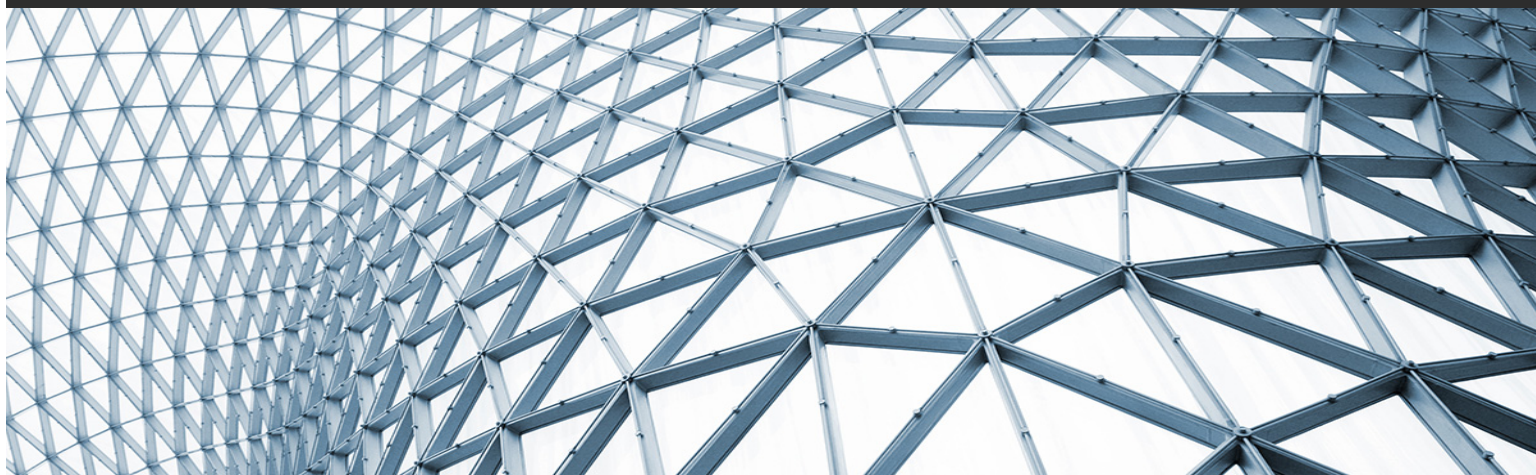


## Who is a Customer-Generator? Uncertainty Abounds for the Pennsylvania PUC



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**By Jillian C. Kirn | June 18, 2020 | The Legal Intelligencer**

Last month, a three-judge panel of the Commonwealth Court of Pennsylvania held that certain net metering regulations of the Pennsylvania Public Utility Commission (PUC) are unenforceable. The regulations at issue are related to the implementation of Pennsylvania’s Alternative Energy Portfolio Standards Act (AEPS Act), which incentivizes the use of electricity generated by renewable sources such as wind, solar, and biomass.

The Commonwealth Court’s ruling in *David N. Hommrich v. Comm., Pa., Pub. Util. Comm’n* (674 M.D. 2016), leaves some questions unanswered. In *Hommrich*, the plaintiff, seeking to install solar photovoltaics, challenged PUC regulations pertaining to net metering that he alleged were unauthorized under the AEPS Act. “Net metering” is a system by which renewable energy generators (most often customers using solar photovoltaics) connect to a public utility power grid, and surplus power is transferred back to the grid, allowing customers to offset the cost of the power they draw from the utility. Hommrich alleged that a project that could be approved for net metering under the AEPS Act could also not be approved under the PUC’s regulations, due to the PUC’s definitions of key terms.

Under the AEPS Act, the General Assembly tasked the PUC “to develop technical and net metering interconnection rules for customer-generators.” Section 5 of the AEPS Act, 73 P.S. 1648.5. The Commonwealth Court grappled with the question of whether the PUC exceeded its statutory authority in doing so. Pursuant to the AEPS Act, the PUC’s implementing regulations provide for how “customer-generators” can “net meter,” and defined both terms. The PUC’s regulations are not known for being internally consistent or easy to parse. One of the primary questions before the Commonwealth Court was whether the PUC regulatory definitions of “customer-generator” and “utility” exceeded the PUC’s rulemaking authority. The AEPS Act defines “customer-generator” as:

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 three megawatts and up to five 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 electric distribution company, electric cooperative or municipal electric system have been promulgated by the Institute of Electrical and Electronic Engineers and the [PUC]. 73 P.S. § 1648.2.

By contrast, the PUC’s 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. 52 Pa. Code § 75.1.

The Commonwealth Court determined that the PUC’s regulations were enacted pursuant to its narrow rulemaking authority under the AEPS Act rather than its broader rulemaking authority under the Pennsylvania Public Utility Code. The AEPS Act confers narrow authority on the PUC to establish technical and net metering interconnection rules. In its analysis of the definitions of the key terms “customer-generator” and “utility” the Commonwealth Court held that the PUC’s regulations added criteria that restrict eligibility for net metering and inhibit the development of alternative energy, in conflict with the AEPS Act. Because of this dissonance, the Commonwealth Court held that those definitions are invalid and unenforceable.

In addition to invalidating the aforementioned definitions, the Commonwealth Court considered two further questions: whether the PUC exceeded its authority in adopting a regulation defining “virtual meter aggregation” and whether the requirement for customer-generators to have an independent load at the generation site in order to net meter was appropriate. “Virtual meter aggregation” as defined by the Pennsylvania Code is:

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 measurable 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. 52 Pa. Code § 75.12.

The Commonwealth Court again held that the PUC's regulations were unenforceable because they created eligibility requirements that were not in the AEPS Act.

While the holding in *Hommrich* may lay the foundation for an increase the number of individuals and entities entitled to be "customer-generators" in the Commonwealth, the Commonwealth Court also upheld some of the PUC regulations challenged in *Hommrich*, namely the regulations that establish an application process for customer-generators and those that establish rules of operation for large customer-generators. The Commonwealth Court held that these regulations were within the PUC's narrow authority under the AEPS Act.

Still, the *Hommrich* holding creates uncertainty for the PUC, which may face significant challenges if it tries to use its defined terms to regulate smaller generators under the AEPS Act. As of now, the door to solar photovoltaic development in Pennsylvania appears more open than ever. The PUC may scramble to close it by requesting a re-argument before the Commonwealth Court or appealing to the Pennsylvania Supreme Court, but in the intervening time the path forward for PUC regulation (particularly of small-scale solar) is unclear.

### About the Author:

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