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May 29, 2015

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Post Office Box 3265
Harrisburg, PA 17105

RE: Implementation of the Alternative Energy Portfolio Standards Act of 2004, Docket No. L-2014 2404361

Dear Secretary Chiavetta,

On behalf of the undersigned advocates for robust and appropriate net metering regulations in Pennsylvania, we submit the following comments for consideration in the matter of the Advanced Notice of Final Rulemaking.

Thank you,

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encl: Joint Comments submitted to PUC

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

COMMENTS OF PENNFUTURE, CLEAN AIR COUNCIL, THE REINVESTMENT FUND, MID-ATLANTIC RENEWABLE ENERGY ASSOCIATION, SIERRA CLUB, THE SOLAR UNIFIED NETWORK OF WESTERN PENNSYLVANIA, AND PENNSYLVANIA SOLAR ENERGY INDUSTRIES ASSOCIATION

Citizens for Pennsylvania's Future ("PennFuture"); the Clean Air Council, The Reinvestment Fund, the Mid-Atlantic Renewable Energy Association, the Sierra Club, the Solar Unified Network Of Western Pennsylvania, and the Pennsylvania Solar Energy Industries Association, (hereinafter "Joint Commentators") summit these comments in response to the Public Utility Commission's ("Commission") Advance Notice of Final Rulemaking Order ("ANFR") in Docket No. L-2014-2404361 concerning the implementation of the Alternative Energy Portfolio Standards Act of 2004 ("AEPS" or "the Act") entered on April 23, 2015 and published in the *Pennsylvania Bulletin* on May 8, 2015.

PennFuture is a membership based non-profit advocacy organization focused on energy and environmental issues that impact Pennsylvanians. We work to create a just future where nature, communities, and the economy thrive. We enforce environmental laws and advocate for the transformation of public policy, public opinion, and the marketplace to restore and protect the environment, safeguard public health, and reduce the consequences of climate change within Pennsylvania and beyond.

The Clean Air Council is a non-profit environmental organization headquartered at 135 South 19th Street, Suite 300, Philadelphia, Pennsylvania 19103. For more than 40 years, the Council has fought to improve air quality across Pennsylvania. The Council has members throughout the Commonwealth who support its mission to protect everyone's right to breathe clean air.

The Reinvestment Fund ("TRF") is a non-profit community development financial institution located at 1700 Market Street, 19th floor, Philadelphia, PA 19103. TRF was selected by the Commission in 1998 to manage the Sustainable Development Fund, which was created by the settlement agreement of the electric utility restructuring proceeding for PECO. SDF has supported solar, wind and other clean energy projects in Pennsylvania and has provided financing for building energy efficiency projects.

The Mid-Atlantic Renewable Energy Association is a non-profit member organization dedicated to informing and educating the public on renewable energy production, energy efficiency, and sustainable living through meetings, workshops, educational materials and energy fairs.

The Sierra Club is America's oldest, largest, and most influential grassroots environmental organization, with over 24,000 members in Pennsylvania. The Club promotes conservation by influencing public policy through grassroots activism, public education, lobbying, and litigation. We work to defend the environment at all levels of government including U.S. Congress, state legislatures, and state and federal courts.

Solar Unified Network of Western Pennsylvania (SUNWPA) is a coalition of solar development and installation companies, support businesses, industry professionals, solar owners and non-profit trade associations that work collaboratively to promote the use of solar energy in

western Pennsylvania through legislative and regulatory advocacy, education, and market development activities.

Pennsylvania Solar Energy Industries Association ("PASEIA") is the Pennsylvania division of the Mid-Atlantic Solar Energy Industries Association ("MSEIA"), which is a not-for-profit trade association of companies, businesses and professionals working in Pennsylvania, New Jersey and Delaware involved in the development, manufacturing, design, construction and installation of solar photovoltaic ("PV") and solar thermal systems.

The Joint Commentators respectfully submit the following comments calling the Commission's attention to issues in the Advance Notice of Final Rulemaking Order ("ANFR"):

I. The purpose of the AEPS Act is to promote alternative energy

The preamble to the AEPS Act 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] The purpose of the Act 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 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 Act.

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

II. We oppose the proposed changes to §75.13(k) that would give the Commission the authority to order utilities to charge customer-generators additional fees.

In the ANFR, the Commission 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*."[3]

In the discussion section of the original proposed rulemaking, the Commission stated that the additional fee authority language is intended 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). 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. In fact, there are no standards or reasons given as to when and why the Commission could order an additional fee.

Such a fee could potentially be proposed and approved as part of a rate case. Rate cases are complex and lengthy proceedings in which it is extremely difficult and expensive for a residential or small business customer to participate. Thus, the individuals and businesses impacted by the fee would have little, if any, input into the fee decision. In addition, charging additional fees to those who install alternative energy systems is unnecessary, will increase compliance costs, and result in slower adoption of such systems contrary to the purposes of the

[3] 44 *Pa.B.* 4190, PRO § 75.13(k) (*emphasis added*).

Act. Furthermore, we are concerned that adding this provision will encourage EDCs and DSPs to request 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.

Moreover, the proposed change fails to provide any basis for determining fees. Fees in general should only be applied if they are in the interest of the ratepayers after considering costs and benefits. No additional fees should be considered—including permissible administrative charges related to virtual net metering—unless a full cost of service study first accounts for 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* analysis commissioned by PASEIA/MSEIA. The study 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.[4] Failure to fully account for these associated benefits of net metering can result in an unfair burden on customer generators.

The Joint Commentators believe the new §75.13(k) language needs to be rewritten so that it is firmly within the limits of the Act. 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. Imposing a fee would erode that right.[5] The new language should be clarified such that it clearly applies only to the administrative costs of billing virtual net-metered systems.

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

[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. However, we believe this fee is warranted for VNM so long as the Commission is available to review the billing fees and to step in when it appears the administrative fee being assessed may be more than a minimal, cost-justified fee. The fee should only be based on the cost recovery needed to compensate the utilities for additional time and resources for the operation and accounting of aggregating multiple accounts into a single account.

III. We believe the Commission's authority to impose a 200 percent of annual load limitation remains in question and the benefits of such a limitation have not been shown to outweigh the costs.

A. The AEPS Act does not provide the Commission with the authority to set an additional limitation.

The Commission lacks the authority to enact limitations that are stricter than the statute. In the comments from the Internal Regulatory Review Commission ("IRRC"),[6] it was requested that the Commission "provide a citation to specific statutory language that would allow for the limitation being proposed under this subsection."[7] The Act limits the authority of the Commission to developing technical and interconnection standards for net metered customers.[8] Adding a proposed cap of 200 percent of generation cannot plausibly be defined as a technical or interconnection standard, and it does not appear that the Commission has identified what additional statutory language in the Act, or otherwise, allows them to impose this limitation.

The Act instead provides a clear and unambiguous definition of 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" along with some provisions to allow systems up to 5,000 kilowatts in certain cases.[9] By this proposal, the Commission is substituting its judgment for that of the legislature and changing the definition of customer generator to lower the statutory caps based on the level of consumption. This is clearly not permitted as the Pennsylvania statutory interpretation law states, "when the words of a statute are clear and free

[6] 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, Oct. 3, 2014.
[7] *Id.* at 6.
[8] 73 P.S. § 1648.5.
[9] 72 P.S. § 1648.2.

from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."[10]

When the Commission originally advanced the 110 percent restriction in the context of third-party operators, its stated purpose was "to limit the possibility of merchant generators posing as customer-generators."[11] Unlike the present proposal, adding the restrictive provision in that case was a clarification of ambiguity in the Act that served to encourage further installation of renewable energy resources.[12] This difference is significant for two reasons. First, encouraging expansion of renewable resources is consistent with the intent of the Act. Second, and more importantly, there was a need to clarify an ambiguity in the statute regarding extension to third party operators. Without similar ambiguity, the Commission's change exceeds its authority.[13]

B. The Commission providing the agriculture exclusion further shows the lack of authority and necessity for the 200 percent limit.

As stated in the ANFR, "the Commission is imposing a 200 percent of annual load limit on the size of customer-generators, *with some exceptions*."[14] Although this is an increase from the original proposal of 110 percent, the proposal remains flawed.

We share DEP, PDA, and the Chesapeake Bay Commission's concerns about the effect of the rulemaking on our environment and waterways. To address their concerns, the Commission has proposed to exclude alternative energy systems that are complying with DEP's Chesapeake WIP or the Nutrient Management Act. Thus, the Commission is picking and

[10] 1 Pa. C.S. § 1921(b).
[11] Pennsylvania Public Utility Commission, Net Metering–Use of Third Party Operators, Final Order, Docket No. M-2011-2249441 (Mar. 29, 2012).
[12] *Id.* at 5.
[13] *See: Malt Bev. Dist. Assoc. v. PALCB*, 974 A.2d 1144,1152 (2009).
[14] Pennsylvania Public Utility Commission, Implementation of the Alternative Energy Portfolio Standards Act of 2004 Advanced Notice of Final Rulemaking Order (ANFR), Docket No. L-2014-2404361, Apr. 23, 2015, 15 (emphasis added).

choosing which customer-generators to exempt from the 200 percent annual load limit. That further proves that there is no statutory requirement to have the 200 percent cap. If the Commission's basis for exempting facilities complying with WIPs or Nutrient Management Plans is that they are reducing nutrient pollution into our waterways as required by law, then they need to exempt all customer-generators for reducing carbon dioxide and other sources of pollution which will help the Commonwealth comply with Clean Air Act requirements and the Pennsylvania Constitution, which guarantees our citizens rights to both pure water AND clean air.[15] Furthermore, just as these systems are only sized to handle waste subject to the WIP and the Nutrient Management Act, all other renewable energy systems can only be sized within the statutory limits of 50 kW and 3-5 mW as stated in the AEPS Act.

C. The Commission has not provided a sufficient cost-benefit analysis of the need for an additional percentage based cap as requested by IRRC.

The Commission has not analyzed whether the benefits of imposing such a limitation outweigh the cost of compliance.[16] The IRRC has asked how the benefits of the regulation outweigh any costs and adverse effects. In response, the Commission noted that regulation will add clarity and reduce uncertainty for all stakeholders. The Commission 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. The IRRC asked the Commission 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. To

[15] Pa. CONST. Art. I § 27.
[16] IRRC Regulatory Analysis Form (RAF), Jun. 23, 2014, Question 18.

date, the Commission has not solicited stakeholders that represent small businesses for the formulation of this analysis.

D. The Commission's approach is not tailored to solve an actual problem.

The Commission has failed to clearly describe the basis for the proposal and has further failed by not providing clear examples of situations where the current rules have proven inadequate to prevent a utility from operating as a customer generator. They have stated to IRRC that this is based on its "experience implementing the AEPS act,"[17] but provide no further details. This lack of specificity makes it difficult for stakeholders to provide less restrictive alternatives.

Under the existing rules there is limited financial incentive for any operator to produce significantly more electricity than they consume. To do so, they must make a significant additional capital investment and then provide the electricity to their utility under what is effectively a zero-interest loan for up to one year. At which point, they are paid at their utility's price to compare, which only reflects avoided generation and transmission costs[18] and is, therefore, less than the full retail value of the electricity. Recognizing that such financial limitations effectively prevent merchant generators from successfully adopting certain business models, the Commission could easily tailor restrictions more narrowly and thus avoid burdening residential customers and small businesses with additional uncertainty and administrative costs.

In the ANFR, the Commission provides an exemption for methane digesters. While the reason given is to address concerns of other jurisdictional agencies,[19] it is also clear that restricting such operators does nothing to advance the stated purpose of such restrictions. It is difficult to imagine that a utility would choose to develop an agricultural operation of significant

[17] *Id.* at question 28.
[18] 52 Pa. Code /S/ 75.13(d).
[19] ANFR, at 12.

magnitude and invest over a million dollars in digester technology for the purpose of disguising itself as a customer-generator. Similarly, the Commission could recognize the limited financial advantage to develop a landfill and install a landfill gas generation system as a means to disguise oneself as a customer-generator.

As we stated in our prior comments, the Commission should also recognize that there is little risk that utilities will attempt to disguise their operations as residential, since 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 the solar system capacity to less than 39kW as per the National Electric Code (NEC). Such limitations are further compounded by the fact that existing EDC residential service tariffs already include specific limitations restricting commercial activities making further restrictions unnecessary.

The Commission has stated that their goal behind the proposed changes is to "exclude persons or entities that own or operate alternative energy systems that are clearly not merchant generators"[20] If that is the case, any restrictions should be narrowly tailored to impact only those cases where there is a substantial risk of utilities acting as customer generators instead of the overly broad restrictions proposed.

IV. 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

[20]ANFR at 8-9.

that the customer-generator has 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."[21]

The proposed change to §75.12 would prevent appropriate siting 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. Furthermore, it implies that systems added to new construction projects or facilities would not be eligible for virtual net metering. This adds a restriction not found in the statute and one which runs contrary to the statutory language and violates the statutory intent to promote new clean distributed generation.

Should the Commission proceed with the proposed changes, we note that the Commission has not included a grandfathering clause for existing systems similar to what it proposes for the 200% limit. It should be made clear that currently installed virtually net-metered systems are exempt from new restrictions as requiring changes to installed systems would create an extreme financial hardship.

V. The definition of "utility" continues to be overly broad and creates the potential for unintended consequences for third-party ownership models.

We believe the proposed new definition for "utility" §75.1 is overly broad and threatens the third-party ownership model for solar and other distributed generation, which the

[21] 73 Pa. Stat. Ann. § 1648.2 (West) (emphasis added).

Commission approved in prior dockets. While the discussion section of the ANFR indicates that the proposed changes are intended to exclude persons or entities that own or operate alternative energy systems and are clearly not merchant generators,[22] the proposed changes do not go far enough to explicitly allow for third party owned systems. In the case of solar energy, the Commission has approved business models [See *Use of Third Party Operators*, Final Order at Docket No. M-2011-2249441 (entered Mar.29, 2012)] that broker leasing or power purchase agreements to host customers. Under the proposed definition revision, those entities do "provide electric generation services" and could be considered a "utility."

We also note that while the preamble defines a utility as "a person or entity whose *primary business* is electric generation…"[23] Annex A does not use the same definition—the definition in the Annex includes all persons or entities who provide electric generation, regardless of whether or not it is their primary business.[24]

VI. Removal of the technical master provision creates an unfair burden on small businesses

Although the technical master provision has not been used thus far, that is not a sufficient reason to remove the option altogether. Removing the technical master option really only hurts residential owners and small businesses who likely cannot afford to hire an attorney or a technical expert to represent them if there is ever a dispute over their generation amount, net metering, etc. Considering the complexity that an additional percentage based cap and the virtual net metering physical aggregation requirement creates, generators are more likely to see an issue arise than under the old rule. Having a technical master serve as a mediator is a valuable

[22] ANFR, at 8-9.
[23] ANFR, at 8 *emphasis added*.
[24] 44 *Pa.B.* 4190, PRO § 75.1

option that needs to remain in the regulation. Removing the provision shifts the balance of interests away from the small generators and toward the Commission and EDCs.

VII. Response to Commissioner Cawley's Concerns

Commissioner Cawley, in a separate statement[25] implies that part of the rationale behind proposing of balancing the interests of early adopters who may "crowd out" those that may install systems later. We believe that the Commission has no mandate to address such questions. The Legislature has already made the policy determination to encourage additional renewable generation through the AEPS. At this point, the authority of the Commission is limited to developing technical and interconnection standards for net metered customers.[26]

We believe that the best solution to Commissioner Cawley's inquiry is for the Commission to use restraint and not attempt to re-write the statute. The legislature has not established an aggregate net metering cap, instead leaving the choice of how much capacity to install and any associated balancing of interest to market forces. The concern that early adopters may "crowd out" later systems is therefore strictly limited to technical and interconnection issues relating to adding additional generation and should have no impact on policy decisions regarding what sources of generation are acceptable. Since the proposed additional restrictions are not limited to technical and interconnection issues, they go beyond the Commission's authority.

While we are not currently providing comments on interconnection requirements related to smart inverters, we request that any such requirements that are considered in the future be addressed following a stakeholder process as required by the Act.[27]

VIII. The Commission has not engaged the regulated community in meaningful dialogue as IRRC requested

[25] *Statement of Commissioner James H. Cawley, (Apr.23, 2015), see* http://www.puc.pa.gov//pcdocs/1355663.pdf.
[26] 73 P.S. § 1648.5.
[27] *Id.*

Due to the lack of solicitation for input during the development of the proposed rulemaking, IRRC suggested that the Commission issue an ANFR to "engage the regulated community in meaningful dialogue as it develops the final-form rulemaking."[28] Given the significance of the issues, we believe that the twenty day comment period associated with the ANFR is inadequate. Additionally, in the ANFR, the Commission did not mention any of the comments the small business community submitted during the proposed rule comment period. It is not clear whether or not the Commission considered the economic impact this rule will have on small businesses. Small businesses are directly impacted by this regulation, even more so than the EDCs. All businesses in the regulated community need to maintain the ability to be competitive in the market and to have their voices heard by the Commission. Thus, we recommend the additional step of formulating a working group that includes representatives from the renewable energy industry, not just utilities, in order to establish and map out the complete range of unintended consequences and possible benefits associated with the proposed changes. This group could also be useful in facilitating the following actions IRRC requested:

- Provide a more thorough analysis of the effects the rulemaking will have on these members of the regulated community.
- 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.
- Help provide a fiscal analysis of the costs associated with the designation by the Commission of technical master.

[28] IRRC Comments, at 4.

IX. Conclusion

As noted above, the proposed regulatory changes create a significant added burden on customer generators and renewable energy businesses. This includes both explicit restrictions that are unwarranted and procedures that effectively shift the burden of proof that a given system is permissible to residential consumers and small businesses that may not have the resources to defend their position against a well-funded EDC. For these reasons, we ask the Commission to withdraw the proposed rulemaking. Any future rulemaking in this area should only be proposed after a stakeholder process that addresses the issues noted above and specifically solicits the involvement of these consumer and small-business stakeholders.