

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

Docket No. _____

VIVINT SOLAR, INC.

PETITION FOR DECLARATORY RULING

I. Introduction

Pursuant to N.H. Code Admin. R. Ann. PUC 203 and 207.01, Vivint Solar, Inc. (“Vivint Solar”) hereby respectfully petitions the New Hampshire Public Utilities Commission (“Commission”) to issue a declaratory ruling clarifying 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. Section 362:2, (2) a “competitive electric power supplier” (“CEPS”) under N.H. Code Admin. R. Ann. PUC 2002.05, or (3) a limited producer of electrical energy (“LPEE”) under N.H. Rev. Stat. Ann. 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.

II. Background

1. Vivint Solar is the second largest installer of residential solar energy systems in the U.S. residential market with approximately 42,000 residential customers, 274 megawatts of solar systems installed, 4,200 employees and over 53 sales offices throughout the U.S.
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 our PPAs and Solar Leases are owned by Vivint Solar's 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., Nat'l Renewable Energy Lab., Photovoltaic System Pricing Trends (2014).* Vivint Solar's PPAs and Solar Leases enable significantly more consumers to generate their own renewable electricity because they efficiently allow investors with tax liability to utilize 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 bill, 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 installed in the U.S. in 2014 was third-party owned in the form of Solar Leases and PPAs. *See* Nicole Litvak, GTM Research, *U.S. Residential Solar Financing 2015-2020* (2015).
5. According to GTM Research, the U.S. residential solar energy market is expected to grow at a compound annual growth rate of approximately 27% from 2013 through 2018. *See id.*
6. The solar energy systems installed on customers' rooftops pursuant to Vivint Solar's PPAs and Solar Leases are located on 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.
7. Vivint Solar's PPAs and Solar Leases are offered only to homeowners that meet our and our financing partners' credit and underwriting criteria and whose homes meet additional physical and safety criteria.

III. New Hampshire Public Utility Regulatory Framework

8. New Hampshire has led the nation in deregulating retail electric utility markets. The New Hampshire Legislature enacted the country's first full retail deregulation legislation in 1996, and the Commission implemented retail choice in 1997. *See, e.g.*, H.B. 1392, 1995 Reg. Session (N.H. 1995); Order No. 22,514. In enacting HB 1392, the Legislature found

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.*

9. In New Hampshire’s restructured retail electricity markets, the Commission provides limited regulation of CEPS and LPEEs. While the Commission does not set the rates for CEPS, these entities are required to comply with reporting, financial, and consumer protection requirements. *See* N.H. Code Admin. R. Ann. PUC 2002-2004 (requiring CEPS to provide evidence of financial security, provide numerous written statements regarding terms of service, and comply with laws regarding telephone solicitation of customers).
10. New Hampshire law allows a LPEE that produces not more than 5 megawatts of power by means of renewable resources or cogeneration to sell power directly to not more than three end users. N.H. Rev. Stat. Ann. §§ 362A:1-a, 2-a, I. The Commission must review and approve all contracts concerning retail sales of electricity from LPEEs. N.H. Rev. Stat. Ann. § 362A:2-a, I.
11. New Hampshire strongly supports the deployment of clean energy and energy independence for the state. New Hampshire’s Renewable Portfolio Standard (“RPS”) requires electricity providers to supply load with approximately 25% clean energy by 2025. *See* N.H. Rev. Stat. Ann. § 362-F. The Commission has also established a rebate program for qualifying homeowners who install rooftop solar or wind generation systems 10 kW or smaller. *See* N.H. Code Admin. R. Ann. PUC 2508.03.
12. 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* N.H. Rev. Stat. Ann. § 362-A:9; N.H. Code Admin. R. Ann. PUC 901.01.

IV. Vivint Solar Should Not Be Subject to Regulation by the Commission

A. Standard of Review

13. Under N.H. Code Admin. PUC 207.01(c), the Commission must dismiss any petition for declaratory ruling that: “(1) Fails to set forth factual allegations that are definite and concrete; (2) Involves a hypothetical situation or otherwise seeks advice as to how the commission would decide a future case; or (3) Does not implicate the legal rights or responsibilities of the petitioner; or (4) Is not within the commission’s jurisdiction.”
14. This petition should not be dismissed under this standard because (1) Vivint Solar sets forth definite and concrete factual allegations; (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; (3) the petition implicates the legal rights and responsibility of Vivint Solar, and (4) the subject matter (how the Commission regulates third party providers of solar PPAs and Solar Leases) is squarely within the Commission’s jurisdiction. Without regulatory clarity on how it may be regulated, Vivint Solar cannot enter the state to offer its PPAs and Solar Leases to New Hampshire customers.

B. Vivint Solar is Not a “Public Utility” under New Hampshire Law

15. The Commission has the authority to regulate “public utilities.” N.H. Rev. Stat. Ann. § 365:8. The definition of a public utility under N.H. Rev. Stat. Ann. Section 362:2 provides in relevant part that a “public utility shall include every corporation,

company . . . their lessees, trustees or receivers appointed by any court . . . owning, operating or managing any plant or equipment or any part of the same . . . for the manufacture or furnishing of light, heat, sewage disposal, power or water for the public, or in the generation, transmission or sale of electricity ultimately sold to the public.”

16. Whether a sale of electricity to a customer constitutes a sale of electricity to the “public” is informed by *Appeal of Zimmerman*, 141 N.H. 605, 609 (N.H. 1997), in which the New Hampshire Supreme Court held that a distinguishing characteristic of a public utility is “service to the public without discrimination.”¹
17. Vivint Solar does not sell the electricity generated by its solar energy systems to the “public,” as interpreted by the Court in *Zimmerman*. Vivint Solar offers its PPAs and Solar Leases exclusively to residential customers who meet Vivint Solar’s strict 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, electrical distribution system requirements). Vivint Solar simply cannot provide PPAs and Solar Leases to the public broadly in New Hampshire. Since Vivint Solar does not provide “service to the public without discrimination,” it is not a “public utility” under New Hampshire law. *See Zimmerman*, 141 N.H. at 609.
18. A Declaratory Ruling finding that neither Vivint Solar nor its affiliates is a “public utility” under New Hampshire law would also be consistent with the state’s competitive

¹ *See also Claremont Gas Light Co. v. Monadnock Mills*, 92 N.H. 469 (1943) (holding that the operator of a steam plant was not offering services “for the public” because it had not undertaken to furnish steam at reasonable rates to anyone who applied for it, but on voluntary grounds).

electricity markets and renewable energy policies, as further described in sections IV(E) and (F) below.

19. 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

20. N.H. Code Admin. R. Ann. PUC 2002.05 defines a CEPS as “any person or entity that sells or offers to sell electricity to retail customers in this state.” Under N.H. Rev. Stat. Ann. Section 374-F:7, the Commission is authorized to establish requirements for competitive electricity suppliers, including registration, registration fees, customer information, disclosure, standards of conduct, and consumer protection and assistance requirements. The purpose of allowing CEPS to operate in the state is to enable customers to choose among options such as levels of service reliability, real time pricing, and generation sources, including “interconnected self generation.” N.H. Rev. Stat. Ann. § 374-F:3.
21. Vivint Solar’s contractual relationship with its homeowner customers is fundamentally different from the relationship between a CEPS and its customers. While a CEPS procures wholesale power from various sources, arranges for delivery of power and related services to its customers over utility-owned transmission and distribution systems, and provides the interface between the customer and a significantly complicated energy market, Vivint Solar simply leases, or sells power from, a system installed on the homeowner’s roof at a predictable price fixed by long-term contract – all behind the meter from the more complicated interconnected electric grid and energy markets.

22. Vivint Solar's Solar Lease does not result in a sale of electricity. The Solar Lease allows residential customers to lease the solar energy system over the contract term of 20 years. Residential customers pay fixed monthly lease payments, regardless of how much their solar energy system produces and thus the Solar Lease does not qualify as a sale of power.
23. Vivint Solar's PPA should not subject Vivint Solar to regulation by the Commission as a CEPS. While some homeowners prefer making fixed monthly lease payments, PPAs allow homeowners to pay only for the electricity generated by the solar panels installed on their rooftops. PPAs give customers "clear price information" on a per kilowatt-hour basis, providing more choice, encouraging self generation and increasing cost transparency. These features of PPAs are consistent with the goals of New Hampshire's electricity market restructuring policy principles. *See id.*
24. In addition, the electricity generated by the solar energy systems installed by Vivint Solar will help meet the New Hampshire's goal of providing diversified and small scale renewable sources of electrical power. The output of all of Vivint Solar's systems is 100% solar-produced electric energy. If Vivint Solar were regulated as a CEPS, however, it would have to comply with the CEPS requirement that a certain portion of Vivint Solar's energy sold to New Hampshire customers from biomass and other non-solar generation sources.² This regulatory burden would be impossible for Vivint Solar to meet without fundamental changes to its business model and customer service offerings.

² Under N.H. Rev. Stat. Ann. Section 362-F:3, providers of electricity, including CEPS, must comply with New Hampshire's RPS, which requires procurement from four different classes of renewable energy sources in different proportions. If Vivint Solar is regulated as a CEPS, it would lead to the incongruous result that in year 2016, Vivint Solar would have to meet 6.9% of its customer load through Class I resources such as wind, geothermal, hydrogen, ocean thermal wave, current or tidal energy; 8% of its customer load through Class III resources such as biomass or methane gas facilities; and 1.5% of its customer load through Class IV resources such as hydroelectric generation

25. 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.

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

26. Under N.H. Rev. Stat. Ann. Section 362-A:1-a, a LPEE is a facility that has a total capacity of not more than five megawatts and generates power from renewable resources or cogeneration. Upon request of a LPEE, the statute requires any franchised electrical public utility in the transmission area to transmit electrical energy from the producer's facility to a purchaser's facility. N.H. Rev. Stat. Ann. § 362-A:2-a.

27. A LPEE has the authority to sell power to not more than three end users other than the franchise electric utility. *Id.*

28. The solar energy systems under Vivint Solar's PPA and Solar Lease offerings are fundamentally different than the facilities that the Limited Electrical Energy Producers Act 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. Vivint Solar's solar energy systems do not require the use of the franchise electrical public utility's central power stations, wire, distribution or transmission facilities to transmit electricity to residential customers.

facilities. Vivint Solar would only be able to count the electricity generated by its solar energy systems toward 0.3% of its RPS requirements. *See* N.H. Code Admin. R. Ann. PUC 2005.

29. Vivint Solar intends to offer numerous New Hampshire residents the ability to self-generate electricity and thus does not fall within the scope of N.H. Rev. Stat. Ann. Section 362-A:2-a, which limits LPEE's to selling power to three end users.
30. Furthermore, the purpose of the Limited Electrical Energy Producers Act would be contravened if Vivint Solar were regulated as a LPEE. The Limited Electrical Energy Producers Act 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. *Id.*
31. For these reasons, the Commission should issue a Declaratory Ruling clarifying that neither Vivint Solar nor its subsidiary, Vivint Solar Developer, LLC, shall be regulated by the Commission as a LPEE.

E. Vivint Solar's Petition is Consistent with New Hampshire's Policy of Deregulation and Retail Customer Choice

32. 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.B. 1392, 1995 Reg. Session (N.H. 1995).
33. In enacting HB 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.*
34. In February 1997, the Commission issued a restructuring plan and a set of implementing orders (the "Plan"). *See* 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.

35. 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. For these reasons, the Commission should rule that neither Vivint Solar nor its affiliates shall be regulated as public utilities, CEPS or LPEE's in New Hampshire.
36. Vivint Solar recognizes that the Commission is currently reviewing the Competitive Electric Power Supplier and Aggregator Rules under N.H. Code Admin. R. Ann. PUC 2000 for CEPS in the rulemaking docket DRM 13-151. 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 13-351 rulemaking docket. While Vivint Solar supports the same regulatory outcome, Vivint Solar does not want to wait the six to twelve months that the DRM 13-351 rulemaking docket is likely to take to deal with this important issue. Given the reductions in Federal Investment Tax Credit for installations of solar power and accelerated tax depreciation 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.

F. Vivint Solar’s Petition will Further New Hampshire’s RPS and clean energy policies

37. 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.” N.H. Rev. Stat. Ann. § 362-F:1.
38. 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.*
39. In addition, New Hampshire requires all utilities selling electricity in the state to offer net metering to customers who own, operate, or purchase power from systems up to one megawatt (1 MW) in capacity that generate electricity from renewable resources. *See* N.H. Rev. Stat. Ann. § 362-A:9.
40. 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. Our 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.
41. For these reasons, the Commission should grant the relief requested by Vivint Solar.

V. Request for Relief

This petition sets forth factual allegations that are definite and concrete, does not involve a hypothetical situation or otherwise seek advice as to how the Commission would decide a future case, implicates the legal rights and responsibilities of the petitioner, and is within the Commission’s jurisdiction. 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, Vivint Solar respectfully requests that the Commission 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 N.H. Rev. Stat. Ann. Section 362:2, (2) CEPS under N.H. Code Admin. R. Ann. PUC 2002.05, or (3) LPEE under N.H. Rev. Stat. Ann. Section 362-A:2-a, and to grant such other and further relief as may be just and equitable.

Respectfully submitted,

Dated: August 12, 2015

_____/s/_____
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AFFIRMATION

I hereby affirm that I have knowledge of the relevant facts stated in the foregoing Petition and that those facts are true and accurate to the best of my knowledge and belief.

_____/s/_____
C. Dan Black
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