

February 5, 2018

Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

RE: Docket No. M-2017-2631527: Tentative Implementation Order Concerning Act 40 of 2017

Cypress Creek Renewables, LLC (“Cypress Creek”), appreciates the opportunity to submit these comments on the Pennsylvania Public Utility Commission’s December 21, 2017, Tentative Implementation Order (the “TIO”) concerning Act 40 of 2017 (the “Act”). Cypress Creek is a solar photovoltaic (“Solar PV”) energy company with experience developing and building utility-scale Solar PV facilities across the United States. With more than two gigawatts of Solar PV systems deployed in more than a dozen states, Cypress Creek is one of the country’s leading Solar PV companies.

Cypress Creek, through its affiliates, is the owner of twelve Solar PV facilities located outside of Pennsylvania, which, prior to the effective date of Section 2804 of the Act (the “Effective Date”), were certified as authorized suppliers of Solar PV renewable energy certificates (“SRECs”) for use by parties with SREC compliance obligations under the Pennsylvania Alternative Energy Portfolio Standards Act, 73 P.S. §§ 1648.1 *et seq.* (the “AEPS Act”). Also prior to the Effective Date, the Cypress Creek affiliated owners of those facilities were all parties to contracts for the sale of the their SRECs for use in meeting the requirements of the AEPS Act.

The Commission’s TIO correctly interprets the Act’s geographical limits on Solar PV systems that qualify for the Solar PV share requirement of the AEPS Act as not affecting those contracts or the REC sales they provide for. Any other interpretation – and specifically, the suggestion by some commenters, including members of the Commission – that only certain types of contracts pre-dating the Act should remain valid, is inconsistent with the plain and unambiguous meaning of the Act and Article I, section 10 of the Constitution of the United States.

The Act

Section 2804(1) of the Act provides that in order to qualify as a generator of SRECs that can be used to satisfy the Solar PV share of the AEPS Act compliance requirements, a Solar PV system must either: (1) directly deliver the electricity it generates to a retail customer of, or the distribution system of, an electric distribution company (“EDC”) operating within the Commonwealth and subject to an AEPS compliance obligation; (2) directly connect to the distribution system of an EDC operating within the Commonwealth; or (3) directly connect to the transmission system at

a point that is within the service territory of an EDC operating within the Commonwealth.

Section 2804(2) limits the effects of the foregoing restrictions in two ways. First, Subsection 2804(2)(i) provides that the restrictions will not apply to a certification “originating within the geographical boundaries of the Commonwealth” prior to the Effective Date of a Solar PV energy generator as an alternative energy source (“AES”) eligible to provide SRECs to satisfy the Solar PV share of compliance obligations under the AEPS Act. Second, Subsection 2804(2)(ii) provides that the restrictions will not apply to certification of a Solar PV system as an AES eligible to provide SRECs to satisfy the Solar PV share of compliance obligations under the AEPS Act if the system has a binding contract for the sale and purchase of SRECs entered into prior to the Effective Date.

Section 2804(3) of the Act provides that “[t]his section shall apply to contracts entered into or renewed on or after the effective date of this section.]

The TIO

The Commission’s TIO proposes to interpret Subsection 2804(2)(i) to grandfather Solar PV systems certified as a Pennsylvania AESs before October 30, 2017, as continuing to qualify to generate energy and SRECs eligible to be used by EDCs and electric generation suppliers (“EGSs”) to meet the Solar PV share requirements of the AEPS Act. More specifically, the Commission “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 AEC Program Administrator in accordance with 52 Pa. Code §§ 75.62, 75.63 & 75.64.” Thus, the Commission reads the phrase “originating within the geographical boundaries of this Commonwealth” to refer to where the certification was issued. As a result, since all such certifications for eligibility to provide Pennsylvania SRECs were issued by an agency located within the Commonwealth, all Solar PV systems so certified prior to the Effective Date would remain eligible to provide SRECs for AEPS Act compliance purposes in perpetuity.

In light of its interpretation of Subsection 2804(2)(i) to fully grandfather all Solar PV systems certified as an AES before the Effective Date, regardless of whether they had contracted for the sale of their SRECs, the Commission proposes to interpret Subsection 2804(2)(ii) to grandfather Solar PV systems that were *not* certified prior to the Effective Date but which had nonetheless entered into a contract for the sale of their SRECs for AEPS Act compliance purposes. The Commission would allow such systems to be certified as eligible SREC providers, but only for the duration of the contract. The Commission proposes to interpret Section 2804(3) as reinforcing its interpretation of Subsection 2804(2)(ii).

Cypress Creek Comments

Although Cypress Creek would benefit from the Commission’s proposed interpretation of Subsection 2804(2)(i) of the Act, it respectfully submits that the statutory language in question is ambiguous and that the Commission’s proposed interpretation would eviscerate the purpose and intent of the Act.¹

The phrase “a certification originating within the geographical boundaries of this Commonwealth” is a curious one. If, as the Commission suggests, the legislature meant to grandfather *all* Solar PV systems that had been certified as Pennsylvania SREC suppliers before the Effective Date, it could have simply said that the Act’s restrictions do not apply to systems holding such a certification. Since all such certification are issued by a Pennsylvania agency and thus originate “within the geographical boundaries” of the Commonwealth in that sense, there would have been no need to include a phrase that adds no meaning and does not distinguish one class of systems from another.

The alternative interpretation of the Act presented by Commission Chairman Gladys Brown and Vice Chairman Andrew Place in their December 21, 2017 statement in response to the TIO offers a more plausible interpretation of this subsection that is much more consistent with the obvious legislative intent. Commissioners Brown and Place would limit the coverage of Subsection 2804(2)(i) to Solar PV systems located within the boundaries of the Commonwealth.

As is evident from the Act and the comments of bill sponsors Senator Killon, Senator Fontana, and Senator Scavello, the intent of the Act 40 is, with limited exceptions, to close the state’s borders to the delivery of SRECs from out-of-state resources. Unlike the Commission’s interpretation of this subsection, which through its expansive grandfathering would do little if anything to increase the market for SRECs generated in-state, the Brown/Place interpretation would narrowly limit the subsection’s impact. If the TIO is finalized as proposed, the Act will do little if anything to increase the development of new Solar PV systems in Pennsylvania. Cypress Creek therefore urges the Commission to adopt the Brown/Place interpretation of Subsection 2804(2)(i).

Another problem with the Commission’s overly broad interpretation of Subsection 2804(2)(i) is that it requires the Commission to adopt a tortured and unsupported interpretation of Subsection 2804(2)(ii) in order to give that subsection meaning. Specifically, the Commission would read the Act to authorize the issuance of new certifications to Solar PV systems that don’t meet the criteria of Section 2804(1) after the Effective Date if they had contracts to sell Pennsylvania SRECs, but were not certified, prior to that date. As an initial matter, it’s not clear that there are any such systems, as SREC sellers would typically be required to be certified before they could

¹ Where a statute is ambiguous, the Commonwealth’s Statutory Construction Act requires that the legislative intent be effectuated. Statutory Construction Act of 1972, 1 Pa.C.S. § 1921: “The 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.”

enter into an SREC purchase and sale agreement. More importantly, Subsection 2804(2)(ii) is clear and unambiguous and there is no basis for interpreting it to authorize new certifications under the AEPS Act.²

The clear meaning of Subsection 2804(2)(ii) is that an AEPS certification must remain valid for a Solar PV system that had contracted to sell Pennsylvania SRECs prior to the Effective Date. This understanding is reinforced by Section 2804(3), which provides that Section 2804 of the Act only applies to contracts entered into after the Effective Date – i.e., that it only restricts the ability of Solar PV systems affected by Section 2804(1) to enter into contracts for the sale of their SRECs for AEPS Act compliance purposes after the Effective Date.

The same principles of statutory construction preclude the proposal by Commissioners Brown and Place to a graft a new limitation onto Subsection 2804(2)(ii) that appears nowhere in the unambiguous statutory language. They suggest that the exclusion of pre-existing contracts from the impact of Section 2804(1) be limited to contracts for the sale of SRECs between certified Solar PV systems and a subset of specified counterparties: electric distribution companies, electric generation suppliers serving Pennsylvania customers, load serving entities, electric cooperatives, or municipal cooperatives. This list omits one important category of counterparties with which certified SREC suppliers, including the Cypress Creek affiliates, lawfully contracted before the Effective Date: SREC brokers, who often facilitate the transfer of SRECs from generators to entities required to comply with the AEPS Act. This unjustified (and perhaps unintentional) omission would deny the benefit of the subsection’s exclusion to Solar PV systems, such as those owned by the Cypress Creek affiliates, who prior to the Effective Date contracted for the sale of SRECs to brokers or other third-party entities for resale to EDCs and EGSs with AEPS Act compliance obligations.³

The Brown/Place interpretation of Subsection 2804(2)(ii) is not only totally unsupported by the plain language of the Act, but it also discriminates against a group of Solar PV systems without any rational basis and likely runs afoul of the Contracts Clause of the U.S. Constitution.⁴

² See Statutory Construction Act of 1972, 1 Pa.C.S. § 1921(b) (“When 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.”); *Commonwealth v. Segida*, 604 Pa. 103, 108, 985 A.2d 871, 874 (2009) (“In order to ascertain the intent of the General Assembly, the ruling body should first look at the plain language of the statute.”).

³ The use of brokers in SREC transactions is a widespread practice in the energy market.

⁴ If a statute is susceptible of two competing interpretations (which Cypress Creek contends is not the case here), one of which is constitutionally vulnerable, it should be assumed that the legislature did not intend to violate the Constitution. “The ‘canon of constitutional avoidance’ provides that when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter Pennsylvania explicitly recognizes this canon by statute in instances where construction of a Pennsylvania statute is at issue.” *Commonwealth v. Veon*, 637 Pa. 442, 455–56,

U.S. Constitution, Article I, section 10. The Contracts Clause reads, in pertinent part, “No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts[.]” The Third Circuit Court of Appeals has explained that if a law operates as a “substantial impairment of a contractual relationship,” then the law is invalid unless: (a) the State can provide a “significant and legitimate public purpose behind the regulation,” and (b) the adjustment of the contracting parties' rights and responsibilities under the law is (i) based upon reasonable conditions, and (ii) is of a character appropriate to the public purpose justifying the legislation's adoption. *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243 (3d Cir. 1987) (*citing Energy Reserves Group v. Kansas P. & L. Co.*, 459 U.S. 400 (1983)). In this case, the Brown/Place interpretation of Subsection 2804(2)(ii) would severely if not totally impair the value of the Cypress Creek pre-existing SREC contracts. This is not a reasonable nor fair result and is not necessary to achieve the Pennsylvania General Assembly’s goal of incentivizing in-state development of Solar PV facilities.

For the foregoing reasons, Cypress Creek urges the Commission to find that Subsection 2804(2)(ii) excludes from the application of Section 2804(1) *all* certified Solar PV systems that, prior to the Effective Date, had contracted to sell SRECs for potential use for AEPS compliance, regardless of the nature of the direct SREC buyer. All members of the Commission appear to agree, as does Cypress Creek, that any exclusion under this subsection should be limited to the duration of the contract in question, and that conclusion is reinforced by Subsection 2804(3) of the Act.

Finally, Cypress Creek would add the following ancillary comments:

- 1) The TIO correctly finds that out-of-state Solar PV systems that are not grandfathered as eligible SREC sellers are still fully eligible to receive Tier 1 Renewable Energy Credits.
- 2) Previously banked SRECs must remain eligible for use in meeting AEPS Act compliance obligations. Otherwise, investments made by parties in reasonable reliance on the pre-existing statutory and regulatory regime would be unfairly impaired.
- 3) The Commission should consider implementing an orderly and transparent program for the decertification of previously certified Solar PV systems that are, or become, ineligible under the Act to sell SRECs for AEPS Act compliance purposes.

Thank you again for the opportunity to submit comments on this important matter.

150 A.3d 435, 443 (2016) (*quoting MCI WorldCom, Inc. v. Penna. Pub. Utility Comm'n*, 577 Pa. 294, 844 A.2d 1239 (2004)) (citations omitted).

With best wishes,

Sincerely yours,

Steven J. Levitas

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