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PWIA
Pennsylvania Waste Industries Association
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RECEIVED
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Independent Regulatory Review Commission

June 27, 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 Public Utility Commission's Final Rulemaking Order, adopted June 9, 2016, based on 52 Pa. Code §§ 75.1 and 75.17
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 June 30, 2016

Dear Independent Regulatory Review Commissioners:

The Pennsylvania Waste Industries Association ("PWIA") was relieved to see the IRRC take action to disapprove the Public Utility Commission's ("PUC") Final-Form Regulation #57-304 (IRRC #3061) "Implementation of the Alternative Energy Portfolio Standards Act of 2004" at your May 19, 2016 meeting. We were pleased to see that the IRRC disapproval order issued June 2, 2016 ("Disapproval Order") noted that the so-called "200% rule" was not in the public interest for three independent reasons: lack of statutory authority, lack of overall need, and the fact that the decision is of such a substantial nature that it requires legislative review. Unfortunately, the revised Final-Form Regulation submitted on June 13, 2016 gives the PUC an unfettered ability to do covertly what it has recently been disapproved to do overtly.

PWIA believes that these revised Final-Form Regulations again fail all three criterion identified in the Disapproval Order relating to public interest, particularly as the PUC lacks the legal 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 implicitly limiting the capacity of alternative energy sources that may participate in the net-metering program beyond the limits explicitly established in Act 213 through the new definition of "utility" set forth in Section 75.1 *Definitions*. Furthermore, the PUC has not demonstrated an overall need for the inclusion of this definition.

In addition, PWIA believes the revised Final-Form Regulations should also be disapproved due to inclusion of a new layer of project review by the PUC that is not in the public interest. The requirement for this new review is set forth in Section 75.17 *Process for obtaining Commission approval of customer-generator status* ("New PUC Review Process") and the PUC has failed to demonstrate an overall need for the new layer of project review, and the review process itself violates the explicit intent of the General Assembly in enacting Act 213.

Overview

PWIA has reviewed all thirteen sets of comments submitted through the morning of June 27th regarding the Final-Form Regulations submitted to the IRRC on June 13th. We agree with much of the analysis contained in those comment letters regarding the effect of the new definition of "utility", and therefore have only provided limited analysis specific to that issue.

While several of the comments can be read in a manner that seems to indicate that the commenters believe that the PUC has intentionally crafted the Final-Form Regulations to eliminate net-metering altogether (especially in light of the long-history of PUC opposition to the net-metering program as it was amended in 2007), we do not ascribe to that theory. It seems more likely that the quick turnaround between the Disapproval Order and the Commissioners' vote on the regulations resulted in the interplay between the definition of utility, the New PUC Review Process and the deletion of the 200% requirement not being recognized. The timing of the recent action on the Final-Form Regulations includes:

1) the PUC's receipt of the June 2nd Disapproval Order;
2) the PUC staff's review and revisions to the Final-Form Regulations and the 120-page Order provided to the PUC Commissioners for their action at the June 9th meeting;
3) the PUC Commissioners vote to approve the PUC staff's revisions to the Final-Form Regulations and Order at the June 9th meeting; and
4) submission of the regulations, the PUC Order and regulatory analysis form received by the IRRC on June 13th.

In particular, we agree with the analysis and discussion submitted by Hawke McKeon & Sniscak LLP ("Hawke McKeon") on behalf of Pennsylvania State University regarding the legislature's intent in amending Act 213 in 2007, in particular the change from a subjective test that required divination of the alternative energy generating source's "primary or secondary" purpose to a purely objective test for qualification "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."[1] This change was intentional and made knowingly by the legislature; the intent and the effect of the amendment was clear—removing barriers to net-metering.

New Definition of Utility

We agree with the other commenters to the extent that the definition of the term "utility" set forth in Section 75.1 is unnecessary and would apply in a manner that gives the PUC the ability to prevent any customer-generator—past, present, or future—from participating in the net-metering program despite full qualification under the Act. Like other commenters, we find it odd that the PUC is proposing a definition of "utility" that applies only in the net-metering

[1] H.R. 1203, 2007 Sess., Section 2. Definitions, "Net Metering" p. 21 (Pa. 2007)

context, especially given that the term has both a widespread common usage and the existing statutory definition of "public utility" set forth at 66 Pa.C.S. § 102.

With the elimination of the 200% requirement, the questionable need that previously existed for this definition is nullified; there is no "need" for a definition of utility and such a definition is therefore not in the public interest, as that criterion is applied under the Regulatory Review Act, 71 P.S.§§ 745.1, *et seq.* ("RRA"). Similarly, the definition and its use under the Final-Form Regulations are not in the public interest as the PUC lacks statutory authority to issue a definition that functions to completely eliminate net-metering, especially after the Disapproval Order explicitly denied the PUC's claim of right to merely diminish net-metering.

In particular, we agree with the analysis and position put forth by Eckert Seamans, on behalf of the Dauphin County Industrial Development Authority, and Hawke McKeon on the issue of the definition of utility, and further note that their analysis applies equally to non-solar renewable energy sources.

New PUC Review Process

Section 75.17 establishes the first ever regulatory requirement for a PUC review of any net-metering application. Specifically, the PUC review would be performed by staff on the Bureau of Technical Utility Services and the review applies to applications of all systems rated at 0.50 MW or greater. Section 75.17 establishes no standards whatsoever for the scope of review, the standards to be used to evaluate the review, or the purpose of the review. We further note that the IRRC challenged the PUC's authority and need to add this additional layer of approval in its comments to the Notice of Proposed Rulemaking.[2]

The Final-Form Regulations which were subject to the Disapproval Order included this provision. At that time, the PUC justified its inclusion primarily on the basis that it was needed to implement the 200% restriction, although it also cited unspecified "reports" of "inconsistent application" of the net-metering rules by the EDCs, which have been responsible for evaluating net-metering applications since the passage of the Act in 2004. On page 96 of the Final Rulemaking Order submitted to the IRRC to support the Final-Form Regulation that was subject to the Disapproval Order, the PUC justified the New PUC Review Process by noting:

> "Since the inception of the AEPS Act and these regulations, the EDCs have been solely responsible for interconnecting and approving net metering for all customer generators. **While this has worked well** for EDCs and customer-generators, the Commission has received some reports of inconsistent application of the net metering rules. In addition, **as the Commission is imposing a 200% of annual load limit on the size of customer-generators,** we are proposing a process for seeking

[2] IRRC, Comment Letter on Proposed Rulemaking for PUC's Regulation #57-304, Implementation of the AEPS Act of 2004 (10/3/2014), http://www.irrc.state.pa.us/docs/3061/IRRC/3061%2010-03-14%20COMMENTS.pdf.

> Commission approval of all customer-generators with a nameplate capacity of 500 kilowatts or greater." [Emphasis added]

The first justification relied upon rings hollow, "received some reports of inconsistent application," particularly in light of the PUC's explicit statement that the system has "worked well" and the lack of any specificity or data on the "reports."

With the elimination of the 200% requirement, the PUC now attempts to justify the New PUC Review Process by claiming it is needed to ensure consistency of the net-metering requirements across the Commonwealth at the same time it states "that administrative efforts and costs will be minimal due to the small number of such systems applying for net-metering in a year."[3] These statements are in conflict, the PUC has not produced any data, evaluation of data or evidence that there is an existing problem with statewide consistency, especially in light of the "small number of such systems applying" each year (and keeping in mind that not all applicants are approved by the EDCs, and not all approved applications result in projects being built). Furthermore, because there are no standards or scope of review set forth in the Final-Form Regulations, it is unclear as to whether this new layer of PUC review will address the "consistency" problem at all. The PUC staff testimony at the May 19th IRRC meeting—that the PUC performed no economic analysis of the net-metering program at any time during the development of this regulation—let alone any analysis of these costs or burdens from the unsubstantiated allegation that statewide inconsistency may exist—undercut any claimed need for this new review.

As the PUC notes, EDCs currently and historically have evaluated all net-metering applications. Based on a review of comments submitted to the PUC and the IRRC during this rulemaking, EDCs uniformly dislike the net-metering program. This is consistent with Commissioner Powelson's comments[4] where he alludes to the on-going national initiative to roll-back state net-metering programs. It is unclear as to why the PUC believes that the EDCs would give anything other than the strictest scrutiny to net-metering applications, given their stated opposition—both nationally and in Pennsylvania—to the net-metering program in its entirety.

Had the 200% requirement remained in the Final-Form Regulation, then PUC review of certain net-metering applications may have been appropriate as evaluation of the 200% requirement would have involved a certain amount of subjective discretion, and using the PUC as a clearinghouse for those types of decisions—decisions that never have been part of the process—would have made sense from a statewide consistency issue (of course, since the PUC never quantified or analyzed any data about participation in or costs of net-metering, it remains

[3] We note that we believe the PUC is correct that the number of systems applying to net-meter in the future will be minimal, and our conclusion is driven by the new definition of Utility, which will essentially kill the net-metering program, as discussed herein. Although the PUC leaves unstated why it believes there will be few net-metering applications in the future, this statement may be a brief insight into the PUC's own thoughts on why it has included the definition of Utility.

[4] PA PUC Commissioner Powelson, Statement on Final Rulemaking Order for PUC's Regulation #57-304, Implementation of the AEPS Act of 2004 (2/11/2016), http://www.puc.state.pa.us/pcdocs/1414734.pdf

impossible to determine if the 0.5 MW threshold was needed and/or appropriate). But the 200% requirement is not in the Final-Form Regulation, and this New PUC Review Process does not appear to meet any public interest. The review is not needed from a safety or engineering standpoint (nor does the PUC claim it is so), as detailed procedures for review of the interconnection from the customer-generator are already in-place, and the financial arrangement of net-metering does not impact the interconnection itself.

Similarly, determining whether a system qualifies under the statutory size restrictions is a very simple matter likely involving mere minutes of EDC review, as the statutory restrictions are based on "nameplate" capacity of the customer-generator's proposed project. To the extent that the PUC believes that EDCs have not successfully handled this type of analysis over the last 12 years, the evidence of such belief is completely lacking from the record. And the review applies to all systems 0.5 MW and above, so the suggestion by the PUC that its direct review is necessary to evaluate the applications of customer-generators demonstrating that they meet the special eligibility requirements for systems sized "above 3 MW" also fails.

As discussed above, Section 75.17 is not in the public interest because it fails the RRA criterion of need. The standard-less nature of the review process, coupled with unanswered questions regarding the PUC's authority to conduct the reviews, demonstrate that Section 75.17 is also not in the public interest as both exceed the statutory authority granted to the PUC and implicate decisions that are of such a substantial nature that legislative review is necessary.

The Regulatory Analysis Form ("RAF") Section 10

Section 10 of the RAF requires that the PUC: "State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit."[5]

In its response to this question, the PUC claims that: "the changes will benefit the millions of EDC ratepayers and EGS customers. The Commission, in its 2014 AEPS Act Annual Report, is projecting that it could cost over $164 million to comply with the AEPS Act's 18% of retail sales requirements."[6] This response is disingenuous and misleading as it applies to the Final-Form Regulations.

The RAF submitted for the Final-Form Regulations that were subject to the Disapproval Order did not include any financial information. Under direct questioning from the IRRC Commissioners during the May 19th hearing, PUC staff ultimately admitted that the PUC never quantified the economic benefits or costs of the net-metering program at any time during the Final-Form Regulation development, let alone how the Final-Form Regulations would change

[5] Implementation of the Alternative Energy Portfolio Standards Act of 2004, Regulation No. 57-304, RAF, Section 10, p. 2 (submitted Jun. 13, 2016).
[6] *Id.*

those costs. The revised RAF now states that "millions" of ratepayers will benefit from the regulation; this is a meaningless statement absent any quantification of how **much** the alleged benefits (or costs) to these "millions" of ratepayers actually are—pennies, dollars, tens or hundreds of dollars, etc. We have heard from renewable energy stakeholders that the total estimated cost of the net-metering program is, at most, literally pennies per citizen per year, and numerous public interest groups have published reports that increased generation of renewable energy decreases overall consumer energy costs.[7]

Essentially every commentor, both those for and against the Final-Form Regulations, as well as earlier version of the regulations, all start with the same understanding—the Final-Form Regulations will chill alternative energy development and net-metering. While some commenters approve of this outcome, most do not. Regardless of how the commentor "polling numbers" add up, two things are paramount—legislative intent, and whether this section of the RAF has been completed in a manner that meets the statutorily mandated process for promulgation of regulations.

Similarly, the $164 million figure cited by the PUC is **unrelated** to the net-metering program, net-metering compensation or any meaningful issue addressed in the revised Final-Form Regulations. The $164 million figure is the total estimated cost in 2021 for the purchase of AEPS credits and does not include any costs, whatsoever, of the compensation paid through the net-metering program. Both the total number of AEPS credits required in 2021, and their associated cost, is utterly unaffected by whether the credits are generated by AEPS sources that participate in net-metering or not. Interestingly, in the very next sentence of the 2014 annual report, the PUC minimizes the impact of the $164 million cost, stating, to "put these figures in perspective, the average annual statewide customer expenditures on electric service totaled approximately $15.5 billion in 2013." Similarly, the 2014 annual report spends several pages discussing the economic benefits of the generation of alternative energy in Pennsylvania, noting, "Since its inception, the AEPS has resulted in sustaining and creating thousands of jobs and business ventures associated with all aspects of renewable and alternative energy generation."[8]

The RAF Section 21

Section 21 of the RAF requires reporting of estimates of savings, costs and revenue losses for local governments, state governments, and the regulated community. The PUC estimates each and every of the 12 categories as either "minimal" or "0". These projections are

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[7] *See E.G.* Black & Veatch, *Assessment of a 15 Percent Pennsylvania Alternative Energy Portfolio Standard*, Final Report (Jan. 2010), http://www.pennfuture.org/UserFiles/File/Legislation/HB80SB92_Report201001.pdf; Gideon Weissman, Frontier Group and David Masur, PennEnvironment Research & Policy Center, *Solar Schools for Philadelphia, Clean Air, Green Jobs, and Financial Savings* (March 2016), http://www.pennenvironment.org/sites/environment/files/reports/Solar%20Schools%20for%20Philadelphia.pdf; GE, *PJM Renewable Integration Study*, (Oct. 28, 2013), http://www.pjm.com/~/media/committees-groups/committees/mic/20131028-impacts/20131028-pjm-renewable-integration-study.ashx

[8] PA PUC, 2014 Annual Report, Alternative Energy Portfolio Standards Act of 2004, p. 14 http://www.puc.pa.gov/Electric/pdf/AEPS/AEPS_Ann_Rpt_2014.pdf.

inconsistent with the PUC's claims in Section 10 of the RAF, inconsistent with the PUC's acknowledgment that it has been no economic analysis performed on net-metering as part of the Final-Form Regulation development, and inconsistent with the number of commentators who claim significant economic harm will occur as a result of implementation of the Final-Form Regulations. The commenters include various forms of local government such as county authorities and school districts, and various members of the regulated community, including several statewide trade associations, one of which represents dairy farmers.

The (continued) failure of the PUC to estimate the benefits, costs, and/or savings that would accrue from passage of the Final-Form Regulations demonstrates that the Final-Form Regulations are not in the public interest as the PUC lacks the necessary statutory authority, has failed to demonstrate an overall need, and is a decision of such a substantial nature that it requires legislative review. Unfortunately, the revised Final-Form Regulation submitted on June 13, 2016 gives the PUC an unfettered ability to do covertly what it has recently been disapproved to do overtly.

Conclusion

PWIA recommends disapproval of the revised Final-Form Regulations as they (again) fail all three public interest criterion identified in the Disapproval Order, particularly as the PUC lacks 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, by implicitly limiting the capacity of alternative energy sources that may participate in the net-metering program beyond the limits explicitly established in Act 213 through the new definition of "utility" set forth in Section 75.1 *Definitions*. In addition, PWIA believes the revised Final-Form Regulations should also be disapproved due to inclusion of a new layer of project review by the PUC set forth in Section 75.17 *Process for obtaining Commission approval of customer-generator status* is not in the public interest. The PUC's repeated failure to calculate the costs, benefits and/or savings from the revised Final-Form Regulations, as required under the RRA, further demonstrate that the PUC has failed to demonstrate that the Final-Form Regulations are in the public interest.

Very truly yours,

Marilyn C Hammond for

Tim O'Donnell
President

cc: The Honorable Elder J. Vogel, Pennsylvania State Senate
The Honorable David H. Zimmerman, Pennsylvania House of Representatives