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3061

June 21, 2016

VIA CERTIFIED MAIL

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

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 regulations[2] 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 of PPL,

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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, Amended Final Rulemaking Order entered June 9, 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 electricity (currently 3.2 MW) which is delivered to the distribution system of PPL Electric Utilities ("PPL"), consistent with current law, rules and regulations.

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 collecting landfill gas for use in industrial boilers and to generate electricity since 1985. Granger is a third generation, family-owned and operated business based in Lansing, Michigan. Granger Energy Services partners with landfill owners, private industry, municipalities and utilities to create mutually beneficial landfill gas recovery solutions that make sense economically and environmentally. We are concerned that the subject regulations would severely limit both the existing and prospective eligibility of customer-generators' current and future 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, based on the existing rules. Specifically, Granger Energy believes that any existing customer-generator should be grandfathered and exempted from the application of the Commission's proposed final regulations.

Definition of "Utility"

Granger Energy submits that the proposed definition of utility (a) is intended to unlawfully exclude/eliminate existing net metering projects and (b) is not in the public interest.[5]

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.*

5 71 P. S. §§ 745.5b(a), (b)(3), (b)(4), (b)(7), (b)(8).

The Commission has proposed a definition of the term "utility" that exempts landlords and internal distribution systems. But, as written[6] and explained[7] by the Commission, anyone else who exports power to the grid falls within the scope of that definition.

The Commission is engaged in making a substantial policy decision: Namely, who is, and who is not, a "nonutility" for purposes of the AEPS Act.[8] The definition of "utility" will be used in conjunction with the definition of customer-generator. By deeming that a person or entity is a "utility," the Commission can impact that person's or entity's eligibility to participate in net metering. There is nothing in the statutory provisions or stated legislative intent which shows a desire on behalf of the General Assembly to treat certain systems (landlords or internal distribution systems) differently from other systems (such as landfill gas systems). Yet, the Commission goes on to exclude proposing to create a substantial difference between these systems. That difference constitutes a policy decision of such a substantial nature that it should be made by the elected officials of the General Assembly, and not by the Commission.

The proposed definition is neither reasonable nor precise.[9] Nothing shows that the proposed definition is reasonable. In 2014, IRRC commented that the Commission should provide a more precise definition of "utility."[10] The first sentence remains unchanged. It is written so broadly that any person who exports electricity to the grid is within its scope. Since 2014, the second sentence

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6 Amended Final Rulemaking Order, at Annex A, Proposed Section 75.1 (definition of utility). The PUC proposes to define a "utility" as: "A person or entity that provides electric generation, transmission or distribution services, at wholesale or retail, to other persons or entities. 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.

7 Amended Final Rulemaking Order, at pp. 27-28. The PUC has explained that: "A customer-generator is one who is not in the business of providing electric power to the grid or other electric users. As such, we have defined a utility in this context as a person or entity whose primary business is electric generation, transmission, or distribution services, at wholesale or retail, to other persons or entities."

8 The Commission should be required to show the need for this definition and how it protects consumers by addressing a significant harm or problem. See 71 P. S. §§ 745.5b(b)(3)(iii).

9 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).

10 IRRC, Notice of Comments Issued, Pennsylvania Public Utility Commission Implementation of the Alternative Energy Portfolio Standards Act of 2004, 44 Pa.B. 6449, 6730 (October 18, 2014) ("IRRC Comments"), at Comment 3.

was added. That sentence excludes landlords and internal distribution systems. The addition of the second sentence did negate the over broad reach of the first sentence.

The proposed definition is circular and difficult to understand. As written, a person is eligible if they do not export any electricity to the grid. But, if they export any amount of electricity, they are within the scope of the definition. No guidance is given as to its application to existing customer-generators who will be exporting electricity to the grid. If an existing or future net metered system exports power to the grid, is it a utility?

The Commission did not provide any guidance for implementation of the proposed definition. The Commission expressed concern over "merchant" generators.[11] It desires to preclude merchant generators from qualifying for net metering. But, what criteria are used to determine if a person is a so-called merchant generator? The Commission has stated that it is looking for exports of electricity that constitute a "business" or a "primary business." What those terms mean is unclear. So, there is no way for an existing or future net metered system to know what it can (and cannot do) to avoid being deemed to be a "utility".

The Commission is not acting in the public interest by refusing to grandfather existing alternative energy systems. Granger Energy's existing (and grandfathered) landfill gas systems will be unfairly, and retroactively, categorized as a "utility" under the Commission's proposed definition. Rather than give assurances that said definition will not affect existing customer-generator systems, the Commission did the opposite. If the proposed definition is approved, the Commission has stated that it cannot ignore the term "nonutility" and must enforce it.[12] In fact, the Commission explicitly refused to state that the definition of "utility" would only be applicable to new facilities.[13] This means that the Commission could argue 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.").[14] Such a result is not acceptable, and would violate both constitutional protections[15] and Granger Energy's vested rights.

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11 See, e.g., Amended Final Rulemaking Order, at p. 9, 13, 16, 22, 26-27, 34-36, 41-42, 45-46, 48-49, 57, 81, 82.

12 Amended Final Rulemaking Order, at p. 27-28.

13 Amended Final Rulemaking Order, at p. 27-28.

14 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)).

15 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 Constitution and the Pennsylvania Constitution forbid *ex post facto* laws. 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

Large Customer Generators

The AEPS Act provides, in part, that a net metered alternative energy system can have a nameplate capacity above 3 MW and up to 5 MW if the system is "available to operate in parallel with the electric utility during grid emergencies as defined by the regional transmission organization."[16] As part of the Amended Final Rulemaking Order, the Commission has proposed creating a new step in the application process for large customer generators. That step will require all alternative energy systems with a nameplate capacity of 500 kilowatts or greater to obtain Commission approval for net metering.[17]

First, the need for this costly burden is not clear. The Commission expresses the need for "uniform application of the net metering rules throughout the Commonwealth."[18] But, notes that it will review and approve only a "relatively small" number of such applications.[19] The Commission provided no data on this point. Nothing explains why review and approval of only the largest alternative energy systems will ensure that the rules are uniformly applied to all customer-generators and alternative energy systems in the Commission.

That being said, there is little for the Commission to actually approve. In the normal course, the Commission does not review applications to begin service. And, there is nothing in the AEPS Act which suggests that the Commission should be reviewing applications to use net metering. The AEPS Act sets the statutory eligibility criteria. There is simply no basis for the Commission to deny net metering to a customer-generator and alternative energy system that satisfies the statutory

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obligation of contracts." 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."

16 73 P.S. § 1648.2 (Definition of "customer-generator" provides that systems can be above three megawatts and up to five megawatts if the systems are "available to operate in parallel with the electric utility during grid emergencies as defined by the regional transmission organization or where a micro-grid 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, provided that technical rules for operating generators interconnected with facilities of an electric distribution company, electric cooperative or municipal electric system have been promulgated by the Institute of Electrical and Electronic Engineers and the Pennsylvania Public Utility Commission.").

17 Amended Final Rulemaking Order, at Annex A, Proposed Section 75.13(a)(7) and Section 75.17.

18 Amended Final Rulemaking Order, at p. 27, 56-58.

19 Amended Final Rulemaking Order, at p. 56.

PJM's markets.[26] PJM explicitly told the Commission that state-level programs and the PJM-level programs are mutually exclusive.[27]

The requirement is not contained in the statutory language, and is inconsistent with the way PJM and PJM's markets actually operate. No clear explanation is given in the Amended Final Rulemaking Order. That being said, Granger Energy is concerned that - if it is approved - this first requirement could be misinterpreted and implemented in a manner that would exclude/eliminate large generation projects.

Conclusion

The foregoing comments demonstrate that provisions in the subject regulations remain fatally flawed and do not satisfy the criteria set forth in the Regulatory Review Act **even after the removal of the 200% limitation**. 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, we submit that the IRRC should act to disapprove said regulations in their entirety.

Sincerely,

Ray Easton
Vice President
Granger Energy of Honey Brook, LLC
Granger Energy of Morgantown, LLC

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26 Comments (dated September 3, 2014) of PJM Interconnection, L.L.C in response to the February 20, 2014, Proposed Rulemaking Order ("PJM Comments"), at p. 2-3. PJM's Comments are available at: http://www.puc.state.pa.us/pcdocs/1309545.pdf.

27 *Id.* In fact, PJM's requirements for net metering (which PJM calls "Behind-the-Meter Generation" or "BtMG"), which are summarized in PJM Manual 14D, provides that "BtMG does not include at any time, any portion of a generating unit's capacity that is designated as a Capacity Resource; or in any hour, any portion of the output of such generating unit that is sold to another entity for consumption at another electrical location or into the PJM Interchange Energy Market." PJM Manual 14D (Generator Operational Requirements), Revision: 37, Effective Date: December 22, 2015, p. 138 - Appendix A, ¶ 6.