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Ms. Kaitlin Kelly
Massachusetts Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02114

**RE: Emergency Rulemaking, 225 C.M.R. 20.00 *et seq.*, for Solar Massachusetts
Renewable Energy Target (SMART) program**

Dear Ms. Kelly,

On April 15, 2020 the Department of Energy Resources (“DOER”) promulgated an emergency regulation which updates 225 C.M.R. 20.00 *et seq.*, Solar Massachusetts Renewable Energy Target (“SMART”) program (“Emergency Regulation”). The updates include a doubling of the program capacity, additional restrictions on open space development, expansion of the treatment of low income and public entity units, creation of the pollinator adder, clarifications for energy storage systems, and increased consumer protections. Prior to promulgating the Emergency Regulation, DOER proffered its 400 MW Review Proposal. The AGO submitted comments on that Proposal on September 30, 2019. The DOER held public hearings on May 22, 2020 and requested written comments to be filed on or before June 1, 2020. Pursuant to the DOER’s request, the Office of the Attorney General (“AGO”) submits these comments for the Department’s consideration.

I. Comments

The AGO supports DOER’s efforts to increase photovoltaic energy generation and energy storage systems in an effort to reduce reliance on expensive and polluting fossil fuels and meet the Commonwealth’s obligations under the Global Warming Solutions Act. The expansion of the SMART program through this Emergency Regulation attempts to balance the sometimes competing goals of development and preservation. These comments focus on clarity of program changes and participant expectations, as well as the program’s consumer protections.

A. Cost of the Program

DOER doubles the capacity size of the SMART program with this Emergency Regulation. 225 C.M.R. 20.05(1). Because this program delivers critical benefits to ratepayers, supports the Commonwealth’s clean energy goals, and offers economic support for a key sector of our

distressed economy, the added capacity is likely appropriate. However, the increase in program size also increases ratepayer costs. Unfortunately, the extent of this ratepayer impact continues to be a mystery as DOER has failed to share its cost analysis. While the Legislature has specifically directed DOER to reduce the cost of its solar programs, St. 2016, c. 75, § 11(a), it is impossible to know whether DOER has met its statutory obligation because, unlike the first 1,600 MW of capacity in the SMART program, DOER has not disclosed its ratepayer costs estimates.

It is important that the public has access to these cost estimates. Such access will allow the public to examine DOER's programmatic choices and determine the total ratepayer investment in technology. It will also provide vital checks on program implementation. Further, the Department of Public Utilities' ("DPU") review of proposed tariff changes will benefit from comparing DOER's cost estimates with the Electric Distribution Companies' ("EDCs") estimates.

The Emergency Regulation cuts in half the Base Compensation Rate reduction. 225 C.M.R. 20.07(2). Given the status of the solar and storage markets, DOER should examine if this is an appropriate ratepayer cost. If such costs are appropriate, the AGO supports limiting the effective date of the two percent reduction to the first capacity block of the second 1,600 MW of capacity rather than as DOER qualifies it, "after the publication date." Such a change will limit ratepayer exposure and will not change the rules for any developers relying on the original regulation.

The AGO respectfully requests that DOER make public its cost estimates for the expanded SMART program under the Emergency Regulation. The AGO also requests the Emergency Regulation make clear that a two percent Base Compensation Rate reduction begin with the first capacity block of the second 1,600 MW of SMART capacity.

B. Consideration of Low Income Adder

The AGO supports the expanded definition of Low Income Customer, intended to reach more customers that have been marginalized from the SMART program thus far. 225 C.M.R. 20.02. The inclusion of residents of a "Low Income Eligible Area" will allow for more communities to access and hopefully build solar and storage in new ways. All ratepayers pay for the cost of SMART, however, not every ratepayer has the same ability to participate directly. Adjusting this definition, and therefore the adder itself, removes one of several hurdles and signals to the market that previously ignored ratepayers and neighborhoods are to be courted.

The AGO further supports requiring all energy products offered to Low Income Customers to provide net benefits and is pleased to see its inclusion in the Emergency Regulation. DOER's inclusion of this net benefit provision is consistent with steps taken around the country with respect to programs for Low Income consumer protections.

The set-aside of only five percent, however, is seriously deficient. 225 C.M.R. 20.05(3)(d). In stark contrast, the program set aside for units typically owned or leased by ratepayers who have the opportunity to own property – under 25 kW – is 20 percent to 35 percent. 225 C.M.R. 20.05(3)(a). Moreover, units sized 25 kW to 500 kW have a set-aside of 20 percent. 225 C.M.R.

20.05(3)(c). The Emergency Regulation's paltry five percent is inequitable to Low Income Customers. Further, DOER must consider the data from the EDCs' quarterly reports to the DPU which show that participation by Low Income ratepayers is lagging other adders. The AGO also asks DOER to review a recently published report connecting the unequal impacts of the COVID-19 pandemic on low-income populations and the longstanding impacts of environmental injustice, including investment in clean energy. *See* Appendix A.

The AGO recommends DOER amend the Emergency Regulation to set a Low Income Adder set aside of 20 percent.

C. Consumer Protection

The rapid growth of the solar industry in the Commonwealth brings opportunities for ratepayers, business developers and solar/storage employees, but which, left unchecked, can result in illegal or improper behavior by those trying to cut corners or hit quick sales targets in an increasingly competitive field. As previously noted in the AGO's 400 MW Review Proposal Comments (September 2019), customers continue to file complaints with the AGO about the solar industry. While it may seem obvious that sales of SMART products (including generation units and credits) must comply with all state regulations and consumer protection statutes, some participants may be unaware of the consequences. Creating the audit process, and including notice of such in the Emergency Regulation, places every SMART participant on notice of their responsibilities. 225 C.M.R. 20.06(1)(m). The AGO applauds the creation of the Audit and anticipates close collaboration with DOER during implementation. The AGO does offer two proposed changes to the Emergency Regulation to further protect consumers.

First, "single applicant" should be defined in the final regulation and the definition should broadly include a company, its affiliates, and any subsequently company created by officers. *Id.* An applicant should not be allowed to lie to or cheat consumers under one name and then create a new LLC or shell company to avoid enforcement.

Second, DOER should strike the exception from audits created by 225 C.M.R. 20.06(1)(n). No consumer relationship should be exempt from the protections afforded by these audits. The absence of a customer contract does not release an applicant or developer of its responsibility to comply with DOER's regulation. If there is any type of customer relationship that requires a customer disclosure form, the applicant must disclose the true nature of the product and be held to the same standards of the SMART program or face the consequences of an audit.

Therefore, the AGO recommends that DOER amend the Emergency Regulation to include a thorough definition of "single applicant" for use in 225 C.M.R. 20.06(1)(m) and strike 225 C.M.R. 20.06(1)(n).

D. Miscellaneous Considerations

a. Pollinator Adder

The AGO supports the Emergency Regulation's addition of a pollinator adder. 225 C.M.R. 20.07(e). The Emergency Regulation provides that a unit that obtains and maintains at least a silver certification from the University of Massachusetts Clean Energy Extension is eligible to receive an adder. However, to ensure that the benefits from this program are delivered for the entirety of the SMART credit eligibility, the AGO recommends that the certification awarded by the University of Massachusetts Clean Energy Extension be reviewed and renewed annually. The final regulation should explicitly state this requirement.

b. Public Entity

The AGO also recommends that the final regulation's definition of Public Entity Solar Tariff Generation Unit make clear that an eligible unit must be located on municipal land or, if located on private land, that municipal or other government entity accounts in the municipality receive 100% of the unit's output. 225 C.M.R. 20.02. If municipal residents are not receiving the benefit of credits to offset municipal electric bills, ratepayers should not pay a premium for a municipality to own/operate a unit on private land. The final regulation should change paragraph (b) in the definition of Public Entity Solar Tariff from an "either, or" statement to a "both, and" requirement for subparagraphs (i) and (ii).

c. Equally Sized Blocks

The Emergency Regulation allows DOER to set the Block Allocation according to the "electric load served data" for each EDC. 225 C.M.R. 20.05(3). At the same time, the Emergency Regulation requires sixteen equally sized blocks. *Id.* While the AGO agrees with the apparent goal of dividing the capacity among the EDCs according to accurate and current load data, these two provisions likely create a conflict. To have sixteen equal blocks, DOER must maintain those set at the creation of SMART. If the intent of the Emergency Regulation is to use updated load profiles from 2020 for the program, the AGO recommends that DOER set eight equal capacity blocks for the second set of 1,600 MW blocks. If the intent is to update the blocks according to yearly load data, different language is necessary. The AGO does not endorse this approach as it will create unknowns for the development community, whereas, one of the hallmarks of SMART is the predictability of the blocks for financing purposes.

The AGO recommends amending the Emergency Regulation to clarify that the second set of capacity blocks (*i.e.*, blocks nine to sixteen) be equally sized and set in 2020 according to the most recent electric load served data.

II. Conclusion

The Attorney General respectfully requests that the DOER adopt the above recommendations prior to promulgating the final SMART regulation.

Respectfully submitted,
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/s/ Elizabeth Mahony

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