would apply the Public Utility Code and its associated regulations to implementation and enforcement of the AEPS Act, except where prohibited by the express language of AEPS ACT or necessary implication thereof.. *Implementation of the Alternative Energy Portfolio Standards Act of 2004,* PUC Docket No. M-00051865, Implementation Order entered March 25, 2004; 2005 Pa. PUC LEXIS 35.

satisfies the statutory eligibility criteria. Under the AEPS Act, and the Public Utility Code, the Commission's role is to ensure that the EDC does not violate the customer-generators' statutory right to use net metering. The Commission's role is not to grant or deny the statutory right of net metering to any customer-generator.

IV. CONCLUSION

DCIDA appreciates this opportunity to provide its viewpoint regarding the proposed changes to net metering regulations and respectfully requests that the Commission revise its proposed regulations as set forth above.

Respectfully submitted,

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Date: August 4, 2014

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