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August 22, 2016

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VIA HAND DELIVERY
Amy Elliott, Senior Deputy Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Re: Independent Regulation Review Commission ("IRRC") No. 3061
Pennsylvania Public Utility Commission Regulation No. L-2014-2404361/57-304
Implementation of the Alternative Energy Portfolio Standards Act of 2004
52 Pa. Code, Chapter 75

Dear Ms. Elliott:

We represent the Pennsylvania Waste Industries Association ("PWIA"). The Public Utility Commission ("PUC") submitted the above-referenced Revised Final Form Regulations ("proposed regulations") for approval under the Commonwealth Documents Law[1] and the Commonwealth Attorneys Act.[2] PWIA respectfully requests that the Attorney General reject the regulations as illegal because the PUC lacks the statutory authority to promulgate the proposed regulations. Independent of statutory authority, we request that the Attorney General rejects the proposed regulations as illegal due to improper form, pursuant to the requirements of the Regulatory Review Act.[3]

The PUC's proposed regulations are not statutorily authorized because they violate the plain meaning of the underlying statute, and directly contravene the clear and unambiguous legislative intent. The proposed regulations do this in a number of ways, including but not limited to the improper definition of "utility", the creation of an arbitrary and standard-less PUC Review Process. Both of these issues subvert the plain language and the intent of the Alternative Energy Portfolio Standards Act of 2004 ("AEPS Act" or "Act") by restricting net metering.[4] In

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[1] 45 P.S. §§ 1102, 1201- 1208.
[2] 71 P.S. §§ 732-101 – 732-506.
[3] 71 P.S. §§745.1 -745.14.
[4] PWIA highlights §§ 75.1 and 75.17, relating to the definition of utility and the Review Process, but this is by no means an exhaustive examination of all of illegal aspects of the proposed regulations. We understand that there are several other pertinent elements of the proposed regulations whose legality is in question, including the independent load requirement under § 75.13(a)(1); the ability of the PUC to authorize Fees and Charges related to virtual meter aggregation under § 75.13(k); virtual meter aggregation, §74.14(e); as well as potential constitutional due process and *ex post facto* laws issues.

addition, the Final Form Regulations and Report were formatted improperly, calling into question the legislative committees' ability to conduct the proper Final Review within the mandated timeframe and determine whether to proceed with resolutions to bar promulgation of the regulations that were twice disapproved by the IRRC.

As you know, under the Commonwealth Attorneys Act, the Attorney General is required to review these proposed regulations and determine whether the proposed regulations are in the proper form, statutorily authorized, and constitutional.[5] These regulations are fatally flawed due to both "form" and "legality" issues. The IRRC highlighted the lack of statutory authority for these proposed regulations in both of its written disapprovals, and further warned the PUC that its Final Form Regulations failed to comply with the mandated form under RRA. It is our further understanding that the Final Form Regulations provided to your office are identical to the Final Form Regulations deemed improper for form by the IRRC. As more fully set forth below, we suggest that this Office object to these regulations as illegal under Section 204(b) of the Commonwealth Attorneys Act. If the PUC promulgates these regulations in any event over this Office's objection, the Attorney General should petition for review in the Commonwealth Court to prevent illegal regulations from taking effect.

The Regulations Are Not Statutorily Authorized

The PUC claims it has statutory authority for these rules under its legislative rulemaking authority under Section 501 of the Public Utility Code[6] and rulemaking authority under the AEPS Act[7]. The IRRC already determined that "the PUC does not have the statutory authority to promulgate the rulemaking", and that this violated Section 5.2(a) of the RRA.[8] The proposed regulations are in direct conflict with the legislative intent of the AEPS Act. Under the Pennsylvania Rules of Statutory Construction, "the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly."[9]

The PUC's tortured interpretation of its statutory authority to limit net-metering directly and indirectly, relies on a mish-mash of cherry-picked language from the AEPS Act and Section 501. The PUC is wrong about its statutory authority, and the proposed rulemaking violates the legislative intent of the AEPS Act. PWIA is not the only entity that believes this, as an identical claim of authority was recently and soundly rejected by the Commonwealth Court[10]. As set forth

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[5] 71 P.S. § 732-204(b). If the regulations are improper, not statutorily authorized or unconstitutional, the Attorney General is required within 30 days to notify in writing, the agency, the Office of General Counsel and certain members of the General Assembly.
[6] 66 Pa. C.S. 501(b).
[7] 73 P.S. §1648.7(a).
[8] IRRC June 2, 2016 Disapproval Order at 1.
[9] 19 Pa. C.S. § 1921(a).
[10] In September 2015, the Commonwealth Court upheld the importance of the General Assembly's policy decision in the AEPS Act to encourage the production of renewable energy sources, and rejected the PUC's attempt to ignore it. *Dauphin Cty Indus. Dev. Auth. v. Pennsylvania Pub Util. Comm'n*, 123 A3d 1124, 1135 (Pa. Cmwlth 2015), *reargument denied* (Oct. 30, 2015), *appeal denied*, 140 A.3d 14 (Pa. 2016). In *Dauphin*, the customer-generator argued on appeal and won that the PUC's interpretations in its Time-of-Use program improperly conflicted with the

in greater detail below, the purpose of the Act is to increase the generation of alternative energy, including alternative energy qualifying for the net-metering program, and the proposed regulations directly contradict both the legislative intent of the AEPS Act and the plain language. The touchstone canon of statutory construction is that the plain language of a statute cannot be disregarded in pursuit of unstated legislative intent when the words are clear and free of ambiguity. 1 Pa.C.S § 1921(b). The General Assembly's explicit intent to provide for the sale of energy generated from renewable and environmentally beneficial sources is clear on its face[11].

Moreover, the General Assembly amended the AEPS Act in 2007 by intentionally removing additional barriers to net metering. In 2007, the original *subjective* test set forth in the 2004 Act was removed—statutory language which required an evaluation of the purpose of the alternative energy generating system in generating electricity to qualify for the net metering program—and the General Assembly replaced it with an entirely *objective* test for qualification for net metering. Today, the AEPS Act qualifies all customer for net metering "when **any** portion of the electricity generated by the alternative energy generating system is used to offset part of all of the customer-generator's requirements for electricity"[12] without any parsing of the "intent" of the customer-generator. In response to this and other changes in the 2007 Act, the PUC explicitly recognized that the Legislature's clear intent is to provide customer-generators with "annual compensation for excess generation in a manner that encourages research, development and deployment of alternative energy systems."[13] Quite simply, the statute does not provide barriers to net metering "when any portion of the electricity generated the alternative energy generating system is used to offset part or all of the customer-generator's requirements for electricity" other than statutorily defined nameplate capacity requirements, and this is a fact that the PUC recognized, and published its agreement with, in 2008.

The PUC's proposed regulations add a definition of "utility" and create a Review Process as part of its so-called "clarifying" of net metering, interconnection and portfolio standard compliance provisions. The proposed regulations contradict the intent of the AEPS Act by improperly restricting net metering and disqualifying entities that would otherwise be eligible for net metering under the AEPS Act. Agency regulations are only valid and binding if they are: (1) within the agency's granted power; (2) issued pursuant to proper procedure; and (3) reasonable.[14]

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same AEPS Act requirement at issue here, *i.e.*, that "[e]xcess generation from net-metered customer-generators shall receive full retail value for all energy produced on an annual basis." (73 P.S. § 1648.5). *Id.* The PUC's contention that another statutory mandate to ensure that utility rates are "just and reasonable" trumped the AEPS Act intent was soundly rejected by the Commonwealth Court. *Id.*

[11] The AEPS Act is titled "[a]n Act to provide 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 source by electric distribution and supply companies." Alternative Energy Portfolio Standards Act, 2004 Pa. Legis. Serv. Act 2004-2013 (S.B. 1030) (Purdon's).
[12] H.R. 1203, 2007 Sess. Section 2. Definitions, "Net Metering" p. 21 (Pa. 2007).
[13] *Implementation of Act 35 of 2007, Net Metering and Interconnection*, Docket No. L-00050174, Final Omitted Rulemaking Order at 18 (entered July 2, 2008).
[14] *Naylor v. Com., Dep't of Pub. Welfare*, 54 A.3d 429, 434–35 (Pa.Cmwlth. 2012), *aff'd*, 76 A.3d 536 (Pa. 2013) (*citing Rohrbaugh v. Pa. Public Utility Comm'n*, 727 A.2d 1080, 1085 (Pa. 1999)).

Because the meaning of a statute is "essentially a question of law," "when an agency's interpretation of a statute is unwise or violative of a legislative intent, courts disregard the regulation"[15] Likewise, under the CAA § 732-204(b) review, this Office can determine the meaning of the AEPS Act and reject regulations based on PUC's interpretations that violate legislative intent.[16]

The PUC's interpretation of its statutory authority here is incorrect because the proposed regulations subvert the clear intent of the AEPS Act. On June 2, 2016, in its first disapproval, the IRRC concluded that the PUC had no statutory authority to impose any annual load limit on the size of customer-generators, including the proposed 200% limit.[17] Recognizing that the PUC would likely remove the 200% limit based on the IRRC's conclusions, the IRRC specifically cautioned the PUC to "ensure that other provisions of the proposed regulations do not limit a customer-generator's ability to net-meter excess generation it produces."[18] Unfortunately, the PUC failed to heed the IRRC's admonition.

Under the AEPS Act, "[e]xcess generation from net-metered customer-generators shall receive full retail value for all energy produced on an annual basis."[19] The only statutory limitations are certain nameplate capacity requirements[20] and that any portion of the electricity generated by the alternative energy generating system [be] used to offset part of all of the customer-generator's requirements for electricity.[21] The PUC's Revised Final Form Regulations are more restrictive to net metering than the AEPS Act, as the proposed regulations go beyond the statutory authority by creating artificial restrictions on customer-generators ability to qualify for net metering. This occurs through several different mechanisms, including the definition of the new term "Utility".

The definition of "Utility" is not statutorily authorized.

The AEPS Act defines net metering as available to all "nonutility" customer-generators.[22] While neither the AEPS Act nor the Public Utility Code define "nonutility", the Public Utility Code does define "public utility," and that term has both wide and common usage.[23] The proposed regulations create a first-time ever definition of "utility" applicable to the AEPS Act in

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[15] *Id. citing Philadelphia Suburban Corp. v. Bd. of Finance and Revenue*, 535 Pa. 298, 301–02, 635 A.2d 116, 118 (1993) "[Thus, an appellate court will not overturn a regulation promulgated under an agency's statutory grant of rulemaking authority if the regulation is within the agency's delegated power, issued pursuant to proper procedure, and reasonable. *See Popowsky v. Pa. Pub. Util. Comm'n*, 589 Pa. 605, 629–30, 910 A.2d 38, 53 (2006).

[16] The PUC's regulations likely would not survive court challenge.
[17] June 2, 2016 IRRC Disapproval Order at p. 2.
[18] June 2, 2016 IRRC Disapproval Order at p. 2.
[19] 73 P.S. § 1648.5
[20] See,.e.g, Statements of IRRC Chairman Brown and Vice Chairman Place noting that additional limitations ignore the very specific size limitations provided in the AEPS Act.
[21] 73 P.S. § 1648.2.
[22] 73 P.S. § 1648.2.
[23] 66 Pa.C.S. § 102.

§ 75.1, and under proposed § 75.13(a)(2), prohibit customer-generators from net-metering where the alternative energy system is owned or operated by a "utility" as defined by the PUC new regulations.[24] This definition of utility is significantly different than the traditional definition of public utility set forth in the Public Utility Code.

At best, the definition of "utility" is ambiguous and creates confusion, as it is not clear who is eligible for net metering.[25] In its second disapproval, the IRRC cited lack of clarity with respect to the utility definition[26] and concluded that the definition is not in the public interest.[27] Numerous commenters, both at the IRRC hearing and through written testimony, noted that the definition of utility would redefine most customer-generators as "utilities" simply through the most fundamental aspect of net-metering, providing electricity to the electric grid. The PUC has never adequately explained why a separate definition created solely for net metering purposes is required, nor has it explained how the new definition does not lead to more confusion over what entity qualifies as a "utility" and what entity is "public utility" under the statutory definition. During the IRRC hearing, the PUC testified that it will not apply the definition as many commentators to the IRRC suggested, and that it simply attempted to define a "utility" as "a person or entity whose primary business is electric generation, transmission, or distribution services, at wholesale or retail, to other persons or entities."[28] Unfortunately, the language of the definition does not reflect the PUC's attempt, and the IRRC rejected the PUC's explanation unanimously, despite the PUC's testimony and earlier, private meetings with members of the IRRC staff and/or IRRC Commissioners referenced during the IRRC hearing.[29]

The gravamen of the issue is that the definition of utility has the effect of preventing many, if not all, customer-generators from qualifying for net metering. In effect, in the Revised Final Form Regulations, the PUC removed the 200% limitation because it lacked statutory authority to place such explicit limits, and instead replaced the explicit size limit with a definition, when applied as written, has the effect of precluding any party generating excess electricity from being able to net meter. These proposed regulatory restrictions on net metering,

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[24] Utility – A person or entity that provide electric generation, transmission or distribution services, at wholesale or retail, to other persons or entities. THIS TERM EXCLUDES BUILDING OR FACILITY OWNERS OR OPERATORS THAT MANAGE THE INTERNAL DISTRIBUTION SYSTEM SERVING SUCH BUILDING OR FACILITY AND THAT SUPPLY ELECTRIC POWER AND OTHER RELATED POWER SERVICES TO OCCUPANTS OF THE BUILDING OR FACILITY. See Amended Rulemaking Order Annex at 5, and also Revised Page 5 submitted on June 21, 2016, attached hereto as Exhibit B.

[25] One source of the PUC's ongoing inability to craft a clear, non-ambiguous and statutorily acceptable definition is the PUC's mistaken determination that a definition of "utility" is needed at all: "[t]he Commission determined that it is easier to identify what a utility is as opposed to identifying all persons or entities that are not utilities"[25] *See Amended Final Rulemaking Order* at p. 24. In contrast, the statutory mandate is defined in terms of a "nonutility."

[26] 71 P.S. § 745.5b(b) (3)(ii)

[27] 71 P.S. § 745.5b(b)(3)(iii)

[28] *Amended Final Rulemaking Order* at p. 17.

[29] The PUC's new review process to "approve" entities for net metering, rather than leaving approval of application to EDCs as required under the AEPS Act since 2004, (as discussed more fully herein), creates further uncertainty and ambiguity as to who might qualify for net metering. This uncertainty is antithetical to encouraging the research, development, and deployment of alternative energy systems.

whether intentional or inadvertent, are not statutorily authorized. The new "utility" definition is so broad that it covers anyone who engaged in net metering and has any excess generation that is sold back to the electric distribution system. The proposed regulations would completely eliminate the third-party partnerships model operating successfully here in the Commonwealth by disqualifying every customer-generator from net metering the first time they export energy to the grid, as the customer-generators would be redefined as "utilities", thereby disqualified from net metering.

The newly-created PUC Review Process for net metering is not statutorily authorized.

The proposed regulations also establish a new PUC Review Process for net metering applications for systems rated at 0.50MW (500kW) or greater under § 75.17, despite the AEPS Act's clear approval for systems rated up to 3.0 MW, and 5 MW in special circumstances. The proposed regulations do not establish any criteria to be used by the PUC in performing this new review. There is no statutory authority for the creation of this standard-less review and imposition of a new regulatory burden that will operate to restrict net metering in contravention to the AEPS Act. The PUC's insistence on review of net metering applications suggests that the PUC believes that some systems should be excluded from net metering, even if they meet the statutory requirement.

First, there is no explicit statutory authority for the PUC to conduct any review of net metering applications. The AEPS Act does not provide for a review process, and when the net metering provisions were amended in 2007 by the General Assembly, they did not take that opportunity to add a review. Second, the proposed Review Process does not contain any published standards on which PUC intends to evaluate applications. Third, there are no limits on the length of time in which the PUC must complete its review. The PUC has not cited any statutory authority for its ability to deny applications for net metering, period, let alone deny them on an arbitrary basis[30]. Furthermore, regardless of how the PUC actually conducted the Review Process, the very prospect of an arbitrary Review Process will surely discourage net metering applications, again improperly restricting net metering in contravention to the AEPS Act. And finally, the PUC has very publically, repeatedly, and loudly indicated its disdain for the net metering program as set forth in the AEPS Act—both in its filings in the PA Bulletin, discussions with stakeholders, discussions during the PUC Commissioners meetings, and in testimony before the IRRC.

Fourth, the PUC's original justification for the Review Process – the 200% load restriction –has been removed from the regulation for lack of statutory authority. In the Final

[30] Since the inception of the AEPS Act, Electric Distribution Companies aka EDC (the entity that actually pays the customer-generator for any excess electricity) has been responsible for evaluating net metering applications. As discussed in numerous filings before the PUC and IRRC, the EDCs have a financial interest in denying net metering applications whenever possible. It is unclear as to why a second round of review is in the public interest, particularly a round of review without any published criteria or timeframes.

Rulemaking Order submitted to the IRRC that resulted in the first disapproval, the PUC justified the Review Process as necessary to administer the proposed 200% restriction, noting:

> Since the inception of the AEPS Act and these regulations, the EDCs have been solely responsible for interconnecting and approving net metering for all customer generators. **While this has worked well** for EDCs and customer-generators, the Commission has received some reports of inconsistent applications of the net metering rules. In addition, **as the Commission is imposing a 200% of annual load limit on the size of customer-generators,** we are proposing a process for seeking Commission approval of all customer-generators with a nameplate capacity of 500 kilowatts or greater. [emphasis added].[31]

Now that the 200% restriction has been removed from the proposed regulations, the Review Process is a solution in search of a problem. In fact, the PUC has already conceded that the search for a problem has failed, as they note that the existing review by EDCs "has worked well for EDCs and customer-generators" and, as explained more fully in PWIA's comments to the IRRC [letter dated June 27, 2016, attached hereto as **Exhibit A**]. As noted above, EDCs surely are already giving strict scrutiny to the applications, given the EDC's uniform dislike of the program.

The PUC never performed any economic analysis of the net metering program at any time during the development of these regulations, never performed any analysis of the cost and burdens of review at the individual EDCs, and fails to identify any statutory authority for the Review Process. The PUC admits the current system works well, and offers no rational basis for its inclusion in the proposed regulations.

Improper Form

PWIA suggests that the PUC's Final Form Regulation, as reviewed by the IRRC and the Committees[32] fails as to proper form, because the Revised Final Form Regulation violated the IRRC's formatting requirements and the RRA. The irregularities specifically involved the highly contested definition of the word "utility", § 75.1 and the regulation's general net metering provision also involving "utility", in § 75.13(a)(3).

After PUC's submission of the Revised Final Form Regulation on June 13, 2016 to the IRRC, the PUC attempted to correct the text of the final regulations. On June 21, 2016, the PUC sent a letter to Chairman Bedwick of the Independent Regulatory Review Commission ("IRRC")

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[31] PA PUC Final Rulemaking Order, *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, Docket No. L-2014-2404361, p. 96. (February 11, 2016).
[32] And perhaps received by the Attorney General's Office, although we do not know what was submitted.

enclosing a copy of pages 5, 6, and 6A of the revised final form of the regulation, which contained, among other things, the definition of "utility" and §75.13(a)(3). (A copy of the June 21, 2016 letter is attached hereto as **Exhibit B**). The revised pages were formatted to "illustrate" the changes made between the final form regulation disapproved in the June 2, 2016 Order and the Revised Final Form Regulation. In response, the IRRC informed the PUC that sending the additional pages did not alter the Revised Final Form Regulation and that the PUC had to withdraw and resubmit the regulation to effect the change, and that the PUC had until July 21, 2016 to do so. (A copy of the June 22, 2016 IRRC letter is attached as **Exhibit C**).

It does not appear from public documents that the PUC sent the Revised Final Form Regulations in the proper format to the IRRC, nor did it send the proper format to the House Consumer Affairs Committee, or the Senate Consumer Protection and Professional Licensure Committees ("Committees").[33] Accordingly, the Committees' failure to act (interpreted as a deemed approval) allegedly effective July 26, 2016, is suspect[34]. The PUC did not follow the proper procedures under the Regulatory Review Act ("RRA") for formatting the text of the proposed regulations.[35] As such, the "deemed approvals" of the House and Senate Committees are suspect.

The IRRC's second disapproval of June 13, 2016, concluded that the regulations violate the RRA and the IRRC regulations as to form under 1 Pa. Code 311.4[36]. As submitted to the IRRC, the Revised Final Form Regulations were unclear for the public, IRRC and the Committees. Given that the PUC did not simply remove one offending portion of the regulations in response to the First IRRC Disapproval, but rather changed other definitions and provisions, there can be significant confusion over what text is newly revised and what was in the first revision.

The Report filed by the PUC with the Revised Final Form Regulations also fails under the RRA because it did not provide a detailed explanation as to how the revisions address the IRRC comments[37]. Specifically, the PUC never addressed the IRRC concerns that it completely lacked any quantified justification as to the potential – but not current—problem of service customers incurring substantial costs in subsidizing oversized customer-generators through net metering subsidies garnered by merchant customer-generators' alternative energy systems. [38] Secondly, the PUC never addressed the IRRC concerns that the PUC's changes represent a policy decision that requires legislative review. The PUC did not directly address the issue, but

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[33] See Transmittal Sheet for Regulations Subject to Section 7(b) and 7(c) of the Regulatory Review Act. Attached hereto as Exhibit D. Under the regulations, the PUC was required to send a copy of the Revised Final Form Regulations to the Committees on the same day that it send the Report to the IRRC. See 1 Pa. Code § 311.4.
[34] 71 P.S. § 745.7 (providing for 14 day review afforded by the Committees before deemed approval).
[35] 71 P.S. § 745.1 et seq.
[36] 311.4 cites to 1 Pa Code 307.3a relating to form
[37] 1 Pa. Code 311.4
[38] IRRC June 2, 2016 Disapproval Order at p. 3.

claimed that the regulation was discussed at committee meetings of the legislature. Ultimately, though, the PUC failed to send a properly formatted text of proposed regulation to the Committees, as discussed, making it difficult, if not impossible for the Committee to properly review the proposed regulations to see if they comport with legislative intent.

For the foregoing reasons, PWIA suggests that the PUC's proposed regulations are illegal. The proposed regulations' definition of utility and the wholly new and arbitrary PUC Review Process creates restrictions on ability to net meter in direct opposition to the plain language of the statute, and in contravention to the purpose and spirit of AEPS Act.

Respectfully submitted,

Mark C. Hammond

Enclosures

cc: Senator Elder Vogel
Representative David Zimmerman
George D. Bedwick, Chairman, IRRC (w/o enc.)
Rosemary Chiavetta, Secretary, Pennsylvania PUC (w/o enc.)
Tim O'Donnell, President, PWIA