

**INDEPENDENT REGULATORY REVIEW COMMISSION
DISAPPROVAL ORDER**

Commissioners Voting:

Public Meeting Held May 19, 2016

George D. Bedwick, Chairman
John F. Mizner, Esq., Vice Chairman
W. Russell Faber
Murray Ufberg, Esq.
Dennis A. Watson, Esq.

Order Issued June 2, 2016
Regulation No. 57-304 (#3061)
Pennsylvania Public Utility Commission
Implementation of the Alternative Energy
Portfolio Standards Act of 2004

On June 23, 2014, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the Pennsylvania Public Utility Commission (PUC). This rulemaking amends 52 Pa. Code Chapter 75. The proposed regulation was published in the July 5, 2014 *Pennsylvania Bulletin* with a 60-day public comment period. The final-form regulation was submitted to the Commission on March 22, 2016.

This final-form rulemaking revises the PUC's regulations pertaining to net metering, interconnection, and portfolio standard compliance provisions of the Alternative Energy Portfolio Standards Act (AEPS Act) to comply with Act 35 of 2007 and Act 129 of 2008 amendments to the AEPS Act and to clarify certain issues of law, administrative procedure and policy.

As described by the PUC in response to Question #10 of the Regulatory Analysis Form submitted with this final-form regulation, the amendments are needed to:

. . . reasonably limit the amount of energy default service providers purchase at above market retail rates, ensuring that default service is provided at the least cost to customers over time, as required by the Act of 129 of 2008 amendments to the Public Utility Code. 66 Pa. C.S. § 2807(e). The purpose of this limitation is to avoid having default service customers pay substantial net metering subsidies to merchant scale alternative systems.

After a review of the final regulatory package and hearing statements from the PUC, the public and the regulated community at our public meeting of May 19, 2016, we find that the rulemaking is not in the public interest for the following reasons.

First, we find that the PUC does not have the statutory authority to promulgate the rulemaking. This violates Section 5.2(a) of the Regulatory Review Act (RRA). 71 P.S. § 745b(a). Section 75.13 (a)(3) of the PUC's proposed rulemaking would have required alternative energy systems to be "sized to generate no more than 110% of the customer-generator's annual electric consumption." The PUC increased the percentage from 110% to 200% in the final-form rulemaking. This Commission's comments of October 3, 2014, questioned the PUC's statutory authority for this provision. In response to comments on the issue of statutory authority, the PUC cited its legislative rulemaking authority in Section 501 of the Public Utility Code (Code)

(Pa. C.S. § 501(b)) and its broad rulemaking authority to implement the AEPS Act (73 P.S. § 1648.7(a)). The PUC contends that the rules of statutory construction require the Code and the AEPS Act to be construed together. Therefore, the PUC avers that it “has broad and explicit legislative rulemaking authority...to promulgate these regulations.” The PUC also cites 66 Pa. C.S. § 2807(e)(3.4) as a basis for imposing the limit included in § 75.13(a)(3) of the final-form regulation. This statutory provision requires electric distribution companies to procure energy for default service customers to ensure “. . . the least cost over time.” The PUC believes that the proposed 200% limit being proposed allows them to meet this statutory mandate.

At this Commission’s public meeting of May 19, 2016, the PUC was asked to identify a specific provision of law that would allow for the imposition of the limit included in § 75.13(a)(3) of the final-form regulation. The PUC was not able to identify a specific provision, but reiterated its belief that its rulemaking authority under the Code and AEPS Act, along with the “least cost over time” provision cited above provide the authority and also represents the true intent of the General Assembly in the passage of both statutes. Based on our review of the PUC’s written response to our comments and the statements presented at the meeting of May 19, 2016, we find that the PUC does not have the statutory authority to impose the limit included in § 75.13(a)(3) of the final-form regulation. As noted by parties that commented on the final-form regulation, accepting the legal analysis put forth by the PUC would allow the PUC to justify any action it decided to take by concluding that the action was needed to ensure the “least cost over time” concept.

In addition, we agree with the statements included in the final regulation package from PUC Chairman Gladys Brown and Vice Chairman Andrew Place. Chairman Brown stated that “setting such limits ignores the very specific size limitations provided in the AEPS Act.” The limits referred to by Chairman Brown are found in the AEPS Act definition of “customer generator” which reads as follows:

A nonutility owner or operator of a net metered distributed generation system with a nameplate capacity of no greater than 50 kilowatts if installed at a residential service or no 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 the regional transmission organizations 73 P.S. § 1648.2.

Vice Chairman Place noted that “it is axiomatic that the Commission, as a creature of the legislature, has only those powers conferred upon it by statute. *See Feingold v. Bell*, 477 Pa. 1, 383 A.2d 791 (1977). Therefore I must oppose the Rulemaking because I believe that it goes beyond the Commission’s authority.”

If the PUC decides to proceed with this rulemaking by deleting the limit included in § 75.13(a)(3) of the final-form regulation, it should ensure that other provisions of the regulation do not limit a customer-generator’s ability to net-meter excess generation it produces.

The second reason we find the rulemaking is not in the public interest relates to the RRA criterion of need. 71 P.S. § 745b(b)(3)(iii). Our comments on the proposed rulemaking stated the PUC had not established the overall need for the changes being offered. In response to this comment, the PUC provided additional information in response to Question #10 of the Regulatory Analysis Form submitted with the final-form regulation. As explained by the PUC, the purpose of the limit of § 75.13(a)(3) “is to avoid having default service customers pay *substantial* net metering subsidies to merchant scale alternative energy systems.” (Emphasis added.) After a review of the additional information provided, we find that the PUC has not definitively quantified what the substantial net metering costs will be to customers. In addition, during the public meeting, the PUC stated that over-sized customer-generator systems are not currently a problem in the Commonwealth, but could be in the future. Based on these responses, we find that the PUC has not established the compelling need for this rulemaking.

Our final reason for finding the rulemaking is not in the public interest relates to the RRA criterion of whether the regulation represents a policy decision of such a substantial nature that it requires legislative review. 71 P.S. § 745b(b)(4). Our comments noted that the implementation of the proposed rulemaking could potentially curtail the development of alternative energy in the Commonwealth in conflict with the AEPS Act. We commented that any deviation from the intent of the AEPS Act would represent a policy decision that requires legislative review. We encouraged the PUC to work closely with the members of the General Assembly and the designated standing committees to ensure the final-form regulation was within the scope of its granted regulatory authority. In addition, the PUC was asked at the public meeting of May 19, 2016, if it attempted to resolve the problem of merchant generators through a legislative remedy.

The PUC did not directly respond to our comment in the Order submitted with the final regulatory package. In response to the question asked at the public meeting, the PUC stated that the regulation was discussed at meetings held with committees of the legislature. Based on this response and our concerns related to statutory authority and need, we still question whether this rulemaking is a policy decision of such a substantial nature that it requires legislative review. The answers provided by the PUC have not alleviated our concern on this issue. If the PUC continues to believe that some customer-generators that produce excess energy are causing economic harm to default service customers, we again encourage the PUC to consult with the legislature to achieve a statutory remedy to this problem.

We have determined this regulation is not consistent with the statutory authority of the PUC and the intention of the General Assembly. As discussed above, we find promulgation of this regulation is not in the public interest.

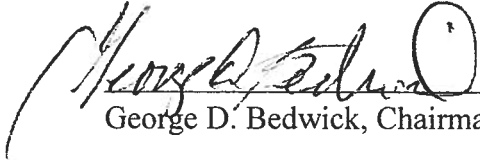
BY ORDER OF THE COMMISSION:

The regulation # 57-304 (IRRC # 3061) from the _____

Pennsylvania Public Utility Commission

was disapproved on May 19, 2016.




George D. Bedwick, Chairman