ECKERT SEAMANS
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC
213 Market Street
8th Floor
Harrisburg, PA 17101

TEL 717 237 6000
FAX 717 237 6019
www.eckertseamans.com

Carl R. Shultz
717.255-3742
cshultz@eckertseamans.com

May 28, 2015

**VIA ELECTRONIC FILING**
Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Dauphin County Industrial Development Authority's Comments, in the above referenced matter. If you have any questions regarding this filing, please contact me at your convenience.

Very truly yours,

Carl R. Shultz

CRS/jls
Enclosure

cc: Scott Gebhardt, TUS (via email)
Kriss Brown, Law Bureau (via email)

**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**COMMENTS OF THE**
**DAUPHIN COUNTY INDUSTRIAL DEVELOPMENT AUTHORITY**
**TO THE PROPOSED FINAL REGULATIONS**

The Dauphin County Industrial Development Authority ("DCIDA" or "Authority") submits these Comments to the proposed final regulations set forth in Annex A to the Advanced Notice of Final Rulemaking Order entered on April 23, 2015 ("Proposed Final Rulemaking Order") by the Pennsylvania Public Utility Commission ("Commission" or "PUC") concerning proposed revisions to the Commission's current regulations that implement the Alternative Energy Portfolio Standards Act of 2004 ("AEPS" or "Act"). The notice published in the *Pennsylvania Bulletin* requested comments on the proposed regulations by May 29, 2015. *Notice; Proposed Rulemaking; Implementation of the Alternative Energy Portfolio Standards Act of 2004*, 45 Pa.B. 2231, 2242 (May 9, 2015).

## I. INTRODUCTION

As a threshold matter, the Commission has not clearly explained how the proposed regulations will affect existing alternative energy systems, such as DCIDA's Solar Facility. On one hand, the Commission proposes to exclude all existing systems from the proposed 200% consumption limitation. *See* Proposed Section 75.13(a)(3)(III). But, on the other hand, the Commission proposes to define the term "utility" so that any alternative energy system – whether existing, proposed or future – that generates more than 200% of the customer-generator's annual

electric consumption is ineligible for net metering. *See* Proposed Sections 75.1 and 75.13(a)(2). So, as written, the proposed final regulations are contradictory and confusing with respect to grandfathering.

## II. BACKGROUND

DCIDA is a net metering customer that may be impacted by changes to the net metering regulations. The Commission's proposed consumption limitation is not a cosmetic change or a new interpretation of the Act. It is, essentially, a new statutory standard being unlawfully created by the Commission under the guise of regulation to severely restrict the customer-generator's right to use net metering and will effectively discourage the creation of large-scale solar projects, such as DCIDA's Solar Facility. This proposed consumption limitation will decimate the viability of net metered solar projects in the Commonwealth, and has the potential to impact DCIDA's vested rights under the Act.

In 2009, DCIDA began the planning and development process to construct a solar energy farm (the "Solar Project" or "Solar Facility") within the service area of PPL Electric Utilities Corporation ("PPL") in Dauphin County, Pennsylvania. DCIDA built the Solar Facility in two phases. In October 2011, it completed and began operating Phase I, which had approximately one megawatt ("MW") of generating capacity. It completed and began operating Phase II in October 2013. Phase II added approximately one MW of generating capacity to the facility, which now has slightly more than two MWs of generating capacity.

In building the Solar Facility, DCIDA sought to advance green energy generation and to position Dauphin County as a leader in the investment in and growth of alternative energy generation sources in the Commonwealth. DCIDA intended that the Solar Project would offer a power source for the County's emergency management systems in the case of a disaster. The

Solar Facility is connected to Dauphin County's mobile emergency management unit (which is located at the site of the Solar Facility). So, the Solar Facility was sized (a) to satisfy the annual energy usage for Dauphin County's emergency management systems and (b) to generate excess electric energy. The Solar Facility operates in parallel with the PPL distribution system, and conforms to the applicable interconnection standards and regulations.

The ability to recover costs and derive revenue for its public projects significantly incentivized DCIDA's investment in the Solar Project. DCIDA recognized that the Solar Project, thereby, offered it a unique source of revenue. DCIDA understood that PPL would credit and compensate it for the Solar Farm's excess generation in compliance with applicable law and PPL's tariff. DCIDA believed that it could derive revenue from this system, allowing it to service any debt associated with the project and ultimately to facilitate DCIDA's public mission of fostering community and economic development. DCIDA invested $8.5 million in the Solar Project, incurring approximately $2.5 million in debt in the process. DCIDA anticipates a ten to eleven year payoff period for the debt.

Since October 2011, DCIDA has taken net-metered service from PPL. In April 2013, DCIDA elected to take PPL's Time-Of-Use ("TOU") rate option as a net-metered customer, rather than net-metering with a fixed-price default service rate. Regardless of election on TOU rates, as a net-metered customer, DCIDA offsets its on-site power consumption from PPL with the kilowatt-hours (kWh) of power that the Solar Facility generates, pursuant to PPL's tariff, the Commission's Regulations and the Act.

The Solar Facility operates in parallel with the electric utility grid. DCIDA's supply provides a backup to PPL's system and in the event it ever became necessary for PPL to buy power at spot market prices, PPL would be able to offset that cost using the cheaper power

DCIDA generates. In addition, to the extent the Solar Facility generates power that services local demand, this is less costly to PPL and involves less loss of energy than would be involved in PPL transmitting power over long distances.

## III. COMMENTS OF DCIDA

DCIDA offers the following comments on the proposed regulations set forth in Annex A to the Proposed Final Rulemaking Order.

### A. Section 75.13(a)(3): Grandfathering for Existing Customer-Generator Facilities

DCIDA and any other existing customer-generator who is actually engaged in the practice of net-metering should be grandfathered and exempted from the application of new restrictions being created by the Commission. The Commission appears to agree. Commissioner Cawley explained that: "Existing net metered installations are grandfathered"[1] and the Proposed Final Rulemaking Order states that:

> The 200% of the customer-generator's annual electric consumption limitation applies to any interconnection application for a new alternative energy system or expansion of an existing alternative energy system submitted on or after _____. (Editor's note: The blank refers to 180 days after the effective date of adoption of this proposed rulemaking.)[2]

But, the Commission did little to provide any assurance that the requirements of the rulemaking will not affect existing customer-generator systems. The Commission made a minimal effort to explain that it does not intend to apply the proposed 200% consumption limitation to existing alternative energy systems. In fact, such efforts appear to be entirely negated by a different proposal by the Commission. As explained below in Section III.B., the

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1 Implementation of the Alternative Energy Portfolio Standards Act of 2004, PUC Docket No. L-2014-2404361, Statement by Commission James H. Cawley dated April 23, 2015, at fn 1.

2 Proposed Final Rulemaking Order, Annex A at § 75.13(a)(3)(III).

Commission has proposed a definition of the term "utility" that would make any alternative energy system – whether existing, proposed or future – that generates more than 200% of the customer-generator's annual electric consumption is ineligible for net metering. Thus, as written, the proposed final regulations are contradictory and confusing with respect to grandfathering.

DCIDA believes that the Commission does not intend such a drastic and extreme result. Therefore, the Commission must do more to clearly explain in the regulations itself that the Commission does not intend,[3] and will not apply, the "new" consumption limitation and the other proposed requirements in Section 75.13(a) of the rulemaking to existing projects,[4] such as the DCIDA's Solar Facility. This can be easily done with a savings clause or other provision that provides for the grandfathering and exemption of existing projects from the application of the proposed regulations.

### B. Section 75.1 and 75.13(a)(2): Definition of "Utility"

DCIDA is concerned that it will be unfairly categorized as a "utility." DCIDA explained its concerns in its original comments,[5] which are incorporated herein by reference. The AEPS

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3 Elimination of DCIDA's (and others') right to engage in net metering is not supported by the nature and strength of the public interest articulated by the Commission. The Legislative intent behind the Act was to encourage the use of alternative energy sources. *See, Final Rulemaking Re Net Metering for Customer-generators pursuant to Section 5 of the Alternative Energy Portfolio Standards Act*, 73 P.S. § 1648.5; *Implementation of the Alternative Energy Portfolio Standards Act of 2004: Net Metering*, PUC Docket No. L-00050174; M-00051865, Final Order entered June 23, 2006; 2006 Pa. PUC LEXIS 20 (the Act's intent is to remove barriers to net metering and provide appropriate treatment to customer-generators who wish to net meter).

4 For example, the Commission proposed final regulations contain new definitions for, at least, six terms: (1) customer-generator; (2) grid emergencies; (3) micro-grid, (4) utility; (5) useful thermal energy; and (6) virtual net metering. *See* Proposed Final Rulemaking Order, Annex A at § 75.1. These revised or newly-created definitions should not be permitted to impact existing customer-generators and alternative energy systems.

5 DCIDA Comments to Proposed Rulemaking Order, at Section III.C.

Act provides that net metering is available to "nonutility" energy generators.[6] But, the Commission is engaged in efforts to define certain "non-utility" energy generators as "utilities" for purposes of the AEPS Act so that they are not eligible to net meter in the Commonwealth.

DCIDA is concerned that there is a potential for confusion because the Commission continues to propose a definition that departs from statutory definitions, published guidelines and established precedent to create the proposed definition. The Independent Regulatory Review Commission ("IRRC") acknowledged these concerns, and asked the Commission "to provide a more precise definition of this term and to consider using the statutory term 'public utility.'"[7]

**The additional language proposed by the Commission will creates drastic implementation problems for existing – and presumably "grandfathered" – alternative energy systems, such as the DCIDA's Solar Facility.** Specifically, the Commission proposes to add the following text to the original (and flawed) proposed definition of utility:

> An owner or operator of an alternative energy system that is designed to produce no more than 200% of a customer-generator's annual electric consumption shall be exempt from the definition of a utility in this chapter.[8]

As noted in Section III.A, under Proposed 75.13(a)(3)(III), the 200% limitation would not apply to existing systems. But, the definition of utility – which uses the same 200% limitation – would be applicable to the existing systems. This means that existing systems which produce more than 200% of a customer-generator's annual electric consumption would be classified as a "utility" under the proposed final regulations. Once within the scope of the "utility" definition, it could

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6 73 P.S. § 1648.2 (definition of customer-generator).

7 IRRC, Notice of Comments Issued, Pennsylvania Public Utility Commission Implementation of the Alternative Energy Portfolio Standards Act of 2004, 44 Pa.B. 6449, 6730 (October 18, 2014) ("IRRC Comments"), at Comment 3.

8 Proposed Final Rulemaking Order, Annex A at § 75.1.

be argued that the owner/operator or alternative energy system no longer qualifies for net metering under Proposed Section 75.13(a)(2) ("The owner or operator of the alternative energy system may not be a utility."). Such a result in not acceptable, and would violate DCIDA's vested rights.

Moreover, it should be noted that the language proposed in the Proposed Final Rulemaking Order does not resolve any of the concerns raised with the original (and flawed) proposed definition of "utility." That original proposed definition defined a "utility" as a "person or entity that provides electric generation, transmission or distribution services, at wholesale or retail, to other persons or entities."[9] That original proposed definition is so broad that it actually turns anyone who generates electricity that is used by someone else into a "utility." That original proposed definition is so broad that is actually contradicts the statutory definition of public utility,[10] the Commission's published guidelines[11] or established precedent related to a "public utility." Differing standards for these terms and a lack of specificity for the term "utility" could cause difficulty in administering this provision and lead to costly litigation. So, consistent with its positions throughout this proceeding, DCIDA submits that the definition is confusing and will generate misunderstandings.

The potential for confusion and misunderstanding is not eliminated by adding the 200% consumption limitation to that original (and flawed) proposed definition of "utility." The only persons exempted from that broad terms of the original (and flawed) proposed definition are those who produce no more than 200% of their own requirements for electricity. But, nothing

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9 Proposed Final Rulemaking Order, Annex A at § 75.1; Proposed Rulemaking Order, Annex A at § 75.1.

10 66 Pa. C.S. § 102.

11 52 Pa. Code § 69.1401.

was done to show why the 200% threshold/limitation is reasonable and in the public interest.[12] The Commission never explains how the 200% threshold was established or its potential impact on net metering in the Commonwealth. Nor does the Commission explain how the production of electricity above that threshold means that the customer generator is now "primarily" a business[13] or otherwise dictates that the owner/operator or system should be treated as a "utility" for purposes of the AEPS Act.

Simply put, there is no reasonable or rational basis for the Commission to incorporate a consumption limitation into the definition of a utility. DCIDA submits that, from a logic and drafting standpoint, it is unreasonable and irrational to put a percentage threshold in the definition of a "utility." An entity is either a utility or it's not. The proposed definition confers different "utility" status upon (a) an entity that produces exactly 200% of its annual electric consumption and (b) an entity that produces exactly 200.01% of its annual electric consumption. Why is the first entity a non-utility, and the second entity a utility? No answers are found in the Proposed Final Rulemaking Order.

In conclusion, DCIDA submits that the Commission has not satisfied all of the criteria necessary to promulgate[14] the proposed definition of "utility" and that said definition is not in the public interest.

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12 The Commission should be required to show the need for this threshold and how it protects consumers by addressing a significant harm or problem. See 71 P. S. §§ 745.5b(b)(3)(iii).

13 See Proposed Final Rulemaking Order, p. 8. ("... a utility in this context as a person or entity whose primary business is electric generation, transmission, or distribution services, at wholesale or retail, to other persons or entities.").

14 71 P. S. §§ 745.5b(a), (b).

### C. Section 75.13(a)(3): 200% Consumption Limit

Nothing in the Act authorizes the Commission to create – by regulation – a consumption limitation. This is a specific concern of DCIDA.[15] IRRC acknowledged such concerns, and stated:

> Commentators have questioned the PUC's statutory authority for this provision and also how it will be implemented. Regarding statutory authority, the commentators believe there is nothing in the Act, Act 35 or Act 129 that would allow the PUC to impose such a restriction. We ask the PUC to provide a citation to specific statutory language that would allow for the limitation being proposed under this subsection. (emphasis added)[16]

This challenge remains unmet. The Commission did not provide any citation to specific statutory language. The Commission merely asserts and assumes that the Commission is authorized by the Act to "set more restrictive size limitations on customer-generators."[17] This assertion is based on a misreading of legislative intent, and a convoluted interpretation of the AEPS Act. To support its consumption limitation, the Commission argues that a consumption limitation is needed to keep "merchant generators" from using net metering.[18] But, that goal does not justify a consumption limitation upon all customer-generators.

It is clear that the Commission is attempting to prohibit – by regulation – alternative energy systems that are otherwise permissible under the Act. Such actions should be rejected as

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15 DCIDA Comments to Proposed Rulemaking Order, dated August 4, 2014, at Section III.B. http://www.puc.state.pa.us/pcdocs/1301982.pdf

16 IRRC Comments, at Comment 5.

17 Proposed Final Rulemaking Order, p. 9-10.

18 The Commission interprets the statutory definition of "customer-generator" as excluding "merchant generators" from net metering in the Commonwealth. Proposed Final Rulemaking Order, p. 8-9, 11. Based on said interpretation, the Commission is proposing a consumption limitation to limit the possibility of merchant generators posing as customer-generators. Proposed Final Rulemaking Order, p. 9-12. Notably, the term "merchant generator" does not appear in the Public Utility Code or the AEPS Act. No definition of the term "merchant generator" is proposed by the Proposed Final Rulemaking Order. No effort is made to explain that term in the body of the Proposed Final Rulemaking Order.

being beyond the scope of the Commission's statutory authority.[19] Support for this position can be found in DCIDA's comments to the Proposed Rulemaking Order, which are incorporated herein by reference.

### D. Section 75.13(a)(7) and Section 75.17; Commission Approval of Applications

The Commission continues to propose a requirement that all alternative energy systems with a nameplate capacity of 500 kilowatts or greater obtain Commission approval for net metering. As noted in the DCIDA's original comments,[20] which are incorporated herein by reference, the need for this costly burden is not clear. IRRC acknowledged this comment, and noted that: "The Act sets forth criteria for alternative energy systems eligibility, but it does not require approval by the PUC. What is the PUC's statutory authority for this provision as it relates to systems of this size?"[21] No response is given by the Commission to IRRC' s inquiry.

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19 71 P. S. § 745.5b(a).

20 DCIDA Comments to Proposed Rulemaking Order, at Section III.D.

21 IRRC Comments, at Comment 5.

## IV. CONCLUSION

DCIDA appreciates this opportunity to provide its viewpoint regarding the proposed changes to net metering regulations and respectfully requests that the Commission revise its proposed regulations as set forth above.

Respectfully submitted,

Mark Stewart, Esquire
(I.D. No. 75958)
Carl R. Shultz, Esquire
(I.D. No. 70328)

Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
Telephone: 717.237.7191

Date: May 28, 2015

Attorney For Dauphin County Industrial Development Authority