Comments of the Independent Regulatory Review Commission

Pennsylvania Public Utility Commission Regulation #57-304 (IRRC #3061)

Implementation of the Alternative Energy Portfolio Standards Act of 2004

October 3, 2014

We submit for your consideration the following comments on the proposed rulemaking published in the July 5, 2014 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Pennsylvania Public Utility Commission (PUC) to respond to all comments received from us or any other source.

1. **Whether the regulation is consistent with the intent of the General Assembly; Possible conflict with or duplication of statutes or existing regulations; Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review; Need for the regulation; Whether the regulation is supported by acceptable data; The legality, desirability and feasibility of exempting or setting lesser standards of compliance for individuals or small businesses; Whether a less costly or less intrusive method of achieving the goal of the regulation has been considered for regulations impacting small businesses; Implementation procedures; Economic or fiscal impacts; Direct and indirect costs to the Commonwealth and to the private sector; Adverse effects on prices of services or competition.**

The Alternative Energy Portfolio Standards Act of 2004 (Act) (73 P.S. §§ 1648.4 – 1648.8) and Section 2814 of the Electricity Generation Customer Choice and Competition Act (66 Pa. C.S. § 2814) impose certain duties upon the PUC relating to alternative energy. Under this proposal, the PUC seeks to align its regulations on net metering, interconnection, and portfolio standard compliance to the Act and recent changes to the Act made by Act 35 of 2007 and Act 129 of 2008. The regulation is also intended to clarify issues of law, administrative procedures and policy.

Legislators, other Commonwealth and government agencies, local governments and authorities, the farming community, environmental groups, alternative energy businesses and residents have raised numerous concerns with the proposed rulemaking. Some believe amendments being proposed deviate from the intent of the Act and conflict with specific provisions of the Act. Others are concerned with the effect the changes will have on the alternative energy market in the Commonwealth and the possible negative consequences to the environment.

Of particular concern to these commentators are amendments or new language added to the following definitions or provisions:

- § 75.1, definitions of "customer-generator" and "utility;"
- § 75.12, definitions of "virtual meter aggregation" and "year and yearly;"
- § 75.13(a), the conditions that customer-generators must meet to qualify for net metering. Of particular concern are the "independent load" condition of Subsection (a)(1), the "owner or operator of the alternative energy system may not be a utility" condition of Subsection (a)(2), the "no more than 110%" condition of Subsection (a)(3), and the "Commission approval for net metering of 500kW or more alternative energy systems" condition of Subsection (a)(7);
- § 75.13(k) and the potential imposition of a charge or fee;
- § 75.16(a)(2) and the requirement that a large customer-generator must be able to provide emergency support; and
- § 75.17 and the process for obtaining PUC approval of customer-generator status.

We agree with commentators that the intent of the Act, and the General Assembly, is to promote alternative energy. We offer the following comments on the provisions noted above.

Whether the regulation is consistent with the intent of the General Assembly

Representative Greg Vitali submitted comments stating, "The intent of the legislature in enacting alternative energy portfolio standards was to promote the purchase of renewable energy such as solar photovoltaic by electric distribution and supply companies." According to the Preamble, the reason for this rulemaking is to limit the possibility of merchant generators posing as customer-generators. Commentators believe that a consequence of this action is that third-party owners and operators of alternative energy systems that provide service to those without the capital to develop their own alternative energy systems would face regulatory hurdles that would impede the development of renewable energy sources. We ask the PUC to explain how this potential consequence is consistent with the intent of the General Assembly, the Act and its recent amendments.

Possible conflict with or duplication of statutes or existing regulations

Commentators have raised several concerns related to the conflicts between the Act and the proposed rulemaking. For example, 73 P.S. § 1648.5 states, "Excess generation from net-metered customer-generators shall receive full retail value for all energy produced on an annual basis." However, § 75.13(k) of the rulemaking allows for the imposition of a charge or fee on customer-generators.

In addition, the statutory definition of "net metering" found at 73 P.S. § 1648.2 provides guidance on virtual net aggregation as follows: "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." The regulatory definition of "virtual net aggregation" found at § 75.12 and § 75.14(e) would require *each meter* of a customer generator to have measurable load. Commentators believe that the Act allows for a customer-generator to

have measurable electric load *overall*. They believe the proposed regulation would prevent appropriate siting of renewable energy systems.

In light of the comments received pertaining to possible conflicts with the Act, we ask the PUC to provide a more detailed explanation of why it believes the various provisions of the rulemaking cited by commentators do not conflict with the Act.

Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review

If this rulemaking is implemented, it could have an effect on the research and future development of the alternative energy market in the Commonwealth. As noted by Pennsylvania State University, various sections of the rulemaking, "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." We believe such a result would be a deviation from the intent of the Act and represents a policy decision that should be made by the General Assembly. We, therefore, encourage the PUC to work closely with members of the General Assembly and the designated standing committees to ensure the final-form regulation is within the scope of its granted regulatory authority.

Protection of the public health, safety and welfare and the effect on the Commonwealth's natural resources

The Pennsylvania Department of Environmental Protection (DEP), the Pennsylvania Department of Agriculture and commentators representing landfill and farming interests have raised concerns with the effect the rulemaking will have on the environment and waterways of the Commonwealth. Biomass is considered a Tier I alternative energy source under the Act. Customer generators such as farmers and landfills use biomass to produce energy that is often times in excess of the 110% limit for alternative energy systems found under § 75.13(a)(3) of the rulemaking. If these customer-generators are unable to beneficially use biomass, such as farm waste, it would negatively affect the environment. We ask the PUC to address these concerns when it submits the final-form rulemaking and explain how the regulation protects the Commonwealth's natural resources.

Need for the regulation; Whether the regulation is supported by acceptable data

As it relates to the regulatory provisions noted above, the PUC has not established the overall need for or provided any acceptable data to support the proposed changes. We ask the PUC to expand upon the information provided in Section 10 of the Regulatory Analysis Form (RAF), relating to need. In addition, we ask the PUC to provide specific references to the sections or parts of the annual report cited in Section 28 of the RAF, relating to acceptable data, that justifies the changes being proposed.

The legality, desirability and feasibility of exempting or setting lesser standards of compliance for individuals or small businesses; Whether a less costly or less intrusive method of achieving the goal of the regulation has been considered for regulations impacting small businesses

The regulatory provisions noted above, if implemented, will affect both residential customer-generators and small-business customer-generators, including farmers. We recommend the PUC consider setting lesser standards of compliance for these generators or explain why such standards would not be in the public interest. Additionally, the PUC should provide a more thorough analysis of the effects the rulemaking will have on these members of the regulated community.

Implementation procedures

Commentators have questioned how this rulemaking will be implemented. Specifically, they seek assurance that the requirements of the rulemaking will not affect existing customer-generator systems. In addition, they question how the PUC intends to administer or enforce these regulations as they pertain to alternative energy systems currently under development but not yet functioning. We ask the PUC to include specific language in the final-form regulation that will clarify how the regulation will affect these systems.

Economic or fiscal impacts; Direct and indirect costs to the Commonwealth and to the private sector; Adverse effects on prices of services or competition

RAF Question #18 asks how the benefits of the regulation outweigh any costs and adverse effects. In response, the PUC notes that regulation will add clarity and reduce uncertainty for all stakeholders. The PUC believes any costs would be offset by the benefits of obtaining more certainty as to the benefits available to qualified alternative energy systems, as well as potential alternative energy development. Many commentators dispute the PUC's response and believe that the rulemaking will impose significant costs on the regulated community, especially those involved with research and development and the sale and installation of alternative energy systems because the rules being proposed will have a negative effect on their businesses. For example, the "110%" rule would reduce customer-generators' access to compensation and the "independent load" rule prevent the development of alternative energy systems on non-contiguous property. We ask the PUC to work with the regulated community to gain a better understanding of how this proposed rulemaking will affect certain businesses and to include a more thorough cost/benefit analysis in the RAF submitted with the final-form rulemaking.

2. Advanced Notice of Final Rulemaking (ANFR)

As noted by the PUC in response to RAF Question #14, "During the development and drafting of the regulation changes, there were no formal communications with nor solicitations for input from the public, any advisory council/groups, small businesses or groups representing small businesses." Given the lack of solicitation for input during the development of the proposed rulemaking and significance of the issues raised by commentators, we suggest that the PUC issue an ANFR to engage the regulated community in meaningful dialogue as it develops the final-form rulemaking.

Subchapter A. GENERAL PROVISIONS

3. Section 75.1. Definitions. – Whether the regulation is consistent with intent of the General Assembly; Fiscal impact; Clarity.

Customer-generator

The existing regulatory definition of this term is the same as the definition found in 73 P.S. § 1648.2. Under this proposal, the PUC is adding language that specifies a customer-generator must be a retail electric customer. The addition of the term "retail electric customer" could alter the landscape of the alternative energy market that, to some degree, relies on the third-party ownership model. We ask the PUC to further explain how it ascertained that inclusion of this term is consistent with the intent of the General Assembly and the overall purpose of the Act.

Utility

This new term is defined as, "A person or entity that provides electric generation, transmission or distribution services, at wholesale or retail, to other persons or entities." Commentators have noted that the term is overly broad and could be interpreted to include entities not intended by the PUC, such as landlords. Concerns have been raised that this definition, read in conjunction the revised definition of "customer-generator," would threaten the third-party ownership model. We ask the PUC to provide a more precise definition of this term and to consider using the statutory term "public utility."

Subchapter B. NET METERING

4. Section 75.12. Definitions. – Fiscal impact; Implementation procedures; Clarity.

Year and yearly

Commentators are concerned that the amendment to this existing definition will impose costs on electric distribution companies that relate to modifications to information technology and billing systems. Commentators also noted the proposal would conflict with existing regulatory and operational frameworks for PJM Interconnection, L.L.C., further complicate the regulatory environment and needlessly confuse customers. We ask the PUC to work with the regulated community to gain a better understanding of how the proposed amendments would be implemented and the corresponding financial implications of such changes.

5. Section 75.13. General provisions. – Statutory authority; Need; Implementation procedures; Fiscal impact; Adverse effects on prices, productivity or competition; Clarity.

In addition to the comments above on this section, we raise the following concerns.

Subsection (a)

Under this subsection, potential customer-generators must meet seven conditions. We have three concerns.

First, under Subsection (a)(1), customer-generators must "Have electric load, independent of the alternative energy system, behind the meter and point of interconnection of the alternative energy system." How will this provision be implemented for new construction that may incorporate an alternative energy system? Would the owner be precluded from qualifying as a customer generator because they do not have electric load at the time of application to the electric distribution company or the Default Service Provider (DSP)?

Second, Subsection (a)(3) requires alternative energy systems to be "sized to generate no more that 110% of the customer-generator's annual electric consumption." Commentators have questioned the PUC's statutory authority for this provision and also how it will be implemented. Regarding statutory authority, the commentators believe there is nothing in the Act, Act 35 or Act 129 that would allow the PUC to impose such a restriction. We ask the PUC to provide a citation to specific statutory language that would allow for the limitation being proposed under this subsection.

Examples of concerns related to implementation cited by commentators are how the percentage is calculated for new construction, fluctuations in electric usage and production from year to year and the potential loss of customer-generator status if the percentage is exceeded, the practicality of imposing this condition on residential customers, and who monitors this condition. If this provision is implemented, we ask the PUC to clarify in the final-form regulation how this condition would be implemented.

Third, alternative energy systems with a nameplate capacity of 500 kW or more must have PUC approval for net metering. The Act sets forth criteria for alternative energy systems eligibility, but it does not require approval by the PUC. What is the PUC's statutory authority for this provision as it relates to systems of this size?

Subsection (e)

The PUC is adding language to this subsection to address how excess generation amounts are determined at the end of the year and how the compensation is to be computed. A commentator has asked for clarification on the exact methodology to make the required determinations. Another commentator notes that the proposed language will be time consuming and costly to implement. We ask the PUC to work with the regulated community to develop a more precise and less costly alternative to the proposed language.

Subsection (k)

Revisions to this subsection of the PUC's regulations would allow for the imposition of fee or charge. As noted above, these revisions have generated a great deal of interest from segments of the regulated community. We have already commented on various aspects of this provision and

raise the following additional concerns. First, how will this fee be calculated and what factors would the PUC consider when allowing such a charge or fee?

Second, would the charge or fee be limited to customer-generators, or could it be imposed on any customer of an Electric Distribution Company (EDC) or DSP?

Third, as written, the charge or fee may be imposed if the charge or fee "is specifically authorized under this chapter or by order of the Commission." The Preamble notes that § 75.14(e) currently allows an EDC to impose a charge related to recouping expenses for virtual net metering of a customer-generator. Will the proposed charge or fee contemplated by Subsection (k) be tied exclusively to § 75.14(e)? If this provision remains in the final-form regulation, we recommend that the regulation specifically cite that section and delete the phrase "under this chapter." We also question under what circumstances the PUC may, by order, impose a charge or fee. This should be specified in the final-form regulation.

Fourth, the RAF is silent on the fiscal impact this provision could have on the regulated community. We ask the PUC to quantify how much of a cost the charges or fees will impose on the regulated community.

Finally, a commentator has suggested that the amount of the charge or fee that will be required to cover costs associated with virtual net metering would make it uneconomical for some customer-generators. We question the reasonableness of a provision that would stifle the development of alternative energy and whether that result is consistent with the intent of the Act.

6. Section 75.16. Large customer-generators. – Implementation procedures; Clarity.

This new section identifies the standards that distributed generation systems with a nameplate capacity above 3 MW and up to 5 MW must satisfy for customer-generator status. Commentators have raised two concerns related to implementation of this section. First, commentators believe that it is unrealistic for some renewable energy projects of this size, such as wind and solar, to be available during grid emergencies as required under Subsection (b). Clarification is sought on how systems that operate continuously or are powered by wind or solar can comply with this provision. Second, a commentator notes that the provision, as written, would not allow a system to respond during grid emergencies because of governing agreements with regional transmission organizations. We ask the PUC to explain how this section will be implemented and to amend the rulemaking accordingly to address these concerns.

7. Section 75.17. Process for obtaining Commission approval of customer-generator status. – Implementation procedures; Need.

This section establishes the process through which EDCs obtain PUC approval to net meter alternative energy systems with a nameplate capacity of 500 kW or greater. Will this process run simultaneously with the review procedures set forth in Subchapter C, relating to interconnection standards for new customer-generators? We ask the PUC to ensure this new sections does not delay a potential customer-generator's ability to employ a new alternative energy system as quickly as possible.

Subchapter C. INTERCONNECTION STANDARDS

8. Section 75.51. Disputes. – Reasonableness.

The PUC is proposing to delete language related to the appointment of a technical master to be used to resolve disputes. The language is being deleted to reduce costs associated with the appointment of a technical master and because, to date, the PUC has not designated a technical master. Given the potential for more disputes arising as a result of the implementation of this rulemaking, we question the reasonableness of this change at this time. In addition, we ask the PUC to provide a fiscal analysis of the costs associated with the designation by the PUC of technical master.

Subchapter D. ALTERNATIVE ENERGY PORTFOLIO REQUIREMENT

9. Sections 75.62. Alternative energy system qualification and 75.64. Alternative energy credit program administrator. – Implementation procedures; Reasonableness; Fiscal impact.

Commentators have expressed concern with how alternative energy credits which are deemed to have been generated from non-compliant alternative energy systems will be treated. The concern is that current owners of the credits could be unfairly penalized for the non-compliance by an alternative energy system. This would have a negative fiscal impact on the current owner of the credit. To provide regulatory stability, we recommend that the PUC clarify how these credits will be treated.