

L-2014-2404361

October 19, 2016

Attorney General Bruce R. Beemer  
Pennsylvania Office of Attorney General  
16<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120

Sent by email to [lrs@attorneygeneral.gov](mailto:lrs@attorneygeneral.gov)

RE: Implementation of the Alternative Energy Portfolio Standards Act of 2004  
Pa. PUC Docket No. L-2014-2404361)  
Independent Regulatory Review Commission ("IRRC") No. 3061

Dear Attorney General Beemer:

As a participant in the Commonwealth's AEPS and net metering program through our solar energy project, we remain very concerned as previously expressed to the PAPUC and IRRC with the final revised ruling passed by the PAPUC on June 9, 2016. Our prior letter sent to your office is enclosed. We ask your Office disapprove this final revised rulemaking, as the IRRC has now twice done.

We would like to further bring to your attention the Pa Commonwealth Court's recent ruling from Sunrise Energy, LLC v. First Energy Corp. and West Penn Power Co., No. 1282 C.D. 205 (Oct. 14, 2016), Opinion by President Judge Leavitt (joined by Simpson, Brobson, McCullough, Covey and Wojcik), Dissenting Opinion by Cohn Jublirer. The court ruling specifically says "The Court describes the AEPS Act as giving the PUC authority to "establish 'technical and net metering interconnection rules', but it does not give the PUC power to act beyond this narrow authorization." See attached letter from Land Air Water Legal Solutions that provides more specific details.

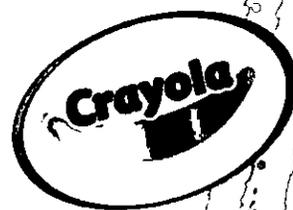
Significant investments were and are being made, benefiting both the environment and local communities, relying on the current AEPS mandate "to foster economic development, encourage reliance on more diverse and environmentally friendly sources of energy". The outcome of your review of this proposed legal change to the AEPS is very important to maintaining that mandate.

Thank you for your consideration of our comments.

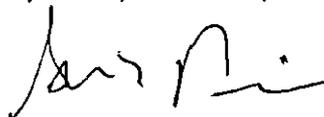
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Respectfully Submitted,



Glenn M. Price  
Vice President, Global Sourcing & Sustainability  
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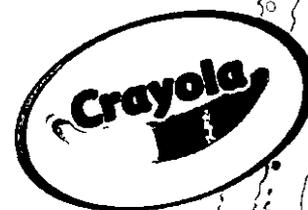
cc: Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120  
Attn.: Chairman Gladys M. Brown

Independent Regulatory Review Commission by email to [irrc@irrc.state.pa.us](mailto:irrc@irrc.state.pa.us)

Enc: To - Amy Elliott, Senior Deputy Attorney General from - Land Air Water Legal  
Solutions LLC October 14, 2016

To - Amy Elliott, Senior Deputy Attorney General from - Crayola LLC August 25,  
2016

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## Land Air Water Legal Solutions LLC

Mark C. Hammond  
610-898-3854  
mhammond@landairwater.com

October 14, 2016

**VIA FACSIMILE (717-705-7244)**

Amy Elliott, Senior Deputy Attorney General  
16<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120

**Re: Independent Regulation Review Commission (“IRRC”) No. 3061  
Pennsylvania Public Utility Commission Regulation No. L-2014-2404361/57-304  
Implementation of the Alternative Energy Portfolio Standards Act of 2004  
52 Pa. Code, Chapter 75  
Impact of *Sunrise Energy, LLC v. First Energy Corp. and West Penn Power Co.*,  
Commonwealth Court (No. 1282 C.D., Oct. 14, 2016)**

Dear Ms. Elliott:

We represent the Pennsylvania Waste Industries Association (“PWIA”). The Public Utility Commission (“PUC”) submitted the above-referenced Revised Final Form Regulations (“proposed regulations”) for approval under the Commonwealth Documents Law<sup>1</sup> and the Commonwealth Attorneys Act<sup>2</sup> and we submitted a letter to you on August 22, 2016, urging disapproval of the regulations. Before this Office finalizes any decision on the proposed regulations, please consider the Commonwealth Court’s decision issued earlier today that clearly rejects the PUC’s contention that it has the authority to construe the Alternative Energy Portfolio Standard Act (“AEPS Act”), and specifically the definition of “customer-generator.” See [http://www.pacourts.us/assets/opinions/Commonwealth/out/1282CD15\\_10-14-16.pdf?cb=1](http://www.pacourts.us/assets/opinions/Commonwealth/out/1282CD15_10-14-16.pdf?cb=1) for the Court’s Opinion in *Sunrise Energy, LLC v. First Energy Corp. and West Penn Power Co.*, No. 1282 C.D. 205 (Oct. 14, 2016).

PWIA continues to respectfully request that the Attorney General reject the proposed regulations as unlawful because the PUC lacks the statutory authority to promulgate the proposed regulations. Because the Commonwealth Court issued its opinion in *Sunrise Energy* case only this morning, and given that the regulations are under active review by your office, our review of the opinion has been limited in an effort to ensure that your Office receives this information prior to rendering a decision. Based on our review, the holding clearly reaffirms and broadens the Commonwealth Court’s position in *Dauphin Cty Indus. Dev. Auth. v. Pennsylvania*

<sup>1</sup> 45 P.S. §§ 1102, 1201-1208.

<sup>2</sup> 71 P.S. §§ 732-101 – 732-506.

## Land Air Water Legal Solutions LLC

Amy Elliott, Senior Deputy Attorney General

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*Pub Util. Comm'n*, 123 A.3d 1124, 1135 (Pa. Cmwlth 2015), *reargument denied* (Oct. 30, 2015), *appeal denied*, 140 A.3d 14 (Pa. 2016) which severely limited the PUC's authority to "interpret" the AEPS Act. As you may recall, *Dauphin Cty* rejected the PUC's attempt to use its general authority granted under another statute to trump the AEPS Act's specific mandate that "[e]xcess generation from net-metered customer-generators shall receive full retail value for all energy produced on an annual basis" (73 P.S. § 1648.5).

In *Sunrise Energy*, the Commonwealth Court held that the PUC does not have primary exclusive jurisdiction to decide the construction of the AEPS Act, including the definition of "customer-generator". *Id.* at 16. On interlocutory appeal, the Commonwealth Court affirmed the trial court's decision overruling West Penn Power's preliminary objections, which had asserted that the PUC, and not the trial court, had jurisdiction over Sunrise Energy's complaint for declaratory judgment on whether Sunrise meets the statutory definition of "customer-generator" under the AEPS Act. The PUC actively participated in the *Sunrise Energy* proceedings, including filing of an *amicus brief*.

In short, the Commonwealth Court rejected the PUC's attempts<sup>3</sup> to exceed the "narrow authorization" in the AEPS Act related to net metering to determine who qualifies as a "customer-generator". *Id.* at 10. The Commonwealth Court admonished the PUC for its attempted power grab by stating: "First, an agency cannot confer authority upon itself by regulation." *Id.* at 21. Moreover, Commonwealth Court found that PUC's lack of authority to construe the AEPS Act on net metering was plainly evident, stating such a decision "was not a close case". *Id.* at 15-16.

As the Commonwealth Court explained in *Sunrise Energy*, the PUC does not have jurisdiction to decide who is a "customer-generator" simply by promulgating regulations. The PUC's authority related to net metering under the AEPS Act is limited, and "[t]his limited authority does not give the PUC jurisdiction to decide eligibility for net metering. Eligibility has been fully established by the legislature in the Alternative Energy Act." *Id.* at 23.

Furthermore, the Commonwealth Court stated that the AEPS Act's grant of authority to the PUC regarding net metering is limited to just the two issues explicitly stated in the Act—technical and interconnection issues. Commonwealth Court very clearly states that "[t]his limited authority does not give the PUC jurisdiction to decide eligibility for net metering. Eligibility has been fully established by the legislature in the Alternative Energy Act". [*Id.* at 23, *internal footnote omitted*]. Much of the regulations pending before your Office involve the PUC involve precisely what Commonwealth Court found offensive and forbidden in *Sunrise Energy*—establishing new and more stringent requirements beyond those set forth in the AEPS Act regarding eligibility for net metering. A significant portion of the regulations pending before your Office appear to violate *Sunrise Energy*, but none more so than the PUC's proposed establishment of a new Review Process to determine customer-generator status for net-metering applications above 500 kW.

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<sup>3</sup> The PUC filed an *amicus brief* in *Sunrise Energy*. *Id.* at 16.

## Land Air Water Legal Solutions LLC

Amy Elliott, Senior Deputy Attorney General

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In summary, although not at the core of the controversy in the *Sunrise Energy* case, Commonwealth Court seems to directly opine on the very issue raised by numerous commentators before your Office, whether the proposed regulations exceed the PUC's authority. The court notes that "[t]o the extent the PUC has adjudicatory authority, it is, at most, to clarify technicalities of those [technical and net metering interconnection] rules." *Id.* at 21.

The *Sunrise Energy* decision makes clear that the newly created Review Process exceeds PUC's authority. Without any statutory authority, explicit or implied, the new Review Process establishes a new role for the PUC—adjudicator as to whether systems rated at 0.50MW (500kW) or greater qualify as customer-generators, despite the AEPS Act's clear approval for systems rated up to 3.0 MW, and 5 MW in special circumstances. As Commonwealth Court held in *Sunrise Energy*, the PUC does not have jurisdiction to determine who qualifies as a customer-generator, and "does not enjoy a roving mandate to adjudicate on the construction of the Alternative Energy Act." *Id.* at 22. As such, this new Review Process obviously exceeds PUC's authority.

For the foregoing reasons, PWIA suggests that the PUC's proposed regulations are illegal. The *Sunrise Energy* decision affirms PWIA's position that the proposed regulations exceed the AEPS Act grant of authority to the PUC.

Respectfully submitted,



Mark C. Hammond

Enclosure

cc: Senator Elder Vogel  
Representative David Zimmerman  
George D. Bedwick, Chairman, IRRC  
Rosemary Chiavetta, Secretary, Pennsylvania PUC  
Tim O'Donnell, President, PWIA

August 25, 2016

Amy M. Elliot, Esquire  
Senior Deputy Attorney General  
Legal Review Section  
Pennsylvania Office of Attorney General  
16<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120

Certified Mail/Return Receipt

RE: Implementation of the Alternative Energy Portfolio Standards Act of 2004  
Pa. PUC Docket No. L-2014-2404361)  
Independent Regulatory Review Commission ("IRRC") No. 3061

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As a participant in the Commonwealth's AEPS and net metering program through our solar energy project, we remain very concerned as previously expressed to the PAPUC and IRRC with the final revised ruling passed by the PAPUC on June 9, 2016. We ask your Office disapprove this final revised rulemaking, as the IRRC has now twice done.

The proposed legal definition of what is considered a "utility" which says "A person or entity that provides electric generation, transmission or distribution services, at wholesale or retail, to other persons or entities" is so broad that it appears to negate and, in effect, disqualify from net-metering any party involved in providing any form of electricity production or distribution to anyone else. It is setting a precedent by declaring that any alternative energy producer that provides power to anyone else is a "utility". The Public Utility Code specifically excludes Electric Generation Suppliers (non-PAPUC regulated suppliers) from the definition of a public utility.

A utility is traditionally considered a provider of services for the good of the general public. A small, on-site, non-regulated alternative energy system is simply not a utility by any definition. This new utility definition in conjunction with the revised customer-generator definition (which goes beyond the statutory language) does not support the AEPS Act's intent to promote renewable generation.

The results of these changes means 30% to 50% (assuming PA market penetration mimics the national market share) of solar projects on houses who have third party providers would no longer be eligible for net metering – severely impeding existing

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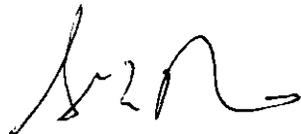
project economics and the development of new alternative energy systems. The same remains true for larger systems that rely on partnerships with other parties.

Our understanding is that the net metering rules were established to promote the use of renewable energy in the Commonwealth under the AEPS Act which "was designed to foster economic development, encourage reliance on more diverse and environmentally friendly sources of energy". In our opinion, however, the proposed legal changes to the intent of the Act will undermine these objectives and slow the acceptance of these environmentally responsible technologies.

Significant investments were and are being made, benefiting both the environment and the local communities, relying on this understanding. Changing the rules after the fact is unfair to current and new net metering participants and threatens the viability of their businesses. In addition, it undermines public trust in the PAPUC, the Commonwealth and its existing laws. Certainly, this action is contrary to the mission of the IRRC. Pennsylvania will have difficulty attracting future investment, if its announced long term policies are subject to regular revision.

Thank you for your consideration of our comments.

Respectfully Submitted,



Glenn M. Price  
Vice President, Global Sourcing & Sustainability  
Crayola LLC  
610-253-6272  
1100 Church Lane  
Easton, PA 18042

cc: Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120  
Attn.: Chairman Gladys M. Brown

Independent Regulatory Review Commission by email [irrc@irrc.state.pa.us](mailto:irrc@irrc.state.pa.us)



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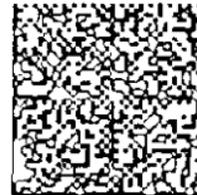
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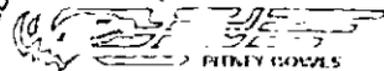
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