May 18, 2018

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Implementation of Act 40 of 2017
Docket No. M-2017-2631527
Final Implementation Order, May 3, 2018

Dear Secretary Chiavetta:

Enclosed for electronic filing and service in accordance with the attached Certificate of Service is the Petition for Rehearing and Reconsideration of American Municipal Power, Inc. ("AMP") with regard to the above-referenced docket.

Sincerely,

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CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the Petition for Rehearing and Reconsideration of the Final Implementation Order of Act 40, Docket No. M-2017-2631527, upon the persons listed below in the manner indicated in accordance with the requirements of 51 Pa. Code Section 1.54.

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BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Final Implementation Order	)	
	)	**Docket No. M-2017-2631527**
71 P.S. §§ 1 *et. seq.* Act 40	)	

Petition for Rehearing and Reconsideration of American Municipal Power, Inc.

Pursuant to Section 703(f) and 703(g) of the Public Utility Code,[1] and Section 5.572 of the regulations of the Pennsylvania Public Utility Commission ("Commission"), American Municipal Power, Inc. ("AMP")[2], on behalf of its members, hereby submits this Petition for Rehearing and Reconsideration regarding the Pennsylvania Public Utility Commission's ("Commission") Final Implementation Order entered on April 19, 2018. On October 30, 2017, the Pennsylvania Assembly enacted Act 40, which was signed into law by Governor Wolf on the same day. The legislation amends the Pennsylvania administrative code to limit the eligibility of solar facilities to meet the Commonwealth's alternative energy requirements under the Alternative Energy Portfolio Standards Act ("AEPS") to those facilities located in Pennsylvania.[3] The Commission, in its Final Implementation Order found that Act 40's "closing of the borders" provisions of out-of-state solar facilities should be applied to previously-granted certifications of out-of-state solar facilities that were granted before Act 40 was enacted.

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[1] 66 Pa. C.S. §§ 703(f) and 703(g).

[2] Given that this is a non-adversarial proceeding, AMP has not submitted a *pro hac vice* motion in accordance with Commission Regulations but instead is being represented by a bona fide officer of AMP. 52 Pa. Code § 1.21. Should the Commission determine this is an adversarial proceeding, or that a *pro hac vice* motion is required, AMP will submit a *pro hac vice* motion.

[3] Act 40 of 2017, Section 2804.

On May 11, 2018, Community Energy, Inc. and Community Energy Solar, LLC (collectively, "Community Energy") filed a Petition for Clarification and/or Reconsideration of the Final Implementation Order. The Community Energy Petition argued that the Final Implementation Order lacked clarity about whether the interests of all entities in the chain of ownership of the renewable energy credits can be preserved by the EDC or EGS filing a Petition to grandfather these credits. AMP agrees that the Final Implementation Order lacks clarity on this issue and that the Commission should clarify. On May 17, 2018, the Commission granted additional time for reconsideration and stayed the sixty-day period for Electric Distribution Companies and Electric Generation Suppliers to file a petition seeking qualification of credits under Section 2804(2)(ii) of the Administrative Code pending review of and consideration on the merits of the Community Energy Petition.

Nonetheless, AMP has additional concerns with the Final Implementation Order as described herein. Accordingly, and for the reasons set forth more fully herein, AMP respectfully requests that the Commission: (1) reconsider and vacate the Final Implementation Order, and; (2) adopt an order that recognizes the Commission-granted certifications of out-of-state solar facilities approved prior to the enactment of Act 40. In support hereof, AMP further avers as follows:

I. INTRODUCTION AND BACKGROUND

1. On December 21, 2017, the Commission issued a Tentative Implementation Order regarding Act 40's new locational requirements for solar photovoltaic systems, which was accompanied by a Joint Statement from Chairman Brown and Vice Chairman Place that offered an alternative interpretation of Act 40's treatment of out-of-state solar facilities that

had previously been certified by the Commission. The Tentative Implementation Order and the Joint Statement were published in the Pennsylvania Bulletin on January 7, 2018.

2. Following a comment period, wherein AMP submitted comments opposing the Joint Statement's supplemental interpretation, the Commission issued a Joint Motion of Chairman Brown and Vice Chairman Place on April 19, 2018 and entered a Final Implementation Order on May 3, 2018. As discussed below, the Final Implementation Order adopted the Joint Statement from Chairman Brown and Vice Chairman Place and is unjust and unreasonable.

II. LEGAL STANDARDS FOR REHEARING AND RECONSIDERATION

3. Pennsylvania Code Sections 703(f) and 703(g) grant parties the right to seek relief from a final decision of the Commission.[4] The right to seek relief is granted to any party to the proceeding and may relate to any matters in the proceeding as specified by the request for rehearing.[5]

4. Parties may raise matters designed to convince the Commission that it should exercise its discretion to amend or rescind a prior order.[6]

5. Through this petition, AMP demonstrates why the Commission should reconsider its Final Implementation Order regarding the interpretation of Act 40's Section 2804(2) to adopt the plain language of the legislation, avoid retroactive effect, and not run afoul of the commerce clause of the U.S. Constitution.

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[4] 66 Pa. C.S. §§ 703(f) and 703(g).

[5] *Crooks v. Pa. PUC*, 1 Pa. Cmwlth. 583, 276 A.2d 364 (1971).

[6] *Duick v. Pa. Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1982).

III. ARGUMENT

A. The Commission's manufacture of intent was in error when the plain language of Act 40 is clear.

6. Act 40 is clear and unambiguous if each word is given significance. Therefore the Commission need not divine the intent of the Pennsylvania General Assembly in its Final Implementation Order. Under the Pennsylvania Rules of Construction, in interpreting a statute that is "clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursing its spirit."[7] Only if the language is ambiguous may the intentions of the General Assembly be assessed.[8]

7. Prior to the passage of Act 40, the AEPS limited the locational requirements of alternative energy sources to (1) those within Pennsylvania or (2) within a Regional Transmission Organization ("RTO") footprint that provides transmission service to a part of Pennsylvania, such as PJM Interconnection, L.L.C.. However Act 40, Section 2804, sets new locational requirements for solar photovoltaic systems to be located within the geographic boundaries Pennsylvania, or directly connected to a Pennsylvania electric distribution system, in order to be an alternative energy source eligible under the AEPS.

8. As drafted and enacted by the Pennsylvania Assembly, Act 40 states that its changes to the AEPS shall not affect "*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 [under the AEPS]." Act 40, Section 2804(2) (emphasis added). The clear and plain

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[7] 1 Pa.C.S.A. § 1921(b).

[8] 1 Pa.C.S.A. § 1921(c).

meaning of the language refers to the certification originating within Pennsylvania. In fact, the Commission understood this plain language as, in its Tentative Implementation Order, the Commission stated that it "proposes to interpret the language 'a certification originating within the geographical boundaries of the Commonwealth' as a reference to certifications issued by the Commission's AEC Program Administrator in accordance with 52 Pa. Code §§ 75.62, 75.63 & 75.64."[9]

9. This plain language interpretation allows those solar facilities located outside of Pennsylvania commonwealth boundaries that have already been certified within Pennsylvania to remain so, but effectively "closes the border" to future certifications as of the day the law was signed.

10. Despite the lack of ambiguity of the plain language, the Commission, in an apparent attempt to add meaning to Act 40's Section 2894(2) that is not plainly stated, found in its Final Implementation Order Section 2804(2) of Act 40 contains vague and "unclear" language and that given the "unclear" language the Commission should look to the Rules of Statutory Construction to find the intention of the General Assembly. Final Implementation Order at 17. The Commission then relied on the submitted comments of legislators within the Pennsylvania Assembly[10] to effectively rewrite the plain language of Act 40 to change "certification" to "facility" in Section 2804(2).

[9] Tentative Implementation Order at 5-6.

[10] Joint Statement at 3, Final Implementation Order at 17-18.

11. In doing so, the Commission erred by inferring intention into legislation when the plain meaning is clear in violation of the Rules of Statutory Construction that instruct the Commission to not disregard the letter of legislation.[11]

12. The Commission's interpretation also is contrary to Pennsylvania precedence. Pennsylvania courts have held that "The legislature cannot be deemed to intend that language used in a statute shall be superfluous and without import. Neither may a court, in construing a statute, delete or disregard words contained therein. In construing a statute, no word of the statute is to be left meaningless, unless no other construction is possible."[12]

13. The plain language of the legislation clearly references certifications that have been granted, rather than facilities located within the boundaries of Pennsylvania. The word "certification" is significant and has meaning – certification refers to the determination by the AEC Program Administrator that the facility was deemed to meet AEPS requirements. The Final Implementation Order treats "certification" as superfluous and without significance under the guise of "unclear" language in order to reach the question of legislative intent.

14. The Commission should not ignore the plain language of Act 40 or replace the plain language with its own assertion of the General Assembly's intent. AMP requests that the Commission revert to the Tentative Implementation Order to recognize the

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[11] 1 Pa. C.S. § 1921(b).

[12] *See City of Allentown v. Pennsylvania Public Utility Commission*, 173 Pa.Super. 219 (1953); *citing Com. v. Mack Bros. Motor Car. Co.*, 359 Pa. 636 (1948); *Com. v. One 1939 Cadillac Sedan*, 158 Pa.Super. 392 (1946); and *Keating v. White*, 141 Pa.Super. 495 (1940) (citations omitted).

certifications granted to out-of-state solar facilities by Pennsylvania prior to Act 40's enactment in accordance with the plain language of Act 40.

B. The Commission's Final Implementation Order impermissibly results in retroactive application.

15. Under the Rules of Statutory Construction, when interpreting legislative text, administrative agencies should presume against a retroactive effect unless the legislation specifically declares as much.[13] As Pennsylvania courts have held, "[a]bsent clear language to the contrary, statutes are to be construed to operate prospectively only."[14]

16. There is no declaration, express or even implicit, that Act 40 shall apply retroactively. To the contrary, Act 40 clearly[15] states that it does not become effective prior to the effective date – October 30, 2017 (i.e., prospective operation). The Commission rightly concluded in the Tentative Implementation Order that facilities already certified on and prior to October 30th should retain their certification. However, in its Final Implementation Order the Commission did not address these concerns of retroactive application on certifications, addressing the issue only for the self-created problem of "banked credits." Final Implementation Order at 27-30.

17. The effect of the Final Implementation Order is that certifications that were lawfully obtained by the Pennsylvania Commission would become invalid, resulting in a

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[13] 1 Pa. C.S. § 1926.

[14] *See Green v. Pennsylvania Public Utility Commission*, 81 Pa. Commonwealth Ct. 55 (Commonwealth Court of Pennsylvania, 1984), citing *Department of Labor and Industry, Bureau of Employment Security v. Pennsylvania Engineering Corp.*, 54 Pa. Commonwealth Ct. 376 (1980).

[15] Section 2804(2) repeatedly references the effective date of the legislation as a demarcation of its application. *See* Section 2804(2)(i) and (ii), and Section 2804(3).

retroactive application of the border limitation in Act 40, contrary to the same Rules of Statutory Construction referenced in the Joint Statement and Final Implementation Order.

18. The Commission's interpretation that results in retroactive application when Act 40 specifically operates prospectively was an error. Accordingly, the Commission should apply Act 40's border limitation on a prospective basis only.

C. The Commission's Final Implementation Order Violates the Dormant Commerce Clause and is Unconstitutional.

19. The Commission's Final Implementation Order also runs afoul of the U.S. Constitution in its discrimination against out-of-state solar facilities. Article I, Section 8, clause 3 of the United States Constitution or the "commerce clause" allows Congress to regulate interstate commerce, but also limits states' ability to affect interstate commerce by treating in-state and out-of-state commerce disparately, i.e., the dormant or anti-commerce clause.[16]

20. State laws and regulations that discriminate against interstate commerce have been routinely struck down by the U.S. Supreme Court as a violation of the commerce clause, unless the state-administered discrimination is "demonstrably justified by a valid factor unrelated to economic protectionism."[17]

21. The Commission's Final Implementation Order confers economic benefits and disparately treats in-state solar facilities to the detriment of out-of-state facilities. Prior to Act 40 and the Commission's Final Implementation Order, these out-of-state solar

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[16] *See New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1998), *Loren J. Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

[17] *New Energy Co.* at 274, citing *Maine v. Taylor*, 477 U.S. 131 (1986).

facilities received the same certifications and similar treatment under the then-existing rules and laws. Treating in-state solar facilities differently from out of state solar facilities that lawfully received Pennsylvania certifications is unduly discriminatory in violation of the commerce clause as the Final Implementation Order favors in-state solar facilities in a way that is "designed to benefit in-state economic interests by burdening out-of-state competitors."[18] The Commission's Tentative Implementation Order, however, would be less susceptible to a discrimination claim as solar facilities outside of the Commonwealth that have already been certified by the Commission would be treated on par with their in-state counterparts.

22. The Commission has also failed to provide a valid reason for its discrimination against out-of-state solar facilities that does not rest on economic protectionism.[19] In its Final Implementation Order, the Commission did not offer a permissible reason for discriminating against out of state solar facilities that were certified in Pennsylvania, instead relying on the comments of Pennsylvania General Assembly legislators that the purpose of Act 40 was to promote "economic and job growth within Pennsylvania's solar energy industry."[20] These comments indicate that economic protectionism for Pennsylvania's solar industry is the basis of the Final Implementation Order.

23. The Commission's interpretation of Act 40 to insulate the solar facilities within Pennsylvania from interstate competition violates the commerce clause. The Commission

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[18] *New Energy Co.* at 274.

[19] *Maine v. Taylor*, 477 U.S. 131 (1986).

[20] Final Implementation Order at 18, citing comments of Senator John T. Yudichak and Senator Jay Costa filed on February 2, 2018.

should revert to the Tentative Implementation Order to recognize the certifications granted to out-of-state solar facilities by Pennsylvania prior to Act 40's enactment.

IV. CONCLUSION

Based on the foregoing, AMP respectfully requests that the Commission reconsider and vacate its April 19, 2018 Joint Statement and its May 3, 2018 Final Order and recognize the Commission's previously-granted solar facility certifications as part of the Alternative Energy Portfolio Standards.

Respectfully submitted,

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May 18, 2018

VERIFICATION

I, Pamala M. Sullivan, certify that I am the Executive Vice President Power Supply and Generation Operations for American Municipal Power, Inc. and that in this capacity I am authorized to, and do make this Verification on its behalf, that the facts set forth in the foregoing document are true and correct to the best of my knowledge, information and belief, and that American Municipal Power, Inc. expects to be able to prove the same at any hearing that may be held in this matter. I understand that false statements made therein are made subject to the penalties of 18 Pa. C.S. §4904, relating to unsworn falsifications to authorities.

Pamala M. Sullivan
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Dated: May 18, 2018

4849-4696-4324, v. 1110