

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

DE 15-303

VIVINT SOLAR, INC.

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

REPLY BRIEF OF COMMISSION STAFF

Pursuant to the Commission's secretarial letter dated October 12, 2015, the petitioner in this proceeding, Vivint Solar, Inc. (Vivint Solar), filed a legal brief on November 6, 2015 (VS Brief) addressing the basis for its petition for declaratory ruling and three legal issues regarding the regulatory status of Vivint Solar and its subsidiary, Vivint Solar Developer, LLC, and their affiliates, in particular whether any of such entities will be regulated by the Commission as:

1. A public utility as defined in RSA 362:2;
2. A competitive electric power supplier (CEPS) under N.H. Code Admin. Rules Chapter Puc 2000; or
3. A limited producer of electrical energy (LPEE) under RSA 362-A:2-a.

The petitioner's brief recites many of the same facts as set forth in its petition. The petitioner argues that its petition should be decided, and not dismissed, because it sets forth definite and concrete factual allegations regarding Vivint Solar's plans to enter the New Hampshire residential solar market in the near future and its interest in avoiding "burdensome regulations, with respect to many of which it cannot comply." VS Brief at 5. The petitioner asserts that its ability to offer its services in New Hampshire is not a hypothetical situation and its petition does not seek advice about how the Commission would rule in a future case, but rather whether and how it would be regulated by the Commission if it pursues its business plans in the state.

The petitioner further argues that neither Vivint Solar nor any of its affiliates should be regulated by the Commission as a public utility, a CEPS, or a LPEE, as its planned business activities in the state do not come within the scope of the Commission’s regulatory authority under the relevant statutes and rules. For the reasons set forth below, Commission Staff (Staff) believes that the petitioner’s legal arguments have merit and should be given substantial weight by the Commission. Staff does, however, wish to clarify the scope of the Commission’s authority to regulate activities such as those proposed by Vivint Solar and its affiliates.

1. Vivint Solar’s Petition for Declaratory Ruling is Properly Before the Commission

Under N.H. Code Admin. Rules 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.” For the reasons stated in Vivint Solar’s petition and in the VS Brief, Staff concurs that there is no basis for the Commission to dismiss the petition. Staff believes that a petition for declaratory ruling may be an appropriate vehicle for a business entity seeking to enter the state to clarify its regulatory status, provided it is able to describe in detail the business operations it proposes to conduct in the state. Staff believes Vivint Solar has disclosed sufficient detail regarding its proposed business operations in the state to meet this threshold requirement.

2. Vivint Solar is not a Public Utility Under RSA 362:2

Vivint Solar argues that neither it nor its affiliates should be regulated as a “public utility” as defined in RSA 362:2, relying principally on the finding of the New Hampshire Supreme Court that "a distinguishing characteristic of a public utility is “[s]ervice to the public

without discrimination.”” *In re Zimmerman*, 141 N.H. 605, 609 (1997) (citing *Claremont Gas Light Co. v. Monadnock Mills*, 92 N.H. 468, 469 (1943)). Vivint Solar maintains it does not sell the electricity generated by its solar energy systems to the "undifferentiated public," as interpreted by the Court in *Zimmerman*, 141 N.H. at 609. Instead, Vivint Solar offers its power purchase agreements (PPAs) and Solar Leases exclusively to residential customers who meet certain creditworthiness and other underwriting requirements, own their homes, and whose homes meet additional physical and safety criteria, such as solar insolation, roof condition, and electrical distribution system requirements. Vivint Solar asserts it cannot and does not offer its PPAs and Solar Leases to the undifferentiated public as a public utility does and must. VS Brief at 7-11.

Citing *Zimmerman*, *Claremont*, and *Dover, Somersworth & Rochester Street Railway Co. v. Wentworth*, 84 N.H. 258 (1930), Vivint Solar maintains it has a relationship with its residential customers that is “sufficiently discrete as to distinguish the recipient [of its services] from other members of the relevant public.” See *Zimmerman*, 141 N.H. at 609. Vivint Solar's solar energy systems are located on its customers’ rooftops, on their private property, and behind their distribution utility meters. According to Vivint Solar, its customers explicitly agree to host its solar energy systems on their rooftops and, during the term of the applicable 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 remove the solar energy systems, where necessary. The complexity of this provider-customer relationship goes well beyond that of the standard relationship between a public utility and its customers. VS Brief at 7-11.

Staff concurs with Vivint Solar that, based on the relevant facts and the applicable precedent, neither Vivint Solar nor its affiliates should be found to be a “public utility” as defined in RSA 362:2, nor regulated as such by the Commission pursuant to its broad authority over jurisdictional public utilities.

3. Vivint Solar is Not a Competitive Electric Power Supplier Under Puc 2002.05

Vivint Solar recognizes that, under the electric utility restructuring statute, RSA 374-F, the Commission is authorized to adopt rules establishing requirements, excluding price regulation, for CEPS, “including registration, registration fees, customer information, disclosure, standards of conduct, and consumer protection and assistance requirements.” RSA 374-F:7, I. Pursuant to this authority, the Commission has adopted the Puc 2000 Competitive Electric Power Supplier and Aggregator Rules, which cover CEPS registration, contract terms and conditions, information disclosures, customer solicitation and enrollment, customer account transfers, financial security, enforcement, sanctions, remedies, and reporting obligations. *See* N.H. Code Admin. Rules Chapter Puc 2000. Under Puc 2002.05, a CEPS is defined as “any person or entity, that sells or offers to sell electricity to retail customers in this state.”

Vivint Solar acknowledges the breadth of this regulatory definition of CEPS, but it argues that RSA 374-F:7 and the Puc 2000 rules 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, and that this regulatory regime does not contemplate the residential solar third party ownership business model or intend to cover such activities behind the customer's retail electric meter located on the customer's private property. VS Brief at 12-13.

Vivint Solar cites several specific provisions under the Puc 2000 rules as examples of regulatory requirements it claims cannot and should not apply to its business practices and customer relationships, including the following:

- (i) Puc 2003.01(d)(1), which requires each CEPS to demonstrate that it can transfer data between the franchise utility and its customers;
- (ii) Puc 2003.01(d)(2), which requires each CEPS to demonstrate that it can obtain electricity supply in the New England energy market;
- (iii) Puc 2004.05, which restricts the ability of a CEPS to transfer service obligations to another entity and provides the customer a right to choose a different service provider in connection with any such CEPS transfer of service; and
- (iv) Puc 2004.10, which prohibits a CEPS from discriminating against customers on the basis of home ownership.

VS Brief at 13-15.

In addition, Vivint Solar highlights the incongruity that would result from requiring it as a CEPS to comply with renewable portfolio standard (RPS) obligations under RSA 362-F. For example, RSA 362-F:10, II and Puc 2503.03(c) require each CEPS to pay alternative compliance payments to the Commission, if and to the extent the CEPS has not met its RPS compliance obligations through the acquisition of renewable energy certificates, for all four RPS resource classes, including Class III existing biomass and Class IV existing hydroelectric sources. Vivint Solar claims 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.” VS Brief at 14.

Staff agrees with Vivint Solar that the Commission’s Puc 2000 rules applicable to CEPS were not adopted in contemplation of behind-the-meter, third party-owned, rooftop solar energy system installations and related electricity sales, which are at the crux of the relationship between Vivint Solar and its residential customers. Staff notes the general rule of statutory construction,

believed to be equally applicable to administrative rules, that all provisions should be read as a whole and in the entirety in the interpretation of each separate provision. *See, e.g., Appeal of Northern New Eng. Tel. Operations, LLC*, 165 N.H. 267, 271 (2013) (legislative intent to be determined from words of the statute considered as a whole; statutes to be interpreted not in isolation but in the context of overall statutory scheme); *Appeal of Pennichuck Water Works*, 160 N.H. 18, 27 (2010) (various statutory provisions to be construed harmoniously insofar as reasonably possible); *Chase v. Ameriquest Mortgage Co.*, 155 N.H. 19, 22 (2007) (statutes to be construed in harmony with the overall statutory scheme). Under such an integrated reading, the seemingly broad definition of CEPS contained in Puc 2002.05 may not be read so expansively in the context of the overall regulatory regime adopted through the existing Puc 2000 rules.

Staff concurs with Vivint Solar that, based on the relevant facts and the most appropriate interpretation of the Commission's rules, neither Vivint Solar nor its affiliates should be found to be a CEPS as defined in Puc 2002.05, nor regulated as such by the Commission pursuant to the Puc 2000 rules.

4. Vivint Solar is not a Limited Producer of Electrical Energy under RSA 362-A:2-a

Vivint Solar argues that neither it nor its affiliates should be regulated as a LPEE under the New Hampshire Limited Electrical Energy Producers Act, RSA 362-A (LEEPA), which implements within New Hampshire the requirements of the federal Public Utilities Regulatory Policy Act of 1978 (PURPA). The LEEPA statute sets forth the right of qualifying facilities to sell electric power to regulated utilities at avoided costs, and also permits a LPEE to sell power to not more than three end users other than the franchise electric utility, provided that the Commission finds the terms and conditions of such sales and any related wheeling arrangements meet certain statutory standards of reasonableness and are consistent with the public good. RSA

362-A:2-a. Under RSA 362-A:1-a, a LPEE 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 energy resources.

Vivint Solar maintains that the solar energy systems covered by its PPA and Solar Lease offerings are fundamentally different from the facilities intended to be regulated under LEEPA, because they are installed on a customized basis only on the rooftops of qualified residential homeowners, they are sized for the homeowners' energy needs, and they are located on the customers' side of the utility electrical meter. Vivint Solar asserts that the regulation of LPEEs is inconsistent and incompatible with its business model for two primary reasons. First, under its PPAs and Solar Leases, Vivint Solar does not sell electricity to the franchise electric utility. Second, its solar energy systems are located on the 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; as a result, it does not use utility transmission or distribution lines to transmit electricity to its purchasers and does not require the utility's wheeling services. Vivint Solar argues that this incompatibility is evidence that LEEPA was not enacted to apply to its business model. VS Brief at 17-18.

Staff agrees with Vivint Solar that the purpose and scope of the LEEPA statutory provisions, when read as a whole, do not seem intended to regulate behind-the-meter, third party-owned, rooftop solar energy system installations and related electricity sales to the residential customers hosting such installations. Staff concurs with the petitioner that, based on the relevant facts and the most appropriate interpretation of LEEPA, neither Vivint Solar nor its affiliates should be found to be a LPEE as defined in RSA 362-A:1-a, nor regulated as such by the Commission pursuant to LEEPA.

5. The Commission has the Authority to Regulate Rooftop Solar Energy System Owners Selling Electricity to Retail Customers

Although Staff concurs with Vivint Solar's position that neither it nor its affiliates should be regulated under current law and rules as a public utility, a CEPS, or a LPEE, Staff believes that the Commission nonetheless has authority under the electric restructuring statute to regulate electricity sales to retail customers (with the exception of price regulation) from third party-owned, behind-the-meter, solar energy systems installed on the customers' premises, including sales under the solar energy system PPAs proposed by Vivint Solar in this proceeding.

Under RSA 374-F:7, I and V, the Commission is given broad rulemaking authority "to establish requirements, excluding price regulation, for competitive electricity suppliers, including registration, registration fees, customer information, disclosure, standards of conduct, and consumer protection and assistance requirements." The statute defines "electricity suppliers" as "suppliers of electricity generation services and [the term] includes actual electricity generators and brokers, aggregators, and pools that arrange for the supply of electricity generation to meet retail customer demand, which may be municipal or county entities." RSA 374-F:2, II. Presumably, a "competitive" electricity supplier is one that is not also a regulated public utility by virtue of its ownership and operation of electric transmission and/or distribution facilities.

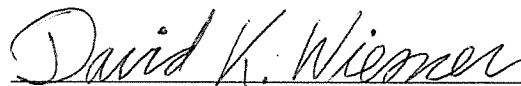
Staff believes that third party owners and operators of solar energy systems installed behind-the-meter on retail electric customers' premises may be considered "competitive electricity suppliers" to the extent they sell power directly to these customers from such systems. The Commission therefore has the authority, should it find it necessary or advisable, to adopt rules pursuant to the Administrative Procedure Act, RSA 541-A, that may establish requirements for registration, customer disclosures, standards of conduct, and consumer protection and

assistance obligations applicable to such business entities. Staff takes no position at this time as to whether any such new rulemaking initiative should be undertaken by the Commission.

6. Conclusion

For the reasons set forth above, Staff is in accord with the positions advocated by Vivint Solar and the conclusion that neither Vivint Solar nor its affiliates should be regulated by the Commission under current statutes and rules as a public utility, a CEPS, or a LPEE. Staff believes, however, that the Commission has the authority under the electric restructuring statute, RSA 374-F, to regulate electricity sales to retail customers (with the exception of price regulation) from third party-owned, behind-the-meter, solar energy systems installed on the customers' premises, including the solar energy PPAs described by Vivint Solar in its petition.

Respectfully submitted,



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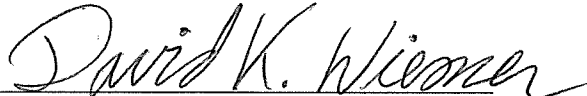
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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically served a copy of this filing upon each party on the official Service List compiled by the Secretary in this proceeding.

Dated at Concord, New Hampshire, this 20th day of November, 2015.


David K. Wiesner, Esq.

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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FILING INSTRUCTIONS:

a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:

DEBRA A HOWLAND
EXECUTIVE DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
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b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.

c) Serve a written copy on each person on the service list not able to receive electronic mail.