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

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|  | Public Meeting held September 15, 2021 |
| 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 PECO Energy Company for Waiver of Standard Interconnection Application and Agreement Forms – Tyler State ParkPetition of PECO Energy Company for Waiver of Standard Interconnection Application and Agreement Forms – Evansburg State ParkPetition of PECO Energy Company for Waiver of Standard Interconnection Application and Agreement Forms – CollegevilleImplementation of the Alternative Energy Portfolio Standards Act of 2004: Standard Interconnection Application Forms  | P-2021-3025868P-2021-3025869P-2021-3025957M-00051865 |

**TENTATIVE ORDER**

**BY THE COMMISSION:**

 In May 2021, PECO Energy Company (PECO or the Company) filed three Petitions 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. PECO filed the first two Petitions on May 13, 2021, both seeking a waiver of the Commission’s standardized interconnection agreement form as applied to the Pennsylvania Department of Conservation and Natural Resources (DCNR). PECO filed the third Petition on May 19, 2021. This third Petition seeks similar relief to the two DCNR Petitions, but it relates to an interconnection project of the Pennsylvania Department of Military and Veterans Affairs (DMVA). As these Petitions involve a common question of law and fact, the Commission will consolidate them for disposition, 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 tentatively 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 state agencies governed by and subject to the same laws as those at issue in this Order.

**PECO Petitions - DCNR**

 PECO’s two DCNR Petitions relate to proposed solar array projects at Tyler State Park in Bucks County, Pennsylvania,[[1]](#footnote-1) and Evansburg State Park in Montgomery County, Pennsylvania.[[2]](#footnote-2) PECO states that it received Level 2 applications and requests from DCNR to interconnect a 98.8 kW solar array facility at Tyler State Park and a 78.4 kW solar array facility at Evansburg State Park. PECO asserts that it uses the standard application and agreement forms adopted by the Commission for interconnection projects.[[3]](#footnote-3) *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*).

According to PECO, DCNR requests modifications to the sections of the interconnection agreement addressing Indemnification (Section 9) and Limitation of Liability (Section 10). Further, PECO itself requests modification to Section 14 of the Standard Interconnection Agreement, which addresses Assignment/Transfer of Ownership of the Customer-Generator Facility. The specific modifications requested by DCNR and PECO through its Petitions are as follows:[[4]](#footnote-4)

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, ~~including reasonable~~ 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 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.

14) **Assignment/Transfer of Ownership of the Customer-Generator Facility.** ~~This Application/Agreement shall survive the transfer of ownership of the Customer-Generator Facility to a new owner unless the new owner terminates this Application/Agreement and so notifies the Company in writing.~~ The Customer-Generator will not assign this Application/Agreement or transfer ownership of the Customer Generator Facility to a non-Commonwealth party without the prior, written consent of PECO, which may require the Application/Agreement to be amended to reinsert the standard Level 2, 3 or 4 Interconnection Agreement provisions altered by the Pennsylvania Public Utility Commission’s Order approving the Waiver of such standard Agreement. Customer-Generator may

assign this Application/Agreement or transfer ownership to another Commonwealth party without the prior, written consent of PECO.[[5]](#footnote-5)

The Company will be responsible for contacting the new customer to execute a new Application/Agreement or assignation agreement, in order for the new owner to be treated as a Net Metering customer.

PECO states that DCNR has represented that these modifications to Sections 9 and 10 are necessary to ensure adherence to the Constitution of the Commonwealth of Pennsylvania, Article I, § 11 and 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.[[6]](#footnote-6) PECO asserts that the modifications to Section 14 are necessary to protect PECO in the event that DCNR assigns or transfers ownership of the facilities to a non-Commonwealth party by allowing the Company to re-insert the standard interconnection agreement language that was removed for DNCR’s benefit.[[7]](#footnote-7)

PECO asserts that the Company has previously had similar revisions to the interconnection agreement approved by the Commission.[[8]](#footnote-8) *See* *Petition of PECO Energy Company for Waiver of Standard Interconnection Application and Agreement Forms*, Docket No. P-2018-3004086 (Order entered September 20, 2018). PECO also notes that the Commission granted a similar request for the Metropolitan Edison Company in 2011.[[9]](#footnote-9) *See* *Petition of Metropolitan Edison Company for Waiver of Standard Interconnection Application and Agreement Forms*, Docket No. P-2011-2238314 (Order entered October 28, 2011).

**PECO Petition - DMVA**

 PECO states that it also received an interconnection application from DMVA to interconnect a 33.3 kW solar array system in Collegeville, Montgomery County, Pennsylvania.[[10]](#footnote-10) PECO asserts that it uses the standard application and agreement forms adopted by the Commission for interconnection projects.[[11]](#footnote-11) *See AEPS Act Implementation Order*.

 According to PECO, DMVA requests modifications to the sections of the interconnection agreement addressing Indemnification (Section 9) and Limitation of Liability (Section 10). Further, PECO itself requests modification to Section 14 of the Standard Interconnection Agreement, which addresses Assignment/Transfer of Ownership of the Customer-Generator Facility. The specific modifications requested by DMVA and PECO through its Petitions are as follows:[[12]](#footnote-12)

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, ~~including reasonable~~ 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 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.~~

14) **Assignment/Transfer of Ownership of the Customer-Generator**

**Facility.** ~~This Application/Agreement shall survive the transfer of ownership of the Customer-Generator Facility to a new owner unless the new owner terminates this Application/Agreement and so notifies the Company in writing.~~ The Customer-Generator will not assign this Application/Agreement or transfer ownership of the Customer Generator Facility to a third party without the prior, written consent of PECO, which may require the Application/Agreement to be amended to re-insert the standard Level 2, 3 or 4 Interconnection Agreement provisions altered by the Pennsylvania Public Utility Commission’s Order approving the Waiver of such standard Agreement. The Company will be responsible for contacting the new customer to execute a new Application/Agreement or assignation agreement, in order for the new owner to be treated as a Net Metering customer.

PECO states that DMVA has represented that these modifications to Sections 9 and 10 are necessary to ensure adherence to the Constitution of the Commonwealth of Pennsylvania, Article I, § 11 and 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 DMVA.[[13]](#footnote-13) PECO asserts that the modifications to Section 14 are necessary to protect PECO in the event that DMVA assigns or transfers ownership of the facilities to a non-Commonwealth party by allowing the Company to re-insert the standard interconnection agreement language that was removed for DMVA’s benefit.[[14]](#footnote-14)

PECO asserts that the Company has previously had similar revisions to the interconnection agreement approved by the Commission.[[15]](#footnote-15) *See* *Petition of PECO Energy Company for Waiver of Standard Interconnection Application and Agreement Forms*, Docket No. P-2018-3004086 (Order entered September 20, 2018). PECO also notes that the Commission granted a similar request for the Metropolitan Edison Company in 2011.[[16]](#footnote-16) *See* *Petition of Metropolitan Edison Company for Waiver of Standard Interconnection Application and Agreement Forms*, Docket No. P-2011-2238314 (Order entered October 28, 2011).

**DISCUSSION**

As an initial matter, since the three Petitions involve the Commission-approved Standard Interconnection Agreement adopted through the *AEPS Act Implementation Order* at Docket No. M-00051865 and the same law and issues relating to State agency liability, the Commission finds that it is reasonable and prudent to consolidate the Petitions in accordance with 52 Pa. Code § 5.81. We also find that it is appropriate to consolidate these proceedings because, through this Order, we are amending the *AEPS Act Implementation Order* through which the Standard Interconnection Agreement was adopted.

Regarding PECO’s 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.[[17]](#footnote-17)

The interconnection agreements for Levels 1‑4 contain specific limitations on indemnification and liability. In addition, the Level 1-4 agreements contain specific terms regarding the transfer of ownership of the customer-generator’s facility. 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 PECO to seek permission to deviate from use of the standardized interconnection agreement forms.

With respect to the PECO’s DCNR Petitions and DMVA Petition, the two agencies made it known that they requested the above modifications in an effort to comply with 1 Pa.C.S. § 2310, which grants the Commonwealth of Pennsylvania, its officials, and its agencies statutory sovereign immunity. DCNR is an agency of the Commonwealth of Pennsylvania tasked with maintaining and preserving the 121 state parks; managing the 2.2 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*.[[18]](#footnote-18) DMVA is an agency of the Commonwealth of Pennsylvania with a dual mission: to provide quality service to the Commonwealth’s veterans and their families, and to oversee and support the members of the Pennsylvania National Guard. Created by the Act of April 11, 1793, the Adjutant General Department was later renamed the Department of Military Affairs by the Administrative Code of 1923. The Act of March 21, 1996, changed the name, once again, to what it is known by today – the Department of Military and Veterans Affairs.[[19]](#footnote-19)

Thus, both DCNR and DMVA are Commonwealth agencies for purposes of the *Sovereign Immunity Act*. 42 Pa.C.S. §§ 8521-8528. As a result, DCNR and DMVA are 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 and DMVA. Retaining the indemnification clause in the standardized interconnection agreement with DCNR and DMVA 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 PECO’s interconnection project agreements with DCNR or DMVA. 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 and DMVA 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.

In addition, we agree that it is appropriate to modify the Assignment/Transfer of Ownership of the Customer-Generator Facility provision of the standardized interconnection agreement as requested by PECO. If DCNR or DMVA were to assign or transfer their ownership interests in the facilities to a non-Commonwealth party, this modification will protect PECO by allowing the Company to re-insert the standard interconnection agreement language that was removed for the agency’s benefit. For these reasons, the Commission will tentatively approve the modifications requested by PECO.

As noted by PECO, the Commission has approved these same changes to the Indemnification and Limitation of Liability provisions of 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. Further, although PECO’s request to modify the language of the transfer of ownership provision is a novel request, no party filed an objection in the present proceedings. Accordingly, the Commission finds it reasonable and appropriate to tentatively 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 tentatively approves the modifications to the language of Sections 9, 10, and 14 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).

However, given that PECO amended its original DCNR Petitions via email[[20]](#footnote-20) to include the following sentence at Section 14—“Customer-Generator may assign this Application/Agreement or transfer ownership to another Commonwealth party without the prior, written consent of PECO.”—we will permit interested parties to file adverse comments to the addition of this sentence within 10 business days of the publication of this Tentative Order in the *Pennsylvania Bulletin*. Absent the filing of adverse comments within 10 business days of publication, this Tentative Order will become a Final Order by operation of law.

**CONCLUSION**

For the foregoing reasons, the Commission finds that the PECO’s reasons for seeking waiver of the standard interconnection agreements are valid. Accordingly, we find it is in the public interest to tentatively grant these Petitions. We also find that it is reasonable and appropriate to tentatively 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 at Docket Nos. P-2021-3025868, P-2021-3025869, P‑2021-3025957, and M-00051865 shall be consolidated, pursuant to 52 Pa. Code § 5.81(a).

2 That the Petitions of PECO Energy Company at Docket Nos. P-2021-3025868, P-2021-3025869, and P-2021-3025957 for Waiver of Standardized Interconnection Application and Agreement Forms established by the Commission in the proceeding at Docket No. M‑00051865 are tentatively granted in accordance with the terms of this Tentative Order.

3. That the Commission tentatively approves the modifications to the language of Sections 9, 10, and 14 of the standard interconnection agreement as set forth in this Tentative 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).

 4. That the Secretary serve a copy of this Tentative Order on the Commission’s Bureau of Investigation and Enforcement, the Commission’s Bureau of Technical Utility Services, the Office of Consumer Advocate, the Office of Small Business Advocate, the Pennsylvania Department of Conservation and Natural Resources, the Pennsylvania Department of Military and Veterans Affairs, and all jurisdictional electric distribution companies.

 5. That the Secretary cause a copy of this Tentative Order to be published in the *Pennsylvania Bulletin* with a 10-day comment period.

 6. That, to the extent that any interested party objects to the modifications to the language of Section 14 of the standard interconnection agreement as set forth in this Tentative Order, they must file comments with 10 days after publication of this Tentative Order in the *Pennsylvania Bulletin*. Written comments referencing Docket Nos. P-2021-3025868 and P-2021-3025869 must be eFiled to the Pennsylvania Public Utility Commission 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 rather than eFiled.

 7. That absent the filing of adverse comment relating to the amendment via email of Section 14 of the standard interconnection agreement of the Petitions of PECO Energy Company at Docket Nos. P-2021-3025868 and P-2021-3025869 within 10 business days of the publication of this Tentative Order in the *Pennsylvania Bulletin*, this Tentative Order will become a Final Order by operation of law.

**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: September 15, 2021

ORDER ENTERED: September 15, 2021

1. *See* Petition at Docket No. P-2021-3025868. [↑](#footnote-ref-1)
2. *See* Petition at Docket No. P-2021-3025869. [↑](#footnote-ref-2)
3. PECO Petitions – DCNR (Tyler State Park and Evansburg State Park) at ¶¶ 3, 5. [↑](#footnote-ref-3)
4. *Id*. at ¶¶ 6-9, 11, 15-16. [↑](#footnote-ref-4)
5. This sentence does not appear in either of the two PECO Petitions for DCNR. After Commission staff reviewed the Petitions, staff determined that the language of Section 14 proposed in PECO’s Petitions failed to account for the possibility of DCNR transferring ownership of its facilities to another Commonwealth agency. After discussing the issue with PECO, the Company proposed via email to clarify the issue by adding this sentence. PECO’s email was copied to all parties served with the two DCNR-related Petitions. [↑](#footnote-ref-5)
6. *Id*. at Introduction, ¶¶ 6-8, 11, 16-17. [↑](#footnote-ref-6)
7. *Id*. at ¶¶ 9, 16. [↑](#footnote-ref-7)
8. *Id*. at ¶ 10, 17-18. [↑](#footnote-ref-8)
9. *Id*. at ¶ 17, FN 13. [↑](#footnote-ref-9)
10. See Petition at Docket No. P-2021-3025957. [↑](#footnote-ref-10)
11. PECO Petition – DMVA (Collegeville) at ¶¶ 3, 5. [↑](#footnote-ref-11)
12. *Id*. at ¶¶ 6-9, 11, 15-16. [↑](#footnote-ref-12)
13. *Id*. at Introduction, ¶¶ 6-8, 11, 16-17. [↑](#footnote-ref-13)
14. *Id*. at ¶¶ 9, 16. [↑](#footnote-ref-14)
15. *Id*. at ¶ 10, 17-18. [↑](#footnote-ref-15)
16. *Id*. at ¶ 17, FN 13. [↑](#footnote-ref-16)
17. *AEPS Act Implementation Order* at 7-8 (Ordering Paragraph No. 5). [↑](#footnote-ref-17)
18. PECO Petitions – DCNR (Tyler State Park and Evansburg State Park) at Introduction, FN 2. [↑](#footnote-ref-18)
19. PECO Petition – DMVA (Collegeville) at Introduction, FN 2. [↑](#footnote-ref-19)
20. *See* FN 5 above (Page 4). [↑](#footnote-ref-20)