

Several Pennsylvania PUC Regulations Concerning Net Metering Ruled Invalid and Unenforceable



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On May 12, 2020, a three-judge panel of the Commonwealth Court of Pennsylvania ruled that certain net metering regulations of the Pennsylvania Public Utility Commission (PUC) are invalid and unenforceable. These regulations help implement the Alternative Energy Portfolio Standards Act (AEPS Act), which encourages the use of electricity generated by renewable and environmentally beneficial sources such as wind power, solar electric energy, and biomass energy.

David N. Hommrich v. Comm., Pa. Pub. Util. Comm'n, 674 M.D. 2016, involved an action for declaratory and injunctive relief filed by an individual seeking to develop several solar photovoltaic power facilities. The individual alleged that his projects qualified for net metering under the AEPS Act, but could be disapproved under the PUC's regulations. Net metering is the difference between the amount of electricity supplied by a utility to a customer and the electricity generated by that customer, when the customer's generated energy offsets his need for electricity.

The Commonwealth Court considered whether the PUC's regulations defining the terms "customer-generator" and "utility" exceeded the PUC's rule-making authority. The regulations define a customer-generator as:

A retail electric customer that is 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, except for customers whose systems are above 3 megawatts and up to 5 megawatts who make their systems available to operate in parallel with the electric utility during grid emergencies as defined by the regional transmission organization or where a microgrid is in place for the primary or secondary purpose of maintaining critical infrastructure, such as homeland security assignments, emergency services facilities, hospitals, traffic signals, wastewater treatment plants or telecommunications facilities, provided that technical rules for operating generators interconnected with facilities of an EDC, electric cooperative or municipal electric system have been promulgated by the institute of electrical and electronic engineers and the Commission.

The AEPS Act does not define the term utility, but the PUC's regulations define the term as:

- (i) A business, person or entity whose primary purpose, character or nature is the generation, transmission, distribution or sale of electricity at wholesale or retail.
- (ii) The term excludes building or facility owners or operators that manage the internal distribution system serving the building or facility and that supply electric power and other related power services to occupants of the building or facility.

The Commonwealth Court found that the PUC's regulations were enacted pursuant to the PUC's narrow rule-making authority under the AEPS Act rather than the PUC's broad rule-making authority under the Pennsylvania Public Utility Code. The AEPS Act only confers authority on the PUC to establish technical and net metering interconnection rules. The Commonwealth Court compared the PUC's regulations to the language in the AEPS Act and found that the PUC's regulations added criteria that restrict eligibility for net metering and curtail the development of alternative energy, in conflict with the AEPS Act. Consequently, the Commonwealth Court ruled those definitions invalid and unenforceable.

The Commonwealth Court also considered whether the PUC exceeded its authority in adopting a regulation defining "virtual meter aggregation" as:

The combination of readings and billing for all meters regardless of rate class on properties owned or leased and operated by a customer-generator by means of the EDC's billing process, rather than through physical rewiring of the customer-generator's property for a physical, single point of contact. Virtual meter aggregation on properties owned or leased and operated by the same customer-generator and located within 2 miles of the boundaries of the customer-generator's property and within a single EDC's service territory shall be eligible for net metering. Service locations to be aggregated must be EDC service location accounts, held by the same individual or legal entity, 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.

The Commonwealth Court also reviewed a related regulation, 52 Pa. Code § 75.13(a)(1), requiring customer-generators to have an independent load at the generation site in order to net meter.

Again, the Commonwealth Court found that the PUC's regulations impermissibly created eligibility requirements that were not in the AEPS Act. Consequently, the Commonwealth Court found these regulations unenforceable.

The Commonwealth Court, however, upheld some of the PUC regulations that were challenged in the case. First, the Commonwealth Court upheld regulations that establish an application process for customer-generators. Second, the Commonwealth Court upheld regulations establishing rules of operation for large customer-generators. According to the Commonwealth Court, these regulations were within the PUC's narrow authority under the AEPS Act to establish technical and net metering requirements.

At this time, it is unclear how the PUC will react to this decision. The PUC's options include requesting re-argument before the Commonwealth Court (which would have the discretion to hear the case before an *en banc* panel). Unless the decision is modified, the PUC cannot use the invalid and unenforceable regulations to make decisions pursuant to the AEPS Act.
