Klavens Law Group

July 11, 2017

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

Re: Comments on the SMART Program, 225 CMR 20.00

Dear Commissioner Judson:

As practitioners and stakeholders in the Massachusetts renewable energy community, we would like to submit comments on the SMART Program emergency regulation (the "Regulation").

Our firm, Klavens Law Group, P.C. ("KLG"), provides corporate, real estate and regulatory services and has been deeply involved in solar energy development in Massachusetts. Our clients include solar energy project developers, investors, EPC contractors and offtakers from Massachusetts and around the country who have been and continue to be key players in the growth and development of the flourishing Massachusetts solar energy sector.

We have participated in multiple stakeholder processes throughout the development and implementation of the Green Communities Act and the regulatory proceedings that adopted the SREC I and II programs (the "SREC Program"), the net metering program and, most recently, the proposed SMART Program.

We applaud the Department of Energy Resources ("DOER") for its continued commitment to the development of solar energy through its development of the SMART Program. From the first straw proposal presented to the public on September 23, 2016, through the subsequent deep dive stakeholder working groups, to the filing of the Regulation on June 5, 2016, DOER has continued to develop and refine the SMART Program, incorporating valuable stakeholder input driven by the experience of developing, financing, constructing and owning solar energy projects under the Commonwealth's prior and existing net metering and solar compensation and incentive programs.

Development of Appropriate Land Use Requirements. One of the more difficult policy dilemmas for DOER to work through has involved DOER's desire to develop land use requirements that strike an appropriate balance between encouraging solar development and protecting certain

land types in Massachusetts, particularly valued forested and agricultural land. As part of this this land use framework, the Regulation imposes some additional requirements on the development of certain solar projects based on their land type or parcel configuration. Because of our extensive experience representing solar developers in Massachusetts who have continually wrestled with land use and parcel configuration issues under the prior solar incentive programs, we focus our comments on one of these requirements: the "project segmentation" provision at 225 CMR 20.05(5)(f). For the reasons described below, we believe that this provision is not an appropriate land use requirement and, despite DOER's best intentions, this provision could and would have significant unintended and adverse consequences.

The Subdivision Rule. We note at the outset that the Regulation continues to use the so-called "Subdivision Rule" originally adopted as part of the SREC Program. For purposes of enforcing a limit of 5 MW AC of SMART unit capacity on a single parcel, the Subdivision Rule creates a rebuttable presumption against recognition of any parcel created by a subdivision recorded after January 1, 2010. 225 CMR 20.05(5)(f). In other words, a developer cannot avoid the 5 MW parcel limit by subdividing a parcel of land so as to create two parcels and install up to 10 MW of SMART units. A developer can rebut that presumption and achieve recognition of post-January 1, 2010 parcel boundaries by demonstrating to DOER that the subdivision was not for the purpose of obtaining SMART Program eligibility. *Id.* Although we have reservations about the propriety of carrying the Subdivision Rule forward into the SMART Program, the rule is reasonably well understood by stakeholders and continues to serve a purpose in curtailing what DOER might view as "gaming" of the 5 MW parcel limit.

The Segmentation Rule. Unlike the regulation embodying the SREC Program, the Regulation also contains another land use provision, captioned "project segmentation," which states:

> No more than one Building Mounted Generation Unit on a single building, or one ground-mounted Solar Tariff Generation Unit on a single parcel or contiguous parcels of land, shall be eligible to receive a Statement of Qualification as a Solar Tariff Generation Unit.

225 CMR 20.05(5)(f). We will refer to this provision as the "Segmentation Rule."

DOER carves out some exceptions to the Segmentation Rule. 225 CMR 20.05(5)(g). These include:

> (1) a unit 25 kW AC or less on a parcel land contiguous to another parcel of land containing another SMART unit;
> (2) a unit 25 kW or less, or a building mounted unit, on the same parcel of land as another SMART unit, provided that the units are separately metered and not on the same building;

> (3) a unit 25 kW or less, or a building mounted unit, on the same building as another SMART unit, provided that the units are separately metered and are connected to the meters of separate end-use customers; and
> (4) a SMART unit on a parcel that is the same as or contiguous to a parcel with another SMART unit, provided the additional unit files its Statement of Qualification Application ("SQA") at least 12 months after the Commercial Operation Date of the prior unit and is separately metered.

Cautionary Lessons from Experience with the Net Metering Single Parcel Rule. We have participated and continue to participate in proceedings before the Department of Public Utilities ("DPU") involving net metering and DPU's Single Parcel Rule ("SPR"). The SPR originated from DPU's effort to provide clarity on the definition of "facility" and "unit" as used in the net metering statute and regulations in order to enforce the corresponding capacity limits associated with each and to preclude what DPU perceived as "gaming" of the net metering program. DPU adopted the SPR in its Order 11-11-C by defining a net metering facility as "the energy generating equipment associated with a single parcel of land, interconnected with the electric distribution system at single point, behind a single meter." D.P.U. 11-11-C, Order on Definitions of Unit and Facility (August 24, 2012) at 23 ("Order 11-11-C").

Within a short period of time (less than a year) after adopting the SPR as a bright line rule, the DPU followed up with Order 11-11-E recognizing the need to provide exceptions to the bright line SPR. D.P.U. 11-11-E, Order on Exceptions to Definitions of Unit and Facility (July 1, 2013). Specifically, DPU authorized the distribution companies (the "Utilities") to grant exceptions to the single meter and/or single interconnection point elements of the SPR if it was for optimal interconnection configuration. DPU indicated that DPU itself would entertain *ad hoc* petitions for "good cause" exceptions to the single parcel element of the rule (*e.g.*, an exception to allow one facility on multiple parcels or multiple facilities on a single parcel).

DPU has dealt with the ensuing SPR exception petitions on a case-by-case basis but has seen a dramatic uptick in their number. Realizing that such individualized review is not efficient for the growing number of circumstances necessitating such requests, DPU recently opened docket D.P.U. 17-22 to discuss the possibility of some "blanket exceptions" in certain circumstances.

The petitions presented to DPU to date involve a range of fact patterns that often present either (1) projects with odd parcel configurations or (2) innovative project development. One recurring fact pattern involves a single parcel with multiple buildings (such as an apartment complex) where the petitioner seeks to have a solar net metering facility on the roof of each building to serve that building's energy needs. Many of these projects look just like other projects eligible for net metering but for quirks of parcel configuration. It is clear that DOER has looked at this group of projects and, in providing blanket exceptions under (g), tried to preclude similar difficulties with implementation of the Segmentation Rule.

In addition to the projects covered by petitions filed with DPU, we have seen and advised clients regarding a fair number of projects that either presented SPR questions or problems that were resolvable by means other than seeking an exception. While KLG supported DPU's creating rules to preclude "gaming" of the net metering program, we have seen many unintended consequences of the SPR pose costly or complex challenges to otherwise laudatory projects. For instance, a farmer has put 50 kW of solar panels on her barn and then wishes to install a 480 kW anaerobic digestion unit but cannot have two net metering facilities on the same parcel of land. From a capacity standpoint, these projects are not "gaming" the system but the farmer seeking an exception from DPU would face a long and expensive process. (Although this particular example would not conflict with the proposed Segmentation Rule, it is an example of some of the unintended consequences of hard line rules involving parcel boundaries.)

Practical Difficulties and Unintended Consequences of the Segmentation Rule. Although the Segmentation Rule, together with its blanket exceptions, avoids some of the known possible adverse consequences observed with DPU's SPR, the addition of the contiguous parcel language may create even more negative outcomes. KLG strongly encourages DOER to rethink the Segmentation Rule because of the potential for unintended consequences to solar projects.

For example, consider a project involving installation of solar panels on the roof of a public housing complex where the capacity was constrained by shading and existing HVAC equipment so the system only serves part of the building's load. The project proponent plans to install a solar canopy facility on the parking lot for the building which would serve the remainder of the building's load. The Segmentation Rule would create many unnecessary risks for a project which would appear to meet multiple policy goals of the SMART Program. First, it is not clear, if the solar canopy unit files an SQA after the building mounted unit files an SQA, whether it would be eligible for the exception in subsection (g)(2) or would have to wait 12 months from the commercial operation date of the building mounted unit under subsection (g)(4). Second, the building mounted unit's commercial operation date would be an uncertain future date largely in the control of the Utilities, not the owner of the project, and utility construction schedules are often 16-18 months in the future, even for smaller projects. Third, the project may not be able to receive financing because it would be unclear when it would be eligible to apply for the SMART Program and may in fact miss all the blocks.

Consider as well a circumstance where separate project developers are developing solar projects on contiguous parcels of land but are not aware of each other and only blind luck would determine which one receives its ISA and permits first, which would determine which project is able to submit an SQA and which would have to wait twelve or more months. We do not think that DOER intended to preclude otherwise eligible project development simply because separate projects are located on contiguous parcels of land. We also note that there does not seem to be an answer for when the second project could submit an SQA if the first project receives a block reservation but never achieves commercial operation.

Across our work with clients, we have seen a number of situations that reflect the long and tortured histories of some parcels of land, often creating situations where application of a rule such as the SPR or the Segmentation Rule results in frustrating and counterintuitive barriers to solar development. Some farms are comprised of many small tracts of land, and some are one large one. Some towns many years ago took portions of land from multiple parcels by eminent domain to create a landfill. Often in these instances the towns have never recorded a plan for the sole purpose of creating a single parcel because state law merger principles already treat contiguous parcels under common ownership as a single parcel for certain purposes. As DPU and the Utilities use the most recently recorded deed or plan as the basis of the parcel for SPR purposes, it means that a landfill may be multiple parcels, such that what would otherwise be a single unit on a single parcel is now arguably one facility spread over multiple parcels, or multiple units on multiple parcels that now may have a project segmentation issue. We note that it is not clear if a single project or Generation Unit is constructed on multiple parcels (with a total capacity of less than 5 MW) whether it would trigger the Segmentation Rule. In this instance, one ready solution would be for the town to prepare and record a plan that does effectively merge parcels and that plan would provide a single parcel for the facility. However, it seems strange for a town, for no other reason than hosting a solar facility, to be forced to have its lawyer review all the relevant deeds to ensure there is no problem in recording a plan, and then incur the extra expense and time to record a plan merging the parcels. This does not seem like government at its most efficient state.

We have also seen multiple instances of challenging deeds with parcel descriptions that cannot be accurately determined without the cost of a surveyor, further underscoring the point that tying a project's eligibility for the SMART Program to parcel boundaries may be rife with frustrating, inefficient outcomes.

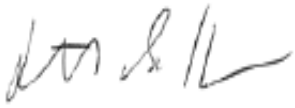
Finally, we are concerned that the Segmentation Rule may work against the achievement of efficiencies with respect to interconnection upgrades. DOER has at various points in the development of this program discussed distribution grid upgrades and the value in locating them in the most efficient locations or otherwise maximizing the upgrades' value to the larger distribution system. As more and more feeders become "full" with the SREC I and II projects online or under construction, finding space both on land and on the grid is becoming more difficult and more costly. In order to make the more expensive required upgrades economic, developers need to derive revenue from a certain threshold of capacity related to those upgrades. Precluding a clustering of developments will create inefficiency. This scenario is much like the town with too many school bus routes that expends extra resources to have more buses driving half full instead of reconfiguring the routes to maximize capacity on each bus. DOER should be finding ways to encourage the clustering of projects to make the most efficient use of system upgrades rather than having many more of them sitting around half full.

In light of the negative outcomes identified above, and in light of the potential for so many likely unintended consequences, DOER should omit from the final regulation any bright line rules concerning development on contiguous parcels of land. We believe that, with the limit of five MW per parcel, along with the Subdivision Rule, there will be sufficient safeguards against "gaming" of the system.

Thank you for your consideration.

Sincerely,

Courtney Feeley Karp



Jonathan Klavens