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

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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.

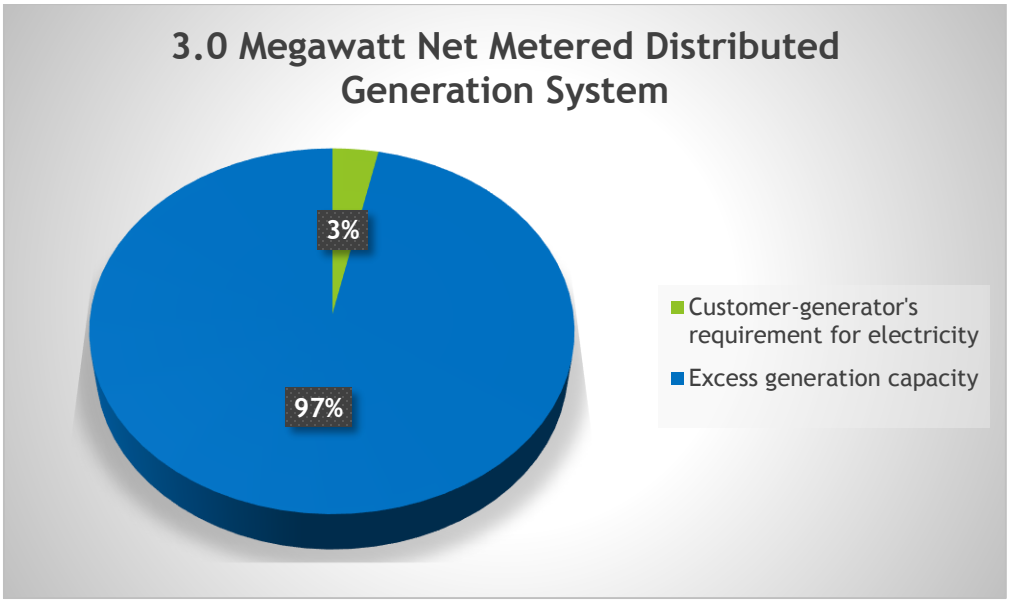
Dismantling the 110% Rule

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.

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.