**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held April 5, 2018

Commissioners Present:

Gladys M. Brown, Chairman

Andrew G. Place, Vice Chairman

Norman J. Kennard

David W. Sweet

John F. Coleman, Jr.

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| Petition of the Pennsylvania Waste Industries Association for a Declaratory Order to Declare that Landfills and Landfill Gas Operations are Critical Infrastructure and Are Not Public Utilities under the Public Utility Code, the Alternative Energy Portfolio Standards Act, and Regulations and Orders Promulgated by the Pennsylvania Public Utility Commission |  Docket No. P-2017-2637800 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

# I. Matter Before the Commission

 Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition by the Pennsylvania Waste Industries Association (PWIA) seeking a Declaratory Order by the Commission declaring that municipal waste landfills (MSW Landfills) operating with permits issued from the Pennsylvania Department of Environmental Protection (DEP): (1) are not “utilities,” and (2) are “critical infrastructure,” for purposes of the Commission’s net-metering regulations, to remove uncertainty whether MSW Landfills may qualify as “customer-generators” under the Commission’s net-metering regulations.

For the reasons stated herein, we will grant PWIA’s Petition.

**II. Procedural History**

 On December 11, 2017, PWIA filed a Petition of the Pennsylvania Waste Industries Association for a Declaratory Order to Declare that Landfills and Landfill Gas Operations are Critical Infrastructure and Are Not Public Utilities under the Public Utility Code, the Alternative Energy Portfolio Standards Act, and Regulations and Orders Promulgated by the Pennsylvania Public Utility Commission, at Docket No. P-2017-2637800.

No Comments in response to PWIA’s Petition were received.

# III. Discussion

#  A. Legal and Procedural Standards

1. **Legal Standard for Declaratory Order**

Section 331(f) of the Public Utility Code, 66 Pa.C.S. § 331(f), and the Commission's related regulations at 52 Pa. Code § 5.42, provide that the Commission may issue a Declaratory Order to terminate a controversy or to remove uncertainty. Section 331(f) of the Public Utility Code states: “Declaratory Orders - The commission, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.” 66 Pa.C.S. § 331(f). Section 5.42 of the Commission’s regulations states:

Petitions for declaratory orders.

(a) Petitions for the issuance of a declaratory order to terminate a controversy or remove uncertainty must:

(1) State clearly and concisely the controversy or uncertainty which is the subject of the petition.

(2) Cite the statutory provision or other authority involved.

(3) Include a complete statement of the facts and grounds prompting the petition.

(4) Include a full disclosure of the interest of the petitioner.

52 Pa. Code § 5.42.

 A declaratory judgment is a means to declare rights, status, and other legal relations, (*See* 42 Pa.C.S. §§ 7532, 7533) and “is to be liberally applied to afford relief from uncertainty and insecurity.” *Township of Derry v. Pa. Dep of Labor & Industry*, 593 Pa. 480, 485 (2007) (*citing* 42 Pa.C.S. § 7541(a)). But a “declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic.” *Gulnac* v. *South Butler County School District,* 526 Pa. 483, 488 (1991).

The PWIA has requested that the Commission approve its Petition for Declaratory Order on an expedited basis.

1. **Legal Standards of the Public Utility Code Generally**

As used in the petition and this Order, an MSW landfill means an “Municipal waste landfill” as defined in 25 Pa. Code 271.1 and that is also subject to the permitting and operating requirements set forth in 25 Pa. Code Chapter 273. These Regulations are under the jurisdiction of the Pennsylvania Department of Environmental Protection (DEP).

The Alternative Energy Portfolio Standards Act (AEPS), 73 P.S. §§ 1648.1, *et seq.*, provides, in pertinent part:

“Net metering.”

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.

73 P.S. § 1648.2. (Emphasis added.)

The Commission’s Regulations implementing the AEPS net-metering standards define a “customer-generator” as:

“Customer-generator”

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 ...

52 Pa. Code § 75.1. (Emphasis and italics added.)

 The Commission’s Regulations implementing the AEPS net-metering standards define a “utility” as:

“Utility”

(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**.

52 Pa. Code § 75.1. (Emphasis added.)

 The Commission’s Regulations implementing the AEPS net-metering standards define a “microgrid” as:

“Microgrid”

A system **analogous** to the term distributed resources (DR) island system, when parts of the electric distribution system have DR and critical infrastructure load in a combination so as to give the EDC the ability to safely and intentionally disconnect that section of the distribution system from the rest of the distribution system and operate it as an island during emergency situations.

52 Pa. Code § 75.1. (Emphasis added.)

 The Commission’s Regulations implementing the AEPS net-metering standards regarding large customer-generators, provides:

75.16. Large customer-generators.

(c) A retail electric customer may qualify its alternative energy system located within a **microgrid** for customer-generator status if it satisfies the following requirements:

(2) The customer documents that the alternative energy system **exists for the primary or secondary purpose of maintaining *critical infrastructure***.

52 Pa. Code § 75.16(c). (Emphasis and italics added.)

**B. PWIA’s Petition**

 PWIA asserts that there is considerable uncertainty as to the meaning and interpretation of certain provisions of the Commission’s regulations pertaining to net metering as applied to MSW Landfills. That uncertainty is both creating impacts on the development of MSW Landfill projects intending to participate in the net metering program and is threatening the security for MSW Landfill projects already operating in the net metering program.

 The PWIA notes that it had filed a Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief with the Commonwealth Court of Pennsylvania on February 1, 2017, challenging the legality of certain aspects of the Net Metering Regulations, including items relating to the subject matter of this Petition for Declaratory Order.[[1]](#footnote-1) PWIA Petition at ¶ 11. As a result of settlement discussions to resolve the Commonwealth Court action, PWIA and the Commission agreed to a consent decree that was filed with the Commonwealth Court on December 7, 2017 and entered as an order of the Commonwealth Court on December 15, 2017. As part of that consent decree, PWIA agreed to file the instant Petition and to discontinue the Commonwealth Court action, which PWIA did on December 15, 2017.

PWIA notes that the Commission has indicated, through its Answer and Cross Application for Partial Summary Relief (“Answer”) to the Petition for Review, that it disagrees with PWIA’s understanding of the meaning and interpretation of certain items in the Net Metering Regulations used or otherwise as set forth in PWIA’s Petition to Review, including items relating to the subject matter of this Petition for Declaratory Order. PWIA Petition at ¶ 13. PWIA asserts that this proceeding demonstrates that there is an actual controversy regarding the net metering regulations, and that the issuance of a Declaratory Order by the Commission would also resolve the PWIA’s pending Petition for Review to the extent that the Declaratory Order is consistent with the relief sought herein. PWIA Petition at ¶¶ 14-15.

 PWIA submits that it and its members have an immediate, substantial, and direct interest in the resolution of the issues posed in its Petition. The issuance of a Declaratory Order by the Commission regarding the subject matter of its Petition is therefore appropriate and necessary to remove uncertainty. PWIA Petition at ¶¶ 16-17.

PWIA asserts in its Petition that in order to participate in net metering programs under the AEPS Act, MSW Landfills must submit applications to EDCs to both interconnect with the electrical grid and to receive payment as a “customer‑generator” for electricity generated at full retail rates pursuant to the net metering program. PWIA asserts that the new definition (new since November 2016) of “utility” with regard to the Commission’s net-metering regulations is unclear as to how this “utility” definition (really at issue is the “nonutility” definition) will be applied to MSW Landfills. PWIA also asserts that it is unclear whether the Commission considers MSW Landfills, and their landfill gas collection systems, landfill gas processing systems and control devices, and wastewater treatment plants used to treat landfill leachate, to be “critical infrastructure” for purposes of the Commission’s net-metering regulations. The “nonutility” status, as well as the “critical infrastructure” status, of MSW Landfills, are crucial to MSW Landfills qualifying as “customer-generators” under the Commission’s net-metering regulations. PWIA Petition at ¶¶ 46-48.

PWIA asserts the following facts to support its Petition:

1. MSW landfill means an “Municipal waste landfill” as defined in 25 Pa. Code 271.1 and that is also subject to the permitting and operating requirements set forth in 25 Pa. Code Chapter 273.
2. MSW Landfills are used to dispose of waste generated from homes, businesses, and other entities.
3. As the waste decomposes, it generates landfill gas (“LFG”).
4. LFG typically contains 50% methane, on average, and cannot be vented to the atmosphere.
5. MSW Landfills include a variety of environmental protection systems, including landfill gas collection systems, which are necessary to help prevent LFG from being vented to the atmosphere.

1. MSW Landfills use primary control methods with the collected LFG: i) they can destroy it in a flare with no energy recovery or economic benefit; ii) they can convert it into electricity—the process of converting LFG into electricity is called landfill gas-to-energy (“LFGTE”); and iii) they can process and treat it to become a direct-use fuel, either as a medium-BTU fuel substitute or a high-BTU “pipeline quality” substitute for natural gas.
2. MSW Landfills cannot turn off the generation of LFG as it occurs through anaerobic decomposition after waste disposal that occurs within an engineered cell over a period of years. The amount of gas generated is dependent on existing waste that has been in place for years, and the ongoing waste acceptance that occurs pursuant to municipal waste disposal contracts.

PWIA Petition at ¶¶ 20-26.

First, PWIA asserts that MSW Landfills are not utilities, nor are owners and operators of MSW Landfills operating a utility, pursuant to the definition of “utility” found in 52 Pa. Code § 75.1 of the Commission’s net-metering regulations. PWIA Petition at ¶¶ 49-55.

 In support thereof, PWIA asserts that MSW Landfills are costly and complex engineering projects, typically costing tens to hundreds of millions of dollars to construct, and that the primary purpose of owning or operating an MSW Landfill is clearly the disposal of waste. While all MSW Landfills produce landfill gas, that production is incidental to the disposal of waste. Although some MSW Landfills use the collected landfill gas to generate electricity, that generation is incidental and wholly dependent on the MSW Landfill’s primary business purpose, the disposal of waste. Finally, PWIA asserts that by any metric—employment, revenue, operating expense, etc. - the primary purpose, character or nature of an MSW Landfill is the disposal of waste, not the generation, transmission, distribution, or sale of electricity. Therefore, a MSW Landfill should not be considered a “utility”, nor should the owners or operators of MSW Landfills be considered as owning or operating a utility, for purposes of the Commission’s net-metering regulations. PWIA Petition at ¶¶ 49-55.

 Second, PWIA asserts that all MSW Landfills are “critical infrastructure” pursuant to the definition of “customer-generator” at 52 Pa. Code § 75.1, as well as for purposes of 52 Pa. Code § 75.16(c)(2) (qualifying for “customer-generator” status), in the Commission’s net-metering regulations. PWIA Petition at ¶¶ 56-81.

 In support thereof, PWIA asserts that the safe and efficient disposal of waste is an important and necessary aspect of modern infrastructure. MSW Landfills protect human health and the environment. MSW Landfills play an important role in disaster response, such as during Hurricane Sandy, and more recently Hurricane Harvey. MSW Landfills isolate and control waste and associated vectors. MSW Landfills protect the environment through proper siting, use of composite lines, leachate collection and removal systems, appropriate operating practices, LFG collection and control, groundwater and other monitoring, and are required to have 30-year closure and post-closure care requirements. PWIA Petition at ¶¶ 56-57.

 PWIA asserts that Pennsylvania residents generate 8.7 million tons of municipal solid waste each year. Having sufficient infrastructure necessary to manage and dispose of this waste is of critical importance to the citizens of the Commonwealth. The General Assembly directly spoke to this issue in Section 102 of the Solid Waste Management Act (“Act 97”), stating that “[t]he Legislature hereby determines, declares and finds that, since improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare….” 35 P.S. § 6018.102. PWIA Petition at ¶¶ 58-60.

PWIA also indicated that the General Assembly further stated, in Section 102(a) of the Municipal Waste Planning, Recycling and Waste Reduction Act (“Act 101”), that “[a]ll aspects of solid waste management, particularly the disposition of solid waste, pose a critical threat to the health, safety and welfare of the citizens of this Commonwealth.” 53 P.S. § 4000.102(a)(20). *See also* 53 P.S. §§ 4000.102(a)(1), (2), (17), (18), and (19). PWIA Petition at ¶¶ 61.

 PWIA also asserts that MSW Landfills are also a critical component of the infrastructure for the response to natural disasters, such as hurricanes, earthquakes, and other severe weather events, as well as pandemics such as the avian flu. Hurricanes generate large amounts of waste from impacted homes and businesses. Removing this waste and disposing of it quickly is important to prevent the spread of airborne mold and mildew spores, as well as other pathogens. Similarly, the prompt removal and disposal of this waste is important to prevent other vectors, such as vermin population booms, including rodents, mosquitos, bacteria, mold, mildew, etc. Pennsylvania’s MSW Landfills were an important part of the response to Hurricane Sandy and Tropical Storm Lee, assisting impacted communities in both Pennsylvania and New Jersey, as well as subsequent disasters. PWIA Petition at ¶¶ 63-70.

 PWIA also asserts that the safe operation of MSW Landfills requires the collection of landfill gas and the treatment of leachate water. MSW Landfills generate LFG continuously. MSW Landfills must collect and control LFG continuously to prevent fire and explosion. MSW Landfills must collect and control LFG continuously to protect the integrity of the landfill’s environmental protection systems. Leachate is a liquid that drains or “leaches” from the waste mass as storm water enters the top of the landfill, passes through the waste mass, and is collected from the bottom of the landfill. Leachate contains contaminants and cannot be discharged to the environment without appropriate treatment. The collected leachate is typically pumped to a holding tank or pond, where it is either treated on-site in a wastewater treatment plant operating under a permit issued by the PA DEP or transferred off-site to a permitted wastewater treatment facility. Some, but not all MSW Landfills, operate wastewater treatment facilities to treat leachate for discharge into streams and rivers. PWIA notes that the AEPS Act specifically identifies wastewater treatment plants as critical infrastructure. 73. P.S. § 1648.2 (Definition of “Customer-generator”). PWIA Petition at ¶¶ 71-81.

 PWIA asserts that because MSW Landfills play a crucial role in the protection of human health and the environment, and the continuous collection and control/treatment of LFG and leachate is essential to the operation of MSW Landfills, MSW Landfills, as well as its LFG collection systems, landfill gas processing and control devices, and leachate collection, are all “critical infrastructure” to the citizens of the Commonwealth, and as such should also be so within the meaning of the term for purposes of the Commission’s net-metering regulations. PWIA Petition at ¶¶ 81.

 Finally, in reliance on the foregoing, PWIA seeks a Declaratory Order stating:

* The environmentally safe disposal of solid waste is the primary purpose, character, and nature of MSW Landfills operating with permits issued under 25 Pa. Code Chapter 273;
* The generation and subsequent sale of any electricity derived from landfill gas, by the owner or operation of an MSW Landfill operating with a permit issued under 25 Pa. Code Chapter 273, is an ancillary activity and does not alter an MSW Landfill’s primary purpose, character, or nature;
* Businesses, persons, and entities that own or operate MSW Landfills operating pursuant to a permit issued under 25 Pa. Code Chapter 273, regardless of whether they generate, transmit, distribute, or sell electricity derived from or occurring at that landfill, are not utilities, as the term “utility” is defined in 52 Pa. Code § 75.1;
* MSW Landfills operating pursuant to permits issued under 25 Pa. Code Chapter 273 are “critical infrastructure” as that term is used in 52 Pa. Code § 75.16(c)(2); and

* Landfill gas collection systems, landfill gas processing systems and control devices, and wastewater treatment plants used to treat landfill leachate, are critical components to the operation of an MSW Landfill operating pursuant to a permit issued under 25 Pa. Code Chapter 273 and each is “critical infrastructure” in and of itself, as that term is used in 52 Pa. Code § 75.16(c)(2).

PWIA Petition at ¶¶ 82.

**C. Disposition**

Upon our consideration of PWIA’s Petition, and the supporting documents attached to the Petition, and upon analysis of the Public Utility Code and the relevant Commission regulations, we conclude the following:

The substance and facts pled in the Petition to Review demonstrate that this Petition for Declaratory Order has been filed due to actual impacts, and that issuance of this Declaratory Order will afford relief from uncertainty and insecurity for PWIA and MSW Landfill owners and operators, as well as electric distribution companies. We note that neither the statutory parties, nor any electric distribution company, filed any comments in opposition to the Petition.

PWIA’s Petition is well pled and meets all the requirements for issuance of a declaratory order. We adopt the facts stated in the Petition, as well as the attached supporting documents, as the factual basis for this Order.

First, owners of municipal waste landfills operating with a permit issued under 25 Pa. Code Chapter 273 are not utilities, as the term “utility” is defined in 52 Pa. Code § 75.1 of the Commission’s net-metering regulations. In particular, Section 75.1 defines “utility” as: “[a] business, person or entity whose primary purpose, character or nature is the generation, transmission, distribution or sale of electricity at wholesale or retail.” Based on the facts pled in the petition, we find that the primary purpose of municipal waste landfills is not the generation, transmission, distribution or sale of electricity. Rather, PWIA’s Petition has demonstrated that the environmentally safe disposal of solid waste is the primary purpose, character, and nature of entities that own municipal waste landfills. The ownership or operation of generation at a municipal waste landfill using the landfill gas and the subsequent sale of any electricity derived from that generator by the owner of the municipal waste landfill, is an ancillary activity and does not alter the primary purpose, character, or nature, of the entity that owns the municipal waste landfill such that it be considered a utility as defined in 52 Pa. Code § 75.1.

We are careful to distinguish that it is only owners or operators of municipal waste landfills holding a permit issued under 25 Pa. Code Chapter 273 that are not utilities under the facts presented in this Petition.

Second, municipal waste landfills operating with permits issued under 25 Pa. Code Chapter 273 are “critical infrastructure” as that term is used in 52 Pa. Code § 75.16(c)(2). We find controlling the intent of the General Assembly, which stated that “[t]he Legislature hereby determines, declares and finds that, since improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare….” regarding the passage and necessity of the Solid Waste Management Act. 35 P.S. § 6018.102. Moreover, the General Assembly further stated, in Section 102(a) of the Municipal Waste Planning, Recycling and Waste Reduction Act (“Act 101”), that “[a]ll aspects of solid waste management, particularly the disposition of solid waste, pose a critical threat to the health, safety and welfare of the citizens of this Commonwealth.” 53 P.S. § 4000.102(a)(20). *See also* 53 P.S. §§ 4000.102(a)(1), (2), (17), (18), and (19).

We agree with PWIA that safe and efficient disposal of waste is an important and necessary aspect of modern infrastructure, and that MSW Landfills protect human health and the environment. MSW Landfills play an important role in disaster response, such as during Hurricane Sandy, and more recently Hurricane Harvey. MSW Landfills isolate and control waste and associated infection vectors. MSW Landfills protect the environment through proper siting, use of composite lines, leachate collection and removal systems, appropriate operating practices, landfill gas collection and control, groundwater and other monitoring, and are required to have 30-year closure and post-closure care requirements. Given these functions, it is clear that a municipal waste landfill is critical infrastructure for the Commonwealth and its citizens.

Specifically, the landfill gas collection systems, landfill gas processing systems and control devices, and the wastewater treatment plants used to treat landfill leachate, for a municipal waste landfill operating with a permit issued under 25 Pa. Code Chapter 273, are also “critical infrastructure” as that term is used in 52 Pa. Code § 75.16(c)(2). These subsystems are necessary for the operation of the municipal waste landfill, and as such are critical infrastructure to support the municipal waste landfill. These systems are critical systems to prevent explosions, as well as to prevent waste from reaching the environment.

**IV. Conclusion**

Consistent with the foregoing discussion; **THEREFORE,**

**IT IS ORDERED:**

1. We grant PWIA’s Petition.
2. Owners of municipal waste landfills operating with a permit issued under 25 Pa. Code Chapter 273 are not utilities, as the term “utility” is defined in 52 Pa. Code § 75.1 of the Commission’s net-metering regulations.
3. The environmentally safe disposal of solid waste is the primary purpose, character, and nature of entities that own municipal waste landfills.
4. The ownership or operation of generation at a municipal waste landfill using the landfill gas and the subsequent sale of any electricity derived from that generator by the owner of the municipal waste landfill, is an ancillary activity and does not alter primary purpose, character, or nature, of the entity that owns the municipal waste landfill such that it be considered a utility as defined in 52 Pa. Code § 75.1.
5. Municipal waste landfills operating with permits issued under 25 Pa. Code Chapter 273 are “critical infrastructure” as that term is used in 52 Pa. Code § 75.16(c)(2).
6. Landfill gas collection systems, landfill gas processing systems and control devices, and wastewater treatment plants used to treat landfill leachate, are critical components to the operation of a municipal waste landfill operating with a permit issued under 25 Pa. Code Chapter 273, and each is “critical infrastructure” in and of itself, as that term is used in 52 Pa. Code § 75.16(c)(2).
7. That this matter be marked closed.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: April 5, 2018

ORDER ENTERED: April 5, 2018

1. *PWIA v. Pa Public Utility Commission*, (Pa. Cmwlth., No. 42 M.D. 2017). [↑](#footnote-ref-1)