

**Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Implementation of Act 40 of 2017 : **Docket No. M-2017-2631527**

**ANSWER OF THE MID-ATLANTIC RENEWABLE ENERGY COALITION
IN SUPPORT OF PETITIONS FOR CLARIFICATION OR RECONSIDERATION**

Pursuant to 52 Pa. Code § 5.572(e), the Mid-Atlantic Renewable Energy Coalition (“MAREC”) files this Answer in support of the Petitions of Community Energy, Inc. and Community Energy Solar, Inc. (together “Community Energy”) and Cypress Creek Renewables, LLC (“Cypress Creek”) seeking clarification or reconsideration of the Pennsylvania Public Utility Commission’s (“Commission”) Final Implementation Order entered May 3, 2018 (“FIO”) in the above-captioned matter. In support thereof, MAREC submits as follows:

1. On May 3, 2018, the Commission entered its FIO for Act 40 of 2017 (“Act 40”), which established guidance and qualifications for systems that qualify for the solar photovoltaic (“solar PV”) requirements under the Alternative Energy Portfolio Standards Act (“AEPS Act”), 73 P.S. §§ 1648.1 *et seq.*

2. On May 11, 2018, Community Energy filed a Petition for Clarification and/or Reconsideration of the FIO, stating that the Commission’s interpretation of 72 P.S. § 2804(2) “creates significant uncertainty regarding the status of Alternative Energy Credits (“solar AEC”)¹ controlled by Community Energy. Section 2804(2) provides in part:

Nothing under this section or section 4 of the “Alternative Portfolio Standards Act” shall affect any of the following: . . . (ii) Certification of a solar photovoltaic system with a binding written contract for the sale and purchase of alternative energy credits derived from solar photovoltaic energy sources entered int prior to the effective date of this section.

¹ Community Energy Petition at p. 2.

Community Energy argues that the Commission did not address the situation where there may be multiple parties in the production of solar energy to the retirement of the associated solar AECs.² The Commission's interpretation in the FIO at pages 8-9 appears to only consider contracts for solar AECs between out-of-state facilities and an EDC or EGS failing to acknowledge that there may be more than a single party in the chain of ownership of the solar AECs, such as the situation with Community Energy. This is the situation that Community Energy finds itself, as their affiliates own the rights to the solar AECs but no longer own the facilities generating the credits. In its Petition, Community Energy has requested "that the Commission clarify and/or Reconsider its Order to remove the uncertainty and affirm that all contracts with EDCs and EGSs are grandfathered such that all parties holding contracts entered into prior to October 30, 2017, and within the chain of production of the solar AECs supplying those contracts, are also grandfathered."

3. On May 16, 2018, Cypress Creek filed a Petition for Clarification or Reconsideration of the FIO, contending that the Commission's language appears to limit out-of-state solar photovoltaic systems, like ones owned by Cypress Creek affiliates, having contracts with brokers or middle marketers prior to the effective date of Act 40 and not directly with EDCs or EGSs. Cypress Creek argues that Act 40's grandfathering clause is unambiguous in its application to all photovoltaic facilities with contracts for solar AECs to be retired in Pennsylvania entered into prior to the effective date of the Act. Cypress Creek also raises compelling arguments indicating that it was never the legislative intent to exclude these types of contracts, and to the contrary several legislators cited the need to "honor existing contracts."³ Moreover, the Company

² *Id* at p. 3

³ Petition of Cypress Creek at p. 13.

raises the Contracts Clause of the Constitution, which would find the Commission's interpretation as it relates to the contractual relations of Cypress Creek and middle marketers and brokers, as an improper interference with its existing contracts as of the effective date of Act 40.⁴ Cypress Creek's is requesting that the Commission modify or clarify that all binding contracts for sale and purchase of solar AECs as of the effective date of Act 40 be interpreted as part of the grandfathering provision.

4. MAREC⁵ fully supports the Petitions for Clarification or Reconsideration filed by Community Energy and Cypress Creek.

5. As MAREC stated in its Comments on the Tentative Order in this docket, that the grandfathering provision should be interpreted to protect the sanctity of binding written contracts, as it was intended by the plain language of Section 2804(2)(ii), "as well as the historic protection on legally binding contracts in reliance of statute."⁶ This point was made abundantly clear in both Petitions we are supporting here. Neither Community Energy, Cypress Creek, nor MAREC is suggesting that the grandfathering clause extends to contracts entered into after the effective date of Act 40. However, it should be made clear and unambiguous that the grandfathering provision applies to all binding contracts for the sale of solar AECs entered into prior to the effective date as part of the chain of production, whether the contract involves entities, like Community Energy's affiliates, who own the rights to the solar AECs but no longer own the facilities generating the energy; or entities, such as Cypress Creek affiliates, that own the facilities but sell to middle marketers and brokers for solar AECs to be retired in the State. In each case, these entities are

⁴ *Id. at p. 14.*

⁵ MAREC previously submitted written comments in response to the Commission's Tentative Implementation Order at this docket on February 5, 2018.

⁶ MAREC Comments on TIO at 3.

parties to a binding contract that have the solar AECs ultimately delivered to the EDCs and EGSs in compliance with 72 P.S. § 2804(2).

6. MAREC agrees with Community Energy's assertion that the Commission did not address the situation involving "more than one party in the chain of production to retirement of the AECs,"⁷ as is the situation that Community Energy finds itself. This situation is also very similar to the position of Cypress Creek. Each company, in reliance on pre-existing law, has entered into contractual arrangements for the sale of solar AECs in the chain of production, either as the solar facility selling to a middle marketer or via a contract where it retained the rights to the credits produced from a solar facility but no longer owns the facility generating the credits. In both cases the affected entities are essential parties to the chain of production, which ultimately leads to the retirement of the solar AECs by an EDC or EGS from the solar generation facility. It is common in AEC markets for AECs to be purchased and sold multiple times before being retired by an EDC or EGS. The failure to address these situations leaves both companies in untenable positions where their pre-existing contractual rights will be dramatically reduced in value by unilateral action of the Commission, or at best they will be left with uncertainty as to whether the contracts that they have entered into in reliance of statute are going to be considered valid under the grandfathering provision of Act 40. Furthermore, as indicated previously, and as addressed extensively in the Petitions of Community Energy and Cypress Creek, the statute and legislative intent do not provide support for the Commission's limitation on types of contracts grandfathered by law.

WHEREFORE, MAREC respectfully requests that the Commission grant the Petitions for Clarification or Reconsideration of Community Energy and Cypress Creek in the above matter and

⁷ Community Energy Petition at p. 3.

clarify or reconsider its FIO consistent with the reasons set forth above and in said Petitions.

Respectfully submitted,



Bruce H. Burcat, Esq. (PA ID # 44868)
Executive Director
Mid-Atlantic Renewable Energy Coalition
29 N. State St., Suite 300
Dover, DE 19901
Tel: 302-331-4639
bburcat@marec.us

*Attorney for the Mid-Atlantic
Renewable Energy Coalition*

DATED: May 29, 2018

VERIFICATION

I, Bruce H. Burcat, Executive Director of the Mid-Atlantic Renewable Energy Coalition, hereby state that the facts set forth above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Dated: May 29, 2018

Bruce H. Burcat

CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of May, 2018, served a true and correct copy of the foregoing document, upon the upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54:

Via First Class Mail

Lauren M. Burge, Esquire
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101

Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Assistant Small Business Advocate
Office of Small Business Advocate
300 North Second Street, Suite 202
Harrisburg, PA 17101

Todd S. Stewart, Esquire
Hawke McKeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101

Daniel Clearfield, Esquire
Carl R. Shultz, Esquire
Sarah C. Stoner, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101

[Insert Name of Server]