BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

COMMENTS OF JOINT COMMENTATORS

I. Introduction

The Distributed Wind Energy Association ("DWEA"), United Wind, Inc., and other interested parties (hereinafter "Joint Commentators") summit these comments in response to the Public Utility Commission's ("Commission") Proposed Rulemaking Order ("PRO") in Docket No.L-2014-2404361 concerning the implementation of the Alternative Energy Portfolio Standards Act of 2004 ("AEPS" or "the Act") entered on February 20, 2014 and published in the *Pennsylvania Bulletin* on July 5, 2014.

DWEA is a non-profit, membership-based trade association comprised of manufacturers, distributors, project developers, dealers, installers, and advocates, whose primary mission is to promote and foster all aspects of the American distributed wind energy industry, headquartered at 1065 Main Ave., Ste 209, Durango, CO 81301. United Wind, Inc. is a developer of small wind turbines, offering leasing and financing to rural landowners throughout the country, based at 20 Jay St. Ste 936, Brooklyn, NY 11201. eFormative Options, LLC provides consulting services in market and policy analysis, project and organizational development, and stakeholder communications focused on forming and advancing sustainable endeavors, based PO Box 47, Vashon, WA 98070.

The Purpose of the AEPS Is to Promote Alternative Energy

The preamble to the AEPS begins, "An act providing 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 sources by electric distribution and supply companies..."[1] This purpose to promote the purchase of renewable energy by electric distribution and supply companies is furthered by a robust virtual net metering program under which "[e]xcess generation from net-metered customer-generators shall *receive full retail value for all energy produced on an annual basis*."[2] Restrictions on such a program that provide

[1] S.B. 1030 P.N. 1973 (enacted as 73 P.S. § 1648.1 *et seq.*) (November 30, 2004)
[2] 73 P.S. § 1648.5 (*emphasis added*)

customer generators less than that full retail value, that do not promote efficient operation, that restrict availability, or that result in inconsistent interpretations of rules between service territories clash with the overall policy objectives of the AEPS.

The Joint Commentators respectfully submit the following comments calling the Commission's attention to issues in the Proposed Rulemaking Order ("PRO")[3]:

II. Comments on the Proposed Rulemaking Order

A. We oppose the proposed changes to §75.13(k) that would give the Commission authority to allow utilities to charge new fees to customer-generators.

The PRO proposes to amend §75.13(k) by adding new language at the end of the section: "An [electric distribution company] EDC or [default service provider] DSP may not charge a customer-generator a fee or other type of charge unless the fee or charge would apply to other customers that are not customer-generators, *or is specifically authorized under this chapter or by order of the Commission.*"[4]

In the Discussion section of the PRO, the Commission states its intent for this change was to allow EDCs or DSPs the ability to recover their administrative costs of setting up and billing virtual net metering accounts, as provided for in §75.14(e). But instead, the actual proposed language allows fees to be charged on *any* net-metered customer, not just customers whose accounts are aggregated through virtual net metering. Even more problematic is the fact that the proposed language does not restrict the fee to the administrative costs of aggregating and billing virtual net metered accounts. There is nothing in the proposed language that would prevent an EDC or DSP to request (and a future Commission to approve) a new charge to compensate for the customer-generator's use of the distribution system or the cost of maintaining generation capacity for times when the customer-generator's system is not generating electricity.

The Joint Commentators believe the new §75.13(k) language needs to be rewritten so that it is firmly within the limits of §75.14(e). As the proposed new language in §75.13(k) now stands, it clearly violates the AEPS guarantee that net metered customers receive the full retail rate for all generation they produce up to their annual usage. A fee would erode that right to full retail rate.[5]

In addition, charging additional fees to those who install alternative energy systems is unnecessary and will increase compliance costs and result in slower adoption of such systems contrary to the purposes of the Act. Furthermore, we are concerned that adding this provision will encourage EDCs and DSPs to seek such fees creating a financial burden on residential and small-business system owners who have or are looking to install alternative energy generation at their homes or businesses.

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[3] 44 *Pa.B.* 4179 – 4194

[4] 44 *Pa.B.* 4190, PRO § 75.13(k) (*emphasis added*)

[5] We note that the administrative fee to recoup billing costs for aggregated accounts also has the potential to erode the right to the full retail rate, and we support further discussion prior to the implementation of any such fees.

Moreover, the proposed change fails to provide any basis for determining this fee. If there is to be a fee, it should be based on a full cost of service study for each net metered system, that evaluates both the costs and the benefits of each specific net metered system such as the recently completed *Value of Distributed Solar Electric Generation to New Jersey and Pennsylvania*[6] analysis commissioned by PASEIA/MSEIA, which found that solar power delivers a premium value in the range of $150 to $200 per MWh (15 cents to 20 cents per kWh), above the value of the solar electricity generated.

The new language should be clarified such that it clearly applies only to the administrative costs of billing virtual net-metered systems.

B. We believe the proposed new definition for "utility" in §75.1 is overly broad and threatens the third-party ownership model for distributed generation which the Commission has approved in prior dockets.

While the Discussion section of the PRO[7] indicates the new definition of "utility" is designed to allow non-electric utilities such as water and wastewater utilities to qualify as a customer-generator, the "utility" definition could be interpreted to apply to solar and other alternative energy developers who build and own systems and sell the output to the host customer through a long-term power purchase agreement. We urge the Commission to amend the definition of "utility" so it explicitly preserves the ability to use a third-party ownership business model for net metered systems.

The Commission defines *Customer-generator*, in part, as a "nonutility." Therefore an understanding of customer-generator will be impacted by the definition of *Utility*. Troublingly, the Commission provides conflicting definitions in its discussion in part A.4 of the PRO and the proposed language in Annex A at § 75.1. The Joint Commentators are concerned that the definition in Annex A is overbroad and may cause confusion and inconsistent implementation of net metering programs.

The Order says "we have defined a utility in this context as a person or entity whose *primary business* is electric generation, transmission, or distribution services, at wholesale or retail, to other persons or entities."[8] Annex A, on the other hand, defines the term more broadly as follows: "A person or entity that provides electric generation, transmission or distribution services, at wholesale or retail, to other persons or entities." Critically, the Annex A language does not restrict the definition of utility to entities whose primary business is electric generation, transmission, or distribution.

Under the definition in Annex A, for example, a small-business who wishes to install an electric vehicle charging station selling a trivial amount of electricity to its customers and employees could risk being labeled a "Utility" and would no longer qualify as a customer-generator. The Annex A language could also apply to a solar PV developer who used a third-party ownership

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[6] *Available at* http://mseia.net/site/wp-content/uploads/2012/05/MSEIA-Final-Benefits-of-Solar-Report-2012-11-01.pdf.

[7] 44 Pa.B. 4181

[8] 44 *Pa.B.* 4181, PRO at A.4. (*emphasis added*)

model to own a new solar system and "sell" the electricity to the host property power through a power purchase agreement. The efficacy of this business model for deploying solar and other distributed generation has been recognized by the Commission is earlier Orders,[9] but is threatened by this broad definition of *Utility*. The Joint Commentators recommend that the Annex A definition be restricted to those whose *primary business* is generation.

C. We do not believe that the Legislature requires customer-generators to actually purchase power.

The AEPS defines *Customer-generator* as "[a] nonutility owner or operator of a net metered distributed generation system with a nameplate capacity of not greater than 50 kilowatts if installed at a residential service or not larger than 3,000 kilowatts at other customer service locations. . . ."[10] The Commission maintains that the use of the term "Customer" as part of this definition implies "[t]he person or entity must purchase electricity or electric service to be considered a customer under the AEPS Act."[11] The Joint Commentators would like to clarify that a Customer-generator simply be a customer of a Utility for general electric service (such as backup availability in the case the net metered system fails), which does not require the purchase of power.

D. We oppose the proposed change in §75.12 to the definition of "virtual meter aggregation" that adds a requirement that all service locations must have separate existing measurable load.

The Joint Commentators agree that the Act's definition of net metering implies that there is a requirement that a customer-generator must have a measurable load independent of the alternative energy system; however, in the case of virtual net metering, it should be sufficient that the customer-generator have measurable electric load overall, not that each and every meter of the customer-generator have measurable load, including at the point of interconnection.

The proposed change is neither implied nor supported by the statutory text.

The statute establishes clear and unambiguous standards for virtual net metering 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.[12]

The proposed change to §75.12 would prevent appropriate sighting for virtual net metered systems as it requires systems to be installed in proximity to a customer generator's existing meters that have a measurable load. This adds a restriction not found in the statute and one

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[9] Net Metering – Use of Third Party Operators, (Docket M-2011-2249441), (March 29, 2012)

[10] 73 P. S. § 1648.2

[11] 44 *Pa.B.* 4181, PRO at A.4.

[12] 73 Pa. Stat. Ann. § 1648.2 (West) (*emphasis added*).

which runs contrary to the statutory language and violates the statutory intent to promote new clean distributed generation.

The Commission's Justifications for the Restriction Are Untenable.

The Commission argues there is a textual basis for implying an independent load requirement, specifically, net metering requires an independent load against which the generation is netted. This would be reasonable if it were applied at the customer level, as it is fairly implied in the definition of customer-generator. The Commission however impermissibly extends the restriction when it is applied to every individual meter owned by the customer. AEPS expressly allows for aggregation under net metering, and through aggregation, multiple meters can be treated as one thus obviating the need for an independent load on each meter. So long as the customer-generator has a load on one of the meters to be aggregated, the alternative energy system will have a load to offset.

The second component of the Commission's justification is that its own prior regulations imply the restriction. That is, on its face, insufficient authority to deviate from the expressed language of AEPS. But, this threshold issue aside, the Commission's current regulations do *not* in fact imply the proposed restriction. The Commission states, "this requirement is implied in the current regulations, where it states that EDCs shall offer net metering to customer-generators that generate electricity on the customer-generator's side of the meter. Again, there would be no need for a customer's electric meter if there was no independent demand for electricity."[13] Here again, the Commission appears to ignore its own virtual net metering aggregation program. A meter with no independent demand for electricity can record electricity generated to be used to offset electricity consumed at another meter used by the same customer.

In its discussion of the proposed change as it appears in § 75.12, Definitions, and § 75.14, Meters and Metering, the Commission turns to legislative intent to justify the new restriction. The Commissions argues that when it introduced virtual net metering in 2006, it was for the limited purpose of reducing the regulatory burdens on farmers who have multiple non-contiguous properties and want to install alternative energy generating systems.[14] The Commission then notes that when the General Assembly amended the AEPS to include, in part, a specific reference to virtual net metering, the statutory language borrows heavily from the Commission's prior regulation.[15] The unstated implication is by adopting the Commission's language, the General Assembly also adopted the Commission's intent.

This argument fails for two reasons. First, the Commission's 2006 Order does not evince intent to offer only a narrow and limited virtual net metering program designed to support agrarian biodigestors. In fact, the opposite is true. The introduction of virtual net metering was couched in terms of broadly promoting alternative energy and heralded as removing unnecessary barriers to the creation of alternative energy generating systems. In proposing virtual net metering, the 2006 Order begins, "The fundamental intent of [the AEPS] is the expansion and increased use of

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[13] *Id.*

[14] *See* 44 *Pa.B. 4183-84*

[15] *Id. at 4184*

alternative energy systems and energy efficiency practices."[16] While the 2006 Order discusses anaerobic digesters used by farmers as an example of the type of system which would benefit from virtual net metering, the 2006 Order makes clear that it is but one example. "In addition, PennFuture directed our attention to other types of projects which could meet the requirements for customer-generator net metering, but would be unable to avail themselves of virtual meter aggregation under the regulations as proposed."[17] And tellingly, the Commission adopted many of PennFuture's recommendations aimed at expanding virtual net metering, finding those "comments [were] well directed and provide[d] language that will help alternative generation expand as envisioned by the Act."[18] Per PennFuture's suggestions, the final version of the 2006 Order eliminated the requirement that the aggregated meters be on contiguous properties and that virtual net metering be restricted by rate class.[19] Finally, it must be noted that even if 2006 Order was motivated solely by the desire to expand the use of biodigesters, such a purpose would not support the restriction at issue, as farmers may wish to install biodigesters at locations on their property with no existing meter and thus no existing load. Therefore, the independent load requirement would conflict with this purported purpose of virtual net metering to promote anaerobic digesters.

Second, as fully discussed *supra*, the language of the AEPS and its legislative history reveal a clear intent to promote alternative energy by, in part, removing barriers to the installation of alternative energy systems. Even if the Commission is correct in asserting that its 2006 Order aimed to create only limited virtual net metering, such a purpose is unequivocally trumped by the General Assembly's intent to expand alternative energy in Pennsylvania.

New Construction

We also are concerned that the wording of this definition might be misconstrued by some as prohibiting net metering in the case of new construction. We do not believe that it was the intent of the legislature to mandate the load be present before the alternative energy system if reasonable business judgment would indicate construction of the alternative energy system first would be more practical.

Since the interconnection standards indicate that excess generation is measured on an annual basis, the Joint Commentators believe it is reasonable to allow generation installed before a load to be carried forward within the year in accordance with existing regulations.[20]

E. We disagree with the proposed change in §75.13(a)(3) for the new system size limit of 110% of the customer-generator's annual electric consumption.

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[16] *Final Rulemaking Re Net Metering for Customer-Generators Pursuant to Section 5 of the Alternative Energy Portfolio Standards Act*, Docket L-00050174 at 21 (Order entered June 22, 2006).

[17] *Id.*

[18] *Id. at* 22.

[19] *Id.*

[20] 52 Pa. Code §75.13(c)

The Legislature made clear policy decisions as to the allowable size of systems when it drafted the Act.[21] The Joint Commentators recognize the Commission's proposal as an attempt to prevent merchant generators from obtaining undue subsidies, and not to substitute the Commission's judgment as to allowable system size for that of the legislature. In light of this narrow purpose, the Joint Commentators do not believe the changes are justified.

The new limitation is an unnecessary restriction

This new limit is added to the existing limits of 50 kW for residential systems and 3 (or 5) MW for nonresidential systems. We believe this additional size limit is unnecessary and only adds additional uncertainty and regulatory cost. The AEPS statute creates an environment where there is no incentive to over-size systems since any annual production in excess of on-site consumption does not receive net metering treatment and is compensated at the wholesale rate. Sizing a system to overproduce on an annual basis does not make economic sense and additional system size restrictions are simply not necessary.

The Joint Commentators specifically note that the Commission has not provided an analysis showing the 110% restriction would be effective achieving the stated goal. There is also no analysis suggesting the Commission considered alternative measures that would be less intrusive, or less costly for small businesses. Nor does the Commission indicate there have been any cases where disguised merchant generators have successfully obtained net metering benefits under the existing rules and would be prevented from doing so under the proposed changes. In addition to the questionable effectiveness, in its Regulatory Analysis Form submitted to the Independent Regulatory Review Commission has indicated fiscal savings as "0" or "minimal" for government and the regulated community.[22]

Depending on how such a restriction is applied, it could lead to inconsistent implementation across EDCs, discourage legitimate adoption of distributed generation systems the Act was intended to encourage, and act as a de-facto limit on nameplate capacity, all of which would negatively impact customers. It could also create a perverse incentive to avoid energy efficiency upgrades once a system is installed.

Determining consumption and capacity

The Joint Commentators believe the new size limit would be difficult to apply (especially in new construction or gut rehab projects) and could present additional time and expense for customers. While the commission has stated that the costs associated with this provision, at least as related to small businesses, are "anticipated to be minimal as the customer can obtain the usage data from the EDC and the developer already needs the design output of the system to ensure a safe and reliable system."[23] This overlooks the fact that systems may be installed as part of new construction where usage data cannot be easily obtained.

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[21] 74 P.S. §1648.2

[22] Regulatory Analysis Form, 57-304, at 23

[23] Regulatory Analysis Form, 57-304, at (24)(b)

The proposed condition specifies that "[t]he alternative energy system must be sized to generate no more than 110% of the customer-generator's annual electric consumption at the interconnection meter location when combined with all qualifying virtual meter aggregation locations." In the Order, the Commission uses the phrase "sized to generate" immediately prior to a discussion of nameplate capacity.[24] The Joint Commentators ask that the Commission clarify that the phrase "sized to generate" is not limited to nameplate capacity of the generation equipment, but refers to net output at the point of interconnection after considering appropriate capacity factors and system efficiency provided the nameplate capacity does not exceed limits defined in the Act.

This is consistent with the Commission's proposed definition of Electric Nameplate Capacity as used in Subchapter C. Interconnection standards,[25] but the Order is not clear if that definition is intended to be understood in applications outside of that subchapter.

Timing of determination of eligibility

The Joint Commentators appreciate the Commission's explanation that "the customer-generator's annual electric consumption" should be based on "historical or estimated annual system output and customer usage". We recommend, however, that the Commission clarify that this determination be made at the time the distributed generation system is designed or modified, and is not to be applied as an annual test of eligibility. This is consistent with an explanation the Commission made in a footnote to its previous order[26] and resolves a potential situation where customer-generators who invest in measures to increase energy efficiency and lower demand could risk being reclassified as merchant generators.

Creating a situation where changes in the future business climate or production demands could result in a business losing net metering eligibility would create additional risks for a business considering the installation of an alternative energy system. Like any added risks, this would increase the cost of capital and ultimately discourage installation of such systems. We believe such uncertainty is unacceptable.

Exception for residential service locations

Should the Commission choose to adopt the 110% limit as specified in condition 75.13(a)(3), the Joint Commentators recommend that it be limited to systems that are not installed at residential service locations.

There is little risk that a significant number of merchant generators will attempt to disguise their operations as residential. Residential systems are already limited to 50kW (60 to 100 times smaller than systems at commercial locations), and many have 200 amp services which would limit solar installation size to less than 38kW as per the International Electric Code (NEC). In

[24] 44 *Pa.B.* 4181

[25] 52 Pa. Code § 75.22

[26] Net Metering – Use of Third Party Operators, (Docket M-2011-2249441), fn 13 At 6

addition, existing EDC residential service tariffs already include specific limitations restricting commercial activities.

While there is little gained by adding restrictions at residential locations, there are significant risks in applying this provision to customers who often lack the engineering skill and financial resources to independently evaluate the system design or to challenge an EDC in a dispute over their qualification as a customer-generator. Such customers are vulnerable to being sold a system that, while under 50kW, is later determined to be over 110% of their particular load causing significant financial hardship when they are not permitted to engage in net metering. Facing such risks, customers may choose to deliberately under-size their system or forgo installation of a system all together.

Applying this restriction to residential locations also risks inequity as identical systems installed at identical houses may not both qualify as customer generators. This could, in effect, penalize families who have made more energy-efficient choices in the past. These systems will also be particularly vulnerable to inconsistent implementation between EDCs as they are, by definition, below 500 kW and are therefore exempt from requiring individual Commission approval.[27]

The Joint Commentators recognize that Commission intends the 110% limit to be a flexible standard as they have stated that this is "not to be used as a hard kilowatt-hour cap on the customer-generator's system output."[28] While providing flexibility is a reasonable accommodation for larger facilities, taking advantage of such flexibility may take resources that are beyond the means of residential customers.

Elsewhere in this order the Commission has balanced necessity for uniformity and the burden faced by smaller customer generators when it proposes that only larger systems, above 500 kW, that presumably "have the resources to comply with [the] review process"[29] are subject to the requirement for individual approval. While the Joint Commentators do not believe the proposed 110% condition is justified or beneficial, at the very least, granting residential customers an exception from the 110% limit is a reasonable accommodation.

G. We do not support the proposed deletion in §75.51(c) of the Commission ability to appoint a technical master to assist in the resolution of any disputes.

The Joint Commentators understands the Commission has not made use of its power to appoint a technical master, but nevertheless recommends that the Commission retain the provisions proposed for deletion.[30] We are particularly concerned that residential customers and small business are already at a disadvantage when faced with disputes regarding the technical application of the regulations and, with increasing complexity, this is expected to continue. For this reason, it is premature to delete the provisions.

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[27] See 52 Pa. Code § 75.13(a)(7) (*proposed*)

[28] 44 *Pa.B.* 4182, PRO at B.1.

[29] *Id.*

[30] 52 Pa. Code § 75.15

Furthermore, even if the Commission does not make use of its power to designate a technical master, that ability, and the ability of an appointed master to determine costs for the review, serve as an incentive for the parties to make effective use of the existing alternative dispute resolution process.

H. With regard to the Commission's proposed requirement to review and approve customer-generator alternative energy systems which are 500 kW or larger for net metering eligibility, the proposed timeline is much too long compared to the interconnection application review process timeline.

The Joint Commentators recognize the importance of Commission oversight to insure consistent implementation of the Act and do not have an issue with the additional review/approval requirement of alternative energy systems with nameplate capacities of 500 kW or larger, as proposed.[31] However, we are very concerned with the timeline for this review process, which could take up to 70 days. The proposed ruling gives an EDC 20 days to submit their recommendation to the Commission's Bureau of Technical Utility Services ("BTUS"), which then gives the net metering applicant 20 days to respond to the EDC's recommendation, BTUS then has 30 days to finalize their approval or rejection of the net meting application.[32] Even if the net metering applicant responds immediately, this proposed review process could take up to 50 days. This is far longer than the 30 day interconnection application review process, which includes up to 10 days for the EDC to acknowledge that they received the interconnection application, then the EDC has 20 days to evaluate, analyze and report back to the interconnection applicant on the status of their request.

We feel the overall net metering review process should not take any longer than the interconnection application review process, and more importantly, both of these review processes should run in parallel, and should not interfere with each other.

I. We support the Commission's effort to clarify the confusion around "Year and Yearly" *but suggest a case-by-case approach to eliminate inequities among different* distributed generation systems.

While we support revising the definition of Year and Yearly, we recommend using technology-specific calendars rather than May 1 through April 30 as proposed. We believe the Commission's intent was to reduce the amount of surplus solar production at the end of the net metering reporting year. By changing this net metering rule to account for solar, significant disadvantages to distributed wind customer-generators occur, as distributed wind systems have different intrannual and seasonal production variances than solar, resulting in unintended financial consequences which may influence the ability of a customer-generator to utilize a distributed wind system. In order to avoid putting one type of system at an advantage over others, the Joint Commentators suggest creating different calendars for different types of systems, based on the most like intrannual production for each type of system.

[31] 44 *Pa.B.* 4182–33, PRO § 75.13
[32] 44 *Pa.B.* 4185, PRO § 75.17

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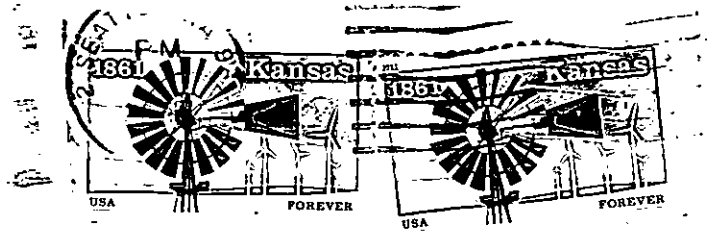

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