**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**Comments of American Municipal Power, Inc.**

American Municipal Power, Inc. ("AMP"), on behalf of its members, hereby submits comments regarding the Pennsylvania Public Utility Commission's ("Commission") Tentative Implementation Order entered on December 21, 2017 and published in the Pennsylvania Bulletin on January 6, 2018 in the above referenced docket. 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.[1]

## I. AMP's Interest

AMP is a nonprofit multistate public power entity formed in 1971 that currently has 135 Members in nine states, including 29 members in Pennsylvania. All of AMP's members are political subdivisions that own and/or operate municipal electric utility systems. AMP's primary purpose is to assist its member communities in meeting their electric and energy needs in a reliable and economic fashion. This purpose is served in a number of ways, including through the ownership of electric generating facilities,

[1] Act 40 of 2017, Section 2804.

scheduling and dispatch of member-owned generation, and through power supply and transmission arrangements that AMP makes with third-parties at the request of and on behalf of its members. AMP's generation resources include renewable energy resources such as solar, hydroelectric, and wind facilities. Five (5) of AMP's solar sites are currently certified by Pennsylvania pursuant to the AEPS in effect prior to October 30, 2017. Two Pennsylvania Borough Members receive solar-generated power from some of these installations, along with the accompanying environmental attributes.

As an owner of solar generation facilities already certified by the Commission, AMP and the participating members will be directly affected by any changes made to the Pennsylvania AEPS as a result of this proceeding. AMP therefore submits the following comments in response to the Tentative Implementation Order and the supplemental interpretation offered by Chairman Brown and Vice Chairman Place in their joint statement.

## II. Comments

### A. Tentative Implementation Order

Prior to the passage of Act 40, the AEPS limited the locational requirements of alternative energy sources simply to those within Pennsylvania or 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 in Pennsylvania, or directly connected to a Pennsylvania electric distribution system, in order to be an alternative energy source eligible under the AEPS. Act 40 also 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 sources eligible [under the AEPS]." Act 40, Section 2804(2) (emphasis added).

In the Tentative Implementation Order, the Commission states that it "proposes to interpret the language 'a certification originating within the geographical boundaries of the Commonwealth' as a reference to systems certified by the Commission's AEC Program Administrator in accordance with 52 Pa. Code §§ 75.62, 75.63 & 75.64."[2] This interpretation allows those solar facilities located outside of Pennsylvania commonwealth boundaries that have already been certified to remain so, but effectively "closes the border" as of the day the law was signed. AMP supports the Commission's interpretation as it strikes an appropriate balance between supporting Pennsylvania-specific solar projects and honoring the certification of existing, out of state solar projects. As discussed below, alternative interpretations raise issues of retroactive effect and undercuts the plain language of Section 2804(2)(i) origin of certification focus.

**B. Supplemental Interpretation**

AMP has concerns and does not support the supplemental interpretation set forth in the Joint Statement of Chairman Brown and Vice Chairman Place. The Joint Statement provides an alternative interpretation to a plain reading of the text of Act 40 wherein rather than Act 40 not affecting "a certification originating within the geographical boundaries of this Commonwealth," the General Assembly intended to mean that nothing in Act 40 would affect "a facility located within Pennsylvania having received an AEPs Tier 1 solar

[2] Tentative Implementation Order at 5-6.

photovoltaic share certification."[3] The joint statement asserts that this supplemental interpretation would frame the "*potential intentions* of the General Assembly to foster economic development in the state, to support environmental stewardship, and to instill electric reliability." Joint Statement at 2 (emphasis added).

To justify this significant change in meaning, the Joint Statement suggests the Rules of Statutory Construction instruct the Commission to effectuate the intent of the Pennsylvania legislature. However, the Commission should not read an unstated and potential intention into legislation when the plain meaning is clear. The Rules of Statutory Construction also note 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."[4] Pennsylvania courts have also 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." *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).

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

[3] Joint Statement of Chairman Gladys M. Brown & Vice Chairman Andrew G. Place at 2-3 ("Joint Statement").

[4] 1 Pa. C.S. § 1921(b).

determination by the AEC Program Administrator that the facility was deemed to meet AEPs requirements. The supplemental interpretation would require the Commission to ignore the plain text of and impermissibly rewrite Act 40.

Moreover, the Joint Statement fails to explain how changing "certification" to "facility" achieves the purported intent of fostering economic development in the state, supporting environmental stewardship, and instilling electric reliability. In fact, the effect of the supplemental interpretation is that already approved certifications would become invalid, resulting in a retroactive application of Act 40's border limitation. Such a result is contrary to the same Rules of Statutory Construction referenced in the Joint Statement, which prohibit retroactive application of laws without the express intent of the legislature to do so.

Under the Rules of Statutory Construction, administrative agencies in interpreting legislative text should presume against a retroactive effect unless the legislation clearly makes that intent known.[5] As Pennsylvania courts have held, "[a]bsent clear language to the contrary, statutes are to be construed to operate prospectively only." 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).

There is no intent, express or even implicit, that can be attributed to the text of Act 40 to apply retroactively. In fact, Act 40 does the opposite. The legislation clearly[6] states

[5] 1 Pa. C.S. § 1926.

[6] 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).

that it does not become effective prior to the effective date – October 30, 2017. The Commission rightly concluded in the Tentative Implementation Order that facilities already certified on and prior to October 30th should retain their certification. The Commission should not adopt the supplemental interpretation as it would impermissibly rewrite the text of Section 2804(2)(i) by replacing "certification" with "facility"[7] and result in retroactive application of Act 40.

As recognized in the Joint Statement, the alternative interpretation of Act 40 also creates the unintended consequence of stranded banked Solar Renewable Energy Credits ("SRECs") and, for this additional reason, should be rejected. Pursuant to the Pennsylvania AEPs, SRECs have a life of three years after they are generated by a solar renewable generation facility.[8] However the supplemental interpretation's retroactive effect raises the issue of whether SRECs generated by solar renewable generation facilities located out of state that have already been certified by the Commission's AEC Program Administrator in accordance with 52 Pa. Code §§ 75.62, 75.63 & 75.64 have any value in Pennsylvania. As the Joint Statement notes, "the proposed supplemental interpretations […] inherently require that we address the status of banked SRECs from previously certified out-of-state facilities" and asks for parties to address this issue. Again, any potential loss of banked SRECs runs afoul of the presumption against retroactive effect. This unreasonable and unintended result could be avoided by adopting the Commission's Tentative Implementation Order. At the very least, however, the

[7] See Joint Statement at 2-3.

[8] 73 P.S. § 1648.3(e)(6) "An electric distribution company and electric generation supplier may bank or place in reserve alternative energy credits produced in one reporting year for compliance in either or both of the two subsequent reporting years."

Commission should find that SRECs created by the then-lawful certification of an out of state solar facility prior to the effective date of Act 40 should retain their original shelf life of three years from their creation.

## III. Conclusion

AMP appreciates this opportunity to provide its comments on the Tentative Implementation Order and the supplemental interpretation of Act 40 and the Pennsylvania AEPS. AMP respectfully requests that the Commission honor its previous certifications of qualifying solar facilities by imposing the locational requirements of Act 40 on a prospective basis.

Respectfully submitted,
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