October 19, 2015

TO:
Honorable Kathleen H. Burgess
Secretary to the Commission
New York State Public Service Commission
Empire State Plaza, Agency Building 3
Albany, New York 12223-1350
secretary@dps.ny.gov

FROM:
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RE: Case 15-M-0180 – In the Matter of Regulation and Oversight of Distributed Energy Resource Providers and Products // REPLY COMMENTS

Dear Secretary Burgess,

Please find the Solar Energy Industries Association's Reply Comments on the Public Service Commission Staff Proposal on rules as to Distributed Energy Resource oversight.

Sincerely,
/s/ Thomas P. Kimbis
Thomas P. Kimbis
Vice President & General Counsel
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Phone: 202-682-0556
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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

RE: **CASE 15-M-0180**

Dear Secretary Burgess,

The Solar Energy Industries Association (SEIA) respectfully submits these reply comments in regards to Public Service Commission Staff's proposed rules in Case 15-M-0180 as to Regulation and Oversight of Distributed Energy Resource Providers and Products.

As mentioned in our initial filing, New York's Reforming the Energy Vision (REV) seeks to modernize electricity markets and strengthen the grid, and part of the solution includes Distributed Energy Resources (DERs) such as solar. As the national trade association for solar energy that has been working across the leadership of the industry to build a self-regulatory framework, the Solar Energy Industries Association (SEIA) strongly encourages that New York allow SEIA and the solar industry to self-regulate, rather than subject the New York solar industry to well-intentioned but potentially costly regulations. SEIA cannot understate the importance of the actions taken by its Board of Directors in adopting the *SEIA Solar Business Code* (Code) on September 14, 2015.

Outside the formal scope of this docket, SEIA has been contacted by several offices within New York State to discuss the particulars of the Code, implications on enforcement, the application of consumer protection to community solar, solar finance mechanisms and consumer protection, and other similar matters. In each case, SEIA has engaged in a thorough dialogue with New York State personnel and officials, bringing its highest level corporate members and staff to the discussions, in order to move forward solar consumer protection at a groundbreaking level. New York is in a position to lead in solar consumer protection and provide not only that coverage to its citizens, but to stand as an example to its fellow states that have not progressed to the point New York has with its REV process. SEIA stands ready to be an active and engaged partner in furthering the state's efforts.

Self-Regulation

The comments filed by the City of New York recommend against self-regulation. It is unclear the intent behind this position, but note that the self-regulation proposed by SEIA, with its intention to work closely with state and local jurisdictions, provides a higher level of consumer protection than the rules proposed by PSC Staff (Staff) in this Matter. While the proposed rules govern a general DER transaction, the SEIA Code maximizes consumer protection by targeting solar-specific issues.

Self-regulation can be and has been successful. In fact, the Federal Trade Commission (FTC) is one of the biggest proponents of self-regulation. According to the FTC, well-crafted self-regulation can "be more prompt, flexible, and responsive when business models or technologies change" than government regulation.[1] It can help consumers achieve speedy resolution of their issues, assist governments and help free up their resources, and promote prompt compliance through industry "buy-in." In developing our self-regulation program, SEIA consulted with organizations that the FTC highlighted as having well-made self-regulation programs.

SEIA's intent is not to provide a shield behind which solar companies can hide, but to shine a bright light on any activity that provides less than full understanding of solar transactions by consumers. Since the filing of its initial comments, SEIA through its Consumer Protection Committee, along with contributions from close to two dozen attorneys, has developed a draft enforcement mechanism for the Code. SEIA's intent is to have this enforcement mechanism finalized by the second week of November 2015, and begin operation immediately.

Note that SEIA does not intend that self-regulation would mean an abdication of power by the state or other authority within New York. On the contrary, SEIA's proposed efforts would provide a framework through which the industry would reduce the burden upon state and local offices and budgets, provide insight that can only come from being judged by one's peers through the enforcement process, and work hand-in-hand with state and local authorities to ensure that the level of information sharing is sufficient for New York's needs. In some cases,

[1]Commissioner Maureen K. Ohlhausen, *Success in Self-Regulation: Strategies to Bring to the Mobile and Global Era BBB Self-Regulation Conference*, BBB Self-Regulation Conference (June 24, 2014).

SEIA anticipates determining that a matter is too expansive or involves potentially criminal behavior, and would direct those matters to the Attorney General or appropriate state or local contact.

Standard Contracts

As contained in SEIA's initial comments in greater depth, SEIA has spent some time discussing the pros and cons of standardized contracts, and decided that model, best practice forms – rather than mandatory ones – adopted by the marketplace are preferable. Innovation is at the heart of the solar energy success story of the last decade, and not only in the laboratory and production centers, but in the way systems are owned and financed. Hence, the industry has witnessed significant changes and progress in these areas that impact contract vehicles. SEIA anticipates this innovation to continue, and is in prime position to take part in this evolution, convene appropriate industry and public personnel, share information among all such parties, and develop best practice models that protect the consumer while not hampering economic progress.

Already, SEIA has formally adopted model lease and Power Purchase Agreement (PPA) contracts, first developed through a National Renewable Energy Laboratory (NREL) working group consisting of law firms, investment professionals, and other organizations in the solar space. These model contracts list material terms to solar transactions in clear language, and will help both consumers and companies. More than one hundred experts vetted the contracts, which help foster consumer understanding in contract terms due to standardization. The largest residential solar companies use these templates today, and SEIA is working to educate all of its member companies about them while remaining compliant with antitrust law. Broad adoption of best practice contracts will reduce transaction costs to both company and consumer alike in part because of ease of comparing contracts. The CPC will also draft a model cash sale contract and standard disclosure forms for all agreements that provide a snapshot to consumers upfront of key material terms such as monthly and total payments, warranty coverage, and expected output. All of these efforts are designed to increase consumer understanding and protection, while making the solar transaction easier and more transparent.

SEIA is happy to share the model, best practice disclosures, contracts and other forms it develops with all the states including New York, partner organizations, consumer groups and government associations. As noted, SEIA has already engaged with the National Association of Attorneys General, Better Business Bureau, Federal Trade Commission, Consumer Financial Protection Bureau, U.S. Department of Energy, U.S. Department of Treasury, State of New York, State of California, State of Oregon, Consumers Union, Consumer Reports, Direct Marketing Association, Renewable Energy Marketers Association, National Electricity Marketing Association, Solar Electric Power Association, and other government and nonprofit organizations. SEIA plans to work with dozens of other organizations to increase consumer understanding of solar through a variety of channels over the next year.

Innovation has been, and always will be, critical to the success of high-tech industries such as solar power. As noted in the initial brief, through REV, "New York is actively spurring clean energy innovation, bringing new investments into the State and improving consumer choice and affordability."[2] To do so, New York would not want to sacrifice companies' ability to innovate. New business models may make current "material" contract terms immaterial, and vice versa, or require a different set of disclosures. This means that contracts must adapt to the realities of new products and services. Community solar, with many permutations in its ownership structure, is a good example of a type of solar structure that can be distributed energy in some forms, but would be impossible and unwise to force into one contract type without stifling innovation and picking winners. Therefore, mandating a "standard contract" for all solar DER transactions is not realistic and not supported by the solar industry. Instead, SEIA will continue to promote model forms while keeping their usage voluntary in the hopes that over time, best practices will drive increased consistency.

Guaranteed Savings

Some commentary submitted by others in the initial round of responses indicated that solar companies should be held to providing payment in full of all anticipated energy savings for breach of warranty. Although SEIA agrees that solar companies should be held to any guarantees that they make to consumers, including guaranteed savings, we also urge caution that this not be

[2] http://www3.dps.ny.gov/W/PSCWeb.nsf/All/CC4F2EFA3A23551585257DEA007DCFE2?OpenDocument

construed too broadly by the state. A warranty could be breached in many different ways, and a breach does not necessarily mean that the consumer's remedy should automatically be the entirety of anticipated energy savings guaranteed in the sales contract. This would stand against years of contract law and remedies. Instead, a breach of warranty should be met with the same type of remedy provided in other areas of contract law – there is nothing specific to solar that demands development of a new lineage of legal remedies.

SEIA's Code already in place dives into this area using governing language such as (<u>emphasis added</u>):

2.1. As a guiding principle, each Company shall conduct all aspects of its business that touch on Consumers or their interests without any unfair, deceptive, or abusive acts or practices ("UDAAP").

3.1. No advertising claim by any Company should be deceptive or misleading, whether by affirmative statement, implication or omission, including claims:

3.1.2 About pricing, quality and <u>performance</u>.

5.2. Company representatives shall not make promises or guaranties about system performance, results, or services to a Consumer that exceed the promises or guaranties that will be in the Company's agreements with that Consumer.

As SEIA's new Code and enforcement process gain traction across the nation, SEIA will attempt to augment its Code and process to ensure it is adequately addressing the needs of the consumers, including those of New York, based on the types of complaints it receives.

Respectfully Submitted,
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