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RE: Comments on draft "RFS Guideline for SREC-I Construction Timeline Extensions" (Sept. 27, 2013)

Gentlemen:

This follows up our previous communications. It presents summary comments of CFS and its MA co-developers Kearsarge Renewables LLC and SunDurance Energy LLC on key aspects of the draft Guideline. We appreciate the opportunity for input and would be pleased to discuss these comments further.

CFS is a solar center of excellence with approximately 40 MW of ground-mounted solar PV facilities under development in Massachusetts and elsewhere. Kearsarge Renewables, an affiliate of Kearsarge Energy, LP (Watertown MA), has more than 60 MW of projects in development, operation or scheduled for commercial operations this year in MA, North Carolina and Hawaii, including New England's largest operating ground-mounted solar PV project to date. SunDurance, a subsidiary of The Conti Group, Inc. (Edison NJ), is a solar PV developer and turnkey EPC provider with numerous PV projects completed or in development on both coasts.

We support DOER's efforts to bring greater certainty to the developing SREC-I process. We particularly applaud the Guideline proposals that apparently would allow applicants to (1) use a presumptive per-Wp estimate for the denominator of the "incurred costs" calculus and (2) include the costs of binding obligations contracted-for before December 31 in the numerator of that calculus.

(1) would provide a safe-harbor that removes major uncertainties around total construction costs, since *post-hoc* costs often vary widely from estimates made before or during construction. (2) would implement the underlying intent to preserve SREC-1 status for projects that are 'sufficiently far along in the development process,' which we generally take to mean projects that have

substantial investment at stake, bear significant risks associated with non-completion, and thus are likely to be completed. Each of these steps, if adopted, will reduce current unpredictability as to whether SREC-1 projects that do not receive interconnection approval by the end of this year will remain "SREC-I." Accordingly, they will facilitate those projects' financing and completion.

However, we are concerned that the criteria for initial extensions to June 30, 2014 remain ambiguous in certain respects. We are still more concerned that the criteria for "second" extensions past June 30 seem much less robust and do not address certain key issues at all.

While we believe each issue identified below is material, those we think most critical are **asterisked**.

__General issue__

The Guideline repeatedly says that projects which meet its criteria for initial or further extensions "may be" granted the extension or "are eligible for" an extension, instead of stating that such projects generally *will be granted* an extension. Such 'fudge' language creates needless financing uncertainty. It is clear from the overall Guideline that DOER has broad discretion to deny an extension by stating a Guideline-related basis for denial. But tacitly treating extensions as presumptively suspect does not advance the Guideline's underlying goals. No DOER authority would be compromised by language that is more clear and firm.

- **We urge that DOER replace all such phrases with language plainly stating that projects which meet stated criteria generally *will receive* the requested extension.** This would track parallel passages in the Emergency Reg that generally use such language, such as the provision quoted on p. 5 below.

__Initial extension__

A. **Eligible costs.** Draft Guideline § 2 defines permissible "construction costs" for purposes of the "50% incurred" requirement as "any costs associated with building the Generation Unit, excluding legal fees, permitting, and financing costs." The accompanying proposed form fleshes out this single sentence somewhat by listing nine general categories of permissible costs, including "land acquisition," "engineering & design," "interconnection," and "other construction related costs."

We appreciate the potentially helpful breadth of these categories. We also are aware that DOER cannot anticipate all possible circumstances in a general proposal which was rapidly generated in an effort to *provide* further predictability. *However,* what costs are "permissible to count" towards the 50% metric remain uncertain in key respects.

For example:

1. Under "land acquisition," how should site lease costs be "counted," given that many developers lease rather than purchase sites, many financiers abhor outright purchases, and some investors are barred for tax reasons from participating in such purchases? May applicants "count" the NPV of a 20-year site lease whose costs they generally are obliged to incur under a usual and customary executed Site Lease? If not, how will DOER level this unequal field?

2. Under "engineering & design," do design costs "count" when drawings or plans initially prepared for permit approvals also are used for refined work that directly determines construction? Put differently, by excluding "permitting" costs does DOER mean to exclude essentially permit fees; or something slightly more; or any costs whatever associated with local permitting?

3. Under "interconnection" it seems clear that any utility-system upgrade costs should "count." But by the same token it would seem that both the customary upfront deposit of "half the threshold impact-study cost estimate" and the 2+X downstream study costs typically incurred under a binding impact-study agreement should qualify. So should such items as the substantial security deposit (or substitute letter of credit fees) typically required when executing an interconnection service agreement.

The draft Guideline is silent on these matters.

- ****We urge that to facilitate project financing, DOER clarify these specific items in the final Guideline, and in addition provide for an informal**

advisory-letter process by which similar questions may promptly be resolved.** We believe most questions will fall within relatively few topic areas, and that each topic area largely will be resolved by DOER's initial response letter. Thus the benefits of this approach should far outweigh the limited resources needed to implement it.

4. **"Soft costs" in general.** DOER apparently proposes to exclude from the "50% incurred" numerator traditional project-development "soft costs" – legal, permitting and financing expenses – because its per-Wp "Presumptive Total [Construction] Costs" denominators rest mainly on land, labor and equipment costs, and therefore are assumed to exclude these soft costs. The presumptive denominator figures plainly are meant to save applicants the time and difficulty of documenting moving-target "total actual demonstrated costs" *and* to save DOER the time and resources required to vet such documentation. *However,* to the extent these figures may be overstated – and thus tend to include part or more of *all-in capex*, going beyond permissible "construction" costs -- the underlying assumption would appear to be compromised.

We cannot speak here to the draft Guideline's Presumptive Total Cost per-Wp figures for roof-mounted or relatively small (up to 500 kW) ground-mounted Units (§§ 3.a-c). *However,* we believe the draft's Presumptive Total Cost of $2.25 per-Wp for "a Large Ground-Mounted Generation Unit" (§ 3.d) is overstated by at least ten percent, based mainly on current pricing for panels and other array components.

- ** **We urge that DOER either (i) reduce this figure to $2.05 per Wp (a figure more representative of contemplated "construction" costs for this generally most cost-efficient category), or (ii) allow developers to "count" a proportion (e.g., 10%) of soft costs up to the proposed $2.25 per Wp level, if the latter level is adopted.**** We note that legal, permit and finance fees often represent more cost (in both absolute dollars and percentage of total capex) for such projects than for rooftop or smaller ground-mounted projects, and that they are expected to increase over the next nine months as (e.g.) component costs for this category continue to decline.

B. **Incurred costs.** Draft Guideline § 4 states that "costs will be considered to be incurred by the developer [and thus "count" towards the 50% requirement] for actual disbursement of funds *and* upon entering into a binding legal obligation for goods and services" (emphasis added). While the intent seems plain to allow either cash disbursements or binding contracts requiring them to qualify, use of the underscored conjunction -- instead of "or" -- already has generated considerable uncertainty. In light of the underlying 'sufficiently far along' criterion, it makes scant sense to treat amounts that *must be expended* under a binding contract signed by December 31 any differently than funds *actually disbursed* by that date.

- **We recommend that DOER replace "and" with "or" in the final Guideline.**

Extensions beyond June 30, 2014

The recently-refiled Emergency Reg [225 CMR 14.05(4)(k)4.c] states that where the "50% incurred" test has been met "but that interconnection depends only on the receipt of . . . authorization to interconnect or . . . permission to operate, and such receipt *is delayed only by the local distribution company or due to remaining steps required by other parties for safe and reliable interconnection*, then the [Generating] Unit *will be* provided an extension [beyond June 30, 2014 to preserve its SREC-I status] until the authorization . . . or permission . . . is received." [emphasis added]

The draft Guideline then goes on to recite that a 50% Unit merely "*will be deemed eligible* for such further extension . . . if . . . substantially all of the solar equipment *on the End-Use Customer's side of the local distribution company's meter*, including panels, inverters, ballasts, or other mounting equipment, has been physically constructed and all payments due to the local distribution company under the interconnection service agreement prior to June 30, 2014 have been paid as and when due." [emphases added]

These sentences are the only ones in the Reg or draft Guideline that address *in any manner* when a further extension beyond June 30 may be secured. The resulting uncertainty is crucial -- financiers already have balked at funding otherwise-qualified projects because their long-term SREC-I status is insufficiently assured. Many more have signaled that (depending on the final Guideline's contents) they may do so.

We have substantive and procedural problems arising from the lack of sufficient predictability in these short passages. In general, there are innumerable reasons why construction and subsequent turn-on may be delayed beyond June 30, *even* *where a developer has incurred far more than 50% of eligible costs by December 31, 2013 and has diligently proceeded towards project completion.* The Reg and draft Guideline facially accommodate almost none of them.

A. "**Receipt delayed due to remaining steps required by other parties [than the local distribution company] for safe and reliable interconnection.**" This phrase seems narrowly to envision ISO-related delays due to transmission concerns. However, we are mystified why it is limited to "safe interconnection" when all kinds of causes beyond the developer's control may delay construction or completion, and therefore turn-on, for periods up to (or even surpassing) the six months DOER apparently assumes sufficient to achieve commercial operation. See our next point below.

- **We recommend that DOER strike "safe and reliable interconnection" in the final Guideline.**

B. **No *force majeure* circumstances seem to be recognized.** PPAs and other project documents universally acknowledge that long lists of non-exhaustive circumstances beyond the developer's reasonable control may substantially delay the start, continuance, or completion of project construction. They typically excuse the developer from performance or penalties for the duration of such events as long as prompt notice is given and available remedies are diligently pursued, sometimes subject to a cap of no more than (say) five months of cumulative *force majeure* claims in any twelve-month period.

Force majeure events classically include storms, flash floods, hurricanes, forest fires or other acts of God; labor strikes or sabotage; bankruptcy or other default of a financier, EPC contractor or component (e.g., panel) provider; delay by local authorities in issuing required permits or approvals, despite timely developer filings; delays by serving utilities in providing Impact Study results or meaningful system-upgrade schedules; utility delays installing line or system upgrades that are required for a project to interconnect; unexpected imposition of unreasonable tax burdens or building-permit fees; and litigation, suspending injunctions, or renegotiation of many of the above.

The Reg and draft Guideline are silent on whether, when and to what extent usual and customary *force majeure* exceptions will apply to allow extensions beyond June

30. This seems unreasonably disruptive given common practice. It also would seem to undercut the rationale of preserving predictable SREC-I status for projects that have done everything else they are required to do – and thus are likely to be completed -- but may be delayed by forces beyond their diligent power to control.

- ****We urge DOER to include usual and customary *force majeure* extensions in the final Guideline, subject to a cap of (for example) no more than an additional six months beyond June 30, 2014.**** Such extensions could be either "automatic" (i.e., subject to prompt notice and reasonable record-keeping, as *force majeure* claims customarily are) or granted through prompt case-by-case DOER review (preferably through a "deemed approved" process if DOER does not question or deny them within 10 days). Not to recognize *force majeure* at all seems fatal to meaningful predictability.

C. **The draft Guideline apparently contemplates that only behind-the-meter or other net-metered (colletively, "BTM") PV installations will be 'eligible' for its new proposed "substantially all construction" extension,** as indicated by its reference to "End-Use [Retail] Customer." This is too narrow. Many projects in mid- or late-stage development do not fit this box, including solar QFs that will sell wholesale under long-term bilateral PPAs. In addition, as noted above there are numerous legitimate circumstances in which a diligent developer – whatever its project type -- may incur substantially all its equipment, site, and engineering/design costs by December 31 and still not be "physically constructed" by June 30 next year.

To note one example, a developer may receive delayed Impact Study results December 1; swallow unreasonable system-upgrade estimates and order equipment so as to meet the December 31 deadline; not receive a firm system-upgrade schedule from its serving utility for another month or more; and then discover that schedule calls for delivery of upgrade equipment in May with a month's installation to follow. Even where they have funded equipment orders, financiers often balk at providing "physical construction" funds until a system upgrade which is the predicate for interconnection (and whose costs are narrowly bounded) has been assured. Thus equipment easily may have been purchased but not on site by June 30, let alone assembled by that date.

- ****We urge that the new extension language not be limited to BTM projects, and that the pertinent test be whether equipment is on site or**

ready to be delivered, subject to usual and customary *force majeure* exceptions.**

D. **Thirty-day delay for grant of post-June extensions.** DOER likely hopes to act on many extensions more swiftly than this. However, for financing reasons above an additional 30-day period of extension uncertainty will act more as a poison pill than a safety valve. This is especially true because the 30-day limit is not practicably enforceable. From our perspective the probable result will be suspension of construction until an extension is in hand. Such stop-and-start development is the bane of EPCs and financiers – it injects needless cost and unpredictability into a complex, highly coordinated and interdependent construction process.

There is an alternative approach which can add certainty without compromising the Guideline's goals.

- **We recommend that DOER adopt a "tabling" approach by which timely submitted complete extension requests will be "deemed approved" within 10 days from submittal if DOER does not affirmatively question them or object within that period.** This also will allow DOER to focus first on problematic requests, without delaying others that are relatively routine.

E. **What happens if a project "falls out of" SREC-I for failure to receive an extension beyond June 30, notwithstanding the developer's diligent good-faith efforts?** The Reg and draft Guideline also are silent on this critical matter. We recognize that in the abstract how such "nearly SREC-I" projects should be treated may be more appropriately addressed in the proposed and final SREC-II rules. *However,* as a practical matter the timeframe for those rules is downstream and uncertain, and the Guideline offers an opportunity to relieve much current uncertainty with little programmatic risk.

- ****We urge DOER to state in the final Guideline that otherwise-qualified SREC-I projects which (for example) have incurred 75% of permissible construction costs by June 30, but which do not receive post-June 30 extensions, be assured that at least 80% of their SREC production will qualify under SREC-II, as long as they complete construction and receive utility approval to operate before (say) the end of 2014.**** Projects which pursue SREC-I to the end in good faith, but narrowly miss the end zone and are completed within a reasonable time afterwards, should warrant no less.

We appreciate DOER's transparency and inclusiveness in developing the draft Guideline. Please contact me if you have questions about these comments.

Best regards.

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