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By email to DOER.SREC@state.ma.us

Michael Judge
Director, Renewable and Alternative Energy Development
Massachusetts Department of Energy Resources (DOER)
100 Cambridge Street
Suite 1020
Boston, MA 02114

Re: Second set of comments to DOER proposed Next Generation Program to SREC-II to support continued development of solar photovoltaic (PV) installations in the Commonwealth

Dear Mr. Judge:

Associated Industries of Massachusetts (AIM) is pleased to provide our second set of comments to DOER's proposed Next Generation Incentive Proposal to continue development of solar in Massachusetts.

The following comments reiterate some of those raised in our first set of comments filed with your office on October 28, 2016, particularly regarding the lack of competition as a mechanism to set baseline tariff rates and adders. Instead of choosing a competitive model – one that will set tariff rates that are transparent and accurate because they are market based – DOER is continuing down the dubious path of not only setting base tariff rates based on already outdated surveys of solar installers but also arbitrarily assigning additional tariff adders to accomplish specific agency goals.

And some of those adders are questionable on their face. For instance, the recently proposed adder for those needing new roofs prior to installing solar panels is particularly egregious in that it is based on anecdotal evidence and goes far beyond where any incentive program paid by ratepayers should go. If a homeowner – or anyone else – needs a new roof (or in fact other possible structural upgrades) that cost could be folded into the price of the contract between the installer and the customer. Certain customers may get less of a monetary benefit, but that is offset by the fact the customer is getting more than just free electricity.

The very clear benefit of transitioning to a competitive pricing model is that it will eliminate continuing arguments over the true cost of solar installations and the legitimacy of adders and will also avoid what we believe are serious legal issues with the current path the DOER is taking

to develop tariffs on their own. These legal issues are problematic as they could derail or delay the program as it proceeds to the Department of Public Utilities (DPU) for approval.

To avoid legal challenge, DOER must construct a program that does not violate constitutional provisions of the Supremacy Clause, the Commerce Clause, or the Federal Power Act. In fact, injunctions have been imposed by federal courts stopping new state energy regulations – and this has occurred in New England with regards to adders similar to those contained in this recent proposal. As a result, state regulatory tariffs need to:

- Not interfere indirectly with exclusive ISO authority over market prices and tariffs, and
- Comply with Federal Power Act requirements over solar Qualifying Facility tariffs.

In 2016, a Supreme Court decision, federal Court of Appeals decisions, and two FERC decisions define what state regulation cannot do when a state is in an ISO market for power – as Massachusetts is (there are also are other similar pre-2016 decisions).

THE DOER PROPOSAL DOES NOT COMPLY WITH CONSTITUTIONAL REQUIREMENTS AND THE FEDERAL POWER ACT

1. Supreme Court Decisions

In 2016, the Supreme Court unanimously held that a state tariff for its regulated distribution utilities could not provide adders to the amount received by designated non-utility independent market participant within an ISO power market. *Hughes v. Talen Energy*. The state of Maryland's stricken regulatory tariff required its regulated utilities to enter into a 20-year guaranteed adder to the prices earned for the sale of power by certain designated state-favored independent power generators, in addition to the price set pursuant to the FERC-approved wholesale market auction within the PJM ISO. Eight of the Justices upheld the (also unanimous) 4th Circuit Court of Appeals decision finding both field preemption (state tariffs can never regulate in any way indirectly influencing wholesale power markets) and conflict preemption (states cannot regulate in this particular conflicted way). All 9 Justices were unanimous that a state operating within an ISO could not provide adders to selected power generators.

Any regulation or tariff that is even indirectly linked or tethered to a generator's wholesale market participation within an ISO is impermissible, according to the unanimous 2016 Supreme Court. A significant amount of the Massachusetts PV project power and capacity sales affected by the proposed DOER regulation and tariff are part of their ISO-NE wholesale market participation. Any state regulation or tariff which applies an adder in addition to any ISO market prices is not allowed.

2. Federal Circuit Court Decisions

Fourth Circuit - As the *Hughes* case came through the Fourth Circuit on its way to the Supreme Court, the Court of Appeals concluded unanimously that the FERC-administered PJM ISO market is "a finely wrought scheme…The federal scheme is carefully calibrated to serve a host

of competing interests. It represents a comprehensive program of regulation that is quite sensitive to external tampering." *PPL Energyplus, LLC, et al. v. Nazarian*, 753 F.3d 467, 473 (4th Cir. 2014) (finding both field preemption and conflict preemption of state adders).

Third Circuit - The 2016 Supreme Court decision in *Hughes* notes that New Jersey has "a similar program implemented at around the same time." New Jersey had ordered its state distribution utilities to provide adders to the tariff received by certain designated independent power projects whose power was traded through the PJM ISO market. The trial court and the Third Circuit unanimously held that such state regulation was unconstitutional. *PPL Energyplus, LLC. v. Solomon*, 766 F.3d 241, 246 (3d Cir. 2014). The *Hughes* 2016 Supreme Court decision, by reference to its similar facts, also reinforces preemption of the New Jersey state tariff adders.

Eighth Circuit - Minnesota also attempted to promote renewable energy by state regulation discriminating in favor of certain designated generation participating in the MISO interstate ISO. This was held unconstitutional in a unanimous decision of the Eight Circuit Court of Appeals in 2016. *North Dakota v. Heydinger*, No. 14-2156, 14-2251 (2016).

3. FERC Decisions

The state of Ohio, to support certain independent power projects located in Ohio which otherwise would not be able to operate profitably, ordered Ohio retail utilities to provide tariff adders for certain independent merchant power plants which transacted their power sales through the interstate PJM ISO. This adder was a set fixed value determined unilaterally by state regulation, with parallels to what Maryland and New Jersey did (above). An Ohio tariff ordered regulated retail utilities to pay the adder and pass-through costs to the distribution charge to customers. On appeal in two separate decisions, FERC ruled in 2016 these state regulations were illegal. *Electric Power Supply Association, et al v. FirstEnergy Solutions Corporation, et al*., 155 FERC ¶ 61,101 (2016); *Electric Power Supply Association, et al v. AEP Generation Resources, Inc. and Ohio Power Company,* 155 FERC ¶ 61,102 (2016).

Of note, FERC held that state retail ratepayers were held captive because they would have no ability to avoid the state-subsidized *generation* costs included in the non-bypassable charge when it was imposed in the *distribution* adder charge by choosing another retail power provider, even though allowed by state law to seek competitive power. Such adders paid to power generation cannot be inserted in the distribution tariff.

DOER MUST SET SOLAR TARIFF RATES CONSISTENT WITH AVOIDED COST REQUIREMENTS APPLICABLE TO QUALIFYING FACILITIES (QFs)

Pursuant to amendments to the Federal Power Act contained in the Public Utility Regulatory Policies Act there are three decades of Supreme Court, federal Court of Appeals, and FERC decisions consistently holding that the only non-retail tariff that a state may set or influence is an Avoided Cost rate for its Qualifying Facilities (QFs). A state cannot legally diverge either higher by using adders, or lower with reductions, from a full Avoided Cost tariff. These relevant Federal

Power Act amendments have twice been upheld by the U.S. Supreme Court. Since these many cases are well known, we won't take space to repeat this long list here.

All of the solar PV units affected by the proposed Massachusetts DOER regulation and tariff satisfy the definition of QFs. Avoided Cost is defined by federal regulation, upheld by the U.S. Supreme Court, as the cost at which a utility could either produce or procure this power. State regulation creating adders have had their tariffs federally stricken as illegal. Thereafter, these states have switched to competitive auctions which set the Avoided Cost for the utility to purchase the power through what is a legally accepted competitive market mechanism.

CONCLUSION

Any legally successful Massachusetts tariff must satisfy both the Constitutional requirements and requirements of the Federal Power Act. Massachusetts has elected to participate in ISO-NE, with ISO-NE in exclusive control of wholesale power markets and tariffs. Legal decisions at the highest levels in 2016 (as well as prior federal court and FERC decisions not listed above) consistently hold that states cannot legally place adders in the distribution component of customers' retail utility bills to pay selected generators for their power output.

AIM has an interest in making any DOER regulation and tariff work from the outset. If a state sets a tariff at the winning price(s) bid in a competitive, non-discriminatory auction, this satisfies both the Federal Power Act requirement to set Avoided Cost, as well as the constitutional requirements when a state participates in an ISO. This is precisely what states have subsequently successfully shifted to after their tariff adders were stricken as illegal. The Massachusetts General Court has supported use of competitive mechanisms in the power sector. A state competitive auction to set the tariff rate is the regulatory mechanism which cannot be challenged.

We urge DOER to adopt a competitive model consistent with the requirement of the legislation as well as consistent with legal decisions mentioned above. A competitive model has not only been proven to be the most cost-effective and transparent mechanism to ensure renewable development, but it also ensures that any resulting regulations will be implemented without legal delays.

Should you have any questions please do not hesitate to contact me.

Sincerely yours,

Robert A. Rio, Esq.
Senior Vice President and Counsel
Government Affairs