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BY EMAIL (to [records@utc.wa.gov](mailto:records@utc.wa.gov))

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**RE: Comments of Renewable Northwest Project and Northwest Sustainable Energy for Economic Development Docket UE-112133—Commission’s April 17, 2013 Notice of Opportunity to Submit Written Comments on the Rulemaking to Consider Proposed Changes in Existing Interconnection Rule, WAC 480-108**

Renewable Northwest Project (“RNP”) and Northwest Sustainable Energy for Economic Development (“Northwest SEED”) support adoption of the proposed rules and appreciate the contributions of the Model Rule Workgroup, the Commission, and all stakeholders. In these final comments, RNP and Northwest SEED reiterate our support for the proposed rules’ inclusion of third-party ownership in the definition of a net-metered interconnection customer. In addition, we urge the Commission to use its rule adoption order to signal that a third-party owner of net-metered solar systems, in factual circumstances defined here, would not be subject to regulation by the Commission.

Clarifying the situation for third-party ownership of distributed generation facilities is among the most important interconnection clarifications identified by the Interstate Renewable Energy Council (IREC) in their model procedures.<sup>1</sup> Furthermore, the National Governors’ Association listed clarifying regulations for third-party ownership as one of the top ten state policy innovations that can help advance renewable energy goals.<sup>2</sup> This means clarifying not only that third-party ownership of net-metered systems is *permitted*, but also that third-party owners of on-site generating facilities will not be subject to regulation as public service companies under Washington law. Without the second element, expansion of third-party ownership—and therefore of net-metering and distributed solar generally—is likely to be limited in Washington.

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<sup>1</sup> Interstate Renewable Energy Council, *Model Interconnection Procedures* (2009 Ed.), at p. 1, available at <http://irecusa.org/wp-content/uploads/2010/01/IREC-Interconnection-Procedures-2010final.pdf>.

<sup>2</sup> National Governor’s Association Issue Brief and White Paper, “Ten Trends to Track: State Policy Innovations to Advance Energy Efficiency and Renewable Energy.” #7-Clarify Regulations for Third-Party Owners of Solar PV.

RNP and Northwest SEED are aware that the Commission cannot make a final, binding determination of jurisdiction over all third-party owners in a rule adoption order. It is, however, appropriate for the Commission to use its rule adoption order to signal its view of the law surrounding its new rules. The Commission's view of the background law affects the practical impact of the Commission's amendment to the "interconnection customer" definition. By addressing how it might apply the law to the generic third-party ownership scenario presented below, the Commission can prompt the next steps toward clarifying Washington's treatment of third-party owners.

In the comments that follow, RNP and Northwest SEED: (1) reiterate their reasons for supporting clarification of third-party ownership of net-metered facilities; (2) describe the most common third-party ownership business model; and (3) explain, based on Washington case law, why a business following that model would not be subject to Commission jurisdiction.

### **1. Third-party ownership democratizes and expands distributed solar.**

By statute, Washington has declared a public interest in encouraging private investment in renewable energy resources. RCW 80.60.005. Facilitating the third-party ownership business model would make net-metered on-site electricity generation more affordable for more customers in Washington.<sup>3</sup> Without third-party financing for on-site generating facilities, low to moderate income families are shut out of the market for this technology. Third-party ownership has been shown to be the most popular method for financing residential generating facilities: for example, in mature solar markets such as California, Arizona and Colorado, third-party ownership has become the dominant model for financing residential facilities.<sup>4</sup> By giving Washingtonians more options for investing in renewable energy, third-party ownership expands solar markets and advances the state's energy, climate, and economic development goals.

### **2. The third-party ownership business model is well known.**

We focus here on the third-party ownership leasing/power purchase agreement ("PPA") business model that has transformed the solar market in the United States.<sup>5</sup> This solar financing model is permitted without regulation as a public service company in twenty-two states, D.C., and Puerto Rico.<sup>6</sup>

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<sup>3</sup> See, e.g., Dryry, E. et al., *The transformation of southern California's residential photovoltaics market through third-party ownership*. Energy Policy (2012) doi:10.1016/j.enpol.2011.12.047, available at [http://www.academia.edu/1299862/The\\_transformation\\_of\\_southern\\_Californias\\_residential\\_photovoltaics\\_market\\_through\\_third-party\\_ownership](http://www.academia.edu/1299862/The_transformation_of_southern_Californias_residential_photovoltaics_market_through_third-party_ownership).

<sup>4</sup> CSI Database, Arizonagoessoalr.com, GTM U.S. Solar Market Insight 2012 Fig 2-8.

<sup>5</sup> Third-party ownership clarification is also important to several methods for developing locally-owned, community scale solar installations. These are an important reason for the Commission to clarify its view of third-party regulation. We focus on the

Under this model, the third-party business uses its access to investor resources and tax equity to purchase solar PV systems on behalf of property owners. The third-party provider receives all rebates, tax credits and depreciation; in turn, the property owner hosts a solar installation for no or low up-front cost, receiving its electricity output in exchange for a monthly lease fee or a per kWh charge for the electricity produced. The third-party owner also provides a warranty, production guarantee, system monitoring and operations and maintenance over the typical 20-year lease or PPA term. At the end of the term, the property owner can renew the agreement, purchase the system at fair market value, or have it removed at no cost.

While third-party solar providers generally market to an entire utility service territory, they only offer solar systems to property owners who meet defined criteria. Companies have discretion to serve and customers have many different choices for going solar. Commonly, customers will not be able to acquire a solar installation under the third-party ownership model if they do not own the property on which it will be located, if they have an inadequate credit score,<sup>7</sup> if there is shading on the property that would make solar uneconomical, or if there are engineering or structural issues with the property.

Third-party owners of solar system do not agree to serve all customers, nor do they agree to meet all of the selected host customers' electricity needs. A third-party-owned system is located behind a host customer's meter and is dedicated to serving that customer's load. The customer will use the generation from the solar system when the system is generating, but will continue to rely on basic electricity service from its utility to supply the balance of its electricity needs. If the net-metered host customer delivers excess on-site generation to the grid, the Commission's proposed rules state that "the interconnection customer maintains the net-metering relationship with the electrical company"(WAC 480-108-010), not the third-party.

Using the above factual scenario, the Commission can speak generally to its view of its jurisdiction over companies using this type of third-party ownership and solar financing business model, according to the legal principles discussed below. A general signal as to how the Commission might view a business with these types of characteristics would promote the next steps toward greater clarity on this issue.

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third-party financing business model because it presents a more common and well-developed factual scenario.

<sup>6</sup> Database of State Incentives for Renewables and Efficiency, *Solar Summary Maps, 3<sup>rd</sup> Part Owner PPA Policies*, available at [www.dsireusa.org/userfiles/image/summarymaps/3rdpartyppamap.gif](http://www.dsireusa.org/userfiles/image/summarymaps/3rdpartyppamap.gif).

<sup>7</sup> For example, SolarCity requires an "excellent" FICO credit score of 680 or greater [www.solarcity.com/residential/solar-ppa.aspx](http://www.solarcity.com/residential/solar-ppa.aspx).

### 3. **Third-party ownership is not a public service.**

Commission jurisdiction over a third-party owner depends on whether the owner is considered a public service company. *Inland Empire Rural Electrification, Inc. v. Dept. of Pub. Serv.*, 199 Wn. 527, 535 (1939). An entity is not a public service company in Washington unless its business activity is dedicated to a public use. *See Clark v. Olson*, 177 Wn. 237, 243 (1934). This means that, to be a public service company, a company must hold itself out with the intent to serve the general public as a whole (or at least to all within a particular geographic or with a particular need).

A company offering third-party ownership of distributed generation does not express or imply an intent to dedicate its services to the general public. The company offers to negotiate with eligible members of the public toward a private contract between the company and the particular host customer. Nor does such a company dedicate its property to public use by implication—*i.e.*, by offering a service imbued with the public interest, like public transportation or basic electricity service, for which there are no readily available alternatives. Third-party solar providers are not serving a customer's full electricity requirements and there is no general public interest or right to have electricity provided by rooftop solar panels. The solar electricity provided is a supplemental service, not a basic necessity. Moreover, if consumers want solar on their rooftops, they have many different choices for securing it.

The third party does not make use of public infrastructure. *Cf. State ex rel. Stimson v. Kuykendall*, 137 Wn. 602, 606-07 (1926) (finding public service, in part, because a timber towing company used public waterways for its service). Minimal excess electricity flows back to the grid from net-metered systems. When it does, the host customer—not the third party—receives the electricity and maintains the relationship with the utility and its distribution system. Therefore, any use of that infrastructure is by the host customer, not the third party.

The general public cannot demand service from a third-party owner. Even if the third-party owner markets its service broadly within a region, what it offers is a consultation to determine whether interested consumers meet its eligibility requirements. These range from property ownership to creditworthiness to engineering and solar resource thresholds. The third party maintains absolute discretion whether to enter into an agreement. *See West Valley Land Co. v. Nob Hill Water Assoc.*, 107 Wn. 2d 359, 367 (1986) (holding that a membership-based water association was not a public service company because it had chosen to serve particular individuals of its own selection).

In sum, the third-party ownership business model described above would not constitute a public service company under Washington law. It offers solar electricity services—a supplemental, not basic service—amounting to a voluntary, private contractual relationship between the company and host customers selected in the company's discretion. (This legal analysis is explored in greater detail in IREC's memorandum dated September 29, 2011, in UE-

110667.) We urge the Commission to echo this general view of the background law, and its likely application to a common factual scenario, in its rule adoption order.

#### **4. Conclusion**

RNP and Northwest SEED support adoption of the proposed rules. By adopting them, the Commission will make regulatory changes that advance distributed generation at little to no cost to the state. The Commission should also take another step forward for distributed generation by explaining its view of whether companies offering third-party owner financing of an on-site generating facility are providing a public service subject to Commission regulation. While not the last word, speaking to this issue will provide a signal encouraging the next steps toward greater clarity.

Sincerely,

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