

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF ENERGY RESOURCES**

Implementation of Solar Carve-Out)
of the Class I Renewable Energy)
Portfolio Standard)

COMMENTS OF RETAIL ENERGY SUPPLY ASSOCIATION

Introduction and Summary

The Department of Energy Resources (“DOER” or “Department”) has commenced this rulemaking to adopt final regulations for a solar carve-out program within the Renewable Energy Portfolio Standard (“RPS”) Class I regulations (“Solar Carve-Out”) pursuant to Section 32 of An Act Relative to Green Communities (“Green Communities Act” or “Act”).¹ The proposed final regulations (“Proposed Rules”) mirror the emergency regulations promulgated by the Department on January 8, 2010. They require that a portion of the Commonwealth’s Class I RPS be satisfied with renewable energy certificates (“RECs”) generated from solar photovoltaic (“PV”) projects that are constructed in Massachusetts after January 1, 2008. In a mid-February, 2010 Notice of Public Hearing (“Notice”), the Department invited interested persons to comment on the Proposed Rules. The Retail Energy Supply Association (“RESA”) submits these written comments pursuant to the Notice.

RESA is a trade association that represents the interests of its members in regulatory proceedings in the New England, New York, Mid-Atlantic and Midwest regions. RESA’s members include providers of competitive supply products to electricity and gas consumers in the five New England states that have restructured their electric markets.² Over half of

¹ This Section of the Act is codified at G.L. c. 25A, § 11F(g).

² RESA’s members include ConEd Solutions; Constellation NewEnergy, Inc.; Direct Energy Services,

the electricity load in Massachusetts is sold by competitive retail electric suppliers.

Consequently, the Solar Carve-Out program will have a significant impact on suppliers' business operations.

Historically, the Commonwealth has implemented RPS obligations in a manner that minimizes risks and unexpected costs to load serving entities ("LSEs") in two important respects. First, when new renewable or alternative product obligations are imposed, such as the Class II RPS and the Alternative Portfolio Standard ("APS") implemented last year, the Commonwealth has exempted existing retail supply contracts for the remainder of their terms. This confirmation of existing contract arrangements gives LSEs confidence to negotiate forward looking contracts with retail customers and with renewable generators. The Department should preserve and reaffirm this important policy precedent. Second, the General Court specified in G.L. c. 25A, § 11F(a) the annual step increases in the Class I RPS obligations, and DOER followed suit when it implemented the Class II RPS and APS regulations that are now codified at 225 CMR 15.00 and 16.00, respectively. Thus, under existing RPS and APS law, suppliers and their customers know with certainty today what their renewable obligations will be for many years in the future. The Department should not implement the Solar Carve-Out program in a way that disturbs this certainty.

When the General Court adopted Section 32 of the Green Communities Act, it afforded the Department substantial discretion to determine the means by which it would implement a renewable carve-out program in a workable and equitable fashion. Nothing in

LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Gexa Energy; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; PPL EnergyPlus; and Semptra Energy Solutions LLC. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

the Class I RPS statutory scheme, as amended by the Act, prohibits the Department from either exempting existing contracts from the Solar Carve-Out program or fixing the solar RPS obligation for a multi-year period. By embracing these dual features, the Department can send a clear message to LSEs and their customers that they safely can continue to enter into forward contract arrangements in the Commonwealth. By contrast, imposing new product requirements on existing contracts and subjecting market participants to unpredictable quantity changes in the Solar Carve-Out obligation, as the Proposed Rules would do, will cause substantial financial harm to customers and suppliers that are parties to existing contracts, materially increase forward contracting risk and discourage forward load and supply commitments in Massachusetts. Such a result will not advance the objectives of either jump starting solar installations or fostering the continued development of a robust retail market in the Commonwealth.

On an ongoing basis, portfolio managers will seek to manage their regulatory risk in one of two ways under the Proposed Rules in their current form. First, they may shorten the length of their retail load serving contracts, perhaps to twelve months or less, to allow LSEs and their customers to reprice and renegotiate at the time of annual renewal, thereby minimizing the risks inherent in changes to the annual Solar Carve-Out obligation. This approach will severely restrict the incentive an LSE might otherwise have to purchase solar RECs today for use as a hedge against future compliance obligations. Alternatively, LSEs may offer longer term contracts with a pass-through for RPS compliance costs. This would undercut LSE incentives for solar RECs hedging and shift the regulatory risk from the LSE to the customer. In the end, if the current mechanism is maintained, the Proposed Rules likely will fail their essential purpose – that is, to foster significant forward demand in the market that would provide a stable revenue stream for solar developers. The Solar Carve-

Out program would have a much greater chance of success if the Proposed Rules were modified to: (1) exempt existing supply contracts by either excluding them from the scope of the program altogether or setting an alternative compliance payment (“ACP”) for load served under such contracts at the Class I RPS ACP (presently \$60.93/megawatt hour (“MWh”)); and (2) fix the Solar Carve-Out obligation for a multi-year period.

Overview of the Solar Carve-Out Program

The proposed Solar Carve-Out program is a revision to the Commonwealth’s existing Class I RPS regulations embodied in 225 CMR 14.00. Under the Proposed Rules, a percentage of the Commonwealth’s Class I RPS must be satisfied with RECs generated from solar PV projects that are constructed after January 1, 2008 in Massachusetts (hereafter called “SRECs”). The program is intended to facilitate the development of solar PV projects that are less than 2 megawatts (“MW”) in size and help achieve Governor Patrick’s goal of constructing at least 250 MW of solar PV projects in the Commonwealth by 2017.

The Solar Carve-Out program would begin with a minimum state-wide obligation of 30 MW of capacity in 2010, and would thereafter increase by 30 percent more each year than it did in the previous year.³ For example, if the obligation were to jump from 30 MW in 2010 to 70 MW in 2011 (a 40 MW rise), the 2012 obligation would increase by 130% of 40 MW, or 56 MW. The annual obligation would be further adjusted by deducting the ACP volume from the previous year (indicating undersupply of SRECs) and adding banking volume from the previous year (indicating oversupply of SRECs).⁴ Additional adjustments would be made if the auction fails to clear, as discussed below, to further expand

³ Proposed Rule 225 CMR 14.07(2)(d).

⁴ *Id.*

compliance-driven demand to meet supply.⁵ The annual obligation as adjusted would then be divided by the load served by all LSEs during the previous compliance year to derive the Solar Carve-Out minimum standard per MWh.⁶ The Department would announce this minimum standard not later than July 20 of each compliance year.⁷

The program contains a complex auction process that is intended to provide long-term revenue stability to solar projects by ensuring that all SRECs generated in a given year are purchased by LSEs. DOER would establish an auction account known as the “Solar Credit Clearinghouse” into which solar PV generators could deposit unsold SRECs for a limited period of time.⁸ Following such deposits, the Department would re-mint the SRECs into extended-life SRECs, which could be used for compliance purposes in either of the next two compliance years.⁹

In July of each year, DOER would hold a fixed-price auction for the extended-life SRECs, which would be open to all qualified bidders.¹⁰ The extended-life SRECs would be offered at a fixed price of \$300/MWh.¹¹ Bids would be entered in the auction for the volume of extended-life SRECs that are desired by a bidder. If the bid volume is insufficient to clear the volume of available extended-life SRECs, then DOER would increase the shelf life of the extended-life SRECs and repeat the auction.¹² If the bid

⁵ *Id.* at 14.07(2)(e).

⁶ *Id.* at 14.07(2)(a).

⁷ *Id.*

⁸ *Id.* at 14.05(4)(c).

⁹ *Id.* at 14.05(4)(e).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 14.05(4)(f)-(g).

volume after this auction still is insufficient to fully clear the volume of available extended-life SRECs, DOER would increase the obligation for the compliance year to reflect the total amount of SRECs that were deposited into the auction account.¹³ The Department envisions that increasing the obligation in this way will allow all available SRECs to clear the auction.

For the 2010 compliance year, the ACP rate under the Solar Carve-Out program would be set at \$600/MWh, nearly ten times the \$60.93 ACP for the general Class I RPS program.¹⁴ The Proposed Rules do not exempt existing retail supply contracts, but they provide an ACP discount for load under contract prior to January 1, 2010 as follows: \$400/MWh for 2010; \$450 MWh for 2011; and \$500 MWh for 2012.¹⁵

Comments

I. THE DEPARTMENT SHOULD EXEMPT EXISTING RETAIL SUPPLY CONTRACTS FROM THE SOLAR CARVE-OUT PROGRAM.

A. The Department Has Clear Statutory Discretion to Exempt Existing Contracts.

In earlier stakeholder sessions, the Department expressed concern that the Class I RPS scheme for which the Solar Carve-Out is a part does not authorize the exemption of existing supply contracts. A close reading of the statute, however, reveals that the Department has ample authority to implement a new renewable carve-out program in a manner that fosters legislative policies for both renewable resource expansion and competitive market access. The statute authorizing a renewable carve-out program, G.L. c. 25A, § 11F(g), states as follows:

¹³ *Id.* at 14.05(4)(h).

¹⁴ *Id.* at 14.08(3)(b)(2).

¹⁵ *Id.* at 14.08(3)(b)(3).

In satisfying its annual obligations under subsection (a) [the Class I RPS standard], each retail supplier shall provide a portion of the required minimum percentage of kilowatt-hour sales from new on-site renewable energy generating sources located in the commonwealth and having a power production capacity of not more than 2 megawatts which began commercial operation after December 31, 2007, including, but not limited to, behind the meter generation and other similar categories of generation determined by the department. The portion of the required minimum percentage required to be supplied by such on-site renewable energy generating resources shall be established by the department; provided, however, that the department may specify that a certain percentage of these requirements shall be met through energy generated from a specific technology or fuel type.

This statute is silent on the issue of whether existing supply contracts should be included or excluded from the reach of a renewable carve-out program. Indeed, the only statutory requirements that the Department must observe in its implementation of a renewable carve-out are to limit qualifying projects to 2 MW or less and include behind the meter generation and other similar resources. Although the Class I RPS that appears in G.L. c. 25A, § 11F(a) contemplates that all sales under existing and new contracts will be subject to the Class I standard, the Department nonetheless has discretion to exclude sales under retail supply contracts executed before January 1, 2010 as a feature of its Solar Carve-Out program.

The only argument put forth in support of the position that the Department lacks such discretion is that, in directing the Department to exempt existing contracts from the Class II and APS requirements while remaining silent with respect to the on-site renewable generation portion of Class I, the General Court deprived the Department of the authority to grant such an exemption for the on-site renewable generation requirement. This argument gets the fundamental precepts of statutory construction exactly backwards. The General Court's directive to the Department to exempt existing contracts from the Class II and APS requirements is just that: a requirement to act in a particular way in a particular circumstance. Such a prescriptive provision of a statute cannot also be interpreted as a statement by the General Court that the agency in question is actually forbidden from doing

the thing required in other circumstances. In fact, the General Court's use of prescriptive language with respect to the Class II and APS requirements implies a recognition on the General Court's part that, in the absence of such a directive, the Department would have full discretion to do as it saw fit with respect to existing contracts, either exempting them or not as circumstances might require. Any other view would imply that in the absence of such a directive the Department would be required not to exempt existing contracts, an interpretation that finds no support in any other provision of enabling statutes for the Class II and APS programs. Here, the General Court's silence leaves the Department with the full range of its discretion. This discretion includes the ability to grant an exemption for existing contracts if circumstances warrant, which they clearly do in this instance.

Exemption of existing supply contracts could be accomplished in two ways. First, the Department could modify the Proposed Rules to exclude sales under existing supply contracts from the Solar Carve-Out obligation altogether. Under this option, such sales would remain subject to the regular Class I RPS standard contained in G.L. c. 25A, § 11F(a). Alternatively, the Department could include existing supply contracts within the scope of the Solar Carve-Out program, but set the ACP for sales made under such contracts at the ACP established for the general Class I RPS (\$60.93 per MWh for 2010).

Two critical points reveal the Department's authority to adopt these exemption techniques. First, the last sentence of G.L. c. 25A, § 11F(g), as quoted above, requires the Department to set the portion of the minimum percentage subject to the program requirements. Consistent with this discretionary grant of power, the Department could set the Solar Carve-Out percentage at zero for existing supply contracts as a matter of equity, reasonable expectation of the parties, and preservation of a robust retail electricity market. Nothing in the statute implies or states otherwise. The silence by the General Court in this

area reflects its considered judgment that the Department is best suited to evaluate the complex interactions and dynamic effects on retail market participants and develop the precise contours of a renewable carve-out program.

Second, the fact that DOER has already provisionally proposed a “discounted” ACP payment structure over a three-year period as a means of implementing the Solar Carve-Out on existing contracts is indicative of the Department’s own recognition of the broad discretion afforded to it by G.L. c. 25A, § 11F(g). Like a full exemption approach, a “discount” is not expressly authorized in the statute. To the extent that Department has the authority to discount the ACP for existing contracts by a fixed percentage, such as 20 to 33 percent, it likewise has the authority to discount the ACP for existing contracts down to the ACP rate established for the general Class I RPS (\$60.93 per MWh for 2010).¹⁶

Furthermore, the existence and structure of the proposed Solar Carve-Out show that the Department understands itself to be invested with broad discretion to design this program as it sees fit. The imposition of a technology- or fuel-specific subset of the on-site generation requirement is not required by the statute. Nevertheless, the Department determined this program element was within the scope of its discretion under the Act. Other than the phrase allowing “that the department may specify that a certain percentage of these requirements shall be met through energy generated from a specific technology or fuel type,” the statute contains no directives to the Department in fashioning a “carve-out” reserved to a specific technology or fuel type. On this slim reed of authority, the Department has built a complex mechanism to promote – even ensure – a significant

¹⁶ Reducing the Solar Carve-Out ACP from \$600 to some figure lower than \$600 but higher than the general Class I ACP would lessen, but not avoid, the adverse impacts on suppliers and customers from the current design of the Solar Carve-Out. It also would not affect the disincentives for suppliers to engage in forward contracting for SRECs under the Proposed Rules. *See* Section II *infra*.

amount of solar development in the Commonwealth. In doing so, the Department has employed means to achieve this goal (including an annual auction and an obligation that can change not only from year to year but even within a given compliance year) that have not been used with respect to any other portfolio standard. The view that the statute grants the Department the authority to design and implement such a complicated and far-reaching program yet deprives the Department of the discretion to avoid the manifest injustice and adverse supplier, customer and policy consequences associated with imposing this obligation on existing contracts is, in RESA's view, unsupportable.

Finally, if the Department believes that it needs additional evidence of legislative intent, it need look no further than the November 12, 2009 letter from Senator Michael W. Morrissey to Commissioner Giudice on this topic. In the letter, Senator Morrissey explained that, in making periodic changes to the Commonwealth's RPS, the General Court has sought to maintain a stable and predictable climate for electricity contracting.¹⁷ He further stated that exempting existing contracts from the Solar Carve-Out program would be "consistent with the policy direction . . . set in the Green Communities Act, and will help create a business climate that promotes solar power development in concert with retail competition."¹⁸

B. Exempting Existing Contracts Would Avoid Financial Harm to Retail Electricity Suppliers and Their Customers and Lessen Perceived Regulatory Risk.

Applying the Solar Carve-Out obligation to sales arising from existing contracts would create significant operational and financial challenges for suppliers that do business in the Commonwealth and, thereby harm suppliers, their customers and, ultimately, solar

¹⁷ Letter of Michael W. Morrissey to Philip Giudice, DOER Commissioner (Nov. 12, 2009).

¹⁸ *Id.*

developers. Some, but not all, existing retail supply contracts allow suppliers to pass through to their customers increased costs attributable to a change in law. Notwithstanding that fact, the imposition of such additional charges is problematic for customers because they order their business affairs in reliance on the contract price, particularly in these difficult economic times. Moreover, virtually all existing residential supply contracts and some non-residential contracts do not allow a pass through of change-in-law costs, meaning that LSEs must absorb the incremental expenses of the Solar Carve-Out program until such time as the contracts can be repriced according to their terms.

In earlier stakeholder sessions, the Department questioned the significance of these concerns, noting that the Solar Carve-Out obligation is only 30 MW for all LSEs in 2010. This view misses the mark. More than half of the electricity consumed in Massachusetts is sold by competitive electricity suppliers under existing contracts, many of which extend for several years. The ACP for the Solar Carve-Out program is set at almost ten times the regular Class I RPS ACP rate. This means that the Solar Carve-Out obligation at full build out translates into the economic equivalent of multiple times the current Class I RPS obligation. Retail suppliers and customers who must immediately bear these costs are finding the impact to be significant, sudden and contrary to the underlying goal of price certainty that led them to contract in the first instance. Including existing contracts within the reach of the Solar Carve-Out program undermines contract expectations and also runs counter to the approach of modest, graduated step increases that the General Court and DOER chose to adopt for Class I and II RPS and APS requirements in general.

Applying the Solar Carve-Out to existing contracts also will create a perception that doing business in Massachusetts entails undue regulatory risk, which will discourage both suppliers and customers from entering into long-term contracts that could provide

significant value to electricity consumers. Under shorter-term contracts or pass-through arrangements, LSEs would have no real incentive to enter into forward SREC supply arrangements. This, of course, undercuts the fundamental development goal of the Solar Carve-Out program. The Department can and should avoid this result by exempting existing supply contracts in one of the two ways recommended by RESA.

II. THE DEPARTMENT SHOULD FIX THE ANNUAL SOLAR CARVE-OUT OBLIGATION NOW FOR FUTURE YEARS.

The SREC price support mechanism is designed to create a price floor for SRECs without the need for direct governmental subsidies. It aims to do this by having DOER administer a fixed-price auction in which the compliance shelf life of SRECs sold at the predetermined auction price is expanded until the auction clears. If necessary, the compliance obligation itself also may be increased in order to clear all offered supply. Critical to the success of this market mechanism is the active participation of willing sellers and willing buyers, both with a mutual desire to contract forward.

As a general matter, parties purchase RECs for a variety of purposes. LSEs may purchase RECs to provide renewable energy products to their customers or to meet their RPS obligations; customers may purchase RECs directly and retire them to reduce their own environmental footprint; and companies may purchase RECs with the intent to resell them later at a profit. By far, though, the greatest driver of demand for RECs is the RPS.

The Solar Carve-Out program rests in large part on the theory that LSEs will be willing to purchase SRECs today as a hedge against their future obligations under the Solar Carve-Out program. In practice, however, the uncertainty of the annual obligation will diminish greatly an LSE's incentive to engage in such forward hedging under the Proposed Rules. This same uncertainty also will discourage companies from purchasing SRECs and

holding them for resale. The Department should create greater market certainty by fixing the Solar Carve-Out obligation for the next several years, which, in turn, will lead to forward contracting supportive of project financing.

A. LSEs Will Lack Incentive to Contract Forward for SRECs for Compliance Purposes Under the Proposed Rules.

In Massachusetts, nearly all load is served directly or indirectly by competitive market suppliers that either provide wholesale service to the electric distribution companies and municipalities or provide retail service directly to end-use customers. In either case, the load serving supplier must provide electricity on demand to customers on basic service or fixed-price retail supply contracts for the term of its contractual commitments. To manage price risk, suppliers will contract forward for a portfolio of physical and financial products, adjusting the portfolio over time to match changes in demand or to take advantage of changes in market conditions. To meet RPS obligations, the supplier will contract for RECs. If, however, the supplier's annual RPS obligation fluctuates in an unpredictable fashion, RECs contracting options become far less attractive.

As with any RPS obligation, LSEs will face price risk in deciding what SRECs purchases to make for a supply portfolio under the Solar Carve-Out program. If the price of the SRECs increases during the supply commitment and hedges have not been secured, then the portfolio manager will have to cover its Solar Carve-Out obligations in a high price market. For this reason, many suppliers would prefer to cover their future obligations at today's SRECs prices with a forward purchase and bundle the cost of the SRECs into the sales price to the customer. But such forward purchases will not be particularly attractive to LSEs under the Proposed Rules because the annual Solar Carve-Out obligation would change year to year in an unpredictable way, exposing LSEs to additional forward contracting risk. If the Solar Carve-Out obligation rises more than anticipated, the portfolio

manager will have to procure more SRECs at a time when there is increased demand in the marketplace. In that event, prices for SRECs would be higher than those assumed in the price of the supplier's fixed-price supply contracts. LSE's will seek to avoid this risk by either avoiding long-term supply commitments altogether or adopting pass-through provisions in their contracts. If, by contrast, the Solar Carve-Out obligation increases by less than anticipated, then an LSE will find itself with excess SRECs in a market where demand is lower and so presumably are prices. Both of these risks will inhibit forward contracting for SRECs, which is essential to the development objectives of the Solar Carve-Out program.

B. Companies Will Lack Incentive to Contract Forward for SRECs for Other Purposes.

Aside from hedging activity for compliance purposes, companies often purchase RECs for future delivery and resale, provided that they can form a view as to future REC prices. Unfortunately, the same risks associated with the annual change in the Solar Carve-Out obligation that would discourage LSEs from forward contracting for compliance purposes, also would dampen forward contracting by companies for other purposes. That is because the shifting obligations and demand would alter the forward price curve. Taking a forward position requires a capital commitment and often exposes companies to mark-to-market accounting risks. Many companies likely will avoid contracting for SRECs and will opt to deploy their capital in more liquid, stable and predictable markets.

C. The Department Should Fix the Annual Solar Obligation Now for Future Years.

A simple solution can address the dilemmas described above: fix the annual Solar Carve-Out obligation of LSEs in the Proposed Rules. Although this approach would not allow a guaranteed auction price, it would nonetheless spawn greater solar development due

to the certainty of the Solar Carve-Out obligation. When given the choice between (1) a guaranteed price and uncertain demand, or (2) no guaranteed price and greater certainty in demand, most developers versed in REC market fundamentals would choose the latter.

The annual Solar Carve-Out obligation could be fixed in several ways, including the graduated increases set forth in the table below. The annual obligations in this table would allow new solar development to reach 250 MW by 2017, consistent with Governor Patrick's goal, and reach 400 MW by 2020.

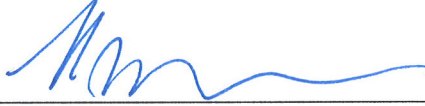
Compliance Year	Annual Compliance Obligation		Cumulative Obligation
	<i>MW</i>	<i>MWh</i>	<i>MW</i>
2010	25	28,470	25
2011	27	30,748	52
2012	29	33,025	81
2013	31	35,303	112
2014	33	37,580	145
2015	35	39,858	180
2016	38	43,274	218
2017	41	46,691	259
2018	44	50,107	303
2019	47	52,524	350
2020	50	56,940	400

Section 14.07(2) of the Proposed Rules contemplates that the annual Solar Carve-Out obligation will be divided by the total MWh of electricity sales to end-use customers in the prior year to derive the minimum standard per MWh, which would be announced by July 20 of each compliance year. RESA recommends that DOER base the minimum standard on projected load for the compliance year, as determined by the Department in conjunction with the distribution companies and/or ISO New England, Inc., and announce that minimum standard by January 15 of each compliance year.

Conclusion

The Department has put forth a creative approach that aims to give solar PV developers the price certainty required to support project financing. The success of the

program, however, is dependent upon the willingness of LSEs to enter into forward contracts for the resulting SRECs. But for LSEs to place a value today on SRECs that can be used to fulfill their future solar RPS obligations, they must have greater certainty of their Solar Carve-Out obligations than is offered by the Proposed Rules. Exempting existing retail supply contracts and fixing the annual obligation for a term of years are simple solutions that the Department can adopt, consistent with the time-tested RPS policies of the General Court and the Department.

	<p>Respectfully submitted,</p> <p>RETAIL ENERGY SUPPLY ASSOCIATION By its attorneys,</p>  <hr/> <p>Robert J. Munnelly, Jr. Diana M. Kleefeld Murtha Cullina LLP 99 High Street - 20th Floor Boston, MA 02110 Telephone: (617) 457-4000 Facsimile: (617) 482-3868 rmunnelly@murthalaw.com dkleefeld@murthalaw.com</p>
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Dated: March 2, 2010