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MEMORANDUM

To: House Consumer Affairs Committee Members

From: State Representative Chris Ross CR

Subject: **FIB** 1580

Date: January 10, 2012

With the hearing coming up on Wednesday, I wanted to give you an update **on** HB 1580. **As** you know, I drafted this legislation to address **a specific** imbalance **in** the Solar Renewable Energy Credit Market. Functioning as part of the Alternative Energy Portfolio Standards Act of 2004, the **solar** credits, or SRECs, were working well through 2010. Unfortunately, the short lived and very generous grant programs for **solar** projects caused a rush to build solar installations, which in turn flooded the SREC market and caused a crash in SREC prices in **201** 1. The grants are now nearly all gone and it is estimated that without corrective action no new solar installations **will** be needed to meet SREC requirements until 2016. **This** will effectively put more than 100 companies here in Pennsylvania out of business. and perhaps a thousand of their employees out of their jobs. HB 1580 simply adjusts the requirements in years 2013 through 2015 ***to*** put the demand for SRECs back in balance with supply and offset the disruption created by the grant program.

Some of my colleagues, while sharing my concerns about the solar installers. have asked me to do more to minimize the costs to electric ratepayers. In response, I am preparing an amendment which will:

1. Offset all the increases with decreases later. (Please see the attached graph.)

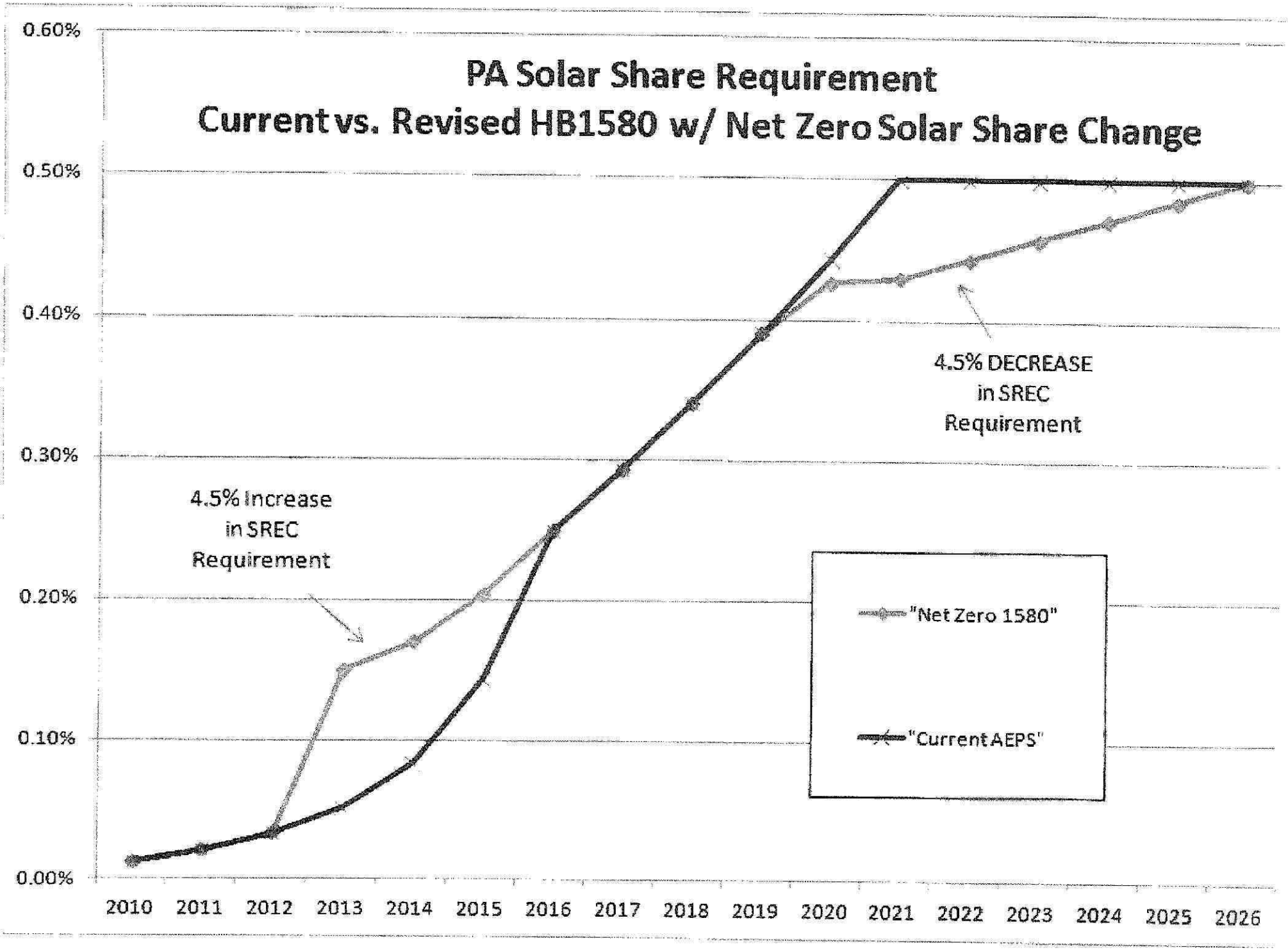
2. Further limiting the potential impact on ratepayers **by** establishing a cap on the SREC prices through an Alternative Compliance Payment of $325 per SREC in 2013, followed by a subsequent decline of 2% per year.

3. Allowing for solar thermal technology to qualify for SRECs as well as solar photovoltaic systems. This will further reduce the impact on ratepayers.

4. Make it plain that solar technology must merely connect to the distribution grid, reconfirming that homes and businesses that use their own solar power some of the time still qualify for SRECs.

Others have raised concerns about language I included designed to strengthen our Pennsylvania distribution grid by requiring future systems to connect to that grid. By doing this, we would be following the example of New Jersey, Maryland, Delaware, and Washington D.C., among others. I am attaching a brief submitted to me, which explains why this provision is not in violation of the Interstate Commerce Clause.

I look forward to seeing you on Wednesday.


PA Solar Share Requirement
Current vs. Revised HB1580 w/ Net Zero Solar Share Change
0.60%
0.50%
0.40%
0.30%
0.20%
0.10%
0.00%
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025
2026
4.5% Increase in SREC Requirement
4.5% DECREASE in SREC Requirement
"Net Zero 1580"
"Current AEPS"

MEMORANDUM

To: Honorable Chris Ross

From: Michael P. Malloy, Jr., Esquire

Date: January 3, 2012

Re: Commerce Clause Objection to HB 1580

Thank you for the opportunity to offer my comments to you about the objection raised in Public Utility Commission ("PUC") Chairman Robert F. Powelson's letter to House Consumer Affairs Committee Chairman Robert W. Godshall that Section 4(b) of HB 1580 may violate the Commerce Clause of the United States Constitution.[1] I respectfully disagree with the Chairman Powelson's conclusion.

1. The Commerce Clause Generally

"The Commerce Clause gives Congress the power 'to regulate Commerce . . . among the several States.'" *American Trucking Associations, Inc.* v. *Whitman*, 437 F.3d 313,318 (3d Cir. 2005) (quoting U.S. Const. art. I § 8 cl. 3). "Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court has long recognized that it also limits the power of the States to erect barriers against

[1] Chairman Powelson's letter cites other reasons for the PUC's opposition to HB 1580. This memorandum responds only to the portion of that letter dealing with HH 1580's purported violation of the Commerce Clause

operated by an electric distribution company operating within this Commonwealth" will impact commerce. To determine whether that impact violates the Commerce Clause, a court would first determine whether Section 4(b) is discriminatory on its face 01-has only an incidental effect.

Contrary to the PUC's characterization of Section 4(b) as an "out-of-state restriction", Section 4(b) **does not discriminate on its face** against solar photovoltaic installations in other states. Both in-state and *out-ofitare* solar photovoltaic systems can meet the requirements of Section 4(b) if they directly deliver solar energy to Pennsylvania's distribution system. Section 4(b) docs not require a solar photovoltaic system to be *located* in Pennsylvania to meet the requirements; rather, it mandates only the geographic location of the delivery point for the solar power generated.

The opposition to HB 1580 likely will argue that despite its facial neutrality, Section 4(b) might violate the Commerce Clause because it makes it cost prohibitive for out-of-state solar developments to meet Pennsylvania's interconnection requirement. Such cost, however, is a consequence of distance to the distribution system, and not, as suggested in the PUC letter, the result of a state imposed restraint on interstate commerce.

Conceivably, some out-of-stale solar installations may not be impacted at all. For example, under Section 4(b), a solar photovoltaic generator located just

across the Pennsylvania border in one of our neighboring states, would be equally capable of interconnecting to Pennsylvania's distribution system, as a solar system physically located in Pennsylvania. Nothing in Section 4(b) prohibits an interconnection across state Iines or draws any distinction between in-state and out-of-state solar generators with respect to establishing the interconnection. Accordingly, Section 4(b) is correctly characterized as a "*facially neutral*" statute, *i.e.*, one that does not discriminate on its face between in-state and out-of-state interests.

Once a court dctcrmines that Section 4(b) is facially neutral, it is then necessary to determine whether the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike, supra.* The local benefits of Section 4(b) clearly outweigh the incidental burden imposed on commerce.

One can contemplate several reasons why Pennsylvania has a legitimate interest in requiring solar photovoltaic systems to directly deliver power to Pennsylvania's distribution system. For example, Section 4(b)'s connection requirement ensures that clean solar energy will displace a portion of the traditional energy actually used in Pennsylvania. Solar energy delivered to locations other than into Pennsylvania's distribution system cannot promise the same positive environmental result.

The U.S. Supreme Court has held that states have a legitimate interest in environmental protection (*i.e.*, protection of health, safety and welfare), and would likely uphold Section 4(b) on those grounds. *See Minnesota* v. *Clover Leaf Creamery*, 499 U.S. 456, 472-73 (1981) (applying *Pike* to uphold Minnesota statute banning use of environmentally unfriendly plastic containers by both out-of-state and in-state sellers notwithstanding the burden on out-of-state suppliers in light of the state's interest in environmental protection).

Likewise, Section 4(b)'s requirement is further justified by Pennsylvania's legitimate state interest in promoting distributed energy, Distributed energy promotes grid reliability and diversity in power supply. Under the *Pike* balancing test, a court would most likely find that these legitimate state interests also would outweigh any incidental burden on commerce created by Section 4(b)'s restriction.

III. The PUC's analysis is misapplied.

Citing *New England Company of Indiana v. Limbach*, 486 *U.S.* 269, 108 S.Ct. 1803 (1988), Chairman Powelson asserts on behalf of the PUC that the Court has "interpreted the Commerce Clause as prohibiting state legislative or regulatory measures that are designed to benefit the in-state economic interest by placing a burden on out-of-state competitors, unless the measures are justified by valid factors not related to economic protectionism." *Limbach*, 486 U.S. at 269, 108 S.Ct. at 308.

Further, Chairman Powelson contends that "Courts have held that any statute or regulation that creates a barrier to out-of-state participation must be narrowly tailored to address a non-economic concern and must be demonstrated to bc the only reasonable method to effectuate that non-economic purpose in order to survive a Commerce Clause challenge." Powelson Letter (citing *Chamber Medical Technologies v. Bryant*, *52* F.3d *1252*, 1256 (4th Cir. 1995)).

The legal standard set forth in the PUC's letter, however. would be inapplicable to a Court's Commerce Clause evaluation of Section 4(b). The PUC's letter sets forth the legal standard for evaluating a statute that is discriminatory *on its face,* and not one that is *facially neutral*, like Section 4(b). Because Section 4(b) is even-handed and does not discriminate on its face, it would likely not be subject to strict or heightened scrutiny.

In *Limbach*, the U.S. Supreme Court case cited in the PUC's letter, the Court held unconstitutional an Ohio law that extended sales tax credits to fuel dealers purchasing Ohio-manufactured ethanol, but explicitly did not extend the same tax credits to dealers for the purchase of ethanol manufactured in other states. Since the law there explicitly discriminated against out-of-state manufacturers on its face, the Court applied heightened scrutiny. Unlike the Ohio lam-, Section 4(b) does not discriminate against out-of-state interests on its face and; therefore, would be subject to the ***Pike*** balancing test (discussed above). and not heightened scrutiny.

We should urge the PUC to undertake a more detailed review of the legal standard applicable to Section 4(b).

IV. The Massachusetts Law

Chairman Powelson warns in his letter that "in Massachusetts, a similar out-of-state restriction on a renewable portfolio program was challenged in court, resulting in suspension of the program until the case is resolved". This statement ignores the **vast differences** between the challenged Massachusetts laws and proposed Section 4(b); and further, the differences between the Massachusetts law and those of other states that have gone unchallenged because of their facial neutrality.

In Massachusetts, TransCanada challenged two aspects of the Massachusetts RPS: (i) the requirement that the Mass, Department of Public Utilities adopt rules to implement Iong term contracts between distribution companies and renewable energy developers to facilitate the financing of *in-state* projects. The DPU's rules limited eligibility for Iong term contracts to generation facilities *"located within the boundaries of [Massachusetts]*"; *and* (ii) the requirement that "in satisfying its annual obligations under the [RPS program] each retail supplier shall provide a portion of the required minimum percentage of kilowatt-hours sales from new on-site renewable energy generating sources *located in the Commonwealth [of Massachusetts]* . . . .„

It is important to note at the outset that **both** of the provisions challenged in Massachusetts were **discriminatory on their face** because the provisions explicitly discriminate against out-of-state market participants in favor of Massachusetts-based market participants. The first provision prohibited long-term contracts with out-of-statc generators; and the second, limited the purchase of renewable power or credits to in-state generating sources.

With respect to participation in long tenn contracts (which had to do mainly with wind power and not solar), the parties' settlement in TransCanada eliminated the in-state requirement, The legal case has been stayed to allow for a new long term contract solicitation process to proceed under the revised requirements.

With respect to the solar carve out requirement that a minimum percentage of electricity sales be from on-site renewable energy generating sources located in-state, Massachusetts settled the claim by agreeing to charge diffcrcnt alternative compliance payments to TransCanada for its load obligation before and after a contract date of January 1,2015.

The Massachusetts statutes were vulnerable to challenge due because they were facially discriminatory; while states with facially neutral statutes remain unchallenged. For example:

- New Jersey's requirement provides: "Electric generation qualifies for issuance of RECs only if: 1. It is produced by a generating facility that

is interconnected with an electric distribution system that supplies New Jersey . . . ." N.J.A.C. 14:8-2.9; and

- Maryland's requirement provides: "…energy 6-om a Tier 1 renewable source under § 7–701(l)(1), (9), (10), or (11) of this subtitle is eligible for inclusion in meeting the renewable energy portfolio standard only if the source is connected with the electric distribution grid serving Maryland.. .." MGA §7-704(a)(2).

V. Conclusion

Correctly analyzed, proposed Section 4(b) likely does not violate the Commerce Clause of the United States Constitution. It would not be subject to heightened scrutiny, since it does not discriminate against out-of-state participants on its face.

It also would more than likely survive a Constitutional challenge under the more lcnicnt *Pike* balancing test standard. Pennsylvania has several legitimate interests in requiring solar power providers, whether in-state or out-of-state. to directly connect to Pennsylvania's distribution system.

The PUC letter uses the incorrect legal standard to analyze Section 4(b) by evaluating the proposed statute under the "heightened scrutiny" standard. The PUC letter fails to even consider the vital threshold question of whether Section 4@) is discriminatory in the first place. The heightened scrutiny standard is

reserved only for statutes that discriminate on their face, and not facially neutral statutes like Section 4(b).

There are vast differences between the challenged Massachusetts law, which explicitly discriminates against out-of-state interests, and Section 4(b), which requires all solar systems, whether in-state or out-of-statc, to connect to Pennsylvania's distribution system. The PUC's concerns over the similarities between the challenged Massachusetts law and proposed Section 4(b)'s interconnection requirement are unfounded. The challenged Massachusetts laws were clearly discriminatory on their face, while Section 4(b) is facially neutral. Existing facially neutral laws in other states, that are substantially similar to the proposed provisions here, remain unchallenged.

Please let me know if you have any further questions. Again, thank you for asking for my input.