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

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|  | | Public Meeting held January 14, 2021 |
| Commissioners Present: | |  |
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| Gladys Brown Dutrieuille, Chairman | |  |
| David W. Sweet, Vice Chairman | |  |
| Ralph V. Yanora | |  |
| John F. Coleman, Jr. | |  |
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| Proposed Implementation of Act 114 of 2020 | M-2020-3023323 | |
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**TENTATIVE IMPLEMENTATION ORDER**

**BY THE COMMISSION:**

On November 23, 2020, Governor Wolf signed into law Act 114 of 2020, which amends the Fiscal Code, 72 P.S. §§ 1 *et seq*. Act 114, *inter alia,* establishes geographical limits on energy resources that qualify as Tier II resources under the Alternative Energy Portfolio Standards (AEPS) Act, 73 P.S. §§ 1648.1 *et seq*. The Pennsylvania Public Utility Commission’s (Commission) administrative responsibilities for implementing the provisions of Act 114 are contained within Sections 10 and 14 of Act 114. In general, Sections 10 and 14 amend the Fiscal Code at Article XVII-E (relating to the AEPS Act) by adding Sections 1728-E and 1799.10-E, respectively. This Tentative Implementation Order provides the Commission’s proposed interpretation as well as implementation of Sections 10 and 14 of Act 114 and seeks comment from the public and industry with respect to this interpretation and implementation.

1. **OVERVIEW OF SECTION 10 OF ACT 114**
   1. **Section 1728-E**

This Section revises the definition of customer-generator in Section 2 of the AEPS Act, 73 P.S. § 1648.2, by adding new distributed generation systems that qualify as customer generators. The definition of customer-generator in Section 2 of the AEPS Act defines a customer-generator as a nonutility owner or operator of a net metered distributed generation system with a nameplate capacity of not greater than 50 kilowatts if installed at a residential service or not larger than 3,000 kilowatts at other customer service locations. However, customers may exceed the three megawatt limit up to five megawatts when such customers make their systems available to operate in parallel with the electric utility during grid emergencies as defined by the regional transmission organization or where a microgrid is in place for the primary or secondary purpose of maintaining critical infrastructure, such as homeland security assignment, emergency services facilities, hospitals, traffic signals, wastewater treatment plants or telecommunications facilities, provided that technical rules for operating generators interconnected with facilities of an electric distribution company (EDC), electric cooperative or municipal electric system have been promulgated by the Institute of Electrical and Electronic Engineers and the Pennsylvania Public Utility Commission.

Section 1728-E specifically states the following:

The definition of “customer-generator” in Section 2 of the act of November 30, 2004 (P.L. 1672, No. 213), known as the Alternative Energy Portfolio Standards Act, shall include net-metered distributed generation systems owned, operated or supporting the Department of Military and Veterans Affairs on property owned or leased and operated by the Department with a nameplate capacity not to exceed the Department’s annual electric needs to support the Department’s facilities on its property.

72 P.S. § 1728-E. This addition to the definition of customer-generator includes net-metered distributed generation systems owned, operated, or supporting the Department of Military and Veterans Affairs (DMVA) on property owned or leased and operated by the DMVA with a nameplate capacity not exceeding the DMVA’s annual electric needs to support the DMVA’s facilities on its property. The Commission proposes to interpret this section as permitting the DMVA to own or operate net-metered distributed generation systems with a nameplate capacity that does not exceed the annual electric needs of the DMVA’s facilities on its respective property.

As there has been no other limiting language on the nameplate capacity to the net‑metered distributed generation systems identified in this amended definition of customer‑generator, the Commission proposes to interpret Section 1728-E as permitting DMVA to own or operate net-metered distributed generation systems that exceed five megawatts. We note, however, that this amendment contains several limiting conditions. First, we interpret the phrase “owned, operated or supporting the DMVA” as allowing DMVA or a third-party to own or operate the system, provided the system is designed and interconnected in a way that it only supports facilities operated by DMVA. Second, the system must be located on property owned or leased and operated by DMVA. Third, if DMVA intends to use virtual meter aggregation, any load meter DMVA intends to aggregate must be on a DMVA account, be within two miles of the facility and be located in the same electric distribution company’s (EDC’s) service territory. Finally, the net-metered distributed generation systems cannot exceed the respective DMVA’s property’s annual cumulative electric needs.

With respect to a DMVA property’s annual electric needs, the Commission recognizes that DMVA’s annual electric needs may vary from year to year due to weather. The Commission also recognizes that the output of any alternative energy system (AES), such as solar photovoltaic facilities, will also vary from year to year due to weather conditions. As such, designing and installing an AES that exactly matches the DMVA’s annual electric needs is difficult, if not impossible to implement. Accordingly, the Commission proposes a 110% design limit on any AESs DMVA proposes to net meter under this provision of Act 114. The Commission posits that this design limit is a reasonable way to implement the phrase “with a nameplate capacity not to exceed the Department’s annual electric needs to support the Department’s facilities on its property.”

The Commission clarifies that the 110% limitation is proposed to be part of the criteria used in designing any AESs installed to support the DMVA’s facilities on its properties. The Commission proposes that the 110% design limit will be based on DMVA’s historical or estimated annual system output and facilities electric usage, both of which are affected by weather that is beyond the control of DMVA. The Commission further proposes that the 110% limitation should apply to the cumulative consumption of all DMVA customer electric meters that qualify for virtual meter aggregation under the AEPS Act and the Commission’s regulations. As such, the Commission proposes that the 110% limitation as a design criterion of DMVA AESs shall apply to the cumulative consumption of all meters that are eligible for virtual meter aggregation in accordance with the AEPS Act and the Commission’s regulations.

With respect to new construction that does not have historical usage data, the Commission proposes the use of square footage, occupancy and comparisons to similar buildings as all valid estimates that could be utilized. The Commission recognizes that the DMVA or its AES developer has the responsibility to provide an estimate of annual electric consumption for any new buildings it proposes to net meter, along with supporting data, to demonstrate that the AESs are designed not exceed 110% of DMVA’s annual electric consumption at the facilities that qualify for net metering. The DMVA or its AES developer will have to provide adequate support for their usage estimate, which may include one or more years of historical usage or estimates based on similarly equipped and utilized buildings. The Commission proposes that these estimates be provided to the EDC when filing any interconnection application.

The Commission recognizes that the 110% limitation should apply as a design criterion for the sizing of all DMVA AESs, to include any proposed expansions or additions to DMVA’s AES portfolio. As such, the Commission proposes that DMVA shall provide, with any interconnection application, adequate supporting data to demonstrate that any AES it proposes to net meter under Section 1728-E, 72 P.S. § 1728‑E, is designed, along with other net metered AESs, to provide no more than 110% of the DMVA’s cumulative annual electric usage.

1. **OVERVIEW OF SECTION 14 OF ACT 114**
   1. **Section 1799.10-E(a)(1)**

This Section creates a limitation to Section 4 of the AEPS Act, 73 P.S. § 1648.4, that established, *inter alia*, that energy derived from AESs inside the geographical boundaries of Pennsylvania shall be eligible to meet the compliance requirements under the AEPS Act. Section 4 also provides that energy derived from AESs located outside the geographical boundaries of the Commonwealth but within the service territory of a regional transmission organization (RTO) that manages the transmission system in any part of Pennsylvania shall be eligible to meet the AEPS Act compliance requirements of EDCs or electric generation suppliers (EGSs) located within the service territory of the same RTO. Finally, Section 4 provides that AESs located in the PJM Interconnection, L.L.C. RTO (PJM) or its successor service territory shall be eligible to fulfill the AEPS Act compliance obligations of all EDCs and EGSs. *See* 73 P.S. § 1648.4.

Section 1799.10-E(a) specifically states the following:

(1) Notwithstanding Section 4 of the act of November 30, 2004 (P.L. 1672, No. 213), known as the Alternative Energy Portfolio Standards Act, in order to qualify as an alternative energy source eligible to meet the Tier II share of this Commonwealth’s compliance requirements under Section 3(c) of the Alternative Energy Portfolio Standards Act and to qualify for Tier II Alternative Energy Portfolio credits, each Tier II source must do one of the following:

(i) Directly deliver the electricity it generates to a retail customer of an electric distribution company or to the distribution system operated by an electric distribution company operating within this Commonwealth and currently obligated to meet the compliance requirements contained under the Alternative Energy Portfolio Standards Act.

(ii) Be directly connected to the electric system of an electric cooperative or municipal electric system operating within this Commonwealth.

(iii) Connect directly to the electric transmission system at a location that is within the service territory of an electric distribution company operating within this Commonwealth.

(iv) Generate electricity at generation units whose construction and operation is subject to and complies with permits issued by the Department of Environmental Protection of the Commonwealth under the Act of January 8, 1960 (1959 P.L. 2119, No. 787), known as the Air Pollution Control Act, or the Act of July 7, 1980 (P.L. 380, No. 97), known as the Solid Waste Management Act.

72 P.S. § 1799.10-E(a)(1). Section 1799.10-E(a)(1) modifies Section 4 of the AEPS Act to limit the eligibility of Tier II AESs to those that meet the requirements of subparagraphs i through iv. Below we will provide proposed interpretation and implementation of each requirement.

* 1. **Section 1799.10-E(a)(1)(i)**

This subsection provides two scenarios where AESs qualify to generate Tier II AECs for use by EDCs and EGSs for compliance with the AEPS Act Tier II share requirements. The first scenario that qualifies is when the AES directly delivers the electricity it generates to an EDC’s retail customer within the Commonwealth and is currently obligated to meet the compliance requirements contained under the AEPS Act. The Commission proposes to interpret this section as applying to Tier II AESs physically connected to an EDC’s customer’s internal electric system.

The second scenario that qualifies is when a Tier II AES directly delivers its power to the distribution system operated by an EDC that has an obligation to meet the AEPS Act compliance requirements. The Commission proposes to interpret this provision as applying to Tier II AESs physically interconnected to a Pennsylvania EDC’s distribution system.

* 1. **Section 1799.10-E(a)(1)(ii)**

This subsection addresses the scenario where a Tier II AES is directly connected to the electric system of an electric cooperative or municipal electric system operating within the Commonwealth. The Commission proposes to interpret this subsection as permitting Tier II AESs physically connected to a Pennsylvania electric cooperative’s or municipal electric system’s distribution network to qualify to generate energy and AECs eligible to be used by EDCs and EGSs to meet their Tier II share requirements.

* 1. **Section 1799.10-E(a)(1)(iii)**

This subsection addresses the scenario where a Tier II AES is directly connected to the electric transmission system at a location that is within the service territory of an EDC. The Commission proposes to interpret this subsection as permitting Tier II AESs physically located in Pennsylvania and interconnected to a transmission system that is also located in Pennsylvania to qualify to generate energy and AECs eligible to be used by EDCs and EGSs to meet their AEPS Act Tier II share requirements. This would include utility scale Tier II AESs that are physically interconnected to a transmission system within an EDC’s service territory and operating under PJM rules as a wholesale generator.

* 1. **Section 1799.10-E(a)(1)(iv)**

This subsection addresses the scenario where Tier II AESs generate electricity at generation units whose construction and operation is subject to and complies with permits issued by the Department of Environmental Protection (Department) of the Commonwealth under the Air Pollution Control Act, 35 P.S. §§ 4001 *et seq.*, or the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq*. The Commission proposes to interpret this subsection as permitting AESs to qualify for Tier II AECs when the Department has issued permits to generation units that comply with the Air Pollution Control Act or the Solid Waste Management Act.

* 1. **Section 1799.10-E(a)(2)(i)**

This subsection provides that a Tier II AES’s certification originating within the geographical boundaries of the Commonwealth granted prior to the effective date of Act 114 will not be affected by Section 1799.10-E or Section 4 of the AEPS Act. This section sets forth a condition to which Section 1799.10-E(a) does not apply. Specifically, Section 1799.10-E(a)(2)(i) states the following:

(2) Nothing under this Section or Section 4 of the Alternative Energy Portfolio Standards Act shall affect any of the following:

(i) A certification originating within the geographical boundaries of this Commonwealth granted prior to the effective date of this section of a Tier II energy generator as a qualifying alternative energy source eligible to meet the Tier II share of this Commonwealth’s alternative energy portfolio compliance requirements under the Alternative Energy Portfolio Standards Act.

72 P.S. § 1799.10-E(a)(2)(i).

The Commission proposes to interpret “[a] certification originating within the geographical boundaries of this Commonwealth. . .” in the same manner it interpreted this language in the *Implementation of Act 40 of 2017*, Docket No. M-2017-2631527 (Order entered May 3, 2018). In the *Implementation of Act 40 of 2017*, the Commission interpreted Section 2804(2)(i) of the Administrative Code of 1929, 71 P.S. § 714(2)(i), as closing Pennsylvania’s borders to solar photovoltaic share AECs.

The Commission recognized that the language in Section 2804(2)(i) was unclear and that the Commission was obligated to ascertain the General Assembly’s intent under the Rules of Statutory Construction. *Id*. at 17-18. The Commission received comments from Governor Tom Wolf, and several Senators and Representatives. As lawmakers who effectuated Act 40, the Commission found that these commenters were uniquely qualified to provide information regarding the intent of the statute. *Id*. Each of the comments provided by lawmakers stated that their intent was to “close the borders” for Tier I solar credit qualifications and was consistent with the design utilized by a number of our neighboring states to promote economic development. *Id*. This interpretation was further consistent with the supplemental interpretation provided in the Joint Statement of Chairman Gladys M. Brown and Vice Chairman Andrew G. Place.

Accordingly, the Commission opined:

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. Therefore, we believe we must support the adoption of our interpretations of Section 2804(2)(i) and 2804(2)(ii) in a manner consistent with the Joint Statement by Chairman Gladys M. Brown and Vice Chairman Andrew G. Place to the Tentative Order. The interpretation of Section 2804(2)(i) of the Adm. Code, 71 P.S. § 714(2)(i) is as follows:

Section 2804(2)(i) – We interpret the phrase “[a] certification originating within the geographical boundaries of this Commonwealth…” as a facility located within Pennsylvania having received an AEPS Act Tier I solar photovoltaic share certification.

*Id*. at20.

In keeping with this interpretation of the phrase “[a] certification originating within the geographical boundaries of this Commonwealth. . .” the Commission proposes to interpret this phrase in Section 1799.10-E(a)(2)(i) as meaning a facility located within Pennsylvania having received an AEPS Act Tier II certification.

* 1. **Section 1799.10-E(a)(2)(ii)**

This subsection addresses the scenario where a Tier II AES had received a Pennsylvania certification as an AES eligible to meet Tier II share requirements prior to November 23, 2020, the effective date of Section 1799.10-E. Specifically, this subsection grandfathers certification of a Tier II AES with a binding written contract for the sale and purchase of Tier II AECs derived from Tier II energy sources for the remaining term of the contract as of the effective date of this section, but only until the current term of the contract ends. Again, we propose to interpret the language used in Section 1799.10-E(a)(2)(ii) consistent with the Commission’s interpretation of the same language used in Section 2804(2)(ii) of the Administrative Code of 1929 in relation to the Commission’s treatment of solar photovoltaic resources with one change.

Specifically, we interpret this section to only permit out-of-state facilities that are (a) already certified as a Tier II AES and that (b) have entered into a contract with a Pennsylvania EDC or EGS serving Pennsylvania customers, for the sale of Tier II AECs, to maintain certification until the expiration of the contract. If the Commission deems the existing contract for Tier II AECs eligible, eligibility will be valid for the term of the contract and in accordance with the banking provisions. For open-ended contracts or contracts that automatically renew, eligibility will terminate at the end of the current term of the last renewal that occurred prior to November 23, 2020.

* 1. **Section 1799.10-E(b)**

This section provides that contracts entered into or renewed on or after the effective date of Section 1799.10-E, are subject to the provisions of Section 1799.10-E. The Commission proposes to interpret this subsection as limiting the eligibility of systems certified under the contract exception in Subsection 1799.10-E(a)(2)(ii) to the duration of the contract for the sale and purchase of AECs where the contract was entered into prior to November 23, 2020. We also propose to limit a Tier II AES owner from extending its facility’s eligibility through a renewal of the original contract or subsequent contracts. The Commission, however, proposes that the AECs generated and transferred to an EDC or EGS prior to expiration of the contract would continue to be eligible to be used by that EDC or EGS to meet their Tier II share requirements in accordance with 52 Pa. Code § 75.69 (relating to the banking of AECs).

* 1. **Implementation of Section 1799-E(b)**

To implement this provision, the Commission proposes that any EDC or EGS seeking to use Tier II AECs generated after November 2020 from AESs located outside the Commonwealth that were acquired through contracts entered into prior to November 23, 2020, to meet their Tier II share requirements file a petition with the Commission after the entry date of a Final Implementation Order in this Docket. The Commission proposes that EDCs and EGSs should clearly identify in their petitions the information they believe is pertinent to determine whether their AECs are eligible to be used by the EDC or EGS to meet its AEPS Act Tier II share requirements. The minimum information and supporting documentation that EDCs and EGSs should provide in their petitions is set forth as follows:

(1) Complete and unredacted copies of all contracts, and amendment(s) thereto supporting the claim for approval of AECs to be used by the EDC or EGS to meet its Tier II share requirements of the AEPS Act;

(2) Documentation that the out-of-state Tier II facilities were certified as an AEPS Act Tier II resource before November 23, 2020;

(3) Documentation that the EDC or EGS entered into a contract prior to November 23, 2020, for the purchase of AECs;

(4) Documentation of the expiration date of the contracts;

(5) Documentation of the number of AECs being purchased by the EDC or EGS; and

(6) Verification pursuant to 52 Pa. Code § 1.36.

The Commission proposes that EDCs and EGSs file their petitions with the Commission in accordance with 52 Pa. Code § 5.41. The petitions should further be served on the Office of Consumer Advocate, the Office of Small Business Advocate, and the Bureau of Investigation and Enforcement.

* 1. **Section 1799.10-E(c)**

This section provides definitions for the following terms to be used only in Section 1799.10-E unless the context clearly indicates otherwise. Section 1799.10-E(c) provides that the terms “Alternative energy source” and “Electric distribution company” are defined as they are defined in Section 2 of the AEPS Act. Accordingly, the Commission proposes to interpret these terms as they are already defined in Section 2 of the AEPS Act.

**CONCLUSION**

This Tentative Implementation Order outlines the key portions of Act 114 of 2020 that the Commission is required to administer and seeks comment from the public and industry with regard to how these provisions are interpreted and implemented. **THEREFORE,**

**IT IS ORDERED:**

1. That the Commission hereby seeks comments on its proposed interpretation and implementation of Sections 10 and 14 of Act 114 of 2020.

2. That a copy of this order be served on all jurisdictional electric distribution companies, all licensed electric generation suppliers, the Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate, and the Department of Environmental Protection.

3. That a copy of this Order shall be published in the *Pennsylvania Bulletin* and posted on the Commission’s website at [www.puc.state.pa.us](http://www.puc.state.pa.us).

4. That written comments referencing Docket No. M-2020-3023323 be submitted within 30 days of publication in the *Pennsylvania Bulletin* to the Pennsylvania Public Utility Commission. Comments should be eFiled through the Commission’s eFiling System per the Commission’s Emergency Order dated March 20, 2020, at Docket No. M‑2020‑3019262. You may set up a free eFiling account with the Commission at https://efiling.puc.pa.gov/ if you do not have one. Filing instructions may be found on the Commission’s website at <http://www.puc.pa.gov/filing_resources.aspx>. Comments containing confidential information should be emailed to Commission Secretary Rosemary Chiavetta at [rchiavetta@pa.gov](mailto:rchiavetta@pa.gov) rather than eFiled.

5. That the Office of Competitive Market Oversight shall electronically send a copy of this Order to all persons on the contact list for the Committee Handling Activities for Retail Growth in Electricity.

6. That the contact persons for Tentative Implementation Order are Aspassia V. Staevska, Assistant Counsel, Law Bureau, [astaevska@pa.gov](mailto:astaevska@pa.gov), (717) 787‑5000, Joseph P. Cardinale, Jr., Assistant Counsel, Law Bureau, [jcardinale@pa.gov](mailto:jcardinale@pa.gov), (717) 787‑5558, and Darren Gill, Bureau of Technical Utility Services [dgill@pa.gov](mailto:dgill@pa.gov), (717) 783-5244.

**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: January 14, 2021

ORDER ENTERED: January 14, 2021