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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

July 12, 2016

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Keystone Building, 400 North Street
2nd Floor, North Wing
Harrisburg, PA 17120

L-2014-2404361

Re: Regulation #57-304 (IRRC #3061)
Pennsylvania Public Utility Commission
Implementation of the Alternative Energy Portfolio Standards Act of 2004

Dear Secretary Chiavetta:

On June 30, 2016, the Independent Regulatory Review Commission disapproved the Pennsylvania Public Utility Commission's report and revised regulation, filed pursuant to section 7(c) of the Regulatory Review Act. 71 P.S. § 745.7(c). A copy of our order is enclosed regulation.

The Commission's disapproval bars final publication of the regulation for 14 days. If either the Senate Consumer Protection and Professional Licensure Committee or House Consumer Affairs Committee reports out a concurrent resolution, the bar will continue until the General Assembly completes its review pursuant to Section 7(d) of the Act. 71 P.S. § 745.7(d).

If you have any questions on this regulation, please contact the Commission's Executive Director David Sumner at 783-5417.

Sincerely,

George D. Bedwick
Chairman
sfh

Enclosure

cc: Honorable Robert M. Tomlinson, Majority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Robert W. Godshall, Majority Chairman, House Consumer Affairs Committee
Honorable Peter J. Daley, II, Minority Chairman, House Consumer Affairs Committee

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SECOND DISAPPROVAL ORDER
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Commissioners Voting:

PA PUC
SECRETARY'S BUREAU Public Meeting Held June 30, 2016

George D. Bedwick, Chairman
John F. Mizner, Esq., Vice Chairman
W. Russell Faber
Murray Ufberg, Esq.
Dennis A. Watson, Esq.

Order Issued July 12, 2016
Regulation No. 57-304 (#3061)
Pennsylvania Public Utility Commission
Implementation of the Alternative Energy
Portfolio Standards Act of 2004

On June 23, 2014, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the Pennsylvania Public Utility Commission (PUC). This rulemaking amends 52 Pa. Code Chapter 75. The proposed regulation was published in the July 5, 2014 *Pennsylvania Bulletin* with a 60-day public comment period. The final-form regulation was submitted to the Commission on March 22, 2016. At its May 19, 2016 public meeting, the Commission voted to disapprove the final-form regulation. On June 13, 2016, the PUC resubmitted the regulation under Section 7(c) of the Regulatory Review Act (RRA), exercising the option to resubmit its regulation with modifications and a report responding to the disapproval order. 71 P.S. § 745.7(c).

This final-form rulemaking revises the PUC's regulations pertaining to net metering, interconnection, and portfolio standard compliance provisions of the Alternative Energy Portfolio Standards Act (AEPS Act) to comply with Act 35 of 2007 and Act 129 of 2008 amendments to the AEPS Act and to clarify certain issues of law, administrative procedure and policy.

The June 2, 2016 order issued by IRRC listed three reasons for the disapproval. First, it was determined that the PUC lacked the statutory authority to impose a limit on the amount of energy a customer-generator could sell back to their EDC. Section 75.13(a)(3) limited the amount of electricity an alternative energy system can generate to no more than 200% of the customer generator's annual electric consumption. The disapproval order stated that if the PUC decided to move forward by deleting that provision of the regulation, it should ensure that other provisions of the regulation do not limit a customer-generator's ability to net-meter excess generation it produces. Second, it was determined that the PUC did not establish a compelling need for imposing the limit found in § 75.13(a)(3). Finally, it was determined that imposing such a limit would be a policy decision of such a substantial nature that it would require legislative review.

On June 13, 2016, the PUC submitted a revised Regulatory Analysis Form, Preamble and final-form rulemaking. Quoted below, from page 10 of the Preamble, is the PUC's response to the disapproval order:

Upon consideration of the IRRC's concerns as outlined in its June 2, 2016 Order and the public comments submitted to IRRC regarding this rulemaking, the Commission will modify the final-form regulations by removing any reference to non-statutory limits

to a customer-generator's ability to net meter excess generation it produces. Specifically, the Commission will remove the proposed Section 75.13(a)(3) and the reference to that section in the definition of utility. In addition, the Commission will renumber the remaining subsection under Section 75.13(a) as directed by the IRRC. As previously stated, based on our experience to date in implementing the current regulation, this Commission finds that it is necessary to update and revise these regulations to comply with Act 129 of 2008, and Act 35 of 2007, and to clarify certain issues of law, administrative procedures and policy. The final-form regulations, modified as requested by IRRC, will continue to meet this need.

The PUC also amended the Regulatory Analysis Form to reflect the changes made to the regulation.

Upon review of the revised regulatory package, comments and statements presented by the regulated community, and statements provided by the PUC at our public meeting of June 30, 2016, we again find that the rulemaking is not in the public interest for the following reasons.

First, the deletion of § 75.13(a)(3) and the revised definition of "utility" has created a regulation that is unclear and ambiguous. This violates Section 5.2(b)(3)(ii) of the RRA. 71 P.S. § 745.5b(b)(3)(ii). Based on the revised definition, we are unable to ascertain who would be eligible for net-metering under the PUC's regulations. As illustrated by the comments and statements made by parties that must comply with this regulation, this lack of clarity and regulatory uncertainty will cause confusion for the regulated community.

Second, the PUC has not convinced this Commission of the need for all provisions of this rulemaking. While we acknowledge that the rulemaking aligns certain sections of the PUC's regulations with statutory changes made by Act 35 of 2007 and Act 129 of 2008, it also makes other changes that are driven by PUC policy. Our order of June 2, 2016, found that the PUC did not establish a compelling need for imposing a limit on the amount of energy a customer-generator could sell back to their EDC. The disapproval order stated that if the PUC decided to move forward by deleting that provision of the regulation, it should ensure that other provisions of the regulation do not limit a customer-generator's ability to net-meter excess generation it produces. Although the limit was deleted from the rulemaking, other provisions that limit a customer-generator's ability to net-meter remain. After a review of the report submitted by the PUC, we again find that a compelling need for all of the provisions of the rulemaking has not been established. 71 P.S. § 745b(b)(3)(iii).

Finally, the revised definition of "utility" found under § 75.1 and the revised provision relating to qualifications for net metering in § 75.13(a)(3) were not formatted in compliance with this Commission's regulations at 1 Pa. Code § 311.4 (report for a disapproved regulation submitted with revisions). This violates Section 5.2(b)(6) of the RRA which requires compliance with the RRA or the regulations of the Commission. 71 P.S. § 745.5b(b)(6). Proper formatting allows this Commission, the designated standing committees and the public to understand the changes

being offered by the promulgating agency. It allows for meaningful participation by those with an interest in a rulemaking.

We have determined this regulation is not consistent with the statutory criteria of clarity and need and accordingly, we find promulgation of this regulation is not in the public interest.

BY ORDER OF THE COMMISSION:

This regulation is disapproved.



George D. Bedwick
George D. Bedwick, Chairman

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