

**BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

Docket No. 15-303

**Vivint Solar, Inc. Petition for Declaratory Ruling
regarding RSA 362:2, 362-A:2-a and Rule Puc 2002.05**

**LEGAL BRIEF OF VIVINT SOLAR, INC.
IN SUPPORT OF PETITION FOR DECLARATORY RULING**

I. Introduction and Procedural Background

On August 14, 2015, Vivint Solar, Inc. (“Vivint Solar”) filed a Petition for Declaratory Ruling (“Petition”) with the New Hampshire Public Utilities Commission (“Commission”) seeking clarification that, in offering solar power purchase agreements (“PPAs”) or solar leases (“Solar Leases”) to residential customers in the State of New Hampshire, neither Vivint Solar nor its subsidiary, Vivint Solar Developer, LLC, or affiliates, will be regulated by the Commission as (1) a “public utility” under N.H. Rev. Stat. Ann. (“RSA”) Section 362:2, (2) a “competitive electric power supplier” (“CEPS”) under N.H. Code Admin. R. Ann. Puc (“Puc”) 2002.05, or (3) a limited producer of electrical energy (“LPEE”) under RSA Section 362-A:2-a. Vivint Solar requests this relief because it seeks to serve residential customers in New Hampshire with rooftop solar installations on such customers’ private property, behind their utility electrical meters, in order help such customers afford to generate their own electricity and fulfill New Hampshire’s retail choice and renewable energy policy goals.

Freedom Logistics, LLC d/b/a Freedom Energy Logistics and the Alliance for Solar Choice have intervened in this proceeding. While the Office of Consumer Advocate has a statutory right to intervene, it has chosen not to. On October 8, 2015, the Commission held a duly noticed prehearing conference where it granted the petitions to intervene. Following the prehearing conference, parties and Staff met in a technical session and agreed upon a proposed schedule for this proceeding. This proposed schedule was approved pursuant to the Commission's October 12, 2015 Secretarial Letter and prehearing order. Pursuant to such letter and order, Vivint Solar hereby submits this brief on the merits of its Petition.

II. Statement of Facts

1. Vivint Solar is the second largest installer of residential solar energy systems in the U.S. residential market with approximately 51,000 residential customers, 340 megawatts of solar systems installed, 4,200 employees and over 53 sales offices throughout the U.S. as of June 30, 2015.
2. Vivint Solar offers solar energy to qualified residential customers primarily through long-term customer contracts in the form of PPAs, under which a customer agrees to purchase all of the power generated by a solar energy system installed on the customer's rooftop, as well as Solar Leases under which a customer leases the solar energy system which is installed on the customer's real property. Under either arrangement, Vivint Solar installs, operates, and maintains the solar energy system throughout the term of the agreement. The solar energy systems installed under Vivint Solar's PPAs and Solar Leases are owned by its affiliates and financing parties.

3. Most homeowners are unable or unwilling to pay the upfront costs of a rooftop solar system, which ranges from \$20,000 to \$50,000. See David Feldman et al., *Photovoltaic System Pricing Trends: Historical, Recent, and Near-Term Projections*, Nat'l Renewable Energy Lab. (Aug. 25, 2015), https://emp.lbl.gov/sites/all/files/pv_system_pricing_trends_presentation.pdf. Vivint Solar's PPAs and Solar Leases enable significantly more consumers to generate renewable electricity on their homes using third party financing through contractual arrangements that enable investors with tax liability to utilize efficiently the Federal Investment Tax Credit for installations of solar power, accelerated tax depreciation, as well as state and utility solar incentive programs, where applicable. These agreements empower homeowners to become energy independent at little-to-no upfront cost and at prices below their utility rates. By leveraging these incentives and enabling customers to net meter, homeowners can save money immediately on their electricity bills, while third parties such as Vivint Solar remain responsible for financing, permitting, installing and maintaining a solar energy system.
4. According to GTM Research's report, *U.S. Residential Solar Financing 2015-2020*, 72% of all residential solar systems installed in the U.S. in 2014 were third-party owned in the form of Solar Leases and PPAs. See Nicole Litvak, *U.S. Residential Solar Financing 2015-2020*, GTM Research, July 2015.
5. Vivint Solar's PPAs and Solar Leases are offered only to homeowners that meet Vivint Solar's and its financing partners' credit and underwriting criteria and whose homes meet additional physical and safety criteria (e.g., solar irradiance, roof pitch and condition, shading and local electrical distribution system requirements).

6. During the term of its PPA or Solar Lease, Vivint Solar possesses an irrevocable license coupled with an interest to enter onto its customers' property, install its solar energy systems on their rooftops, access the solar energy systems in order to provide maintenance and repairs, and to remove the solar energy systems, where necessary.
7. The solar energy systems installed on customers' rooftops pursuant to Vivint Solar's PPAs and Solar Leases are located on the customers' private property, on the customers' side of the utility electrical meters. These systems do not use the central power stations, wires, distribution or transmission facilities of a public utility to provide electricity to customers. Independent of Vivint Solar's solar energy system, customers remain connected to, and a customer of, their local utility or competitive supplier, with full access to universal service and the ability to switch between CEPS.
8. Vivint Solar has the right to terminate its PPA and Solar Lease if its customers fail to make payments when due, fail to perform their obligations, such as providing access rights or broadband internet connections, or go into bankruptcy or foreclosure. In the event that a PPA or Solar Lease is terminated, the customer will continue to take electric service from its local utility or CEPS without any interruption of service.

III. Standard of Review

Under Puc 207.01(c), the Commission must dismiss any petition for declaratory ruling that: “(1) [f]ails to set forth factual allegations that are definite and concrete; (2) [i]nvolves a hypothetical situation or otherwise seeks advice as to how the commission would decide a future case; (3) [d]oes not implicate the legal rights or responsibilities of the petitioner; or (4) [i]s not within the commission’s jurisdiction.”

The Petition should not be dismissed under this standard for the following reasons:

(1) Vivint Solar set forth definite and concrete factual allegations in the Petition.

(2) Vivint Solar’s ability to offer its services in New Hampshire is not a hypothetical situation and the Petition does not seek advice about how the Commission would rule in a future case. Vivint Solar actively seeks to enter the New Hampshire market now, while the Investment Tax Credit remains at the 30% level and while net metering capacity remains available in the state.

(3) The Petition implicates the legal rights and responsibilities of Vivint Solar. Without the clarity requested in the Petition, Vivint Solar could be subjected to burdensome regulations, with respect to many of which it cannot comply. Without regulatory clarity it requests regarding how it may be regulated, Vivint Solar cannot enter the state to offer its PPAs and Solar Leases to New Hampshire customers.

(4) Whether an entity is subject to regulation as a public utility, CEPS or LPEE is squarely within the Commission’s jurisdiction. RSA § 374:7; *see also id.* § 362-A:2-a; *Freedom Logistics, LLC*, Order No. 25,775 (Apr. 8, 2015).

IV. Argument

For the reasons described below, the Commission should rule that neither Vivint Solar nor its subsidiary, Vivint Solar Developer, LLC, or affiliates, should be regulated by the Commission as (1) a “public utility” under RSA Section 362:2, (2) a “competitive electric power supplier” (“CEPS”) under Puc 2002.05, or (3) a limited producer of electrical energy (“LPEE”) under RSA 362-A:2-a.

A. New Hampshire Law Encourages Competition and Customer Choice

New Hampshire was the first state in the nation to pass full retail deregulation legislation via H.B. 1392, which directed the Commission to develop a statewide restructuring plan to implement electric retail choice for all customers by January 1, 1998. *See* H.R. 1392, Reg. Sess. (N.H. 1996) (“H.B. 1392”). In enacting H.B. 1392, the New Hampshire legislature found that “New Hampshire’s extraordinarily high electric rates disadvantage all classes of customers” and that it was in the best interests of New Hampshire citizens that the state establish a “competitive market for retail access to electric power as soon as is practicable.” *See id.* § 129:1(II), (V). Importantly, the Legislature explicitly recognized the vital roles of customer choice, renewable energy and self-generation in achieving this transformation of the retail state’s electricity markets. *Id.* § 374-F:3(II). In February 1997, the Commission issued a restructuring plan and a set of implementing orders (the “Plan”). *See In re Statewide Elec. Util. Restructuring Plan*, 82 N.H. P.U.C. 122 (Feb. 28, 1997) (“Order No. 22,514”). The Plan’s goals were that customers could choose the source of their electricity and the market would set prices through competition. *See id.* The policies of self-generation and clean energy deployment have been further recognized

and supported over the past two decades through the state's Electric Renewable Portfolio Standard ("RPS"), net metering policies and incentive programs.

Vivint Solar's PPAs and Solar Leases enable New Hampshire residents to realize the state's goal of encouraging competition for retail access. These agreements facilitate customer choice for more affordable electricity, consistent with New Hampshire's clear laws and policies. These market offerings empower New Hampshire residents to self-generate electricity from clean, renewable resources, in line with the state's public policy goals. Vivint Solar's agreements provide clear disclosure to customers of all relevant terms, thereby enabling customers to choose the source and pricing of their electricity. No party to this proceeding has argued that Vivint Solar should be regulated by the Commission as a public utility, CEPS or LPEE.

Finally, the relief sought in the Petition is consistent with the Commission's role: to "oversee and regulate monopolies so the constitutional rights of free trade and private enterprise are disrupted as little as possible." *In re Omni Communications, Inc.*, 451 A.2d 1289, 122 N.H. 860, 862-63 (1982). As further described below, Vivint Solar is not a monopoly as it is unable to provide universal service without discrimination in New Hampshire. Instead, its presence in the New Hampshire rooftop solar market will enhance the state's goals of competition, clean, distributed generation and energy independence.

B. Vivint Solar Is Not a "Public Utility" Under New Hampshire Law.

New Hampshire's statutory definition of "public utility" includes, in relevant part, "every corporation, company . . . owning, operating or managing any plant or equipment . . . for the manufacture or furnishing of . . . power . . . *for the public*, or in the generation, transmission or

sale of electricity ultimately sold *to the public.*” RSA § 362:2 (emphasis added). Under New Hampshire precedent, “a distinguishing characteristic of a public utility is ‘[s]ervice to the public without discrimination.’” *In re Zimmerman*, 689 A.2d 678, 141 N.H. 605, 609 (1997) (alteration in original) (quoting *Claremont Gas Light Co. v. Monadnock Mills*, 32 A.2d 823, 92 N.H. 468, 469 (1943)). Moreover, “it is the general rule that unless a person has publicly professed his readiness to perform a particular service he is under no duty to render that service to all who request it.” *Claremont*, 92 N.H. at 469-70. “The dedication of property to a public service ‘is never presumed without evidence of unequivocal intention.’” *Id.* at 471.

Vivint Solar does not sell the electricity generated by its solar energy systems to the “undifferentiated public,” as interpreted by the New Hampshire Supreme Court in *Zimmerman*. 141 N.H. at 609. Instead, Vivint Solar offers its PPAs and Solar Leases exclusively to residential customers who meet its creditworthiness and other underwriting requirements, own their homes, and whose homes meet additional physical and safety criteria (e.g., minimum sun hours, roof condition, shading, and electrical distribution system requirements). Vivint Solar cannot offer its PPAs and Solar Leases to customers whose rooftops do not receive sufficient sunlight or cannot support photovoltaic panels, or who do not meet credit requirements indicating that they can afford to pay for electricity or lease Vivint Solar’s solar systems over a 20 year term. Vivint Solar and its financing parties pay significant costs to install solar energy systems, and if systems are removed prematurely, Vivint Solar and its financing parties potentially face significant Federal Investment Tax Credit recapture penalties, are deprived of revenue associated with system performance that is modeled into the 20-year term of Vivint Solar’s PPA or Solar Lease structure, and must bear removal costs. For these reasons, Vivint Solar must contract with creditworthy customers. Further, the NEM cap limit places a limit on how many customers that

Vivint Solar can serve; thus the cap itself makes it impossible for Vivint Solar to provide its service to “the public.” *See* RSA § 362-A:9(I).

Vivint Solar has never publicly professed its readiness to enter into its PPAs or Solar Leases with all who request them. *See Claremont*, 92 N.H. at 469. As in *Claremont*, Vivint Solar has never undertaken to sell rooftop solar power or lease solar systems at reasonable rates to “all who apply therefor.” *See id.* at 470. If Vivint Solar’s customers either don’t qualify for its PPA or Solar Lease, Vivint Solar is under no obligation to provide service and it may terminate such agreements in the event of customer defaults. Vivint Solar simply cannot and would not provide PPAs and Solar Leases to “all comers,” because this is completely inconsistent with its business model and operations. *See Zimmerman*, 141 N.H. at 612. Indeed, as a company that only provides solar power, it would be impossible for Vivint Solar to provide its services to the public; third-party financed rooftop solar simply does not make sense for those who do not own a roof with adequate solar insolation. Instead, as in *Claremont*, the service Vivint Solar seeks to render to New Hampshire homeowners would be “purely voluntary.” *See* 92 N.H. at 469. Vivint Solar’s service is only provided through a bilateral contract between a willing customer and a willing provider.

Similar to *Zimmerman*, *Claremont*, and *Dover, Somersworth & Rochester Street Railway Co. v. Wentworth*, 149 A. 505, 84 N.H. 258 (1930), Vivint Solar has a relationship with its customers that is “sufficiently discrete as to distinguish the recipient from other members of the relevant public”: Vivint Solar’s solar energy systems are located on its customers’ rooftops, on their private property, and behind their distribution utility meters. *See Zimmerman*, 141 N.H. at 609. Vivint Solar’s customers explicitly agree to host Vivint Solar’s solar energy systems on their rooftops. During the term of its PPA or Solar Lease, Vivint Solar possesses an irrevocable

license coupled with an interest to enter onto its customers' property, install its solar energy systems on their rooftops, access the solar energy systems in order to provide maintenance and repairs, and to remove the solar energy systems, where necessary.

In *Dover*, for example, the plaintiff sought to enjoin defendant Wentworth from transporting the employees of a separate defendant (Plant Corporation) to and from their work on the grounds that Wentworth was acting as a common carrier. 84 N.H. at 259. The New Hampshire Supreme Court concluded that Wentworth was not a common carrier because it found that the service he provided was not "to the public" but rather "special and exclusive" and limited to the transportation of specific employees of the co-defendant. *Id.* at 260.¹ In similar fashion, Vivint Solar only offers its PPA and Solar Lease to customers who meet its underwriting criteria, who own their homes and whose homes have physical characteristics sufficient to generate solar power in a quantity that makes economic sense for the customer. This, coupled with Vivint Solar's license and access rights to its customers' property, distinguishes it from a common carrier or public utility.

The facts here are also analogous to those in *Allied New Hampshire Gas Co. v. Tri-State Gas & Supply Co.*, in which the New Hampshire Supreme Court found that the seller of liquefied petroleum gas to the developer of a single four-family dwelling, where the single 1,000 gallon tank was located approximately 50 feet from the dwelling, all on the same parcel of land, was not a public utility. 221 A.2d 251, 107 N.H. 306 (1966). While that decision focused on whether the Legislature intended the Commission to regulate liquefied petroleum gas, the Court noted that

¹ The New Hampshire Supreme Court has applied its reasoning in *Dover* with respect to what constitutes "service to the public generally" to its public utility cases. See *Zimmerman*, 141 N.H. at 608; *Claremont*, 92 N.H. at 469.

RSA Section 362:2 was not “intended to apply to the defendant whose pipeline was fifty feet from a small, single storage tank on the private property of one owner to a single structure containing four apartments.” *Id.* at 309.

Here, if provided with the ruling requested in the Petition, Vivint Solar plans to sell photovoltaic power to its customers from solar systems located *on* the customer’s single-family dwelling. Under Vivint Solar’s PPA and Solar Lease, the solar energy system which produces the electricity is installed on the same parcel of property that is privately owned by the customer. While the sale of electricity is within the jurisdiction of the Commission, under these factual circumstances, RSA Section 362:2 was not intended to apply.

Vivint Solar should not be found to be a “public utility” under New Hampshire law because it does not provide “service to the public without discrimination.” *See Zimmerman*, 141 N.H. at 609. For these reasons, the Commission should issue a Declaratory Ruling clarifying that neither Vivint Solar nor its subsidiary, Vivint Solar Developer, LLC, or other affiliates, shall be regulated by the Commission as a public utility.

C. Vivint Solar Should Not Be Regulated as a Competitive Electric Power Supplier by the Commission.

The New Hampshire Legislature’s primary purpose in restructuring the electric utility industry was to “reduce costs for all consumers of electricity by harnessing the power of competitive markets.” RSA § 374-F:1(I). This legislative purpose was fully consistent with New Hampshire’s Constitution, which expresses the state’s “fundamental preference for free enterprise.” *Omni Communications*, 122 N.H. at 862 (citing N.H. Const. art. 83, pt. II). In light of this constitutional mandate, the bill provided that competitive markets should “provide electricity suppliers with incentives to operate efficiently and cleanly, open markets for new and

improved technologies, provide electricity buyers and sellers with appropriate price signals” among other goals. H.B. 1392 § 374-F:1(II).

The Legislature specifically tied the rationale for this transformation to retail competition to its potential role in mitigating environmental impacts. H.B. 1392 provides that “[t]he overall public policy goal of restructuring is to develop a more efficient industry structure and regulatory framework that results in a more productive economy by reducing costs to consumers while maintaining safe and reliable electric service with minimum adverse impacts on the environment.” *Id.* § 374-F:1(I). H.B. 1392 emphasized the paramount role of customer choice, and specifically provided that “[c]ustomers should be able to choose among options such as levels of service reliability, real time pricing, and *generation sources*, including interconnected *self generation*.” *Id.* § 374-F:3(II) (emphasis added); *see also id.* § 374-F:3(IX). This restructuring effort expressly recognized the role of distributed generation in this market transformation, including its ability to minimize transmission and distribution costs. RSA § 374-F:3(II), (III). As the Legislature aptly noted, “[a]s generation becomes deregulated, innovative, market-driven approaches shall be preferred to regulatory controls to reduce environmental impacts.” *Id.* § 374-F:3(VIII).

The Legislature authorized the Commission to establish requirements for competitive energy suppliers. RSA § 374-F:4(I); *id.* § 374-F:7(I). Order No. 22,514 implemented H.B. 1392 and subsequent law, establishing New Hampshire’s regulatory framework for retail competition. The Commission’s regulations broadly define a CEPS as “any person or entity, that sells or offers to sell electricity to retail customers in this state.” Puc 2002.05. RSA section 374-F:7 and the Commission’s CEPS regulations, however, are clearly intended to apply to entities that procure power at wholesale and supply it to retail customers, using the franchise utility’s

transmission and distribution wires. This regulatory regime did not contemplate the residential solar third party ownership business model or intend to sweep in such activities behind the customer's meter, on the customer's private property.

If permitted to operate in New Hampshire, Vivint Solar would advance all of the goals articulated by the Legislature in H.B. 1392. Vivint Solar's PPA and Solar Lease increases competition, reduces electricity costs to customers, reduces transmission and distribution costs by deploying distributed generation, and advances the state's environmental goals by allowing customers to self-generate using 100% clean solar energy harnessed using advanced technologies.

Under either its PPA or Solar Lease, Vivint Solar's contractual relationship with its homeowner customers is fundamentally different from the relationship between a CEPS and its customers the Commission sought to regulate in Chapter Puc 2000. Vivint Solar's Solar Lease does not result in a sale of electricity; the Solar Lease simply allows residential customers to lease the solar energy system over the contract term of 20 years at fixed monthly payments. Under the PPA, Vivint Solar simply sells power from a solar energy system installed on the homeowner's roof at a predictable price fixed by long-term contract with that customer – all behind the meter from the more complicated interconnected electric grid and energy markets. The customer remains connected to the grid and retains access to electricity from its distribution supplier in the event of termination of the PPA or Solar Lease.

The CEPS regulatory regime is simply not intended to cover third party financed self-generation. For instance, Puc 2003.01(d)(2) requires a CEPS to demonstrate that they can obtain electricity supply in the New England energy market. Such a requirement is inapposite to behind the meter generation service. Vivint Solar never obtains electric supply in wholesale markets, and would not do so in NEPOOL. Instead, its solar energy systems are powered by the sun,

harvested from its customer's own rooftops. Third-party financed self-generation does not fit, and was never intended to fall, within the CEPS regulatory framework.

Puc 2004.06 requires CEPS to bill customers on a time of use schedule. This is incompatible with Vivint Solar's PPA, which requires its customers to purchase all of the electricity produced by the solar energy system. Vivint Solar's rates and solar generation's production profile are unrelated to the customer's demand, the time signature of such load or the franchise utility's coincident peak. Instead, Vivint Solar sizes its solar energy systems based on the customer's historical energy usage. The CEPS regulations are incompatible with the rooftop solar third party ownership model.

CEPS are required to purchase net metering output from customer-generators. RSA § 362-A:9. This statutory requirement demonstrates that New Hampshire's CEPS requirements were not intended to apply to residential solar PPA and Solar Lease providers like Vivint Solar. There would be no way for Vivint Solar to *buy* exports of electricity from its customers, because Vivint Solar has no presence on the franchise utility's side of the customer's meter. Vivint Solar solely sells power to its customers from their side of the meter.

CEPS must comply with New Hampshire's RPS, which requires that 8% of load be served with Class III resources such as biomass or methane facilities and 1.5% be served from Class IV sources such as hydroelectric facilities between 2015 and 2024. *See* RSA § 362-F:3. It would be illogical for this requirement to apply to an entity like Vivint Solar, whose business model has only ever been to supply 100% of its electricity from the sun.

Additional CEPS regulations are incongruous if applied to Vivint Solar. CEPS are not permitted to discriminate against customers on the basis of home ownership, for example. Puc 2004.10. For the reasons described in Section III.B above, Vivint Solar must discriminate in the

provision of its services and cannot provide its services to the entire public. Vivint Solar can only install its solar energy systems on safe rooftops with adequate insolation for a period of twenty years and obtains an irrevocable license to access the solar energy system during the term of the PPA. For these reasons, it must contract only the fee owner of the properties that meet its criteria. Vivint Solar simply could not offer its PPA to New Hampshire customers if Chapter 2000 is held to apply to its intended activities. If Vivint Solar is deemed to be a CEPS and comply with Chapter 2000's requirements, it cannot comply and will be effectively barred from providing its services in New Hampshire.

Additional incompatibilities include that CEPS must demonstrate that it can transfer data between the franchise utility and their customer. Puc 2003.01(d)(1). Vivint Solar cannot meet this requirement, because it does not interface between the franchise utility and customer (other than to interconnect and obtain net metering authorization as a service on behalf of the customer). All of Vivint Solar's data is collected on the customer's side of the meter. CEPS must inform customers that their meter reading is available on their utility's bill. Puc 2004.06(a)(4). Vivint Solar utilizes its own meter and its data would never appear on the customer's utility bill. Finally, Puc 2004.05 subjects CEPS to numerous requirements regarding transfers of service between CEPS and between the franchise utility and a CEPS. Vivint Solar's customers, meanwhile, do not formally transfer service, but rather remain with their current grid-side electricity supplier (whether that is the default utility or a CEPS).

Thus, it is abundantly apparent that Chapter 2000 was not written with customer-sited third party owned rooftop solar business models in mind. It would be impossible for Vivint Solar to comply with the CEPS regulatory framework. For all of these reasons, the Commission

should issue a Declaratory Ruling clarifying that neither Vivint Solar nor its subsidiary, Vivint Solar Developer, LLC, or affiliates, shall be regulated by the Commission as a CEPS.

Vivint Solar recognizes that the Commission is currently reviewing the Competitive Electric Power Supplier and Aggregator Rules under Puc 2000 for CEPS in the rulemaking docket DRM 13-151 2000 Rules. Vivint Solar also recognizes that another solar company has requested that the Commission provide clarification that rooftop solar energy services should not be regulated as CEPS or a public utility in the DRM 13-151 rulemaking docket. While Vivint Solar supports the same regulatory outcome, Vivint Solar cannot wait the six to twelve months that the DRM 13-151 rulemaking docket is likely to take to deal with this important issue. Given the significant reductions in Federal Investment Tax Credit for installations of solar power and accelerated tax depreciation expected in 2017, as well as limited nature of state and utility solar incentive programs, Vivint Solar wants to be able to provide PPAs and Solar Leases to New Hampshire customers as soon as possible.

D. Vivint Solar Should Not Be Regulated as a Limited Producer of Electrical Energy by the Commission.

The Limited Electrical Energy Producers Act (“LEEPA”) implements the federal Public Utilities Regulatory Policy Act of 1978 (“PURPA”) and sets forth the right of qualifying facilities to sell power to utilities at avoided cost. *See* RSA §§ 362-A:3, 4, 8; Pub. L. No. 95-617, 92 Stat. 3117 (1978). Upon request of a LPEE, the statute requires any franchised electrical public utility in the transmission area to wheel power on behalf of the LPEE’s facility to a purchaser’s facility. RSA § 362-A:2-a(II).

The definition of a “limited producer” or “limited electrical energy producer” under LEEPA includes the owner or operator of a facility with a total capacity of not more than five megawatts that produces electricity solely by the use of renewable resources. *Id.* § 362-A:1-a. New Hampshire restricts LPEEs to selling power to not more than three end users other than the franchise electric utility. *Id.* § 362-A:2-a(I).

The solar energy systems under Vivint Solar’s PPA and Solar Lease offerings are fundamentally different from the facilities that LEEPA intended to regulate. Vivint Solar offers PPAs or Solar Leases to qualified residential homeowners and installs a customized system, sized for the homeowner’s energy needs and placed on the customers’ side of the utility electrical meter.

Regulation of LPEE’s is inconsistent and incompatible with Vivint Solar’s business model. First, under its PPA and Solar Lease, Vivint Solar does not sell electricity to the franchise utility. Second, Vivint Solar’s solar energy systems are located on its customers’ private property, and electricity is transmitted from the solar energy system to power the home directly on the customer’s side of the meter. For this reason, Vivint Solar does not use the transmission or distribution lines to transmit electricity to its purchasers and does not require the utilities’ wheeling services. This incompatibility is evidence that LEEPA was not enacted to apply to Vivint Solar’s business model.

Moreover, Vivint Solar intends to offer numerous New Hampshire residents the ability to self-generate electricity in a cost-effective manner, and thus does not fall within the scope of RSA Section 362-A:2-a, which limits LPEE’s to selling power to three end users. The purpose of the LEEPA would be contravened if Vivint Solar were regulated as a LPEE. LEEPA was enacted in the public interest to encourage and support diversified electrical production that uses

indigenous and renewable fuels and benefits the environment and public health. RSA § 362-A:1. By restricting Vivint Solar and similar companies' ability to sell to only three customers in New Hampshire, the legislative purpose of LEEPA, New Hampshire's RPS and net metering goals would be hampered.

For these reasons, the Commission should issue a Declaratory Ruling clarifying that neither Vivint Solar nor its subsidiary, Vivint Solar Developer, LLC, or affiliates, shall be regulated by the Commission as a LPEE.

E. Vivint Solar's Petition Will Further New Hampshire's RPS and Clean Energy Policies.

New Hampshire strongly supports the deployment of clean energy and energy independence for the state. New Hampshire's RPS requires electricity providers to supply load with approximately 25% clean energy by 2025. *See* RSA § 362-F. New Hampshire's RPS was established to "provide fuel diversity to the state and New England generation supply through use of local renewable fuels and resources that serve to displace and thereby lower regional dependence on fossil fuels." *Id.* § 362-F:1. The legislature recognized that the RPS had "the potential to lower and stabilize future energy costs by reducing exposure to rising and volatile fossil fuel prices [and] help to keep energy and investment dollars in the state." *Id.*

New Hampshire has also established a strong net metering program in order to provide for small scale and diversified sources of supplemental electrical power and benefit the environment and public health. *See id.* § 362-A:9; Puc 901.01. In 2014, the Legislature amended the state's net metering statute to expressly provide that customers purchasing electricity from a third party owner of a renewable generating facility are eligible for net metering. *See* H.R. 1600, Reg. Sess. (N.H. 2014). An "eligible customer-generator" for

purposes of the state's net metering statute is a customer who "owns, operates or purchases power from" a renewable generating facility up to one megawatt (1 MW) in capacity. RSA § 362-A:1-a(II-b). The state Legislature thereby recognized the value of this business model to New Hampshire residents, and did not direct the Commission to regulate such entities. For this reason, Vivint Solar seeks to offer PPAs to its New Hampshire customers, rather than Leases.

Vivint Solar's PPAs and Solar Leases would enable New Hampshire to achieve greater energy independence by using clean, local, renewable sources of energy consistent with the state's RPS and net metering policies. Vivint Solar's agreements would further state policy goals of providing fuel diversity by deploying solar energy resources, lowering the cost of electricity and solar power for customers, and enabling New Hampshire homeowners to net meter. By contrast, subjecting Vivint Solar and other similar companies to burdensome and inapplicable regulatory regimes, such as those applied to public utilities and CEPS, would prevent Vivint Solar from operating in New Hampshire. If Vivint Solar were deemed to be a LPEE, it would only be able to sell to three residential customers in New Hampshire. Such an interpretation of New Hampshire's laws and regulations would contravene these state clean and distributed energy policies and Legislative intent. For these reasons, the Commission should grant the declaratory ruling requested by Vivint Solar.

V. Conclusion

In light of the foregoing, and in order for Vivint Solar to offer solar energy to New Hampshire residents and have certainty it can operate in the state, the Commission should issue a ruling declaring that Vivint Solar's operations in New Hampshire as described herein would not subject it or its affiliates to regulation as a (1) "public utility" under RSA Section 362:2, (2) CEPS under Puc 2002.05, or (3) LPEE under RSA Section 362-A:2-a, and to grant such other and further relief as may be just and equitable.

Respectfully submitted,

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