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|  | **PENNSYLVANIA**  **PUBLIC UTILITY COMMISSION**  **Harrisburg, PA 17105-3265** |  |

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|  | Public Meeting held February 24, 2022 |
| Commissioners Present: |  |

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| Gladys Brown Dutrieuille, Chairman  John F. Coleman, Jr., Vice Chairman | |  | |
| Ralph V. Yanora | |  | |
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| Net Metering – Use of Third-Party Operators | Docket No. M‑2011‑2249441 | |
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**ORDER**

**BY THE COMMISSION:**

With the passage of the Alternative Energy Portfolio Standards Act of 2004[[1]](#footnote-1) (AEPS Act), this Commonwealth embarked on a policy of promoting alternative generation sources. The Commission has been steadfastly committed to making sure the AEPS Act successfully meets the legislative policy goal of promoting reasonable alternative energy. To further this commitment, the Commission, in a Final Order,[[2]](#footnote-2) adopted as the policy of the Commission to interpret the term “operator” in the definition of “customer-generator” as including customer-generators with distributed alternative energy systems that contract with a third party to perform the operational functions of the system provided the size of the system was designed to produce no more than 110% of the customer’s annual electric consumption. For the reasons expressed in this Order the Commission withdraws this policy and it will no longer be the policy of the Commission to limit third-party owned and operated systems to 110% of the customer-generator’s annual electric consumption.

DISCUSSION

1. **Background**

On March 29, 2012, the Commission entered a Final Order that interpreted the term “operator” in the definition of “customer-generator” in the Alternative Energy Portfolio Standards (AEPS) Act, 73 P.S. §§ 1648.1-1648.9, to include customer‑generators with distributed Alternative Energy Systems (AES) that contract with a third party to perform the operation functions of the system. *See* *Net Metering Policy Order*. The Commission adopted, as policy, a size limitation of 110% for net‑metered AESs owned and operated by third parties that are interconnected and placed on property owned or leased and operated by an electric utility customer. *Id*. at 8. This 110% limitation was intended to be used as criteria in designing a system that is installed as part of the third-party business model, and it does not apply to those systems directly owned or operated by a customer-generator who is not using the third-party owner or operator model. *Id*. at 8-9. The Commission did not include a kilowatt-hour output restriction on systems utilizing the third-party owner/operator business model.

In the *Net Metering Policy Order*, the Commission noted that it believed that the 110% design criterion would be a reasonable way to limit the possibility of merchant generators posing as customer-generators. *Id*. at 8. The Commission noted that this policy was intended to permit customer-generators who chose to contract with a third‑party to own and operate an AES located on property owned or leased and operated by that customer-generator to virtual net meter in the same manner as if that customer‑generator owned or operated the AES.

The Commission’s policy adopted in 2012 is rooted in the Commission’s concerns over merchant generators obtaining retail value for excess energy from oversized AESs. After adopting this policy in 2012, the Commission adopted regulations that sought to further preclude large merchant generators posing as customer-generators from receiving full retail value under net metering. In 2016, the Commission made amendments to its regulations in relation to the AEPS Act. The Commission added the definitions “customer-generator” and “utility” to Section 75.1 of the Commission’s regulations to limit the entities who qualified for net metering. 52 Pa. Code § 75.1. *See also* *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, Docket No. L‑2014-2404361 at 11-20 (Order entered October 27, 2016). The Commission amended Section 75.12 to clarify the definition of virtual net metering by adding the requirement for independent load at each site where an AES is installed. The Commission also defined “independent load” in Section 75.13(a)(1) as electric load having a purpose other than to support the operation, maintenance, or administration of the AES. 52 Pa. Code § 75.13(a)(1).

1. **Commonwealth Court’s Opinion**

The Commonwealth Court declared the regulations at 52 Pa. Code §§ 75.12 (definition of virtual meter aggregation where we added references to independent load) and 75.13(a)(1) to be invalid and unenforceable. *Hommrich v. Pa. Pub. Util. Comm’n*., 231 A.3d 1027 (Pa. Cmwlth. 2020). Further, the Court found the definitions of “customer-generator” and “utility” in 52 Pa. Code § 75.1 to be invalid and unenforceable. *Id*. at 1040. The Court found the three remaining regulations that were challenged—52 Pa. Code §§ 75.13(a)(5), 75.16, and 75.17—to be valid and enforceable. *Id*. at 1043-44.

The Court found that Section 5 of the AEPS Act, 73 P.S. § 1648.5, grants legislative rule-making authority to the Commission to establish “technical and net metering interconnection rules for customer-generators” intending to own and operate qualifying AESs. *Id*. at 1040. The Court noted that legislative rulemaking by an administrative agency—as opposed to interpretive rule-making—is an exercise of legislative power that has the effect of law when it is (1) within the legislative power granted by the General Assembly; (2) issued pursuant to proper procedure; and (3) reasonable. *Id*. at 1034 (*quoting Popowsky v. Pa. Pub. Util. Comm’n.*, 910 A.2d 38, 53 (Pa. 2006)). The Court further noted that all regulations “must be consistent with the statute under which they were promulgated.” *Id*. Both parties agreed that the regulations at issue were adopted pursuant to proper procedure, so the Court focused its analysis on the two remaining prongs: the Commission’s authority to issue the regulations and whether the regulations are reasonable. *Id*.

The Court held that under Section 5 of the AEPS Act, the General Assembly conferred relatively narrow authority on the Commission to “develop technical and net metering interconnection rules for customer-generators” intending to operate alternative energy systems. *Id*. at 1035 (citing 73 P.S. § 1648.5). This, according to the Court, did not represent a “broad grant of authority to do whatever is necessary to effectuate” the AEPS Act. *Hommrich*, 231 A.3d at 1036.

The Court held that the Commission does not have general legislative rule‑making authority to promulgate and enforce the challenged net metering regulations under the Public Utility Code, 66 Pa.C.S. §§ 501, 502, 508, 701, 1501, 1504, 2807(e), and 3301(a). *Id*. at 1037. The Court recognized the Commission’s broad authority to regulate public utilities under the Public Utility Code; however, the Court found that the customer‑generators at issue here are not public utilities. *Id*. As such, the Court held that the Commission’s authority derives solely from the AEPS Act under which its authority is limited to developing technical and net metering interconnection rules. *Id*.

The Pennsylvania Supreme Court’s order entered on February 17, 2021, affirmed the Commonwealth Court’s opinion and order, thus establishing the Commonwealth Court’s opinion as the final authority on the validity of the Commission’s regulations at issue. *Hommrich*, 245 A.3d 637. Accordingly, the Commission’s regulations at 52 Pa. Code §§ 75.12, 75.13(a)(1) and its definitions of “customer generator” and “utility” at 52 Pa. Code § 75.1 are invalid and unenforceable.

1. **Disposition**

The Commonwealth Court’s review in *Hommrich* of the Commission’s regulations considered whether the Commission’s regulations differed from the statute. The Court noted that the General Assembly conferred narrow rulemaking authority to the Commission in Section 5 of the AEPS Act which authorizes the Commission to “develop technical and net metering interconnection rules for customer-generators intending to operate renewable onsite generators in parallel with the electric utility grid . . . .” *Hommrich*, 231 A.3d at 1035 *citing* 73 P.S. § 1648.5. The court noted that the AEPS Act did not give the Commission broad authority to do whatever is necessary to effectuate the enabling statute. *Id*.

The Commonwealth Court made a finding that is directly relevant to the Commissions’ *Net Metering Policy Order*. The Court noted that while it recognizes the Commission’s broad authority in regulating public utilities under the Public Utility Code it determined that it was not dealing with “public utilities” in *Hommrich* with respect to customer-generators. *Id*. at 1037. It determined that the AEPS Act applies to “customer‑generators,” which by definition are not public utilities. *Id*. The Court relied on this rationale in its holding that the Commission’s authority to regulate customer‑generators derives solely from the AEPS Act, and not the Public Utility Code. *Id*.

The *Net Metering Policy Order* sets forth how the Commission views third-party net metering entities and imposes a design criterion of a system not exceeding 110% of the customer-generator’s electric needs. Like the Commission’s regulations requiring “independent load” and defining “utility” and “customer-generator” the Court would likely apply the same review on the Commission’s policy statement as imposing a requirement that is not otherwise provided for in the AEPS Act. As the Commonwealth Court has held in *Hommrich* that the Commission’s authority over net metering derives

exclusively from the AEPS Act the Commission’s policy statement would also be reviewed in this vane.

The AEPS Act does not define third-party entities and it further does not impose any limitations on the sizes of AESs in relation to the electric needs of customer‑generators. The AEPS Act simply defines a customer‑generator, in relevant part, 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[.]

73 P.S. § 1648.2 (“customer-generator”).

The *Net Metering Policy Order* alters the AEPS Act’s “customer‑generator” definition in two ways. First, the Commission announced it would recognize third-party operators as “operators” under the AEPS Act’s definition of “customer-generator.” *Net Metering Policy Order* at 6-7. Second, it announced that the size of a third-party owned AES had to be designed to provide no more than 110% of the energy needs at the site of interconnection. *Id*. at 8-9. Based on the reasoning in *Hommrich*, the policy set forth in the Commission’s *Net Metering Policy Order* would likely be stricken as invalid if challenged in court. Accordingly, it will no longer be the policy of the Commission to limit third-party owned and operated systems to 110% of the customer-generator’s annual electric consumption.

# **CONCLUSION**

For the reasons set forth herein, the Commission withdraws the policy set forth in the *Net Metering Policy Order* and it will no longer be the policy of the Commission to limit third‑party owned and operated systems to 110% of the customer-generator’s annual electric consumption. The Commission therefore enters this order to withdraw its *Net Metering Policy Order* at this docket; **THEREFORE,**

**IT IS ORDERED:**

1. That the Commission’s policy statement announced in its final order at *Net Metering – Use of Third-Party Operators*, Docket No. M-2011-2249441 (Order entered March 29, 2012) is withdrawn.
2. That it is no longer the policy of the Commission that net metered alternative energy systems owned and operated by third parties that are interconnected and placed on property owned or leased and operated by an electric utility customer be designed to generate no more than 110% of that utility customer’s annual electricity consumption, at the interconnection meter location and all qualifying virtual meter locations.
3. That it is no longer the policy of the Commission that customer-generators with third-party owned and operated systems shall provide with the interconnection application adequate supporting data to demonstrate that the alternative energy system is designed to provide no more than 110% of the customer-generator’s annual electric usage at all qualifying meter locations.
4. That the Secretary serve a copy of this Order on the Office of Consumer Advocate, the Office of Small Business Advocate, the Bureau of Investigation and Enforcement, and all electric distribution companies.
5. That the Law Bureau shall publish a copy of this Order in the *Pennsylvania Bulletin*.
6. That this Docket be marked Closed.

**A picture containing letter

Description automatically generatedBY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: February 24, 2022

ORDER ENTERED: February 24, 2022

1. 73 P.S. §§ 1648.1 – 1648.8 and 66 Pa.C.S. § 2814. [↑](#footnote-ref-1)
2. *See* Final Order entered on March 29, 2012, under the above referenced caption and docket number (*Net Metering Policy Order*). [↑](#footnote-ref-2)