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BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF

15 DCMR 9 – NET ENERGY METERING	)	**Formal Case No. 1130**
	)	**RM-09-2017-01**
	)	

COMMENTS ON THE SECOND PROPOSED RULEMAKING, OF MAY 4, 2018,

IN FORMAL CASE NO. 1130, RELATING TO 15 DCMR 9

On May 4, 2018, the Public Service Commission of the District of Columbia ("Commission") gave notice of its intent to amend Title 15, Chapter 9, of the District of Columbia Municipal Regulations (DCMR); the chapter pertains to net energy metering.[1] The Notice of Proposed Rulemaking came in Formal Case no. 1130 ("FC 1130"), whose goals include identifying—and evidently enacting—"policies that can modernize our energy delivery system for increased sustainability."[2] Separately, on April 12, 2018, as a residential electricity consumer in the District, I filed a formal complaint with the Commission against Potomac Electric Power Company ("Pepco").[3] That ongoing adjudication has highlighted an ambiguity in the definition of "customer-generator" in 15 DCMR 999. Through FC 1130, the Commission

[1] Public Service Commission of the District Of Columbia, "Notice of Second Proposed Rulemaking. Formal Case No. 1130, In the Matter of the Investigation into Modernizing the Energy Delivery System For Increased Sustainability; RM-09-2017-01, In the Matter of 15 DCMR Chapter 9—Net Energy Metering; RM-13-2017-01, In the Matter of 15 DCMR Chapter 13—Rules Implementing the Public Utilities Reimbursement Fee Act of 1980; RM-29-2017-01, In the Matter of 15 DCMR Chapter 29—Renewable Energy Portfolio Standard; RM-36-2017-01, In the Matter of 15 DCMR Chapter 36—Electricity Quality of Service Standards; RM-40-2017-01, In the Matter of 15 DCMR Chapter 40—District of Columbia Small Generator Interconnection Rules; RM-41-2017-01, In the Matter of 15 DCMR Chapter 41—the District of Columbia Standard Offer Service Rules; RM-42-2017-01, In the Matter of 15 DCMR Chapter 42—Fuel Mix And Emissions Disclosure Reports; and RM-44-2017-01, In the Matter of 15 DCMR Chapter 44—Submetering And Energy Allocation," May 4, 2018.
[2] Public Service Commission of the District of Columbia, "Formal Case No. 1130, In the Matter of the Investigation into Modernizing the Energy Delivery System for Increased Sustainability," Order No. 17912, June 12, 2015, at 1.
[3] *See*, David Roodman, complaint, Consumer Complaint No. 9075234, April 12, 2018.

could quickly correct this ambiguity, and in a way that would increase the scope for sustainable energy generation in the District from distributed customer-generators; harmonize the regulatory framework across the District-Maryland border; and even reduce net costs for other players in the local energy system.

I. BACKGROUND

The Retail Electric Competition and Consumer Protection Act of 1999 created a new legal class of actor in the District's power landscape: the customer-generator. The definition reads:

> (15) "Customer-generator" means a residential or commercial customer that owns and operates an electric generating facility that:
>
> (A) Has a capacity of not more than 1000 kilowatts;
>
> (B) Uses renewable resources, cogeneration, fuel cells, or microturbines;
>
> (C) Is located on the customer's premises;
>
> (D) Is interconnected with the electric company's transmission and distribution facilities; and
>
> (E) Is intended primarily to offset all or part of the customer's own electricity requirements. (DC code §34–1501(15))

This phrasing in subsection E poses a practical problem: how is it to be determined whether a customer-generator's system is "intended primarily" for own use? The Maryland legislature created the identical regulatory challenge when it adopted the same language: compare to MD Pub Util Code §7–306(a)(4)(iii). Yet the regulatory agencies in the two jurisdictions responded differently to the challenge.

In the District, the original rulemaking for 15 DCMR 9 (Formal case no. 945, Phase II, Order No. 13501) did not quantify "intended primarily." Here, the language was copied directly from statute. Thus 15 DCMR 999 too states that a customer-generator's system is

one "intended primarily to offset all or part of the customer's own electricity requirements." During rulemaking, the Office of the People's Counsel argued for clarifying "intended primarily."[4] Pepco replied that "No explanation is necessary inasmuch as the referenced language is taken directly from the relevant portion of the definition of a customer-generator [of the Act]."[5,6] I find this reply unconvincing: as a regulatory agency, one of the Commission's core responsibilities is to resolve ambiguities in statute.

After the definition of customer-generator, including the "intended primarily" phrase, was transplanted into the regulations, Pepco began applying it in a way that maximally limits the size of net-metering customers' solar systems in the District. To obtain interconnection approval from Pepco, the company's website explained, a proposed system should be expected to generate no more than 100 percent of the customer's baseline usage. (Details below.) Thus did "intended primarily" in law became "intended exclusively" in practice.

The Maryland Public Service Commission ("Maryland PSC"), by contrast, translated the same legal language into a regulatory definition that reads, in pertinent part:

> (1) In order to initially qualify for net energy metering:
>
> …
>
> (b) The eligible customer-generator's proposed electric generating system may not exceed 200 percent of the eligible customer-generator's baseline annual usage.[7]

The Maryland ceiling at 200 percent of baseline usage is twice the 100 percent ceiling Pepco has put in place in the District.

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[4] *See*, Office of the People's Counsel, "Initial Comments of the Office of the People's Counsel," Formal Case No. 945, August 3, 2001, at p. 9.
[5] *See*, "Reply Comments of Potomac Electric Power Company," Formal Case No. 945, August 17, 2001, at p. 7.
[6] For summary of the debate, *see* "Formal Case No. 945, Phase II, in the Matter of the Investigation into Electric Service Market Competition and Regulatory Practices," Order No. 12291, January 8, 2002, at p. 3.
[7] COMAR 20.50.10.01.D(1)(b).

During the Maryland rulemaking, the Office of Staff Counsel of the Maryland PSC set aside Pepco's argument against this language. "Staff believes that the Commission's interpretation is a reasonable reading of the word 'primarily,' as being something more than half of the output."[8] That is: if a customer-generator's production is 190 or 199 percent of consumption—getting close to the 200 percent limit—then the consumption is still a bit more than half of production. And that, in the Maryland Commission's reading, is "primarily."

II. MY CONSUMER COMPLAINT AGAINST PEPCO

In January 2018, I applied to Pepco for permission to install a 7.6 kW photovoltaic system on the roof of my home in the District.[9] Using its formula for DC customers, Pepco estimated that my system would generate power equivalent to about 115 percent of my historical usage on an annual basis. I agreed with the company's estimate. Pepco rejected my application. I disagreed with the company's action. And so, I filed what became Consumer Complaint No. 9075234. The basis of the Complaint is simply that my system would go about 85 percent for own use, and, under a plain reading of the regulation, that satisfies the "intended primarily" requirement.[10]

My complaint case has not yet had a formal hearing. My purpose in pursuing it is not to *change* the rule, but to change how Pepco acts under the rule, at least in my case. I argue that while the rule may be ambiguous as a *general matter*—that is, its application may be substantially ambiguous in other, hypothetical cases—its application is not ambiguous in my case. I am therefore entitled to a hearing and a favorable decision.

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[8] *See*, Office of Staff Counsel, "Revised Regulations and Comments of the Staff of the Maryland Public Service Commission," Rulemaking 41, June 30, 2011, at p. 3.

[9] Per the Pepco formulas quoted above, 7.6 kW is the capacity of the *inverter*, not the panels.

[10] Since production would be about 115 percent of consumption, consumption would be about 85 percent of production.

III. DISCUSSION

The District-Maryland divergence manifests in Pepco's separate, consumer-facing websites for the two jurisdictions. Here is how the "frequently asked questions" (FAQ) pages of the two sites answer the question, "How is the size of the renewable system determined?":

> **District website:** Add up the total energy consumption (in kWh) as shown on your last 12 Pepco bills. Divide that sum by 1,200. The result is the maximum inverter nameplate rating you can install. We use the formula 12-month kWh usage / 1,200 = maximum kW inverter rating, to comply with District of Columbia rules, meet all or part of your electrical needs, and follow our regulatory requirements.[11]
>
> **Maryland website:** Add up the total energy consumption (in kWh) as shown on your last 12 Pepco bills. Divide that sum by 1,200. *Multiply that number by 2.* The result is the maximum inverter nameplate rating you can install. We use the formula (12-month kWh usage / 1,200) *x 2* = maximum kW inverter rating, to comply with state rules, meet all or part of your electrical needs, and follow our regulatory requirements. [emphasis added to highlight differences][12]

The Maryland version differs substantively only in doubling the cap. The difference may seem typographically subtle and conceptually straightforward, but it betrays illogic. It strongly implies that the "intended primarily" standard in 15 DCMR 999 *requires* Pepco to impose a 100 percent ceiling on District consumers ("to comply with District of Columbia rules…and follow our regulatory requirements"). Put otherwise, it implies that a reasonable person cannot conclude that the Commission's intentions in formulating that standard were compatible with a ceiling any higher. Yet a reasonable person could in fact conclude that, for the Maryland PSC hears in the same phrase a call for a limit far higher, and there is nothing in the public record to suggest that the District Commission disagrees.

[11] *See*, "Green Power Connection FAQs," "How is the size of the renewable system determined?", available at https://www.pepco.com/MyAccount/MyService/Pages/DC/GreenPowerConnection/FAQs.aspx.
[12] *See*, "Green Power Connection FAQs," "How is the size of the renewable system determined?", available at https://www.pepco.com/MyAccount/MyService/Pages/MD/GreenPowerConnection/FAQ.aspx.

In sum, Pepco won the argument for ambiguity, then pushed that ambiguity to and beyond reasonable interpretive limits. It is rather as if Pepco got to cut the cake in two *and* pick the first piece.

The District Commission's decision during the original rulemaking for 15 DCMR 9 therefore has had several unfortunate results:

- It has been unclear how exactly to apply a legal standard.
- There is inconsistency between neighboring jurisdictions as regards two groups of similarly situated people: District Pepco customers and Maryland Pepco customers.
- The lack of clarity has made it easier for Pepco to formulate an interpretation that is outside the zone of reasonableness, as my Complaint demonstrates. My system is unambiguously intended primarily for own use. Yet it has been barred from interconnection.
- The logical tension between the Commission's rule and Pepco's practice has contributed to Pepco mischaracterizing a Commission rule to the public.
- There exists an unnecessary impediment to distributed, sustainable customer-generation in the District.

IV. PROPOSAL

The commission should augment the proposed amendments in the NOPR for 15 DCMR 9 in order to harmonize the definition of "customer-generator" across the District-Maryland border

My Complaint appears to be a case of first impression: the Commission appears not to have formally confronted the quantification, or at least adjudication, of the "intended primarily" phrase in the definition of "customer-generator." Whatever the ultimate disposition of my Complaint about Pepco's behavior *under* the current rules, it is clear that an ideal

outcome from the controversy would include the Commission *revising* the rules. The Commission should take the lesson from my case and banish the needless ambiguity. The most expedient and appropriate way to do so is to adapt Maryland's regulatory language. To be precise, the Commission should replace clause (e) of the definition of "Customer-generator" in 15 DCMR 999 with text straight from COMAR 20.50.10.01.D(1)(b), giving:

(e) would not exceed 200 percent of the customer-generator's baseline annual usage.

This change would have the following virtues:

- It would remove an unnecessary source of uncertainty and dispute in the rules governing net energy metering in the District.
- It would honor the highly relevant precedent set by the Maryland Commission.
- It would better harmonize the regulatory framework between the District and Maryland, across a shared distribution system and a geographically integrated set of markets.
- The revision would end a subtle betrayal of the Commission's trust. Under cover of ambiguity, Pepco is interpreting a regulatory phrase so as to unambiguously contradict the plain meaning of that phrase. "Intended primarily" is not "intended exclusively."
- The revision might *reduce* costs in the rest of the supply and distribution system. To avoid triggering FERC jurisdiction, the billing rules for net-metering customers (15 DMCR 902.3 and 903.5) are designed to prevent "sale for resale" by such customers.[13] In practice, this means that net metering customers are promised only that credit balances will accumulate in their accounts, not that they can "cash out." Net-metering customers that generate surpluses long-term may therefore provide energy to the system for free. And in the case of solar, most of the surpluses accrue at high-value times: summer afternoons.

[13] S*ee*, "Formal Case No. 945, Phase II, In the Matter of the Investigation into Electric Service Market Competition and Regulatory Practices," Order No. 12704, April 16, 2003.

- By doubling a ceiling, the revision would expand the scope for sustainable energy production in the District. It would serve the evident purposes of this proceeding and of the Renewable Portfolio Standard Expansion Amendment Act of 2016.

V. CONCLUSION

In closing, I would observe that there are several reasons that my Complaint is the case of first impression on this issue. My family probably consumes less power than most. My roof is more suited for solar than many. In addition—and more relevant to this proceeding—I am unusual for the energy I have been willing to put into this dispute. The rarity of my effort reflects the power asymmetry between Pepco and its customers. Most customers would not notice, much less strive to challenge, Pepco's stretching of this rule. And revising regulations to promote distributed generation is in no small part about rectifying just such imbalances between large and small players. Finally, solar panels have steadily become more efficient. I expect this trend to continue. As it does, more District customers will have the ability and desire to breach the ceiling that Pepco has incorrectly placed upon us.

Respectfully submitted,

By: 

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