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Pennsylvania Waste Industries Association
127 State Street, Harrisburg, Pennsylvania 17101

May 12, 2016

Via U.S. Mail and E-Mail

Independent Regulatory Review Commission
333 Market St, 14th Floor
Harrisburg, PA 17101

Re: Supplemental 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 ("AEPS"); 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 supplemental comments, specific to the Regulatory Analysis Form ("RAF") prepared by the Pennsylvania Public Utility Commission's ("PUC"), relating to its Final Rulemaking Order promulgated on February 11, 2016. As indicated in our primary comment letter, submitted to your attention on April 29, 2016, PWIA opposed the regulation 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 offers these supplemental to correct and/or clarify three misstatements in the PUC's RAF that relate specifically to the use of landfill gas.

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.

RAF, Section 10

Beginning with the first full paragraph on page 3 of the RAF, the PUC makes several conclusory statements regarding some of the financial aspects of the current net metering program, based on “information obtained from EDC’s.” No meaningful data or calculations are provided, and the PUC acknowledges that the summary is specific to “one service territory.” Based on our research, this data and conclusions were not previously presented or referenced by the PUC in any document related to this regulation. Not only has this “analysis” been withheld from public review, but it is not responsive to the requirement stated in Section 10 of the RAF to “Quantify the benefits as completely as possible.”

While it is reasonable to infer that the PUC has not provided that information because it either finds the results of a statewide analysis to be unpersuasive or because it never performed such an analysis in the initial instance, the reason for its failure is irrelevant². Regardless of the cause, the quality of the data an analysis provided in Section 10 of the RAF violates Section 5(a) of the Regulatory Review Act. Section 5(a) *requires* an agency promulgating a proposed regulation to submit a RAF that includes “[a] description of any data upon which a regulation is based with a detailed explanation of how the data was obtained and why the data is acceptable data.” 71 P.S. §§ 745.5(a), 745.5(a)(14). “An agency advocating that any data is acceptable data shall have the burden of proving that the data is acceptable.” 71 P.S. § 745.5(a)(14).

Even if the IRRC was to ignore the PUC’s failure to account for its data collection methodology or proffer any statement demonstrating the acceptability of the data,³ that the PUC neglected to submit the data, as required, with its Proposed Regulation RAF is telling and ultimately fatal to the PUC’s “end around” by including this cursory summary in the RAF for Final Rulemaking Order. The Regulatory Review Act does not contemplate or permit a promulgating agency to support a Final Rulemaking Order with data submitted in the first instance. A promulgating agency that wishes to utilize data to support a rulemaking *must* first submit said data with the Proposed Regulation RAF, along with an explanation detailing the collection methodology and trustworthiness of the data. 71 P.S. §§ 745.5(a), 745.5(a)(14). Absent that, the IRRC may not consider the data when determining whether the regulation is in the public interest.

Consequently, as the PUC neither submitted the data to which it refers in Section 10 with its Proposed Regulation RAF, nor provided any statement explaining how the data was collected

² We further note that the Department of Environmental Protection found the 2014 total generation from net metering sources on the Energy Information Administration’s (“EIA”) website and cited it in their comment letter submitted to the IRRC on May 20, 2016. It is our understanding that the PUC routinely interacts and exchanges data with the EIA.

³ “Acceptable data” means empirical, replicable, and testable data as evidenced in supporting documentation, statistics, reports, studies, or research. 71 P.S. § 745.3. The PUC does not provide, identify, or cite to any data, let alone acceptable data, in either its Proposed or Final Rulemaking RAF.

and/or evidencing its acceptability, the IRRC must reject the statements the PUC espouses in Section 10 as wholly unsupported conclusions.

RAF, Section 13

Although not directly responsive to Section 13's requirement to list how the regulation will "affect any other regulations of the promulgating agency or other state agencies", we note that the regulation will cause the Commonwealth to be in violation of its Memorandum of Understanding ("MOU") with the US Environmental Protection Agency (US EPA). More than a decade ago, the Department of Environmental Protection ("DEP") executed an MOU with US EPA's Landfill Methane Outreach Program where DEP promised, on behalf of the Commonwealth, to overcome barriers and promote landfill gas project development. As well documented in submissions to the PUC by PWIA and other affected entities including small businesses and municipal/county governments, the regulation will prevent the future beneficial use of landfill gas from smaller landfills by increasing barriers to landfill gas project development, in direct breach of the MOU. We note that the DEP has submitted a comment letter recommending that the IRRC disapprove the regulation.

RAF, Section 18

On page 8 of the RAF, the PUC cites to the fact that landfill gas projects from 3 MW to 10 MW are participating in the wholesale electricity market as proof that smaller projects can successfully participate in wholesale markets. This conclusion is incorrect, and directly contradicted by information previously submitted to the PUC regarding this regulation. In addition, as the net metering regulation applies to projects smaller than 3 MW (and in special circumstances up to 5 MW), the PUC's failure to identify or provide any analysis whatsoever of landfill gas projects operating at the 3 MW level and below (i.e. the project size actually within the scope of the regulation) makes the statements about landfills in Section 18 completely beside the point.

The rate of construction of landfill gas projects has dropped dramatically in the Commonwealth; for nearly a decade, Pennsylvania hosted the second largest number of such projects in the country. Today, Pennsylvania has fallen well behind Michigan, and is expected to fall further in the state rankings over the next several years even with net metering in its current form. Almost all of the "large" landfill gas volumes are currently being utilized by projects, whereas the smaller volumes are relatively unutilized. The current net metering program, as established in the Act, is necessary to promote these projects.

As an initial matter, only municipal solid waste landfills typically generate landfill gas in quantities supporting any beneficial use, including electric generation (all references herein apply to municipal solid waste landfills). The size of a project at a landfill is based solely on the volume of landfill gas generated at the landfill; landfills cannot increase the amount of landfill gas available based on project considerations. Gas generation is dependent on the volume of waste disposal—both historic and on-going disposal rates. The gas must be collected and

controlled pursuant to state and federal law, and approximately 30% of the gas collected at the Commonwealth's landfills is combusted with no beneficial use, such as energy recovery. The remaining gas is beneficially used, predominately through combustion for the generation of electricity.

It is absolutely true that larger projects using landfill gas have been built in the Commonwealth and continue to operate. These projects, not all of which necessarily remain profitable today, were constructed when wholesale electric prices were considerably higher, which justified the capital expenditures. Today, the economics are much harsher. In addition, larger projects are less costly to build, on a per kW basis, due to economies of scale. As a result, the majority of landfill gas that is not being used beneficially is at landfills with smaller available gas volumes. These are precisely the projects that net metering can incentivize, and the fact that this has occurred only in limited instances is direct, empirical evidence that the net metering program is neither the "windfall" the PUC claims it to be nor are these projects profitable at wholesale pricing.

Throughout the history of this regulation's development, the PUC has claimed the harm it seeks to prevent is the "sham" customer-generator that participates in the net-metering program when they are truly a merchant-generator in disguise. This justification for the regulation is laughable when applied to landfills. It is extremely costly (tens of millions of dollars and up), difficult, and time intensive (five to ten years) to permit and construct a new landfill in Pennsylvania, and then wait another three-to-five years for sufficient landfill gas generation to support just a single engine for electricity generation. The number of new landfills that have opened in the last 30 years can be counted on one-hand, with a few fingers left over; nobody is going to open a new landfill just so that they can be the PUC's fanciful merchant-generator masquerading as a customer-generator.

The need for net metering to incentivize electricity generation from landfill gas that is currently unutilized has been well documented, including in submissions to the PUC, documents presented to the Climate Change Advisory Committee, and in the December 2013 Climate Change Action Plan Updated issued by the Department of Environmental Protection⁴. It is an important public good that unutilized landfill gas, which is combusted without any energy or economic recovery, be used to generate renewable electricity, a Tier I resource under the AEPS.

Conclusion

As stated in our primary comment letter dated April 29, 2016, PWIA opposes final-form 52 Pa. Code §§ 75.13(a)(3) and 75.1 because it is disregards and contradicts the plain language of Act 213 and the General Assembly's explicitly-stated, and judicially-interpreted intent, in

⁴ See http://files.dep.state.pa.us/Air/AirQuality/AQPortalFiles/Advisory%20Committees/CCAC/Docs/Final_Climate_Change_Action_Plan_Update.pdf

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enacting the statute. These supplemental comments are provided to address misstatements in the RAF relating to the regulation, particularly as it applies to landfill gas, and provide further evidence for disapproval of the final-form 52 Pa. Code §§ 75.13(a)(3) and 75.1.

Very truly yours,



Tim O'Donnell
President

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