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

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|  | Public Meeting held August 27, 2020 |
| Commissioners Present: |  |

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| Gladys Brown Dutrieuille, Chairman | | |
| David W. Sweet, Vice Chairman | | |
| John F. Coleman, Jr. | |
| Ralph V. Yanora | |
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| Petition of Wellsboro Electric Company for Waiver of the Standard Interconnection Agreement Form | P-2020-3020901 |

Petition of Pennsylvania Electric Company for Waiver P-2020-3020946

of the Standard Interconnection Agreement Form

Petition of Pennsylvania Power Company for Waiver P-2020-3020947

of the Standard Interconnection Agreement Form

Implementation of the Alternative Energy Portfolio Standards M-00051865

Act of 2004: Standard Interconnection Application Forms

**ORDER**

**BY THE COMMISSION:**

Three Petitions were recently filed with the Commission pursuant to 52 Pa. Code

§ 5.41 requesting that the Commission approve waivers of the use of its standardized interconnection agreement form for proposed interconnection projects. The first Petition was filed on July 17, 2020, by Wellsboro Electric Company (Wellsboro) seeking a waiver from using the Commission‑adopted standardized interconnection agreement form to accommodate a request by the United States Army Corps of Engineers (Corps of Engineers) to modify three sections of the existing standardized terms and conditions in the interconnection agreement. The other two Petitions were filed on July 21, 2020, by the Pennsylvania Electric Company (“Penelec”) and the Pennsylvania Power Company (“Penn Power”), both seeking a waiver of the Commission’s standardized interconnection agreement form as applied to the Commonwealth of Pennsylvania’s Department of Conservation and Natural Resources (“DCNR”).[[1]](#footnote-1) As these Petitions involve a common question of law and fact, the Commission is consolidating them along with the proceeding under which the standard interconnection forms were adopted at Docket No. M-00051865, in accordance with 52 Pa. Code § 5.81.

The Commission will grant the three Petitions as set forth in this Order. Furthermore, to avoid the need for the filing and review of similar petitions in the future, the Commission will approve modifications to the language of the standard interconnection agreement form as set forth in this Order for federal and state agencies governed by and subject to the same laws as those at issue in this Order.

**Wellsboro’s Petition**

Wellsboro states that it received a Level 2 application and request from the Corps of Engineers to interconnect a 28 kW AC facility at 710 Ives Run Lane, Tioga, Pennsylvania. Wellsboro asserts that it uses the standard application and agreement forms adopted by the Commission for interconnection projects. *See Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standard Interconnection Application Forms,* Docket No. M-00051865 (Order entered February 27, 2009) (*AEPS Act Implementation Order*). Wellsboro states that the Corps of Engineers requested modifications to the sections of the interconnection agreement addressing Indemnification (Section 9), Limitation of Liability (Section 10), and Governing Law (Section 19). The specific modifications requested by Wellsboro through its Petition are as follows:[[2]](#footnote-2)

9) RESERVED. ~~Indemnification. The Parties shall at all times indemnify, defend, and save the other Party harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demand, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the other Party's action or inactions of its obligations under these terms and conditions on behalf of the indemnifying Party, except in cases of gross negligence or intentional wrongdoing by the indemnified Party.~~

10) Limitation of Liability. Each party’s liability to the other party for any loss, cost, claim, injury, liability, or expense, ~~including~~ excluding ~~reasonable~~ attorney’s fees, relating to or arising from any act or omission in its performance of these terms and conditions, shall be limited to the amount of direct damage actually incurred. In no event shall either party be liable to the other party for any indirect, incidental, special, consequential, or punitive damages of any kind whatsoever.

19) Governing Law and Regulatory Authority. This Agreement shall be governed by, interpreted, construed, and enforced in accordance with the laws of the Commonwealth of Pennsylvania; provided, however, in the event of a conflict between this Agreement or the laws of the Commonwealth of Pennsylvania and Federal rules, regulations, laws or processes that apply to Customer-Generator due to its status as an Agency of the Federal Government, the Federal requirements shall apply. ~~This Agreement is subject to, and the Parties' obligations hereunder include, operating in full compliance with all valid, applicable federal, state, and local laws or ordinances, and all applicable rules, regulations, orders of, and tariffs approved by, duly constituted regulatory authorities having jurisdiction.~~

Wellsboro asserts that the above modifications to the standard interconnection agreement are appropriate because special legal privileges are granted to federal agencies, including the Corps of Engineers, with respect to disputes involving indemnification, liability, and claims. Specifically, Wellsboro states that the Corps of Engineers has represented that the modifications are necessary to ensure compliance with certain federal laws to which it is subject, including the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 1491; the Contract Disputes Act, 41 U.S.C. §§ 7101-7109; and the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412. In addition, Wellsboro avers that the parties negotiated the proposed changes to Section 19 (Governing Law and Regulatory Authority) to preserve the Corps of Engineers’ ability to assert arguments based on applicable federal laws in any legal actions between the parties.[[3]](#footnote-3)

**Penelec’s and Penn Power’s Petitions**

Penelec received an interconnection application from DCNR to interconnect a 632-kilowatt solar photovoltaic system at Gallitzin State Park in Patton, Pennsylvania. Penn Power also received an interconnection application from DCNR to interconnect a 27.8-kilowatt solar photovoltaic system at Pymatuning State Park in Jamestown, Pennsylvania. During the application processes, DCNR requested that Penelec and Penn Power agree to modify the existing standardized terms and conditions in the Level 2 through 4 Interconnection Agreement.

Specifically, DCNR requests that Penelec and Penn Power make the following modifications to the sections of the agreement dealing with indemnification (Section 9) and limitation of liability (Section 10):

~~9. Indemnification. The Parties shall at all times indemnify, defend, and save the other Party harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demand, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the other Party's action or inactions of its obligations under these terms and conditions on behalf of the indemnifying Party, except in cases of gross negligence or intentional wrongdoing by the indemnified Party.~~

10. Limitation of Liability. Each party’s liability to the other party for any loss, cost, claim, injury, liability, or expense, excluding payment of any attorney’s fees, relating to or arising from any act or omission in its performance of these terms and conditions, shall be limited to the amount of the direct damage actually incurred. ~~In no event shall either party be liable to the other party for any indirect, incidental, special, consequential, or punitive damages of any kind whatsoever.~~

DCNR has represented that these modifications are necessary to ensure adherence to 1 Pa. C.S. § 2310, which states that the Commonwealth, its officers, and its employees are subject to sovereign immunity, unless such immunity is specifically waived by the General Assembly. As an agency of the Commonwealth, this provision is applicable to DCNR.

Penelec and Penn Power assert that identical issues were previously considered by the Commission at Docket Nos. P-2018-3000113 and P-2018-3005789. *Petition of West Penn Power Company for Waiver of Standard Interconnection Application and Agreement Forms*; Docket No. P-2018-3000113 (Order dated May 3, 2018); *Petition of West Penn Power Company for Waiver of Standard Interconnection Application and Agreement Forms*; Docket No. P-2018-3005789 (Order dated December 20, 2018).

**DISCUSSION**

To begin with, as the three Petitions involve the Commission approved Standard Interconnection Agreement that was adopted by the Commission through the *AEPS Act Implementation Order* at Docket No. M-00051865 and the same or similar law and issues relating to Federal and State agency liability, we find that it is reasonable and prudent to consolidate them in accordance with 52 Pa. Code § 5.81. We also find that it is appropriate to consolidate these proceedings as we are amending our February 27, 2009, Order at Docket No. M-00051865 that adopted the Standard Interconnection Agreement with this Order.

Regarding the Petitioners request to revise the Standard Interconnection Agreement, the Commission notes that it has exclusive regulatory jurisdiction over the implementation of public utilities and, where possible, seeks to establish statewide standardization of all facets of public utility operations. Through its *AEPS Act Implementation Order*, the Commission established standardized interconnection application and agreement forms in accordance with the *Alternative Energy Portfolio Standards Act of 2004*, 73 P.S. §§ 1648.1-1648.8, and the Commission’s corresponding regulations at 52 Pa. Code §§ 75.1-75.51. The standard application and agreement forms are intended to be used for all levels of review for proposed interconnection projects. The Commission directed that the standard interconnection application and agreement forms be used by jurisdictional electric distribution companies (EDCs) for processing interconnection requests brought under the Commission’s regulations at 52 Pa. Code

§§ 75.1-75.51.[[4]](#footnote-4)

The interconnection agreements for Levels 1‑4 contain specific limitations on indemnification and liability. In addition, the agreements for Levels 2-4 contain specific terms regarding the laws and regulations applicable to the agreement. Since the Commission approved the provisions set within these standardized forms and directed their use by EDCs for all levels of interconnection projects, the Commission is the appropriate forum for Petitioners to seek permission to deviate from use of the standardized interconnection agreement forms.

The Corps of Engineers, a formation of the United States Army, is a federal government agency subject to federal law. In general, federal agencies are exempt from lawsuits under the doctrine of sovereign immunity. As a result, the Corps of Engineers is insulated from liability, except in certain specific circumstance where Congress has waived the protections of sovereign immunity. *See* 28 U.S.C. §§ 1346, 1491 (Federal Tort Claims Act). In those instances where sovereign immunity has been waived, jurisdiction over any permissible lawsuit is vested in either the U.S. district courts or the U.S. Court of Federal Claims. *See* 28 U.S.C. §§ 1346(a), (b)(1) and 1491(a)(1). The FTCA waives sovereign immunity for torts involving property damage, personal injury, or death caused by the negligent or wrongful act or omission of any federal employee acting within the scope of his employment. 28 U.S.C. § 1346(b)(1). Section 1491 confers jurisdiction on the U.S. Court of Federal Claims to hear claims against federal agencies based on the Constitution, federal laws or regulations, or an express or implied contract. 28 U.S.C. § 1491(a)(1).

Further, under the Contract Disputes Act, 41 U.S.C. §§ 7101 – 7109, any claims by or against a federal executive agency[[5]](#footnote-5) related to a contract for, among other things, the procurement of property or services, or the construction, alteration, repair, or maintenance of real property must first be submitted to the contracting officer for a decision. 41 U.S.C. §§ 7102(a), 7103(a). A “contracting officer” is the person authorized to make and administer contracts and to make determinations and findings with respect to contracts on behalf of an executive agency. 41 U.S.C. § 7101(6). A contracting officer’s ruling on a contract dispute can be appealed to an agency board of contract appeals—including the Armed Services Board—or to the U.S. Court of Federal Claims. *See* 41 U.S.C. §§ 7101(2), 7104(a)-(b), 7105(a), (e)(1)(A). A decision by an agency board can be appealed to the U.S. Court of Appeals for the appropriate circuit.

41 U.S.C. § 7107(a)(1), (b).

Also, under the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412, the prevailing party before a federal agency or a federal court may be entitled to judgment for costs and fees, including attorney’s fees, within certain prescribed limits. 5 U.S.C. § 504(a)(1), (b)(1) and 28 U.S.C. § 2412(a)(1), (b), (d)(2)(A). However, when reimbursement is sought, the costs and fees at issue must be submitted to either the federal agency or the federal court before which the case was heard and approved by that agency or court. 5 U.S.C. § 504(a)(2)-(3) and 28 U.S.C. § 2412(d)(1)(A)-(C).

Under these circumstances, the Commission agrees that it is appropriate to remove the Indemnification provision (Section 9) in its entirety and to modify the Limitation of Liability and Governing Law and Regulatory Authority provisions (Section 10 and Section 19, respectively) of the standardized interconnection agreement as requested by Wellsboro and the Corps of Engineers. Retaining the indemnification clause in the standardized interconnection agreement between Wellsboro and the Corps of Engineers would have the effect of placing the United States and its assets at risk—in violation of the doctrine of sovereign immunity—by exposing the United States to liability for tort actions beyond those permitted by statute.

Further, the federal statutes at issue dictate that any permissible claims or appeals involving the Corps of Engineers—whether tort claims or contract claims—be heard by the contracting officer for the agency, an agency board, or a federal court. The jurisdiction and procedures of these federal agencies and courts, including their ability to award attorney’s fees to the prevailing party, are established under the federal laws discussed above. Accordingly, the Commission finds that requiring the Corps of Engineers to execute the standardized interconnection agreement form that retains the Indemnification, Limitation of Liability, and Governing Law and Regulatory Authority provisions in their standard form would (1) constitute an impermissible waiver of sovereign immunity and (2) lead to violations of federal laws and regulations regarding the adjudication of permissible claims involving the Corps of Engineers.

With respect to the Petitions filed by Penelec and Penn Power, DCNR made it known to each that it requested the above modifications in an effort to comply with 1 Pa. C.S. § 2310, which states that the Commonwealth of Pennsylvania, its officials, and its agencies are entitled to statutory sovereign immunity. DCNR is a state agency of the Commonwealth of Pennsylvania tasked with maintaining and preserving the 116 state parks; managing the 2.1 million acres of state forest land; providing information on the state’s ecological and geologic resources; and establishing community conservation partnerships with grants and technical assistance to benefit rivers, trails, greenways, local parks and recreation, regional heritage parks, open space, and natural areas under the *Conservation and Natural Resources Act*, 71 P.S. §§ 1340.101, *et. seq*. Thus, DCNR is a Commonwealth agency for purposes of the *Sovereign Immunity Act*. 42 Pa. C.S. §§ 8521-8528. As a result, DCNR is insulated from liability, except in certain specified circumstances where the General Assembly has waived sovereign immunity protection. *See* 42 Pa. C.S. §§ 8521(a), 8522(a)-(b).

Based upon a review of this Commission’s prior approval of the above-cited similar waiver requests as well as relevant case law regarding sovereign immunity, we agree that it is appropriate to remove the Indemnification provision and modify the Limitation of Liability provision of the standardized interconnection agreement as requested by DCNR. Retaining the indemnification clause in the standardized interconnection agreement with DCNR would have the effect of placing the Commonwealth, its assets, and the Pennsylvania General Fund at risk, because it would expose the Commonwealth to liability for tort actions beyond what is statutorily allowed. The purpose of sovereign immunity is to provide special protection against the loss of assets held in common for many people, specifically Pennsylvania citizens, now and in the future, for the performance of vital government functions.

We note that, under the *Sovereign Immunity Act*, there are certain specified circumstances in which the General Assembly has waived sovereign immunity protection. 42 Pa. C.S. §§ 8521(a), 8522(a)-(b). The exceptions to sovereign immunity under the *Sovereign Immunity Act* are to be strictly construed and are the only instances where immunization from liability for Commonwealth agencies is waived. *See* 42 Pa. C.S. §§ 8521(a), 8522(a)-(b). No exception enumerated in the *Sovereign Immunity Act* applies to instances where a state agency enters into an interconnection project with a public utility and, therefore, no exception applies to Penelec’s or Penn Power’s interconnection project agreements with DCNR. Moreover, nothing in the Procurement Code generally addresses tort liability and we decline to read such an exception therein. Accordingly, we find that requiring DCNR to execute the standardized interconnection agreement form that retains the Indemnification and Limitation of Liability provisions as is would constitute an impermissible waiver of sovereign immunity. For these reasons, the Commission will approve the modifications requested by Petitioners.

As noted by Petitioners, the Commission has approved these same changes to the Standard Interconnection Agreements to accommodate prior requests by DCNR. The Commission also notes that no party has filed an objection to the changes proposed for the standard Interconnection Agreement in each of the prior proceedings, and no party filed an objection in the present proceedings. Accordingly, the Commission finds it reasonable and appropriate to amend the Commission’s February 27, 2009, Order at Docket No. M‑00051865 relating to the Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standard Interconnection Application Forms, pursuant to our authority under Section 703(g) of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 703(g).

Specifically, the Commission approves the modifications to the language of Sections 9, 10, and 19 of the standard interconnection agreement as set forth in this Order as an approved amendment to the Standard Interconnection Application Forms for federal agencies governed by and subject to the same federal laws as those at issue here (the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 1491; the Contract Disputes Act, 41 U.S.C. §§ 7101-7109; and the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C.

§ 2412). Likewise, the Commission approves the modifications to the language of Sections 9 and 10 of the standard interconnection agreement as set forth in this Order as an approved amendment to the Standard Interconnection Application Forms for state agencies governed by and subject to the same state laws as those at issue herein (the *Sovereign Immunity Act*. 42 Pa. C.S. §§ 8521-8528).

**CONCLUSION**

For the foregoing reasons, the Commission finds that the Petitioners’ reasons for seeking waiver of the standard interconnection agreements are valid. Accordingly, we find it is in the public interest to grant these Petitions. We also find that it is reasonable and appropriate to amend the Commission’s February 27, 2009, Order at Docket No. M‑00051865 relating to the Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standard Interconnection Application Forms, by approving modifications to the Standard Interconnection Agreement Forms as set forth in this Order as approved amendments to said forms;

**THEREFORE,**

**IT IS ORDERED:**

1. That the proceedings docketed at P-2020-3020901, P-2020-3020946, P‑2020-3020947 and M-00051865 shall be consolidated, pursuant to 52 Pa. Code § 5.81(a).

2 That the Petition of Wellsboro Electric Company at Docket No. P‑2020‑3020901 for Waiver of the Standardized Interconnection Agreement Form established by the Commission in the proceeding at Docket No. M‑00051865 is granted in accordance with this Order.

3. That the Petition of Pennsylvania Electric Company at Docket No. P‑2020‑3020946 for Waiver of the Standard Interconnection Agreement Form established by the Commission in the proceeding at Docket No. M‑00051865 is granted in accordance with this Order.

4. That the Petition of Pennsylvania Power Company at Docket No. P‑2020‑3020947 for Waiver of the Standard Interconnection Agreement Form established by the Commission in the proceeding at Docket No. M‑00051865 is granted in accordance with this Order.

5. That the Commission approves the modifications to the language of Sections 9, 10, and 19 of the standard interconnection agreement as set forth in this Order as an approved amendment to the Standard Interconnection Application Forms for federal agencies governed by and subject to the same federal laws as those at issue here (the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 1491; the Contract Disputes Act, 41 U.S.C. §§ 7101-7109; and the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412).

6. That the Commission approves the modifications to the language of Sections 9 and 10 of the standard interconnection agreement as set forth in this Order as an approved amendment to the Standard Interconnection Application Forms for state agencies governed by and subject to the same state laws as those at issue herein (the *Sovereign Immunity Act*. 42 Pa. C.S. §§ 8521-8528).

7. That a copy of this Order be served on the Commission’s Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate, all jurisdictional electric distribution companies, and the Pennsylvania Department of Conservation and Natural Resources..

8. That the Secretary cause a copy of this Order to be published in the *Pennsylvania Bulletin*.

9. That the matters at Dockets No. P-2020-3020901, P-2020-302946, P‑2020-302947 and M-00051865 be marked closed.

**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: August 27, 2020

ORDER ENTERED: August 27, 2020

1. Collectively, Wellsboro, Penelec and Penn Power will be referred to as “Petitioners.” [↑](#footnote-ref-1)
2. Wellsboro Electric Company Petition at 2-3 (¶¶ 4-5). [↑](#footnote-ref-2)
3. Wellsboro Electric Company Petition at 3-4 (¶¶ 6-9). [↑](#footnote-ref-3)
4. *AEPS Act Implementation Order* at 7-8 (Ordering Paragraph No. 5). [↑](#footnote-ref-4)
5. An “executive agency” includes “a military department as defined in section 102 of title 5.” 41 U.S.C. § 7101(8)(B). Military departments include the Department of the Army. *See* 5 U.S.C. § 102. [↑](#footnote-ref-5)