

THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Docket No. DE 15-303
Vivint Solar Inc., Petition for Declaratory Ruling
regarding RSA 362:2, 362-A:2-a and Rule Puc 2002.05

VIVINT SOLAR, INC.
MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT

In accordance with Puc Rule 203.08, Vivint Solar, Inc. (“Vivint Solar”) hereby respectfully submits this Motion for Protective Order and Confidential Treatment of all or a portion of its responses to six New Hampshire Public Utilities Commission Staff (“Staff”) data requests (“Data Request”) submitted on October 26, 2015 and two documents submitted to Staff on November 12, 2015 in response to additional Staff requests. As discussed below, these documents are subject to confidential treatment pursuant to RSA 91-A:5, IV, New Hampshire case law and Commission precedent. No party to this proceeding or other person has objected to Vivint Solar’s requests for confidential treatment of such documents, and The Alliance for Solar Choice (“TASC”) has agreed to waive any right it has to access such documents.

I. DESCRIPTION OF DOCUMENTS SUBJECT TO CONFIDENTIAL TREATMENT

On October 26, 2015, Vivint Solar provided responses to Staff data requests. Six of these Data Request responses contained information and documents that Vivint Solar provided to the Commission Staff only, accompanied by written statements of Vivint Solar’s intent to file a motion to seek confidential treatment of such information and documents provided pursuant to Puc Rule 203.08(d). Data Requests Staff 1-5, 1-11 and 1-12 were marked “CONFIDENTIAL”

on the upper right hand header of each page pursuant to Puc Rule 201.04(b). Vivint Solar provided unredacted versions of these responses to Commission Staff and Freedom Logistics, LLC d/b/a Freedom Energy Logistics (“FEL”) and provided redacted versions of these responses to all other parties to the discovery service list. Vivint Solar is hereby seeking confidential treatment of the unredacted versions of these responses marked “CONFIDENTIAL.” Data Requests Staff 1-1 (Vivint Solar’s draft solar power purchase agreement (“PPA”) for use in New Hampshire and Customer Packet), 1-3 (Vivint Solar’s draft solar lease (“Lease”) for use in New Hampshire) and 1-9 (Exhibit B to each of the PPA and Lease for all states in which Vivint Solar is currently operating (plus New Hampshire)) were marked “CONFIDENTIAL” on the upper right side of the header of each of these documents as well as via watermark across each document. Vivint Solar is seeking confidential treatment of these documents in their entirety, and therefore only provided such documents to Staff and FEL and did not provide redacted versions of such documents to the discovery service list.

On November 12, 2015, in response to subsequent document requests from Staff, Vivint Solar submitted a form letter for its customers regarding property tax assessment (“Tax Letter”) and a customer survey script used by Vivint Solar with its customers prior to installing solar energy systems (“Customer Survey”). These documents were provided to Commission Staff only, and were also marked “CONFIDENTIAL” on the upper right hand corner of the header as well as in a watermark across the entire document and accompanied by written statements of Vivint Solar’s intent to file a motion to seek confidential treatment of information provided pursuant to Puc Rule 203.08(d). Vivint Solar is seeking confidential treatment of these two documents in their entirety.

For the reasons set forth below, Vivint Solar hereby requests a protective order from the Commission for confidential treatment of the redacted portions of responses to Data Requests Staff 1-5, 1-11 and 1-12, and for the entirety of responses to Data Requests Staff 1-1, 1-3 and 1-9 and the Tax Letter and Questionnaire Script.

II. THE COMMISSION'S STANDARD FOR CONFIDENTIAL TREATMENT

Puc Rule 203.08(a) provides in relevant part that “[t]he Commission shall upon motion issue a protective order providing for the confidential treatment of one or more documents upon a finding that the document or documents are entitled to such treatment pursuant to RSA 91-A:5, or other applicable law” based upon the information submitted in the moving party’s motion for confidential treatment. RSA 91-A:5, IV exempts public records containing “confidential, commercial, or financial information” from New Hampshire’s Right-to-Know Law.

To determine whether a document is entitled to confidential treatment, the Commission applies a three-step analysis prescribed by the New Hampshire Supreme Court in *Lambert v. Belknap County Convention*, 157 N.H. 375, 382 (2008). *Unitil Corp. & Northern Utilities, Inc.*, DG 08-048, Order No. 25,014 (September 22, 2009) (“*Unitil*”) at 3. The first step of the analysis considers whether there is a privacy interest at stake that would be invaded by disclosure. *Id.* “[W]hen commercial or financial information is involved, this step includes a determination of whether an interest in the confidentiality of the information is at stake.” *Id.* (citing *Lambert*, 157 N.H. at 382-83). If there is a privacy or confidentiality interest at stake, the second step assesses the public’s interest in disclosure. Disclosure should serve the purpose of informing the public about activities of its government; “if the information does not serve that purpose, disclosure is not warranted.” *Id.* (citing *Lambert*, 157 N.H. at 383). The last step requires balancing the public interest in the disclosure against the privacy interests in nondisclosure. *Id.*

III. THE COMMISSION SHOULD PROTECT VIVINT SOLAR'S COMMERCIAL AND FINANCIAL DOCUMENTS AND INFORMATION AS HIGHLY CONFIDENTIAL

A. The Commission's Application of the *Lambert* Test to Confidential Commercial and Financial Information

The Commission routinely grants motions for confidential treatment with respect to confidential, commercial and financial information protected by RSA 91-A:5, IV, including "competitively sensitive information," the disclosure of which "could result in financial or competitive harm." *National Grid USA, et al.* DG 11-040, Order No. 25,370 (May 30, 2012) ("*National Grid I*") at 45 (granting motion for confidential treatment of proprietary forward-looking financial assumptions and documents containing information regarding potential litigation liabilities); *see also Unitil*, Order 25,014 at 5-6, 13-14 (protecting confidential strategies, business analyses, and revenue forecasts); *Northern Utilities, Inc.*, DG 12-031, Order No. 25,330 (February 6, 2012) ("*Northern Utilities II*") at 6 (granting motion for protective order covering pricing and cost information and financial analyses).

The Commission also grants protective treatment to contractual agreements, including those with customers, finding that disclosing such agreements would erode a discloser's ability to negotiate future contracts effectively and would allow potential competitors to "understand [the discloser's] costs and possibly undercut them." *Northern Utilities Inc.*, DG 10-034, Order No. 25,085 (March 25, 2010) at 9 ("*Northern Utilities I*") (protecting terms of a gas transportation contract); *New Hampshire Gas Corp.*, DG 11-212, Order No. 25,281 (October 28, 2011) at 8-9 (protecting a gas storage lease agreement); *see also Unitil* at 7-8 (granting motion for confidential treatment of financial advisory engagement contract); *see also National Grid USA et al.* DG 11-040, Order No. 25,400 at 5 (August 21, 2012) ("*National Grid II*") (granting

motion for protective order and confidential treatment of portions of an escrow agreement with a bank).

Based upon voluminous applicable Commission precedent and the application of the *Lambert* factors as described below, all of the confidential material described in Section I above should be subject to a protective order.

B. Response to Data Requests Staff 1-1 and 1-3

Staff requested a copy of the form of solar power purchase agreement (PPA) and form of solar lease (Lease) that Vivint Solar or its subsidiaries propose to use in connection with residential photovoltaic installations in New Hampshire. Vivint Solar seeks confidential treatment of the PPA, the Lease and the Customer Packet in their entirety in light of RSA 91-A:5, IV, New Hampshire case law and Commission precedent.

There is a clear privacy interest at stake regarding the draft forms of the PPA, Lease and Customer Packet. Vivint Solar participates in a highly competitive industry; residential solar companies such as Vivint Solar attempt to differentiate themselves from their competitors (such as the members of TASC) through the contractual relationship and experience that they offer their potential customers. A solar company's customer-facing documents, such as the PPA, Lease and Customer Packet, are key proprietary offerings of the unique customer relationship and contain proprietary information about how the solar company will serve its customers. Notably, due to this competition, the residential solar industry has not coalesced around a single form of power purchase agreement or lease to offer the customer the best deal and experience. Such competitive innovation should be encouraged, rather than undermined through public disclosure.

The versions of the PPA, Lease and Customer Packet provided to Staff for use in New Hampshire are substantially the same as those to be used throughout the states in which Vivint Solar currently operates, and are similar to those currently used in such states.¹ They comprise extremely sensitive commercial and financial information including all of the terms of Vivint Solar's core agreements with its customers. Vivint Solar considers its PPA and Lease to be its intellectual property. Whereas some providers of solar power purchase agreements and solar leases publicly disclose their commercial contracts, Vivint Solar treats these documents as confidential, proprietary information and does not make them publicly available.

Vivint Solar updates its PPA, Lease and Customer Packet frequently to address rapidly evolving market terms in a highly competitive residential solar marketplace. Disclosure of the drafts of the PPA, Lease and Customer Packet to Vivint Solar's key competitors (including the members of TASC) and the public at large would put Vivint Solar at a competitive disadvantage. Disclosure of these documents would also undermine Vivint Solar's ability to negotiate future financings with its investors and financing parties, because such parties expect Vivint Solar to protect such agreements as confidential, proprietary information.

The Commission has correctly recognized the importance of maintaining the confidentiality of contracts in numerous orders. In *New Hampshire Gas Corp.*, the Commission protected pricing and other key terms of a gas storage lease where disclosure would have made other potential lessors aware of the terms secured by the gas utility, which could have caused competitive harm to the lessor in contract, dissuaded other lessors from negotiating with NHGC, and "undermine[d] NHGC's bargaining position for such contracts required in the future." Order

¹ As explained in Response to Data Request Staff 1-9, the PPA and Lease submitted in response to Data Requests Staff 1-1 and 1-3 contain a draft of Exhibit B to the PPA and Lease for New Hampshire customers. Vivint Solar uses state specific versions of Exhibit B for each state in which it operates.

25,281 at 8. These potential harms are very analogous to those to Vivint Solar if its PPA and Lease forms and key terms were to be subject to public disclosure. Not only would its direct competitors have access to its carefully crafted proprietary agreements, but financing parties with whom it negotiates could be reluctant to finance its agreements with customers if their terms would be publicly disclosed.

In *Unitil*, the Commission granted a motion for confidential treatment to a financial advisory and marketing engagement contract between Blackstone and NiSource, which had been characterized as Blackstone's intellectual property. Order 25,014 at 7-8. The Commission recognized Blackstone's "legitimate commercial interest in not disclosing it to potential competitors." *Id.* at 8. For similar reasons, the Commission should protect Vivint Solar's customer contracts as its intellectual property and not permit them to be disclosed to competitors.

The Commission also protected as confidential contracts with customers. In *Northern Utilities I*, Northern sought to protect key terms contained in its gas transportation contract with Foss. Order 25,085 at 4. The Commission granted the motion, reasoning that "[d]isclosing the information would likely lead to the erosion of Northern's ability to maintain a strong position in negotiating contracts." *Id.* at 9. Although the Commission did find some minimal public interest in disclosure, the disclosure would have provided little understanding about the Commission and was outweighed by Northern's interest in confidentiality. *Id.* As with Northern, disclosing Vivint Solar's PPA and Lease could erode its negotiating position, both with customers and with third party investors that supply capital for the solar installations. There is no public interest in the disclosure of the PPA, Lease or Customer Packet. These documents are Vivint Solar's contracts with its private customers. These documents reveal nothing about the workings of the Commission or any other branch of government.

Finally, even if the Commission were to construe a public interest in disclosure, any such interest would be strongly outweighed by the harm to Vivint Solar that would occur if these documents were disclosed. Disclosure of Vivint Solar's PPA, Lease and Customer Packet would have the same effect as direct disclosure to Vivint Solar's competitors, particularly as its two key competitors are members of TASC and thus parties to the above-referenced docket. Accordingly, Vivint Solar requests the entirety of the drafts of the PPA, Lease, and Customer Packet to be afforded confidential treatment.

C. Response to Data Request Staff 1-5

In Data Request Staff 1-5, Staff asked Vivint Solar to describe whether payments under the Lease are calculated based on the anticipated electrical output of the photovoltaic system installed at the customer's residence and to describe in detail the basis for such payments and how such payments are determined and calculated. Vivint Solar's methodology for determining monthly payments under its Lease is extremely sensitive confidential, commercial and financial information subject to protection under RSA 91-A:5, IV, New Hampshire case law and Commission precedent.

Vivint Solar has a strong privacy interest in the methodology for determining its Lease payments. Vivint Solar maintains this methodology as a confidential, proprietary, trade secret. This information is not disclosed to the public in its Lease or otherwise. Vivint Solar operates in a highly competitive landscape, where competitors use highly proprietary methods to price customer Leases. This information also varies based on the entity providing Investment Tax Credit financing for the particular Lease, and thus is a proprietary, confidential commercial and financial interest of Vivint Solar's financing parties.

The information Vivint Solar seeks to protect in response to Data Request Staff 1-5 is similar to the terms of customer contracts this Commission protected in *Northern Utilities I*, Order 25,085 at 4. The monthly lease payment calculation components are also similar to the calculation of Granite State Gas Transmission's rate of return that the Commission protected in *Unitil*, Order 25,014 at 13-14. There is no public interest in disclosure of Vivint Solar's proprietary lease pricing methodology, because it does not shed any light on the conduct of government. *See, e.g., National Grid I* at 45. Thus, disclosure of this information is not warranted here.

Even if there were a public interest in disclosure of this information, this interest is heavily outweighed by Vivint Solar and its financing parties' interest in maintaining the confidentiality and proprietary nature of such information, and by the harm that would come to all such parties from disclosure. *See, e.g., Northern Utilities I*, Order 25,085 at 9.

Finally, Vivint Solar has selectively and minimally redacted its responses to the Commission Staff Data Request, redacting only the description of the methodology used to determine its Lease payments, and publicly providing numerous other factors involved in the pricing of its Lease. For all of these reasons, the Commission should grant Vivint Solar's motion for confidential treatment of the redacted information in response to Data Request Staff 1-5.

D. Response to Data Request Staff 1-9

In Data Request Staff 1-9, Vivint Solar was asked to state whether it was required to provide disclosures or truth-in-lending or financing notices to customers it currently serves and to describe such disclosures in detail. The version of Exhibit B to each of the PPA and Lease for each of the states in which Vivint Solar currently operates was supplied to the Staff in response to this data request. The content and forms of these disclosures constitute confidential

commercial information subject to protection under RSA 91-A:5, IV, New Hampshire case law and Commission precedent and Vivint Solar seeks a protective order covering the entirety of such submissions.

Vivint Solar and its financing parties hold a significant privacy stake in these versions of Exhibit B because they constitute sensitive commercial information. Vivint Solar is subject to numerous disclosure requirements, including those required by federal and/or state leasing regulations, home improvement laws, door-to-door sales statutes, solar incentive program requirements, and many other regulatory regimes. Navigating consumer regulations across numerous states that do not neatly apply to the PPA or Lease business model is a nontrivial task. Such disclosures are heavily researched by Vivint Solar and are updated from time to time to comply with state laws. Disclosing the numerous municipal law, state law, licensing board, and regulatory requirements that Vivint Solar adheres to in various states would put Vivint Solar at a distinct competitive disadvantage vis-a-vis its competitors who could feasibly duplicate such disclosures without cost.

Vivint Solar's privacy interest in these disclosures is akin to the business strategies the Commission protected in *Unitil*. Order 25,014 at 5-6. Under the second prong of the *Lambert* test, however, the public would gain no insight into the operations of its government through disclosure of such portions of Vivint Solar's customer agreements. These exhibits reveal nothing about the Commission's activities or conduct. Disclosure of Exhibit B to the PPA and Lease is therefore unwarranted.

Finally, even if the Commission found a public interest in disclosure, it would not outweigh Vivint Solar's strong interest in maintaining the confidentiality of such exhibits. The ability for the public to effectively evaluate the Commission's decision in the related docket

based on the information sought and the non-confidential portions of Vivint Solar's response are more than sufficient to serve what public interest there may be advancing the public's understanding of the Commission's analysis in this proceeding.

Accordingly, the Commission should issue a protective order covering the entirety of the Exhibit B to the PPA and Lease.

E. Response to Data Request Staff 1-11

Data Request Staff 1-11 requested the percentage of Vivint Solar's residential solar customers who have executed PPAs and Leases, and both in total and for each individual state or other jurisdiction in which both PPAs and Leases are offered by Vivint to residential customers. This sensitive commercial information is protected under RSA 91-A:5, IV, New Hampshire case law and Commission precedent and Vivint Solar seeks a protective order covering the redacted portion of its response to this Data Request.

Vivint Solar has a significant privacy stake in the percentage of its customers who have executed PPAs and Leases. This data is confidential, highly sensitive commercial information. Disclosure of such information would reveal Vivint Solar's confidential, proprietary strategy for determining when to offer a PPA or Lease, as well as detailed information regarding its overall portfolio of PPA and Leases across its business operations. This is material, non-public information which Vivint Solar maintains as confidential. The Commission has protected such business strategy information in the past. *See, e.g., Unitil*, Order 25,014 at 5-6.

Disclosure of these data would not provide the public with any insight into the operations of government. This data is specific to Vivint Solar's strategy, and its revelation would not further the purposes of the Right-to-Know Law. And, even if the Commission found a public interest in such disclosure, such interest does not counterbalance Vivint Solar's very strong

commercial interest in maintaining its privacy interest in such data. Thus, Vivint Solar requests confidential treatment of the redacted portions of its response to Data Request 1-11.

F. Response to Data Request Staff 1-12

Staff requests the percentage of Vivint Solar’s residential solar customers who have defaulted on their obligations under their respective PPAs or Leases. The default rates of Vivint Solar’s customers are financially sensitive data that reveal important aspects of Vivint Solar and its financing parties’ financial position. This is material, nonpublic information that is highly competitively sensitive. Vivint Solar keeps such information confidential in all its public-facing reports to the Securities Exchange Commission or otherwise.

The data contained in Vivint Solar’s confidential response to the Staff Data Request 1-12 is analogous to the financial information relating to Foss Manufacturing that the Commission protected *Northern Utilities* order. There, Foss had contracted for gas transportation with Northern, and Northern sought to protect the competitive and confidential information of its customer, Foss. The Commission reasoned that the financial information relating to Foss and Foss’s gas usage would reveal information about Foss (and, indirectly, Northern), but “would shed little light on the Commission’s activities.” *Northern Utilities I*, Order 25,085 at 8. Here, the default rates would reveal information about Vivint Solar’s customers, as well as information about Vivint Solar and its financing parties’ financial position, but it would shed no light on the Commission’s activities.

The data for which confidential protection is sought here is similar in several ways to the financial assumptions and litigation liabilities protected by the Commission in *National Grid I*. In that order, the Commission recognized that such information would not “materially advance the public’s understanding of the Commission’s analysis,” and that disclosure “could result in

financial or competitive harm.” Order 25, 370 at 45. Similar to the Commission’s finding in *National Grid I*, disclosure of Vivint Solar’s default rates is unwarranted because it will not aid in the public’s understanding of the Commission and its analysis, and that even if there were such a benefit from disclosure, it would be very strongly outweighed by the tangible competitive and financial harm to Vivint Solar that would be caused by disclosure. Vivint Solar respectfully requests confidential treatment of the redacted information supplied in its response to the Data Request in Staff 1-12.

G. Response to Supplemental Data Requests from the Technical Session

As a supplement to the Data Requests, during the Technical Session in the above-referenced docket, Commission Staff requested a (i) copy of communications sent to local taxing authorities regarding the personal property third party ownership of the installed systems (Tax Letter), and (ii) Vivint Solar’s script for the intake telephone call or electronic questionnaire with prospective customers (Customer Survey). The requested documents reveal important aspects of Vivint Solar’s proprietary business practices that help it navigate property tax issues and customer relations and ensure its customers understand the terms of its PPAs and Leases. Vivint Solar treats these documents as confidential and proprietary. Vivint Solar expends significant effort to develop its consumer protection best practices and refuses to share its knowhow and proprietary documents with its competitors. Both pieces of information requested are sensitive commercial information that if disclosed to the public, could result in competitive harm to Vivint Solar. *See, e.g., Northern Utilities I*, Order 25,085 at 9 (recognizing risk of disclosure in allowing competitors to access customer contract terms and undercut them).

Vivint Solar’s responses to Data Request Staff 1-11 do not advance the public’s understanding of the inner workings of the Commission or other parts of the New Hampshire

State or local government. The description of these documents contained in the Stipulation of Facts in this docket provides the public with sufficient information regarding the role and customer protection purpose of these documents, without revealing proprietary and competitively sensitive information. Thus, disclosure is not justified. Moreover, even if there were a public interest in disclosure, it is outweighed by the competitive harm to Vivint Solar that would result from disclosure. For this reason, the Tax Letter and Customer Survey should be protected by the Commission as confidential.

IV. CONCLUSION

Vivint Solar and its financing parties hold a strong privacy interest in the highly confidential commercial and financial information requested in the Data Requests described above. These documents and data represent proprietary, highly sensitive information, the disclosure of which would harm Vivint Solar and its financing parties and put it at a distinct disadvantage in a highly competitive residential solar marketplace. None of these documents or information would inform the public about the conduct of its government, and so disclosure is not warranted. Any public interest in disclosure is overwhelmingly outweighed by the privacy interest of Vivint Solar in keeping its sensitive commercial information confidential to prevent the financial and competitive harm that would result from disclosure.

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WHEREFORE, Vivint Solar respectfully requests that the Commission grant this Motion for Protective Order and Confidential Treatment of the redacted portions of responses to Data Requests Staff 1-5, 1-11 and 1-12, and for the entirety of responses to Data Requests Staff 1-1, 1-3 and 1-9 and the Tax Letter and Customer Survey and grant such other relief as is just and equitable.

Respectfully submitted,

Dated: December 1, 2015



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