



COMMONWEALTH OF PENNSYLVANIA

February 5, 2018

E-FILED

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Implementation of Act 40 of 2017 / Docket No. M-2017-2631527

Dear Secretary Chiavetta:

I am delivering for filing today the Comments of the Office of Small Business Advocate ("OSBA"), pursuant to the Tentative Implementation Order issued in the above-captioned proceeding.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in blue ink that reads "Elizabeth Rose Triscari".

Elizabeth Rose Triscari
Deputy Small Business Advocate
Attorney ID #306921

Enclosures

cc: Kriss Brown, Assistant Counsel, Law Bureau
Darren Gill, Bureau of Technical Utility Services
Mr. Brian Kalcic
Mr. Robert D. Knecht

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Implementation of Act 40 of 2017 : Docket No. M-2017-2631527

**COMMENTS OF THE OFFICE OF SMALL BUSINESS ADVOCATE
TO TENTATIVE IMPLEMENTATION ORDER**

I. INTRODUCTION

On December 21, 2017, the Pennsylvania Public Utility Commission (“Commission”) entered a Tentative Implementation Order (“Tentative Order”), which provides the Commission’s interpretation and implementation of Section 11.1 of Act 40 of 2017. Act 40, among other things, amends the qualifications to certify Tier I solar photovoltaic (solar PV) systems under the Alternative Energy Portfolio Standards (AEPS) Act.

The Office of Small Business Advocate (“OSBA”) submits the following comments in response to the Tentative Order for the Commission’s consideration.

II. COMMENTS

At the outset, the OSBA notes that it generally supports the development of solar PV systems in the Commonwealth. However, the OSBA also has concerns with the effect legislation, such as Act 40, could have on rates, by decreasing the number of solar PV systems certified as a Pennsylvania Alternative Energy Supplier (“AES”), and thereby increasing the cost of solar renewable alternative energy portfolio credits (SRECs).

With respect to the proper interpretation of Section 11.1 Act 40, the OSBA submits that the Tentative Order has correctly interpreted the plain language of the statute. Section 2804(1) modifies Section 4 of the AEPS Act to exclude solar PV sources located outside of Pennsylvania from qualifying as eligible to generate power and SRECs to meet the Commonwealth's solar PV share requirement. Section 2804(2) provides for exclusions to the general rule of Section 2804(1), by (1) grandfathering in out-of-state solar PV systems certified by the Commonwealth prior to the effective date of the Act as well as (2) certifying out-of-state solar PV systems not otherwise certified with binding written contracts for the purchase and sale of SRECS entered into prior to the effective date (but limiting the certification to the duration of the contract). In short, the Tentative Order interpretation effectively "closes the borders" only on a going-forward basis.

The Joint Statement offered by Chairman Gladys M. Brown and Vice Chairman Andrew G. Place reviews the Tentative Order interpretation of Section 2804(2) and offers an alternative interpretation, argued to be more aligned with legislative intent. Under the Joint Statement's alternative interpretation, the language in Section 2804(2)(i), "certification originating within the geographical boundaries of this commonwealth," is posited to mean facilities actually located in Pennsylvania, rather than all facilities previously certified by the Commission's AEC Program Administrator. The Joint Statement also provides an alternative interpretation of Section 2804(2)(ii), limiting it to only already certified out-of-state solar PV systems with contracts entered into before the effective date (and similar to the Tentative Order, limiting certification to the term of the contract). Both of these alternative interpretations would significantly reduce the number of solar PV systems that are currently certified as a Pennsylvania AES.

It is possible, perhaps even likely, that the Joint Statement alternative interpretations better effectuate the intentions of the legislature, in light of past iterations of the bill and the truncated legislative procedure under which this language was adopted (as one of numerous Administrative Code amendments and without hearings). However, the Commission is nevertheless bound by the plain language of the statute that was ultimately passed and signed into law. The Joint Statement's alternative interpretations are simply not consistent with the text of the statute. The rules of statutory construction are only applicable when the plain language of a statute is ambiguous and open to varying interpretation, which the OSBA argues is not the case here. It would not be appropriate for the Commission to substitute what it speculates the legislature intended for the actual language of the statute.

Moreover, the OSBA submits that the Tentative Order interpretation is the more reasonable alternative from a practical perspective, in that it will likely result in less disruption to markets for SRECs. OSBA generally agrees with the Joint Statement where it indicates that grandfathering eligibility for out-of-state AESs will likely result in Act 40 having only a limited impact on SREC prices, at least in the near-term. The Joint Statement, however, does not offer any evaluation of the potential impact of the alternative impact on SREC markets of the alternative interpretation. The OSBA submits that the impact could be very large. It is not even clear that sufficient eligibility capacity will exist, and the SREC price could easily rise to the alternative compliance payment level. The Commission reports that the average SREC price in energy year 2017 was \$12.16 per MWh, whereas the solar alternative compliance payment was \$110.44 per

MWh.¹ Moreover, the solar alternative compliance payment has been as high as \$654.37 per MWh over the past decade.² If there is any uncertainty as to legislative intent, the OSBA recommends that the Commission choose the option which is less disruptive.

Therefore, the OSBA respectfully submits that the Tentative Order's strict textual interpretation is both legally and practically appropriate. If the General Assembly disagrees with this interpretation and finds it does not comport with the desired intent, an amendment to the statute's language can be proposed.

III. CONCLUSION

The OSBA respectfully requests that the Commission consider and adopt the foregoing comments.

Respectfully submitted,



Elizabeth Rose Triscari
Deputy Small Business Advocate
Attorney ID No. 306921

For:

John R. Evans
Small Business Advocate

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300 North Second Street, Suite 202
Harrisburg, PA 17101

Dated: February 5, 2018

¹ See <http://www.pennaeps.com/energy-year-2017-solar-acp-level-and-average-solar-and-tier-ii-prices-released/> and <http://www.pennaeps.com/wp-content/uploads/2017/11/AEPS-Historical-Pricing.xlsx>, reviewed on February 2, 2018.

² *Id.*