Energy Clinic
Institute for Energy and the Environment

Vermont Law School
164 Chelsea Street, PO Box 96
South Royalton, VT 05068
802.831.1151

August 22, 2016

Derek Moore
U.S. Federal Trade Commission (FTC) Office of the Secretary
600 Pennsylvania Avenue N.W.
Suite CC-5610 (Annex B) Washington, DC 20580

RE: Solar Electricity Project No. P161200. Comments of Vermont Law School's Energy Clinic on the Federal Trade Commission's "Something New Under the Sun: Competition and Consumer Protection Issues in Solar Power" Workshop

Dear Mr. Moore:

Thank you for the opportunity to submit comments on the topics covered at the "Something New Under the Sun: Competition and Consumer Protection Issues in Solar Power" Workshop. The Workshop and request for comments raise important and timely discussion points. Our comments focus on the issues of consumer protection and competition among solar providers, as informed by our experience at Vermont Law School's Energy Clinic where we have observed and worked with various stakeholders engaged in the renewable energy development process in Vermont and various other states.

Summary

While both the Federal Trade Commission ("FTC") and Vermont's Attorney General's Office have issued helpful guidelines addressing consumer protection issues arising in the renewable energy development context, further efforts are required to educate the public and increase transparency in these transactions, together with an increased focus on enforcement. Our experience suggests that some solar providers continue to take advantage of consumers' poor understanding of increasingly complex contractual terms and issues surrounding renewable energy credits. This, in turn, impacts on fair competition among solar developers. Increased transparency and enforcement will strengthen the solar industry, protect consumers, and result in further growth in solar which offers important benefits for the environment.

Vermont Law School's Energy Clinic

Vermont Law School's Energy Clinic is a student staffed energy law and policy clinic that is a project of the Institute for Energy and the Environment within our top ranked environmental law program. The Energy Clinic assists communities across multiple states in developing community energy facilities that provide environmental and economic benefits for the local communities. As a result, we regularly work with various community members on the development of community solar projects, often directly owned by the community members. We regularly provide information to municipalities, community organizations, solar installers and other community members on strategies for developing solar in a manner that provides economic benefits to the communities while reducing their local carbon footprints. In this capacity, we have become aware of a number of competition and consumer protection issues affecting solar development.

Given the Energy Clinic's focus on community solar, we are particularly concerned about competition and consumer protection issues in the net metering context. In general, the Energy Clinic supports the continued development of net metering programs as an effective means of increasing the availability of local distributed renewable resources in a manner that treats all customers equitably and provides fair compensation for the value of the customer's solar energy. Many electric customers, private citizens, community organizations and business desire to reduce their carbon footprints and solar net metering is one of the available means for achieving this goal. We also believe that the availability of group and virtual net metering options are essential to make renewable energy more broadly available to all community members, including those who may not own their home but would like to have access to the benefits of net metering through projects such as community solar. We believe that increased transparency in these transactions on both financial terms as well as renewable energy credits is crucial to achieving these important goals.

Consumer Protection Issues

There are major information gaps for solar consumers that regularly place consumers in a position that results in them making decisions about procuring solar products without understand the true nature of the product they are purchasing. While solar companies generally understand the concept of RECs and what it means to decouple RECs from the electricity produced by a renewable energy facility, the general public is less educated on this concept. Our observations suggest that in many instances the problem goes well beyond a lack of information by the consuming public and increasingly appears to be an issue of companies engaging in unethical practices to knowingly deceive customers about the products they are purchasing. As the transactions involved become more complex, this issue becomes more acute.

Historically, one of the most convenient ways to reduce your impact on the planet was to contract with a local solar company to install solar panels at your home and interconnect them with your utility. As your solar system spun your electric meter backward, you would reduce

your utility bill and your carbon footprint through solar net metering. Your interaction with your solar installer was simple. The solar company installed your system, you paid the company upfront for the solar system, and you owned the solar system along with the rights to the renewable energy it produced. Today, new financing and purchase options have increased and these can be positive developments, except that often various companies take advantage of the complexity of these options with deceptive sales practices. While their customers believe they are getting solar energy, in fact, the company is instead selling their solar energy to a third party. This is because in many of these new financing arrangements the owner or developer of the solar system is selling the RECs to another third party, not the net metering customer, without clearly explaining to the customer the implications of not providing them the RECs. Often it goes beyond not providing a clear explanation of the transaction to the consumer; instead, the company throughout its marketing is regularly conveying the opposite, that the consumer is purchasing solar energy when in fact they are not.

Partly as a result of our advocacy, the Office of the Vermont Attorney General on December 8, 2015 provided official guidance to solar companies doing business in Vermont to avoid making deceptive claims for certain solar projects. "The recent proliferation of new solar projects also brings the potential for a new kind of deception," said Attorney General Sorrell. According to the Attorney General's Office, in certain solar project agreements, including most community solar or net metering credit purchase arrangements, the solar company owns the solar panels, instead of the consumer. Within some of these projects, the solar company also sells the RECs attributed to the electricity generated by those solar panels in a regional market in order to help finance the project. In such cases, the energy used by the consumer is not, legally speaking, renewable or solar energy, it is simply undifferentiated power or "null electricity." Therefore, solar companies may not state or imply that the energy consumed from such projects is "solar," "renewable," or "clean," and solar companies should have clear disclosures about the RECs. The Vermont Attorney General's Office warns "public statements, including those on websites or in print material, that solar energy is 'clean' or 'renewable' can be deceptive if the RECs are sold and there is no adequate disclosure about it. Disclosures must be proximate to the promotion of solar energy; disclosures on websites (such as on an "FAQ" page) are not enough." The Attorney General's Office in this guidance also noted that the Federal Trade Commission already has in place regulations prohibiting these deceptive practices.

While the Vermont Attorney General's official guidance on this issue was a clear and direct warning to companies it does not seem to have noticeably changed behavior or cleared up the confusion among consumers. Unfortunately, in some instances, customers have been constantly marketed with incorrect information and reducing the flow of the incorrect information hardly seems enough to prevent this practice. The companies continue to market that the customer can "go solar" or have "solar with no upfront cost," and even if they slowly change their ways consumer perceptions will continue to be incorrect and lead to purchases inconsistent with the customers' desires. Some of these players are unlikely to change their ways without stronger enforcement actions including penalties and requirements they participate in marketing campaigns to correct consumer perceptions about their products.

By way of example, while we first saw this problem locally with no upfront cost offers for participation in community solar projects[2] we have also seen a number of developers sell ownership shares in their community solar project but explain in their contracts or perhaps in the FAQs on their website, often very discretely, that the developer of the project, not the customer owner of the solar panels, retains the RECs. In a third example there was a company, partnered with a utility, who was using the sharing economy angle to install solar panels on a customer's home and then contractually sharing the net metering credits with other parties. While clearly marketed as a solar sharing opportunity, if you read the details in the contract you would learn that neither the solar host, nor its sharing partner, was legally purchasing solar energy. Instead this enterprising company was marketing the RECs to a third party for additional profit.

This problem is not limited to community or shared solar. Today, very large companies are leasing solar systems to customers on the customers' own roofs and the customers are participating in net metering, even getting credits on their utility bills labeled "solar credits," but the leasing companies retain ownership of the RECs while the customers often believe they have gone solar.[3] Since our clinic has been advocates on these disclosure issues we have heard from both customers who have unwittingly purchased these deceptive solar products, as well as their lawyers, asking for information on how to get out of both lease and purchase agreements. It is truly disheartening to witness our community members anguish over having unknowingly given up thousands of their dollars to purchase a share of a "community solar" system then to find out that they were not in fact purchasing solar energy. Unwinding these deals has not been easy for the customers or their lawyers.

A new and perhaps more troubling problem is on the horizon as commercial customers who have purchased shares of community or onsite solar, but not the associated RECs, now believe that they have gone solar. Some of these customers have tried to register their projects with EPA's green power partnership program only to find out that they cannot participate in the EPA program since they unknowingly did not purchase their RECs through their contractual arrangements. There are also growing examples of commercial customers advertising that they are "100% solar electricity" and themselves now violating state and federal laws which do not allow commercial customers to make these claims. There are real examples of companies unknowingly making these false green claims today. With the growth of leading companies doing direct purchases of solar and wind projects, including the RECs, what will these corporate environmental leaders think when they learn that their competitors may be making false green claims as a result of a deceptive solar agreement?

---

[2] One company clearly marketed their product as "Vermont Community Solar" and proclaimed that this is how renters and the low income could "go solar" but included a provision in the contract that the owner received any incentives or renewable energy credits and the customer "may not claim publicly" that they are using solar or renewable energy.

[3] It is not surprising that the customers are confused since the companies' internet pop-up ads, brochures, personal sales pitch, and name may all suggest that the customer is in fact purchasing solar energy even though the contracts are carefully worded to not legally convey those rights.

A final example that we have seen in various states is where state agencies offer incentives to solar customers to install solar, but through their agreement with the solar customer the state agency retains the RECs to count toward their state renewable portfolio standard goal. Since the state agency takes the RECs and the customer does not retain them they have not legally gone solar but this is often not clear to customer. The customer in installing solar on their roof or participating in a shared community project believes they have "gone solar" but have not. If this is a commercial customer and they make renewable energy claims it seems that they will be in conflict with FTC rules. We have seen cases where customers have unknowingly given up this right sometimes for a very modest state incentive.

Similarly, in the Vermont context, while the Energy Clinic is generally in favor of regulatory programs that incentivize in-state retirement of RECs generated in Vermont, we are concerned that Vermont's recently promulgated net metering rule will give rise to the same misunderstandings and misrepresentations as in the examples above. The Vermont Public Service Board recently promulgated new net metering rules which incorporate a REC price adjuster. The REC adjuster provides an economic incentive for facility owners to transfer the facility's RECs to the interconnecting utility, the utility will then retire those RECs in Vermont to comply with the utility's state mandated renewable energy standard ("RES") obligations. Under this scenario, the solar customer does not retain the RECs and therefore, as with the examples given above, cannot legally claim to that it is consuming solar electricity from the facility. Thus, while this new rule may have some positive influence on in-state renewable energy consumption, it will not eliminate the consumer protection issues discussed above. Improved transparence regarding the implications to customers of accepting state incentives is necessary.

Competition Issues

While we have discussed the important consumer protection issues regarding transparency over RECs, of equal importance is the impact that some of these deceptive practices have on fair competition among solar developers. As one example, at a regional community solar forum we participated in when asked by the moderator what the companies did with the RECs, half of the participants explained that they turned them over to the customer and the other half admitted that they kept them for sale to third parties. Prior to this question, it was not apparent from the companies' materials or presentations who retained the RECs. As noted early on in our comments, historically solar companies sold turnkey systems to their customers allowing them to legally go solar. Many companies in the solar industry maintain this tradition of providing their customers with additional solar energy that they own. These honest solar companies are being harmed by unfair competition because their customers cannot tell the difference between the companies who actually sell them solar energy compared to those who don't. Similarly, it is difficult for a farmer who follows organic practices to differentiate his product from the nonorganic farmer without transparent disclosure and effective enforcement. The solar company who is foregoing the revenue from third party REC sales is put at an unfair competitive disadvantage when their competitor is deceptive in their marketing. When a customer wants to reduce their carbon footprint through a solar purchase but does not do so

due to deceptive marketing the customer is harmed, the environment is harmed and the honest solar companies are harmed.

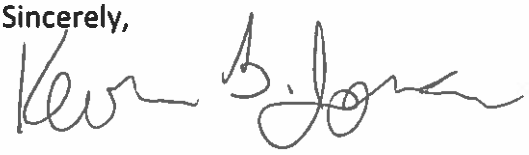
Conclusion

We should be concerned about the misleading and deceptive practices identified in this comment letter for a number of reasons. First, many solar customers are signing contracts believing they are purchasing clean, local solar energy when they are, unfortunately, being misled into doing the opposite. Second, by selling the solar energy to a third-party, companies using these deceptive practices to gain added revenue, which allows them to lower their prices and increase their profits, undercutting honest solar companies. Finally, the environment is being harmed when customers believe they are buying solar energy while in reality they purchase the relatively more polluting residual mix in its place.

In conclusion, while both the Federal Trade Commission and Vermont's Attorney General's Office have issued helpful guidelines addressing consumer protection issues arising in the renewable energy development context, further efforts are required to educate the public and increase transparency in these transactions, together with an increased focus on enforcement.

Thank you very much for the opportunity to comment.

Sincerely,



Kevin Jones
Professor and Director