

Pennsylvania Public Utility Commission Further Defines Qualifying Alternative Energy Sources

Pennsylvania's Alternative Energy Portfolio Standards Act (AEPS Act)¹ requires that a certain percentage of the electric energy that electric distribution companies (EDCs) and electric generation suppliers (EGSs) sell to retail customers be derived from qualifying alternative energy sources. EDCs and EGSs must meet certain minimum thresholds for the use of energy generated by: solar photovoltaic technologies, Tier I sources (including wind, fuel cells and biomass), and Tier II sources (including distributed generation systems, demand-side management and municipal solid waste).²

Consequently, the rules defining a qualifying alternative energy source are very important. Most of these rules are set forth in the AEPS Act and its implementing regulations.³ However, Act 40 of 2017 amended the Administrative Code of 1929 to promote economic development and investment in Pennsylvania's solar energy sector by "closing the borders" on Pennsylvania's market for solar photovoltaic alternative energy sources. Rather than adopting regulations, the Pennsylvania Public Utility Commission (PUC) adopted an implementation order interpreting and implementing Act 40 (the Act 40 Implementation Order).⁴

Act 114 of 2020 amended the Fiscal Code to establish rules for qualifying alternative energy sources. In part, Act 114 established rules for Tier II sources that are very similar to many of the rules for qualifying solar photovoltaic sources in Act 40. At its public meeting of May 6, 2021, the PUC adopted an implementation order interpreting and implementing Act 114 (the Act 114 Implementation Order).⁵

Rules for Qualifying Tier II Sources

Since many of the rules for Tier II sources in Act 114 are so similar to the rules for solar photovoltaic sources in Act 40, the PUC previously resolved many of the issues presented in the interpretation and implementation of Act 114. For example, in the Act 40 Implementation Order, the PUC confronted the question of whether the General Assembly intended to grandfather out-of-state facilities that were certified as qualifying alternative energy systems before the effective date of Act 40. The PUC decided against that interpretation, but allowed certified out-of-state alternative energy systems that had a binding written contract with a Pennsylvania EDC or EGS for the sale or purchase of solar alternative energy credits to maintain their Pennsylvania certification until the expiration of the contract's current term (so long as the credits were used to comply with the AEPS Act).⁶ The PUC followed this same approach in interpreting and implementing Act 114's provisions regarding qualifying Tier II sources.⁷

The PUC, however, established some different procedural rules for Tier II sources, based on its experience in implementing Act 40. For example, in the Act 114 Implementation Order, the PUC held that petitions for recognition of out-of-state Tier II contracts and alternative energy credits can only be filed by EDCs or EGSs.⁸ These petitions must be filed by November 2, 2021, and must include certain information (including copies of the pertinent contracts and documentation that the out-of-state facility was certified as a Tier II source before Act 114 took effect). In addition, the PUC advised EDCs and EGSs to submit a petition to extend their AEPS Act compliance true-up period for Tier II compliance, if necessary.⁹

In the Act 114 Implementation Order, the PUC also held:

- The PUC will recognize Tier II alternative energy systems physically connected to an EDC



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customer's internal electric system, and Tier II alternative energy systems directly delivering power to the distribution system operated by an EDC, as qualifying for Tier II treatment.

- The PUC will recognize Tier II alternative energy systems physically connected to a Pennsylvania electric cooperative's or municipal electric system's distribution network as able to qualify to generate energy and alternative energy credits eligible to be used by EDCs and EGSs to meet their Tier II share requirements.
- The PUC will recognize Tier II alternative energy systems physically located in Pennsylvania and interconnected to a transmission system that is also located in Pennsylvania to qualify to generate energy and alternative energy credits eligible to be used by EDCs and EGSs to meet the Tier II share requirements. This includes utility scale Tier II alternative energy systems that are physically interconnected to a transmission system within an EDC's service territory and operating as a wholesale generator.
- Alternative energy systems may qualify for Tier II alternative energy credits when the Pennsylvania Department of Environmental Protection has issued permits to generation units that comply with the Air Pollution Control Act or the Solid Waste Management Act.

Net Metered Distributed Generation Systems Owned and Operated by the Pennsylvania DMVA

Act 114, unlike Act 40, includes provisions creating special rules for net metering distributed generation systems owned and operated by the Department of Military and Veterans Affairs (DMVA). Net metering allows a customer-generator to offset some or all of its electricity requirements by the amount of electricity it generates using a qualifying alternative energy generating system.

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 up to 50 kilowatts for residential service or up to three megawatts for other service locations, but systems can be as large as five megawatts if they meet certain conditions. Act 114 amended the AEPS Act to expand the definition of a customer-generator to include net-metered distributed generation systems owned, operated, or supporting the DMVA, on property owned or leased and operated by the DMVA, having a nameplate capacity not exceeding the DMVA's annual electric needs to support the DMVA's facilities on its property.

The PUC held that it will interpret Act 114 as (a) exempting the DMVA's net-metered alternative energy generating systems from the conditions that normally apply to systems between three and five megawatts, and (b) permitting the DMVA's net-metered alternative energy generating systems to exceed a nameplate capacity of five megawatts. A DMVA distributed generation system, however, cannot be sized larger than the annual cumulative electric needs of the DMVA on that particular property. Since the DMVA's energy needs vary over time, and the output of an alternative energy system also varies over time, the PUC will construe Act 114 as imposing a 105 percent design limit on any alternative energy system that the DMVA proposes to net meter.

Next Steps

Following the PUC's adoption of the Act 40 Implementation Order, several petitions for reconsideration and/or clarification were filed and the PUC, in fact, modified the Act 40 Implementation Order. The period for filing such a petition has not yet run with regard to the Act 114 Implementation Order. As a result, the PUC could modify the holdings discussed above. To the extent those holdings are consistent with the Act 40 Implementation Order, however, that possibility seems remote.

¹ 73 P.S. §§ 1648.1 -1648.9.

² The minimum annual thresholds have varied over time. For the period June 1, 2020, through May 31, 2021, and each 12-month period thereafter, the Tier I requirement is 8 percent of all retail sales (of which at least 0.5 percent of all retail sales are to come from solar photovoltaic technologies), and the Tier II requirement is 10 percent of all retail sales. 52 Pa. Code § 75.61(b)(15).

³ 52 Pa. Code §§ 75.1-75.72.

⁴ *Implementation of Act 40 of 2017*, Docket No. M-2017-2631527 (final implementation order entered May 3, 2018; Order on Reconsideration and Clarification entered August 2, 2018).

⁵ *Implementation of Act 114 of 2020*, Docket No. M-2020-3023323 (final implementation order entered May 6, 2021).

⁶ *Implementation of Act 40 of 2017*, pp. 15-20 and 23-27 and Reconsideration Order pp. 16-17.

⁷ *Implementation of Act 114 of 2020*, pp. 15-25.

⁸ *Id.* pp. 22-23.

⁹ *Id.*, p. 29.