PWIA
3061
Pennsylvania Waste Industries Association
122 State Street, Harrisburg, Pennsylvania 17101

September 2, 2014

Via U.S. Mail

Pennsylvania Public Utility Commission
Attn: Secretary
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Comments in Opposition to Proposed 52 Pa. Code §75.13(a)(3)
Implementation of the Alternative Energy Portfolio Standards Act of 2004;
Doc. No. L-2014-2404361
Published at 44 Pa.B. 4179, Saturday, July 5, 2014

Dear Commissioners:

The Pennsylvania Waste Industries Association ("PWIA") submits these comments in opposition to proposed 52 Pa. Code §75.13(a)(3), which was published on July 5, 2014 in the Pa. Bulletin. PWIA believes that proposed this regulation, which would limit the capacity of sources otherwise qualified to participate in net metering to 110% of the facility's historical electricity usage, is bad policy, violates both the spirit and the substance of Act 213 of 2004 as amended by Act 35 of 2007 ("Act 213"), and is unlawful because it disregards and contradicts the plain language of Act 213. Approval of §75.13(a)(3), as proposed, will not survive judicial scrutiny.

PWIA's Interest in this Matter

PWIA is the Pennsylvania chapter of the National Waste and Recycling Association, a non-profit organization that represents the interests of the North American waste and recycling industry. PWIA members include both privately held and publicly traded companies that own and operate commercial solid waste and recycling facilities throughout the Commonwealth. In addition to solid waste landfills, our members operate resource recovery facilities, recycling facilities, transfer stations, and collection operations. Overall, the waste industry in Pennsylvania is responsible for generating over 26,000 jobs and $4.1 billion in economic activity. PWIA's primary missions are to advance the safe, efficient, and environmentally responsible management of solid waste and to promote sound public policy in rulemaking that affects the management of solid waste.

Landfills continuously generate landfill gas, which consists of approximately 50% methane, through biogenetic processes. Traditionally, landfill gas has been collected through a network of pipes and collection devices in the waste mass and combusted in flares to address

potential environmental and safety concerns. This historically has occurred without any energy recovery or other beneficial use of the combusted landfill gas. Today, thirty-seven renewable gas-to-energy projects are located at Pennsylvania landfills, the second highest number of any state after California[1]. Two-thirds of these projects generate electricity from landfill gas. The other third process landfill gas as direct fuel for commercial use, just like natural gas. We are proud that eight Pennsylvania landfill gas-to-energy projects have been honored with national awards from the US EPA, and that our industry supplies approximately 170 MWh of baseload renewable electricity from these projects. When used to generate electricity, landfill gas is classified as a Tier I resource under Act 213.

For those landfills that are still without landfill gas-to-energy projects, landfill gas is collected and burned in a flare without any energy recovery. Although the vast majority of existing landfill gas-to-energy projects in the Commonwealth exceed the 3MW/5MW limits set forth in Act 213 and do not qualify for net metering, the inventory of potential landfill gas-to-energy projects consists primarily of much smaller projects that do meet the applicable 3MW/5MW threshold. The economic barriers to developing these smaller potential projects are significant, primarily high capital costs due to low economies of scale aggravated by low wholesale electric prices. In many cases, the only way these smaller projects will be built is through the availability of the enhanced revenue stream that net metering can provide. It is our understanding that several smaller landfill gas-to-energy projects have recently been constructed in reliance on the availability of the net metering program. The proposed change to §75.13(a)(3) will impact the continuing viability of certain projects, and will decrease if not eliminate the deployment of this source of renewable energy in the future[2].

These comments are submitted in furtherance of our primary missions, particularly advancing environmentally responsible management of solid waste through sound public policy.

Proposed 52 Pa. Code §75.13(a)(3) is Unlawful

Contradicts the Plain Meaning of the Act

As the Commission has explicitly recognized in other rulemakings pertaining to the implementation of Acts 213 and Act 35, it is Pennsylvania law that the plain language of a statute cannot be disregarded in pursuit of unstated legislative intent when the words are clear and free of ambiguity. 1 Pa.C.S § 1921(b). Similarly, the Commission can presume that the legislature did not intend an interpretation that is absurd or unreasonable. 1 Pa.C.S. § 1922(l). Proposed §75.13(a)(3) contradicts the plain meaning of the Act.

[1] According to the U.S. Environmental Protection Agency (US EPA).

[2] It is our understanding of the proposal that it will not affect existing projects participating in net metering. To the extent that our reading of the proposed regulation is incorrect, the viability of existing projects will clearly be impacted. The likely result of a retroactive prohibition on net metering would be, in many cases, breaches of project financing agreements, shutdown of the projects, and removal and reuse of the equipment in other states.

The plain meaning of the Act is clear. Non-residential customer-generators with net-metered distributed generation systems that have a nameplate capacity of no more than 3 MW[3] qualify for net metering (i.e. to receive "full retail value" for all excess generation) if any portion of its electricity is used on-site to offset its non-generation electrical consumption. Other than the 3 MW cap, there is no limitation of any sort on the amount of electricity that qualifies for net metering compensation set forth in the Act.

More specifically, the Act's definition of "Customer-generator" states in relevant part:

> 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,...

and ""Net metering" is defined 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. [emphasis added]

The Act sets the compensation rate in Section 5. Interconnection standards for customer-generator facilities, which states in relevant part:

> Excess generation from net-metered customer-generators shall receive full retail value for **all energy** produced on an annual basis. [emphasis added]

The plain language of Act 213 includes no discussion or references to historical or estimated annual system output or customer usage, nor does it imposes, discuss or reference any limitation based on historical or actual usage, nor does it direct (or give authority to) the Commission to promulgate any such limits. Act 213 is clear: Customer-generators who use any portion of their electricity on-site for non-generation purposes shall receive full retail value of all excess electricity it produces[4].

---

[3] Or 5 MW, if certain conditions are met.

[4] The phrase "any portion of the electricity" was added by the legislature through Act 35, and is completely objective. This phrase replaced the Act's previous language, which required a subjective determination of the customer-generator's intent.in generating. 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 the Act. The intent of the change and the current statutory language are clear—"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". It would be absurd to think that the legislature intended to limit the portion of excess generation qualifying for compensation to "110% of historical or estimated usage" when it passed a statute that said "for all energy produced".

Relies on Unlawful Basis: Foreign Jurisdictions

The proposed regulation relies on the different approaches taken by legislatures in other states as support for ignoring the plain language of Act 213 (see page 12 of the proposed regulation, Section B. Net Metering §75.13. General Provisions, 1. Section 75.13(a)). Act 213 is clear that the compensation for net metering is "full retail value for all energy produced" and the Commission cannot substitute its judgment in place of the plain language of the Act. The fact that the Commission believes its proposed approach is "consistent" with how net metering is treated in other states is functionally and legally meaningless.

In limited instances, Act 213 does direct the Commission to develop certain net metering regulations that are consistent with other states in limited circumstances; i.e. only those relating to technical issues. As set forth in Section 5 of the Act:

> Section 5. Interconnection standards for customer-generator facilities. Excess generation from net-metered customer-generators **shall receive full retail value for all energy produced** on an annual basis. The commission shall develop **technical and net metering interconnection rules** for customer-generators intending to operate renewable onsite generators in parallel with the electric utility grid, consistent with rules defined in other states within the service region of the regional transmission organization that manages the transmission system in any part of this Commonwealth. The commission shall convene a stakeholder process to develop Statewide technical and net metering rules for customer-generators. The commission shall develop these rules within nine months of the effective date of this act. [emphasis added]

The first sentence of Section 5 sets forth the *financial* compensation required under Act 213, "shall receive full retail value for all energy produced on an annual basis". The second sentence requires the Commission to develop "technical and net metering interconnection rules" that are "consistent with rules defined in other states..." but this consistency mandate is limited to *technical* and *interconnection* issues. The reliance on New Jersey and Delaware regulations implementing New Jersey and Delaware statutes in an effort to rewrite the plain language of Act 213 as it pertains to financial compensation for net metering is unlawful.

Relies on Unlawful Basis: Third Party Operator-Owner Regulations

In 2012, the Commission passed regulations addressing an area relating to net metering that was not addressed in Act 213, whether (and under what conditions) generation owned and operated by third-parties could participate in net metering. The ability of third-party systems to participate in net metering programs was not addressed in Act 213, as these systems did not fall within the plain language of the definition of customer-generator as set forth in Act 213. The fact that the Commission issued regulations to fill this statutory gap does not give the Commission authority to issue subsequent regulations that contradict the plain language of Act 213 as it pertains to customer-generators.

Similarly, the incorrect "fact" that the "majority of comments[5] supported the [110%] limit as a reasonable and balanced approach to support the intent of the AEPS Act..." is legally meaningless (see page 12 of the Proposed Rulemaking Order, Section B. Net Metering §75.13. General Provisions, 1. Section 75.13(a)). The Commission cannot issue regulations that contradict the plain language of the Act, regardless of how many commenters encourage them to do so. Because the Act did not give third-party owned and operator generators a clear statutory right to net meter, the Commission had broad authority to issue regulations on this topic. Given that the Commission could (arguably) have found no intent by the legislature to allow net metering of third-party owned and operated projects, it is not surprising that the commenters would support a "compromise" that imposed lower participation and/or compensation rights than granted to customer-generators under the Act. The approach taken in the 2012 rulemaking appears reasonable in that the danger identified by the Commission— merchant generators using the net metering program to circumvent the wholesale market—is not present for customer-generators as these entities are not in the merchant generating business[6].

Conclusion

PWIA opposes proposed 52 Pa. Code §75.13(a)(3), which was published on July 5, 2014 in the Pa. Bulletin. PWIA believes that this proposed regulation is bad policy, violates both the spirit and the substance of Act 213, and is unlawful because it disregards and contradicts the plain language of Act 213. Approval of §75.13(a)(3), as proposed, will not survive judicial scrutiny and we strongly encourage the Commission to withdraw this proposal.

Very truly yours,

Mark C. Pedersen

Mark C. Pedersen
President

cc: Christopher Abruzzo, Esquire; DEP Secretary
Mr. Patrick Henderson, Governor's Office

[5] Only 7 out of 15 commenters supported the 110% limitation.

[6] It is our understanding that besides our members, the groups most hurt by the Commission's proposal are pig, dairy, and other farmers using digester technology to generate renewable energy from manure and other farm by-products. Clearly, companies in the merchant generating business are not opening landfills or livestock farms in an effort to generate biogenetically derived methane gases to produce electricity in a convoluted Machiavellian effort to circumvent the wholesale electricity market.