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April 23, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 595 and House Bill 1016

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 595 and House Bill 1016, entitled "Electricity - Net Energy Metering - Renewable Energy Portfolio Standard - Solar Energy." In conducting our review, we have considered whether two provisions of the bills violate the Commerce Clause of the United States Constitution. It is our view that the provisions in question do not violate the Commerce Clause in any currently likely application.

Senate Bill 595 and House Bill 1016 increase the renewable energy portfolio standards and require that the amount of the increase in each year come from solar energy. The bills further provide that energy from a solar source is eligible for inclusion in meeting the renewable energy portfolio standard only if the source is connected with the electric distribution grid in Maryland, but that, until December 31, 2011, energy from solar source that is not connected with the electric distribution grid serving Maryland is eligible for inclusion in meeting the renewable energy portfolio standard only if not enough offers are made to the electricity supplier from Maryland sources. The bills also requires the owner of a solar generating system in Maryland that chooses to sell solar renewable energy credits from that system to first offer them to an electricity supplier or electric company that shall apply them toward compliance with the renewable energy portfolio standard.

The renewable energy portfolio standard was originally enacted in 2004. That program permits inclusion of energy for purpose of meeting the renewable energy portfolio standard if it is

from a renewable source that is located in the PJM region[1] or in a state that is adjacent to the region, or outside that area, but in a control area that is adjacent to the PJM region if the electricity is delivered into the PJM region. In our bill review letter on the bills enacting these provisions, we noted that the provisions did not prevent suppliers from purchasing electricity, renewable or otherwise, from any source in the country, and treated sources in other States in Maryland's region the same as instate sources. We concluded that the actual impact on interstate commerce would be, at most, incidental, and that it was justified by interests other than simple protectionism and thus found that the bills did not violate the Commerce Clause. *See* Bill Review Letter on House Bill 1308 and Senate Bill 869 of 2004.

Senate Bill 595 and House Bill 1016 provide that energy from a solar source is eligible for inclusion in meeting the renewable energy portfolio standard only if the source is "connected with the electric distribution grid serving Maryland." It is our understanding following conversations with legislative staff that this language is intended to limit credits for solar energy to solar energy produced by an entity linked to an electric company in Maryland and sold to that company, and to renewable energy credits ("RECs"), which reflect solar produced by such entities for their own use. However, the bill permits the use of RECs from other states if none are available from entities in Maryland. In Maryland, RECs are created by the statute creating the renewable energy portfolio standard and take their value from the operation of that statute. Public Utility Companies Article § 7-709. However, there are a few other states that have similar programs. The bill further provides that an owner of a solar generating facility who chooses to sell RECs must first offer them to a person who will use them to meet the Maryland renewable energy portfolio standard.

In *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) the Supreme court found that an Oklahoma law requiring coal-fired electric generating plants in the State to burn a mixture of coal containing at least 10% Oklahoma-mined coal violated the Commerce Clause. Noting that *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) had held that the "negative" aspect of the Commerce Clause prohibits economic protectionism, "that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," the Court found that the 10% requirement discriminated against out-of-state commerce and was invalid. In doing so, the Court rejected arguments that the statute should be upheld because the burden on commerce was de minimis, stating that the "volume of commerce affected measures only the extent of the discrimination; it is of no relevance to the determination whether a State

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[1] PJM Interconnection, Inc., is a regional transmission authority established in 1927 that "ensures the reliability of the largest centrally dispatched control area in North America by coordinating the movement of electricity in all or parts of Delaware, Illinois, Maryland, New Jersey, Ohio, Pennsylvania, Virginia, West Virginia and the District of Columbia." It is a regional transmission organization under Federal Energy Regulatory Commission (FERC) Order 2000, 65 Fed.Reg. 810 (2000).

has discriminated against interstate commerce." *Id.* at 455. Because the act discriminated against interstate commerce, the Court applied the strictest scrutiny and found that the State had failed to meet its burden to "justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id.* at 256.

At first glance, the provisions of Senate Bill 595 and House Bill 1016 appear to mirror those of the Oklahoma law at issue in *Wyoming v. Oklahoma*, in that they effectively require the use of a specified percentage of Maryland generated solar power unless in-state sources are unavailable. However, the nature of the solar market provides a basis for differentiation. As we understand it, virtually all solar power is produced by customer-generators who install solar generating systems for their own energy needs and sell the excess to their own electric company, under the net metering provisions or otherwise. It is also our understanding that the net metering program, which is expanded by Senate Bill 595 and House Bill 1016, is expected to provide a substantial portion of renewable energy portfolio standard credit for electric companies, and that technical barriers exist to the importation of solar energy from out-of-state to parts of the State. Thus, as a practical matter, the limitation to solar energy produced in the State does not have a de minimis effect, but no effect at all. To the extent that a solar energy producer might be created in the future with the ability to distribute solar energy in Maryland from out-of-state, a Commerce Clause problem might arise. For similar reasons, the limitation to in-state RECs can be justified because the problems to be addressed by the renewable energy portfolio standards program are most likely to be addressed by encouraging customers to install their own generating equipment in the State. If the various technical problems that currently prevent any significant level of interstate transmission of solar energy are resolved in the future, however, this provision also could lead to Commerce Clause problems at that point.

Finally, while Senate Bill 595 and House Bill 1016 were not cross-filed bills, they have been amended to be substantially the same. There are, however, differences between the two bills. In § 7-306(g)(2), the House Bill twice refers to an "eligible customer-generator" while in the Senate bill the second reference is to the "customer-generator." There are also minor differences in the titles. For example, the House bill, at page 2, line 23, contains the words "in a certain manner" and they do not appear in the equivalent provision of the Senate title.

Very truly yours,

/s/

Douglas F. Gansler
Attorney General

DFG/KMR/kmr

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Rob Garagiola
The Honorable Sue Hecht