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**Via Electronic Filing**

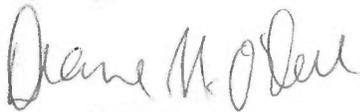
Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Comments of the Retail Energy Supply Association ("RESA") to the Tentative Order Entered December 21, 2017 with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Deanne M. O'Dell

DMO/lww  
Enclosure

cc: Kriss Brown w/enc. ([kribrown@pa.gov](mailto:kribrown@pa.gov))  
Darren Gill w/enc. ([dgill@pa.gov](mailto:dgill@pa.gov))



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## I. INTRODUCTION

In its Tentative Implementation Order entered December 21, 2017 (“TIO”), the Commission provides its proposed interpretation of Act 40 of 2017<sup>1</sup> and seeks comments from interested stakeholders. Act 40 places new in-state geographical limits on the solar photovoltaic systems that generate the solar photovoltaic shares (“SRECs” or “SAECs”) that electric distribution companies (“EDCs”) and electric generation suppliers (“EGSs”) must acquire to comply with the Alternative Energy Portfolio Standards (“AEPS”) Act.<sup>2</sup> The Retail Energy Supply Association (“RESA”)<sup>3</sup> is a broad and diverse group of retail energy suppliers which includes many EGSs licensed in Pennsylvania that are required to meet the obligations of the AEPS Act.

Because of the fluid nature of EGS AEPS obligations, the variety of supply contracts utilized by EGSs and the importance of banking, RESA recommends that the Commission carefully consider how different interpretations of Act 40 can negatively impact the market and unnecessarily increase the costs to consumers to implement the new requirements. Any increased costs for AEPS compliance resulting from implementing Act 40 will ultimately fall to Pennsylvania electricity consumers.<sup>4</sup> Therefore, it is important to ensure that implementation of

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<sup>1</sup> The new law amends the Administrative Code and has been codified at 71 P.S. § 714. However, references to the sections as they are identified in Act of Oct. 30, P.L. 379, No. 40 are utilized in these comments to be consistent with the references in the TIO.

<sup>2</sup> 73 P.S. §§ 1648.1-1648.8.

<sup>3</sup> The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at [www.resausa.org](http://www.resausa.org).

<sup>4</sup> EDCs will recover the cost from default service customers consistent with mechanisms approved in their default service plans and EGSs will recover the costs from shopping customers in their

Act 40 – while remaining consistent with the intent of the Legislature – also charts a reasonable and least costly path for implementation. More specifically, interpretations which involve devaluing or nullifying existing SRECs EGSs have already acquired or for which they are contractually entitled due to existing supply contracts, will unnecessarily disrupt the market and impact the costs that will be borne by customers.

As discussed further below, RESA supports an interpretation of the law that allows EGSs to continue to rely on both (1) existing SRECs (ones already purchased and/or banked); and, (2) contractually committed SRECs (whether through direct, aggregator or broker supply contracts) to satisfy their SREC obligations.<sup>5</sup> This result is consistent with Act 40 because Act 40 establishes the going-forward geographical limitations for solar photovoltaic systems while maintaining the validity of already certified SRECs and the ability of previously qualified solar photovoltaic systems to produce certified SRECs under existing supply contracts (until those contracts expire or renew). As set forth in Act 40, the “transition” process to the new geographical limitations will occur as existing SREC certifications are retired and as supply contracts expire. This transition period is incredibly important to ensure that EGSs may rely on the actions they have already taken to acquire qualifying SRECs so as to minimize the amount that consumers will be required to pay as a result of increased costs to comply with the new requirements. A “flash cut” from the current geographical requirements which results in

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retail contracts. *See, e.g., Proceeding to Evaluate Transition to Corrected Non-Solar Tier I Calculation Methodology*, Docket No. M-2009-2093383, Final Order entered October 6, 2016 at 10.

<sup>5</sup> In the absence of this interpretation, the Commission can clarify that the new requirements apply to retail contracts entered into on and after the October 30, 2017 effective date of the law.

invalidating existing SREC certifications and existing supply contracts will unnecessarily increase the costs of AEPS compliance.<sup>6</sup>

## II. BACKGROUND

### A. AEPS Act Requirements and Act 40

Consistent with the AEPS Act, EDCs and EGSs must acquire and retire alternative energy credits (“AECs”) in quantities equal to a percentage of their total retail sales of electricity to all of their retail electric end-user customers for each reporting period.<sup>7</sup> AECs are categorized into two “tiers.”<sup>8</sup> Tier I includes solar photovoltaic shares (i.e. SRECs or SAECs) which have their own specific percentage requirements.<sup>9</sup> All AECs are generated from qualified alternative energy facilities<sup>10</sup> and are created, tracked and verified via the creation of certificates.<sup>11</sup> The AEPS Administrator qualifies alternative energy facilities and the Generation Attribute Tracking System (“GATS”), operated by PJM Environmental Information Services Inc. (“PJM-EIS”), is the AEC registry used to track generation, ownership and retirement of AECs.

As approved in 2007, the geographical requirements for alternative energy facilities to produce AECs that can be utilized to satisfy Pennsylvania requirements require the alternative energy facility to be located “within the service territory of a regional transmission organization

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<sup>6</sup> EGSs do not, like the EDCs, have the right to see full cost recovery for these expenses. 66 Pa. C.S. § 2807(e)(3.9). Thus, each EGS will have to determine how to recover the increased costs. Because of this the recovery of costs from shopping customers will be inconsistent among shopping customers, among EGSs, and as between shopping and default service customers. The greater the costs EGSs need to handle, the more skewing in market pricing that will occur.

<sup>7</sup> 52 Pa. Code § 75.61. If they fail to comply with this requirement, then they will be required to make an Alternative Compliance Payment (“ACP”) in lieu of retiring AECs. 73 P.S. § 1648.3(f).

<sup>8</sup> 73 P.S. § 1648.3(b) and (c).

<sup>9</sup> 72 P.S. § 1648.3(b); 71 P.S. § 714.

<sup>10</sup> 52 Pa Code § 75.62 sets forth the process for an alternative energy system to become qualified.

<sup>11</sup> 52 Pa. Code § 75.63 sets forth the process for AEC certification.

that manages the transmission system of any part of this Commonwealth.”<sup>12</sup> Act 40 revises this geographical requirement only for SRECs by now requiring solar photovoltaic systems to: (1) directly deliver electricity to a Pennsylvania customer and/or EDC; (2) directly connect to an electric cooperative or municipal electric system operating in Pennsylvania; or, (3) connect directly to the electric transmission at a location within the service territory of an EDC.<sup>13</sup>

Effective October 30, 2017, these new requirements: (1) must be satisfied in order for a solar photovoltaic system to be qualified to generate Pennsylvania AEPS-complaint SRECs;<sup>14</sup> and, (2) “apply to contracts entered into or renewed on or after the effective date of this section.”<sup>15</sup> Act 40 also makes clear that the new geographical limitations do not apply to: (1) certifications granted prior to the effective date of the new law; and, (2) binding written contracts with solar photovoltaic systems entered into prior to the effective date.<sup>16</sup>

#### **B. EGS AEPS Compliance Processes**

The amount and type of AECs that EGSs must retire to satisfy the AEPS Act is determined by the amount of electricity each EGS sells to its end-user customers in the reporting year. EGSs enter into retail contracts with their end-user customers.<sup>17</sup> On a continuing basis, an

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<sup>12</sup> 73 P.S. § 1648.4.

<sup>13</sup> Section 2804(1) aka 71 P.S. § 714(1).

<sup>14</sup> Section 2804(1) aka 71 P.S. § 714(1)

<sup>15</sup> Section 2804(3) aka 71 P.S. § 714(3).

<sup>16</sup> Section 2804(2) aka 71 P.S. § 714(2).

<sup>17</sup> An EGS’s retail contract also provide the only basis through which EGSs can seek to recover the costs of AEPS compliance. *See, e.g., Proceeding to Evaluate Transition to Corrected Non-Solar Tier I Calculation Methodology*, Docket No. M-2009-2093383, Final Order entered October 6, 2016 at 10. In contrast, EDCs do not enter into retail contracts with end-user customers. They recover the costs of AEPS compliance from default service customers through the various mechanisms available to them. EDCs, unlike EGSs, are entitled to seek full cost recovery for these expenses. 66 Pa. C.S. § 2807(e)(3.9).

EGS's number of customers changes as new customers take service, existing customers switch suppliers and the EGS renews or revises retail contracts. Because of this, there is a lack of certainty about the number/type of AECs an EGS must retire at the end of the AEPS reporting year to be in compliance with its AEPS requirements. To manage this uncertainty, EGSs rely on a number of different types of supply contracts and the banking provisions of the AEPS Act.

### 1. EGS Supply Contracts for AECs

EGSs rely on a variety of supply contracts to ensure that they have sufficient AECs to retire to satisfy their AEPS requirements in a particular reporting year. For example, an EGS may enter into a direct supply contract with a Pennsylvania qualified alternative energy facility that obligates the facility to meet the EGS's AEC requirements. An EGS may enter into this type of direct supply contract with a large renewable energy facility or a single homeowner which gives the EGS ownership of the AECs.

The AEPS Act permits owners of alternative energy systems or a customer-generator to assign AECs via contractual provisions.<sup>18</sup> Generally such assignments are to aggregators. The Commission defines "solar aggregator" as "a person or entity that purchases for resale, or otherwise consolidates for sale, solar alternative energy credits for resale to EDCs and EGSs."<sup>19</sup> Aggregators may be agents for many different alternative energy facilities with authorization to sell AECs. Because they have AECs for sale, they present another way EGSs can acquire necessary AECs and, therefore, EGSs may enter into supply contracts with aggregators to purchase the AECs under their control. EGSs may also have contracts with the alternative

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<sup>18</sup> 73 P.S. § 1648.3(e)(12).

<sup>19</sup> 52 Pa. Code § 69.202.

energy facilities to be the facility's aggregator enabling the EGS to either use and retire the generated AECs for its own AEPS compliance or to sale the AECs to other entities.

EGSs may also enter into supply contracts with brokers or financial institutions. Such broker contracts will require the broker to deliver qualified AECs to the EGS under certain terms and conditions. The broker may or may not be assigned the ownership of a particular AEC but is contractually obligated to deliver a specified number of AECs to the EGS during a specified period. The Commission has approved the use of these types of AEC purchase and sale agreements for the utilities.<sup>20</sup>

While these are some of the general types of supply contracts in use today, it is important to remember that the specific terms and conditions of the supply contracts vary greatly. Some supply contracts may establish specific pricing while others may rely on ranges. Some supply contracts may be for a short period of time while others may be many years. Finally, the supply contracts may cover only Pennsylvania obligations while others may span multiple jurisdictions. The important point here is that these carefully crafted supply contracts are all relied upon by EGSs to ensure that they can satisfy their AEPS obligations in the most cost-efficient manner possible. By doing this, EGSs can pass on these cost efficiencies to end-user customers through their retail contracts.

## **2. AEC Banking Provisions**

EGSs also rely on the ability to "bank" or "place in reserve" AECs produced in one reporting year for compliance in either or both of the two subsequent reporting years.<sup>21</sup> By

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<sup>20</sup> *Petition of PECO Energy Company for Approval to Procure Tier II Alternative Energy Credits and Additional Tier I and Solar Alternative Energy Credits*, Docket No. P-2012-221975, Order entered February 14, 2011 at 12-14.

<sup>21</sup> 73 P.S. § 1648.3(e)(6).

banking AECs, EGSs can ensure that they have sufficient AECs on hand once they determine their actual AEPS reporting year requirements. As discussed previously, EGSs do not know for certain a reporting year's actual requirements until the end of the year because the amount of electricity they sell to customers in any one year constantly shifts. Market prices often vary across different vintage years for AECs. EGSs endeavor to source AECs as cost effectively as possible. In certain cases, EGSs may elect to procure varying vintage AECs for use in future years in accordance with the prevailing banking rules. Therefore, the ability to rely on banked AECs is an important component (along with the various supply contracting options) necessary for EGSs to effectively manage and satisfy their AEPS requirements in as cost-effective manner as possible on behalf of customers.

### **III. RECOMMENDED STATUTORY INTERPRETATIONS**

Act 40 addresses: (1) requirements solar photovoltaic systems must meet effective October 30, 2017 to be qualified to generate Pennsylvania AEPS compliant SRECs; and, (2) the transition process for previously qualified solar photovoltaic systems that do not satisfy the new in-state geographical requirements. In its TIO, the Commission offers its proposed interpretations of Act 40 and seeks comments. Chairman Gladys M. Brown and Vice Chairman Andrew G. Place offer a supplemental interpretation for Section 2804(2) and seek comments about the status of banked SRECs from previously certified out-of-state facilities.<sup>22</sup>

#### **A. General Rule: Section 2804(1) / 72 P.S. § 714(1)**

Section 2804(1) sets forth the new requirements that solar photovoltaic systems must meet to be qualified to generate Pennsylvania compliance SRECs. Regarding this Section, the

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<sup>22</sup> Joint Statement of Chairman Gladys M. Brown & Vice Chairman Andrew G. Place at 2-3.

TIO proposes: (1) to require direct connections between the solar photovoltaic system and either the retail customer and/or the facilities of the electric system; and, (2) to allow the SRECs of solar photovoltaic systems that do not satisfy Act 40 (because they are out-of-state) to continue to be certified as meeting the non-solar Tier I requirements.<sup>23</sup> Both of these proposals are consistent with Act 40 and RESA supports the Commission's interpretations.

The intent of the Act is clear that any new solar photovoltaic system that seeks to be qualified as providing Pennsylvania AEPS SRECs must be "in the state."<sup>24</sup> Pursuant to Section 2804(1) any new solar photovoltaic facility that wishes to qualify for Pennsylvania AEPS must meet this requirement. There is no difference of opinion regarding this requirement and the interpretation of this Section so, effective October 30, 2017, no new out-of-state solar photovoltaic systems can be qualified to generate Pennsylvania AEPS-compliant SRECs. Thus, going-forward, the legislative intent to rely on "in-state" solar photovoltaic facilities will be met.

Also, the ability to continue to use SRECs from solar photovoltaic facilities that do not meet the new geographical requirements to satisfy the non-solar portion of Tier I is particularly important so that EGSs can best leverage their supply arrangements to cost-effectively comply with the AEPS requirements on behalf of customers. Therefore, RESA supports the ability of non-qualifying solar photovoltaic facilities to produce SRECs that can be certified for the non-solar requirements of Tier I.

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<sup>23</sup> TIO at 3-4.

<sup>24</sup> Section 2804(1) aka 71 P.S. § 714(1).

**B. Honoring Already Certified SRECs Through Banking Period and Transitioning Out-of-State Solar Photovoltaic Facilities: Section 2804(2) / 72 P.S. § 714(2)**

Based on the TIO, the Joint Statement of Chairman Brown and Vice Chairman Place, and comments already filed in this proceeding, there is a significant amount of disagreement about how to interpret Section 2804(2). Upon review of the various proposals, the intent of the legislation, and the real-world impacts resulting from various interpretations, RESA recommends that this Section be interpreted as honoring existing SREC certifications and maintaining currently qualified out-of-state solar photovoltaic systems with binding written contracts until the end of those contracts. This interpretation is consistent with the text and intent of the Act while also enabling an orderly transition process from the reliance on existing out-of-state facilities to minimize the costs of compliance that will be passed on to all consumers.

Section 2804(2)(i) should be interpreted to apply to any existing SREC (in contrast to the qualification of the solar photovoltaic facility) that has already been certified as compliant with the Pennsylvania AEPS requirements. Because SRECs can only retain their certification for three AEPS reporting years,<sup>25</sup> RESA's proposed interpretation would not "grandfather" these SRECs into infinitum. Rather, the SREC would need to be retired within the three-year window after they are generated. Focusing on the certification of SRECs prior to October 31, 2017 (rather than the facility) and interpreting Section 2804(2)(i) to mean that these certifications shall remain in place (through the banking period) is a reasonable result because it ensures that EGSs retain the value of the SRECs that they have already purchased on behalf of customers and can continue to rely on these SRECs for compliance consistent with the already existing banking provisions of the AEPS Act. This interpretation also addresses concerns raised in the Joint

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<sup>25</sup> 73 P.S. § 1648.3(e)(6).

Statement about “grandfathering all out-of-state solar facilities” because only the integrity of the already certified SRECs is being preserved. Thus, RESA’s interpretation of this Section does not implicate the pre-existing qualification of any out-of-state solar photovoltaic facility.

Rather, RESA suggests that the facility’s pre-existing qualification be addressed through the interpretation of Section 2804(2)(ii) by allowing previously qualified solar photovoltaic facilities with binding written contracts to maintain their qualification until the end of the contract. These previously qualified solar photovoltaic facilities would not qualify under the new geographical requirements of Section 2804(1) but enabling them to still qualify (temporarily) pursuant to Section 2804(2)(ii) because they were previously qualified and have binding written contracts for the sale and purchase of their SRECs is reasonable. Importantly, honoring the contracts that are in place would present the least disruption to the marketplace which, in turn, will help to ameliorate the costs that will be incurred to comply with the new requirements. As explained previously, EGSs have various contracts with solar photovoltaic facilities and other entities such as aggregators and brokers which rely on the qualification of these facilities granted prior to Act 40. Giving all entities the benefit of these contracts is extremely important and benefits consumers in the form of lessening the cost impact on them.

However, since these contracts will end, eventually the ability of these existing qualified solar photovoltaic facilities to produce Pennsylvania AEPS compliant SRECs in the future will be phased out. As such, this interpretation of Section 2804(2)(ii) is consistent with the goal of Section 2804(1) to move to in-state photovoltaic systems for purposes of generating qualifying SRECs. This interpretation also gives meaning to Section 2804(2) by establishing a reasonable transition period for previously qualified solar photovoltaic facilities that have existing supply contracts. Any determination that the SRECs produced by these previously qualified facilities

are no longer valid regardless of the contracts in place prior to the change in law would be extremely disruptive for the marketplace.

The Joint Statement proposes to interpret “contract” as used in Section 2804(2)(ii) to those between a previously qualified (out-of-state) solar photovoltaic facility and an EDC, EGS, load serving entity, electric cooperative or municipal cooperative.<sup>26</sup> As explained in Section II.B.1, there are many different types of supply contracts utilized in the industry that may not be directly between the facility and the entity with the AEPS obligation. Because of this, RESA recommends that the Commission be cautious in adopting any interpretation that would abrogate existing supply contracts and/or make them valueless for purposes of complying with the SREC requirements of the AEPS Act. Importantly, any supply contract entered into prior to October 30, 2017 with a then-qualified solar photovoltaic facility was entered into in good faith and on the belief that the SRECs delivered pursuant to that contract would qualify to satisfy Pennsylvania AEPS solar requirements. Given this, any interpretation that only allows certain types of supply contracts (i.e. those made directly with the solar photovoltaic facility) to retain the benefit of the bargain while nullifying other supply contracts is patently unfair and is not supported by the language of Act 40. For this reason, RESA recommends that the Commission determine that any contract involving the sale and purchase of SRECs entered into prior to October 31, 2017 is sufficient satisfy the requirements of Section 2804(2)(ii).

**C. Applicability to New or Renewed Contracts After Effective Date: Section 2804(3) / 72 P.S. § 714(3)**

Section 2804(3) states that the new geographical limitations that solar photovoltaic systems must satisfy in order for their SRECs to be certified as compliant with Pennsylvania’s

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<sup>26</sup> Joint Statement at 3.

AEPS “shall apply to contracts entered into or renewed on or after” October 30, 2017.<sup>27</sup> This section does not provide any definition for “contract” or specify the type of contract to which it applies. As discussed previously, both supply contracts and retail contracts are important facets upon which EGSs rely to satisfy their AEPS requirements. To the extent the Commission elects not to adopt RESA’s proposed interpretation of Section 2804(2) (i.e. to honor already certified SRECs and existing out-of-state solar photovoltaic facilities until end of their pre-October 31, 2017 contract supply period), RESA supports interpreting Section 2804(3) to apply to retail contracts entered into or renewed on or after October 31, 2017 (in contrast with supply contracts). Without this interpretation (or the ability to rely on existing certified SRECs), significant marketplace disruption will occur. This is because EGSs will need to evaluate their existing retail and supply contracts to determine how they will be able to meet the new SREC requirements.

**D. Other Issues: Banking and GATS Certification**

In response to the issue of banking identified by the Joint Statement, RESA recommends that any SREC that has already been certified as complying with Pennsylvania AEPS Act continue to retain that certification through the legally permissible banking period. As explained more fully above in Section III.B, RESA views this outcome as required by Section 2804(2)(i) of Act 40 and is the most reasonable way to minimize market disruption (and attendant costs) as Act 40 is implemented.

The TIO proposes changes to the GATS system to identify whether a solar photovoltaic facility’s SRECs are qualified to meet the solar portion of the AEPS Tier I requirements or only

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<sup>27</sup> 2804(3) aka 71 P.S. § 714(3).

the non-solar portion of Tier I. Currently, GATS uses the same numbering format is used to certify SRECs from all Pennsylvania qualified solar photovoltaic facilities. Going forward, the Commission proposes to use two different number formats for the SRECs generated by solar photovoltaic facilities depending on whether the SREC qualifies only for the Tier I requirement or whether it also satisfies the solar requirement.<sup>28</sup> As new solar photovoltaic systems are qualified, RESA supports a certification numbering system that differentiates AEPS compliant SRECs from SRECs that can only be used to satisfy the non-solar requirements of Tier I. Such transparency is good and going forward should be easy to implement as new solar photovoltaic facilities are qualified.

For pre-Act 40 qualified solar photovoltaic facilities, the TIO proposes to require them to submit copies of the pre-October 30, 2017 written contract, any other information requested by the AEC Program Administrator and an application for qualification in accordance with 52 Pa. Code § 75.62. Based on this information, the AEC Administrator will determine qualification and, when the contract ends, re-certify the system as a Tier I non-solar alternative energy facility.<sup>29</sup> Based on this proposed process, RESA assumes the Commission intends that GATS certify the SRECs of the facility using the new numbering format to designate whether the SRECs are eligible for the solar portion of the Tier I AEPS requirements. RESA supports this intent and requests that the Commission make clear that EGSs may rely on the certification number given to the SREC to determine whether or not it is qualified to meet the SREC portion

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<sup>28</sup> TIO at 4-5.

<sup>29</sup> TIO at 8-9.

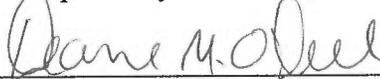
of the Tier I requirements to satisfy their obligation to prove that they are compliant with the AEPS Act.<sup>30</sup>

**IV. CONCLUSION**

RESA appreciates the opportunity to provide its view regarding implementation of this new law. As explained more fully above, RESA supports interpreting Act 40 to:

1. permit any existing SREC certification to remain valid through the end of the legally permissible banking period;
2. temporarily honor the pre-existing qualification of any out-of-state solar photovoltaic facility that has a binding written contract for the sale and purchase of SRECs through the end of the existing contract period;
3. make clear that the new requirements apply to retail contracts entered into after October 31, 2017 (to the extent recommendations 1 and 2 are not implemented);
4. permit the SRECs generated by any non-qualifying out-of-state solar facility to be certified to satisfy the non-solar portion of Tier I AEPS requirements; and,
5. allow EGSs to rely on the certification of the SREC in GATS as satisfying their AEPS requirements.

Respectfully submitted,



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Date: February 5, 2018

Attorneys for the Retail Energy Supply Association

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<sup>30</sup> 73 P.S. § 1648.3(e)(4)(i).