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September 3, 2014

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor (filing room)
Harrisburg, PA 17120

Re: Implementation of the Alternative Energy Portfolio Standards Act of 2004; Docket No. L-2014-2404361; **COMMENTS OF THE PENNSYLVANIA STATE UNIVERSITY**

Dear Secretary Chiavetta:

Please find enclosed, for filing with the Pennsylvania Public Utility Commission, Comments of The Pennsylvania State University in the above-captioned proceeding.

Should you have any questions or comments, please feel free to contact me directly.

Very truly yours,

Thomas J. Sniscak

Thomas J. Sniscak
Christopher M. Arfaa

Counsel for
The Pennsylvania State University

TJS/CMA/das
Enclosures

cc: Independent Regulatory Review Commission (via e-mail)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

COMMENTS OF
THE PENNSYLVANIA STATE UNIVERSITY

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DATED: SEPTEMBER 3, 2014

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The Pennsylvania State University ("PSU"), by its undersigned counsel, Hawke McKeon & Sniscak LLP, submits these comments on the regulations proposed by the Pennsylvania Public Utility Commission ("Commission" or "PUC") in its Proposed Rulemaking Order entered February 20, 2014 and published in the Pennsylvania Bulletin on July 5, 2014.[1]

I. INTRODUCTION

The purpose of the Alternative Energy Portfolio Standards Act, as amended, (the Act) is apparent from its title: "An Act to provide 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."[2] Thus, as the Commission has correctly observed, "[t]he ***fundamental intent*** of the Act is the ***expansion and increased use*** of alternative energy systems and energy efficiency practices."[3] Moreover, as the Commission observed in response to the 2007 amendments to the Act,[4] the Legislature's "clear intent" is to provide customer generators with

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[1] *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, Docket No. L-2014-2404361, Proposed Rulemaking Order, 44 Pa. Bulletin 4179 (July 5, 2014) ("*Proposed Rulemaking Order*"). By Secretarial Letter dated August 1, 2014, the Commission extended the period for filing comments on the rule through September 3, 2014. *See* 44 Pa. Bulletin 5490 (Aug. 16, 2014).

[2] Alternative Energy Portfolio Standards Act, 2004 Pa. Legis. Serv. Act 2004-213 (S.B. 1030) (Purdon's) (emphasis added).

[3] *Final Rulemaking Re Net Metering for Customer-generators pursuant to Section 5 of the Alternative Energy Portfolio Standards Act, 73 P.S. § 1648.5*, Docket No. L-00050174, Final Rulemaking Order at 21 (entered June 23, 2006) (emphasis added).

[4] Act 35 of 2007, 2007 Pa. Legis. Serv. Act 2007-35 (H.B. 1203), § 1 (Purdon's).

"annual compensation for excess generation in a manner that ***encourages research, development and deployment*** of alternative energy systems."[5]

In prior rulemakings implementing the Act and its various amendments, the Commission has promulgated regulations that are generally consistent with these fundamental purposes. However, several of the new requirements and restrictions proposed in this proceeding (the "Proposed Rules") conflict with the statute and, if adopted, would frustrate these purposes by discouraging the research, development and deployment of alternative energy systems. Furthermore, several of the Proposed Rules impermissibly contravene express provisions of the Act and must be rejected for that reason alone. Finally, the Order fails to establish that the Proposed Rules is in the public interest. Therefore, the Proposed Rules discussed herein should be rejected. At the very least, an exemption should be provided to public, educational, agricultural and nonprofit institutions.

II. COMMENTS

A. The Proposed Rules Will Discourage Research, Development and Deployment of Alternative Energy Systems, Contrary to the Fundamental Intent of the Act.

As noted above, the purpose of the Act is "to provide 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."[6] Its "fundamental intent . . . is the expansion and increased use of

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[5] *Implementation of Act 35 of 2007; Net Metering and Interconnection,* Docket No. L-00050174, Final Omitted Rulemaking Order at 18 (entered July 2, 2008) (emphasis added).

[6] Alternative Energy Portfolio Standards Act, 2004 Pa. Legis. Serv. Act 2004-213 (S.B. 1030) (Purdon's) (emphasis added).

alternative energy systems and energy efficiency practices"[7] by providing customer generators with "annual compensation for excess generation in a manner that encourages research, development and deployment of alternative energy systems."[8] The Proposed Rules, however, will sharply ***reduce*** customer generators' access to such compensation in several important ways and thus will ***discourage*** research, development and deployment of alternative energy systems in the manner intended by the General Assembly.

1. The Proposed Rules' requirement that alternative energy systems be owned and operated by nonutility customer-generators will effectively preclude deployment of many alternative energy projects.

The expanded definition of "utility" in proposed § 75.1,[9] together with proposed § 75.13(a)(2)'s disqualification of customer-generators from net metering where the alternative energy system is owned or operated by a "utility"[10] will preclude prospective customer-generators from partnering with third-party owner-operators to deploy alternative energy systems to serve the customer-generators' load. This, in turn, will sharply curtail the ability of prospective customer-generators to deploy and use such systems as intended by the Act.

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[7] *Final Rulemaking Re Net Metering for Customer-generators pursuant to Section 5 of the Alternative Energy Portfolio Standards Act, 73 P.S. § 1648.5*, Docket No. L-00050174, Final Rulemaking Order at 21 (entered June 23, 2006) (emphasis added).

[8] *Implementation of Act 35 of 2007; Net Metering and Interconnection,* Docket No. L-00050174, Final Omitted Rulemaking Order at 18 (entered July 2, 2008) (emphasis added).

[9] "Utility – A person or entity that provides electric generation, transmission, or distribution services." *Proposed Rulemaking Order*, Annex A at 6 (amending 52 Pa. Code § 75.1).

[10] "To qualify for net metering, the customer-generator must meet the following conditions: . . . The owner or operator of the alternative energy system may not be a utility." *Proposed Rulemaking Order*, Annex A at 7 (amending 52 Pa. Code § 75.13(a)).

Most businesses, and certainly most non-profit institutions, do not have the financial resources to deploy renewable energy projects.[11] In order to develop such projects, prospective customer-generators commonly provide the land, and third-parties install, own and operate the alternative generation facilities.[12] The compensation provided by net metering for energy generated by these facilities in excess of the customer-generator's load is essential for the financial viability of such projects.[13] Such arrangements are clearly prohibited by the Proposed Rules. Proposed § 75.13(a)(2) provides that in order for a customer generator to qualify for net-metering, "[t]he owner or operator of the alternative energy system may not be a utility,"[14] that is, "[a] person or entity that provides electric generation, transmission, or distribution services, at wholesale or retail, to other persons or entities."[15]

By withholding net metering compensation from customer-generators that engage third-party "utilities" to own or operate alternative energy projects on the customer-generators' land, the Proposed Rules, if adopted, will render such projects uneconomic. The result will be dramatically fewer alternative energy projects to serve the energy needs of the Commonwealth.

2. The Proposed Rules will severely impede deployment of alternative energy systems by tax-exempt customer-generators like PSU.

Several of the Proposed Rules have the purpose and effect of limiting the participation of existing and potential customer-generators in virtual net-metering:

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[11] *See, e.g.,* Comments of Oregon Dairy, Inc. on Proposed Rules, at 1-2 (filed Aug. 1, 2014); Comments of Crayola LLC on Proposed Rules, at 2 (filed Aug. 8, 2014)

[12] *See id.*

[13] *See id.*

[14] *Proposed Rulemaking Order*, Annex A at 7 (amending 52 Pa. Code § 75.13(a)).

[15] *Id.*, Annex A at 6 (amending 52 Pa. Code § 75.12).

- the amended definition of "virtual meter aggregation" in proposed § 72.12 requiring all properties to "have measureable electric load independent of the alternative energy system";[16]

- the requirement in proposed § 75.13(a)(1) that to qualify for net metering customer-generators must "[h]ave electric load, independent of the alternative energy system, behind the meter and point of interconnection of the alternative energy system";[17]

- the expanded definition of "utility" in proposed § 75.1[18] together with the exclusion in proposed § 75.13(a)(2) of customer-generators meeting that definition from eligibility for net metering;[19]

- the requirement in proposed § 75.13(a)(3) that an 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.[20]

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[16] "All service locations to be aggregated must be receiving retail electric service from the same EDC and have measureable electric load independent of the alternative energy system. To be independent of the alternative energy system, the electric load must have a purpose other than to support the operation, maintenance or administration of the alternative energy system." *Id.*, Annex A at 6 (amending 52 Pa. Code § 75.12).

[17] "To qualify for net metering, the customer-generator must meet the following conditions: (1) Have electric load, independent of the alternative energy system, behind the meter and point of interconnection of the alternative energy system. To be independent of the alternative energy system, the electric load must have a purpose other than to support the operation, maintenance or administration of the alternative energy system." *Id.*, Annex A at 7 (amending 52 Pa. Code § 75.13(a)).

[18] "Utility – A person or entity that provides electric generation, transmission, or distribution services." *Id.*, Annex A at 6 (amending 52 Pa. Code § 75.1).

[19] "To qualify for net metering, the customer-generator must meet the following conditions: . . . The owner or operator of the alternative energy system may not be a utility." *Id.*, Annex A at 7 (amending 52 Pa. Code § 75.13(a)).

[20] "To qualify for net metering, the customer-generator must meet the following conditions: . . . (3) The 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." *Id.*, Annex A at 7 (amending 52 Pa. Code § 75.13(a)).

While the effect of these restrictions, if adopted, will be to discourage research, development and deployment of alternative energy systems by all prospective customer-generators, the effect will be more pronounced in the case of public and not-for-profit institutions such as PSU. Alternative, renewable energy sources such as photovoltaic systems require capital investment that ordinarily would require decades to recover in the form of saved energy costs. To remove this disincentive to research, development and deployment of renewable energy systems, owner-operators are provided significant subsidies by means of tax incentives such as accelerated depreciation deductions[21] and corporate tax credits[22] for renewable energy investments.

The subsidies provided by these tax incentives are unavailable to public education institutions such as PSU and other nonprofit, tax-exempt entities, thus rendering their deployment of most renewable energy systems uneconomic. Thus, as a practical matter, in order to convert to and promote the research and use of renewable energy sources, PSU and similarly-situated customer generators must partner with private, third-party system developers that can utilize available tax incentives to develop and deploy capital-intensive alternative energy systems. The Proposed Rules would effectively prohibit such partnerships and thereby severely

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[21] The federal Modified Accelerated Cost-Recovery System (MACRS) provides businesses with accelerated depreciation tax deductions for a variety of renewable energy properties such as solar-electric and solar-thermal technologies, fuel cells and microturbines, geothermal electric, direct-use thermal and geothermal heat pumps, wind, and combined heat and power (CHP). *See* 26 U.S.C. § 48(a)(3)(A); *see also* http://www.dsireusa.org/solar/incentives/allsummaries.cfm?State=US&SolarPortal=1&re=1&ee=1 .

[22] The federal Business Energy Investment Tax Credit (ITC) provides tax credits equal to 30% of expenditures on solar generation equipment, fuel cells, and small wind turbines, and 10% of other systems. *See generally* http://www.dsireusa.org/solar/incentives/allsummaries.cfm?State=US&SolarPortal=1&re=1&ee=1 .

curtail or eliminate the ability of PSU and other tax-exempt institutions to install renewable energy systems.[23] The effect of the Proposed Rules would thus be to curtail the research, development and deployment of alternative energy systems by the very institutions that, in many cases, would otherwise be at the forefront of such initiatives.

3. The Proposed Rules will severely curtail the deployment of alternative energy systems by customer-generators with non-contiguous properties.

The proposed amendment of the definition of "virtual meter aggregation" (i.e., virtual net metering) to require all properties to "have measureable electric load independent of the alternative energy system,"[24] and the proposed requirement that a customer-generator "[h]ave electric load, independent of the alternative energy system, behind the meter and point of

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[23] Another public institution, the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Allenwood, raises similar concerns:

> In many cases, power consumers do not have sufficient access to the capital required or the ability to use tax subsidies for renewable energy projects. Additionally, realizing the value of any environmental attributes (RECs or other credits) can also be difficult for entities that do not normally participate in these markets. Renewable facilities built, owned, and operated by experienced generation companies provide valuable services to the energy consumer. By selling renewable energy under a power purchase agreement, third party generators secure the necessary financing, reduce the retail customer's exposure to operating and resource risks, and monetize the environmental benefits more efficiently. Recognizing these services, it would be a serious mistake to disqualify a project simply for third party participation by a company that provides electric services . . . .

U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Allenwood, on Proposed Rules, at 1 (filed Aug. 4 2014).

[24] "All service locations to be aggregated must be receiving retail electric service from the same EDC and have measureable electric load independent of the alternative energy system. To be independent of the alternative energy system, the electric load must have a purpose other than to support the operation, maintenance or administration of the alternative energy system." *Proposed Rulemaking Order*, Annex A at 6 (amending 52 Pa. Code § 75.12).

interconnection of the alternative energy system,"[25] will severely curtail the deployment of alternative energy systems by customer-generators that, like PSU, have multiple, varied, noncontiguous tracts of property, and thus frustrate the fundamental intent of the Act.

PSU owns a number of sites with limited potential for economic development. Often the particular attributes of an undeveloped site that limit its potential – location, slope, or other physical features – make it a good candidate for a renewable energy installation. Conversely, the attributes of developed sites – population density, traffic, existing land uses – often limit or preclude the installation or efficient operation of such systems. By definition, an undeveloped site will not have pre-existing load or, after installation, load independent of the load related to operation of the renewable energy system. In order to justify the investment in the renewable system in such situations, the common practice is to install a new service to the generation system, with a meter that reads the generation output, and then to virtually aggregate those readings with the meter readings of the customer-generator's electric service at developed sites with pre-existing load located within two miles and within the same EDC's service area. This is precisely the intent of virtual net metering as provided by the Act.

By requiring all properties participating in virtual net metering to have measureable electric load independent of the alternative energy system behind the meter and point of interconnection of the alternative energy system, the Proposed Rules will remove the economic incentive the Act gives property owners to install alternative energy systems on their

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[25] "To qualify for net metering, the customer-generator must meet the following conditions: (1) Have electric load, independent of the alternative energy system, behind the meter and point of interconnection of the alternative energy system. To be independent of the alternative energy system, the electric load must have a purpose other than to support the operation, maintenance or administration of the alternative energy system." *Id.*, Annex A at 7 (amending 52 Pa. Code § 75.13(a)).

undeveloped sites (i.e., sites without existing load) that are not contiguous with their developed sites (i.e., sites with existing load). The inevitable result will be to discourage the research, deployment and use of renewable energy systems in contravention of the Act's fundamental intent.

4. The Proposed Rules will discourage the research, deployment and use of larger renewable energy systems.

The Proposed Rules would create a completely new set of regulatory burdens on prospective customer generators with larger energy systems (500 kW or greater) by requiring them to seek and approve Commission approval of their customer-generator status.[26] The Order fails to identify any compelling need for this additional layer of bureaucracy. To the contrary, the Commission observes that the current system "has worked well for EDCs and customer-generators."

The Order downplays the burdens imposed by this additional requirement by stating its belief that customer-generators that deploy larger systems have the resources to jump through such regulatory hoops and that "the total number of such systems applying for net metering in a year will remain relatively small such that it will not burden the EDCs or the Commission." However, the fact is that every additional burden discourages the research, deployment and use of renewable energy systems.

The Commission's expectation that the total number of such systems applying for net metering will "remain relatively small" indicates a fundamental disconnect between the Proposed Rules and the Act. The purpose of the Act is not to keep the number of systems eligible for compensation "relatively small," but rather to provide customer generators with

[26] *See Proposed Rulemaking Order*, Annex A at 11-12 (adding 52 Pa. Code § 75.17).

"annual compensation for excess generation in a manner that encourages research, development and deployment of alternative energy systems." If the Proposed Rules are adopted, the Commission's expectation with respect to lack of growth of large systems applying for net metering may be fulfilled, but the fundamental intent of the Act will not.

B. The Proposed Changes to the Net Metering Rules Contravene the Express Provisions of the Act.

Section 1648.5 of the Act commands that "[e]xcess generation from net-metered customer-generators ***shall*** receive full retail value for all energy produced on an annual basis."[27] The Proposed Rules would restrict the availability of compensation to net-metered customer-generators in a manner that not only thwarts the General Assembly's fundamental intent to encourage the research, development, and deployment of renewable energy systems, but also directly contravenes the express provisions of the Act.

1. The proposed "behind-the-meter" and "independent load" conditions.

Proposed Section 75.13(a)(1) would impose "behind-the-meter" and "independent load" conditions on a customer-generator's eligibility for net metering. [28] The Proposed Order asserts that these conditions are "implied" by the definition of "net-metering" in the Act.[29] However, that definition permits net-metering "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***

[27] 73 Pa. Stat. Ann. § 1648.5 (West) (emphasis added).

[28] "To qualify for net metering, the customer-generator must meet the following conditions: (1) Have electric load, independent of the alternative energy system, behind the meter and point of interconnection of the alternative energy system. To be independent of the alternative energy system, the electric load must have a purpose other than to support the operation, maintenance or administration of the alternative energy system." *Proposed Rulemaking Order*, Annex A at 7 (amending 52 Pa. Code § 75.13(a)).

[29] *Proposed Rulemaking Order* at 11.

requirements for electricity."[30] The statute could not be more clear: net-metering is available when "any" portion of the electricity a customer-generator's alternative energy system is used to offset "part or all" of the customer-generator's requirements for electricity. Nothing in the Act suggests, much less requires that the "part" of the customer-generator's load offset by the alternative energy system be either "behind the meter" or "independent" from the system.

As this Commission previously observed when promulgating regulation under the Act,

> this Commission is bound by the requirement to promulgate regulations that do not conflict with the statute the regulations are implementing. See *Popowsky v. Pa. PUC*, 589 Pa. 605, 910 A.2d 38 (2006) and *Commonwealth v. Colonial Nissan, Inc.*, 691 A.2d 1005, 1009 (Pa. Commw. Ct. 2007). The Pennsylvania General Assembly specifically directed that for a customer to be eligible for virtual meter aggregation, the generator must be "located within two miles of the boundaries of the customer-generator's property..." 73 P.S. §1648.2. We cannot disregard the Legislature's clear direction under the pretext of pursuing its spirit, 1 Pa. C.S. § 1921(b).[31]

By imposing behind-the-meter and "independent load" requirements on net-metering, the proposed rules contravene the Legislature's "clear direction" that customer-generators "shall" be compensated by net-metering when any part of their electrical requirements is offset by their alternative energy systems.

2. The proposed "110%" limitation.

Proposed Section 75.13(a)(3) would preclude compensation whenever the customer-generator's alternative energy system is capable of generating more than 110% of the customer-generator's annual electric consumption:

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[30] 73 Pa. Stat. Ann. § 1648.2 (West) (emphasis added).

[31] *Implementation of Act 35 of 2007; Net Metering and Interconnection,* Docket No. L-00050174, Final Omitted Rulemaking Order at 10 (entered July 2, 2008).

> The 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.[32]

This new rule should be rejected in its entirety, since it is in conflict with the plain language of the Act, as amended.

The Act originally defined net-metering as "the difference between the electricity supplied by an electric utility and the electricity generated by a customer-generator when the renewable energy generating system ***is intended primarily*** to offset part or all of the customer-generator's requirements for electricity."[33] In 2007, the Legislature amended this provision by deleting the highlighted language and inserting new language so that net-metering is permitted "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."[34] The purpose of the 2007 amendment could not be more clear: net-metering is ***not*** to be limited to situations where the primary purpose of the renewable energy system is to offset the customer-generator's load. Indeed, the Commission itself recognized this when deleted the "primarily offset" requirement from its Rules in order to conform to the amended statutory definition of net-metering.[35]

The purpose and effect of the proposed 110% condition is to reinstate the "primary purpose" requirement that the Legislature expressly rejected. "Where there is a conflict between

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[32] *Proposed Rulemaking Order*, Annex A at 7 (amending 52 Pa. Code § 75.13(a)).

[33] Act 213 of 2004, 2004 Pa. Legis. Serv. Act 2004-213 (S.B. 1030) (Purdon's), § 2.

[34] 73 Pa. Stat. Ann. § 1648.2 (West) (emphasis added). *See* Act 35 of 2007, 2007 Pa. Legis. Serv. Act 2007-35 (H.B. 1203), § 1 (Purdon's) (amending definition of "net metering").

[35] *Implementation of Act 35 of 2007; Net Metering and Interconnection,* Docket No. L-00050174, Final Omitted Rulemaking Order at 8-9 (entered July 2, 2008).

the statute and a regulation purporting to implement the provisions of that statute, the regulation must give way."[36] The 110% condition of proposed rule 52 Pa. Code § 73.13(a)(3) is in direct conflict with the amended definition of net metering in the Act, and it therefore must be rejected.

3. The proposed revisions to the virtual meter aggregation rule.

Proposed Section 75.14(e) would require all properties to be aggregated in virtual metering arrangements to "receiv[e] electric generation service and have measureable load independent of any alternative energy system." Once again, the proposed rule has no basis in the text of the Act and, if adopted, would both contravene its express provisions and frustrate its fundamental purposes.

The 2007 amendments to the Act's definition of net-metering codified the requirements for virtual meter aggregation:

> "Net metering." The means of measuring the difference between the electricity supplied by an electric utility 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. ***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.***[37]

There is ***no*** requirement that each of the properties involved in virtual meter aggregation receive electric generation service, nor is there any requirement that each property have measurable load independent of any alternative energy system. To the contrary, the ***only*** requirements for virtual meter aggregation to be eligible for net metering are that the properties

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[36] *Heaton v. Commonwealth Department of Public Welfare*, 96 Pa. Cmwlth. 195, 506 A.2d 1350 (1986).

[37] Act 35 of 2007, 2007 Pa. Legis. Serv. Act 2007-35 (H.B. 1203) (Purdon's), § 1.

involved be (1) owned or leased and operated by a customer-generator, (2) located within two miles of the customer-generator's property, and (3) located within a single EDC's service territory. As discussed above, the proposed limitations on virtual meter aggregation will discourage the deployment and use of alternative energy systems by customer-generators that, like PSU, have multiple, varied, noncontiguous tracts of property, and thus frustrate the fundamental intent of the Act.

C. The Proposed Rules Are Not in the Public Interest

The Pennsylvania Regulatory Review Act[38] lists the criteria for determining whether a proposed rule is in the public interest.[39] The "first and foremost" criterion is "whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based."[40]

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[38] Act of June 25, 1982, P.L. 633, No. 181 (reenacted and amended June 30, 1989, P.L.73, No.19), as amended, codified at 71 P.S. § 745.1 *et seq.* ("Regulatory Review Act").

[39] The Regulatory Review Act was enacted pursuant to the General Assembly's finding that its delegation of rulemaking authority to various agencies had "resulted in regulations being promulgated without undergoing effective review concerning cost benefits [sic], duplication, inflationary impact and conformity to legislative intent." 71 P.S. § 745.2(a). The General Assembly therefore concluded that "it must establish a procedure for oversight and review of regulations adopted pursuant to this delegation of legislative power in order to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania." *Id.* That procedure is set forth in the Regulatory Review Act. An agency proposing a regulation must submit the regulation for review by the Independent Regulatory Review Commission ("IRRC") together with a regulatory analysis form providing specified information. *Id.* § 745.5(a). The IRRC then may within 30 days of the close of the public comment period communicate to the agency its comments, recommendations and objections to the proposed regulation based on whether the regulation meets or fails to meet certain criteria for determining whether the regulation is in the public interest. *Id.* § 745.5(g).

[40] 71 P.S. § 745.5b(a).

The Order repeatedly states that the intent of the Proposed Rules is to "clarify,"[41] to provide "clarity,"[42] and to provide "guidance."[43] To the contrary, the only "clarity" and "guidance" provided by the Proposed Rules is that they purport to codify the Commission's intention to restrict the availability of compensation to customer-generators and thus frustrate the fundamental intent of the Act[44] and, with respect to the amendments to the net-metering rules, violate its express directives.[45] Thus the Proposed Rules fail to meet the "first and foremost" requirement for regulations promulgated by a Pennsylvania agency—conformity with the letter of the statute in question and the intent of the General Assembly.[46]

The Proposed Rules that are the subject of these comments also fail to meet additional public interest criteria of the Regulatory Review Act. They are not based upon any demonstrated need,[47] nor are they based upon or supported by acceptable data.[48] To the contrary, they represent substantial policy decisions by the Commission that differ markedly from the General Assembly and thus require legislative review before they are implemented.[49]

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[41] *See Proposed Rulemaking Order* at 1, 16, 17, 19, 25.

[42] *See id.* at 5, 6, 9, 10, 14, 15, 16, 17, 24, 27.

[43] *See id.* at 5, 6, 9, 10, 14.

[44] See section II.A, above.

[45] See section II.B, above.

[46] *See* 71 P.S. § 745.5b(a).

[47] *See id.* § 745.5b(b)(3)(iii) (reasonableness of regulation to be determined by considering need for regulation).

[48] *See id.* § 745.5b(b)(3)(v) (reasonableness of regulation to be determined by considering whether acceptable data is basis for regulation); *id.* § 745.5b(b)(7) (whether regulation is in the public interest to be determined by considering whether regulation is supported by acceptable data).

[49] *See id.* § 745.5b(b)(4) (whether a regulation is in the public interest is to be determined by considering "whether the regulation represents a policy decision of such a substantial nature that it requires legislative review").

D. Alternatively, the Commission Should Exempt Public, Educational, Agricultural and Non-Profit Customer-Generators from the New Restrictions and Requirements Imposed by the Proposed Rules

It appears that the Proposed Rules stem from a concern that customer generators may deploy excessive alternative energy systems or partner with so-called "merchant generators" to do so in order to generate compensation under the Act. This concern should not extend to existing and prospective public, educational, agricultural and non-profit customer-generators. Such institutions are not required to generate returns for private shareholders, and their alternative energy projects are sized and structured to ensure financial viability and the ability to meet future energy needs, not profit. Therefore, if the Commission moves forward with the Proposed Rules discussed in these Comments,[50] it should exempt public, educational, agricultural and non-profit institutions from their application.

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[50] *I.e.*, proposed **§ 75.12**, *Proposed Rulemaking Order*, Annex A at 6 (amended definition of "virtual meter aggregation" requiring all properties to "have measureable electric load independent of the alternative energy system"); proposed **§ 75.13(a)(1)**, *id.*, Annex A at 7 (requiring qualifying net metering customer-generators to "[h]ave electric load, independent of the alternative energy system, behind the meter and point of interconnection of the alternative energy system"); proposed **§ 75.1**, *id.*, Annex A at 6 (expanded definition of "utility"), together with proposed **§ 75.13(a)(2)**, *id.*, Annex A at 7 (excluding customer-generators meeting expanded definition of "utility" from eligibility for net metering); proposed **§ 75.13(a)(3)**, *id.*, Annex A at 7 (requiring alternative energy systems to 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); proposed **§ 75.14(e)**, *id.*, Annex A at 10 (requiring all properties to be aggregated in virtual metering arrangements to "receiv[e] electric generation service and have measureable load independent of any alternative energy system"); proposed **52 § 75.17**, *id.*, Annex A at 11-12 (imposing onerous process for obtaining Commission approval of customer-generator status).

III. CONCLUSION

For all of the foregoing reasons, PSU urges the Commission to reject the Proposed Rules as discussed above.

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