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|  | **PENNSYLVANIA**  **PUBLIC UTILITY COMMISSION**  **Harrisburg, PA 17105-3265** |  |

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|  | Public Meeting held April 25, 2019 |
| Commissioners Present: |  |

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| Gladys Brown Dutrieuille, Chairman |  |
| David W. Sweet, Vice Chairman |  |
| Norman J. Kennard |  |
| Andrew G. Place |  |
| John F. Coleman, Jr. |  |

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| Joint Petition by AEP Energy, Inc. and AEP OnSite Partners, LLC to Certify Electric Production from Five Out-of-State Solar Facilities from November 1, 2017, through the Life of Each Facility as Eligible to Satisfy Their Tier I Solar Photovoltaic Shares Alternative Energy Credits Requirements Consistent with Existing Contracts | P-2018-3004218 |
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**OPINION AND ORDER**

**BY THE COMMISSION:**

Now before the Pennsylvania Public Utility Commission (Commission) for consideration is the Joint Petition of AEP Energy, Inc (AEP) and AEP OnSite Partners, LLC (AOP) (collectively, Joint Petitioners), requesting that the electric production from five AOP out-of-state solar facilities from November 1, 2017, through the life of each facility be qualified as satisfying the Tier I solar photovoltaic shares alternative energy credits (SAECs) obligations of AEP pursuant to contracts entered into prior to October 30, 2017 (Contract Petition). For the reasons expressed below, we will grant, in part, and deny, in part, the Contract Petition.

**Background**

Section 11.1 of Act 40 of 2017 (Act 40)[[1]](#footnote-1) amends the Administrative Code (Adm. Code), 71 P.S. §§ 1 *et seq*., by adding Section 2804 to the Adm. Code, 71 P.S. § 714, that amends the Alternative Energy Portfolio Standards Act (AEPS Act), 73 P.S. §§ 1648.1 – 1648.8, 66 Pa. C.S. § 2814, by establishing geographical limits on solar photovoltaic (solar PV) systems that qualify for the solar PV share requirement in Section 3 of the AEPS Act, 73 P.S. § 1648.3(b)(2). Act 40 became effective on October 30, 2017.

On December 21, 2017, the Commission adopted a Tentative Implementation Order (TIO) at the above referenced Docket seeking comments on proposed interpretations and implementation of Section 2804 of the Adm. Code.[[2]](#footnote-2) In addition to the TIO, Chairman Gladys M. Brown and Vice Chairman Andrew G. Place issued a joint statement that presented supplemental interpretations of Section 2804(2)(i) and 2804(2)(ii) of the Adm. Code, as well as the status of banked solar PV alternative energy credits (SRECs) for comment. Written comments were to be submitted within 30 days of the publication of the TIO in the *Pennsylvania Bulletin*, February 5, 2018.[[3]](#footnote-3)

On April 19, 2018, upon consideration of the comments, the Commission adopted the Joint Motion of Chairman Gladys M. Brown and Vice Chairman Andrew G. Place setting forth the Commission’s interpretation and implementation of Act 40. On May 3, 2018, the Act 40 Final Implementation Order (FIO) was entered.[[4]](#footnote-4) On May 16, 2018, the Commission issued a Secretarial Letter providing additional procedural information regarding Section 2804(2)(ii) of the Adm. Code, 71 P.S. § 714(2)(ii), contract approval process.

Various petitions for reconsideration/clarification and an application for stay were filed in response to the Act 40 FIO - some of which requested clarification regarding the Commission’s implementation of Section 2804(2)(ii).[[5]](#footnote-5) In response, the Commission entered an Opinion and Order on August 2, 2018, clarifying its interpretation and implementation of Section 2804(2) of the Administrative Code, 71 P.S. § 714(2).[[6]](#footnote-6)

Accordingly, we provided the following clarification as to the Implementation of Section 2804(2)(ii) as set forth below.

In the FIO, we stated the following regarding Sections 2804(2)(i) and (2)(ii):

For the reasons expressed in Section F.2. above, when reviewing the totality of comments described above, it becomes evident that Section 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 Act needs of Pennsylvania entities.

FIO at 26. We went on to state that “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 [Electric Distribution Company (EDC)] or [Electric Generation Supplier (EGS)] serving Pennsylvania customers, for the sale of solar credits, to maintain certification until the expiration of the contract.” FIO at 26-27. We further stated that “this maintained 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.” FIO at 27.

In addition, the Act 40 FIO addressed two issues related to subsection 2804(2)(ii). First, the Commission determined that the credits produced from any out-of-state solar facility that was certified by the AEPS Administrator prior to November 1, 2017, would retain the “SUN” designation; thus, continuing to allow those SAECs to remain eligible for use towards the AEPS Act solar share compliance requirements and which may be banked for subsequent use, consistent with the AEPS banking rules. Credits produced from these out-of-state solar facilities after November 1, 2017, are to be re-designated with an “NSTI” [Non-Solar Tier I] designation in the PJM Generation Attributes Tracking System (GATS) making these credits eligible only for the non-solar Tier I compliance requirements. FIO at 29-30.

On May 16, 2018, the Commission issued a Secretarial Letter regarding Petitions that may be filed pursuant to the FIO, which seek to have these now-designated NSTI credits, be considered as eligible for compliance towards the AEPS Act solar share compliance requirements, stating that:

Contracts may include those directly entered into between an out-of-state certified Tier I solar facility and an EDC or EGS; and/or a trail of contracts between an out-of-state certified Tier I solar facility, one or more intermediaries such as but not limited to wholesale default service participants or solar AEC aggregators, and an EDC or EGS which directly exhibits that a committed quantity of solar AEC output from the certified generation facility is being utilized to facilitate an EDC’s or EGS’s Tier I solar Alternative Energy Portfolio Standards obligations.

May 16, 2018, Secretarial Letter at Docket No. M‑2017‑2631527, n.3.

We provided further clarification as to the implementation of subsection 2804(2)(ii) as follows:

We clarify that all contracts with EGSs, EDCs and/or their wholesale suppliers, as well as any other entity holding contracts entered into prior to October 30, 2017, and within the chain of production of the solar AECs supplying those contracts may file a petition. Such Petitions may seek to have the AECs covered by the contracts with the EGS, EDC or their wholesale supplier certified for use by the EGS or EDC for compliance with the AEPS Act solar PV share requirement. We emphasize that only the AECs directly attributable to an EGS serving load in Pennsylvania, an EDC serving load in Pennsylvania or its wholesale supplier will be eligible to be used for the AEPS Act solar PV share requirement pursuant to Section 2804(2)(ii).

Act 40 Clarification order at 17. The Alternative Energy Credit Program Administrator began designating all solar PV credits generated on or after November 1, 2017, by out-of-state solar facilities, with “NSTI” in GATS, making them eligible only for the non-solar requirements of Tier l. FIO at 29-30. For those facilities that meet certain contractual conditions as indicated below, the Commission provided an option to file petitions to approve certain NSTI designated out-of-state solar PV credits as eligible to be used by an EGS or EDC to satisfy their Tier I solar share requirements. Act 40 Clarification order at 18.

**Discussion**

AEP is a Pennsylvania licensed EGS. AEP was initially licensed under the name of BlueStar Energy Services but changed its corporate name to AEP Energy, Inc. effective June 29, 2012, and received Commission approval of this name change via Secretarial Letter dated September 24, 2012. AEP is a subsidiary of American Electric Power Company, Inc. AOP is a limited liability corporation headquartered in Columbus, OH. AOP is a subsidiary of American Electric Power Company, Inc., and therefore an affiliate of AEP. AOP states that it provides behind the meter services and solutions to assist customers to reduce energy costs and risks, including the development, design, installation, ownership, and operation of customer-centric solar asset investments that reduce overall energy spending and risk. AOP owns and operates the following five

Pennsylvania AEPS certified solar generation facilities (collectively AOP Solar Facilities):

1. Clyde Solar Array Facility located at 743 W. McPherson HWY, Clyde, Ohio, Pennsylvania AEPS Certification Number: PA-36386-NSTI-I (Clyde Solar Array Facility);
2. Ohio Northern University Facility located at 780 Klinger Road, Ada, Ohio, Pennsylvania AEPS Certification Number: PA-36446-NSTI-I (ONU Solar Facility);
3. OSU Block O Facility located at 337 W. 17th Avenue, Columbus, Ohio, Pennsylvania AEPS Certification Number: PA-36204-NSTI-I (OSU Block O Solar Facility);
4. Newark Solar Array Facility located at 1367 East Main Street, Newark, Ohio, Pennsylvania AEPS Certification Number: PA-36498-NSTI-I (Newark Solar Array Facility); and,
5. Denison Solar Array located at 879 North St, Granville, Ohio, Pennsylvania AEPS Certification Number: Pennsylvania AEPS Certification Number: PA-36500-NSTI-I and Pennsylvania AEPS Certification Number: PA-36499-NSTI-I (Denison Solar Facility)[[7]](#footnote-7)

Petition ¶¶11-12.

AOP states that it operates each of these solar facilities and owns the marketing rights to the generated SAECs and that each of the AOP Solar Facilities was constructed and operated with the intent of supplying the solar renewable energy needs of its retail affiliate, AEP, for the life of the facility. AEP entered into Purchase and Sale Agreements with each of the five AOP Solar Facilities for Renewable Energy Credits (Solar Purchase Contracts). The petition states that the initial effective date for each of these Solar Purchase Contracts is prior to October 31, 2017. The Joint Petitioners state that pursuant to each of the Solar Purchase Contracts, AEP is contractually obligated to purchase all the SAECs generated by each of the facilities. Petition ¶¶13-16.

AEP and AOP are requesting that the Commission permit AEP to utilize the NSTI credits from the five AOP Solar Facilities, from November 1, 2017 through the life of each facility, to comply with AEP’s Tier I SAEC obligations, pursuant to Section 2804(2)(ii) of Act 40. Petition ¶19. The contracts supporting this request are examined in the sections that follow.

1. **Contract between AEP and Clyde Solar Array Facility**

In support of their petition, the Joint Petitioners provide a copy of the agreement between AEP and AOP’s Clyde Solar Array Facility for the purchase and sale of Ohio Solar RECs. This agreement was entered into by the parties on April 25, 2016, before the effective date of Act 40, and specifies the quantity of RECs and the vintage years. The vintage years specified in the contract are Calendar Years 2016, 2017, 2018 and 2019, beginning on January 1, 2016 and ending on December 31, 2019. Petition at Attachment A.

The Clyde Solar Array Facility was certified by the Pennsylvania AEPS Administrator on October 14, 2016, prior to the effective date of Act 40 (Petition ¶20), permitting its electric output to be qualified to satisfy the Tier I solar share requirements of the AEPS Act and was assigned certification number PA‑36386‑SUN‑I. On August 12, 2016, the Clyde Solar Array Facility was registered in PJM GATS, where credits are issued, and transactions recorded. With the recertification and retagging that occurred subsequent to the implementation of Act 40, effective November 1, 2017, the Clyde Solar Array Facility’s certification number was changed to PA‑36386‑NSTI‑I.

The Joint Petitioners state that the Clyde Solar Array Facility qualifies for two alternative Energy Portfolio Standards - Pennsylvania and Ohio and that AEP has the option to purchase and convert the Ohio Solar RECs to Pennsylvania SAECs and retire them from the PJM GATS tracking system. The Joint Petitioners further state that while the Solar Purchase Contract for the Clyde Solar Array Facility does not specifically note that the agreed-to purchase of RECs qualifies for Pennsylvania SAEC compliance, the output from this facility may be used for Pennsylvania SAEC compliance. Petition ¶17.

The Joint Petitioners state that it is the intent of AEP to utilize the output from this facility, as needed, to meet various state alternative energy compliance standards. Further asserting that this contract qualifies as creating a binding obligation on AEP to utilize the output (as needed) for compliance with the Pennsylvania requirements for the life of the facility and that the specification of certain years in the agreement was never intended to be relied upon as an expiration date of the Purchase and Sale Agreement between AEP and the Clyde Solar Array Facility. Therefore, AEP is requesting that it be permitted to utilize the solar output from the Clyde Solar Array facility to satisfy its Pennsylvania SAEC requirements, through the life of this facility. Petition ¶¶17-19.

Upon review of the agreement between AEP and the Clyde Solar Array Facility, we concur that the agreement was entered into prior to the effective date of Act 40. We disagree, however, with the assertion that the years specified in the agreement should not be relied upon as an expiration date of the Purchase and Sale Agreement between AEP and AOP’s Clyde Solar Array Facility. The agreement does not indicate that the term of the agreement extends past the prescribed years. Specifically, Section 2.4 of the agreement states that “[t]his Agreement shall be effective on and as of the Effective Date and shall terminate upon satisfaction by Buyer and Seller of their respective obligations

pursuant to this Agreement.” Petition Attachment A at 6. The only obligations identified in the Agreement are found on page 1 where it states the following:

The terms of the Transaction to which this Confirmation relates are as follows:

Trade Date: January 27, 2016

Seller: AEP OnSite Partners, LLC

Buyer: AEP Energy Partners, Inc.

Product: Ohio Solar RECs (“RECs”) from an Ohio Solar Renewable Resource pursuant to the Ohio Renewable Portfolio Standard.

(*See attached Annex A for definitions applicable to the Product*)

Vintage: Calendar Years 2016, 2017, 2018 and 2019 (beginning January 1, 2016 and ending December 31, 2019).

Petition Attachment A at 1.

The Joint Petitioners assert that the Transaction Confirmations included with each of the Solar Purchase Contracts provides per REC pricing for specific Calendar Years, the dates were included to match the retail renewable supply obligations at a specific point in time with the projected output of each of the AOP Solar Facilities. They go on to assert that as the solar needs of AEP changed over time (due to shifts in the amount of customer load that was being served), these obligations could be more realistically matched with the projected output of the AOP Solar Facilities closer in time. They argue that though the specification of certain years in the existing Transaction Confirmations was never intended to be relied upon as an expiration date of the Purchase and Sale Agreements between AEP and AOP. Petition ¶18.

The Commission is unpersuaded by this argument. As noted above, Section 2.4 of the agreement states that “[t]his Agreement shall be effective on and as of the Effective Date and shall terminate upon satisfaction by Buyer and Seller of their respective obligations pursuant to this Agreement.” The only obligations are for vintage calendar years 2016, 2017, 2018 and 2019 (beginning January 1, 2016 and **ending** December 31, 2019). As the obligations end December 31, 2019, the parties would have to renew this agreement to extend any obligations beyond December 31, 2019.

Section 2804(3) of the Adm. Code, 71 P.S. § 714(3) (emphasis added), states that ‘[t]his section shall apply to contracts entered into or **renewed** on or after the effective date of this section.” Accordingly, any renewal of the Sale Agreements occurring after October 30, 2017, must comply with Section 2804(1) of the Adm. Code, 71 P.S. § 714(1), in that it must be for AECs generated by solar photovoltaic facilities meeting the requirements set forth in Subsections 2804(1)(i), (ii), (iii) of the Adm. Code, 71 P.S. § 714(1)(i), (ii), (iii). As the Clyde Solar Array Facility is out‑of‑state and does not meet these requirements, AECs generated after December 31, 2019, by the Clyde Solar Array Facility after the Sale Agreement is renewed after October 30, 2017, will not be eligible to be used by AEP to meet its AEPS Act Tier I Solar PV share requirements.

As such, we find that in accordance with Section 2804(2)(ii) of the Adm. Code and the Commission’s Implementation Orders, the applicable terms of the agreement between AEP and AOP’s Clyde Solar Array Facility ends on December 31, 2019. Accordingly, only NSTI credits from the Clyde Solar Array Facility, issued by GATS for generation through the month of December 2019 are eligible to be used by AEP for AEPS Tier I Solar compliance in accordance with 52 Pa. Code § 75.69 (relating to the banking of alternative energy credits). The amount of credits shall not exceed the amounts specified in the agreement.

We deny the request to certify NSTI credits generated by the Clyde Solar Array Facility beginning in January 2020, henceforth, as eligible to be used towards AEP’s AEPS Tier I Solar obligation, pursuant to subsections 2804(2)(ii) and 2804(3) of the Adm. Code, 71 P.S. §§ 714(2)(ii), (3). We note, however, that AEP may use credits generated by the Clyde Solar Array Facility after December 2019 for its compliance with its AEPS Act Tier I non-solar obligations.

1. **Contract between AEP and ONU Solar Facility**

In support of their petition, the Joint Petitioners provide a copy of the agreement between AEP and AOP’s ONU Solar Facility for the purchase and sale of Ohio Solar RECs. This agreement was entered into by the parties on September 12, 2016, before the effective date of Act 40, and specifies the quantity of RECs and the vintage years. The vintage years specified in the contract are Calendar Years 2017 - 2021, beginning on January 1, 2017, and ending on December 31, 2021. Petition at Attachment B.

The ONU Solar Facility was certified by the Pennsylvania AEPS Administrator on May 16, 2017, prior to the effective date of Act 40 (Petition ¶20), permitting its electric output to be qualified to satisfy the AEPS Act Tier I solar share requirements and was assigned a certification number of PA‑36446‑SUN‑I. On April 11, 2017, the ONU Solar Facility was registered in PJM GATS, where credits are issued, and transactions recorded. With the retagging that occurred effective November 1, 2017, the ONU Solar Facility’s certification number was changed to PA‑36446‑NSTI‑I.

In the Joint Petition, AEP requests permission to utilize the output from this facility, through the life of this facility, to satisfy its Pennsylvania SAEC requirements. AEP states that the specification of certain years in the agreement was never intended to be relied upon as an expiration date of the Purchase and Sale Agreement between AEP and the ONU Solar Facility. Therefore, AEP is requesting that it be permitted to utilize the solar output from this facility to satisfy its Pennsylvania SAEC requirements through the life of this facility. Petition ¶¶18-19.

Upon review of the agreement between AEP and AOP’s ONU Solar Facility, we concur that the agreement was entered into prior to the effective date of Act 40. We disagree, however, with the assertion that the years specified in the agreement should not be relied upon as an expiration date of the Purchase and Sale Agreement between AEP and AOP’s ONU Solar Facility. The agreement does not indicate that the term of the agreement extends past the prescribed years. Specifically, Section 2.4 of the agreement states that “[t]his Agreement shall be effective on and as of the Effective Date and shall terminate upon satisfaction by Buyer and Seller of their respective obligations pursuant to this Agreement.” Petition Attachment B at 6. The only obligations identified in the Agreement are found on pages 1-3 where it states the following:

The terms of the Transaction to which this Confirmation relates are as follows:

Trade Date: September 2, 2016

Seller: AEP OnSite Partners, LLC

Buyer: AEP Energy Partners, Inc.

Product: Ohio Solar RECs (“RECs”) from an Ohio Solar Renewable Resource pursuant to the Ohio Renewable Portfolio Standard.

The RECs also qualify as Pennsylvania Solar RECs.

(*See attached Annex A for definitions applicable to the Product*)

ONU Project/Unit Seller’s Ohio Northern University generation facility has an expected total system size of 2,065 kW DC (“ONU Project”). The ONU Project is a ground mounted, inverter‑based solar PV array located south of Lima Ada Road and east of Klinger Road in Ada Ohio, Hardin County (the “Unit”).

Vintage: Calendar Years 2017 – 2021 (“Calendar Year” means the twelve (12) month period beginning January 1 and ending December 31 in which the energy was generated)

Contract Quantity: [proprietary] of the RECs generated by the Unit during the Calendar Years 2017 – 2021, on a Unit Contingent basis.

“Unit Contingent” means Seller’s obligation to deliver the RECs may be excused only on account of the failure of the Unit to generate such RECs during the applicable Calendar Tear, despite Seller’s diligent, commercially reasonable efforts.

Petition Attachment B at 1.

The Joint Petitioners assert that the Transaction Confirmations included with each of the Solar Purchase Contracts provides per REC pricing for specific Calendar Years, the dates were included to match the retail renewable supply obligations at a specific point in time with the projected output of each of the AOP Solar Facilities. They go on to assert that as the solar needs of AEP changed over time (due to shifts in the amount of customer load that was being served), these obligations could be more realistically matched with the projected output of the AOP Solar Facilities closer in time. They argue that though the specification of certain years in the existing Transaction Confirmations was never intended to be relied upon as an expiration date of the Purchase and Sale Agreements between AEP and AOP. Petition ¶18.

The Commission is unpersuaded by this argument. As noted above, Section 2.4 of the agreement states that “[t]his Agreement shall be effective on and as of the Effective Date and shall terminate upon satisfaction by Buyer and Seller of their respective obligations pursuant to this Agreement.” The only obligations are for vintage calendar years 2017 – 2021 (“Calendar Year” means the twelve (12) month period beginning January 1 and **ending** December 31 in which the energy was generated). Also, the contract quantity only includes the RECs generated by the Unit during the Calendar Years 2017 – 2021. As the obligations end December 31, 2021, the parties would have to renew this agreement to extend any obligations beyond December 31, 2021.

Section 2804(3) of the Adm. Code, 71 P.S. § 714(3) (emphasis added), states that ‘[t]his section shall apply to contracts entered into or **renewed** on or after the effective date of this section.” Accordingly, any renewal of the Sale Agreements occurring after October 30, 2017, must comply with Section 2804(1) of the Adm. Code, 71 P.S. § 714(1), in that it must be for AECs generated by solar photovoltaic facilities meeting the requirements set forth in Subsections 2804(1)(i), (ii), (iii) of the Adm. Code, 71 P.S. § 714(1)(i), (ii), (iii). As the ONU Solar Facility is out‑of‑state and does not meet these requirements, AECs generated after December 31, 2021, by the ONU Solar Facility after the Sale Agreement is renewed after October 30, 2017, will not be eligible to be used by AEP to meet its AEPS Act Tier I Solar PV share requirements.

As such, we find that in accordance with Section 2804(2)(ii) of the Adm. Code and the Commission’s Implementation Orders, the applicable terms of the agreement between AEP and AOP’s ONU Solar Facility ends on December 31, 2021. Accordingly, only NSTI credits from the ONU Solar Facility, issued by GATS for generation through the month of December 2021 are eligible to be used by AEP for AEPS Tier I Solar compliance in accordance with 52 Pa. Code § 75.69 (relating to the banking of alternative energy credits). The amount of credits shall not exceed the amounts specified in the agreement.

We deny the request to certify NSTI credits generated by the ONU Solar Facility beginning in January 2022, henceforth, as eligible to be used towards AEP’s AEPS Tier I Solar obligation, pursuant to subsections 2804(2)(ii) and 2804(3) of the Adm. Code, 71 P.S. §§ 714(2)(ii), (3). We note, however, that AEP may use credits generated by the ONU Solar Facility after December 2021 for its compliance with its AEPS Act Tier I non-solar obligations.

1. **Contract between AEP and OSU Block O Solar Facility**

In support of their petition, the Joint Petitioners provided a copy of the agreement between AEP and AOP’s OSU Block O Solar Facility for the purchase and sale of Ohio Solar RECs. This agreement was entered into by the parties on January 27, 2017, before the effective date of Act 40, and specifies the quantity of RECs and the vintage years. The vintage years specified in the contract are Calendar Years 2017 - 2023, beginning on January 1, 2017, and ending on December 31, 2023. Petition at Attachment C.

The OSU Block O Solar Facility was certified by the Pennsylvania AEPS Administrator on January 9, 2017, prior to the effective date of Act 40 (Petition ¶20), permitting its electric output to be qualified to satisfy the AEPS Act Tier I solar share requirements and was assigned certification number PA‑36204‑SUN‑I. On December 8, 2017, the OSU Block O Solar Facility was registered on the PJM GATS registry where credits are issued, and transactions recorded. With the recertification and retagging that occurred effective November 1, 2017, the OSU Block O Solar Facility’s certification number was changed to PA‑36204‑NSTI‑I.

The Joint Petitioners state that the OSU Block O Solar Facility qualifies for two alternative Energy Portfolio Standards - Pennsylvania and Ohio and that AEP has the option to purchase and convert the Ohio Solar RECs to Pennsylvania SAECs and retire them from the PJM GATS tracking system. The Joint Petitioners further state that while the Solar Purchase Contract for the OSU Block O Solar Facility does not specifically note that the agreed-to purchase of RECs qualifies for Pennsylvania SAEC compliance, the output from this facility may be used for Pennsylvania SAEC compliance. Petition ¶17.

The Joint Petitioners state that it is the intent of AEP to utilize the output from this facility, as needed, to meet various state alternative energy compliance standards. Further the Joint Petitioners state that this contract qualifies as creating a binding obligation on AEP to utilize the output (as needed) for compliance with the Pennsylvania requirements for the life of the facility and that the specification of certain years in the agreement was never intended to be relied upon as an expiration date of the Purchase and Sale Agreement between AEP and the OSU Block O Solar Facility. Therefore, AEP is requesting that it be permitted to utilize the solar output from the OSU Block O Solar Facility to satisfy its Pennsylvania SAEC requirements, through the life of this facility. Petition ¶¶17-19.

Upon review of the agreement between AEP and AOP’s OSU Block O Solar Facility, we concur that the agreement was entered into prior to the effective date of Act 40. We disagree, however, with the assertion that the years specified in the agreement should not be relied upon as an expiration date of the Purchase and Sale Agreement between AEP and the AOP’s OSU Block O Solar Facility. The agreement does not indicate that the term of the agreement extends past the prescribed years. Specifically, Section 2.4 of the agreement states that “[t]his Agreement shall be effective on and as of the Effective Date and shall terminate upon satisfaction by Buyer and Seller of their respective obligations pursuant to this Agreement.” Petition Attachment C at 6. The only obligations identified in the Agreement are found on page 1 where it states the following:

The terms of the Transaction to which this Confirmation relates are as follows:

Trade Date: January 9, 2017

Seller: AEP OnSite Partners, LLC

Buyer: AEP Energy, Inc.

Product: Ohio Solar RECs (“RECs”) from an Ohio Solar Renewable Resource pursuant to the Ohio Renewable Portfolio Standard.

(*See attached Annex A for definitions applicable to the Product*)

Vintage: Calendar Years 2017 – 2023 (“Calendar Year” means the twelve (12) month period beginning January 1 and ending December 31).

Petition Attachment A at 1.

The Joint Petitioners assert that the Transaction Confirmations included with each of the Solar Purchase Contracts provides per REC pricing for specific Calendar Years, the dates were included to match the retail renewable supply obligations at a specific point in time with the projected output of each of the AOP Solar Facilities. They go on to assert that as the solar needs of AEP changed over time (due to shifts in the amount of customer load that was being served), these obligations could be more realistically matched with the projected output of the AOP Solar Facilities closer in time. They argue that though the specification of certain years in the existing Transaction Confirmations was never intended to be relied upon as an expiration date of the Purchase and Sale Agreements between AEP and AOP. Petition ¶18.

The Commission is unpersuaded by this argument. As noted above, Section 2.4 of the agreement states that “[t]his Agreement shall be effective on and as of the Effective Date and shall terminate upon satisfaction by Buyer and Seller of their respective obligations pursuant to this Agreement.” The only obligations are for vintage calendar years 2017 – 2023 (“Calendar Year” means the twelve (12) month period beginning January 1 and **ending** December 31). As the obligations end December 31, 2023, the parties would have to renew this agreement to extend any obligations beyond December 31, 2023.

Section 2804(3) of the Adm. Code, 71 P.S. § 714(3) (emphasis added), states that ‘[t]his section shall apply to contracts entered into or **renewed** on or after the effective date of this section.” Accordingly, any renewal of the Sale Agreements occurring after October 30, 2017, must comply with Section 2804(1) of the Adm. Code, 71 P.S. § 714(1), in that it must be for AECs generated by solar photovoltaic facilities meeting the requirements set forth in Subsections 2804(1)(i), (ii), (iii) of the Adm. Code, 71 P.S. § 714(1)(i), (ii), (iii). As the OSU Block O Solar Facility is out‑of‑state and does not meet these requirements, AECs generated after December 31, 2023, by the OSU Block O Solar Facility after the Sale Agreement is renewed after October 30, 2017, will not be eligible to be used by AEP to meet its AEPS Act Tier I Solar PV share requirements.

As such, we find that in accordance with Section 2804(2)(ii) of the Adm. Code and the Commission’s Implementation Orders, the applicable terms of the agreement between AEP and AOP’s OSU Block O Solar Facility ends on December 31, 2023. Accordingly, only NSTI credits from the OSU Block O Solar Facility, issued by GATS for generation through the month of December 2023, are eligible to be used by AEP for AEPS Tier I Solar compliance in accordance with 52 Pa. Code § 75.69 (relating to the banking of alternative energy credits). The amount of credits shall not exceed the amounts specified in the agreement.

We deny the request to certify NSTI credits generated by the OSU Block O Solar Facility beginning in January 2024, henceforth, as eligible to be used towards AEP’s AEPS Tier I Solar obligation, pursuant to subsections 2804(2)(ii) and 2804(3) of the Adm. Code, 71 P.S. §§ 714(2)(ii), (3). We note, however, that AEP may use credits generated by the OSU Block O Solar Facility after December 2023 for its compliance with its AEPS Act Tier I non-solar obligations.

1. **Contract between AEP and Newark Solar Array Facility**

In support of their petition, the Joint Petitioners provided a copy of the agreement between AEP and AOP’s Newark Solar Array Facility for the purchase and sale of Ohio SRECs. This agreement was entered into by the parties on February 2, 2017, before the effective date of Act 40, and specifies the quantity of Ohio SRECs and the vintage years. The vintage years specified in the contract are Calendar Years 2017 - 2020, beginning on January 1, 2017, and ending on December 31, 2020. Petition at Attachment D.

The Newark Solar Array Facility was certified by the Pennsylvania AEPS Administrator on May 10, 2018, after the effective date of Act 40 (Petition ¶21), to permit its electric output to be qualified to satisfy the AEPS Act Tier I non‑solar requirements and was assigned certification number PA‑36498‑NSTI‑I.

The Joint Petitioners state that while this facility received AEPS Act certification after the effective date of Act 40, the Purchase and Sale Agreement was entered into before the effective date of Act 40, and that the contract was a necessary condition for subsequent construction of the facility. They assert that the Purchase and Sale Agreement satisfies the “binding written contract for the sale and purchase of SAECs” requirement of Section 2804(2)(ii), and therefore submit that the Pennsylvania AEPS Act certification date should not derail the ability of AEP to rely on the solar output from this facility to meet its ongoing Pennsylvania AEPS SAEC obligations. Petition ¶21.

Upon review of the agreement between AEP and AOP’s Newark Solar Array Facility, we concur that the agreement was entered into prior to the effective date of Act 40. We disagree, however, that the Purchase and Sale Agreement meets the requirements of Act 40. In the FIO, the Commission interpreted Section 2804(2)(ii) 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.” FIO at 26-27. In the FIO we further stated that “this maintained 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.” FIO at 27. As such, both conditions (a) and (b) referenced above must to be met for an out‑of‑state facility’s output to be eligible as an AEPS Tier I Solar Photovoltaic resource.

The Newark Solar Array Facility entered into a contract prior to the effective date of Act 40 but did not have an AEPS Act Tier I Solar Photovoltaic certification prior to the effective date of Act 40. Therefore, we deny the request to certify NSTI credits generated by the Newark Solar Array Facility, issued by GATS as eligible to be used towards AEP’s AEPS Act Tier I Solar obligation, pursuant to subsection 2804(2)(ii) of the Adm. Code, 71 P.S. § 714(2)(ii). We note, however, that AEP may use credits generated by the Newark Solar Array Facility for its compliance with its AEPS Act Tier I non-solar obligations.

1. **Contract between AEP and Denison Solar Facility**

In support of their petition, the Joint Petitioners provided a copy of the agreement between AEP and AOP’s Denison Solar Facility for the purchase and sale of Ohio SRECs. This agreement was entered into by the parties on July 17, 2017, before the effective date of Act 40, and specifies the quantity of Ohio SRECs and the vintage years. The vintage years specified in the agreement are Calendar Years 2017 – 2021, beginning on January 1, 2017, and ending on December 31, 2021. Petition at Attachment E.

The Denison Solar Facility was certified by the Pennsylvania AEPS Administrator on May 5, 2018, and July 7, 2018,[[8]](#footnote-8) after the effective date of Act 40 (Petition ¶21), to permit its electric output to be qualified to satisfy the AEPS Act Tier I non‑solar requirements and was assigned certification numbers PA-36499 NSTI-I and PA-36500-NSTI-I.

The Joint Petitioners state that while this facility received AEPS Act certification after the effective date of Act 40, the Purchase and Sale Agreement was entered into before the effective date of Act 40, and that the contract was a necessary condition for subsequent construction of the facility. They assert that the Solar Purchase Agreement satisfies the “binding written contract for the sale and purchase of SAECs” requirement of Section 2804(2)(ii), and therefore, submit that the Pennsylvania AEPS Act certification date should not derail the ability of AEP to rely on the solar output from this facility to meet its ongoing Pennsylvania AEPS SAEC obligations. Petition ¶21.

Upon review of the agreement between AEP and AOP’s Denison Solar Facility, we concur that the agreement was entered into prior to the effective date of Act 40. We disagree, however, that the Purchase and Sale Agreement meets the requirements of Act 40. In the FIO, the Commission interpreted Section 2804 (2)(ii) 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.” FIO at 26-27. In the FIO we further stated that “this maintained 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.” FIO at 27. As such, both conditions (a) and (b) referenced above must be met for an out‑of‑state facility’s output to be eligible as an AEPS Tier I Solar Photovoltaic resource.

The Denison Solar Facility entered into a contract prior to the effective date of Act 40 but did not have an AEPS Act Tier I Solar Photovoltaic certification prior to the effective date of Act 40. Therefore, we deny the request to certify NSTI credits generated by the Denison Solar Facility, issued by GATS as eligible to be used towards AEP’s AEPS Tier I Solar obligation, pursuant to subsection 2804(2)(ii) of the Adm. Code, 71 P.S. § 714(2)(ii). We note, however, that AEP may use credits generated by the Denison Solar Facility for its compliance with its AEPS Act Tier I non-solar obligations.

**Conclusion**

For the reasons expressed in this Opinion and Order we will grant, the Joint Petition filed by AEP and AOP to utilize electric production from the Clyde Solar Array Facility, Certification Number PA-36386-NSTI-I, the ONU Solar Facility, Certification Number PA-36446-NSTI-I, and the OSU Block O Solar Facility, Certification Number PA 36204-NSTI-I, from November 1, 2017 as eligible to meet the AEP’s AEPS Act Tier I Solar PV share requirements. The number of credits approved by this order shall not exceed the annual amounts specified in the Purchase and Sale Agreements between AEP and each AOP Solar Facility. The approved credits would be eligible to meet the AEPS Act Tier I solar PV share requirements in accordance with 52 Pa. Code § 75.69 (relating to the banking of alternative energy credits). We will deny the Joint Petition filed by AEP and AOP to utilize electric production from the Newark Solar Array Facility, Certification Number PA-36498-NSTI-I, and the Denison Solar Facility, Certification Numbers PA-36499 NSTI-I and PA-36500-NSTI-I, from November 1, 2017, as eligible to meet the AEP’s AEPS Act Tier I Solar PV share requirements; **THEREFORE,**

**IT IS ORDERED:**

1. That the Joint Petition of AEP Energy Inc. and AOP OnSite Partners, LLC to approve the electric production reported from the Clyde Solar Array Facility, the Ohio Northern University Facility, and the OSU Block O Facility, from November 1, 2017, as eligible to meet their Tier I solar photovoltaic shares alternative energy credits requirements consistent with existing contracts is granted consistent with this Opinion and Order.

2. That the Joint Petition of AEP Energy Inc. and AOP OnSite Partners, LLC to approve the electric production reported from the Newark Solar Array Facility, and the Denison Solar Array, from November 1, 2017, as eligible to meet their Tier I solar photovoltaic shares alternative energy credits requirements consistent with existing contracts is denied consistent with this Opinion and Order.

3. That AEP Energy Inc. may use alternative energy credits generated by the Clyde Solar Array Facility, with a Pennsylvania Certification Number PA-36386-NSTI-I, from November 2017 through the month of December 2019, to satisfy its Alternative Energy Portfolio Standards Act Tier I solar photovoltaic share obligations in accordance with this Opinion and Order.

4. That AEP Energy Inc. may use alternative energy credits generated by the Ohio Northern University Solar Facility, with a Pennsylvania Certification Number PA‑36446-NSTI-I, from November 2017 through the month of December 2021, to satisfy its Alternative Energy Portfolio Standards Act Tier I solar photovoltaic share obligations in accordance with this Opinion and Order.

5. That AEP Energy Inc. may use alternative energy credits generated by the OSU Block O Facility, with a Pennsylvania Certification Number PA-36204-NSTI-I, from November 2017 through the month of December 2023, to satisfy its Alternative Energy Portfolio Standards Act Tier I solar photovoltaic share obligations in accordance with this Opinion and Order.

6. That AEP Energy Inc. may not use alternative energy credits generated by the Newark Solar Array Facility, with a Pennsylvania Certification Number PA‑36498‑NSTI-I, to satisfy its Alternative Energy Portfolio Standards Act Tier I solar photovoltaic share obligations in accordance with this Opinion and Order.

7. That AEP Energy Inc. may not use alternative energy credits generated by the Denison Solar Array with Pennsylvania Certification Numbers PA-36499 NSTI-I and PA-36500-NSTI-I, to satisfy its Alternative Energy Portfolio Standards Act Tier I solar photovoltaic share obligations in accordance with this Opinion and Order.

8. That a copy of this Opinion and Order be served on AEP Energy, Inc., and AEP OnSite Partners, LLC.

9. That this proceeding at Docket NumberP-2018-3004218 be marked closed.

**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: April 25, 2019

ORDER ENTERED: April 25, 2019

1. Act 40 of Oct. 30, 2017, P.L. 379, No. 40 (Act 40). [↑](#footnote-ref-1)
2. *See Implementation of Act 40 of 2017*, Tentative Implementation Order at Docket No. M‑2017‑2631527 (entered December 21, 2017). [↑](#footnote-ref-2)
3. The TIO was published in the *Pennsylvania Bulletin* on January 6, 2018 at 48 Pa. B. 111. [↑](#footnote-ref-3)
4. *See Implementation of Act 40 of 2017*, Final Implementation Order at Docket No. M‑2017‑2631527 (entered December 21, 2017). [↑](#footnote-ref-4)
5. *See, e.g., In the Matter of Implementation of Act 40 of 2017, Docket No. M-2017-2631527, Petition of*

   *Exelon Generation Company. LLC and Constellation New Energy. Inc. For Clarification And/or*

   *Reconsideration of the Commission’s Final Implementation,* at 6-10. [↑](#footnote-ref-5)
6. *Implementation of Act 40 of 2017*, Opinion and Order, Docket No. M-2017-2631527, (entered August 2, 2018) (‘Act 40 Clarification Order). [↑](#footnote-ref-6)
7. Though one facility, the separate metering at this facility necessitated two Pennsylvania AEPS

   certifications. [↑](#footnote-ref-7)
8. Though one facility, the separate metering at this facility necessitated two Pennsylvania AEPS

   certifications. [↑](#footnote-ref-8)