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To:
Pennsylvania Senate Agriculture and Rural Affairs Committee
Sen. Elder Vogel, Chairman
Sen. Judy Schwank, Democratic Chairwoman

Re: Utility Scale Solar Development and Agricultural Land
Comments for Hearing of the Pennsylvania Senate Agricultural and Rural Affairs Committee

Dear Chairman Vogel, Chairwoman Schwank, and Honorable Committee Members:

Thank you for the opportunity to speak before you and provide testimony regarding utility scale solar development in Pennsylvania and more specifically, regarding leasing practices in the solar industry.

My name is Jacob H. Kiessling, Esq. and I am an attorney at the Harrisburg law firm of Mette, Evans & Woodside, P.C., where I am a member of the firm's Agricultural Law practice group, along with my colleagues, Gary J. Heim, Esq. and Jennifer Denchak Wetzel, Esq. Our practice group has a long-standing relationship with the Pennsylvania Farm Bureau ("PFB"), through which we provide legal services to PFB members across the Commonwealth. Due to this close relationship with PFB, I began receiving calls nearly three years ago from landowners approached by solar companies who were in need of representation in negotiating solar ground lease proposals. Those calls became increasingly frequent and soon my practice focused primarily on solar lease negotiation and issues related to solar energy development. To date, I have had the opportunity to represent hundreds of landowners across the Commonwealth and speak with countless others regarding the leasing of their properties for both utility-scale and community-scale solar energy development. While I have become familiar with the solar industry and development, I do not hold myself out as an expert in solar energy development, production, or engineering. I do, however, have extensive experience negotiating solar leases and addressing the issues and concerns present in most every solar lease proposal and have come to be extremely familiar with leasing practices of solar companies engaging landowners in Pennsylvania. My testimony today reflects my experience and observations in working with solar companies on behalf of landowners and my opinions regarding the leasing practices of the solar industry.

While I generally see solar development as a potentially valuable opportunity for landowners and for Pennsylvania to promote the growth of renewable energy production, I still have reservations. Given the length of a typical solar lease and the unavoidable presence that a solar facility will have on a landowner's property, it is imperative that a landowner enters into a lease agreement that protects their property, and the rights and interests of themselves and generations after them. I have had the opportunity to work with many different solar companies and I have found that

many truly care about addressing the concerns of landowners and desire to reach terms which can serve as the foundation for an amicable relationship. Unfortunately, I have also worked with solar companies that have been dismissive and apathetic towards landowners' concerns.

There are a number of misconceptions that landowners have when they reach out to me to discuss a solar lease proposal for the first time. Often these are the result of misrepresentations made by solar company representatives, including assertions that the company will lease the entirety of the landowner's property, that the company will pay all of the real estate taxes assessed against the property, and that the company will remove the solar facility at the end of the lease term and the landowner need not be concerned about the company failing to do so. These representations are almost always at odds with the terms contained in the written lease proposal received by the landowner. At times these provisions are not even mentioned in the proposed lease. The unfortunate reality is that these misrepresentations are sometimes enough to sway a landowner to sign a proposed option or lease agreement without consulting an attorney. In the event that such landowners find themselves with a solar project on their properties, it is unlikely they will receive the payments or protections they believed they were entitled to.

In addition to the previously described misconceptions there are many issues that arise in a solar lease negotiation. Some of the most critical issues include: (i) the ability of the solar company to lease only a portion of a property and pay rent on a substantially smaller acreage than was represented to the landowner and non-interference provisions which confer rights to the solar company outside of the portions of the property they are leasing and which limit the rights of the landowner to use those unleased portions of the property; (ii) annual escalation of rental payments among lease offers; (iii) real estate tax provisions with respect to disqualification from Clean and Green enrollment and increases in real estate taxes; and (iv) decommissioning obligations and financial security for decommissioning of solar facilities on the property.

I. Reductions in Acreage of Property Actually Leased by Solar Companies

It is common that landowners are told that their entire property is of interest to the solar company and that the company will lease all (or nearly all) of the acreage of the property. Every lease, however, provides the solar company with the right to reduce the acreage of the property which they ultimately lease and pay rent for.

In one particular instance, I was approached by a landowner who signed an option agreement based on the solar company's representation that it would lease the entirety of his 130 acre tract. When the option was exercised, however, the company notified the landowner that it would only be leasing and paying rent for ten acres of his property. Further the company had identified a number of easements that it would be placing across the unleased portions of the property for no additional compensation. To make matters worse, the company had substantial non-interference provisions which limited the landowner's ability to farm the unleased remainder of his property despite receiving no payments for that portion of his property. The landowner was unfortunately locked in.

Without careful negotiation of a lease to guarantee payments based on a minimum number of acres and without understanding what the company truly believes it can use on a particular property, any landowner could find themselves in this situation.

II. Annual Escalation of Rental Payments

As with any long-term commercial ground lease, many solar leases provide for some rate of annual escalation of rental payments. Unlike royalty payments under gas leases which are tied to production and pricing, rent payments under solar leases are not dependent on production or energy prices. Rent rates in a solar lease are set for the lease term and without annual escalation provisions, may be grossly inadequate years into the lease term. Although annual escalation of payments is commonly offered, I have seen a number of companies who do not offer any annual escalation.

Even if annual escalation of rental payments are provided for under the lease, they are typically at a set rate of one and a half percent (1.5%) to two percent (2%) per year. At such rates, rental payments over the term of the lease are unlikely to keep pace with inflation. While many companies point to the recent average annual inflation in the United States which, based on CPI increase since 2008, can be calculated at 1.8%, the bigger picture indicates that much greater inflation is likely. Between January 1971 and January 2021, the average annual CPI-U (all urban consumers) increased an average of 4.04% per year. In this broader sample size, it is clear that lease rates (presuming they are fair from the start) will not keep pace with inflation over the course of the lease term.

III. Real Estate Tax Provisions

Typically, solar developers represent to landowners that they will pay all increases in real estate taxes and that they will cover any roll-back taxes due to disqualification of the landowner's property from Clean and Green enrollment. The pertinent lease provisions typically do not provide for such real estate tax obligations of the solar company.

I frequently see provisions that say if the property is disqualified from Clean and Green the solar company will pay the roll-back taxes attributable to the portion of the property that they have determined to lease. In the situation of a 300 acre parcel on which the solar company is using 100 acres for the installation of solar panels, the landowner would be obligated to pay two-thirds of the roll-back taxes as the disqualifying event would result in the entire property being subject to roll-back tax. Even more troubling is the situation when the property subject to the solar lease is one of multiple properties enrolled in Clean and Green on a common application. In this situation, a disqualifying event on the single property subject to the solar lease can trigger roll-back tax on all of the commonly enrolled properties. Many leases also ignore increases in real estate taxes due to assessments being made based on the fair market assessed value rather than the clean and green assessed value following a disqualification of the property from enrollment. These tax increases could be significant and are not what the landowner bargained for.

From a legislative standpoint, addressing the use of agricultural land for solar development would afford a significant cost savings to solar companies and protect landowners from inadequate lease protections from roll-back tax liability.

IV. Decommissioning Obligations and Financial Security

Perhaps the most important issues in any given solar lease, in the absence of legislation addressing the same, involve the obligations of the solar company to decommission the solar facility and restore the landowner's property, and to deliver financial security to secure the performance of the solar company's decommissioning obligations.

Many solar lease proposals contain minimal and vague provisions regarding the company's obligation to decommission the project and restore the property. Concerns such as removal of below-grade improvements to sufficient depth for agricultural operations, repair or replacement of field tile systems, removal of roads, and repair of disturbed land are all obligations that should be addressed to protect the landowner from regaining possession of their property in a condition that is unsuitable for agricultural operations.

While it is important to establish standards for what a company's decommissioning obligations entail, it is equally, if not more, important to require adequate financial security to protect the landowner from a failure of the company to complete its decommissioning obligations. Very few leases provide any bonding requirements as proposed by a solar company. When raised and bonding/security requirements are proposed, two major issues tend to arise.

The first major issue that tends to arise when negotiating financial security for decommissioning obligations is the timing of delivery of the financial security. Many companies seek to defer delivery of financial security until 15 or more years into the lease term. The solar industry tends to argue that there is little risk of termination or abandonment of a solar facility in the first 15 years of a solar lease due to warranties on infrastructure, secured debt of financing parties, and guaranteed revenue under power purchase agreements. While I do not disagree with their position, none of their arguments guarantee that a solar facility cannot and would not be abandoned or that a termination may not occur during those years. In the case of such an early termination, the risk of a solar company failing to complete its decommissioning obligations is borne solely by the landowner. For that reason, I believe it is imperative that companies be required to deliver financial security at the time that construction commences or upon completion of construction at the very latest.

The second major issue involves the determination of the amount of financial security required. Nearly every solar company desires a "net salvage value" standard. This standard provides that the financial security delivered by the company will be equal to the estimated cost to remove the solar facility and restore the property, less the estimate salvage value of the solar facility. I have read a number of industry studies and reports which all reach the same conclusion: that the salvage value of a utility-scale solar project exceed the estimated cost of decommissioning by a significant margin. The problem for landowners is that salvage value is almost certainly worthless to them. Due to the landowner's waivers of liens against the solar facilities, secured rights of financing parties, and the lack of technical knowledge and capability to properly

decommission the solar facility, the landowner will have little or no chance of actually recouping the salvage value of a solar facility should the decommissioning of the project fall to them. For these reasons, the amount of financial security must not consider salvage value and must be based solely on estimated costs to perform the decommissioning obligations of the company. Further these amounts should be periodically re-evaluated in order to ensure adequacy of the security in later years of the lease term.

I hope that my comments and shared observations regarding solar leasing practices in the Commonwealth prove helpful for the Committee in evaluating the benefits of utility-scale solar development and developing policies and legislation as the solar industry continues to grow its presence in the Commonwealth. I am happy to further discuss the issues I have raised today and others which I did not have the opportunity to discuss.

Very truly yours,

Jacob H. Kiessling