

M e m o r a n d u m

Date: May 20, 2008

To: The Commission
(Meeting of May 29, 2008)

From: Pamela Loomis, Deputy Director
Office of Governmental Affairs (OGA) — Sacramento

Subject: **AB 2863 (Leno) Third party solar generators (PPAs)
As Amended May 8, 2008**

**LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: SUPPORT WITH
TECHNICAL AMENDMENTS**

SUMMARY OF BILL:

- This bill would exempt an owner of solar generation from the regulatory provisions governing "electrical corporations" under certain circumstances.
- The bill appears to make it easier [or explicitly legal] for "third party" owners of solar generation to own and operate a solar system and sell electricity to residential utility customers. This model of equipment leasing or Power Purchase Agreements (PPAs) is already common among commercial facilities, and is gaining popularity in the residential sector.
- The bill provides that master-metered customers charge sub-metered users a rate not to exceed the otherwise applicable utility rate or the rate charged by the solar generator, whichever is lower.
- The bill also requires that third party owners of solar generation provide certain disclosures to residential utility customers that buy or lease the solar generation.
- This bill would create new law [Article 3, Sections 2868 and 2869 of Chapter 9 of the Public Utilities Code (PU Code)] and amend existing law [PU Code Sections 218 and 739.5].

SUMMARY OF SUPPORTING ARGUMENTS FOR RECOMMENDATION:

While the Energy Division supports the general direction of the bill to allow PPAs to support the expansion of the use of solar statewide and to insert consumer protection elements into those contracts, we feel that other aspects of the bill, which endorse and expand the reach of PPAs are potentially problematic. This bill requires additional legal analysis to ensure that it does not merely complicate the statute in order to achieve what the law appears to already allow: third party ownership of solar generation.

There are a few main concerns with this bill, as written:

- It expands the potential market for third party owners of solar generation by allowing them to sell power to “an association of a common interest development,” which may contradict the current legislative suspension of direct access.
- The disclosure requirements in this bill only apply to third party transactions with residential customers. Commercial customers potentially face the same risks in PPAs as residential customers, and it would seem appropriate to apply some sort of disclosure requirements across the board. Also, the disclosure requirements do not contain any regulatory enforcement mechanisms. According to the author, the only way to challenge a PPA provider that does not adequately disclose information in contract would be through litigation.
- This bill only addresses solar generation. It would be appropriate to address all distributed generation technologies that are able to use the PPA model and/or are eligible for ratepayer funded incentives and/or net energy metering tariffs.
- This bill appears to not exempt PPAs from the definition of "Electric Service Provider" (PU Code 218.3).

SUMMARY OF SUGGESTED AMENDMENTS:

- Remove the provision that an owner of solar generation be able to sell power to “an association of a common interest development.” [PU Code Section 2868 (d)(3)]
- Expand the disclosure requirement to include commercial customers. Amend proposed PU Code Section 2869 (a) to read:
 - An independent solar energy producer contracting for the sale of electricity or the lease of a generation system, to *any entity a person, an association of a common interest development*, for use on any property ~~a residence~~ shall include a disclosure to the buyer or lessee that, at a minimum, includes all of the following

- Expand bill to cover non-solar technologies.
- Modify the bill to exempt PPAs from the definition of both "Electrical Corporation" and "Electric Service Provider (PU Code 218.3). Otherwise, the "Independent Solar Energy Producers" would fall under the definition of an "Electric Service Provider" which is not allowed under the Direct Access suspension.

DIVISION ANALYSIS (Energy Division):

- **Exempts solar PPAs from the definition of an “electric corporation”**
- This bill would exempt an owner of solar generation from the regulatory provisions governing electric corporations if the solar generation:
 - Is for its own use or the use of its tenants.
 - Is for the use of, or sale to, not more than two other corporations or persons *per generation system* solely for use on the real property on which the electricity is generated, *or on real property immediately adjacent thereto.*
 - *Is for the use of, or sale to, an association of a common interest development solely for the use by, or sale to, its members or their tenants, and solely for use on the real property on which the electricity is generated, or on real property immediately adjacent thereto.*
 - Is for sale or transmission to an electrical corporation or a local or state agency.
- Current statute (PU Code Section 218) already provides an exemption from the definition of an electric corporation for generation “from other than a conventional power source” that meets any of the first, second or fourth bullet points. This bill makes two meaningful changes:
 - It calls out solar generation specifically and clarifies that the sale to not more than two other corporations or persons applies *per generation system*. This effectively endorses the PPA model, since PPAs often own multiple solar generation systems at multiple sites and sell the electricity to the host at each site. We currently understand that most PPAs avoid this concern by legally setting up as separate "special purpose vehicles" – and therefore there is never more than one system owned by a given entity.
 - It also includes a new provision for the sale to "an association of a common interest development." A common interest development, as defined, is limited to a community apartment project, a condominium project, a planned development, or a stock cooperative. This provision has been included to try to allow condo associations to site a solar project on common property (e.g. the roof of the commonly owned poolhouse); however, it is unclear why this provision is so critical. It may contradict the current legislative suspension of direct access if the solar generation were to use this provision

to sell electricity to more than two parties in “an association of a common interest development.”

- **Establishes a price cap for sub-metered tenants in master-metered properties.**
The bill provides that master-metered customers charge sub-metered users a rate not to exceed the otherwise applicable utility rate or the rate charged by the solar generator, whichever is lower. Currently, master-metered customers charge sub-metered users a direct pass through price equal to the otherwise applicable utility rate. This bill intends to ensure that master-metered customers pass all savings associated with solar power from a third party owned system directly to sub-metered users. It furthermore protects sub-metered users from ever having to pay a price for solar generation that exceeds the utility rate. The California Public Utilities Commission (CPUC) existing policy does not allow sub metering, except with a few limited exceptions. This provision of the law would not have much effect unless and until the CPUC made exemptions for sub-metering for solar systems.
- **Provides disclosure requirements for residential PPAs**
This bill would require PPA providers to disclose certain information in all contracts with residential parties. A notice of these contracts would have to be recorded against the property title to the property where the solar generation is installed. The following disclosure information would be required:
 - A good faith estimate of the kilowatthours to be delivered by the generation system.
 - A plain language explanation of the terms under which the pricing will be calculated over the life of the contract and a good faith estimate of the price per kilowatthour.
 - A plain language explanation of operation and maintenance responsibilities of the contract parties.
 - A plain language explanation of the disposition of the generation system at the end of the term of the contract.

PROGRAM BACKGROUND:

- **PPA model:** Third party (PPA) ownership of solar generation is increasingly popular in California. PPAs enable building owners to enjoy the benefits of solar generation through reduced energy costs without incurring the risks of owning and maintaining solar systems themselves. PPA providers typically purchase and install solar on a building roof and sell the electricity produced by that system to the building owner at a fixed price, usually at or below the utility rate, for up to 20 years. Currently PPA providers appear to be operating within existing law because they are set up as "special purpose vehicles" that sell "only to one customer" which is outside the

existing definition of an electrical corporation.¹ Since current statute limits the sale of electricity by a non-electrical corporation to “not more than two other corporations or persons,” PPA providers have tended to sign these contracts with single, owner-occupied buildings.

- Through March 31, 2008, forty four percent of the MWs in the California Solar Initiative appear to be third party owned systems, most of which are using some form of PPA model. According to the April 2008 Energy Division Staff Progress Report on the CSI, 355 out of 9,817 total California Solar Initiative projects, which account for 109 MW out of 249 MW, appear to be third-party-owned PPA systems². Eighty three percent of these projects, and the vast majority of the MWs, are from non-residential systems.
- There are some concerns about the PPA model as it has been currently practiced. The CSI program and the CPUC do not have access to PPA contracts, as they are covered by business to business contract law and not regulated by the CPUC. As such, there is nothing in the current statute to prevent an unscrupulous PPA provider from installing solar on an uninformed customer’s roof and selling them the power at above market rates. In fact, there has been recent press about buyers of PPAs that realized "higher bills after installing solar"; these cases were likely due to the customer not understanding the full financial ramifications of a signing a PPA while also maintaining utility service for some portion of the electrical service. There is nothing in law or CSI program rules that prohibits a provider from selling a customer power from a solar system – that combined with the remaining electricity bill – leaves the customer worse off than before the system.³ This concern would be reduced, though not eliminated completely, if PPAs were required to provide disclosures to residential customers as this bill proposes. **The CPUC could require disclosure as part of the CSI program, with or without this proposed change in law.**
- This bill would put certain obligations on PPA sellers but it does not require a role for the CPUC in enforcing that obligation. The CPUC could incorporate the spirit of this law in the CSI program rules, if it deemed necessary to do so. If the law passed, the CPUC could go beyond the minimum disclosure requirements as set forth in this law.

¹ PU Code 218 currently provides for the PPA model to exist, expressly because they are not covered by the definition of an electrical corporation which "does not include a corporation ... producing power ... for the use of or sale to not more than two other corporations ..." (PU Code 218)

² Third party ownership is not tracked in the CSI database, but there is a reasonable proxy of this based on looking at projects that have a “Host Customer” that is different from the “System Owner.” This data is based on that assumption.

³ See "Bill Rose After Panels Installed", April 16, 2008, *San Diego Union Tribune*, available at: http://www.signonsandiego.com/uniontrib/20080416/news_1n16solar.html

LEGISLATIVE HISTORY:

None.

FISCAL IMPACT:

None. This bill would not require any additional staffing needs at the CPUC.

STATUS:

The bill was currently on the Assembly Floor Consent Calendar.

SUPPORT/OPPOSITION:

Support: Solar Alliance (Sponsor)
Open Energy

Opposition: None on file.

STAFF CONTACTS:

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Date: May 20, 2008

BILL LANGUAGE:

BILL NUMBER: AB 2863 AMENDED
BILL TEXT

AMENDED IN ASSEMBLY MAY 8, 2008
AMENDED IN ASSEMBLY APRIL 8, 2008
AMENDED IN ASSEMBLY MARCH 25, 2008

INTRODUCED BY Assembly Member Leno

FEBRUARY 22, 2008

An act to amend ~~Section 218 of~~ Sections 218 and 739.5 of, and to add Article 3 (commencing with Section 2868) to Chapter 9 of Part 2 of Division 1 of, the Public Utilities Code, relating to ~~public utilities~~ electricity .

LEGISLATIVE COUNSEL'S DIGEST

AB 2863, as amended, Leno. ~~Public utilities: electrical corporations.~~ *Independent solar energy producers: master-meter customers.*

Under existing law, the Public Utilities Commission has regulatory authority over public utilities, including electrical corporations. An electrical corporation is defined as including every corporation or person owning, controlling, operating, or managing any electric plant for compensation within this state, except where electricity is generated on or distributed by the producer through private property solely for its own use or the use of its tenants and not for sale or transmission to others. *Existing law requires that, when gas or electric service is provided by a master-meter customer to users who are tenants of a mobilehome park, apartment building, or similar residential complex, the master-meter customer charge each user at the same rate which would be applicable if the user were receiving gas or electricity directly from the gas or electric company. Existing law creates further requirements for master-meter customers and for the corporations which provide service to them.*

This bill would require the master-meter customer to charge each user a rate not to exceed the rate that would be applicable if the user were receiving gas or electricity, or both, directly from the gas or electrical corporation.

This bill would additionally create an exception from the definition of an "electrical ~~corporation,~~" if a corporation ~~or person employs one or more photovoltaic generation systems for the generation of electricity for its own use or the use of its tenants, the use of, or sale to, not more than 2 other corporations or persons per generation system solely for use on the real property on which the electricity is generated in which case the sale price of the electricity shall not exceed the applicable tariff approved by the commission for the electrical corporation, or approved by the governing board of the local publicly owned electric utility, serving the real property, the use of, or sale to, an association of a~~

~~common interest development solely for use by, or sale to, its members or their tenants, in which case, the sale price of the electricity shall not exceed the applicable tariff approved by the commission for the electrical corporation, or approved by the governing board of the local publicly owned electric utility, serving the real property, or sale or transmission to an electrical corporation or state or local public agency~~
corporation" for an independent solar energy producer, as defined and meeting the requirements described below, employing one or more photovoltaic generation systems for the generation of electricity .

This bill would require an independent solar energy producer contracting for the sale of electricity or the lease of a generation system to a person or common interest development association for use in a residence to make certain disclosures to the buyer or lessee and to record a document that contains notice of the contract, as provided. The bill would require a master-meter customer of an electric utility who purchases electricity or leases a generation system from an independent solar energy producer, and who provides electric service to users who are tenants of a mobilehome park, apartment building, or similar residential complex, to charge each user of the electric service that is under a submetered system a rate for the solar generated electricity not to exceed the rate charged by the independent solar energy producer or the electric utility's rate for an equivalent amount of electricity, whichever is lower.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 218 of the Public Utilities Code is amended to read:

218. (a) "Electrical corporation" includes every corporation or person owning, controlling, operating, or managing any electric plant for compensation within this state, except where electricity is generated on or distributed by the producer through private property solely for its own use or the use of its tenants and not for sale or transmission to others.

(b) "Electrical corporation" does not include a corporation or person employing cogeneration technology or producing power from other than a conventional power source for the generation of electricity solely for any one or more of the following purposes:

(1) Its own use or the use of its tenants.

(2) The use of or sale to not more than two other corporations or persons solely for use on the real property on which the electricity is generated or on real property immediately adjacent thereto, unless there is an intervening public street constituting the boundary between the real property on which the electricity is generated and the immediately adjacent property and one or more of the following applies:

(A) The real property on which the electricity is generated and the immediately adjacent real property is not under common ownership or control, or that common ownership or control was gained solely for purposes of sale of the electricity so generated and not for other business purposes.

(B) The useful thermal output of the facility generating the electricity is not used on the immediately adjacent property for petroleum production or refining.

(C) The electricity furnished to the immediately adjacent property is not utilized by a subsidiary or affiliate of the corporation or person generating the electricity.

(3) Sale or transmission to an electrical corporation or state or local public agency, but not for sale or transmission to others, unless the corporation or person is otherwise an electrical corporation.

(c) "Electrical corporation" does not include a corporation or person employing landfill gas technology for the generation of electricity for any one or more of the following purposes:

(1) Its own use or the use of not more than two of its tenants located on the real property on which the electricity is generated.

(2) The use of or sale to not more than two other corporations or persons solely for use on the real property *on which the* electricity is generated.

(3) Sale or transmission to an electrical corporation or state or local public agency.

(d) "Electrical corporation" does not include a corporation or person employing digester gas technology for the generation of electricity for any one or more of the following purposes:

(1) Its own use or the use of not more than two of its tenants located on the real property on which the electricity is generated.

(2) The use of or sale to not more than two other corporations or persons solely for use on the real property on which the electricity is generated.

(3) Sale or transmission to an electrical corporation or state or local public agency, if the sale or transmission of the electricity service to a retail customer is provided through the transmission system of the existing local publicly owned electric utility or electrical corporation of that retail customer.

(e) "Electrical corporation" does not include ~~a corporation or person employing one or more photovoltaic generation systems for the generation of electricity for any one or more of the following purposes:~~

~~(1) Its own use or the use of its tenants.~~

~~(2) The use of, or sale to, not more than two other corporations or persons per generation system solely for use on the real property on which the electricity is generated, in which case, the sale price of the electricity shall not exceed the applicable tariff approved by the commission for the electrical corporation, or approved by the governing board of the local publicly owned electric utility, serving the real property.~~

~~(3) The use of, or sale to, an association of a common interest development, as defined in subdivision (c) of Section 1351 of the Civil Code, solely for use by, or sale to, its members or their tenants, in which case, the sale price of the electricity shall not exceed the applicable tariff approved by the commission for the electrical corporation, or approved by the governing board of the local publicly owned electric utility, serving the real property.~~

~~(4) - Sale or transmission to an electrical corporation or state or local public agency. - an independent solar energy producer employing one or more photovoltaic generation systems for the~~

generation of electricity pursuant to Article 3 (commencing with Section 2868) of Chapter 9 of Part 2.

(f) The amendments made to this section at the 1987 portion of the 1987-88 Regular Session of the Legislature do not apply to any corporation or person employing cogeneration technology or producing power from other than a conventional power source for the generation of electricity that physically produced electricity prior to January 1, 1989, and furnished that electricity to immediately adjacent real property for use thereon prior to January 1, 1989.

SEC. 2. Section 739.5 of the Public Utilities Code is amended to read:

739.5. (a) The commission shall require that, whenever gas or electric service, or both, is provided by a master-meter customer to users who are tenants of a mobilehome park, apartment building, or similar residential complex, the master-meter customer shall charge each user of the service at ~~the same~~ a rate not to exceed the rate ~~which~~ that would be applicable if the user were receiving gas or electricity, or both, directly from the gas or electrical corporation. The commission shall require the corporation furnishing service to the master-meter customer to establish uniform rates for master-meter service at a level ~~which~~ that will provide a sufficient differential to cover the reasonable average costs to master-meter customers of providing submeter service, except that these costs shall not exceed the average cost that the corporation would have incurred in providing comparable services directly to the users of the service.

(b) Every master-meter customer of a gas or electrical corporation subject to subdivision (a) who, on or after January 1, 1978, receives any rebate from the corporation shall distribute to, or credit to the account of, each current user served by the master-meter customer that portion of the rebate which the amount of gas or electricity, or both, consumed by the user during the last billing period bears to the total amount furnished by the corporation to the master-meter customer during that period.

(c) An electrical or gas corporation furnishing service to a master-meter customer shall furnish to each user of the service within a submetered system every public safety customer service ~~which~~ that it provides beyond the meter to its other residential customers. The corporation shall furnish a list of those services to the master-meter customer who shall post the list in a conspicuous place accessible to all users. Every corporation shall provide these public safety customer services to each user of electrical or gas service under a submetered system without additional charge unless the corporation has included the average cost of these services in the rate differential provided to the master-meter customer on January 1, 1984, in which case the commission shall deduct the average cost of providing these public safety customer services when approving rate differentials for master-meter customers.

(d) Every master-meter customer is responsible for maintenance and repair of its submeter facilities beyond the master-meter, and nothing in this section requires an electrical or gas corporation to make repairs to or perform maintenance on the submeter system.

(e) Every master-meter customer shall provide an itemized billing of charges for electricity or gas, or both, to each individual user generally in accordance with the form and content of bills of the

corporation to its residential customers, including, but not limited to, the opening and closing readings for the meter, and the identification of all rates and quantities attributable to each block in the applicable rate structure. The master-meter customer shall also post, in a conspicuous place, the applicable prevailing residential gas or electrical rate schedule, as published by the corporation.

(f) The commission shall require that every electrical and gas corporation shall notify each master-meter customer of its responsibilities to its users under this section.

(g) The commission shall accept and respond to complaints concerning the requirements of this section through the consumer affairs branch, in addition to any other staff that the commission deems necessary to assist the complainant. In responding to the complaint, the commission shall consider the role that the office of the county sealer in the complainant's county of residence may have in helping to resolve the complaint and, where appropriate, coordinate with that office.

SEC. 3. Article 3 (commencing with Section 2868) is added to Chapter 9 of Part 2 of Division 1 of the Public Utilities Code , to read:

Article 3. Independent Solar Energy Producers

2868. The following definitions shall apply for purposes of this article:

(a) "Association of a common interest development" means a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development as defined in subdivision (c) of Section 1351 of the Civil Code.

(b) "Electric utility" means an electrical corporation as defined in Section 218, a local publicly owned electric utility as defined in Section 9604, or an electrical cooperative as defined in Section 2776.

(c) "Generation system" means any configuration of photovoltaic generation that has a single interconnection with the electric utility transmission or distribution network.

(d) "Independent solar energy producer" means a corporation or person employing one or more photovoltaic generation systems for the generation of electricity for any one or more of the following purposes:

(1) Its own use or the use of its tenants.

(2) The use of, or sale to, not more than two other corporations or persons per generation system solely for use on the real property on which the electricity is generated, or on real property immediately adjacent thereto.

(3) The use of, or sale to, an association of a common interest development solely for use by, or sale to, its members or their tenants, and solely for use on the real property on which the electricity is generated, or on real property immediately adjacent thereto.

(4) Sale or transmission to an electrical corporation or a local or state agency.

(e) "Real property" means a single parcel of land.

2869. (a) An independent solar energy producer contracting for the sale of electricity or the lease of a generation system, to a

person, or an association of a common interest development, for use in a residence shall include a disclosure to the buyer or lessee that, at a minimum, includes all of the following:

(1) A good faith estimate of the kilowatthours to be delivered by the generation system.

(2) A plain language explanation of the terms under which the pricing will be calculated over the life of the contract and a good faith estimate of the price per kilowatthour.

(3) A plain language explanation of operation and maintenance responsibilities of the contract parties.

(4) A plain language explanation of the disposition of the generation system at the end of the term of the contract.

(b) An independent solar energy producer contracting for the sale of electricity or the lease of a generation system, to a person, or an association of a common interest development, for use in a residence shall record a notice of that contract against the title to the real property on which the electricity is generated, and against the title to any adjacent real property on which the electricity will be used, in the office of the county recorder for the county in which the real property is located. The notice shall include the name, address, and telephone number of the independent solar energy producer, identify whether the contract is a contract for the sale of electricity or the lease of a generation system, and provide the dates on which the contract commences and terminates.

(c) A master-meter customer of an electric utility who purchases electricity or leases a generation system from an independent solar energy producer, and who provides electric service to users who are tenants of a mobilehome park, apartment building, or similar residential complex, shall do both of the following:

(1) Charge each user of the electric service that is under a submetered system a rate for the solar generated electricity not to exceed the rate charged by the independent solar energy producer or the electric utility's rate for an equivalent amount of electricity, whichever is lower.

(2) Comply with the provisions of Section 739.5 or 12821.5, and any rules set forth by an electric utility for master-meter customers.