

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Implementation of Act 40 of 2017

Docket No. M-2017-2631527

**COMMENTS OF CITIZENS FOR PENNSYLVANIA’S FUTURE (PENNFUTURE) ET AL. IN
SUPPORT OF THE JOINT STATEMENT OF CHAIRMAN GLADYS M. BROWN AND VICE
CHAIRMAN ANDREW G. PLACE**

Introduction:

On January 6, 2018, the Pennsylvania Public Utility Commission (the Commission) published its Tentative Implementation Order (TIO) regarding implementation of Act 40 of 2017 (hereinafter “the Act”).¹ On the same date, Chairman Gladys M. Brown and Vice Chairman Andrew G. Place issued a Joint Statement (*Joint Statement*) containing interpretations of language in the Act that differ from those proposed in the TIO. For the reasons detailed below, the undersigned parties support the interpretations in the joint statement, rather than the competing interpretations in the TIO, and we respectfully ask that the Commission adopt those interpretations in the final implementation order. We also ask that the Commission find that banked out-of-state credits are not eligible for solar renewable energy credits (SRECs), and that late certifications are not grandfathered.

I. Section 2804(2)(i) of Act 40 is ambiguous in regard to how and when the qualification of a facility as an alternative energy generator originates.

Section §2804(2)(i) of Act 40 creates an exception where the restriction on out-of-state generation does not apply to:

“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 to meet the solar photovoltaic share of this Commonwealth’s alternative energy portfolio compliance requirements under the “Alternative Energy Portfolio Standards Act.”

The TIO “proposes to interpret the language ‘a certification originating within the geographical boundaries of this Commonwealth’ as a reference to systems certified by the Commission’s [Alternative Energy Credit] Program Administrator...” The TIO offers no explanation for this conclusion, which it

¹ 48 Pa.B. 111.

intends to have the practical effect of grandfathering *all* solar PV systems certified as Pennsylvania Alternative Energy Systems before October 30, 2017, irrespective of location.

The Joint Statement suggests that the interpretation is the product of a “strict textual review” of Act 40. We take this to mean that the Commission is attempting to apply section 1921(b) of the Pennsylvania Statutory Construction Act, which says that “[w]hen 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.”² While we agree that is the controlling standard, we strongly disagree with the implication that the TIO interpretation is the unambiguous interpretation of the language in section 2804(2)(i).

Under subsection 2804(2)(i) the phrase “originating within the geographical boundaries of this Commonwealth” modifies the word “certification,” and therefore the certification of a solar PV system must “originate” inside within the geographical boundaries of Pennsylvania. However, Act 40 does not specify when and where a certification originates.

For credits to be certified for use in compliance with Pennsylvania’s Alternative Energy Portfolio Standards Act (AEPS), they must originate at a qualified generator.³ While regulations specifically use the term “qualification” for generating sources and “certification” for credits, the Act does not retain this distinction. Section 2804(2)(i) of the Act refers to certification “of a solar photovoltaic energy generator as a qualifying alternative energy source.” The Act is referring to the qualification of facilities not the certification of the credits themselves.

Language is ambiguous “if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.”⁴ Here, the Act is silent and ambiguous as to whether the qualification “originates” with the underlying application or when the Pennsylvania Administrator provides written notice to applicants of its qualification decision under 52 Pa. Code § 75.64(b)(5). Although there are, in the abstract, two possible meanings for “originates,” the Pennsylvania Supreme Court has also held that “that language capable of more than one meaning can be ‘clear and unmistakable’ in the context of its usage by the selection of the meaning which is neither forced, strained nor contrary to the purpose for which the authority is conferred.”⁵ As discussed below, this ambiguity is clearly resolved by an interpretation that a qualification originates with the application.

II. The TIO’s interpretation of section 2804(2)(i) violates the Statutory Construction Act’s directive to give effect to all the provisions of a statute and would lead to absurd and unreasonable results.

If the TIO’s interpretation of section 2804(2)(i) were adopted, the phrase “originating within the geographical boundaries of this Commonwealth” would be rendered meaningless because the Act would have exactly the same meaning with or without it. This violates the requirement in the Statutory

² 1 Pa.C.S. § 1921(a).

³ 52 Pa. Code § 75.63.

⁴ *Hutchison v. Sunbeam Coal Co.*, 513 Pa. 192, 201, 519 A.2d 385, 390 (1986).

⁵ *Com. Etc. v Butler Cty. Mushroom Farms*, 499 Pa. 509, 516 (1982).

Construction Act that “[e]very statute shall be construed, if possible, to give effect to all its provisions.” Similarly, it violates the Pennsylvania Supreme Court’s holding that where language “has substantive meaning and goes beyond mere style [, the] words may not be ignored.” And as the Court noted in *Masland v. Bachman*,⁶ the Commission may not assume the “geographical boundaries” language is redundant, since to do so is “contrary to the principle that the Legislature is not presumed to have intended the provisions of its enactments as mere surplusage.”⁷ Simply put, if the Legislature intended for all PV systems qualified under the AEPS before October 30, 2017 to be grandfathered, there would be no need to mention geography at all.

The interpretation in the TIO also fails textually. Act 40 establishes two conditions on certification: First, as discussed above, is where it originates—that being “within the geographical boundaries of this Commonwealth”. The second condition is when the certification was granted, which is “prior to the effective date of this section.” The TIO interpretation implies that either the clause “within the geographical boundaries...” modifies “granted,” which is a grammatically strained and illogical construction. Or, that the words “originating” and “granted” mean exactly the same thing rendering one of the terms surplusage. In contrast “the meaning which is neither forced, strained nor contrary to the purpose for which the authority is conferred”⁸ is that these are two distinct conditions with the geographical constraint referring to the location of the generator and not related to the locus of any administrative action.

Moreover, the TIO’s interpretation could lead to absurd and unreasonable results potentially excluding all generating sources approved since at least September 3, 2015. Since that date, the Pennsylvania Administrator has been Incline, Inc.—a Delaware corporation with principal office in Severna Park, Md.⁹ It is, therefore, unclear which if any certification actions by that administrator had a locus within the geographical boundaries of Pennsylvania. This is, of course, an absurd result because, but for the interpretation of the TIO, nothing in Act 40 suggests or supports distinguishing between PV systems based on the geographic locus of the administrator.

III. The intent of the General Assembly was to “close the borders” for solar renewable energy credits (SRECs) to support jobs and investment in Pennsylvania.

When statutory language is ambiguous, the Commonwealth’s Statutory Construction Act requires that “[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.”¹⁰

The solar language inserted into the act Act originated in, and remains substantially the same as, what was proposed in SB 404 (Scavello). The co-sponsorship memorandum circulated prior to proposal makes the

⁶ *Masland v. Bachman*, 374 A.2d 517 (Pa. 1977).

⁷ *Id.*

⁸ *Supra* n.5.

⁹ *Maryland Business Entity Search*, Dept. ID. No. F15789175

¹⁰ 1 Pa.C.S. § 1921(a)

intent clear—it said: “[this] legislation will essentially ‘close the borders’ of the Commonwealth on SREC purchases, similar to many neighboring states. Electric distributors will have to purchase their credits from within the Commonwealth, thereby limiting the available supply of these SRECs.”¹¹ Senator Scavello has further said “Electric distributors will now have to purchase their credits from within the Commonwealth, protecting Pennsylvania-based solar credits and putting us in line with many of our neighboring states. In addition, ‘closing the borders’ ensures that PA rate-payers are supporting jobs, investment and tax revenue here in Pennsylvania.”¹²

The only substantive change from the language of SB 404 to the Act was to also permit solar photovoltaic systems that “connect directly to the electric transmission system...with the service territory of an electric distribution company operating within this commonwealth.”¹³ Language in SB 404 had restricted systems to those that connect to distribution systems of electric distribution companies, electric cooperatives, and municipal electric systems operating within Pennsylvania. While this potentially expands the number of photovoltaic systems that may generate SRECs, it is unambiguously limited to those with a direct physical connection to Pennsylvania.

IV. The interpretation of §2804(2)(i) proposed in the *Joint Statement* is consistent with existing usage.

Under existing regulations, “[a]n alternative energy system may begin to earn alternative energy credits on the date a complete application is filed with the administrator”¹⁴ If the qualification did not “originate” until the administrator acted on the application as implied in the TIO, credits generated in the intervening period between the time of application and the issuance of a decision would not meet the requirements of § 75.63(a) because they would not be from a qualified alternative energy system.

Furthermore, the regulations contemplate a situation where a generator will no longer meet the geographic qualifications under §75.62 and authorizes the Pennsylvania Administrator to suspend or revoke a qualification when that occurs.¹⁵

Adopting the interpretation proposed by the *Joint Statement* would satisfy the requirements of Act 40, effectuate the intent of the Legislature, and avoid the potential for uncertainty and disruption caused by implementing inconsistent regulatory interpretations.

V. Banked SRECs from out-of-state sources do not satisfy Pennsylvania’s photovoltaic share requirement under AEPS.

¹¹ Sens. Scavello & Argall, Senate Co-Sponsorship Memorandum, Solar Energy Credits Legislation, (Dec. 8, 2016)

¹² Website of Sen. Scavello (retrieved Jan. 3, 2018, available at: <http://www.senatorscavello.com/2017/11/02/scavello-provision-boost-solar-energy-pennsylvania-becomes-law/i>).

¹³ Act 40 of 2017, § 2804(1)(III).

¹⁴ 52 Pa. Code § 75.63(i).

¹⁵ *Id.* at § 75.64(6)(i)

The *Joint Statement* asks for comments on how the commission should “address the status of banked SRECs from previously certified out-of-state facilities.” The Commission should find that banked SRECs from out-of-state sources do not satisfy Pennsylvania’s photovoltaic share under AEPS for the following reason:

The Act establishes a general rule that generators are not eligible to be a source of credits used to satisfy the photovoltaic share under AEPS unless it delivers energy to an electric distribution company or other Pennsylvania entity as specified in Section 2804(1). Following this general rule the Act, in Section 2804(2), allows for two specific cases where it does not apply retroactively to existing certifications. Those cases are i) where the generator is physically located within the geographical boundaries of Pennsylvania or, ii) where there is a pre-existing contract for the sale and purchase of credits. The legislature clearly intended the provisions in 2804(1) to have retroactive effect on the qualification of generators. If this were not the case, it would be unnecessary to have the specific exemptions in 2804(2).

We also note that the exception provided for binding written contracts in 2804(2)(ii) further specifies that the contract be for the “sale and purchase” of credits. This indicates that there must be a bilateral contract between the seller and purchaser. Any other contractual arrangement (*e.g.* a contract between a generator and a broker to sell banked credits on consignment) would not be for the “sale and purchase” of credits as required.

Because the rule applies retroactively and provides no exception for banked credits, the commission must ensure that banked credits from out-of-state sources that are not under contract may not be used to satisfy the photovoltaic share.¹⁶

VI. Only out-of-state generators certified prior to October 30, 2017 are eligible to satisfy Pennsylvania’s photovoltaic share under AEPS

The TIO “seeks comments on whether completed solar PV system applications that were received before October 30, 2017, but not approved by the program administrator until after October 30, 2017, should be grandfathered in as a solar PV AES eligible to meet the solar PV share.”¹⁷ The plain language of the Act requires that to be eligible a facility must have a certification “granted prior to the effective date of this section”¹⁸—that is, October 30, 2017. If the commission were to hold that the restrictive clause “prior to the effective date” language modifies the other conditions found in Section 2804(2) (*i.e.* the generator being within Pennsylvania or with an appropriate contract), that would create the absurd result implying that an in-state generator could be moved out of state and retain its certification.

The TIO references 52 Pa. Code § 75.63(i) to justify possibly allowing later certifications in cases where an application was received prior to Oct 30, 2017. That section of the code says “[a]n alternative energy

¹⁶ Comments of Sen. Scavello, (Dec. 27, 2018).

¹⁷ TIO, part F.

¹⁸ Note that, as discussed above, “originating” modifies “within the geographical boundaries...” while “granted” modifies “prior to the effective date of this section.”

system may begin to earn alternative energy credits on the date a complete application is filed with the administrator,” but this is contingent on subsequent approval of the application. If the application were denied no Pennsylvania certification number would be issued and generated credits could not be registered in PJM GATS as eligible to meet APES requirements.

If an out-of-state generator applies for certification prior to October 30, 2017 but is not actually certified as of that date, the commission lacks the authority to issue the certification under any circumstances. In that case, 52 Pa. Code § 75.63(i) does not apply because the application must be denied.

We request that the commission adopt an implementation order consistent with this interpretation. We further note As of January 5, 2018 out-of-state solar generators with a nameplate capacity in excess of 11 MW have registered in PJM GATS,¹⁹ and we request the commission ensure that no credits from any such generators be eligible for the photovoltaic share under AEPS.

VII. Conclusion

For the above reasons, we respectfully ask that the commission to adopt the interpretations proposed by the *Joint Statement*, clarify that banked out-of-state credits are not eligible, and late certifications are not grandfathered.

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¹⁹ Renewable Generators Registered in GATS, (*available at*: <https://gats.pjm-eis.com/gats2/PublicReports/RenewableGeneratorsRegisteredinGATS> retrieved Jan. 5, 2018).