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PWIA
Pennsylvania Waste Industries Association
122 State Street, Harrisburg, Pennsylvania 17101

April 29, 2016

Via U.S. Mail and E-Mail
Independent Regulatory Review Commission
333 Market St, 14th Floor
Harrisburg, PA 17101

Re: Comments in Opposition to the Portion of the Public Utility Commission's Final Rulemaking Order, adopted February 11, 2016, as it applies to 52 Pa. Code §§ 75.13(a)(3) and 75.1
Regulation No. 57-304; Implementation of the Alternative Energy Portfolio Standards Act of 2004; Doc. No. L-2014-2404361
IRRC No. 3061; Public Meeting Scheduled May 19, 2016

Dear Independent Regulatory Review Commissioners:

The Pennsylvania Waste Industries Association ("PWIA") submits these comments in opposition to the portion of the Pennsylvania Public Utility Commission's ("PUC") Final Rulemaking Order promulgated on February 11, 2016 to the extent it limits the ability of sources otherwise qualified to participate in net metering to 200% of the facility's historical electricity through issuance of final-form 52 Pa. Code §75.13(a)(3) (the "Regulation" or "200% Rule") and 52 Pa. Code §75.1.[1] PWIA believes that these final-form regulations are unlawful as the PUC lacked the authority to promulgate them and they violate both the explicitly-stated and judicially-interpreted intent of the General Assembly in enacting Act 213 of 2004, as amended by Act 35 of 2007 ("Act 213"), by limiting the capacity of alternative energy sources that may participate in the net metering program beyond the limits explicitly established in Act 213.

[1] As amended, §75.1 defines a "Utility" as:

> A person or entity that provides electric generation, transmission or distribution services, at wholesale or retail, to other persons or entities. An owner or operator of an alternative energy system that is designed to produce no more than 200% of a customer-generator's annual electric consumption or satisfied the conditions under §75.13(a)(3)(IV) (relating to general provisions) shall be exempt from the definition of utility in this chapter.

Consequently, the PWIA's objections to final-form 52 Pa. Code §75.13(a)(3) articulated *infra* are hereby applied to final-form 52 Pa. Code §75.1 to the extent that §75.1 incorporates the 200% limit.

The Regulation is unlawful because it disregards and contradicts the plain language of Act 213. The IRRC specifically and explicitly identified this deficiency in its 2014 comments,[2] yet the PUC did not sufficiently answer commenters' arguments, including the IRRC's and PWIA's as well as many others, that the limitations imposed by the Rulemaking lack any statutory basis and contradict the plain language of Act 213. Under the Regulation, a customer-generator[3] may generate no more than 200% of its annual electricity consumption for net metering[4] purposes. Mysteriously, while contending that this "reasonable and balanced" limit on the size of alternative energy systems for customer-generators is authorized under Act 213, the PUC ignores the specific restriction—three (3) MW[5]—Act 213 contains on capacity. Act 213 neither restricts consumption as a percentage of capacity, nor contemplates or authorizes the PUC to impose such restrictions.

The Legislature's intent 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, is crystal clear. We believe that disapproval of the 200% Rule by the IRRC is mandated by 71 P.S. § 745.5b(a)(1) because the PUC lacks the statutory authority to promulgate the regulation, and § 745.5b(a)(2) because the regulation does not conform to the legislature's intent in enacting the statute upon which the regulation is based.

PWIA's Interest in this Matter

PWIA's interests in this matter remain as set forth in its Comment Letters, dated September 2, 2014, and May 29, 2015, respectively.[6] Today's comments are submitted in

[2] *See* Pa. Pub. Util. Comm'n, Regulation 357-304 (IRRC 3061), dated October 3, 2014, PUC Regulation No. 57-304 (IRRC No. 3061), at 44 Pa. B. 6733 ("Commentators have questioned the PUC's statutory authority for this provision . . . . Regarding statutory authority, the commentators believe there is nothing in [Act 213], Act 35, or Act 129 that would allow PUC to impose such a restriction.").

[3] In pertinent part, Act 213 defines a "[c]ustomer-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 . . ." 73 P.S. § 1648.2.

[4] In pertinent part, Act 213 defines "[n]et metering" 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.

73 P.S. § 1648.2.

[5] If certain statutorily established criteria are met, the limit is raised to five (5) MW.

[6] PWIA's Comment Letters, dated September 2, 2014, and May 29, 2015, are incorporated by reference as if set forth herein in their entirety.

furtherance of our primary missions, particularly advancing environmentally responsible management of solid waste through sound public policy. In part, PWIA's September 2, 2014 Comment Letter explained:

- Landfills are in the business of waste disposal, not merchant electricity sales.
- As part of the disposal operations, 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 213.
- The amount of landfill gas generated by a landfill is a direct function of the mass of waste contained in the landfill. Like the other generators of biologically derived methane gas, the landfill customer-generator's electric generating potential is solely a function of the existing business, i.e. the mass of waste contained in the landfill.

Final-Form 52 Pa. Code §§ 75.13(a)(3) and 75.1 are Unlawful

Proffered 200% Limit Contradicts the Plain Meaning of Act 213 and the Underlying Legislative Intent

The PUC can presume that the legislature did not intend an interpretation of the statute that is absurd or unreasonable.[7] Although the PUC is entitled to deference when interpreting a statute or engaging in rulemaking pursuant to that statute, "when an administrative agency's interpretation is inconsistent with the statute itself, or when the statute is unambiguous, such administrative interpretation carries little weight."[8] "The clearest indication of legislative intent is generally the plain language of a statute."[9] "[W]here statutory language is clear...interpretive discretion ends and the agency must abide by the statute."[10]

[7] 1 Pa. C.S. § 1922(1).

[8] *Lancaster Cnty. v. Pa. Labor Relations Bd.*, 124 A.3d 1269, 1286 (Pa. 2015) (citation and internal quotation marks omitted); *accord. Dauphin Cnty. Indus. Dev. Auth. v. Pa. Pub. Util. Comm'n*, 123 A.3d 1124, 1133-34 (Pa. Commw. Ct. 2015).

[9] *Walker v. Eleby*, 842 A.2d 389, 400 (Pa. 2004).

[10] *Pa. Power Co. v. Pub. Util. Comm'n*, 932 A.2d 300, 306 (Pa. Commw. Ct. 2007); *accord.* 1 Pa. C.S § 1921(b); *see also Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2445 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always 'give effect to the unambiguously expressed intent of Congress.'") (quoting *Nat'l Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007)).

In crafting Act 213, the General Assembly was perfectly clear as to the qualifications for net metering. Act 213 expressly provides that non-residential customer-generators with net-metered distributed generation systems that have a nameplate capacity of no more than three (3) MW qualify for net metering if any portion of their electricity is used on-site to offset their non-generation electrical consumption.[11] Act 213 further sets forth that "[e]xcess generation from net-metered customer-generators shall receive full retail value for all energy produced on an annual basis."[12] Unlike "some", "several" and "many", the words "any", "three", and "all" are clear and unambiguous. Act 213 contains a clear, explicit, and unambiguous limitation on the nameplate capacity of AEPS sources of electricity that qualify for net metering compensation — three (3) MW—and no further limitation is established, necessary, or allowed. Given the General Assembly's clear statement of the qualification standard as set forth in Act 213, the PUC's interpretation of this section of the statute yields a result that is absurd and unreasonable, in direct violation of 1 Pa. C.S. § 1922(1).

In support of its alleged authority to promulgate the Regulation, the PUC adduces its general authority under the Pennsylvania Utility Code[13] and Act 213.[14] The perfunctory and conclusory nature of these arguments aside, the PUC's stance rings hollow because it neglects to address, let alone rebut, those commenters' objections that the IRRC previously recognized and referenced—that the PUC has no authority to rewrite express limitations on customer-generators' size already articulated within Act 213.[15]

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[11] 73 P.S. § 1648.2.

[12] 73 P.S. § 1648.5 (emphasis added).

[13] *See Final Rulemaking Order*, Docket No. L-2014-2404361, Implementation of the Alternative Portfolio Standards Act of 2004, at p. 45 ("'The [PUC] shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The [PUC] may make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties.'") (quoting 66 Pa. C.S.A. § 501(b)).

[14] *See Final Rulemaking Order*, Docket No. L-2014-2404361, Implementation of the Alternative Portfolio Standards Act of 2004, at p. 45 ("The [PUC] also has broad rulemaking authority to implement [Act 213]." (quoting 73 P.S. § 1648.7(a)). However, unlike with the Pennsylvania Utility Code, the PUC is unable to identify a single, solitary section of Act 213 that bestows such general rulemaking authority. Instead, the PUC relies upon § 1648.7, entitled "Interagency responsibilities," that states that the PUC "will carry out the responsibilities delineated within [Act 213]," 73 P.S. § 1648.7(a), for the premise that it is entitled to draft regulations that alter the express language the legislature has set forth in the statute—yet, curiously, the PUC neglected to identify any Act 213 language that could be reasonably construed as ingratiating the PUC with general rulemaking authority. Moreover, even assuming, *arguendo*, that the PUC did enjoy such extensive power under Act 213, Act 213's net metering limitation language would still remain inconsistent with the Regulations, thereby rendering the Regulation unlawful under, *inter alia*, the Pennsylvania Utility Code—which only permits the PUC to promulgate regulations, "*not* inconsistent with law . . . ." 66 Pa. C.S.A. § 501(b) (emphasis added).

[15] *See supra* note 2.

On a closely related issue, the Commonwealth Court recently rebuked the PUC for ignoring the Public Utility Code's and Act 213's plain language requiring all customers, including those engaged in net metering, to receive an offer for time-of-use rates.[16] There, as is the case here, the PUC erroneously contended that the statutory obligation to permit net metering at retail value for all excess energy produced must be balanced with its general mandate to safeguard "just and reasonable" rates for all customers.[17] Specifically, the Court noted that "[t]he statutory requirement that utility rates be just and reasonable does not authorize the [PUC] to ignore or alter other statutory directives."[18] The Commonwealth Court further noted that:

> [Act 213] is focused on the electric utility's purchase of excess electricity from customer-generators. The purpose of [Act 213] is to encourage growth and investment in renewable sources of energy.[19] [Act 213] achieves this goal by requiring that '[e]xcess generation from net-metered customer-generators shall receive full retail value for all energy produced on an annual basis.'[20]

[16] *See Dauphin Cnty. Indus. Dev. Auth. v. Pa. Pub. Util. Comm'n*, 123 A.3d 1124, 1133-35 (Pa. Commw. Ct. 2015). "The legislature's unqualified use of the words 'shall offer' . . . places the burden on the default service provider . . . to offer Time–of–Use rates to customer-generators." *Id.* at 1134 (quoting 66 Pa. C.S.A. § 2807(f)(5)).

[17] *Dauphin*, 123 A.3d at 1135-36.

[18] *Dauphin*, 123 A.3d at 1135 (citing *Popowsky v. Pa. Pub. Util. Comm'n*, 910 A.2d 38, 53 (Pa. 2006).

[19] Act 213 is an act "[p]roviding for the sale of electric energy generated from renewable and environmentally beneficial sources," and "the acquisition of electric energy generated from renewable and environmentally beneficial sources by electric distribution and supply companies . . . ." Constitutional Title of Act of Nov. 30, 2004, P.L. 1672, No. 213; *accord Comments of Rep. Greg Vitali*, Docket No. L-2014-2404361, dated September 3, 2014, at p.1, ¶2 ("The intent of the legislature in enacting [Act 213] was to promote the purchase of renewable energy . . . ."), *available at* http://www.irrc.state.pa.us/docs/3061/COMMENTS_LEGISLATIVE/3061%2009-03-14%20REP%20VITALI.pdf; *Comments of Rep. Mindy Fee, et al.*, Docket No. L-2014-2404361, dated August 21, 2014, at p. 3, ¶1 ("More generally, the General Assembly believed as a matter of public policy that the Commonwealth should encourage the development of sources of energy that utilize renewable fuels . . . ."), *available at* http://www.irrc.state.pa.us/docs/3061/COMMENTS_LEGISLATIVE/3061%2009-08-14%20REP%20FEE%20&%206%20REPS.pdf ("More generally, the General Assembly believed as a matter of public policy that the Commonwealth should encourage the development of sources of energy that utilize renewable fuels . . . ."); *see also Dauphin*, 123 A.3d at 1135 (The policy decision expressed in [Act 213] to encourage the production of renewable energy sources is not conditioned on its producing the lowest possible tariff).

[20] *Dauphin*, 123 A.3d at 1131 (quoting 73 P.S. § 1648.5) (first and fourth emphasis and fourth alteration in original). Furthermore, although Act 213 does direct the PUC to develop certain net metering regulations in limited circumstances, i.e. only those relating to technical or interconnected issues, 73 P.S. § 1648.5, the 200% limit, which only impacts whether a customer-generators can "receive full retail value for all energy produced," is purely financial—involving absolutely no "technical" or "interconnection" issues—in nature. In *Dauphin*, the Court made clear that the PUC could not utilize the authority granted to it under § 1648.5 to alter the financial compensation due customer-generators. *See Dauphin*, 123 A.3d at 1131-36.

We also note that while this Commonwealth Court decision was rendered after the close of the final public comment period on the regulations, it was issued well before the PUC issued the Final Rulemaking Order. Despite the fact that the PUC was a party in the *Dauphin* litigation, the Commonwealth Court's prohibition on the PUC using its "general mandates", such as ensuring rate fairness, as justification to ignore or alter a specific statutory directive is not addressed in the PUC's Final Rulemaking Order. In its limited discussion of the disposition of comments regarding its legal authority,[21] the PUC completely ignores the *Dauphin* case and avers that it has authorities the Dauphin court determined that it does not. The PUC's reliance in the Final Rulemaking Order on its general mandates is particularly troubling given the *Dauphin* decision.

The PUC's Final Rulemaking Order is bereft of an explanation detailing how the Regulation serves Act 213's goals of encouraging the growth of renewable energy by passage of a regulation that intentionally limits the amount of renewable electricity for which net-metered customer-generators may be compensated. That the Regulation clearly constrains, rather than promotes, the development of alternative energy sources likely explains the absence of such an explanation. Had the PUC attempted to offer an explanation of how severely limiting compensation for an activity would encourage that activity's growth in the Final Rulemaking Order, we suspect it would have sounded similar to the infamous quote regarding the bombing of the Vietnamese town Bến Tre, "it became necessary to destroy the town to save it".

The plain language of Act 213 does not discuss or reference 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 PUC to promulgate any such limits. Act 213 is clear and unambiguous—customer-generators who have a nameplate capacity of no more than three (3) MW, and use any portion of their electricity on-site to offset, shall receive full retail value for all excess electricity they produce.[22]

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[21] While the "discussion" of the disposition of the challenges to the PUC's legal authority span 7 pages, the majority of the discussion focuses solely on policy considerations. The relevant discussion regarding legal authority essentially relies wholly on the PUC general mandates. *See Final Rulemaking Order*, Docket No. L-2014-2404361, Implementation of the Alternative Portfolio Standards Act of 2004, at pp. 45-46.

[22] The phrase "any portion of the electricity" was added by the legislature through Act 35, and provides a completely objective standard for qualification. *See* Act of July 17, 2007, P.L. 114, No. 35, § 2 (Net metering is "[t]he 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."). This phrase replaced Act 213's previous language, which provided a subjective standard based on the customer-generator's "intent" to determine qualification for the net metering program. *See* Act of Nov. 30, 2004, P.L. 1672, No. 213, §2 (Net metering is "[t]he means of measuring the difference between the electricity supplied by an electric utility and the electricity generated by a customer-generators when the renewable energy generating system is intended primarily to offset part or all of the customer-generator's requirements for electricity."). 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 Act 213. The intent of the change and the current statutory language are clear—establishment of an unambiguous, objective standard—"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." In light of *Dauphin*,

(cont'd)

Consequently, that the Regulation imposes a restriction on net metering based on a customer-generator's consumption as a percentage of capacity renders the Regulation unlawful pursuant to Pennsylvania law,[23] a fact the PUC's Chairperson[24] notes: "because [Act 213] very precisely provides that customer generators may size up to 50kw for residential systems and up to 3 or 5 MW for non-residential systems, [the PUC] commits legal error by imposing a different size limitation in our regulations." [emphasis added]. This position is echoed by the dissenting

_____(cont'd)
it would be absurd to conclude 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"; the legislature had two opportunities to forge Act 213 in the same fashion the PUC attempts here and declined to do so on both occasions.

Additionally, the arbitrary, capricious, and unlawful nature of the PUC's actions is further illustrated by its decision to increase the originally proposed 110% limit to 200%, while simultaneously claiming that the "200% limit will ensure that rates default service customers pay for generation is the least cost to customers . . . " without any economic analysis of either proposed limit. *Final Rulemaking Order*, Docket No. L-2014-2404361, Implementation of the Alternative Portfolio Standards Act of 2004, at p. 48. To posit that a 200% limit will ensure the "least cost," when the PUC originally insisted the 110% limit was necessary to ensure the least cost to customers is nonsensical and only underscores the utter lack of support for the PUC's scheme under Pennsylvania law. Similarly, it is unclear as to how the PUC found legal authority under Act 213 to exempt some, but not all, biologically derived methane gas from the 200% Rule based on geographical and other considerations.

[23] *See supra* text accompanying notes 7-10 and notes 7-10.

[24] In pertinent part, Chairman Gladys M. Brown's dissented:

> I am unable to support the proposed amendment of Section 75.13(3) [sic] of the regulations that would require an alternative energy system to be sized to generate no more than 200% of the customer generator's annual electric consumption at the interconnection meter and all qualifying virtual meter aggregation locations . . . . Because one of the basic tenets of public utility regulation, per 66 Pa. C. S. § 1301, is to set rates that are 'just and reasonable,' any rational regulator would be tempted to limit a customer generators from being paid retail rates for energy produced by a system that was purposefully oversized. But, setting such a limit ignores the very specific size limitation provided in [Act 213].
> ...
> Because [Act 213] very precisely provides that customer generators may size up to 50kw for residential systems and up to 3 or 5 MW for non-residential systems, [the PUC] commits legal error by imposing a different size limitation in our regulations. The statutory requirement that utility rates be just and reasonable does not authorize the [PUC] to ignore or alter other statutory directives.

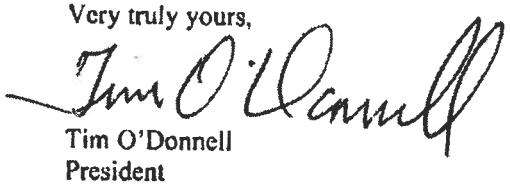
Statement of Chairman Gladys M. Brown, Docket No. L-2014-2404361, Public Meeting held February 11, 2016, at ¶¶ 3-4 (citations and footnote omitted; emphasis added).

statement of the Vice Chairman[25] "the [PUC], as a creation of the legislature, has only those powers conferred upon it by statute...Therefore I must oppose the Rulemaking because I believe that it goes beyond the [PUC]'s authority"

Conclusion

PWIA opposes final-form 52 Pa. Code §§ 75.13(a)(3) and 75.1. PWIA believes that they are unlawful because they both disregard and contradict the plain language of Act 213 and the General Assembly's explicitly-stated, and judicially-interpreted intent,[26] in enacting the statute. Moreover, as the Commonwealth Court has previously demonstrated in *Dauphin*, approval of the Regulation will not survive judicial scrutiny and we strongly encourage the IRRC to disapprove final-form 52 Pa. Code §§ 75.13(a)(3) and 75.1 in accordance with the requirements of both 71 P.S. § 745.5b(a)(1) and § 745.5b(a)(2).

Very truly yours,



Tim O'Donnell
President

cc: Senator Vogel
Representative Zimmerman
US EPA Landfill Methane Outreach Program Director

[25] In pertinent part, Vice Chairman Andrew G. Place's dissented:

> [I]t is axiomatic that the [PUC], as a creature of the legislature, has only those powers conferred upon it by the statute. Therefore, I must oppose the Rulemaking because I believe that it goes beyond the [PUC's] authority.
> ...
> In summary, I firmly believe that consumers are best served by getting the "retail value" price right, rather than by seeking to impose net metering capacity restrictions which are not in [Act 213].

Statement of Vice Chairman Andrew G. Place, Docket No. L-2014-2404361, Public Meeting held February 11, 2016, at ¶¶ 2, 5 (citation omitted).

[26] *See supra* text accompanying note 19 and notes 19-20.