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January 22, 2018

Ms. Kavita Kale, Executive Secretary  
Michigan Public Service Commission  
7109 W. Saginaw Hwy.  
Lansing, MI 48917

RE: MPSC Docket Nos. U-18090 and U-18491

Dear Ms. Kale:

Enclosed herewith for filing in the above-referenced matters, please find the ***Response of Cypress Creek Renewables, LLC in Opposition to Consumers Energy Company's Motion to Stay Capacity Purchase Obligation*** and Certificate of Service. If you have any questions, please feel free to contact my office. Thank you.

Very truly yours,

**Fraser Trebilcock Davis & Dunlap, P.C.**



Jennifer Utter Heston

JUH/ab

Enclosures

cc: All parties of record.

**STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION**

In the matter, on the Commission’s own )  
motion, establishing the method and avoided )  
cost calculation for CONSUMERS ENERGY ) Case No. U-18090  
COMPANY to fully comply with the Public )  
Utilities Regulatory Policy Act of 1978, )  
16 USC 2601 *et seq.* )

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In the matter of the application of )  
CONSUMERS ENERGY COMPANY for ) Case No. U-18491  
to Reset Avoided Capacity Costs )

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**RESPONSE OF  
CYPRESS CREEK RENEWABLES, LLC  
IN OPPOSITION TO CONSUMERS ENERGY COMPANY’S  
MOTION TO STAY CAPACITY PURCHASE OBLIGATION**

Cypress Creek Renewables, LLC (“Cypress Creek”), by and through its attorneys, Fraser, Trebilcock, Davis & Dunlap, P.C., hereby submits this response in opposition to Consumers Energy Company’s (“Consumers”) Motion to Stay Capacity Purchase Obligation filed in the above captioned proceedings on December 20, 2017. Specifically, Consumers requests that the Commission grant a stay of its obligation to purchase capacity under the Public Utility Regulatory Policies Act of 1978 (“PURPA”) pending a Commission order on Consumers’ petition for rehearing in Case No. U-18090 and while the Commission is reviewing Consumers’ 10-year capacity demonstration in Case No. U-18491.

Also on December 20th, the Commission effectively granted a stay of the new avoided cost rates and the effective date of the Standard Offer tariff pending the resolution of Consumers’ and other potential petitions for rehearing in Case No. U-18090 have been addressed, but did not extend the stay for the time required to resolve Consumers’ claims in the U-18491 avoided cost reset proceeding. Cypress Creek opposes Consumers’ request to stay its



capacity purchase obligation under PURPA pending resolution of its application in Case No. U-18491. Consumers' motion to stay is without merit and should be denied, because it fails to meet the standards for a stay. Consumers failed to acknowledge the required elements of a stay, let alone address them. The Commission should therefore deny Consumers' motion.

**I. CONSUMERS' MOTION TO STAY DOES NOT COMPLY WITH MCR 7.123(E)(3), THE STANDARD THE COMMISSION USES WHEN EVALUATING REQUESTS FOR STAYS.**

When requesting a motion to stay, Consumers must comply with the Commission's standards for granting a stay. When evaluating a request for stay, the Commission considers the factors enumerated in MCR 7.123(E)(3).<sup>1</sup> MCR 7.123(E)(3) states, as follows:

- (3) The court may order a stay on appropriate terms and conditions if it finds that:
  - (a) the moving party will suffer irreparable injury if a stay is not granted;
  - (b) the moving party made a strong showing that it is likely to prevail on the merits;
  - (c) the public interest will not be harmed if a stay is granted; and
  - (d) the harm to the moving party in the absence of a stay outweighs the harm to the other parties to the proceedings if a stay is granted.

The Commission can grant a stay "on appropriate terms and conditions," but it must find all the four criteria listed above. Thus, Consumers must show: 1) irreparable injury in the absence of a stay; 2) likelihood of prevailing on the merits; 3) no harm to the public interest in granting the stay; and 4) the relative weight of the harm of the stay with regard to the parties to this proceeding. In a similar case involving the Michigan Attorney General, the Commission ruled, "Having not bothered to address the required elements for granting a stay, the Attorney

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<sup>1</sup> See, Order dated September 23, 2015, MPSC Case No. U-17087, p. 5.

General's motion must be denied."<sup>2</sup> Having failed to address the required elements, Consumers' motion must likewise be denied.

Consumers will not suffer an irreparable injury if a stay is not granted. If, as required by the Commission in Case No. U-18090, Consumers enters into new PURPA contracts for capacity and energy at rates just established by the Commission, these costs will be passed through to ratepayers. If such costs are consistent with the Commission's final order in Case No. U-18090, as it may be modified on rehearing, those costs will, by definition, have been reasonably and prudently incurred and will not be borne by Consumers or its shareholders. Additionally, as Commission Staff obviously believes given its opposition to Consumers' request to stay, Consumers' ratepayers will not be irreparably harmed because the Commission just determined two months ago that Consumers does in fact have a need for capacity and established avoided costs on that basis. The Commission-approved avoided cost rates ensure that Consumers will not pay more for capacity and energy than they would if Consumers procured those resources in another manner. While Consumers now claims that it does not have a capacity need, as noted below, that assertion defies credulity.

Consumers is not likely to prevail on the merits with respect to application filed in the avoided cost reset proceeding, Case No. U-18491. The basis for Consumers' motion to stay is its request that the Commission find that Consumers does not have a capacity need over the next 10 years. Consumers, however, has presented contradictory testimony in its pending renewable energy plan proceeding, MPSC Case No. U-18231 indicating that Consumers has a need for an additional 625 MW of renewable energy capacity to comply with the state's 15% REC standard. The Commission Staff also point out that Consumers recently stated in Case

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<sup>2</sup> *Id.*

No. U-18090 that it has a capacity need. *See* Staff’s January 10, 2018 Response to Consumers, MPSC Case No. U-18090, p. 3. Consumers has therefore not made the required “strong showing” that it will prevail on the merits of its claim that it does not have a capacity need and should therefore be relieved of its state and federal obligation to purchase capacity from PURPA qualifying facilities, such as those being developed by Cypress Creek and others.

The public interest will be significantly harmed if a stay is granted. Granting the stay will severely impede the development and growth of independent renewable power production in Michigan, which is contrary to the Legislature’s policy goals. When passing Michigan’s Clean and Renewable Energy and Energy Waste Reduction Act,<sup>3</sup> the Legislature made very clear the purpose of the Act. In MCL 460.1001(1)(2), the Legislature stated the following:

(2) The purpose of this act is to promote the development and use of clean and renewable energy resources and the reduction of energy waste through programs that will cost-effectively do all of the following:

- (a) Diversify the resources used to reliably meet the energy needs of consumers in this state.
- (b) Provide greater energy security through the use of indigenous energy resources available within the state.
- (c) Encourage private investment in renewable energy and energy waste reduction.
- (d) Coordinate with federal regulations to provide improved air quality and other benefits to energy consumers and citizens of this state.
- (e) Remove unnecessary burdens on the appropriate use of solid waste as a clean energy source.

Thus, the public has a strong interest in increased renewable energy development in the state and in promoting private investment in a diversity of indigenous renewable energy and energy waste reduction resources. Granting the stay requested by Consumers’ will bring to a screeching halt the robust renewable energy development currently underway in the state and

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<sup>3</sup> Public Act 295 of 2008, as amended by Public Act 342 of 2017, MCL 460.1001 *et seq.*

likely prevent any new renewable energy facilities from being placed in service in 2018 while Consumers pursues its improbable claim that it has no need for additional capacity over the next decade.

The harm to Cypress Creek and other interested parties from granting a stay exceeds any harm to Consumers if a stay is not granted. Cypress Creek is ready to move forward significant investment in Michigan. Cypress Creek is committed to growing Michigan's energy infrastructure and solar workforce through a planned investment in the state of more than \$3 billion in low-cost, solar energy. Cypress Creek, through its affiliates, has approximately 700 MW of solar capacity under development in Consumers' service area. These projects will be out on indefinite hold if Consumers' request for stay is granted. Staying Consumers' capacity purchase obligation until the resolution of Case No. U-18491 would mean that Cypress Creek and others could not enter into a power purchase agreement with Consumers potentially for months or even years if a determination on Consumers' 10-year capacity need is not made until the conclusion of Consumers' forthcoming integrated resource plan ("IRP") proceeding.<sup>4</sup> In contrast, as noted above, Consumers and its ratepayers will not be harmed if the stay is not granted because the Commission's final order in Case No. U-18090 (subject to any modification on rehearing) ensures that ratepayers will pay no more for new generation than what the utility

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<sup>4</sup> In its November 21, 2017 order in Case No. U-18090, the Commission stated that the proper place to consider PURPA avoided costs is in the utility's IRP. ("Going forward, the Commission believes that PURPA avoided costs should be integrated with capacity demonstration and IRP proceedings in order to more accurately assess capacity needs. The IRP proceedings are conducive to updating avoided costs, because the Commission will already be evaluating, in detail, utility-specific plans for any incremental generation or purchases along with their associated costs." Order dated November 21, 2017, MPSC Case No. U-18090, p. 33.) Although Consumers has indicated that it plans to file its first IRP at the Commission in June 2018, Consumers is not required under MCL 460.6t(3) to file its first IRP until April 20, 2019. The Commission then has up to 360 days from the date of filing to issue a final, appealable order on Consumers' IRP under MCL 460.6t(7), which means that a final determination of Consumers' 10-year capacity need may not occur until 2020.

would otherwise pay to meet its energy and capacity needs. Thus, the harm to Cypress Creek from granting the stay far exceeds any harm to Consumers and its ratepayers.

Consumers has thus failed to carry its burden of demonstrating that the requested stay is appropriate. Consumers' new avoided cost rates, including payments for capacity, were the result of recently concluded protracted litigation before this Commission. At any time during that litigation, Consumers could have asserted a claim that it no longer has a need for any new capacity over the next decade. Instead, Consumers waited until after the Commission set new avoided cost rates to now claim that it does not have a capacity need. The Commission-approved avoided costs rates and Standard Offer tariff approved in Case No. U-18090 should remain in full force and effect unless and until modified by this Commission following a future evidentiary proceeding.

## **II. CONCLUSION AND PRAYER FOR RELIEF**

For all the reasons explained in the preceding sections of this response, Cypress Creek respectfully requests that the Commission deny Consumers' motion to stay its capacity purchase obligation. For the reasons discussed above, Consumers' motion does not meet the Commission's standards for a stay as prescribed by the Michigan Court Rules. Consumers' motion must be denied.

Respectfully submitted,

**FRASER TREBILCOCK DAVIS & DUNLAP, P.C.**  
ATTORNEYS FOR CYPRESS CREEK RENEWABLES, LLC



Date: January 22, 2018

By: \_\_\_\_\_

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STATE OF MICHIGAN

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motion, establishing the method and avoided )  
cost calculation for CONSUMERS ENERGY )  
COMPANY to fully comply with the Public )  
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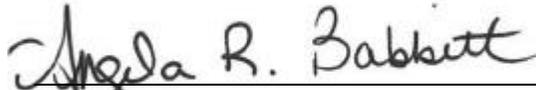
Case No. U-18090

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In the matter of the application of )  
CONSUMERS ENERGY COMPANY for )  
to Reset Avoided Capacity Costs )  
\_\_\_\_\_ )

Case No. U-18491

**CERTIFICATE OF SERVICE**

Angela R. Babbitt hereby certifies that on the 22<sup>nd</sup> day of January, 2018, she served the *Response of Cypress Creek Renewables, LLC in Opposition to Consumers Energy Company’s Motion to Stay Capacity Purchase Obligation* and this Certificate of Service on the persons identified on the attached service list via electronic mail.

  
\_\_\_\_\_  
Angela R. Babbitt

**Service List for U-18090 & U-18491**

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