April 2, 2018

Commissioner Judith Judson
Massachusetts Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02114

Re: SMART Customer Disclosure Forms

Dear Commissioner Judson:

The Solar Energy Industries Association (SEIA) appreciates the opportunity to comment on the Massachusetts Department of Energy Resources (DOER) draft disclosure forms for third-party owned small systems, direct ownership small systems, and community solar systems.

For the past two-plus years, SEIA's Consumer Protection Committee has worked with industry stakeholders to develop model disclosure forms for the three residential solar transactions: system purchases, Power Purchase Agreements (PPAs), and leases. SEIA has also engaged with states like Florida, Nevada, California, and New York as they developed their own residential disclosure forms for onsite systems and community solar systems which to one degree or another track SEIA's disclosure forms. As a result, SEIA is uniquely qualified to comment on the DOER's draft disclosure forms.

Well-crafted disclosure forms can serve as a valuable aid to residential consumers by giving them an opportunity outside of a solar agreement or a sales presentation to review key terms in the agreement. Disclosure forms should also avoid being overly proscriptive and inadvertently impede innovative business models. It also important to recognize that business models for dealing with residential consumers can differ substantially from workings with commercial consumers, especially large, sophisticated entities who sign up for community solar subscriptions and employ teams to negotiate contracts with solar companies.

SEIA recommends that DOER either adopt or allow businesses to use the SEIA disclosure forms, included as **Attachments 1-4**. The SEIA disclosure forms have gone through robust vetting and address terms like costs, system performance, warranties, and performance guarantees. Any additional terms can be incorporated at the end of the disclosure forms. Major companies have already integrated the SEIA disclosure forms into their information technology systems, a substantial task that requires programming, formatting, and testing. This approach allows for the smoothest implementation and rollout of disclosure forms.

Alternatively, DOER could promulgate a disclosure form that is more generic in nature which directs customers to be aware of key terms and conditions with their provider. This approach may offer the most flexibility and recognize that "one size does not fit all" with respect the agreements between customers and solar firms.

If DOER decides to release a more detailed form along the lines of the draft forms for comment, SEIA offers the following recommendations to improve the clarity and usability of the forms. In addition, we offer a detailed mark-up of the forms in **Attachments 5 – 8.**

Third-Party Owned and Direct Ownership Forms

- **Customer ID:** A customer ID number may not be assigned until after the consumer signs the agreement. Because the disclosure form is provided before contract signing, the contractor may not be able to list anything here.
- **System Size (kW AC):** The vast majority of proposals and contracts express system size in kilowatts DC, not AC. Letting contractors use DC promotes consistency between marketing materials, contract, and the disclosure form.
- **Contract Effective Date and End Date (Third-Party Ownership):** A contract only becomes effective once a consumer signs it. Because the consumer receives the disclosure form before signing the agreement, the agreement's effective date and by extension the end date will be unknown. Instead, the disclosure should be changed to "The initial term of your agreement" with a check box to list the term in either years or months.
- **Total Installed Cost Before Incentives (Third-Party Ownership):**
    - Under a TPO agreement, a consumer cannot claim most incentives because they do not own the system and they are only responsible for paying the price listed in the contract whether the TPO provider claims any incentives or not. Simply put, there "pre" or "post" incentive cost or price. For leases, this disclosure should be changed to "Total of all your monthly payments and estimated taxes over the course of Lease:"
    - For PPAs, it is impossible to guarantee the total cost over the life of the contract because payments are based on actual production which may be slightly higher or lower than estimated production. As a result, DOER should not require this disclosure for PPAs.
- **Estimated Year One Credit Value ($) <u>and</u> Estimated Year One Savings ($):** Some businesses choose to not estimate savings during the sales process. Those businesses may instead only provide a system production estimate and let the consumer estimate savings. The draft disclosure forms force businesses to estimate savings even if such an estimate is not offered to the consumer. Instead, SEIA suggests that DOER require an explanation of assumptions used in a savings estimate if the provider offers one to the consumer. If DOER chooses to make this disclosure mandatory, then it must include an

explanation of how a business can calculate the value of any credits to avoid confusion and promote consistency.

- **If roof-mount, what is the age of the roof:** SEIA cautions against requiring contractors to estimate a roof's age and date for replacement. Many factors affect the condition and appearance of the roof and a business may not know the full history behind a roof. In fact, the consumer is often in a much better position than the contractor to know the age of the roof. A business may in an abundance of caution offer a wide age range which would be unhelpful. In addition, some contractors may not perform a detailed roof survey until after the consumer signs the contract. Taken together, SEIA recommends that DOER remove this disclosure.
- **Cost to remove and reinstall system for reroof:** The cost of materials and labor prices associated with removing and reinstalling a system may fluctuate over time, especially if the service occurs decades after the original installation. A consumer might also change their roof in a way that would add extra costs to reinstallation. The disclosure also implies that a company offer such services when it may not do so. SEIA suggests that this disclosure be optional, and that DOER make clear on the form that the estimate should not be interpreted as a quote or firm offer and can change based on many factors.
- **Cost of Cancellation:** "Cost of Cancellation" could refer to the cost of terminating a contract after the cooling-off period or after installation. In addition, not every onsite lease or PPA agreement allows early buyouts and those that allow them may not let the consumer buy-out the system before a certain number of years have passed. There must be an option to state if no early cancellation rights exist.
- **Final Purchase Price (Direct Ownership):** It is unclear how this disclosure differs from the disclosure "Total Installed Cost Before Incentives." If the disclosure means the price a consumer will pay after applying incentives, a business cannot know with 100% certainty whether a consumer will qualify for various incentives or rebates. A consumer pays the contractor the price in the agreement and then claims any incentives from the federal or state government; however, the wording implies that this number is what the consumer pays the contractor. The potential result is that a consumer may mistakenly believe that they only pay the contractor the list price minus incentives. To avoid consumer confusion, SEIA recommends that this disclosure be removed.
- **Amount of Dealer Fees or Finance Charges (Direct Ownership):** If a consumer uses third-party financing, a contractor will not know the financing charges because they are not part of that agreement. Financing agreements are also subject to federal laws and regulations, such as Regulation Z, which dictate how and when specific financing terms are disclosed to consumer. SEIA recommends that this disclosure be modified to read "If your System is financed, carefully read any agreement and/or disclosure forms provided by your lender. This statement does not contain the terms of your financing agreement.

If you have any questions about your financing arrangement, contact your finance provider before signing a Contract."

- **Does the system installation contract conform to the requirements of the State Home Improvement Contract Law (Third-Party Ownership):**
    - Contracts for third-party owned systems are agreements involving personal property and not home improvement contracts. Parties' intent is a controlling factor in determining whether a contract is for personal property or fixtures. PPAs and leases explicitly state that the parties' intent is to treat the system as personal property. The systems are not permanent fixtures because the business removes the system from the home at the end of term. These factors, among others, demonstrate that TPO system are not intended to become a permanent part of a home and therefore are not Home Improvement Contracts.
    - Further, solar leases and PPAs are subject to a host of federal consumer protection laws which regulate the structure, content, and disclosures associated of such agreements. These laws include the Consumer Leasing Act, Regulation M (rules for solar leases), Regulation Z, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act (regulating unfair, deceptive or abusive trade practices in connection with any solar financing).
- **Early Termination Terms and Protections:** The wording of this disclosure is ambiguous and could contain multiple separate disclosures. SEIA interprets the intent of this section to address production guarantees in case a system underperforms. To improve the clarity of the disclosure, SEIA suggests that it be changed to read "Describe any system performance or electricity production guarantee" which will help the consumer understand their remedies in case of underperformance.
- **REC Ownership:** The SMART Tariff program requires all participants to assign their RECs to their utility. To avoid confusing consumers into thinking that they may be able to claim any RECs, SEIA recommends that the REC checkbox be stricken, and the following language be used at the end of the disclosure form: *"A Renewable Energy Certificate (REC) represents the Environmental Attributes associated with one megawatt-hour of renewable energy as defined by Massachusetts law. RECs generated by the facilities participating in the SMART Program are the property of the utility company. Therefore, while you are not using the solar power generated by the facilities, your purchase of credits does support solar development in Massachusetts."*

<u>Community Solar</u>

- **Applicability**: Large, sophisticated commercial users of electricity typically have energy managers or hire energy consultants to negotiate with electricity suppliers and solar providers. The contracts may bear little resemblance to residential agreements whose

terms are heavily dictated by state or federal laws. To maintain consistency between the onsite disclosure forms and community solar forms, SEIA recommends that the community solar forms only be required for subscriptions below 25 kW.

- **Community Solar Project Name and Project Location**: A developer may not know the project name or location until after certain thresholds are met which can occur after a consumer signs up for a subscription. In addition, a consumer may be reassigned to readily available project in another city/town in the same utility service territory if there are delays with the original project. This ensures that consumers can benefit from their subscription as soon as possible. The disclosure could be modified to identify the utility service territory/load zone or region of the state rather than a specific project. If Project Name and City/Town are needed, there needs to be an option to note that the consumer be assigned to a different project in the same utility service territory.
- **Estimated Number of Subscribers to the Project:**
    - SEIA requests more clarity for this disclosure. Is the developer expected to disclose the number of subscribers who have already signed up or the expected number of subscribers when the community solar project becomes operational?
    - Number of subscribers does not help the consumer understand their contractual obligations or what they will receive from their subscription. SEIA recommends that this disclosure be removed. However, if DOER plans to keep this disclosure, then SEIA recommends that DOER clarify that a developer is not be required to submit a new disclosure form if the actual number of subscribers differs from the estimated number.
- **Project Size:** When a consumer signs up for a community solar subscription, the project size typically has not been finalized because the developer is still in the process of signing up other consumers. Project size should not affect a consumer's subscription size or contractual obligations. SEIA recommends that this disclosure either be removed or changed to "Estimated Project Size (kW DC)".
- **Upfront Costs ($):** SEIA requests that DOER clarify which costs count as upfront costs. Does Upfront Costs capture all amounts a consumer pays before a community solar system becomes operational or something else?
- **Starting Rate ($/month, $/kWh):** Some subscriptions models may not offer a fixed starting rate and instead charge consumers based on some form of index pricing, such as a guaranteed discount over the consumer's existing bill (*e.g.*, X% off electricity rates). This disclosure should be modified to accommodate different pricing models.
- **Contract Effective Date and Contract End Date:** A contract only becomes effective once the consumer signs it. Because the consumer presumably receives the disclosure form before signing the contract the business will not know the effective date. Instead, SEIA suggests that DOER change the disclosure to "The initial term of your agreement" with a check box to express the term in either years or months. With this change, consumers will know how long their obligations will last.

- **Cost of Cancellation:** Does "Cost of Cancellation" refer to the cost of cancelling a contract after the cooling-off period or does this mean the cost of cancelling the subscription once the system is operational? If the latter, most agreements do not have a fixed cancellation cost which may depend on factors like time remaining in the agreement or whether the consumer can find a replacement. SEIA recommends that this disclosure either be stricken or changed so that a company can fully explain cancellation costs.
- **Early Termination Terms and Protections:** The wording of this disclosure is ambiguous and could contain multiple separate disclosures. SEIA interprets the intent of this section to address production guarantees in case a system underperforms. To improve the clarity of the disclosure, SEIA suggests that it be changed to read "Describe any system performance or electricity production guarantee" which will help the consumer understand their remedies in case of underperformance.
- **REC Ownership:** The SMART Tariff program requires all participants to assign their RECs to their utility. To avoid confusing consumers into thinking that they may be able to claim any RECs, SEIA recommends that the REC checkbox be stricken, and the following language be used at the end of the disclosure form: *"A Renewable Energy Certificate (REC) represents the Environmental Attributes associated with one megawatt-hour of renewable energy as defined by Massachusetts law. RECs generated by the facilities participating in the SMART Program are the property of the utility company. Therefore, while you are not using the solar power generated by the facilities, your purchase of credits does support solar development in Massachusetts."*

Process and Roll Out

As SEIA developed its own disclosure forms and worked with states as they developed their own disclosure forms, SEIA wishes to offer lessons learned on improving the rollout, implementation, and execution of the forms.

- Once the disclosure forms are published, businesses need time to go over the published forms and solicit feedback from DOER. Integrating the disclosure forms into a business's IT system is also a significant undertaking that involves formatting, programming, and debugging to ensure accuracy. SEIA recommends a 90-day window for businesses to implement the forms.
- Businesses will have questions about the published forms from what DOER expects from a certain disclosure to process. Uncertainty and confusion can lead to forms not being filled out as DOER intended. SEIA strongly encourages DOER to publish a guide on how to fill out the disclosure forms, such as estimating the value of SMART Tariff credits, and host webinars to explain the forms and field questions from businesses.

- Small businesses may not necessarily be aware of the disclosure forms. DOER should coordinate with other relevant agencies to send notices to all licensed contractors about the new requirements.
- After the consumer signs the form, is the expectation that the business sends a copy of the signed form to the consumer, DOER, or both?
- What happens if the consumer signs the disclosure form but fails to send it the contractor or refuses to send it to the contract?
- For Community Solar projects, what happens if certain aspects of a community solar project (*e.g.*, total system size) change between contract signing and becoming operational especially one that does not affect at consumer's subscription? SEIA recommends that the disclosure forms can be amended as a project approaches its commercial operation date.

Thank you for your time and consideration of these comments and our recommendations. Follow up questions on these comments can be addressed to me or directly to Amir Yazdi, SEIA Assistant Counsel at (202) 469-3740 or at ayazdi@seia.org.

Your sincerely,

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