

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560

FAX (717) 783-7152
consumer@paoca.org

February 5, 2018

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

Attached for electronic filing are the Comments of the Office of Consumer Advocate in the above-referenced proceeding.

If you have any questions, please feel free to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lauren M. Burge".

Lauren M. Burge
Assistant Consumer Advocate
PA Attorney I.D. # 311570

Attachment

cc: Darren Gill, Bureau of Technical Utility Services
Kriss Brown, Law Bureau

*243857

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of Act 40 of 2017

:
:

Docket No. M-2017-2631527

COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE

Lauren M. Burge
Assistant Consumer Advocate
PA Attorney I.D. #311570
E-Mail: LBurge@paoca.org

Counsel for:
Tanya J. McCloskey
Acting Consumer Advocate

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152

Dated: February 5, 2018

TABLE OF CONTENTS

I. INTRODUCTION	1
II. COMMENTS	2
A. Section 2804(1)	2
B. Section 2804(1)(i)	2
C. Section 2804(1)(ii)	3
D. Section 2804(1)(iii)	3
E. Implementation of Section 2804(1)	4
F. Section 2804(2)(i)	4
G. Section 2804(2)(ii)	5
H. Banked SRECs	7
I. Section 2804(3)	8
J. Implementation of Section 2804(3)	8
K. Section 2804(4)	9
III. CONCLUSION	10

I. INTRODUCTION

On January 6, 2018, the Pennsylvania Public Utility Commission's (Commission) Tentative Implementation Order was published in the *Pennsylvania Bulletin*. 48 Pa.B. 111, Implementation of Act 40 of 2017, Docket No. M-2017-2631527 (Order entered December 21, 2017) (Tentative Implementation Order). The Tentative Implementation Order seeks to implement the provisions of Act 40 of 2017¹ (Act 40 or the Act), which was signed into law by Governor Wolf on October 30, 2017. Act 40, in relevant part, establishes geographical limits on solar photovoltaic (solar PV) systems that qualify for the solar PV share requirement as part of the Alternative Energy Portfolio Standards (AEPS) Act. See 73 P.S. § § 1648.1 *et seq.*

The Office of Consumer Advocate (OCA) appreciates the opportunity to provide comments on the Commission's proposed interpretation and implementation of Act 40. In general, the OCA submits that the provisions of Act 40 should be implemented in a way that respects the work that has already been done by Pennsylvania electric distribution companies (EDCs) and electric generation suppliers (EGSs) to comply with the AEPS Act, which has resulted in solar development throughout the region, while also ensuring compliance at reasonable cost over time.

¹ Act 40 amended the Administrative Code, 71 P.S. §§ 1 *et seq.* Specifically, Section 11.1 of Act 40 amended Article XXVIII of the Administrative Code of 1929, relating to the powers and duties of the Commission, by adding Section 2804 relating to the Alternative Energy Portfolio Standards Act. This Tentative Rulemaking Order seeks to interpret and implement Section 11.1 of Act 40.

II. COMMENTS

A. Section 2804(1)

As discussed in the Tentative Implementation Order, Section 2804(1) “modifies Section 4 of the AEPS Act to exclude solar PV sources located outside of Pennsylvania from qualifying as an AES [alternative energy source] eligible to generate power and solar renewable alternative energy portfolio credits (SRECs) eligible to be used to meet the solar PV share requirement.” Tentative Implementation Order at 3. The Commission addressed two questions as to how Section 2804(1) is to be interpreted. First, the Commission proposes to define “solar renewable alternative energy portfolio credit” as SRECs that are eligible to meet the AEPS Act solar PV share requirements per Section 3(b)(2) of the AEPS Act, 73 P.S. § 1648.3(b)(2). Id. Additionally, the Commission proposes to interpret Section 2804(1) as permitting any solar PV system meeting the geographic requirements of Section 4 to continue to be eligible to generate Tier I alternative energy credits (AECs) which can be used to meet the Tier I non-solar PV share requirements in Section 3(b)(1) of the AEPS Act, 73 P.S. § 1648.3(b)(1). Id.

The OCA does not object to Commission’s proposed interpretation and additional definitions related to Section 2804(1).

B. Section 2804(1)(i)

Subsection 2804(1)(i) provides that solar PV will qualify to generate energy and SRECs eligible to be used to meet the solar PV share requirement when: (1) the solar PV generation source directly delivers power to an EDC’s retail customer; or (2) the solar PV generation source directly delivers power to the distribution system operated by an EDC that is obligated to meet the AEPS Act compliance requirements. Tentative Implementation Order at 3-4. In its Tentative Implementation Order, the Commission proposes to interpret these items as applying to: (1) “solar

PV systems physically connected to an EDC’s internal electric system, such as a roof mounted solar PV array,” and (2) “solar PV systems physically interconnected to an EDC’s distribution system,” respectively. Id.

The OCA does not object to this interpretation and does not have further comments on this item.

C. Section 2804(1)(ii)

The Commission proposes to interpret Section 2804(1)(ii) as allowing solar PV systems physically connected to a Pennsylvania electric cooperative or municipal electric system distribution networks to qualify to generate energy and SRECs eligible to meet solar PV share requirements. Tentative Implementation Order at 4. The OCA does not object to this proposed interpretation.

D. Section 2804(1)(iii)

The Commission proposes to interpret Section 2804(1)(iii) as “permitting solar PV systems physically connected to an EDC’s transmission system within the EDC’s service territory to qualify to generate energy and SRECs eligible to be used by EDCs and EGSs to meet the solar PV share requirements,” which would include “utility scale solar PV systems that are physically interconnected to an EDC’s transmission system within the EDC’s service territory and operating under PJM rules as a wholesale generator.” Tentative Implementation Order at 4.

The OCA submits that instead of referring to “an EDC’s transmission system,” this provision should apply to *any* transmission system in Pennsylvania. Under this subsection, any solar PV system directly connecting to a transmission system in Pennsylvania should qualify to generate energy and SRECs eligible to meet solar PV share requirements.

E. Implementation of Section 2804(1)

At this time, the OCA does not have specific comments regarding the format for certification numbers assigned to solar PV systems differentiating those eligible or not eligible to meet solar PV share requirements.

F. Section 2804(2)(i)

Section 2804(2)(i) allows solar PV generators with “a certification originating within the geographical boundaries of this commonwealth granted prior to the effective date of this section” to continue qualifying as an AES eligible to meet the solar PV requirement. The Commission proposes to interpret Section 2804(2)(i) as grandfathering in solar PV systems that had a Pennsylvania certification as an AES eligible to meet the solar PV share requirements prior to October 30, 2017 to continue to qualify to generate energy and SRECs eligible to be used by EDCs and EGSs to meet the solar PV share requirements. Tentative Implementation Order at 5. In effect, this would allow out-of-state solar PV generators to continue qualifying to generate energy and SRECs eligible to be used by EDCs and EGSs to meet solar PV share requirements as long as they had an existing Pennsylvania certification before the effective date of Act 40.

In the Joint Statement of Chairman Gladys M. Brown & Vice Chairman Andrew G. Place (hereinafter Joint Statement) that was issued concurrently with the Tentative Implementation Order, Chairman Brown and Vice Chairman Place proposed a different interpretation that they believe better carries out the intended effect of Act 40, as opposed to the “strictly textual” reading proposed in the Tentative Implementation Order. The Joint Statement proposes to 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.” Joint Statement at 2-3 (emphasis added). By requiring that the actual facility be

located in Pennsylvania, and not just that the facility have a preexisting Pennsylvania certification, the Joint Statement interpretation would largely prevent out-of-state participation in Pennsylvania SREC markets from already certified facilities,² while the Tentative Implementation Order interpretation would only prevent this participation on a going-forward basis.

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. Any interpretation of this section, however, should be guided by ensuring that the transition to Act 40 requirements is carried out in the least cost manner for ratepayers while respecting contract rights and investments entered into in good faith based on Pennsylvania law. Otherwise, the result could increase costs and deter future investment.

G. Section 2804(2)(ii)

Section 2804(2)(ii) provides that Section 2804(1) will not affect the “[c]ertification 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.” The Tentative Implementation Order proposes to interpret this language as allowing the program administrator to certify a solar PV system that does not meet the requirements of Section 2804(1) if a binding written contract existed prior to October 30, 2017 for the sale and purchase of alternative energy credits generated by a solar PV system that is not already certified in Pennsylvania. Tentative Implementation Order at 7. For example, under the Commission’s proposed interpretation, an out-of-state solar PV facility that is not certified or does not have a pending application in Pennsylvania could still qualify to generate energy and SRECs

² The OCA notes that it does not have information regarding how many facilities or how many megawatts of solar generation would be impacted by this interpretation. The OCA also does not have information on the cost impact of the differing interpretations. The Commission may wish to obtain this information before making a final decision.

eligible to be used by EDCs and EGSs to meet the solar PV share requirements if a binding contract for the sale and purchase of AECs existed before the effective date of Act 40.

The Commission also proposes to limit the certification to the duration of the contract. After the existing contract expires, the certification would be transferred to a Tier-I non-solar certification. Id. at 7-8. Under this interpretation, banked credits generated during the term of the contract would continue to be eligible to meet the solar PV share requirements per 52 Pa. Code § 75.69. Id. at 8.

The Joint Statement proposes a different interpretation of Section 2804(2)(ii), which would “only permit out-of-state facilities *already certified* as AEPS Tier I Solar Photovoltaic that have entered into a contract with a Pennsylvania electric distribution company, electric generation supplier serving Pennsylvania customers, load serving entity, electric cooperative, or municipal cooperative, for the sale of SRECs” to “maintain certification until the expiration of the contract.” Joint Statement at 3 (emphasis added). Unlike the Commission’s proposed interpretation, the Joint Statement would only allow facilities that are both already certified and have an existing contract to be allowed to continue generating energy and SRECs eligible to be used by EDCs and EGSs to meet the solar PV share requirements, and only for the duration of the existing contract.

The OCA believes that the language in Section 2804(2)(ii) is unclear as to its intent. The OCA is also without information as to the number of facilities impacted or the cost to ratepayers of the differing interpretations. In any case, the OCA submits that it is essential that the Commission proceed in a way that limits impairment of existing contracts and thus limits the impact on consumers as Pennsylvania transitions to the new paradigm required by Act 40. Pennsylvania utilities may have entered into contracts in good faith to purchase generation and SRECs from solar PV facilities that may no longer be eligible to meet the solar PV share

requirements as a result of Act 40. In this situation, an EDC or EGS would still be under contract to purchase from the solar PV facility that cannot obtain certification, but would have to enter additional contracts to buy qualifying SRECs to replace those that will not now qualify. This reduces the value of what is being purchased and requires the EDC or EGS to make additional purchases, thus leading to increased rates for consumers. The OCA submits that consumers should not be required to bear the costs of obtaining SRECs twice. As Pennsylvania transitions to applying the provisions of Act 40, the OCA respectfully suggests that the Commission should implement Act 40 in a manner that is guided by the goal of mitigating rate impacts for consumers.

Additionally, the Commission should be mindful that interpreting Act 40 in a way that impairs existing contracts may run afoul of the Contract Clause in the United States Constitution, U.S. Const. art. I, § 10, and the Pennsylvania Constitution, Pa. Const. art. I, § 17. Article I, Section 17 of the Pennsylvania Constitution states that “[n]o *ex post facto* law, nor any law impairing the obligation of contracts . . . shall be passed.” As explained by the U.S. Supreme Court, “[a]lthough the language of the Contract Clause is absolute, its prohibition must be accommodated to the inherent police power of the State ‘to safeguard the vital interests of its people.’” Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 410 (1983) (citation omitted); see also Emergycare, Inc. v. Millcreek Twp., 68 A.3d 1, 4-5 (Pa. Commw. 2013). The OCA submits that the Commission should be conscious of not violating these important protections for private contracts as it implements the provisions of Act 40.

H. Banked SRECs

The Joint Statement requests comment on the status of banked SRECs purchased from previously certified out-of-state facilities. Joint Statement at 3. The OCA recognizes that the statutory language is unclear on how these banked SRECs should be handled. However, the OCA

submits that banked SRECs have already been purchased by EDCs or EGSs, and the EDCs and EGSs would have to purchase additional SRECs if previously purchased credits are no longer usable. This will result in increased costs to consumers. The OCA reiterates its position that the transition to implementing Act 40's requirements should be carried out at the least cost to consumers.

I. Section 2804(3)

Section 2804(3) provides that “[t]his section shall apply to contracts entered into or renewed on or after the effective date of this section.” The Commission proposes to interpret this section as “limiting the eligibility of systems certified under the contract exception in Subsection 2804(2)(ii) to the duration of the contract for the sale and purchase of AECs when it was entered into prior to October 30, 2017.” Tentative Implementation Order at 8. This would prevent solar PV systems that no longer qualify to generate SRECs eligible to be used by EDCs and EGSs to meet the solar PV share requirements by repeatedly renewing existing contracts; at the end of the contract term, the solar PV system would instead be re-certified as a Tier 1 non-solar alternative energy resource. Id.

The OCA does not oppose this interpretation, but notes that this section should be implemented consistent with the OCA's comments above regarding Section 2804(2)(ii) and banked SRECs.

J. Implementation of Section 2804(3)

The OCA does not have specific comments on the certification process at this time beyond its comments provided above regarding Section 2804(3).

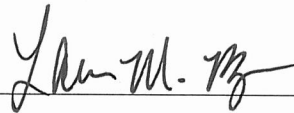
K. Section 2804(4)

Under Section 2804(4), the terms “Alternative Energy Source” and “Electric Distribution Company” maintain their existing definitions in the AEPS Act. The Tentative Implementation Order proposes that as such, solar PV systems that do not meet the requirements of 2804(1) or any exceptions in Act 40 may still generate credits eligible to meet the Tier I non-solar share requirements. Tentative Implementation Order at 9. The OCA does not object to this proposed interpretation.

III. CONCLUSION

The OCA appreciates the opportunity to comment on the Tentative Implementation Order. As discussed above, the OCA submits that the provisions of Act 40 should be implemented in a way that respects the work that has already been done by Pennsylvania electric distribution companies (EDCs) and electric generation suppliers (EGSs) to comply with the AEPS Act while also ensuring compliance at reasonable cost over time.

Respectfully Submitted,



Lauren M. Burge
Assistant Consumer Advocate
PA Attorney I.D. #311570
E-Mail: LBurge@paoca.org

Counsel for:
Tanya J. McCloskey
Acting Consumer Advocate

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152

Dated: February 5, 2018

242961