

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 15-303

VIVINT SOLAR, INC.

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

**Order Granting Petition and Motion for Protective
Order and Confidential Treatment**

ORDER NO. 25,859

January 15, 2016

APPEARANCES: Wilson, Sonsini, Goodrich & Rosati, by Todd G. Glass, Esq., for Vivint Solar, Inc.; Keyes, Fox & Wiedman LLP, by Jason B. Keyes, Esq., for The Alliance for Solar Choice; James T. Rodier, Esq., for Freedom Logistics, LLC d/b/a Freedom Energy Logistics; and David K. Wiesner, Esq., for the Staff of the Public Utilities Commission.

In this order the Commission grants the petition for declaratory ruling filed by Vivint Solar, Inc. (Vivint). We find that, in offering solar power purchase agreements or solar leases to customers in New Hampshire, neither Vivint nor any of its affiliates should be regulated by the Commission as (1) a “public utility” under RSA 362:2, (2) a “competitive electric power supplier” under N.H. Code Admin. Rules Puc 2002.05, or (3) a limited producer of electrical energy under RSA 362-A:2-a. We also grant confidential treatment of certain information and documents provided by Vivint in response to Commission Staff discovery questions.

I. PROCEDURAL BACKGROUND

On August 14, 2015, Vivint filed a petition for declaratory ruling (Petition) pursuant to N.H. Code Admin. Rules Puc 207.01, asking the Commission to issue a declaratory ruling clarifying that, in offering solar power purchase agreements (PPAs) or solar leases (Solar Leases) to residential customers in New Hampshire, neither Vivint nor any of its affiliates will be

regulated by the Commission as (1) a “public utility” under RSA 362:2, (2) a “competitive electric power supplier” (CEPS) under N.H. Code Admin. Rules Puc 2002.05, or (3) a limited producer of electrical energy (LPEE) under RSA 362-A:2-a.

Petitions to intervene were timely filed by The Alliance for Solar Choice (TASC) and by Freedom Logistics, LLC d/b/a Freedom Energy Logistics (FEL). No party objected to either of these intervention requests, and the Commission granted the two petitions to intervene during the prehearing conference held on October 8, 2015.

In accordance with the approved procedural schedule, Vivint filed a legal brief in support of its Petition, and TASC and Commission Staff (Staff) each filed a reply brief. Prior to the hearing on the merits, Staff filed a Stipulation of Facts (Stipulation) pursuant to Puc 203.20 that had been signed by all of the parties. Vivint filed a Motion for Protective Order and Confidential Treatment (Motion) seeking confidential treatment of certain information and documents provided by Vivint in response to Staff data requests. No party objected to the Motion. The hearing on the merits was held on December 3, 2015.

II. STIPULATED FACTS

The following is a summary of the relevant facts as set forth in the Stipulation:

Vivint offers solar energy to qualified residential customers primarily through long-term customer contracts in the form of either, (1) PPAs, under which a customer agrees to purchase all of the power generated by a solar energy system (System) installed on the customer’s rooftop, or (2) Solar Leases, under which a customer leases the System which is installed on the customer’s real property. Under both arrangements, Vivint installs, operates, and maintains the System throughout the term of the agreement, and the Systems are owned by Vivint’s affiliates and financing parties. Vivint believes that, because many homeowners are unable or unwilling to

pay the upfront costs of a System, which range from \$20,000 to \$50,000 for Systems with capacity ranging from 5 kW DC to 12.5 kW DC, Vivint's PPAs and Solar Leases enable these customers to generate renewable electricity on their homes using third party financing through contractual arrangements that enable investors with tax exposure to utilize the Federal Investment Tax Credit for installations of solar power, accelerated tax depreciation, and state and utility solar incentive programs, where applicable.

Under the PPA arrangement, the customer pays Vivint for each kilowatt-hour (kWh) of energy produced by the System at a fixed energy price that escalates each year by not more than a specified percentage for a term of 20 years. Under the Solar Lease arrangement, the customer pays Vivint a fixed monthly lease payment that escalates each year by not more than a specified percentage for a term of 20 years. Vivint's PPAs and Solar Leases are offered only to homeowners that meet Vivint's and its financing partners' credit and underwriting criteria and whose homes meet additional physical and safety criteria, such as solar irradiance, roof pitch and condition, shading, and local electrical distribution system requirements. Vivint's PPAs and Solar Leases are only offered in jurisdictions that provide for net metering or equivalent programs that reimburse customers at retail rates for their exports of energy to the electric distribution system.

During the term of each PPA or Solar Lease, Vivint possesses an irrevocable license coupled with an interest to enter onto its customers' property, install its Systems on their rooftops, access the Systems in order to provide maintenance and repairs, and remove the Systems, if and when necessary. Vivint does not pay the customer to lease the space where the System is located or for the access rights to the property and the System. Vivint has the right to terminate its PPAs or Solar Leases if customers fail to make payments when due, fail to perform

their obligations, or go into bankruptcy or foreclosure. A customer has the right to terminate its PPA or Solar Lease if Vivint fails to perform its material obligations and such failure is not cured within 30 days after written notice is provided to Vivint. In the event that a PPA or Solar Lease is terminated or that a System is temporarily shut down, the customer will continue to take electric delivery service from the local utility and receive power from the local utility or a CEPS without any interruption of service.

Vivint designs, installs, maintains, repairs, monitors, and insures its System at no additional cost to the customer. To the extent possible, Vivint designs each System to serve 90-100% of the customer's annual electric energy requirements, except as otherwise provided under the applicable law or utility tariff. The Systems installed on customers' rooftops pursuant to Vivint's PPAs and Solar Leases are located on the customers' private property, and all energy production from such Systems occurs on the customers' side of the utility electrical meters. Installation of Systems on customers' rooftops may sometimes require utility interconnection upgrades and, in cases in which such upgrades are required, Vivint bears such costs unless it cancels the agreement due to prohibitive cost estimates provided by the utility.

Vivint is licensed to construct Systems in every state in which it operates where licensing is required, and Vivint complies with the relevant electrical code and all applicable state and local laws, rules, regulations, codes, and ordinances. Vivint warranties all its work for 20 years and its roof penetrations for between 10-20 years, and will fix and pay for any damage caused to a customer's property or belongings. The System equipment components are covered by the respective manufacturer's warranty. Vivint carries commercial general liability insurance, workers' compensation, and property insurance covering the Systems installed on its customers' property.

Vivint will not place a lien on customers' real property, but may file a Uniform Commercial Code-1 (UCC-1) financing statement with the appropriate state or local filing office reflecting Vivint's ownership of the System. Vivint will pay for any personal property taxes assessed on the System and will assist customers in informing local real property tax assessors regarding Vivint's ownership of the Systems installed on customers' property and the personal property nature of such installed Systems. If the System is not assessed separately, then Vivint will not pay any real property tax associated with the System or any portion of the customer's property. Vivint's Systems interconnect directly with the electrical panel in each customer's home and do not use the central electric utility stations, wires, distribution, or transmission facilities of any public utility to provide electricity to customers. Independent of Vivint's System, customers remain connected to, and customers of, their local utility for delivery of electricity.

Vivint allows its customers to cancel a PPA or Solar Lease within three days of the date on which it is signed by both parties pursuant to the Federal Trade Commission's Cooling-Off Rule and state equivalents. Vivint goes beyond the customer protections provided under those laws by allowing all customers to cancel at any time until the start of installation of the Systems. Vivint's customers may cancel by calling the toll-free number or writing to the email address listed on the first page of its PPA and Solar Lease, or by mail or telegram.

Vivint conducts a recorded telephone interview or an electronic questionnaire with each customer after they have signed the PPA or Solar Lease, but before the customer's cancellation right has expired. During the call or through the questionnaire, Vivint asks a series of questions to confirm certain information regarding the homeowner's circumstances and to ensure that the customer understands the key terms of the relevant agreement, including ownership of the home,

restrictions imposed by a homeowner's association or other similar arrangements, the term, pricing, escalation, billing, and payment terms of the relevant agreement, the need to maintain internet connectivity and utility electric delivery service, and the customer's right to cancel the transaction.

Not less than 30 days prior to the end of the term of a PPA or Solar Lease, a customer may renew the agreement for a term of five years, purchase the System at its then fair market value as determined by a binding appraisal by an independent third party, or request that Vivint remove the System at no cost to the customer. If a customer moves during the term of a PPA or Solar Lease, the customer may transfer the PPA or Solar Lease to the new homeowner without any minimum credit requirement or other restriction, prepay the agreement, or relocate the System to a new home. In addition, any customer has the right, after the sixth year, to purchase the System pursuant to a one-time purchase option.

Vivint and its financing partners retain all tax incentives and benefits and all environmental attributes of the installed System, including all renewable energy certificates (RECs), during the period of Vivint's ownership of the System. If the customer purchases the System at any time, the customer obtains ownership of all RECs associated with the System's production from and after the transfer of ownership. Vivint prefers to offer its PPA arrangement to customers in New Hampshire because the payment structure is easier for a customer to understand, as the customer pays only for the electricity produced by the System.

TASC's member companies offer PPAs and Solar Leases, build and finance Systems, and offer consumer protections and customer options, all in a manner that is substantially similar in most material respects to those described for Vivint.

III. POSITIONS OF PARTIES

A. Vivint Solar, Inc.

Vivint argued that its Petition should be decided and not dismissed under Puc 207.01(c) because it sets forth concrete factual allegations and Vivint's ability to offer its services in New Hampshire is not a hypothetical or speculative situation. Petition at 5; Vivint Brief at 5. Vivint asserted that, without regulatory clarity on how it may be regulated, it "cannot enter the state to offer its PPAs and Solar Leases to New Hampshire customers." *Id.*

Vivint argued that it should not be deemed a "public utility," as defined in RSA 362:2, subject to the Commission's broad regulatory jurisdiction, because it does not provide "service to the public without discrimination." Petition at 6; Vivint Brief at 8-11 (citing *Appeal of Zimmerman*, 141 N.H. 605, 609 (1997); *Claremont Gas Light Co. v. Monadnock Mills*, 92 N.H. 468 (1943)). According to Vivint, it does not sell the electricity generated by its Systems to the "public," as interpreted by the Court in *Zimmerman*. Petition at 6; Vivint Brief at 8-11. Vivint asserted it instead offers PPAs and Solar Leases "exclusively to residential customers who meet [its] 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)." *Id.* Vivint claimed that it "simply cannot provide PPAs and Solar Leases to the public broadly in New Hampshire." *Id.* Vivint concluded that, since it does not provide "service to the public without discrimination," it is not a "public utility" under New Hampshire law. *Id.*

Vivint argued it should not be deemed a CEPS, defined in N.H. Code Admin. Rules Puc 2002.05 as "any person or entity that sells or offers to sell electricity to retail customers in this state." Petition at 7. Vivint maintained that the electric restructuring statute, RSA 374-F:7,

and the Commission's Puc 2000 rules are intended to apply to entities that procure power at wholesale and supply it to retail customers, using the franchise utility's transmission and distribution facilities, 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. Vivint Brief at 12-13.

Vivint cited 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 provisions:

- (1) CEPS must demonstrate it can transfer data between the franchise utility and its customers, under Puc 2003.01(d)(1);
- (2) CEPS must demonstrate it can obtain electricity supply in the New England energy market, under Puc 2003.01(d)(2);
- (3) CEPS restricted in its ability to transfer service obligations to another entity and required to provide customers with the right to choose a different service provider in connection with any such transfer of service, under Puc 2004.05; and
- (4) CEPS prohibited from discriminating against customers on the basis of home ownership, under Puc 2004.10.

Vivint Brief at 13-15. Vivint also highlighted the incongruity that would result from requiring it as a CEPS to comply with renewable portfolio standard (RPS) obligations under RSA 362-F.

Vivint Brief at 14. For example, RSA 362-F:10, II and Puc 2503.03(c) require each CEPS to make alternative compliance payments to the Commission, if and to the extent the CEPS has not met its RPS compliance obligations through the acquisition of RECs, for all four RPS resource classes, including Class III existing biomass and Class IV existing hydroelectric sources. *Id.*

Vivint claimed it would be "illogical for this requirement to apply to an entity like [Vivint], whose business model has only ever been to supply 100% of its electricity from the sun." *Id.*

According to Vivint, its contractual relationship with its homeowner customers is “fundamentally different from the relationship between a CEPS and its customers.” Petition at 7. Vivint maintained that 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 the energy markets. *Id.* By contrast, Vivint 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.” *Id.* Vivint claimed that its PPA and Solar Lease offerings further the New Hampshire policy goals of fostering electric customer choice and “providing diversified and small scale renewable sources of electrical power.” Petition at 8. Vivint concluded that it should not be regulated by the Commission as a CEPS. Petition at 9; Vivint Brief at 15-16.

Vivint further argued 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 in New Hampshire the requirements of the federal Public Utilities Regulatory Policy Act of 1978 (PURPA). Petition at 9-10; Vivint Brief at 16-18. Vivint noted that the LEOPA statute, RSA 362-A:2-a, permits a LPEE as a small renewable energy generator 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. Petition at 9; Vivint Brief at 16-17.

Vivint asserted that the Systems covered by its PPA and Solar Lease offerings are fundamentally different from the facilities intended to be regulated under the LEOPA retail sales

provisions, because these Systems are installed only on a customized basis on the rooftops of qualified residential homeowners, are sized for the homeowners' energy needs, and are located on the customers' side of the utility electrical meter. Petition at 9; Vivint Brief at 17. Vivint asserted that the regulation of LPEEs is inconsistent and incompatible with its business model for two primary reasons. Vivint Brief at 17. First, under its PPAs and Solar Leases, Vivint does not sell electricity to the franchise electric utility. *Id.* Second, its Systems are located on the customers' private property and electricity is transmitted from the System to power each home directly on the customer's side of the meter; as a result, Vivint does not use utility transmission or distribution lines to transmit electricity to its purchasers and does not require the utility's wheeling services. *Id.* Vivint argued that this incompatibility is evidence that LEEPA was not intended to apply to its business model. Vivint Brief at 17-18. Vivint concluded that it should not be regulated by the Commission as a LPEE for purposes of the limited retail sales provisions of RSA 362-A:2-a. Petition at 10; Vivint Brief at 18.

At hearing, Vivint represented that, in addition to its residential customer business, it also has a small commercial business unit and that commercial System installations could be sized up to a megawatt (MW) in capacity. *See* Transcript of December 3, 2015 Hearing (Tr.) at 24-25. A Vivint representative indicated that the largest Systems it installs "are in the 25-kilowatt to 50-kilowatt range in the residential space." Tr. at 24. Vivint's counsel noted there may not be a clear demarcation line between residential and commercial customer installations, given historical and current mixed uses of land in New Hampshire, and therefore Vivint does "not want any type of a bright line and [has] not sought one." Tr. at 40-41.

In the Motion, Vivint requested confidential treatment of all or a portion of its responses to six Staff data requests and two documents submitted to Staff in response to additional Staff

discovery requests. Motion at 1. Vivint asserted that the information and documents subject to its request are entitled to confidential treatment pursuant to RSA 91-A:5, IV and judicial and Commission precedent. *Id.* Vivint claimed that no party or any other person has objected to such confidential treatment, and it noted that TASC had “agreed to waive any right it has to access such documents.” *Id.* In particular, Vivint sought confidential treatment of the following discovery responses:

Data Request Staff 1-1 in its entirety, including Vivint’s draft form of New Hampshire PPA;

Data Request Staff 1-3 in its entirety, including Vivint’s form of Solar Lease;

Data Request Staff 1-5, redacted information regarding Vivint’s methodology for determining monthly payments under its Solar Leases;

Data Request Staff 1-9 in its entirety, including Vivint’s state-specific Exhibit B customer disclosures and notices for its PPAs and Solar Leases;

Data Request Staff 1-11, redacted information regarding the percentage of Vivint’s residential solar customers who have executed PPAs and Solar Leases, both in total and for each individual state or other jurisdiction in which both PPAs and Solar Leases are offered by Vivint to residential customers;

Data Request Staff 1-12, redacted information regarding Vivint’s residential solar customer default rates in the aggregate and on a state-specific basis;

Vivint’s form of letter for its customers regarding property tax assessment of installed Systems (Tax Letter); and

Vivint’s customer survey script used with its customers prior to installing Systems (Customer Questionnaire).

Motion at 1-3, 5-14.

Vivint argued that all of the redacted information and documents listed above represent highly confidential, proprietary, and commercially sensitive commercial and financial information in which Vivint and its financing partners hold a strong privacy interest. Motion at 14. Vivint asserted that disclosure of this information and documents would harm Vivint and

its financing partners and put it at a distinct disadvantage in a highly competitive residential solar marketplace. *Id.* According to Vivint, none of these documents or information would inform the public about the conduct of its government, and so disclosure is not warranted. *Id.* Vivint claimed that any public interest in disclosure is “overwhelmingly outweighed” by the privacy interest of Vivint in keeping its sensitive commercial information confidential to prevent the financial and competitive harm that would result from disclosure. *Id.*

B. The Alliance for Solar Choice

TASC supported the legal arguments and conclusions contained in the Petition and in Vivint’s Brief, and provided additional arguments and information “to aid the [Commission] in its decision making process.” TASC Reply Brief at 1. In addition to granting Vivint’s Petition, TASC requested that the Commission “find that *all* solar leases and PPAs similar to those described by Vivint are exempt from regulation by this Commission.” TASC Reply Brief at 2-3 (emphasis in original). TASC urged the Commission to be “cautious to not close New Hampshire off to the rest of the solar industry by granting Vivint’s requested relief too narrowly and thereby defeat one of the primary purposes of the Petition.” TASC Reply Brief at 3. TASC maintained that states that have explicitly found that third party owners of solar distributed generation are not public utilities have done so for the industry as a whole rather than on a case-by-case basis. *Id.*

In addition to adopting Vivint’s legal analysis and arguments, TASC argued that third party owners of Systems located on the retail electric customer’s premises behind the meter should not be regulated by the Commission as public utilities because they are not natural monopolies and their regulation would represent undue interference with the free competitive market. TASC Reply Brief at 3-4 (citing *Appeal of Omni Communications, Inc.*, 122 N.H. 860,

862-63 (1982)). TASC further asserted that third party owners of customer-sited Systems do not operate as or engage in the business of public utilities or provide a public service, nor do they have the power of eminent domain; rather these System owners provide a voluntary service to their customers. TASC Reply Brief at 4-5 (citing *Monadnock Mills*).

TASC maintained that “[a]t least 25 States plus the District of Columbia and Puerto Rico authorize or allow third party PPAs for solar [distributed generation].” TASC Reply Brief at 5. According to TASC, numerous state public utility commissions have “squarely examined whether such arrangements trigger public utility status and found that they do not.” *Id.* TASC focused in particular on the 2014 decision of the Iowa Supreme Court in *SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441, 443-444 (Iowa 2014), which found that a third party System owner did not become a public utility by entering into a long-term PPA financing agreement with a municipal customer under which the customer would purchase all of the electricity generated by the System. TASC Reply Brief at 5-6.

TASC noted that, to resolve the question of whether a certain activity was “clothed with sufficient public interest” to qualify as sales “to the public,” the Iowa Supreme Court in the *SZ Enterprises* case employed a “practical,” “multi-factored approach” to examine the issue and looked to the Arizona Supreme Court’s eight-factor test described in *Natural Gas Service Co. v. Serv-Yu Cooperative, Inc.*, 219 P.2d 324 (Ariz. 1950). TASC Reply Brief at 6. TASC listed the eight *Serv-Yu* factors as follows:

- (1) What the corporation actually does.
- (2) A dedication to public use.
- (3) Articles of incorporation, authorization, and purposes.
- (4) Dealing with the service of a commodity in which the public has been generally held to have an interest.
- (5) Monopolizing or intending to monopolize the territory with a public service commodity.
- (6) Acceptance of substantially all requests for service.

(7) Service under contracts and reserving the right to discriminate is not always controlling.

(8) Actual or potential competition with other corporations whose business is clothed with the public interest.

TASC Reply Brief at 6-7. According to TASC, the Iowa Supreme Court analyzed each of those eight factors in its *SZ Enterprises* decision to determine that the solar energy developer in that case should not be regulated as a utility making sales to the public, and TASC urged the Commission to reach a similar conclusion that “solar PPAs do not subject third-party owners to utility regulation.” TASC Reply Brief at 7-10.

TASC further cited decisions by state commissions in Arizona, Hawaii, Nevada, and New Mexico which directly addressed whether the factual scenarios involved with third-party ownership of Systems meet the statutory definition of a public utility subject to those respective commissions’ jurisdictions. TASC Reply Brief at 10 (citations omitted). According to TASC, those state commissions concluded that “a dedicated, behind-the-meter generation facility was not offering service ‘to the public,’ but rather was engaging in a private transaction to a single, on-site customer,” and therefore in each case was not a public utility. TASC Reply Brief at 10-11.

TASC endorsed Vivint’s conclusion that third party System owners should not be regulated as CEPS under the Commission’s Puc 2000 rules. TASC Reply Brief at 11. TASC urged the Commission to revise its definition of CEPS in its rulemaking Docket DRM 13-151 to remove ambiguity in the CEPS definition. *Id.* TASC further requested that, if the Commission were to find that third party System owners come within the current CEPS definition, the Commission nonetheless “rule that it will not regulate [such owners] as CEPS until it clarifies the CEPS definition in the rulemaking docket.” *Id.* TASC suggested that the Commission might resolve the issue through the rulemaking process by restoring language deleted from the

Puc 2000 rules in 2010 that defined a CEPS as an entity that sells or offers to sell electricity to retail customers “by using the transmission and/or distribution facilities of any public utility in this state.” TASC Reply Brief at 11-12. According to TASC, inclusion of the quoted language would exclude from the CEPS definition on-site, behind-the-meter generation facilities such as the Systems installed and owned by Vivint and the TASC members. TASC Reply Brief at 12.

TASC concurred with Vivint’s conclusion that third party System owners should not be regulated as LPEEs under RSA 362-A:2-a. TASC Reply Brief at 12. TASC also noted that the definition of “eligible customer-generator” in RSA 362-A: 1-a, II-b includes customers who purchase power from third party owners of renewable energy generation facilities located behind the retail meter on the customer’s premises. TASC Reply Brief at 12-13. TASC argued that this is a separate definition from the definition of an LPEE contained within the same statutory section, thus indicating there is a clear difference between the two defined terms. TASC Reply Brief at 13. According to TASC, because the legislature created two separate statutory definitions, and third party System owners clearly fall within the definition of a “customer-generator,” these third party System owners “are not within the purview of an LPEE.” *Id.*

TASC further maintained that there is no need for Commission regulation of third party System owners to ensure consumer protection, citing a number of federal laws and regulations applicable to the industry and listing both federal and state regulatory agencies with jurisdiction under these laws and regulations. TASC Reply Brief at 13-14. TASC also referenced industry association guides, checklists, and codes as evidence of the solar industry’s “focus on, and attention to, consumer protections in these materials.” *Id.*

At hearing, TASC’s counsel represented that certain TASC members only install and own Systems for residential customers and these Systems do not exceed 10-20 kW in capacity.

Tr. at 25. He further stated that one TASC member “does commercial business as well, systems up to a megawatt in size ... [b]ut again, it’s all reliant on net metering, so never over-generating.” *Id.*

C. Freedom Energy Logistics

FEL did not file a legal brief. At hearing, FEL’s counsel indicated support for the positions taken by Vivint and characterized the proceeding as “a path-breaking issue for the Commission that [he hoped] will set the stage for further progress.” Tr. at 15-16. FEL’s counsel emphasized that a company selling electricity to a customer with which it has an affinity of some type should not be considered a public utility because it is not offering service to the undifferentiated public, citing the *Zimmerman* precedent. Tr. at 42-43.

D. Staff

Staff in its reply brief addressed Vivint’s legal arguments, and agreed with Vivint’s conclusions regarding its regulatory status under relevant state statutes and Commission rules. Staff Reply Brief at 2-9. Staff concurred with Vivint that there is no basis for the Commission to dismiss the Petition under Puc 207.01(c). Staff Reply Brief at 2. Staff indicated its belief 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.” *Id.* Staff maintained that Vivint had disclosed sufficient detail regarding its proposed business operations in the state to meet this threshold requirement. *Id.*

Staff also concurred with Vivint that neither it nor its affiliates should be regulated by the Commission under current statutes and rules as a public utility, a CEPS, or a LPEE. Staff Reply Brief at 2-7. With respect to CEPS regulation, Staff argued that the broad definition of a CEPS

in Puc 2002.05 should not be read in isolation, but rather as an integrated whole with the complete regulatory regime contained in the Puc 2000 rules. Staff Reply Brief at 4-6.

According to Staff, under such an integrated reading of the CEPS rules, it is clear that the rules “were not adopted in contemplation of behind-the-meter, third party-owned, rooftop [System] installations and related electricity sales, which are at the crux of the relationship between [Vivint] and its residential customers.” Staff Reply Brief at 5-6; *see also* Tr. at 17-18.

Staff claimed, 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 Systems installed on the customers’ premises, including the PPAs between Vivint and its customers. Staff Reply Brief at 8-9; *see also* Tr. at 18-19. Staff clarified it was not currently advocating that the Commission should undertake any such new rulemaking that would seek to regulate behind-the-meter residential solar energy development. *Id.*

IV. COMMISSION ANALYSIS

As a preliminary matter, we agree with Vivint and Staff that the Petition is properly before the Commission and is not subject to dismissal under N.H. Code Admin. Rules Puc 207.01(c). We believe it is important for a party planning to do business in the state to have a vehicle through which it may clarify its regulatory status prior to entering the marketplace, provided that it can describe in sufficient detail its business plans and practices and these plans and practices are not hypothetical or speculative. *Cf. Freedom Logistics, LLC, d/b/a Freedom Energy Logistics*, Order No. 25,744 (December 29, 2014) (petition for declaratory ruling dismissed because it failed to set forth definite and concrete factual allegations, involved a hypothetical situation, and sought an advisory opinion). We find that the Petition should not be

dismissed because Vivint has set forth definite and concrete factual allegations regarding the business plans and practices it intends to implement in the state, these plans and practices are neither hypothetical nor speculative, the questions on which it seeks a declaratory ruling implicate its legal rights and responsibilities, and these questions fall squarely within our regulatory jurisdiction.

We grant Vivint's Petition, for the reasons discussed in detail below. We also grant the Motion, because the information and documents for which Vivint seeks confidential treatment are entitled to such protection.

A. Public Utility Regulation

Under RSA 362:2, the term "public utility" is defined to include "every corporation, ... 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" This broad statutory definition has been interpreted by the New Hampshire Supreme Court with a focus on the "distinguishing characteristic" of a public utility that it furnishes service to the "undifferentiated public" without discrimination. *See Zimmerman*, 141 N.H. at 609. We agree with Vivint that its relationship with its customers is "sufficiently discrete as to distinguish the recipient [of its services] from other members of the relevant public." *Id.*

As described in Sections II and III.A above, Vivint's PPAs provide for sales of electricity from Systems installed, owned, and operated by Vivint or its affiliates on the customer's premises and behind the customer's retail electric meter, and these Systems are not sized in excess of the customer's on-site electricity consumption. Vivint agrees to contract with its

PPA customers based on a combination of individualized factors, including property ownership and accessibility, creditworthiness and other underwriting requirements, and such physical and safety criteria as roof condition, solar insolation, and electrical distribution system requirements. Vivint does not intend, nor is it able, to offer or furnish its services to customers that do not meet those factors and criteria. The conditional nature and relative complexity of Vivint's relationships with its customers goes well beyond that of the standard relationship between a public utility and its customers. We therefore find that, in entering into and performing its PPAs and Solar Leases, Vivint would not be selling electricity to or for the "public" within the meaning of RSA 362:2.

We also note that, to the extent Systems installed on Vivint's customers' premises would be considered "qualifying facilities" under PURPA, federal regulatory exemptions from state regulation of electric utility rates, finances, and organization may be applicable.

See 18 C.F.R. § 292.602(c).

Based on the foregoing analysis and the record in this proceeding, we find that Vivint should not be deemed a "public utility" under RSA 362:2 and should not be regulated as such by the Commission.

B. Competitive Electric Power Supplier Regulation

Under the electric utility restructuring statute, RSA 374-F:7, I, the Commission is authorized to adopt rules establishing requirements, excluding price regulation, for competitive electricity suppliers, "including registration, registration fees, customer information, disclosure, standards of conduct, and consumer protection and assistance requirements." 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 generally*, N.H. Code Admin. Rules Chapter Puc 2000.

Under the Commission's rules as currently in effect, a CEPS is defined in Puc 2002.05 as

any person or entity, that sells or offers to sell electricity to retail customers in this state. The term does not include any utility or any municipal or county corporation operating within its corporate limits or submetering at campgrounds as described in RSA 362:3-a.

At first blush, this definition seems broad enough to encompass the activities undertaken by Vivint and similar solar energy companies in connection with their PPAs. We agree with Vivint and Staff, however, that this definition should not be read in isolation but in the context of the overall purpose and effect of the Puc 2000 rules as read in the entirety. *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).

As noted in Vivint's and Staff's legal briefs, the Puc 2000 rules seem designed to cover a business model in which a CEPS sells full requirements electricity service to retail customers that is delivered through the utility transmission and distribution system to the customers' retail electric meters, for which service the customers are usually invoiced through utility billing systems. In essence, the overall design and many specific provisions of the rules appear to have little or no relevance to the business model of Vivint and other third party System owners. The rules seem intended to regulate a set of relationships and related transactions that is quite

different from those undertaken in the context of customer-sited, behind-the-meter, distributed generation development involving sales of electricity directly to the host customers pursuant to the terms and conditions of PPAs.

We therefore find that, based on the relevant facts and an appropriate integrated interpretation of the Puc 2000 rules, neither Vivint nor its affiliates should be deemed a CEPS as defined in Puc 2002.05, nor regulated as such by the Commission.

C. LPEE Regulation Under RSA 362-A:2-a

Under LEEPA, a LPEE is permitted 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 is defined to include the owner or operator of a facility with a total capacity of not more than 5 MW that produces electricity solely by the use of renewable energy resources. Although Vivint and other third party System owners may meet the LEEPA definition of a LPEE, this does not compel a finding that their PPA or Solar Lease transactions would be subject to the limited retail sales provisions of RSA 362-A:2-a.

We interpret the retail sales provisions of LEEPA as applicable to sales of electricity *off-site* from the generation facilities owned by the LPEE. Such off-site retail sales may be made to a customer immediately adjacent to the generation site with no need for utility wheeling arrangements, or to a customer at a location which requires wheeling across the utility transmission and distribution system. In either case, the circumstances are fundamentally different from the business model of Vivint and other third party System owners, which install Systems on the rooftops of qualified property owners, size the Systems for the property owners'

anticipated electricity requirements, and own and operate the Systems on the customers' side of the utility retail electrical meters. Under this model, the sales of power occur on-site and behind the meter rather than off-site, and are completed without using utility transmission and distribution lines to deliver electricity and without the need for utility wheeling services.

Based on the relevant facts and our interpretation of the LEEPA retail sales provisions, we find that neither the PPAs nor the Solar Leases between Vivint or its affiliates and the System host customers should be subject to Commission regulation under RSA 362-A:2-a.

D. Non-Residential System Installations

We note that, although the Petition and legal briefs filed in this proceeding focus almost exclusively on the residential solar energy market, at hearing statements were made confirming that Vivint and certain TASC members also install Systems on the property of commercial customers, and engage in similar PPA and Solar Lease transactions with such commercial customers. Tr. at 24-25, 40-41. We clarify that our analysis and conclusions in Sections IV. 1-3 above would not be different if the relevant customers were non-residential, assuming that the Systems were installed on the customers' premises behind the utility retail electric meter, were sized no larger than necessary to meet the customers' reasonably anticipated electric consumption, and involved sales of electricity directly to the host customer or leases of the installed Systems to the host customer.

E. Motion for Protective Order and Confidential Treatment

Under RSA 91-A:5, IV, records of "confidential, commercial or financial information" are exempted from disclosure, and the New Hampshire Supreme Court has adopted a three-step balancing test for determining whether certain documents meet this designation. *See, e.g., Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 552-54 (1997); *Lambert v. Belknap*

County Convention, 157 N.H. 375, 382-83 (2008). The first consideration is whether disclosure of the information sought to be protected involves a privacy interest. The second consideration is whether the public has an interest in disclosure of the information. Finally, the public's interest in disclosure is balanced against the privacy interests at stake to determine whether disclosure is warranted. *See, e.g., segTEL, Inc. d/b/a FirstLight Fiber*, Order No. 25,825 (October 13, 2015) at 5-6.

In the Motion, Vivint seeks confidential treatment of certain information and documents contained in all or a portion of its responses to six Staff data requests and two documents submitted in response to additional Staff discovery inquiries. These documents include the forms of PPA and Solar Lease that Vivint proposes to use in New Hampshire, and its forms of Tax Letter and Customer Questionnaire. Vivint claims that all of the information and the entirety of the documents represent confidential, proprietary, and commercially sensitive commercial and financial information in which Vivint and its financing partners hold a strong privacy interest, the disclosure of which would disadvantage them in the competitive solar energy marketplace. We agree that the information and documents are commercially sensitive and are subject to a legitimate privacy interest entitled to protection by the Commission.

With respect to the public interest in disclosure, we note that none of the information or documents was offered as evidence at hearing and therefore forms no part of the record in this proceeding on which our decisions are based. The factual record in this matter effectively was established through the Stipulation, subject to clarification by answers provided during the hearing. We therefore find that there is no public interest in disclosure of the redacted information and documents for which confidential treatment is requested in the Motion.

Because Vivint's privacy interest in the information and documents is significant and the public interest in disclosure thereof is non-existent, we find that the privacy interest outweighs the public interest and confidential treatment of the information and documents is warranted.


We therefore grant the Motion.

Based upon the foregoing, it is hereby


ORDERED, that the Petition for Declaratory Ruling filed by Vivint Solar, Inc. is GRANTED; and it is

FURTHER ORDERED, that the Motion for Protective Order and Confidential Treatment filed by Vivint Solar, Inc. is GRANTED.

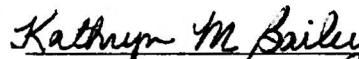
By order of the Public Utilities Commission of New Hampshire this fifteenth day of January, 2016.



Martin P. Honigberg
Chairman



Robert R. Scott
Commissioner



Kathryn M. Bailey
Commissioner

Attested by:



Debra A. Howland
Executive Director

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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