

PENNSYLVANIA PUBLIC UTILITY COMMISSION  
HARRISBURG, PENNSYLVANIA 17105-3265

Implementation of Act 40 of 2017

Public Meeting held April 19, 2018  
2631527-LAW  
Docket No. M-2017-2631527

**JOINT MOTION OF CHAIRMAN GLADYS M. BROWN &  
VICE CHAIRMAN ANDREW G. PLACE**

Before the Commission is the Final Implementation Order (Implementation Order) regarding Act 40 of 2017. Act 40, signed by Governor Tom Wolf on October 30, 2017, *inter alia*, amends the qualifications to certify Tier I solar photovoltaic share facilities under Pennsylvania's Alternative Energy Portfolio Standards (AEPS) Act. Numerous comments were filed in response to the Tentative Implementation Order (TIO) adopted on December 21, 2017, in addition to the Supplemental Interpretation the Vice Chairman and I offered in our Joint Statement. These comments have provided helpful guidance, specifically regarding legislative intent, for our deliberations in this proceeding; therefore, we thank all of those who took the time to help inform the record. Today, the Commission issues this Final Implementation Order to guide the AEPS marketplace toward compliance with Act 40.

The core issues in this proceeding are the Commission's interpretations of Sections 2804(2)(i) and 2804(2)(ii). These read:

**(2) Nothing under this section or section 4 of the "Alternative Energy Portfolio Standards Act" shall affect any of the following:**

**(i) A certification originating within the geographical boundaries of this Commonwealth granted prior to the effective date of this section of a solar photovoltaic energy generator as a qualifying alternative energy source eligible to meet the solar photovoltaic share of this Commonwealth's alternative energy portfolio compliance requirements under the "Alternative Energy Portfolio Standards Act."**

**(ii) Certification of a solar photovoltaic system with a binding written contract for the sale and purchase of alternative energy credits derived from solar photovoltaic energy sources entered into prior to the effective date of this section.**

Interpretation of these sections has been challenging for the Commission, particularly because the verbiage in Section 2804(2)(i) is not precise. The question here is whether or not this statute is intended to 'grandfather' out-of-state facilities certified before October 30, 2017, to generate

Tier I Solar credits. Given this lack of clarity, we issued a Joint Statement in conjunction with adoption of the TIO offering supplemental statutory interpretations to spur comments in an effort to inform the record.<sup>1</sup>

The Office of Consumer Advocate (OCA) succinctly states the challenge in interpreting Section 2804(2)(i) of Act 40.

*The OCA submits that the language as written in Act 40 is unclear and the OCA is unable to discern the intent of the section as written.*<sup>2</sup>

Likewise, the comments of Citizens for Pennsylvania's Future (PennFuture) share similar sentiments as OCA, stating:

*Section 2804(2)(i) of Act 40 is ambiguous in regard to how and when the qualification of a facility as an alternative energy generator originates.*<sup>3</sup>

We too agree that the language of Section 2804(2)(i) is unclear. Consequently, we are obligated, under the rules of statutory construction, to ascertain the intent of the General Assembly. The Rules of Statutory Construction at 1 Pa. C.S. § 1921(b) provide that:

**When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.**

Since, as the OCA and PennFuture point out, the verbiage here is unclear, we must now refer to 1 Pa. C.S. § 1921(c) which provides:

**When the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:**

...

**(2) The circumstances under which it was enacted.**

**(3) The mischief to be remedied.**

**(4) The object to be attained.**

...

**(6) The consequences of a particular interpretation**

**(7) The contemporaneous legislative history.**

**(8) Legislative and administrative interpretations of such statute.**

The comments filed in response to the TIO have proven instructive in regard to why the General Assembly drafted this legislation, why the Governor signed it into law, and the mischief to be remedied.

---

<sup>1</sup> Joint Statement of Chairman Gladys M. Brown and Vice Chairman Andrew G. Place entered December 21, 2017 at the instant Docket.

<sup>2</sup> Comments of OCA at page 5 filed February 5, 2018.

<sup>3</sup> Comments of PennFuture at page 1 filed January 18, 2018.

Comments filed by Governor Tom Wolf, Senators Mario M. Scavello, Tom Killion, John T. Yudichak, Jay Costa, John M. DiSanto, Steward J. Greenleaf, David G. Argall, Wayne D. Fontana, Guy Reschenthaler, and Representatives Michael B. Carroll, Eric M. Roe, Ronald S. Marsico, and Sue Helm are particularly insightful. As lawmakers who effectuated Act 40, these commenters are uniquely qualified to provide the Commission with information regarding the intent of the statute. Each of the comments provided by lawmakers states that their intent to ‘close the borders’ for Tier I solar credit qualifications was consistent with the design utilized by a number of our neighboring states to promote economic development. This interpretation is consistent with the supplemental interpretation provided in our Joint Statement and contrary to the proposal of the Commission in its TIO. Senators Jay Costa and John T. Yudichak descriptively summarize the sentiments and intentions of these lawmakers, stating the following:

*The Commission’s proposed interpretation under the Tentative Implementation Order published in the Pennsylvania Bulletin on January 6, 2018, would “grandfather” systems that are certified in Pennsylvania, rather than physically located in this state. We must respectfully disagree with this interpretation, which we find counter to the intentions of the General Assembly and especially of our colleagues who supported and voted in favor of this legislation.*

*Instead, the joint statement submitted by Chairperson Gladys M. Brown and Vice Chairperson Andrew G. Place better reflects our intentions in approving this legislation. Please know that legislation to “close our solar borders” for the purposes of satisfying the Alternative Energy Standards Portfolio Act has been considered in recent sessions and discussions have been exclusive to the physical locations of systems.*

*While we certainly recognize the potential need to address and honor existing contracts, the long-term and primary goals set forth by this legislation have been clear. Specifically, we seek to join our neighboring states that similarly have “closed solar borders” and to advance our commitment to promoting economic and job growth within Pennsylvania’s solar energy industry.<sup>4</sup>*

In further support of interpreting Sections 2804(2)(i) and 2804(2)(ii) consistent with our Joint Statement, the Department of Environmental Protection (DEP) states that the intention of this provision was to provide certainty that solar photovoltaic energy facilities located within the Commonwealth would not be affected by the changes implemented elsewhere in Act 40.<sup>5</sup> DEP also submits that the interpretation outlined in the TIO would essentially nullify the purpose of Act 40 by grandfathering enough currently-certified sources to prevent the law from having any environmental or other co-benefit whatsoever. Comments from the Pennsylvania Farm Bureau also echo this sentiment, stating that TIO interpretation would limit farmers’ options for compliance with ever-increasing environmental protection standards.<sup>6</sup>

---

<sup>4</sup> Comments of Senator John T. Yudichak and Senator Jay Costa filed on February 2, 2018.

<sup>5</sup> Joint comments of the DEP and Governor Tom Wolf (DEP section at page 1) filed February 5, 2018.

<sup>6</sup> Comments of the Pennsylvania Farm Bureau submitted February 5, 2018.

Further, ET Capital Solar Partners submits that the Commission’s tentative interpretation of Section 2804(2)(i) would make the additional language of Section 2804(2)(ii) redundant.<sup>7</sup> ET Capital Solar Partners states that if the legislative intent of Section 2804(2)(i) follows the Commission’s tentative interpretation, there would be no need for the additional language of Section 2804(2)(ii) to further protect existing facilities that have entered into agreements with Pennsylvania electric distribution companies (EDCs) and electric generation suppliers (EGSs) participating in the Pennsylvania markets. Therefore, ET Capital Solar Partners contends that the language of Section 2804(2)(ii) is further evidence that the legislative intent of Act 40 of 2017 is to stimulate further investment in solar facilities within the Commonwealth. Again, the rules of statutory construction are guiding here. 1 Pa. C.S. § 1922(2) states the following:

**In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:**

...

**(2) That the General Assembly intends the entire statute to be effective and certain.**

Case law further clarifies the interpretation of this provision, stating that the General Assembly does not intend words to be “mere surplusage.”<sup>8</sup>

When reviewing the totality of comments described above, it becomes evident that Sections 2804(1)(i), 2804(1)(ii), and 2804(1)(iii) explicitly describe the qualifications for Tier I Solar facilities after passage of Act 40; Section 2804(2)(i) clarifies that all Tier I Solar facilities certified before passage of Act 40 that are located within the geographic boundaries of Pennsylvania are to be held harmless from this legislation; and Section 2804(2)(ii) enjoins the legislation from breaching existing contracts from out-of-state Tier I Solar facilities which were entered into before passage to serve the AEPS needs of Pennsylvania entities. Therefore, we believe we must support the adoption of our interpretations of Sections 2804(2)(i) and 2804(2)(ii) in a manner consistent with our Joint Statement to the TIO. These interpretations are as follows:

**Sections 2804(2)(i)** - We interpret the phrase “[a] certification originating within the geographical boundaries of this Commonwealth...” as a facility located within Pennsylvania having received an AEPs Tier I solar photovoltaic share certification.

**2804(2)(ii)** - We interpret this section to only permit out-of-state facilities that are (a) already certified as AEPS Tier I Solar Photovoltaic and that (b) have entered into a contract with a Pennsylvania EDC or EGS serving Pennsylvania customers, for the sale of solar credits, to maintain certification until the expiration of the contract. We further wish to clarify that, consistent with the comments provided by ET Capital Solar Partners, this maintained

---

<sup>7</sup> Comments of ET Solar Capital Partners submitted January 17, 2018.

<sup>8</sup> *Thomas Jefferson University Hospitals, Inc. v. Pa. Department of Labor and Industry*, 162 A.3d 384, 393 (Pa. 2017), see also *Holland v. March*, 883 A.2d 449, 455-56 (Pa. 2005); *Green Acres Contracting Comp. v. Commonwealth*, 163 A.3d 1147 (Pa. Cmwlth. 2017) and *Pa. State Police, Bureau of Liquor Control Enforcement v. Legion Post 304 Home Assoc.*, 164 A.3d 612, 619 (Pa. Cmwlth. 2017) (holding that the rules of statutory construction require that courts, whenever possible, give each word in a statutory section meaning and not treat any word as surplusage).

certification should only be applicable to the amount of credits contractually committed to by an out-of-state certified facility to an EDC or EGS.<sup>9</sup> EDCs and EGSs seeking to qualify credits under this provision are required to file a Petition within 60 days of the entry date of this order. Procedures for the 2804(2)(ii) contract approval process will be provided by the Commission at this docket.

Given this interpretation, we are also required to provide implementation procedures associated with banked credits. The AEPS Act permits EDCs and EGSs to bank, or place in reserve, credits produced in one reporting year for compliance in the next two reporting years.<sup>10</sup> Implementation procedures are necessary to address handling of a credit generated by an out-of-state Tier I solar qualified facility before October 30, 2017, and not retired in PJM's Generation Attribute Tracking System before October 30, 2017. Since Act 40 omits any directive expressly empowering the Commission to modify the attributes of such credits, we believe that these credits should retain the tier attribute assigned at the time the credit was generated. To do otherwise would appear to modify the legal status, or tier attribute, of a credit without explicit statutory authority. The Statutory Construction Act does not presume retroactive effect of statutes. 1 Pa. C.S. § 1926 provides:

**No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.**

Further, the Commonwealth Court case provides guidance here when it determined the following:

*A retroactive law is one which relates back to and gives a previous transaction a legal effect different from that which it had under the law in effect when it transpired. This Court has held that "[a] law is given retroactive effect when it is used to impose new legal burdens on a past transaction or occurrence." R & P Services, Inc. v. Commonwealth, Department of Revenue, 541 A.2d 432, 434 (Pa. Cmwlth. 1988). However, section 1926 of the Statutory Construction Act provides that "no statute may be construed to be retroactive unless clearly and manifestly so intended by the General Assembly." 1 Pa. C.S. § 1926.<sup>11</sup>*

Therefore, given Act 40's omission of any directive to change the attribute of these banked credits, we submit that any out-of-state Tier I solar credit generated before October 30, 2017, should retain its Tier I solar attribute for the banking life span enumerated in AEPS. This interpretation is supported by the comments of the Retail Energy Supply Association, who states that EGSs may elect to procure varying vintage credits for use in future years in accordance with the prevailing banking rules, thus, the ability to rely on banked credits is an important component necessary for EGSs to effectively manage and satisfy their AEPS Act obligations.<sup>12</sup>

---

<sup>9</sup> For purposes of implementation, any alteration, such as a change, update, or extension to a contract applicable under this provision, and, entered into after October 30, 2017, would not be recognized under 2804(2)(i).

<sup>10</sup> The Alternative Energy Portfolio Standards Act of 2004, 73 P.S. §§ 1648.3(e)(6)

<sup>11</sup> *Kuziak v. Borough of Danville*, 125 A.3d 470 (Pa. Cmwlth. 2015).

<sup>12</sup> Comments of the Retail Energy Supply Association at 7.

In conclusion, we submit that the interpretations provided herein are necessarily required by this Commission consistent with the rules of statutory construction enumerated supra and also consistent with 1 Pa. C.S. § 1921(a), which provides that:

**The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.**

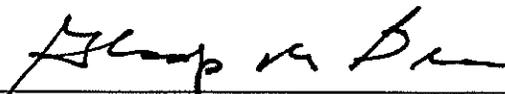
With this Order we begin the process of implementing Act 40, while recognizing that there are complexities in implementing and complying with the Act that may reveal issues which require further Commission action. The Commission will address any such issues, at this docket, and in a manner that provides all interested parties appropriate notice and opportunity to be heard.

**THEREFORE, WE MOVE THAT:**

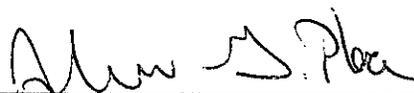
- (1) Electric Distribution Companies and Electric Generation Suppliers seeking to qualify credits under Section 2804(2)(ii) of Act 40 are required to file a Petition within sixty (60) days of the entry date of this order, the specific procedures for which will be outlined at this docket.
- (2) The Law Bureau and the Bureau of Technical Utility Services prepare a Final Implementation Order consistent with this Motion.

April 19, 2018

Date



\_\_\_\_\_  
Gladys M. Brown, Chairman



\_\_\_\_\_  
Andrew G. Place, Vice Chairman