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Michael Judge
Director, Renewable & Alternative Energy Division
MA Department of Environmental Resources ("DOER")
100 Cambridge Street, Ste. 1020
Boston MA 02114 July 11, 2017

RE: COMMENTS – Solar Massachusetts Renewable Target ("SMART") Emergency Regulation, 225 CMR § 20.00 *et seq.*, released 5 June 2017

Dear Mike:

This presents comments of CFS on the SMART Emergency Reg. above.

We incorporate by reference, generally re-affirm, and attach for convenience our three previous sets of comments on the SMART concept as it evolved and has been proposed to be implemented by DOER in this temporary emergency rule.

We also highlight non-exclusively below our major concerns with this latest version of the SMART program. Rationales and authorities for our previous comments are incorporated without being repeated here.

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1. The Rule's base-rate multiplier "indices" and separate compensation "adders" are impermissible and pre-empted under the Federal Power Act, which grants FERC exclusive authority to assure that wholesale rates reasonably reflect affected utilities' "avoided costs."

Predominant among our ongoing concerns with SMART is that, especially where resulting rate-based transactions will be implemented through a FERC-approved ISO, *DOER and DPU cannot in effect set wholesale electricity rates that are substantially divorced from participating utilities' incremental avoided costs.*

Such actions invade FERC's exclusive authority to regulate wholesale energy transactions and are presumptively pre-empted. That remains true whether the rates at issue are "QF" protected under PURPA or are protected by FERC's general FPA authority to assure "just and reasonable" non-discriminatory wholesale rates. [1] FERC's authority protects even the "penumbra" of wholesale rates -- it bars state efforts to limit FERC actions like wholesale demand-response regulation that directly may affect such rates (and indirectly may affect state-jurisdictional retail rates).[2]

For these reasons FERC has invalidated any wholesale contracts reflecting state-mandated rates that exceed avoided costs:

> We cannot ascertain . . . any legal basis under which states have independent authority to prescribe rates for sales by QFs at wholesale that exceed the avoided cost cap contained in PURPA. Moreover, for states to mandate rates above avoided cost for a particular class of power suppliers (i.e., QFs) also runs counter to Congress' and the Commission's current policies which strongly favor competition among all bulk power suppliers. . . . if parties are required by state law or policy to sign contracts that reflect rates for QF sales at wholesale that are in excess of avoided cost, those contracts will be considered to be void *ab initio*.[3]

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[1] See, e.g., *Hughes v. Talen Energy Marketing,* 136 S. Ct. 1288 (2016) (unanimously disallowing state PUC efforts to boost generating capacity beyond current 3-year FERC-approved PJM capacity auctions, through mandated above-wholesale-rate 'contracts for differences'); *North Dakota v. Heydinger,* __ F.3d ___, 2016 WL 3343636 (8th Cir.; June 15, 2016) (unanimously disallowing state PUC efforts to ban or otherwise regulate wholesale energy imports from out-of-state) (concurring opinions relying on FERC pre-emption rather than Dormant Commerce Clause extraterritoriality); *Independent Energy Producers Ass'n. v. CPUC*, 36 F.3d 848 (9th Cir. 1994) (unanimously disallowing CPUC rules that would have allowed utilities to "dock" certain payments to QFs, resulting in lower-than-avoided-cost wholesale rates).

[2] See, e.g., *FERC v Electric Power Supply Ass'n.*, 136 S. Ct. 760 (2016) (reversing lower court and affirming FERC's authority to regulate wholesale demand-response pricing, even where it affects retail power sales).

[3] *Conn. Light & Power Co*., 70 FERC ¶ 61012 at 61029 (1995), *recons. den*. 71 FERC ¶ 61035 (1995), *appeal dismissed*, 117 F.3d 1485 (D.C. Cir. 1997). FERC subsequently modified this position to allow states to set differentiated (as well as uniform) wholesale "avoided cost" rates.

As formulated, the Rule's RFP price caps and "base rate" wholesale multipliers appear facially impermissible and pre-empted under the FPA, since they bear no demonstrated relation to utility avoided costs and differ (without justification or explanation) from FERC-approved ISO-NE wholesale rates.

As formulated, the Rule's adders similarly would be pre-empted.[4] We have found no federal appellate court decision that has affirmed such untethered adders in a wholesale-power context. Numerous circuit court and FERC rulings have disallowed them.[5]

2. The Rule's apparent efforts to mitigate FERC pre-emption cannot withstand scrutiny

In a significant departure from the SMART Design and surrounding communications, the Rule now contains a series of qualifiers apparently meant to reduce or avoid FERC field pre-emption. These include the bizarre declaration that new PV generators' participation in SMART is 'wholly voluntary' (§ 20.01), as well as requirements that eligible participants in effect obtain FERC QF status (§ 20.05(5)(c)) and become ISO-NE 'assets' (§ 20.05(6)).[6]

However, to tell PV developers that they are free voluntarily to participate in SMART is like telling taxpayers they remain free to file federal tax returns. With rare exceptions, declining to participate in SMART means deciding to cease developing projects in Massachusetts – a form of economic suicide substantially more severe than customary IRS penalties for non-filing.

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[4] This would include the Design's special base rate for "low-income under 25 kW," which itself operates as a tacit price adder.

[5] See nn. 1-3 above. See also, e.g., *Allco Renewable Energy Ltd. v. Massachusetts Electric Company dba National Grid*, 2016 WL 5346937 (D.Ma.,2016) (*inter alia* invalidating MDPU rule allowing utility to limit generator's avoided-cost contract options within state RFP process, as an impermissible constraint on generator's right to full avoided cost as defined by FERC).

[6] See also the Rule's repeated references to SMART actions becoming effective "as approved by the DPU *and any other appropriate jurisdictional regulatory bodies*" [e.g., § 20.05(2))(emphasis added) *passim*] – an apparent attempt to shield the Rule from pre-emption by anticipatorily invoking FERC-approved ISO-NE (as well as DPU) regimes.

Moreover, while QF status nominally may invoke certain Commonwealth powers to regulate wholesale rates under PURPA's limited exception to FERC's otherwise-exclusive Federal Power Act authority, that status does not affect wholesale-rate pre-emption. It merely replaces the FPA's general "just and reasonable wholesale rates" test with PURPA's specific "avoided cost" criterion for what wholesale rates are permissible. Wholesale rates like those in the SMART Rule (including base rate index adjustments and adders) that bear no meaningful relation to utility avoided costs – and have not been related in any manner to such costs -- cannot pass muster under either test.[7]

3. Subtracting the "value of energy" from gross SMART Tariff compensation is unexplained, undecipherable and incoherent

Much like the SMART Design, the Rule continues to require that *all value* received by most eligible PV projects from their sale of energy or its equivalent be subtracted 100% from the total SMART revenues (base Tariff compensation plus any adders) they otherwise would receive (§ 20.08).

We see no defensible basis for this requirement.

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[7] No different result would seem to flow from the Rule's statement that initial competitive-bid procurement projects shall "not be eligible to receive Compensation Rate Adders" (§ 20.07(3)(a)(2)(b)). That statement appears to be contradicted by other Rule provisions (e.g., § 20.05(3)(b), providing that "no Solar Tariff Generation Unit shall be eligible to qualify in a Distribution Company's first Capacity Block unless it has a capacity . . . less than 1000 kW *or is eligible to receive a Compensation Rate Adder*" (emphasis added).

Nor should a different result flow from the most recent *Allco* decision. See *Allco Finance Ltd. v. Klee*, __ F.3d ___ (2nd Circ., Nos 16-2946, 16-2949, decided June 28, 2017). That decision addressed very different, more general issues of whether Connecticut could direct LSEs preferentially to seek to procure specified renewable resources *at all* under its general health-and-welfare police powers. No attempt by the state to dictate wholesale rates was involved in those procurements, and the panel expressly found that any effect on such rates would be incidental, if not *de minimis*. Indeed, the Court began its analysis by powerfully restating FERC's exclusive field authority over wholesale rates and the narrow avoided-cost exception to that pre-emption which the PURPA amendments to the Federal Power Act granted to states.

First, so far as we know the requirement never has been explained, except perhaps for vague references to "leveling the playing field."

Second, what field is supposed to be leveled and how the requirement fairly will achieve that outcome never have been specified. Of course, both LMP rates and Net Metering Credit figures vary considerably within and across LSE service territories within Massachusetts, sometimes in 15-minute or quarterly intervals. But those figures reflect real-world wholesale energy values determined by functioning electricity markets implemented by (e.g.) ISO-NE and encouraged as well as overseen by FERC. Artificially influencing them by a flat across-the-board subtraction blunderbuss constitutes a major unnecessary intrusion into established wholesale market mechanisms. That seems particularly true where the 'blunderbuss' is merely part of an overall scheme with multiple goals, whose original declared purpose was to promote continued robust solar growth by ensuring future PV projects a reasonable profit margin absent SRECs.[8]

Finally, 100% subtraction not only will influence future PV generators' wholesale energy prices, but may well turn wholesale rates and existing market mechanisms upside down. Given guaranteed 20-year SMART Tariff rates versus shorter-term less predictable alternatives, it will create powerful incentives for PV developers and owners to price their energy as low as possible, if not virtually give energy (and potentially capacity) away. What economically-rational developer – let alone its investors -- will resist such incentives? The likely distortion of wholesale rates and markets will be far more than "incidental." See, e.g., *FERC v. EPSA*, n. 2 above; *Allco Finance v. Klee*, n. 7 above.[9]

4. The Rule's "Project Segmentation" section should be clarified

Rule § 20.05(f) appears flatly to bar SMART qualification of Tariff Units over 25 kW-ac capacity sited on adjacent contiguous parcels, unless the second Unit submits an SQA at least 12 months after the first Unit's commercial operation date. See id., §

[8] Balanced – to be sure – with reasonable constraints on ratepayer impacts; but especially in light of distributed generation's positive grid contributions, not meant to be eviscerated by such ratepayer concerns.

[9] Subtracting only (say) 25% of the "value of energy" might be a start towards mitigating such distortions.

(g)(4). This provision is new, unexplained, and a potential impediment to otherwise-qualified ground-mounted PV projects that may be sited on adjacent pre-existing parcels held by different owners for reasons (including ease of site discovery, economies of site or title assessment, and cost-saving simultaneous installations) that have nothing to do with possible concerns about developers end-running traditional single-parcel limits. We request that it be clarified to avoid such counterproductive results.

We are available to discuss any of the points above.

Sincerely,

/s/
Michael H. Levin
Managing Director & General Counsel

C (e): Interested parties