

The FTC's Entry Into Rooftop Solar Consumer Protection

Law360, New York (July 15, 2016, 11:21 AM ET) –

The rapid growth of homegrown solar energy solutions is leading to an environment where an uneven patchwork of policies may lead to inconsistent growth for solar power, according to the chairwoman of the Federal Trade Commission. To learn more about how consumers are potentially being impacted by the “complex matrix of laws, regulations, policies, subsidies and incentives” at play, the FTC held a workshop on June 21, 2016, to examine consumer protection issues in the rooftop solar industry — also known as solar “distributed generation.” Beyond exploring a wide range of issues related to rate design, competition and state net metering policies, the workshop signaled a growing interest among federal and state regulators to address — potentially through the issuance of binding regulations — perceived consumer protection challenges in the industry.

Debating the Costs and Benefits of Rooftop Solar

In a panel on retail net metering — which compensates solar generation host customers for the net electric energy injected into the grid at the rate that is tied to the price nonsolar customers pay for their delivered electricity — participants expressed disagreement on fundamental questions about the costs and benefits of rooftop solar, as well as appropriate levels of compensation for solar customers.

A particularly contentious issue was whether retail net metering overcompensates rooftop solar owners. Some panelists argued that solar distributed generation imposes more costs than benefits on the electric distribution grid and insisted that solar customers need to pay their fair share to maintain, update and expand the grid. Others contended that rooftop solar creates system-wide positive benefits and externalities, and that accusations of cost-shifting from solar to nonsolar customers are not backed up by substantial evidence.

In response to this disagreement, FTC staff suggested that the issue might be addressed by adopting New York State’s proposed locational marginal pricing rate, which takes into account the time of day and any other benefits that result from the net energy produced by the distributed resource. As the debate on retail net metering continues, we expect state public utility commission ratemaking proceedings around the country involving rooftop solar to remain highly contentious. In the meantime, many panelists seemed to agree that gathering additional data would be helpful to gain a better understanding of the true costs, benefits and systemic effects of distributed generation resources like rooftop solar.

Role of FTC and States in Promoting Rooftop Solar Consumer Protection

Another key issue being debated by stakeholders is the role of the FTC in promoting consumer protection in the rooftop solar industry and how that role might affect actions taken by state regulatory authorities (such as state public utility commissions) in the same area.



Mark Kalpin



Joseph Jerome



Patrick Bernhardt

The FTC has taken the position that it is “uniquely positioned” to ensure that “consumers are well-informed about its pros and cons and the options available to them” regarding rooftop solar generation. In this regard, the FTC emphasized that its authority to target deceptive advertising was highlighted in its Green Guides and Guides for the Use of Environmental Marketing Claims — which are applicable to the marketing of rooftop solar — and noted that it previously issued “Solar Power for Your Home” guidance for consumers. The FTC also noted that it recently commenced an enforcement action against a company for making allegedly illegal robocalls to generate leads for solar panel installation companies.

Notwithstanding the FTC’s interest in and prior actions addressing rooftop solar, a number of state officials argued that primary regulatory responsibility for regulating the rooftop solar industry should lie with the states, given their primary jurisdiction over electric generation and retail electric sales. Those officials, however, acknowledge that there is a potential role for the FTC to work with the states to identify best practices for the rooftop solar industry, as well as to develop templates for consumer communications.

Recognizing the potential for new regulations to be issued — at either the federal or state level — to address consumer protection issues in the rooftop solar industry, the Solar Energy Industry Association (SEIA) has recently taken several proactive steps, including publishing a Solar Business Code and issuing standardized disclosure forms for lease and power purchase agreements. Whether the SEIA’s forms are sufficiently comprehensive, and will be adopted by a majority of industry members, to constitute “best industry practices” remains an open question.

Identification of Specific Consumer Protection Priorities

Separate from the jurisdictional issues, panelists at the workshop agreed that it was important to curb deceptive trade practices in solar advertising and ensure that consumers have access to reliable and digestible information. A recurring theme was that consumers often lack clear information when making solar purchasing decisions, especially in terms of comparing offers, understanding and negotiating contracts, and dealing with bad actors.

Specific questionable practices identified included:

- Misleading advertising, such as website advertising for “free solar panels;”
- High-pressure sales tactics and biased information from solar installers;
- Lack of standardization in solar energy products and services, which can make it hard for consumers to understand the quality of the product and easier for salespeople to embellish their pricing quotes; and
- Anticompetitive efforts to promote proprietary products and limit consumer choice.

In addition, one panelist noted that estimates of the “repayment period” raise particular concerns, as the repayment period can vary greatly due to divergent assumptions about escalation rates for electricity prices and assessments of regulatory

risk.

Implications for Businesses in the Residential Solar Industry

While the FTC is only beginning to examine consumer protection issues in the rooftop solar industry, the workshop is a clear indicator that the FTC plans to be more active in this industry in the future. While certain subjects — like net-metering policy and financial incentives for solar generation — may fall outside the FTC’s jurisdiction, consumer protection issues lie squarely within the commission’s ambit. As a result, companies should both stay abreast of the FTC’s actions as it continues to evaluate consumer protection-related issues in this area, and take appropriate steps to ensure that their marketing practices and contracts conform to applicable law and best industry practices.

—By Mark C. Kalpin, Joseph W. Jerome, Patrick Bernhardt and Mark Hanin, [WilmerHale](#)

[Mark Kalpin](#) is a partner in WilmerHale’s Boston office, specializing in energy, environmental and natural resource law. He is co-chairperson of the firm’s energy practice group. [Joseph Jerome](#) and [Patrick Bernhardt](#) are associates in WilmerHale’s Washington, D.C., office. Both advise companies on a broad range of consumer protection and privacy laws. Mark Hanin is a summer associate in WilmerHale’s Washington, D.C., office, and a J.D. student at Yale Law School.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.