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March 1, 2021

Via docket e-filing

Pennsylvania Public Utility Commission
Rosemary Chiavetta, Secretary
Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Docket No. M-2020-3023323 – Comments on Tentative Implementation Order (Jan. 14, 2021).

Dear Ms. Chiavetta:

Please accept this letter as the comments of the Virginia Electric & Power Company (d/b/a Dominion Energy Virginia) ("Dominion Energy") on the Pennsylvania Public Utility Commission's ("Commission") Tentative Implementation Order dated January 14, 2021, ("Order") in Docket No. M-2020-3023323. Dominion Energy appreciates the opportunity to participate in the Commission's rulemaking process, and to provide the Commission its comments regarding the Order.

Dominion Energy's interest in the Commission's Order stems from its contractual relationship with entities subject to Pennsylvania's Alternative Energy Portfolio Standards ("AEPS") Act, 73 P.S. §§ 1648.1, *et seq*., for, among other things, the sale of Pennsylvania qualified Tier II alternative energy certificates ("AECs," also known as renewable energy certificates ("RECs")). The Tier II AEC/RECs Dominion Energy has sold and is contracted to sell are generated from an alternative energy source ("AES") located outside of the Commonwealth of Pennsylvania. As such, this contractual arrangement is impacted by the recently enacted Act 114 of 2020 ("Act 114"). In light of its important interests, Dominion Energy submits the specific comments below regarding Section 14 of Act 114 (*i.e*., adding new Section 1799.10-E), and the portion of the Commission's Order related thereto.

Looking first at Section 1799.10-E(a)(2)(i)'s language, "[a] certification originating within the geographical boundaries of this Commonwealth," the Commission stated that it intends to interpret that language in the "same manner it interpreted this [same] language in the Implementation of Act 40 of 2017, Docket No. M-2017-2631527 (Order entered May 3, 2018) ("2018 Order"). Order at 8. The Commission stated further that it intends to

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interpret Section 1799.10-E(a)(2)(ii) similarly, again relying on how it addressed similar statutory language in its 2018 Order. Order at 10.

Regarding Section 1799.10-E(a)(2)(ii), Dominion Energy agrees with the Commission that its intent is to "grandfather" Tier II sources certified prior to the enactment of Act 114 with existing contracts from the reach of Act 114. *Id*. That is, as the Commission stated it in the 2018 Order, that section "'enjoins the legislation from breaching existing contracts from out of state [Tier II AES sources,] which were entered into before passage to serve the AEPS Act needs of Pennsylvania entities.'" Order at 8 (quoting 2018 Order at 20). While there likely are a number of legal and policy reasons behind a provision enjoining legislation from impacting existing contractual relationship, we believe at least two key reasons should compel the Commission to interpret the grandfathering provision liberally.

First, as the Commission's language regarding the prevention of breaching existing contracts in the 2018 Order emphasizes, the intent behind such a provision is to work to immunize the Commonwealth from contracts clause and takings claims, or similar. *See*, *e.g.*, Const. of Pennsylvania § 17. A cramped implementation of the grandfathering clause could subject the Commonwealth to significant legal and financial risk, and thus, should be avoided.[1]

Second, meeting and maintaining compliance with the AEPS Act requires significant planning, particularly to be done in the most cost-effective manner. Entities subject to the AEPS Act need to be able to rely on contractual relationships developed, negotiated, and designed to aid in, and yield, such compliance. That is, they need to be able to rely on the predictability of the consequences of their contractual choices. Doubtless, entities subject to the AEPS Act are counting on contractual arrangements with out-of-state resources to be able to meet Tier II AEPS Act compliance. The Commission should take such reasonable reliance into consideration when determining how liberally to interpret and implement the grandfathering clause. Certainly, that is part of the intent of Section 1799.10-E(a)(2)(ii) allowing existing contractual relationships to run their course. A liberal interpretation and implementation also is appropriate in light of the fac that Section 1799.10-E(a)(2)(ii) sets its effective date as the grandfathering date (which also was Act 114's enactment date of November 23, 2020), which provided very little notice of its prescriptive measures to the

[1] *See also* 2018 Order at 29-30 (discussing that laws shall not be given retroactive effect unless clearly and manifestly intended by the terms of the statute, and finding no such clear statement in Act 40). No such clear statement exists in Act 114 either.

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regulated community.[2] While that choice was the legislature's prerogative, when set against the practical realities of AEPS Act compliance, a cramped implementation of the grandfathering clause is neither warranted, nor appropriate.

The Commission states its interpretation of the grandfathering provision as follows: "[W]e interpret this section to only permit out-of-state facilities that are (a) already certified as a Tier II AES and that (b) have entered into a contract with a Pennsylvania EDC or EGS serving Pennsylvania customers, for the sale of Tier II AECs, to maintain certification until the expiration of the contract." Order at 10. Consistent with the discussion above, Dominion Energy recommends that the Commission clarify this language to reflect a more practical interpretation that also is consistent with the enjoining limitation of Act 114, and the contractual realities and expectations of the regulated communities.

Specifically, the language in (b) should not be read to exclude from grandfathering an existing contractual relationship among many parties, for example, in which AECs are generated by an out-of-state alternative energy source, and sold to an intermediary party that holds an existing contractual relationship with a Pennsylvania EDC or EGS to provide the AECs required for compliance, as needed. The intermediary party may be, for example, an affiliate of the Pennsylvania EDC or EGS. While there may be many reasons to structure a transaction in such a manner, utilizing such intermediaries can support the compliance of multiple affiliated Pennsylvania EDCs or EGSs, or provide a mechanism to achieve the most efficient, cost-effective compliance in light of market realities. There does not appear to be any intent in the legislation to include some contractual relationship structures within the grandfathering provision, while excluding others—rather, the intent appears to be geared solely toward whether the contractual relationship was existing as of the effective date.[3]

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[2] In fact, the statutory changes at issue here were inserted as part of an amendment to a budget bill that was published one business day (November 20, 2020) before Act 114 was passed by the legislature and signed by the Governor (November 23, 2020). Thus, the regulated community was provided one weekend to contemplate and react to the significant impact of Act 114 on their AEPS Act compliance, and strategies and contractual relationships related thereto.

[3] The Commission understood these practical realities when it considered and agreed with similar arguments when interpreting its Act 40 implementation. Specifically, it modified its implementation of Section 2804(2)(ii) such that the grandfathering provision there covered "all contracts with EGSs, EDCs and/or their wholesale suppliers, as well as any other entity holding contracts entered into prior to October 30, 2017, and within the chain of production of the solar AECs supplying those contracts." PAPUC, Opinion and Order on Petitions for Clarification and Reconsideration, Docket No. M-2017 2631527, at 17 (Aug. 2, 2018) ("2018 Reconsideration Order"); *see also* PAPUC, Secretarial Order re Act 40 Petition, at 2 n.2 (May 16, 2018) (permitting the submission of a chain of contracts with intermediaries to as evidence to support a petition). A similar approach is warranted here for the same reasons.

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Along similar lines, there is no intent in the grandfathering provision to require any specific type or form of contract, only that it is written and binding. While that may sound prescriptive, under Pennsylvania contract law it is not. Pennsylvania contract law does not require any specific form or type of writing to form a contract, but instead looks to all of the evidence to determine whether the three basic elements of a contract (offer, acceptance, and consideration (*i.e.*, the exchange of something of value)) have been met—nothing more.[4] The fact that some terms of a contract have been reduced to writing while other terms have not been, or remain the subject of ongoing negotiation, does not preclude a finding that a contract has formed.[5] Further, there is no requirement that written contracts be signed unless it is clear the parties intended the agreement to be contingent on signatures, or signatures are required by statute.[6] Thus, multiple, separate writings over a period of time can suffice to demonstrate the existent of the basic elements of the contract (*e.g.*, binding broker confirms followed by transactional confirms), including electronic writings such as email.[7] Similarly, evidence of a written contract can suffice even when it is clear additional terms may be agreed upon and reduced to writing in the future.[8] As

[4] *See, e.g.*, *Commerce Bank Pa. v. First Union Nat'l Bank*, 911 A.2d 133 (Pa. Super. 2006) ("*Commerce Bank*"). Indeed, so liberal is the nature of Pennsylvania contract law that oral contracts are enforceable contracts in Pennsylvania, and oral statements and other actions related to contracts reduced to a form of writing are important evidence to consider when determining whether a contract has formed. *Id.* "The law of this Commonwealth makes clear that a contract is created where there is mutual assent to the terms of a contract by the parties with the capacity to contract." *Taylor v. Stanley Co. of America*, 158 A. 157 (1932). Any type of writing that meets that standard should suffice here.

[5] *Id.*; *see Johnston v. Johnston*, 499 A.2d 1074 (Pa. Super. 1985) ("If the parties agree upon essential terms and intend them to be binding, a contract is formed even though they intend to adopt a formal document with additional terms at a later date." (internal quotations and citations omitted).

[6] *Shovel Transfer & Storage, Inc. v. Pa. Liquor Control Bd*., 739 A.2d 133 (1999).

[7] *Commerce Bank*, 911 A.2d 133. For example,

[8] Importantly, once a written contract has been formed, Pennsylvania law provides that such writing can be modified, even orally, particularly when evidence of the parties' subsequent actions are consistent with such modification. *Somerset Comm. Hosp. v. Alan B. Mitchell & Assoc., Inc*. ,685 A.2d 141 (Pa. Super. 1996). Thus, the Commission's consideration of whether a contract was formed and existing purposes of Act 114's grandfathering provision can consider changes and modifications to a written contract as parties' contractual relationships evolved and progressed, and may need to be changed or determined in the future, even if such changes are not written out clearly, but sufficient evidence exists to demonstrate them. In making such a determination, however, the Commission should not seek to "freeze" the terms of an existing contract as of the grandfathering date. Such a requirement does not exist in the grandfathering provision, or the rest of Act 114.

Dominion Energy recognizes that this is a departure from the Commission's interpretation in the 2018 Order, which concluded that *any* changes to an existing contract after Act 114's effective date would not be recognized under Section 2804(2)(i). 2018 Order at 27 & note 47. While Section 1799.10-E(a)(2)(i) uses comparable language as Section 2804(2)(i), and thus, interpreting the two section consistently is appropriate, neither section in either act limits or prescribes (much less addresses) whether the provisions of a contract may be modified after those act's effective dates.

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noted, there is no intent in the legislation that any specific type of written contract is required, and thus, no preconceived notions as how or in what form the parties must contract should be applied; that is, there is no intent in the grandfathering provision that the legislature sought to depart from, modify, or add to, the governing body of contract law in the Commonwealth, aside from requiring the contract to be written.[9]

Relatedly, nothing in the grandfathering provision speaks to when performance must be rendered. Instead, the provision focuses only on whether a contractual relationship was in existence on the effective date of Act 114 (November 23, 2020), and allows such contracts to run their course. Thus, in implementing the grandfathering provision, the Commission should not create any artificial requirements regarding the timing or method of performance, or consider such things when determining simply whether a written contract was in existence on the effective date.

In light of the discussion above, Dominion Energy suggests the Commission's interpretation regarding the grandfather provision in its final implementation order make clear it will be consistent with the considerations above, and that the language on page 10 of the Order be modified as follows (new language in italics, omitted language struck):

> [W]e interpret this section to only permit out-of-state facilities that are (a) already certified as a Tier II AES and that (b) *provide evidence demonstrating the formation of a contractual relationship or relationships that result in the sale of Tier II AECs to* ~~have entered into a contract with~~ a Pennsylvania EDC or EGS serving Pennsylvania customers~~, for the sale of Tier II AECs,~~ to maintain certification until the expiration of the contract.

The only limitation in Section 1799.10-E(a)(2)(ii) or Section 2804(2)(ii) is respect to contract term (length). Specifically, those sections allow existing contracts to run their course until they end, but no more. The sections contain no limitation on parties' ability to modify or change other provisions within existing contracts in a manner consistent with Pennsylvania law up and until the contracts run their course. The Commission erred in adopting this position in the 2018 Order, and should not adopt and carry that error (on pages 32 and 47 & notes 47 and 59 of the 2018 Order) into its interpretation of Act 114 here. Specifically, interpreting these statutes in the manner the Commission has adds limitations on the provisions of existing contracts beyond those in the statute. The Commission also should reconsider its interpretation and implementation with respect to Act 40 on this issue.

[9] The grandfathering provision also uses the word "binding," but this does not add any notable requirement beyond basic contract law. *Johnston*, 499 A.2d 1074 (a contract is formed when "the parties agree upon essential terms and intend them to be *binding*") (emphasis added).

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Dominion Energy appreciates the opportunity to comment on the Commission's Order. If the Commission has any questions regarding these comments, please contact me at david.j.depippo@dominionenergy.com or (804) 418-2421.

Sincerely,

/s/David J. DePippo

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