PWIA
Pennsylvania Waste Industries Association
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May 29, 2015

Via U.S. Mail and PA PUC's E-Filing System

Pennsylvania Public Utility Commission
Attn: Secretary
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Comments in Opposition to Advanced Notice of Final Rulemaking Proposed 52 Pa. Code §75.13(a)(3)
Implementation of the Alternative Energy Portfolio Standards Act of 2004;
Doc. No. L-2014-2404361
Published at 45 Pa.B. 2242, May 9, 2015

Dear Commissioners:

The Pennsylvania Waste Industries Association ("PWIA") submits these comments in opposition to proposed 52 Pa. Code §75.13(a)(3), included in the Advanced Notice of Proposed Rulemaking Order published on May 9, 2015 in the Pa. Bulletin. Use of the Advance Notice of Proposed Rulemaking and associated comment period procedure was originally suggested by the Independent Regulatory Review Commission ("IRRC") in its October 18, 2014 Comments[1] to the Commission's prior Notice of Proposed Rulemaking Order, which was originally published on July 5, 2014 in the Pa. Bulletin. PWIA believes that this proposed regulation, as modified to limit the capacity of sources otherwise qualified to participate in net metering to 200% of the facility's historical electricity usage, remains bad policy, violates both the spirit and the substance of Act 213 of 2004 as amended by Act 35 of 2007 ("Act 213").

The Rulemaking is unlawful because it disregards and contradicts the plain language of Act 213. The IRRC specifically and explicitly identified this deficiency in its comments, yet the Commission did not address, let alone sufficiently answer, commenters including PWIA's, arguments that the limitations imposed by the Rulemaking lack any statutory basis and contradict the Act. Under the proposed regulation, the Commission settled on 200%, not 110%, of a customer-generator's annual electric consumption as a "reasonable and balanced" constraint on the size of an alternative energy system for a customer-generator that wished to net meter, even though the Act already contains a specific restriction—3 MW—on capacity[2]. The Act does not

[1] See Pennsylvania Public Utility Commission, Regulation 357-304 (IRRC 33061), Implementation of the Alternative Energy Portfolio Standards Act of 2004, at 44 Pa. B. 6732.
[2] Or 5MW if certain conditions are met.

restrict consumption as a percentage of capacity, nor does it authorize the Commission to impose such restrictions.

In addition, the Commission attempted to mitigate the identified adverse effects on alternative energy systems producing biologically generated methane gas from farm operations by carving out an exemption to the 200% limit for certain digesters at various farms. The exemption is an additional unlawful action by the Commission not based on statute. The arbitrary exemption that the Commission suggests would result in unequal treatment of certain customer-generators using biologically derived methane gas as compared to other customer-generators using the same fuel. The Act does not include any provision allowing the PUC to discriminate between customer-generators using biologically derived methane gas based on either location within in the Commonwealth or by process generating/using the biologically derived methane gas.

The pitfalls faced by the Commission in proposing any particular percentage, and in creating various exemption from the restriction further highlights the Legislature's wisdom in permitting net metering without regard to consumption limitations, i.e., when any portion of the electricity is used to offset a customer-generator's electricity requirements. Approval of §75.13(a)(3), even as modified, will not survive judicial scrutiny.

PWIA's Interest in this Matter

PWIA's interests in this matter remain as set forth in its September 2, 2014 Comment Letter. [3] Today's comments are submitted in furtherance of our primary missions, particularly advancing environmentally responsible management of solid waste through sound public policy. Briefly, PWIA's September 2, 2014 Comment Letter explained:

- Landfills continuously generate landfill gas, which, when used to generate electricity, is classified as a biologically derived methane gas, a Tier I resource under the Act.
- Landfill gas historically has been combusted in flares without any energy recovery or beneficial use.
- Pennsylvania landfills have a relatively large number of award-winning renewable gas-to-energy projects compared to the nation as a whole. The landfills without existing projects are generally smaller projects that need the economic benefits of net metering to obtain financing and proceed through development to operation.
- Rather than encouraging the development of more gas-to-energy projects, the proposed rulemaking raises economic barriers to developing the existing

[3] PWIA's Comment Letter dated September 2, 2014 is incorporated by reference as if set forth in its entirety herein.

inventory of smaller landfill gas-to-energy projects that meet the applicable 3MW/5MW by removing the enhanced revenue stream that net metering can provide. The typical landfill gas-to-energy project, like many methane digesters on farms, produces more electricity than 200% of the typical landfill annual consumption.

- The amount of landfill gas generated by a landfill is a function of the mass of waste contained in the landfill. Unlike most other Tier I resources, the landfill customer-generator is not designing for a particular generation capacity—capacity is a function of the existing waste mass.

- Under the proposed rulemaking restrictions, future gas-to-energy projects will not occur. The opportunity to make beneficial use of a Tier I resource will be lost, as landfill gas will instead be combusted in flares without any associated alternative energy generation. We are aware of several projects that have stalled due to the uncertainty of the net metering program.

Proposed 52 Pa. Code §75.13(a)(3) is Unlawful

Contradicts the Plain Meaning of the Act

The Commission's rulemaking unlawfully imposes a restriction on net metering based on the customer-generators' consumption as a percentage of capacity, in direct contradiction of Act 213. As the Commission has explicitly recognized in other rulemakings pertaining to the implementation of Acts 213 and Act 35, it is Pennsylvania law that the plain language of a statute cannot be disregarded in pursuit of unstated legislative intent when the words are clear and free of ambiguity. 1 Pa.C.S § 1921(b). Similarly, the Commission can presume that the legislature did not intend an interpretation that is absurd or unreasonable. 1 Pa.C.S. § 1922(l). Proposed §75.13(a)(3) contradicts the plain meaning of the Act. The consumption size limitation for all customer-generators – whether it be 110% or 200% of the customer-generator annual electric consumption –is unlawful because it contradicts the plain meaning of the Act. No limitation is authorized by the statute, and the Commission cannot promulgate such a limitation through regulation. In response to the Commission's 110% proposed requirement, the IRRC specifically referenced commentators' concern that there is **"nothing in the Act, Act 35 or Act 129 that would allow the PUC to impose such a restriction"** and asked that the Commission provide statutory authority for the eligibility restriction imposed under 75.13(a)(3).[4] The Commission failed to answer IRRC's inquiry.

The IRRC specifically addressed the concerns of landfills and farmers maximizing beneficial use of the Tier I resource—biologically derived methane gas. The Commission was

[4]See 44 Pa.B. at 6733 (Oct. 18, 2014).

asked to explain how the predicted consequence of impeding the development of renewable energy sources is consistent with the intent of the General Assembly, the Act and its recent amendments.[5] With respect to the originally proposed 110% limitation, the IRRC requested that the Commission address the concerns of the Pennsylvania Department of Environmental Protection, Pennsylvania Department of Agriculture and commentators representing "customer-generators such as farmers and landfills [who] use biomass to produce energy that is often times in excess of the 110% limit", and specifically requested that the Commission "explain how the rulemaking protects the Commonwealth's natural resources" if landfill and farmer customer-generators "are unable to beneficially use biomass." The Commission's Advanced Notice of Final Rulemaking Order does nothing to answer the IRRC's question with respect to landfill customer-generators.[6] Instead, former Commissioner Cawley sidestepped the IRRC's direction by requesting additional comments on the "optimal solution" for some percentage limitation on the customer-generators, stating "[c]hoosing between 110 and 200 percent appears to be largely driven by a review of the output of existing customer-generator systems." Any limitation contradicts the Act and must be rejected.

However, the plain meaning of the Act is clear. Non-residential customer-generators with net-metered distributed generation systems that have a nameplate capacity of no more than 3 MW qualify for net metering (i.e. to receive "full retail value" for all excess generation) if any portion of its electricity is used on-site to offset its non-generation electrical consumption. Other than the 3 MW cap, there is no limitation of any sort on the amount of electricity that qualifies for net metering compensation set forth in the Act.

More specifically, the Act's definition of "Customer-generator" states in relevant part:

> A nonutility[7] 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.

and "Net metering" is defined as:

> The means of measuring the difference between the electricity supplied by an electric utility and the electricity generated by a customer-generator when **any portion of the electricity generated by the alternative energy generating system is used** to offset part or all of the customer-generator's requirements for electricity. [emphasis added]

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[5] See 44 Pa.B. at 6732 (Oct. 18, 2014).

[6] The proposed Order contains an exemption for farming customer-generators where the alternative energy system is used to comply with the PA DEP's Chesapeake Watershed Implementation Plan or is an integral element for compliance with the Nutrient Management Act.

[7] The Commission's proposed changes to the definition of "customer-generator" are not addressed.

The Act sets the compensation rate in Section 5. Interconnection standards for customer-generator facilities, which states in relevant part:

> Excess generation from net-metered customer-generators shall receive full retail value for **all energy** produced on an annual basis. [emphasis added]

The plain language of the Act includes no discussion or references to historical or estimated annual system output or customer usage, nor does it impose, discuss or reference any limitation based on historical or actual usage, nor does it direct (or give authority to) the Commission to promulgate any such limits. The Act is clear: Customer-generators who use any portion of their electricity on-site for non-generation purposes shall receive full retail value of all excess electricity it produces[8]. The Commissions' attempt to impose a limitation, regardless of size of that limitation (110 % or 200%), contradicts the Act.

Favors Private Interests through Arbitrary Exemption and Disparate Treatment

In addition to contradicting the Act, the Commission's proposed Rulemaking is unlawful because it favors private over public interest in contravention of 1 Pa.C.S. § 1922(5), and is unconstitutional under Art. 1, § 26 of the Pennsylvania Constitution. The Rulemaking fails to protect a customer-generator's right to net meter, by creating disparate classes of customer-generators, all of whom use biologically derived methane gas to fuel alternative energy systems.[9] Biologically derived methane gas is precisely the type of alternative energy that the Act was designed to promote. The Commission, however, proposed an arbitrarily-selected restriction of 200% without any statutory basis. The selected restriction constrains, rather than promotes, the development of alternative energy sources related to biologically derived methane gas by making many projects economically unfeasible. Moreover, the Commission's arbitrary exemption from

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[8] The phrase "any portion of the electricity" was added by the legislature through Act 35, and is completely objective. This phrase replaced the Act's previous language, which required a subjective determination of the customer-generator's intent in generating. This change in language was purposeful by the legislature, and was made based on experiences of companies, including PWIA members, attempting to net meter under the previous version of the Act. The intent of the change and the current statutory language are clear—"any portion of the electricity" used on-site for non-generation purposes qualifies a customer-generator for net metering, and compensation is "for all energy produced". It would be absurd to think that the legislature intended to limit the portion of excess generation qualifying for compensation to "200% of historical or estimated usage" when it passed a statute that said "for all energy produced".

[9] Pa. Const. Art. 1, § 26, providing that neither the Commonwealth nor any political subdivision shall deny any person the enjoyment of any civil right. While the prohibition against treating people differently under the law does not preclude the Commonwealth using legislative classifications, those classifications must be reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. *Curtis v. Kline*, 542 Pa. 249, 255, 666 A.2d 265, 268 (1995) (citing *Commonwealth v. Parker White Metal Co.,* 512 Pa. 74, 515 A.2d 1358 (1986). Justification for the classification must have a fair and substantial relationship to the object of the legislation. *Id.* Here, the Commission first has acted outside of any statutory authority, and further in a manner that contradicts the Acts. Therefore, it is difficult to imagine that the Commission's actions bear any reasonable relationship to the Act.

the 200% of consumptive use restriction for those sources that are allegedly used to comply with the Chesapeake Watershed Implementation Plan or that are an integral element for compliance with the Nutrient Management Act is unlawful. The Commission's scheme creates unequal treatment for biologically generated methane gas alternative energy systems, not reasonably related to the intent of the Act. The Act does not contain any restriction related to consumption, but rather allows customer-generators to participate in net metering so long as "any portion of electricity" is used to offset.

Rejects Unanimously Approved Recommendation of PA DEP's Climate Change Advisory Committee

On January 6, 2015, the PA DEP Climate Change Advisory Committee ("CCAC") unanimously voted to request that the Commission to withdraw the proposed net metering regulations that imposed the 110% of a customer-generator's past electricity usage.[10] The Commission ignored the CCAC recommendations[11]. As an alternative to complete withdrawal of the 110% restriction, the CCAC suggested exempting all Tier I resources from the proposed net metering cap, or exempting electrically generated from biologically derived methane gas (a defined term in the Act). Ignoring this suggestion as well, the Commission continued with proposed regulations containing a restriction tied to consumption (albeit a somewhat more lenient restriction) and created an arbitrary exemption from the 200% limit for alternative energy systems that are used to comply with the Chesapeake Watershed Implementation Plan or is an integral element for compliance with the Nutrient Management Act. As outlined above, the Commission's refusal to accept the CCAC recommendation and remove the consumption-based restriction entirely resulted in an arbitrary and unreasonable distinction among biologically derived methane gas generators, which will restrict development of these alternative energy sources.

Relies on Unlawful Basis: Foreign Jurisdictions

The proposed regulation, like its predecessor, relies on the different approaches taken by legislatures in other states as support for ignoring the plain language of the Act (see page 11 of the proposed regulation, Section B. Net Metering §75.13. General Provisions). The Act is clear that the compensation for net metering is "full retail value for all energy produced" and the Commission cannot substitute its own judgment or those of foreign jurisdictions in place of the plain language of the Act. The fact that the Commission believes its proposed approach is "consistent" with how net metering is treated in other states is functionally and legally meaningless.

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[10] On January 6, 2015, the CCAC voted 12-0-0 to approve the Waste to Energy Manure Digesters Work Plan. Two of the absent CCAC members, on behalf of their stakeholders, previously submitted comments to the Commission in opposition of the proposed limits. In total, five different CCAC members either submitted comments directly or on behalf of their stakeholders. All five members opposed the proposed limits.

[11] CCAC Committee member Commissioner Powelson via his designee, Mr. Darren Gill, also voted in favor of the Work Plan recommending that the PUC withdraw the proposed regulations.

In limited instances, the Act does direct the Commission to develop certain net metering regulations that are consistent with other states in limited circumstances; i.e. only those relating to technical issues. As set forth in Section 5 of the Act:

> Section 5. Interconnection standards for customer-generator facilities. Excess generation from net-metered customer-generators **shall receive full retail value for all energy produced** on an annual basis. The commission shall develop **technical and net metering interconnection rules** for customer-generators intending to operate renewable onsite generators in parallel with the electric utility grid, consistent with rules defined in other states within the service region of the regional transmission organization that manages the transmission system in any part of this Commonwealth. The commission shall convene a stakeholder process to develop Statewide technical and net metering rules for customer-generators. The commission shall develop these rules within nine months of the effective date of this act. [emphasis added]

The first sentence of Section 5 sets forth the *financial* compensation required under the Act, "shall receive full retail value for all energy produced on an annual basis". The second sentence requires the Commission to develop "technical and net metering interconnection rules" that are "consistent with rules defined in other states…" but this consistency mandate is limited to *technical* and *interconnection* issues. The proposed 200% limit is purely financial—there are no "technical" or "interconnection" issues associated with it. The continued reliance on New Jersey and Delaware regulations implementing New Jersey and Delaware statutes in an effort to rewrite the plain language of the Act as it pertains to financial compensation for net metering is unlawful.

Relies on Unlawful Basis: Third Party Operator-Owner Regulations

In 2012, the Commission passed regulations addressing an area relating to net metering that was not addressed in the Act, whether (and under what conditions) generation owned and operated by third-parties could participate in net metering. The ability of third-party systems to participate in net metering programs was not addressed in the Act, as these systems did not fall within the plain language of the definition of customer-generator as set forth in the Act. The fact that the Commission issued regulations to fill this statutory gap does not give the Commission authority to rely on these regulations to issue subsequent regulations that contradict the plain language of the Act as it pertains to customer-generators.

In the proposed rulemaking, the Commission relied on the incorrect "fact" that the "majority of comments[12] supported the [110%] limit as a reasonable and balanced approach to

[12] Only 7 out of 15 commenters supported the 110% limitation.

support the intent of the AEPS Act…" This error remains uncorrected on the record by the Commission. More importantly, this "fact", even if true, is legally meaningless (see page 12 of the Proposed Rulemaking Order, Section B. Net Metering §75.13. General Provisions, 1. Section 75.13(a)). In the Advanced Notice of Proposed Rulemaking, the Commission continues to rely on the same unlawful fact to justify the proposed imposition of the 200% limit on all customer-generators. The Commission's only basis for applying the 200% limit to customer-generators in the Advanced Notice of Proposed Rulemaking is the same basis it cited in the Proposed Rulemaking: alleged support of a 110% limit as "reasonable and balanced" from a "majority of comments" to the 2012 Proposed Rulemaking. The Commission then applied the "same reasonable and balanced approach" of a 110% limit to all customer-generators (see page 10 of the Advanced Notice of Proposed Rulemaking, Section B. Net Metering §75.13). Based solely on this tenuous "support" from 2012 comments,[13] the Commission continues to impose a limit on all customer-generators, and has merely increased it from 110% to 200%, asserting that the change "will increase the number of systems that can qualify for net metering, while at the same time meeting the intent of the AEPS" (see pages 11-12 of the Advanced Notice of Proposed Rulemaking, Section B. Net Metering §75.13). The Commission cannot issue regulations that contradict the plain language of the Act, regardless of how many commenters encourage them to do so in a prior rulemaking.

We agree that because the Act did not give third-party owned and operator generators a clear statutory right to net meter, the Commission had broad authority to issue regulations on this topic. Given that the Commission could (arguably) have found no intent by the legislature to allow net metering of third-party owned and operated projects, it is not surprising that the commenters in that rulemaking would support a "compromise" that imposed lower participation and/or compensation rights than granted to customer-generators under the Act.[14] The approach taken in the 2012 rulemaking appears reasonable in that the danger identified by the Commission— merchant generators using the net metering program to circumvent the wholesale market—is not present for customer-generators as these entities are not in the merchant generating business[15].

Breaches Agreements with US EPA

The Commonwealth, through the Department of Environmental Protection, executed a Memorandum of Understanding (MOU) with US EPA to work in partnership with US EPA

[13] The Commission makes no attempt to rely on or quantify commentators to the 2014 Proposed Rulemaking, and simply repeats the reasoning in 2012.

[14] The Commission further suggests that it will review whether to maintain the 110% restriction on third party owned and operated systems. (see page 10 of the Advanced Notice of Proposed Rulemaking, Section B. Net Metering §75.13 at fn. 3).

[15] It is our understanding that besides our members, the groups most hurt by the Commission's proposal are pig, dairy, and other farmers using digester technology to generate renewable energy from manure and other farm by-products. Clearly, companies in the merchant generating business are not opening landfills or livestock farms in an effort to generate biogenetically derived methane gases to produce electricity in a convoluted Machiavellian effort to circumvent the wholesale electricity market.

through its Landfill Methane Outreach Program to overcome barriers and promote landfill gas as a fuel for renewable energy generation, including electricity. The proposed 200% limit violates the Commonwealth's duty under the MOU as it intentionally imposes unnecessary (and unlawful) barriers to the beneficial use of landfill gas.

Conclusion

PWIA opposes proposed 52 Pa. Code §75.13(a)(3), as published on May 9, 2015 in the Pa. Bulletin. PWIA believes that this proposed regulation is bad policy, violates both the spirit and the substance of Act 213, and is unlawful because it disregards and contradicts the plain language of the Act. Moreover, the CCAC unanimously recommended withdrawal of this regulation, or an exemption reasonably related to the maximization of the alternative energy sources as promoted by the Act. Approval of §75.13(a)(3), as proposed, will not survive judicial scrutiny and we strongly encourage the Commission to withdraw this proposal.

Very truly yours,

Mark C. Pedersen

Mark C. Pedersen
President

cc: John Quigley; Acting DEP Secretary
Jessica Shirley; DEP Policy Office (via email)
US EPA Landfill Methane Outreach Program
A. Stevens Krug, Chairman Climate Change Advisory Committee of DEP (via email)