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May 16, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
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 Cypress Creek Renewables, LLC's Petition for Clarification or Reconsideration of the Commission's Final Implementation Order Entered May 3, 2018, in the above-referenced matter. Copies are being served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please contact me at your convenience.

Sincerely,

pp: 

Daniel Clearfield

DC/jls
Enclosure

cc: Certificate of Service (w/enc)

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Cypress Creek Renewables, LLC's Petition for Clarification or Reconsideration of the Commission's Final Implementation Order upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

VIA EMAIL AND/OR FIRST CLASS MAIL

Pennsylvania Public Utility Commission
Bureau of Investigation & Enforcement
P.O. Box 3265
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Assistant Small Business Advocate
Office of Small Business Advocate
300 North Second St., Suite 202
Harrisburg, PA 17101

Date: May 16, 2018



Daniel Clearfield

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Implementation of Act 40 of 2017

:
:
:

Docket No. M-2017-2631527

**PETITION OF CYPRESS CREEK RENEWABLES, LLC, FOR CLARIFICATION OR
RECONSIDERATION OF THE COMMISSION'S
FINAL IMPLEMENTATION ORDER ENTERED MAY 3, 2018**

I. INTRODUCTION AND OVERVIEW

Pursuant to 52 Pa. Code § 5.572, Cypress Creek Renewables, LLC (“Cypress Creek”) hereby petitions the Pennsylvania Public Utility Commission (“Commission”) to clarify or reconsider and revise its Final Implementation Order entered May 3, 2018 in this proceeding (“FIO”) with respect to one narrow issue. The FIO purports to provide policy guidance with respect to the implementation of Section 11.1 of Act 40 of 2017 (“Act 40” or the “Act”). That section added a new Section 2804 to the Administrative Code¹ relating to the eligibility out-of-state solar photovoltaic (“Solar PV”) systems to generate renewable energy credits (“RECs”) that qualify for use as Pennsylvania solar renewable alternative energy portfolio credits (“PA SRECs”) under the “Alternative Energy Portfolio Standards Act” (the “AEPS Act”)². As the Commission correctly determined in the FIO, Section 2804 was generally intended to end the eligibility of out-of-state systems as generators of PA SRECs. However, Section 2804(2)(ii) of Act 40 (the “Grandfathering Provision”) specifically excludes from its impact those Solar PV systems “with a binding written contract for the sale and purchase of alternative energy credits derived from solar photovoltaic energy sources entered into prior to the effective date of this

¹ Act of April 9, 1929 (P.L.177, No.175), 71 P.S. § 714.

² Act of November 30, 2004 (P.L.1672, No. 213), 73 P.S. §§ 1648.1 et seq.

section.”³ Despite this clear and unambiguous legislative language, the FIO appears to graft a limitation onto the Grandfathering Provision that was neither authorized nor intended by the General Assembly, stating that to be grandfathered an out-of-state Solar PV system must have been certified as AEPS Tier I Solar Photovoltaic prior to the effective date of Act 40 *and* “have entered into a contract *with a Pennsylvania [Electric Distribution Company] or [Electric Generation Supplier] serving Pennsylvania customers.*” (Emphasis added.)⁴

The Commission’s limiting language, perhaps unintentionally, excludes from coverage under the Grandfathering Provision a class of out-of-state Solar PV systems, including those owned by affiliates of Cypress Creek, that have entered into contracts to sell those PA SRECs prior to the effective date of the Act, but whose contracts are with brokers or middle marketers rather than directly with Electric Distribution Companies (“EDCs”) or Electric Generation Suppliers (“EGSs”).⁵ Cypress Creek is the development affiliate of several out-of-state solar generators whose systems were certified as AEPS Tier I Solar prior to October 20, 2017, the effective date of Act 40 (“Effective Date”).⁶ As is common in the market for RECs and SRECs, these generators’ contracts are not directly with Pennsylvania EDCs or EGSs, but with brokers or aggregators, who *in turn* contract from time to time for the sale of these SRECs to PA EDCs and/or EGSs. These contracts are functionally the same as a contract where the counterparties are the solar generator on one end and an EDC or EGS on the other – the only difference being the presence of a middle person in the form of a broker or aggregator.

³ The intent and effect of this provision is underscored by subsection (3) of Section 2804, which provides: “This section shall apply to contracts entered into or renewed on or after the effective date of this section.”

⁴ Final Implementation Order at 27.

⁵ Barnhill Road Solar, LLC; Battleboro Farm, LLC; Downs Farm Solar, LLC; Green Farm Solar, LLC; Hardison Farm Solar, LLC; Leggett Solar, LLC; Modlin Farm Solar, LLC; Simons Farm Solar, LLC; SolNCPower1, LLC; SolNCPower2, LLC.

⁶ As discussed below, the RECs generated by these systems were recently “retagged” from PA SRECs to Tier I RECs by unilateral action of Commission staff.

The clear and unambiguous language of the Grandfathering Provision is not limited to contracts directly between an EDC/EGS and a generator. On the contrary, the Legislature – no doubt mindful of the equitable and Constitutional imperative against undermining pre-existing contractual relationships – protected “existing contracts,” without limitation.⁷ In addition to constituting an unauthorized rewriting of Act 40 by adding a limitation that appears nowhere in the Act, the FIO overlooks a fundamental practical reality of the market – that RECs, including PA SRECs, are often sold and purchased through brokers or middle marketers rather than in a direct transaction between the generator and end-user (i.e., EDC or EGS).⁸ This ruling is having an immediate and significant adverse impact on Cypress Creek and its affiliates by preventing

⁷ Many of the legislators who submitted comments to the Commission’s Tentative Order specified that, while the intent of Act 40 was to “close the borders” for Pennsylvania SREC compliance, they desired to do so while “honor[ing] existing contracts” and “allow[ing existing contracts] to sunset.” See Appendix A.

⁸ Earlier today, a Secretarial Letter was issued that sets forth the information and supporting documentation that EDCs or EGSs should provide in their petitions to assist the Commission in determining which alternative energy credits are eligible to be used by the EDC or EGS to meet the AEPS Act solar PV share requirements. *Implementation of Act 40 of 2017*, Docket No. M-2017-2631527, Secretarial Letter dated May 16, 2018, at 1-2. The Secretarial Letter reaffirms the Commission’s interpretation of the “Grandfathering Provision” as presented in the FIO — that grandfathered contracts are those between facilities that are already certified as AEPS Tier I Solar Photovoltaic and “have entered into a contract with a Pennsylvania EDC or EGS serving Pennsylvania customers.” *Id.* at 1. However, the Secretarial Letter clarifies the FIO’s interpretation and provides that “[c]ontracts may include those directly entered into between an out-of-state certified Tier I solar facility and an EDC or EGS; and/or a trail of contracts between an out-of-state certified Tier I solar facility, one or more intermediaries such as but not limited to wholesale default service participants or solar AEC aggregators, and an EDC or EGS which directly exhibits that a committed quantity of solar AEC output from the certified generation facility is being utilized to facilitate an EDC’s or EGS’s Tier I solar Alternative Energy Portfolio Standards obligations.” *Id.* at 2, n. 3. While this clarification helpfully recognizes the central role of middle marketers in the sale and purchase of PA SRECs, it still does not comport with the clear and unambiguous language of the Grandfathering Provision Act or resolve the adverse impact to Cypress Creek and other similarly situated parties. The clear language of Subsection 2804(2)(ii) of the Act states that an AEPS certification must remain valid for a Solar PV system that had contracted to sell PA SRECs prior to the Effective Date of the Act. The Act does not limit the Grandfathering Provision to contracts directly between an EDC/EGS and a generator or a “trail of contracts” between those entities through a middle marketer. It is common for the system owner to have entered into a binding written contract to sell all of its PA SREC output to a middle marketer for a defined period of time without that party necessarily having yet in turn contracted for the resale of such PA SRECs to an EDC or EGS. Thus, the Commission’s clarified interpretation still impairs the value of existing contracts in a manner not consistent with the clear language of the Act or with constitutional principles of contract protection and equal protection of the laws.

them from selling RECs previously contracted for sale as PA SRECs and potentially leading to termination of the affiliates' pre-existing PA SREC contracts in the near future.

To make matters worse, the Commission has not provided any mechanism for out-of-state solar generators potentially affected by the FIO to assert a claim of coverage under the Grandfathering Provision. Although the Grandfathering Provision applies to Solar PV systems, in order for such systems to maintain their certification, the Commission instructed only the EDCs and EGSs to seek to qualify credits by filing a petition within 60-days of the entry of the FIO (by July 2, 2018) to obtain a determination that the contract, and the associated PA SRECs are "grandfathered" pursuant to Section 2804(2)(ii). This mechanism creates no opportunity for the owner of a Solar PV system with a pre-existing contract with a counterparty other than an EDC or EGS to seek to maintain its certification by qualifying under the Grandfathering Provision. Cypress Creek has already been harmed by the FIO. As explained in its separate Petition for Stay or Supersedeas, the RECs generated by the Cypress Creek Solar PV systems previously certified as PA SRECs and the subject of contracts for sale with brokers entered into before Act 40 was enacted have now been unilaterally "retagged" as Tier I RECs. This retagging was premature at best, as the Commission had specifically established a review process for contracts to determine whether they satisfied the Grandfathering Provision of Act 40. As a result, Cypress Creek and the brokers that have purchased these PA SRECs are prevented from selling them as SRECs, even though they otherwise meet all of the requirements of Act 40.

Accordingly, Cypress Creek respectfully requests that the Commission clarify or modify the FIO to provide: 1) that a Solar PV system that otherwise meet the requirements of the Grandfathering Provision (i.e., "with a binding written contract for the sale and purchase of alternative energy credits derived from solar photovoltaic energy sources entered into prior to the

Effective Date) shall be eligible to maintain its certification to sell PA SRECs pursuant to such contract until the expiration of the contract; and 2) that any party to such a contract – not just an EDC or EGS – may submit the contract to the PUC for a determination that the contract satisfies the Grandfathering Provision, as interpreted by the Commission in the FIO as it may be modified pursuant to this Petition. The requested relief is needed to effectuate the plain language of Act 40, to resolve serious constitutional and fairness concerns, and to prevent immediate and substantial harm to Cypress Creek and its affiliates. In the interim, and as requested in Cypress Creek’s separate Petition for Stay or Supersedeas, the Commission should immediately reverse the retagging of Cypress Creek’s PA SRECs to Tier I RECs and direct that any such retagging should occur only at the conclusion of the contract review process established by the Commission to certify that a contract for the purchase and sale of PA SRECs satisfies the Grandfathering Provision of Act 40.

II. BACKGROUND

1. On October 30, 2017, Governor Wolf signed into law Act 40, which establishes geographical limits on Solar PV systems that qualify for the Solar PV share requirement of the AEPS Act.⁹

2. From a high-level perspective, Act 40 addresses: (1) requirements that Solar PV systems must have met, effective October 30, 2017, to be qualified to generate AEPS Act compliant SRECs; and, (2) the transition process for previously qualified Solar PV systems that do not satisfy the new in-state geographical requirements.

3. Section 2804(2)(ii) of Act 40 states:

(2) Nothing under this section or section 4 of the “Alternative Energy Portfolio Standards Act” shall affect any of the following...

⁹ 73 P.S. §§ 1648.1 et seq.

(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 into prior to the effective date of this section.

4. In its Tentative Implementation Order entered December 21, 2017 (“TIO”), the Commission laid out its proposed interpretation of Act 40 of 2017 and sought comments from interested stakeholders. It proposed to interpret Section 2804(2)(ii) to grandfather Solar PV Alternative Energy Systems (“AESs”) certified as a Pennsylvania AES before October 30, 2017, as continuing to qualify to generate energy and SRECs eligible to be used by EDCs and EGSs to meet the solar PV share requirements for the life of the system.¹⁰

5. Chairman Gladys M. Brown and Vice Chairman Andrew G. Place took strong issue with this interpretation of Act 40 and proposed an alternative interpretation for Section 2804(2) of Act 40 (“Joint Statement”) that would allow out-of-state Solar PV systems to maintain their AEPS certification only until their current PA SREC contract expires.¹¹ However, when describing the contracts that would be grandfathered under their interpretation Commissioners Brown and Place, perhaps inadvertently, included language that limited the exclusion of pre-existing contracts from the impact of the Act to contracts for the sale of SRECs between a certified Solar PV system and EDCs, EGSs serving Pennsylvania customers, load serving entities, electric cooperatives or municipal cooperatives.

6. Eighty-nine stakeholders, including Cypress Creek, submitted comments on the Commission’s proposed interpretation of Act 40. While supporting the Joint Statement’s interpretation of Act 40 to “close the borders” to PA SREC compliance using out-of-state solar systems, Cypress Creek’s comments urged the Commission to preserve existing contractual

¹⁰ Final Implementation Order at 12.

¹¹ *Implementation of Act 40 of 2017*, Docket No. M-2017-2631527, Joint Statement of Chairman Gladys M. Brown & Vice Chairman Andrew G. Place dated December 21, 2017 at 3.

relationships for the sale and purchase of PA SRECs being provided pursuant to binding contracts. It pointed out that any limitation on the type of “binding contract” that would qualify for grandfathering under Section 2804(2)(ii) unjustifiably diverged from the clear language in the Act and would illegally and unconstitutionally interfere with existing contracts. Other parties also raised this concern, including the Mid-Atlantic Renewable Energy Coalition (“MAREC”) and the Retail Energy Supply Association that each represent multiple companies active in PJM and the Pennsylvania market.

7. In the FIO, the Commission adopted the interpretation of Section 2804(2)(ii) as set forth in the Joint Statement. The Commission stated that it interpreted Section 2804(2)(ii) to “only permit out-of-state facilities [systems] that are (a) already certified as AEPS Tier I Solar Photovoltaic and that (b) have entered into a contract with a Pennsylvania EDC or EGS serving Pennsylvania customers, for the sale of solar credits, to maintain certification until the expiration of the contract.”¹² The Commission further provided that “this maintained certification should only be applicable to the amount of credits contractually committed to by an out-of-state certified facility [system] to an EDC or EGS.”¹³

8. In order for those systems to maintain their certification, the Commission instructed that EDCs and EGSs seeking to qualify credits were required to file a petition within 60-days of the entry of its Final Implementation Order (or by July 2, 2018) to obtain a determination that a contract was grandfathered. The Commission indicated that it would subsequently provide procedures for the contract petition/approval process for systems to maintain their certification.¹⁴

¹² Final Implementation Order at 26-27.

¹³ Final Implementation Order at 27.

¹⁴ Final Implementation Order at 32.

9. Cypress Creek is a Solar PV energy company with experience developing and building utility-scale Solar PV systems 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.

10. Cypress Creek, through its affiliates, is the owner of eleven Solar PV systems located outside of Pennsylvania, which, prior to the Effective Date, were certified as authorized suppliers of PA SRECs for use by parties with SREC compliance obligations under the AEPS Act.

11. The following table provides information on the contracts entered into between Cypress Creek's affiliates and four counterparties for the sale and purchase of PA SRECs generated from Cypress Creek solar systems located outside of Pennsylvania:

**Cypress Creek
PA SREC Contracts**

	Number of Contracts	Time Left on Contracts
Counter Party 1	3	7.75 years
Counter Party 2	2	2 months
Counter Party 3	1	14 months
Counter Party 4	5	39 months

On average, Cypress Creek sells 4,380 PA SRECs per month per contract to counterparties pursuant to these contracts.

12. Prior to the Effective Date of Act 40, the Cypress Creek affiliated owners of those systems were all parties to contracts for the sale of SRECs for use in meeting the requirements of the AEPS Act. As is typical in the industry, the Cypress Creek generators entered into contracts for the sale of their PA SRECs with brokers or aggregators. As is also typical in the industry,

those brokers or aggregators may not have yet entered into contracts for the sale of all the Cypress Creek-generated PA SRECs to Pennsylvania load-serving entities (EDCs or EGSs).

13. Pennsylvania's AEPS Administrator qualifies alternative energy systems and the Generation Attribute Tracking System ("GATS"), operated by PJM Environmental Information Services Inc. ("PJM-EIS"), is the registry utilized to track generation, ownership and retirement of alternative energy credits ("AECs").

14. After issuance of the FIO, the Commission apparently decided that all out-of-state SRECs, including those generated by Cypress Creek affiliated company systems, should be retagged as "Tier I RECS" without regard to the petition process established by the Commission and without prior notice to affected parties.¹⁵

15. Effective May 8, 2018, PJM-GATS retagged all SRECs being generated from out-of-state Solar PV systems, including those associated with Cypress Creek affiliated companies, as only eligible to satisfy the Tier I non-solar portion pending PUC approval of any existing contracts that qualify the system for "grandfathering."

16. Cypress Creek is simultaneously filing a Petition for Stay or Supersedeas of the action that resulted in all out-of-state SRECs being retagged without the opportunity for entities to file petitions to maintain their current SREC classifications (as set forth in the FIO) or any other opportunity to be heard before its SRECs were converted to Tier I RECs thereby immediately diminishing their value. PA SRECs typically trade at a much higher value than Tier I RECs. Thus the action of retagging all of-of-state SRECs effectively downgraded an anticipated revenue stream contractually relied upon to finance the solar system.

¹⁵ *Implementation of Act 40 of 2017*, Docket No. M-2017-2631527, Secretarial Letter dated May 16, 2018, at 2.

17. The retagging of SRECs also has implications for contracts requiring the delivery of PA SRECs. Since SRECs were retagged, generators can no longer deliver the attribute required to satisfy the terms of the contract. For Cypress Creek, the only way to avoid contract termination at this point is if negotiations between contracting parties yield a mutually satisfactory result. It is important to note that this problem also very likely impacts the contracts between solar generators and EDCs/EGSs that the Commission explicitly intended to grandfather.

18. As explained further below, Cypress Creek requests clarification of the FIO regarding the Commission's apparent limitation on the protections provided in Section 2804(2)(ii) of Act 40 to existing contracts with only a discrete subset of counterparties. Cypress Creek submits that otherwise qualifying contracts with other types of counterparties, including SREC brokers, should be protected by the Act's preservation of certifications until current contracts expire.

III. BASIS FOR REQUEST FOR CLARIFICATION OR RECONSIDERATION

19. The Commission has held that the standard for determining whether a clarification is warranted is substantially similar to the standard for granting reconsideration as set forth in *Duick v. Pennsylvania Gas and Water Co.* The Commission expects new and novel arguments, not previously heard or considerations which appear to have been overlooked by the Commission.¹⁶

20. Here, the Commission has overlooked that its interpretation of Section 2804(2)(ii) – formally adopted by the Commission for the first time in the FIO – will exclude certain SREC

¹⁶ *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 *et al.*, 56 Pa. P.U.C. 553 (1982).

contracts from the Grandfathering Provision protections established in the Act to honor existing contracts.

21. The Act states clearly that it does not invalidate the “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 into prior to the effective date of this section.”¹⁷ The Act does not limit the protection to only contracts between Solar PV systems and EDC/EGSs. The grandfathering in the Act clearly and unambiguously applies to all systems with contracts for the sale and purchase of SRECs that meet the stated criteria.¹⁸

22. There are various types of contracts with owners of Solar PV systems and other entities such as aggregators and brokers which rely on the qualification of these systems granted prior to Act 40. SRECs may be contractually secured through direct, aggregator, broker or financial institution contracts. For example, a broker contract with generators like Cypress Creek’s affiliates may require a broker to deliver qualified AECs to an EDC or EGS. While a broker may or may not be assigned the ownership of a particular AEC, it is contractually obligated to provide a set number of AECs to the EGS or EDC during a specified time period.¹⁹

23. The Commission’s perhaps inadvertent interpretation limiting Section 2804(2)(ii) to contracts between Solar PV systems and EDCs or EGSs is particularly damaging to Cypress Creek and its affiliates. As noted above, Cypress Creek is a solar PV company that, through its affiliates, owns eleven solar PV systems outside of Pennsylvania. Prior to the Effective Date,

¹⁷ 71 P.S. § 714(2)(ii).

¹⁸ There is nothing ambiguous about the use of the word “contracts” in the Grandfathering Provision. Neither the Commission nor a court is free to create ambiguity where none exists and, under the guise of resolving such alleged ambiguity, rewrite legislation to its own liking. If the legislature had banned animals from public buildings but made an exception for “dogs,” neither the Commission nor a court would be free to conclude that the legislature only had in mind small dogs so the exception should not apply to Great Danes and Saint Bernards.

¹⁹ These types of AEC purchase and sale agreements have been approved by the Commission for utilities. *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.

those systems were all certified as authorized suppliers of SRECs for use by parties with compliance obligations under the AEPS. In addition, prior to the Effective Date, those system owners contracted to sell their PA SRECs to brokers and other third-party entities for resale to parties with SREC compliance obligations under the AEPS.

24. If the FIO is not clarified or modified, Cypress Creek's affiliates will be prevented from fulfilling their contractual obligations that arose prior to the Effective Date of the Act – primarily, to provide SRECs for resale. The Commission's interpretation will create the potential for disputes under those contracts, potentially leading to their termination and to significant damage and injury to Cypress Creek's affiliates.

25. A reading that restricts the grandfathering to only contracts directly with EDC/EGSs as counterparties would exclude other similarly situated contracts and is plainly not consistent with clear language of the statute. The clear language 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 of the Act, and for the term of the contract. 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.

26. While it is unnecessary and inappropriate to examine legislative intent where, as here, statutory language is clear and unambiguous,²⁰ the Legislature's intent to honor all existing contracts – regardless of the identity of the counterparties – is clear from the numerous comments submitted by legislators in this proceeding. While fourteen members of the

²⁰ *F. W. Woolworth Co. v. City of Pittsburgh*, 284 A.2d 143 (Pa. Commw. Ct. 1971) (finding that the intent of legislature should be gathered from language of statute alone where such language is clear and unambiguous).

Pennsylvania Legislature submitted comments to the Tentative Order, not a single legislator urged the Commission to grandfather contracts only between an EDC or EGS and a system, as the FIO suggests.²¹ In fact, several urged the Commission to do just the opposite: to preserve existing contracts. Notably, Senators Costa and Yudichak indicated that the objective of the Act is to close Pennsylvania's solar borders but that they "certainly recognize the potential need to address and honor existing contracts." Regarding Section 2804(2)(ii), Senator Scavello (a prime sponsor) stated that "this [grandfathering] language was included only at the request of the AEPS contract holders to further emphasize that contracts shall be allowed to sunset." Similarly, Representative Frankel stated that the proper interpretation of the Grandfathering Provision is to ensure that "out-of state facilities can maintain AEPS certification only until their current contract expires."

27. In addition to complying with the plain language of the Act, preserving all pre-existing PA SREC contracts would reduce market disruption and help lessen the costs incurred to comply with the new SREC certification requirements.

28. Moreover, there are serious legal issues with a limited interpretation of the types of prior contracts required to be grandfathered. Applying Act 40 in a way that undermines contracts that were entered into prior to passage of the Act would be a retroactive modification of existing contractual rights that is plainly illegal, especially without a clear and unambiguous directive from the General Assembly to mandate that result.²² Moreover, arbitrarily limiting the grandfathering clause to only contracts with certain counterparties raises serious constitutional

²¹ See, Appendix "A" hereto.

²² A government agency does not have the authority to restrict, abrogate or reform contracts between private parties. See, e.g., *Harristown Development Corporation v. Department of General Services*, 580 A.2d 1174 (Pa. Commw. Ct. 1990), rev'd on other grounds, 614 A.2d 1128 (Pa. 1992).

issues because it treats two sets of out-of-state contracts differently without any rational basis for doing so in violation of the Equal Protection Clause of the United States Constitution.²³

29. Affirming such disparate treatment, resulting in interfering with existing contracts would also violate the Contracts Clause of the United States Constitution.²⁴ 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.²⁵ In this case, if the FIO was interpreted to grandfather only a certain subset of contracts (those between an EDC/EGS and a solar system) this 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 General Assembly’s goal of incentivizing in-state development of Solar PV systems.

30. It is important to make clear that Cypress Creek does not oppose and in fact agrees with the Commission’s interpretation and application of the Act to, on a going forward basis, close the state’s borders to the use of out-of-state RECs as PA SRECs and to limit the grandfathering of out-of-state Solar PV systems with pre-existing contracts to the life of their existing contracts. Cypress Creek’s narrow request for clarification or modification is simply that the Grandfathering Provision be interpreted as including all binding contracts for the sale

²³ U.S. Const. amend. XIV, § 1 (“nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”). The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly.

²⁴ 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. . . .”

²⁵ *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)).

and purchase of SRECs until contract expiration, and not just those contracts between an out-of-state system and an EDC or EGS.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Cypress Creek respectfully requests that the Commission:

- a) Grant this Petition for Clarification or Reconsideration of its Final Implementation Order entered May 3, 2018;
- b) Issue an order clarifying its interpretation of Section 2804(2)(ii) to provide that any Solar PV system with a binding written contract for the sale and purchase of alternative energy credits derived from solar photovoltaic energy sources entered into prior to the effective date of the Act continue to be qualified to sell RECs PA SRECs pursuant to such contract for the remainder of the term of the contract;
- c) Modify Paragraph 3 of its Order of May 3, 2018 so as to permit entities other than electric distribution companies and electric generation suppliers to qualify contracts as grandfathered under Section 2894(2)(ii) of Act 40; and
- d) Grant any other relief consistent with this Petition deemed to be in the public interest.

Respectfully submitted,



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Dated: May 16, 2018

Counsel for Cypress Creek Renewables, LLC

Appendix A

Member of Legislature	Comment Re: Grandfathering Provisions ("GP")
Senator Argall	Support of Joint Motion; associates with Sen. Scavello comments
Senators Costa and Yudichak	<u>"While we certainly recognize the potential need to address and honor existing contracts,</u> the long-term and primary goals set forth by this legislation have been clear. Specifically, we seek to join our neighboring states that similarly have "closed solar borders" and to advance our commitment to promoting economic and job growth within Pennsylvania's solar energy industry."
Senator DiSanto	Support Sen. Scavello Comments
Senator Fontana	"In terms of contracts, this language was included at the request of AEPS contract holders <u>to further emphasize that contracts shall be allowed to sunset.</u> Most of these contracts are only 3-5 years and once those contracts sunset, they will not be renewed if the solar system distribution system is not within the geographical boundaries of the Commonwealth. To reiterate, the term "contracts" should only refer to those that are AEPS compliant to carry out the intent of the bill."
Senator Greenleaf	Support of Joint Motion; associates with Sen. Scavello comments
Senator Killion	Support of Joint Motion's proposal to not grandfather all existing systems that are certified to provide SRECs; no comment on GP
Senator Reschenthaler	Support of Joint Motion; associates with Sen. Scavello comments
Senator Scavello	On the language regarding contracts: <u>"This language was included only at the request of the AEPS contract holders to further emphasize that contracts shall be allowed to sunset.</u> Most of these contracts are only 3-5 years and once those contracts sunset, they will not be renewed if the (solar system) distribution system is not within the geographical boundaries of the Commonwealth. If the Commission finds that the language of the Act refers to "contracts" other than those used for AEPS compliance, then the purpose of Act 40 will be rendered useless."
Rep. Carroll	Supports Brown/Place statement
Rep. Frankel	"The Brown/Place supplemental interpretation would ensure that only in-state Alternative Energy Portfolio Standards (AEPS) certifications are grandfathered in, <u>and that out-of-state facilities can maintain AEPS certification only until their current contract expires.</u> "
Reps. Marsico, Helm	Support of Joint Motion to "close the borders"; no comment on GP
Rep. Roe	Support of Joint Motion

VERIFICATION

I, Rebecca Goold, hereby state that I am an Asset Manager of Cypress Creek Renewables, LLC and am authorized to make this verification on its behalf, and that the facts above set forth in the attached Petition are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: 9/16/18

Rebecca Goold