

45 YEARS



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August 22, 2016

Edith Ramirez, Chairwoman
Federal Trade Commission
400 7th Street SW
Washington, DC 20024

Re: Solar Electricity Project No. P161200

Dear Chairwoman Ramirez,

Public Citizen attended the June 21, 2016 FTC workshop *Something New Under the Sun: Competition & Consumer Protection Issues in Solar Energy* which addressed opportunities and challenges for households utilizing distributed solar resources. The workshop covered arrangements in which consumers lease their solar system from a corporate third-party. As a follow-up to the workshop, the FTC solicited comments on consumer protection concerns with the rooftop solar industry.

Public Citizen hereby submits comments concerning mandatory arbitration clauses that the solar leasing industry imposes upon consumers. ***The most important consumer protection that the FTC can promote is to issue a rule forbidding such mandatory arbitration clauses in solar lease contracts.***

About Public Citizen, Inc.

Public Citizen is a nonpartisan, not-for-profit research and consumer advocacy organization representing the interests of our more than 400,000 members and supporters across the United States. We promote policies that provide affordable, sustainable and reliable energy for our members. We intervene in cases before the Federal Energy Regulatory Commission and state utility commissions to advocate those electric power market reforms that ensure fair and affordable rates for household consumers. Public Citizen Energy Program Director Tyson Slocum serves on the U.S. Commodity Futures Trading Commission's Energy and Environmental Markets Advisory Committee, where he advises federal regulators on oil, natural gas, electric power and other energy markets. Slocum also frequently testifies before the U.S. Congress on a variety of energy and climate change related policies and regulations on behalf of consumers, and has testified at FTC hearings on energy market competition issues.

Distributed Generation Solar Power

Public Citizen supports policies that allow households to enjoy the financial benefits of distributed generation solar power. Technological innovations are transforming elements of the electric power industry away from centralized sources of generation and towards distributed

sources. Plummeting production costs, combined with a variety of financial incentive and tariff programs, have placed photovoltaic solar ownership in reach for many families. Concerns that state net-metering policies shift costs onto consumers lacking solar can be successfully addressed with basic reforms. Innovative financing arrangements such as third-party solar leasing have expanded rooftop solar access to families that cannot afford ownership. Leasing represented three-quarters of all new distributed solar deployment over the last year.

It is important to note, however, that as much as third-party leasing has expanded solar access, millions of low- and moderate-income families are shut out of the solar leasing market. Solar leasing is not a low-income access program, and it does not serve the needs of renters, those with poor credit, and those in structures unsuitable for rooftop solar. Additional government initiatives that prioritize *equitable* solar deployment are needed to ensure that *all* families will benefit from the technological revolution that will continue to occur in power markets. But that broad issue is beyond the scope of FTC jurisdiction, and is best remedied by state and other federal agency initiatives.

Solar Leasing, Consumer Risks, And Abusive Mandatory Arbitration Clauses

Leasing solar panels can provide financial benefits for families that own their homes but lack the money to buy panels. In a typical arrangement, the solar leasing company retains ownership of the panels, installing them for free with no money down, in exchange for the consumer's agreement to a long-term lease or power purchase agreement (PPA). The consumer pays the solar lease company each month for utility service in lieu of their local utility or other competitive supplier. And because the solar leasing company retains the financial value of any tax incentive (Investment Tax Credit, etc.) and regulatory incentive (Renewable Electricity Credits, net metering, etc.), it is possible for the leasing company to charge a monthly fee that may be less than what the consumer previously paid the utility or competitive supplier.

A result is that the solar leasing company, in effect, becomes the utility for the consumer. As the solar leasing market continues to grow and attract millions of consumers, some solar leasing companies will become larger than traditional utilities, in terms of the number of customers served. ***The terms of service and other leasing contract details essentially serve as utility service for the consumer.***

For a variety of reasons (some quite legitimate), solar leasing companies are not regulated by state utility commissions in the same way that traditional utilities or even competitive retail suppliers are. But because state utility commissions do not regulate the leasing contracts, consumers may find themselves in a regulatory-protection limbo should a dispute arise.

Solar leasing arrangements pose significant financial risks for families. The terms of the contracts typically leave the consumer financially responsible for panel removal and re-installation costs should any roof repairs be required during the lease term. The consumer is responsible for the lease if the house is sold and the new buyer elects not to take on the lease. And, importantly, the consumer is typically liable for any underlying changes in state net-metering or other incentive programs that could ultimately result in significantly larger monthly payments for the consumer.

Because utility commissions do not regulate to protect solar leasing consumers, it is critically important that households have every means of legal recourse available to them in the event of a disagreement. However, mandatory arbitration clauses are standard in solar leasing contracts (See Appendix I). Mandatory arbitration robs the consumer of the ability to resolve a dispute with a solar leasing company in a court of law; instead, the terms of the contract require use of a company-friendly arbitration process that advantages the solar leasing company and leaves the consumer unable to appeal.¹

These mandatory arbitration clauses, when combined with the lack of effective state utility regulatory oversight, expose consumers to unnecessary harm.

The FTC has authority to ban binding mandatory arbitration clauses through its general authority to regulate unfair and deceptive acts or practices,² since solar leasing contracts currently exist in a regulatory void, and most consumers are unaware that the terms of their contract essentially binds them to an unregulated utility. In light of the unique regulatory situation of the solar leasing industry, it is unfair and deceptive to deprive consumers of redress for grievances.

Conclusion

While third-party solar leasing has experienced explosive growth and has provided financial opportunities for some families, there are a number of significant risks associated with solar leasing contracts. State utility regulatory commissions do not have jurisdiction over the solar leasing industry in the same way they do over traditional utilities, a state of affairs that leaves consumers with inadequate protections. Unfortunately, the solar leasing industry standard contract features mandatory arbitration clauses, denying consumers access to U.S. courts in the event of a dispute. Given the lack of adequate state regulatory oversight over the solar leasing industry, it is necessary for the FTC to protect consumers by issuing a ban on mandatory arbitration contracts in the solar leasing industry.

Respectfully submitted,

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¹ www.citizen.org/arbitration

² 15 U.S.C. § 57a(a)(1)(B).

Appendix I. SolarCity Mandatory Arbitration Language

18. APPLICABLE LAW; ARBITRATION

PLEASE READ THIS SECTION CAREFULLY. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY AN ARBITRATOR INSTEAD OF A JUDGE OR JURY.

The laws of the state where your Home is located shall govern this Lease without giving effect to conflict of laws principles. We agree that any dispute, claim or disagreement between us (a "Dispute") shall be resolved exclusively by arbitration.

The arbitration, including the selecting of the arbitrator, will be administered by JAMS, under its Streamlined Arbitration Rules (the "Rules") by a single neutral arbitrator agreed on by the parties within thirty (30) days of the commencement of the arbitration. The arbitration will be governed by the Federal Arbitration Act (Title 9 of the U.S. Code). Either party may initiate the arbitration process by filing the necessary forms with JAMS. To learn more about arbitration, you can call any JAMS office or review the materials at www.jamsadr.com. The arbitration shall be held in the location that is most convenient to your Home. If a JAMS office does not exist within fifty (50) miles of your Home , then we will use another accredited arbitration provider with offices close to your Home.

If you initiate the arbitration, you will be required to pay the first \$125 of any filing fee. We will pay any filing fees in excess of \$125 and we will pay all of the arbitration fees and costs. If we initiate the arbitration, we will pay all of the filing fees and all of the arbitration fees and costs. We will each bear all of our own attorney's fees and costs except that you are entitled to recover your attorney's fees and costs if you prevail in the arbitration and the award you receive from the arbitrator is higher than SolarCity's last written settlement offer. When determining whether your award is higher than SolarCity's last written settlement offer your attorney's fees and costs will not be included.

Only Disputes involving you and SolarCity may be addressed in the arbitration. Disputes must be brought in the name of an individual person or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will not award relief for or against anyone who is not a party. If either of us arbitrates a Dispute, neither of us, nor any other person, may pursue the Dispute in arbitration as a class action, class arbitration, private attorney general action or other representative action, nor may any such Dispute be pursued on your or our behalf in any litigation in any court. Claims regarding any Dispute and remedies sought as part of a class action, class arbitration, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis. This means that the arbitration may not address disputes involving other persons with disputes similar to the Disputes between you and SolarCity.

The arbitrator shall have the authority to award any legal or equitable remedy or relief that a court could order or grant under this agreement. The arbitrator, however, is not authorized to change or alter the terms of this agreement or to make any award that would extend to any transaction other than yours. All statutes of limitations that are applicable to any dispute shall apply to any arbitration between us. The Arbitrator will issue a decision or award in writing, briefly stating the essential findings of fact and conclusions of law.

BECAUSE YOU AND WE HAVE AGREED TO ARBITRATE ALL DISPUTES, NEITHER OF US WILL HAVE THE RIGHT TO LITIGATE THAT DISPUTE IN COURT, OR TO HAVE A JURY TRIAL ON THAT DISPUTE, OR ENGAGE IN DISCOVERY EXCEPT AS PROVIDED FOR IN THE RULES. FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS PERTAINING TO ANY DISPUTE. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING ON THE PARTIES AND MAY BE ENTERED AND ENFORCED IN ANY COURT HAVING JURISDICTION, EXCEPT TO THE EXTENT IT IS SUBJECT TO

REVIEW IN ACCORDANCE WITH APPLICABLE LAW GOVERNING ARBITRATION AWARDS. OTHER RIGHTS THAT YOU OR WE WOULD HAVE IN COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.

19. WAIVER

Any delay or failure of a party to enforce any of the provisions of this Lease, including but not limited to any remedies listed in this Lease, or to require performance by the other party of any of the provisions of this Lease, shall not be construed to (i) be a waiver of such provisions or a party's right to enforce that provision; or (ii) affect the validity of this Lease.

20. NOTICES

All notices under this Lease shall be in writing and shall be by personal delivery, facsimile transmission, electronic mail, overnight courier, or certified, or registered mail, return receipt requested, and deemed received upon personal delivery, acknowledgment of receipt of electronic transmission, the promised delivery date after deposit with overnight courier, or five (5) days after deposit in the mail. Notices shall be sent to the person identified in this Lease at the addresses set forth in this Lease or such other address as either party may specify in writing. Each party shall deem a document faxed or sent via PDF as an original document.

21. ENTIRE AGREEMENT; CHANGES

This Lease contains the parties' entire agreement regarding the lease of the System. There are no other agreements regarding this Lease, either written or oral. Any change to this Lease must be in writing and signed by both parties. If any portion of this Lease is determined to be unenforceable, the remaining provisions shall be enforced in accordance with their terms or shall be interpreted or re-written so as to make them enforceable.

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