

Solar Energy Facilities/Interconnection Tax: Supreme Court of Rhode Island Addresses Challenge to Imposition of Public Utility Commission Order



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The Supreme Court of Rhode Island (“Court”) addressed in a June 1st opinion a challenge to the Rhode Island Public Utilities Commission’s (“PUC”) imposition of a tax as it related to companies that produce and distribute wind and solar energy. See *ACP Land v. Rhode Island Public Utilities Commission*, 2020 WL 2829552 (R.I. June 1, 2020).

ACP Land, LLC (“ACP”) and Wind Energy Development, LLC (“WED”) sought review of a November 27, 2017 PUC order which approved an interconnection tax that National Grid (“NG”) charged ACP and WED. NRG collected the funds and then remitted them to the Internal Revenue Service (“IRS”).

ACP and WED asked the Court to declare the PUC order illegal and unreasonable for failing to follow IRS Notice 2016-36.

Both ACP and WED own and operate solar energy systems in Rhode Island. NG is a regulated electric and gas distribution company in Rhode Island.

ACP and WED interconnect with NG’s distribution system in order to sell the solar power they produce. However, in order to interconnect, ACP and WED must fund the improvements to NG’s distribution system. These improvements are necessary for interconnections between their solar systems and NG’s distribution system. They are known as interties.

NG interpreted certain Internal Revenue Code provisions and IRS Notices as imposing a tax on the amount it was reimbursed by ACP and WED for the construction of the interties. It concluded such reimbursements were taxable as contributions in aid of construction (CIAC). Thus, NG passed that tax liability to ACP and WED.

ACP and WED disputed NG’s interpretation. They concluded a safe harbor provision in IRS Notice 88-129 exempted them from the interconnection tax. As a result, they believed the charge was inappropriate.

The safe harbor provided that interties from energy systems (like ACP’s and WED’s) to the utilities’ *transmission systems* for the purpose of selling electricity are not CIACs. ACP and WED connected to NG’s *distribution system*. This is distinct from its *transmission system*. Accordingly, NG concluded, contrary to the conclusion of ACP and WED, that Notice 88-129 did not provide a safe harbor from the interconnection tax in this case.

ACP and WED filed a petition for dispute resolution with the PUC. They sought a determination as to whether or not NG was properly charging them an interconnection tax for connections to NG's distribution system.

NG responded to the PUC in a February 14, 2014 letter arguing that:

1. The PUC did not have the jurisdiction to determine an issue of federal tax liability;
2. The safe harbor provision did not apply to interconnections to the distribution system, but rather only to the transmission system;
3. NG was not free to rely on any of the IRS private letter rulings ("PLRs") to third parties

Further, NG offered to work with ACP and WED to file a PLR with specific reference to their distribution interconnection dispute.

The companies met with legal counsel at the PUC in an attempt to resolve the issue. Counsel issued a mediation document which contained recommendations for the PUC to resolve the dispute. Counsel framed the issue as whether NG's charge was reasonable and appropriate, rather than whether NG owed the tax, because it was arguably outside the PUC's jurisdiction to determine whether NG has tax liability.

NG filed a settlement proposal. PUC approved it. Per the settlement, NG was to apply for PLRs associated with the disputed application of the safe harbor provision.

NG filed its PLR request with the IRS. Rather than issuing a PLR, the Dept. of Treasury issued IRS Notice 2016-36, which was intended to be a guideline on the disputed issue.

The companies disagreed over whether the 2016 Notice resolved the interconnection tax issue. They filed letters with the PUC outlining their respective positions.

ACP and WED believed the 2016 Notice made it even clearer that the interconnections were safe harbored.

NG, after conferring with IRS counsel and its tax consultant, contended that the 2016 Notice was ambiguous as to whether or not the safe harbor applied. It continued to charge the interconnection tax to ACP and WED.

The PUC determined by a 2-1 vote that NG's decision to continue collecting the tax was reasonable.

An Order was filed documenting its decision.

The issue before the Court was whether or not the PUC erred in determining that NG was reasonable in believing that it owed a tax on the connections between ACP and WED's solar and wind systems and NG's distribution system and in passing that tax onto ACP and WED.

The Court initially noted that the issue of whether the tax was actually owed is a question of federal tax law and not before the Court. Further, it stated that it could only reverse the Order if the PUC ruled in an unlawful and unreasonable manner.

ACP and argued that the PUC's order was illegal and unreasonable. They stated that to adhere to what they deemed to be the upshot of the 2016 IRS Notice – that the safe harbor provision applied to interconnections of power systems with a distribution system, making such interties non-taxable.

In Contrast NG and the PUC contended that the PUC acted reasonably in reaching its conclusion given the uncertainty of the situation. Both NG and the PUC are argued to have attempted in good faith to find the correct answer to a complex tax question.

The Court reviewed the 2016 Notice when addressing the parties' contentions.

In making their arguments, ACP and WED relied on a single sentence in the "Explanation of Provisions" Section of the 2016 Notice. The Court was not persuaded. It noted that it was inappropriate to look at a

certain statutory section “in a vacuum.” Rather, the Court believed it must consider the 2016 Notice in its entirety.

NG, however, maintained that, when read as a whole, the 2016 Notice was ambiguous. It based its argument on the opinion letter of its tax consultant. The consultant reviewed:

the purpose of the 2016 Notice;

1. the application of the safe harbor; and
2. the specific requirements for applicability of the safe harbor.

The consultant discussed the sentence ACP and WED relied upon. It concluded that the language used in that sentence was not alluded to anywhere else in the Notice. The type of interconnections at issue did not meet the requirements of the safe harbor set out in the 2016 Notice.

The Court found that the consultant’s opinion made clear that, when looking at the 2016 Notice as a whole, it remained uncertain whether the safe harbor from the interconnection tax applied to an intertie connecting to a distribution system. It also noted that NG conferred with IRS Counsel. Counsel communicated that the IRS may need to issue additional guidance to make the Notice more clear.

In assessing the reasonableness of NG’s decision to continue to charge the tax to ACP and WED, the Court deemed important the existence of a private letter ruling issued to Massachusetts Electric Company, NG’s Massachusetts affiliate (MA PLR). The PLR was issued less than six months before the 2016 Notice. It was based on facts similar to those in the case at hand. The IRS concluded that the type of interconnection in dispute here is taxable.

Taking into consideration the language of the 2016 Notice as a whole, the consultant’s opinion, the MA PLR, and other documents in the record, the Court held that, due to the uncertainty of the law, it was reasonable for NG to conclude that it must continue to pay the interconnection tax. Thus, the Court found that the PUC did not err in determining that NG’s conclusion was reasonable.

The Court concluded that if NG were to stop charging ACP, WED, and similar companies an interconnection tax when it is reasonable for NG to believe that the tax is actually owed, the risk that NG does actually owe the tax would fall on all of the ratepayers in the state. The Court opined that the risk should remain with the companies who are requesting the interties at issue and then reimbursing NG for the cost of construction of those interties.

The Court affirmed the PUC’s order.

A copy of the Opinion can be downloaded [here](#).