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VIA HAND DELIVERY

Chairman George D. Bedwick
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

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IRRC

RE: Implementation of the Alternative Energy Portfolio Standards Act of 2004
Pennsylvania Public Utility Commission Regulation No. 57-304
Independent Regulatory Review Commission ("IRRC") No. 3061

Chairman Bedwick:

On behalf of Granger Energy of Honey Brook LLC and Granger Energy of Morgantown LLC (collectively, "Granger Energy"), this letter, as set forth in greater detail below,¹ recommends disapproval of the subject regulations² submitted by the Pennsylvania Public Utility Commission ("Commission" or "PUC") in their entirety.

Introduction

Granger Energy is a customer-generator using, and intending to use, net metering in the service territory of PPL Electric Utilities ("PPL"),³ as provided in the current PUC regulations, the tariff

¹ Granger Energy's comments are based on the criteria in Section 5.2 of the Regulatory Review Act. 71 P. S. § 745.5b.

² *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, PUC Docket No. L-2014-2404361, Final Rulemaking Order entered February 11, 2016.

³ Granger Energy of Honey Brook LLC is located at the Chester County Solid Waste Authority Lanchester Landfill in Chester County, Pennsylvania, and provides landfill gas to industrial customers. *Petition of Granger Energy of Honey Brook, LLC for a Declaratory Order Concluding that the Provision of Landfill Gas by Granger Energy of Honey Brook, LLC to Four Industrial Customers Constitutes Neither the Provision of Public Utility Service under 66 Pa. C.S. § 102 nor Natural Gas Distribution Service or Natural Gas Supply Services under 66 Pa. C.S. § 2202*, PUC Docket No. P-00032043, Order entered September 8, 2004, 2004 Pa. PUC LEXIS 33, Granger Energy of Honey Brook LLC also owns and operates generation facilities that use landfill gas to generate

of PPL, and the AEPS Act,⁴. The parent of Granger, Granger Holdings, LLC, is a leader in the development of renewable energy projects that use landfill gas and has been producing landfill gas for use in industrial boilers and to generate electricity since 1985. It is a third generation, family-owned and operated business based in Lansing, Michigan. It specializes in partnering with landfill owners, private industry, municipalities and utilities to create mutually beneficial landfill gas recovery solutions that make sense economically and environmentally. Granger Energy is concerned that the subject regulations will severely limit both the existing and prospective eligibility of customer-generators' existing and planned energy projects for net metering in Pennsylvania.

Comments

Alternative energy systems that are either already on line or which have taken substantial steps to be on line should not have new and significant restrictions imposed on them. They have made financial and operational commitments in good faith reliance on the existing rules. Specifically, Granger Energy believes that any existing customer-generator who is, at the time of the final passage of any such limitation, (a) actually engaged in the practice of net-metering or (b) have or are seeking a Method of Accommodation from the Electric Distribution Company ("EDC"), such as PPL, should be grandfathered and exempted from the application of the Commission's proposed final regulations.

electricity (currently 3.2 MW) which is delivered to the distribution system of PPL Electric Utilities ("PPL"), consistent with current law, rules and regulations.

Granger Energy of Morgantown LLC is located at the Conestoga Landfill in Berks County, Pennsylvania. It provides landfill gas to industrial customers. *See Granger Energy of Morgantown, LLC*; PUC Docket No. M-00051865F0002, Notice and Disclosure Statement, published on July 12, 2008. That Notice and Disclosure Statement is available at <http://www.pabulletin.com/secure/data/vol38/38-28/1309.html>. It is in the process of planning and permitting generators, which it will own and operate, to generate electricity (up to 5 MW as currently allowed under the AEPS Act) that will be delivered to the PPL distribution system under the AEPS Act, the Commission's Regulations, and PPL's net metering tariff provisions. In fact, Granger Energy of Morgantown LLC has a Method of Accommodation from PPL for the project at 3.2 MW, and an application is currently in process for a revised method of accommodation for the project for 4.8 MW.

⁴ The "AEPS Act," which took effect on February 28, 2005, established an alternative energy portfolio standard for Pennsylvania. It was codified at 73 P.S. §§ 1648.1, *et seq.*

The 200% Limitation

For the following reasons, Granger Energy submits that the 200% limitation⁵ is (a) not consistent with the statutory authority of the agency,⁶ (b) not consistent with the intention of the General Assembly,⁷ and (c) not in the public interest:⁸

The Commission's 200% consumption limitation conflicts with the AEPS Act. On its face, the 200% limitation is not consistent with the AEPS Act. In adopting the 200% limitation, the Commission is acting to prohibit systems that are otherwise eligible for net metering under the AEPS Act. For example, a residential customer-generator with an annual demand of 1.2 kW⁹ could only design and use a system of 2.4 kW – despite statutory permission to design and use a system of up to 50 kW. The fact that size limitations were not intended or established by the General Assembly precludes the Commission's ability to add the proposed 200% limitation.

The General Assembly did not delegate to the Commission the power to promulgate a consumption limitation. The General Assembly has indicated its interest in promoting and expanding the use of net metering and the use of alternative energy systems.¹⁰ The AEPS Act provides that customer-generators may design, build and operate a facility up to a specified nameplate capacity.¹¹ Depending on the customer-generator and the system design, this could be

⁵ *Final Rulemaking Order, at pp. 38-51, at Annex A, pp. 6-7* (Proposed Section 75.13(a)(3)).

⁶ 71 P.S. § 745.b(a) (IRRC “shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based.”).

⁷ *Id.*

⁸ *See, e.g.,* 71 P.S. §§ 745.b(b)(3), (4), (7), (8)

⁹ According to data from the U.S. Energy Information Association's (EIA's) 2009 Residential Energy Consumption Survey (www.eia.gov/consumption/residential/), the average electricity consumption in Pennsylvania homes is 10,402 kWh per year. https://www.eia.gov/consumption/residential/reports/2009/state_briefs/pdf/pa.pdf This equates to about 1.2 kW per year (10,402 kWh divided by 8760 hours).

¹⁰ Act 2008-129 (H.B. 2200), P.L. 1592, § 3, approved Oct. 15, 2008, eff. in 30 days.

¹¹ For a residential property, the nameplate capacity limit is 50 kilowatts. 73 P.S. § 1648.2 (definition of customer-generator). For non-residential properties as business or industry), the nameplate capacity limit is 3,000 kilowatts or 3 MWs. *Id.* But, if certain

50 kW, 3 MW or 5 MW. None of those limitations are based on the actual use (or consumption) of electricity by a customer-generator.¹² Nothing in the statutory provisions or stated legislative intent which show a desire on behalf of the General Assembly to impose new or further limitations on net-metered alternative energy systems.

The General Assembly, not the Commission, should be making the basic policy decision on the permissible size of alternative energy systems.¹³ The size of such systems is a policy decision of such a substantial nature that it should be made by the elected officials of the General Assembly. As noted, the Commission is not empowered to substitute its judgment for that of the General Assembly as to the need for consumption limitations on net-metered alternative energy systems. This is especially true when the Commission has failed to give clear explanation for its change in position/policy. No actual data was used by the Commission to show that an actual problem exists with the prices paid for excess generation from net metered alternative energy systems. The Commission broadly, and generally claims, that the purchase of alternative energy by EDCs is harming default service customers. Such claims are not supported by data. The fiscal impact of the proposal was not calculated or articulated by the Commission. Nor was that impact compared to the benefits of electricity from alternative energy sources by the Commission. And, importantly, No data was used to show that the consumption limitation, which changed from 110% to 200%, is a viable solution to the problem the Commission is (allegedly) trying to solve.

design criteria are satisfied, a non-residential facility can have a nameplate capacity of up to 5,000 kilowatts or 5 MWs. *Id.*

¹² The AEPS Act requires that “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 (definition of customer-generator).

¹³ Administrative agencies are created by the Pennsylvania General Assembly, as part of the executive branch, to aid in the faithful execution of laws. Pa. Const. art. IV, § 1; *Blackwell v. State Ethics Commission*, 567 A.2d 630 (Pa. 1989). In *Blackwell*, the Pennsylvania Supreme Court stated that “the Legislature cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority.” *Blackwell*, 567 A.2d at 636. “While the General Assembly may, with adequate standards and guidelines, constitutionally delegate the power and authority to execute or administer a law, the prohibition against delegation of ‘legislative power’ requires that the basic policy decisions be made by the General Assembly.” *Id.* at 637.

Definition of “Utility”¹⁴

Granger Energy submits that the proposed definition of utility (a) is intended to unlawfully exclude existing net metering projects that do not fit the new definition; and, (b) is not in the public interest.¹⁵

The Commission is not acting in the public interest by refusing to grandfather existing alternative energy systems. The proposed definition of term “utility” incorporates a 200% consumption limitation¹⁶ on all other net metered alternative energy systems.¹⁷ If the proposed definition is approved, the Commission has stated that it cannot ignore the term “nonutility” and must enforce it.¹⁸ In fact, the Commission explicitly refused to state that the definition of “utility” would only be applicable to new facilities.¹⁹ The Commission has also broadly concluded that “entities that own facilities with a nameplate capacity of between three megawatts and up to five megawatts that normally supply most or all of their output to the local utility cannot qualify as customer-generators, as they cannot make their generation available to operate in parallel with local utilities during grid emergencies.”²⁰

¹⁴ Final Rulemaking Order, at pp. 12-23, at Annex A, p. 5 (Proposed Section 75.1, definition of utility).

¹⁵ 71 P. S. §§ 745.5b(a), (b)(3), (b)(4), (b)(7), (b)(8).

¹⁶ With respect to the incorporation of said 200% limitation, the Commission’s efforts are fatally flawed for all of the reasons discussed above.

¹⁷ Final Rulemaking Order, at pp. 12-23, at Annex A, p. 5 (Proposed Section 75.1, definition of utility). The proposed definition of “utility” provides: “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 satisfies the conditions under §75.13 (a)(3)(iv) (relating to general provisions) shall be exempt from the definition of a utility in this chapter. This term excludes building or facility owners or operators that manage the internal distribution system serving such building or facility and that supply electric power and other related power services to occupants of the building or facility. .” Final Rulemaking Order, at Annex A, p. 5 (Proposed Section 75.1, definition of utility) (emphasis added).

¹⁸ Final Rulemaking Order, at p. 23.

¹⁹ Final Rulemaking Order, at p. 23.

²⁰ Final Rulemaking Order, at p. 90.

The Commission's refusal to grandfather existing facilities from the 200% limitation in the definition of utility is not acceptable, and would violate both constitutional protections²¹ and Granger Energy's vested rights. It is a fundamental rule of due process that the rules are not changed after the game has been played. This is why both the United States Constitution²² and the Pennsylvania Constitution²³ forbid *ex post facto* laws. That being said, once within the scope of the "utility" definition, it could be argued that the owner/operator or alternative energy system no longer qualifies for net metering under Proposed Section 75.13(a)(2) ("The owner or operator of the alternative energy system may not be a utility."²⁴

The Commission is not acting in the public interest by only giving anaerobic digesters special treatment. The Commission has exempted anaerobic digesters from the 200% limitation in the definition of utility. It justified said exemption because such systems are "specifically sized to deal with the waste produced primarily by that customer's operations."²⁵ Both anaerobic digesters and landfill gas systems are using the by-product of other operations to create electricity. To wit: landfill gas is a by-product of waste deposited in landfills. Once recovered,²⁶ landfill gas can be used as an alternative to natural gas or other conventional fossil fuels by directly powering industrial applications or as a fuel to generate electricity. Using landfill gas to generate electricity further reduces greenhouse gas impacts and also reduces emissions of nitrogen oxides, sulfur dioxide and mercury. By displacing demand for electricity from traditional power plants, landfill gas-to-electricity projects further reduce these important

²¹ The rules, regulations and standards of a regulatory agency must be reasonable, understandable, available, and must not violate the constitutional rights of any citizen. *See, e.g., Bortz Coal Co. v. Commonwealth, Air Pollution Commission*, 279 A.2d 388 (Pa.Cmwlth. 1971).

²² Article I, Section 10 of the U.S. Constitution provides that: "No state shall pass any bill of attainder, ex post facto law or law impairing the obligation of contracts."

²³ Article I, Section 17 of the Pennsylvania Constitution provides that: "No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."

²⁴ This argument would not be applicable to existing (and grandfathered) anaerobic digesters and/or existing (and grandfathered) internal distribution systems. Such systems are (1) excluded and/or exempted from the definition of "utility" under Proposed Sections 75.1 and (2) grandfathered under Section 75.13(a)(3)(III) and/or (IV). See Final Rulemaking Order, at Annex A, p. 5, 6-7 (Proposed Sections 75.1 and 75.13(a)(2)).

²⁵ Final Rulemaking Order, at p. 47, 56, 79-80.

²⁶ If the landfill gas is not recovered, it is usually flared.

pollutants. The incongruent treatment of anaerobic digesters and landfill gas is not reasonable and is not explained by the Commission. It follows that such incongruent treatment could be found by the Courts to violate Granger Energy's equal protection rights.

Conclusion

The foregoing comments demonstrate that provisions in the subject regulations are fatally flawed and do not satisfy the criteria set forth in the Regulatory Review Act. The provisions discussed here are not reasonable and would violate the constitutional rights of existing customer-generators, if implemented in the manner contemplated by the Commission. Since IRRC must act on the regulations in their entirety, Granger Energy submits that the IRRC should act to disapprove said regulations in their entirety.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Carl R. Shultz', with a long horizontal line extending to the right.

Carl R. Shultz
Attorney for Granger Energy

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