

PUBLIC UTILITIES COMMISSION

December 3, 2015 - 1:19 p.m.
Concord, New Hampshire

 ORIGINAL

RE: DE 15-303

VIVINT SOLAR, INC.: Petition for
Declaratory Ruling Regarding RSA 362:2,
362-A2-a, and Rule PUC 2002.05
(Hearing on the Merits)

PRESENT: Chairman Martin P. Honigberg, Presiding
Commissioner Robert R. Scott
Commissioner Kathryn M. Bailey

Sandy Deno, Clerk

APPEARANCES:

Reptg. Vivint Solar, Inc. :
(via videoconference)

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Grace Hsu, Esq. (Wilson, Sonsini...)
Garner Meads, Esq. (Vivint Sr. Corp. Counsel)
Dan Black, Esq. (Assoc. Gen. Counsel)

Reptg. The Alliance For Solar Choice:
(via videoconference)

Jason B. Keyes, Esq. (Keyes, Fox & Wiedman)

Reptg. Freedom Energy Logistics (FEL):
(via teleconference)

James T. Rodier, Esq.

Reptg. PUC Staff:

David K. Wiesner, Esq.
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1 P R O C E E D I N G S

2 CHAIRMAN HONIGBERG: We are here
3 this afternoon in docket -- let's back up. Off
4 the record.

5 (Discussion off the record.)

6 CHAIRMAN HONIGBERG: Now we're
7 back on the record.

8 Good afternoon. We're here this
9 afternoon in Docket DE 15-303, which is Vivint
10 Solar, Inc.'s Petition for Declaratory Ruling.
11 We have intervenors. We have folks who are
12 joining us via the wonders of modern
13 technology, which we hope will function well
14 today. I have been told to ask people to
15 identify themselves when they're going to speak
16 so that everybody knows who's speaking, and to
17 speak slowly and be patient, because there is
18 some lag between or among picture and sound, or
19 perhaps a delay in the way the sound is
20 transmitting. But I think we'll all figure
21 that out as go along.

22 So, before we go any further,
23 let's take appearances. I'm not sure where to
24 start. Normally I would start to my left, but

1 there's nobody's sitting to my left. So how do
2 you want to do it? Somebody start speaking,
3 and we'll go from there. Don't all jump at
4 once.

5 CMSR. BAILEY: How about the
6 representatives from Vivint?

7 MR. GLASS: Todd Glass, from
8 Wilson, Sonsini, Goodrich & Rosati, along with
9 my colleague, Grace Hsu. And from Vivint
10 Solar, I'll hand it over to you, Dan and
11 Garner, to introduce yourselves to the people
12 who can see you on the screen.

13 MR. MEADS: This is Garner Meads
14 with Vivint Solar. And to my right -- or as it
15 appears on your screen, to my left would be Dan
16 Black.

17 MR. KEYES: This is Jason Keyes,
18 with Keyes, Fox & Wiedman, representing The
19 Alliance for Solar Choice.

20 MR. RODIER: And this is Jim
21 Rodier, representing Freedom Energy Logistics.

22 MR. WIESNER: And Attorney
23 Rodier does not have a video connection, but
24 he's on audio.

1 And I'm Dave Wiesner,
2 representing Commission Staff. And with me at
3 the head table here -- and I'll just turn my
4 laptop, and hopefully this works -- are Amanda
5 Noonan of the Consumer Affairs Division, and
6 Liz Nixon of the Sustainable Energy Division.

7 CHAIRMAN HONIGBERG: We could
8 have had a picture of Mr. Rodier posted
9 somewhere. We all know what he looks like, but
10 folks on the West Coast don't.

11 MR. WIESNER: Oh, they met him.

12 CHAIRMAN HONIGBERG: They met
13 him. Ah, well, then they've had the pleasure.

14 Mr. Wiesner, how are we going to
15 proceed this afternoon?

16 MR. WIESNER: Mr. Chairman, we
17 did have filed yesterday a Motion for
18 Confidential Treatment filed by Vivint Solar
19 with respect to materials that Vivint provided
20 in response to Staff discovery questions. I'm
21 not aware that there's any objection from any
22 other party with respect to that motion. I
23 would also note that, because a Stipulation of
24 Facts has been filed in this case, signed by

1 all parties, that there's very little
2 likelihood that any of the discovery materials
3 would be offered in evidence at this hearing.
4 And so my suggestion would be to not ask the
5 Commission to rule on that motion until the
6 order on the merits is issued.

7 CHAIRMAN HONIGBERG: We're good
8 at not doing things. I think we'll be happy
9 not to rule. If something has to be dealt with
10 during the hearing, we'll deal with it then.

11 MR. WIESNER: And I think it's
12 fair to say that I'm not aware of any objection
13 from any of the parties. And not to foreclose
14 any rights they might have to file something in
15 writing, but if there is any issue with that, I
16 would ask people to chime in at this point.

17 CHAIRMAN HONIGBERG: Mr. Glass?

18 MR. GLASS: We filed a motion,
19 and we support the motion and appreciate your
20 consideration.

21 CHAIRMAN HONIGBERG: Mr. Keyes?

22 MR. KEYES: No objection. Thank
23 you.

24 CHAIRMAN HONIGBERG: Mr. Rodier?

1 MR. RODIER: Well, Mr. Chairman,
2 I have asked not to even be included on the
3 list for confidential materials. So I haven't
4 seen those. I do not want to see them. So,
5 obviously, I have no opposition.

6 CHAIRMAN HONIGBERG: Okay. All
7 right. Well, thank you. We'll then deal with
8 it presumably as part of the order at the end
9 of this process.

10 What else, Mr. Wiesner?

11 MR. WIESNER: I guess I would
12 just propose, Mr. Chairman, that we permit
13 parties to make a brief statement of their
14 positions and then open the floor for questions
15 from the Commissioners, either on factual
16 matters that are covered in the stipulation or
17 on the legal positions that parties have taken
18 through the filing of their briefs. And there
19 was a brief filed by the Petitioner, reply
20 briefs filed by The Alliance for Solar Choice
21 and by Commission Staff, and Freedom did not
22 file a brief on its own.

23 CHAIRMAN HONIGBERG: Does that
24 process make sense to the others who are here?

1 Mr. Glass?

2 MR. GLASS: Yes, thank you.

3 CHAIRMAN HONIGBERG: Mr. Keyes?

4 MR. KEYES: Yes, that's fine.

5 Thank you.

6 CHAIRMAN HONIGBERG: Mr. Rodier?

7 MR. RODIER: Yes.

8 CHAIRMAN HONIGBERG: All right.

9 Then that's what we'll do. Typically, we would
10 have the Petitioner go first and then have a
11 chance to go last as well. I see no reason to
12 depart from that. So, Mr. Glass, you have the
13 floor.

14 MR. GLASS: Thank you,
15 Commission -- Chairman Honigberg, as well as
16 Commissioners Scott and Bailey. Thank you for
17 the opportunity to appear, and thank you for
18 accommodating both the schedule, which was an
19 accelerated schedule, and using the technology
20 to allow for our appearance on the Internet
21 today. We'd also like to thank Mr. Wiesner and
22 Commission Staff for their thoughtful
23 investigation and technical discussions over
24 the last -- as well as discussions of the legal

1 matters before us. We find that it's been a
2 very useful process, and we hope that we've
3 been able to explain our business and what we
4 intend to do -- well, what Vivint Solar intends
5 to do.

6 We're here before you today on a
7 Petition for Declaratory Ruling. I will be
8 brief because our petition and the brief that
9 we submitted, and hopefully the stipulation,
10 all basically support that which we've been
11 seeking from the beginning. We believe that
12 the petition is properly before the Commission,
13 that there's definite and concrete factual
14 allegations. This is not a hypothetical
15 matter. Vivint Solar desires to come into the
16 state and provide its services in the manner
17 described in the stipulation and in our filing.
18 We believe that this affects the legal rights
19 of Vivint Solar, and a declaratory ruling is a
20 proper means for us to seek clarification from
21 the Commission as to whether or not it would be
22 regulated, and how so. And finally, I think
23 that this is properly before the Commission as
24 the entity that has the authority under the

1 statutes and the regulations to decide this.

2 I would note, also, as noted in
3 the brief, that New Hampshire was one of the
4 first states to allow retail access in the
5 constitution and through various cases and
6 statutes. It's a state that recognizes the
7 competition and customer choice matter. And we
8 pointed that out in our brief because we do
9 think that New Hampshire is a leader in this,
10 and we would like the Commission to remember
11 that rule that they've been leading for now
12 more than 15, nearly 20 years.

13 The three substantive points
14 that we would like a declaratory ruling on are:
15 One, that Vivint Solar and its subsidiaries and
16 affiliates desire to offer solar power purchase
17 agreements and solar leases in the state,
18 should not be deemed and should not be
19 regulated as a public utility. As noted in the
20 brief, we cannot provide service --

21 (Court Reporter interrupts.)

22 CHAIRMAN HONIGBERG: Mr. Glass,
23 slow down. We've lost a little bit of what you
24 said. If you could slow down just a hair, that

1 would help, and if you could go back a couple
2 of sentences.

3 MR. GLASS: Sorry. Talking too
4 fast is not generally one of my problems, but
5 I'm happy to slow down and be a little more
6 deliberate.

7 CHAIRMAN HONIGBERG: We're just
8 going to blame the technology, as everybody
9 else will.

10 MR. GLASS: Sure. On the first
11 matter in our Petition for Declaratory Ruling,
12 we are seeking clarification from the
13 Commission that Vivint Solar, its subsidiaries
14 and affiliates, in the provision of solar power
15 purchase agreements and solar leases, will not
16 be deemed to be a public utility and will not
17 be regulated by the New Hampshire Public
18 Utilities Commission as a public utility. The
19 key legal things that we point to in our brief
20 is that Vivint Solar cannot provide service to
21 the undifferentiated public without
22 discrimination. Rather, we are providing our
23 solar, behind-the-meter residential services to
24 people who own homes, who have certain credit

1 quality and have other physical and other
2 qualifications that give rise to the
3 opportunity to bring solar to their rooftops.

4 Second legal point is that we
5 believe that, and are seeking a declaratory
6 ruling that Vivint Solar, its affiliates and
7 subsidiaries, would not be regulated as a
8 competitive energy provider, electric provider
9 of service, CEPS, in that, while we find that
10 the definition of a "CEPS" under New Hampshire
11 law is broad, in that it looks to somebody
12 providing retail service, electric service in
13 the state, the entire regulatory regime that
14 has been erected is something that is just
15 opposite of what the residential solar provider
16 such as Vivint can do and do provide. And our
17 brief points out the various points on that.

18 And then, finally, we seek a
19 declaratory ruling that Vivint Solar, its
20 subsidiaries and affiliates, are not a limited
21 producer of electric energy under that statute
22 and regulatory regime. There are a number of
23 provisions of that law in the regulation that
24 point to a fundamentally different business

1 model, one in which there is power produced and
2 then transferred over the wires of a
3 distribution utility to customers. This is not
4 that. And we believe that not only in our
5 brief, but in the stipulation and in the facts
6 that you would find.

7 I would also point out that, in
8 conclusion, both Commission Staff's brief and
9 TASC's brief have come to the same conclusion,
10 in some cases slightly different views of the
11 law, but ultimately coming to the same
12 conclusion that these three legal rulings are
13 timely and properly before the Commission and
14 pointing towards the result that we seek.

15 Thank you. And we're available not only for
16 any legal questions, but having representatives
17 from Vivint Solar on the line will allow you to
18 ask whatever factual questions you may have
19 about the business and what Vivint Solar
20 intends to do. Thank you.

21 CHAIRMAN HONIGBERG: Commissioner
22 Scott. You're going to wait until everybody's
23 done? All right. We're going to wait until
24 everybody's done and then circle back for

1 questions.

2 Next, Mr. Keyes.

3 MR. KEYES: Thank you. TASC
4 supports Vivint completely on all the points
5 that Todd just raised. Let me just go through
6 three things that we also had in our brief, in
7 our reply brief.

8 First, for an analysis of
9 whether Vivint or any third-party owner is a
10 utility, five different states have used the
11 "Serv-Yu" factors. That's a 1950 case from the
12 Arizona Supreme Court. It was most recently
13 used by the Iowa Supreme Court. It goes
14 through eight different factors to analyze
15 whether an entity is a utility or not. And in
16 all five cases, they've come out with a result
17 that they are not a utility. So we thought
18 that would be useful to cite.

19 Second, in our reply brief, we
20 listed all the regulators that already regulate
21 third-party owners. So there's plenty of
22 regulation available if there's a bad actor in
23 our sector. We try very hard to provide great
24 customer service and be self-regulating. And

1 so that was also a section in our reply brief,
2 to the extent of which third-party owners have
3 banded together to develop standards of
4 excellence for service to customers. So I
5 don't think that, even if we're not a utility
6 and not a CEPS and not an LPEE, there's no
7 imminent need for regulation, in light of the
8 regulation that's already there and
9 self-regulation that's already there. So
10 that's it for me. Thank you very much.

11 CHAIRMAN HONIGBERG: Thank you.
12 Mr. Rodier.

13 MR. RODIER: Yes, Mr. Chairman.
14 Very briefly, I do want to say that the people
15 involved here have been very forthcoming. No
16 hidden agendas. You know, very forthright,
17 very patient in explaining. The quality of
18 their paperwork is excellent.

19 As far as the merits are
20 concerned, this is a really path-breaking issue
21 for New Hampshire, having somebody behind the
22 meter that is not going to be -- isn't darkened
23 by the shadow of a utility claiming that they
24 are -- they should be a utility and they're

1 infringing on the existing utility franchise
2 and all those things. And I do know well from
3 my own experience, it wasn't that long ago
4 those were, you know, very prominent issues in
5 New Hampshire.

6 So, in closing, I will say this
7 is a very path-breaking issue for the
8 Commission that I hope will set the stage for
9 further progress. And in closing, I just want
10 to say I compliment the team that Vivint has
11 put together and their willingness to work
12 collegially. Thank you very much.

13 CHAIRMAN HONIGBERG: Mr.
14 Wiesner.

15 MR. WIESNER: On behalf of
16 Staff, I would also like to thank the parties
17 for their cooperation in putting together a
18 Stipulation of Facts which I think covers the
19 factual issues which need to be addressed in
20 this case and brought to the attention of the
21 Commission. And in particular, TASC also --
22 the TASC members who represent, as I understand
23 it, some of the other large national players in
24 the residential solar marketplace were willing

1 to sign on to that stipulation and indicate
2 that, in most material respects, their
3 contracts, their business practices are
4 substantially similar to those of Vivint. And
5 I think that's helpful for the Commission to
6 know, and we on Staff found it helpful. We
7 filed a brief, which is essentially supportive
8 of the conclusions of Vivint on the legal
9 issues, that they should not be regulated as a
10 public utility, as a limited producer of
11 electrical energy under the LEEPA statute, or
12 as a competitive electric power supplier under
13 the PUC's 2000 rules. And I'll just note that
14 the definition of a "CEPS" is very broad. And
15 it might be read in isolation to sweep in
16 business entities such as Vivint and the TASC
17 members. But when you read the rules as a
18 whole, and the intent and the scope of what is
19 being regulated by those rules, it seems clear
20 that they are not designed for that type of
21 business model and not appropriate for these
22 type of business practices. And I think we
23 reached, then, the similar conclusion that
24 Vivint had reached, that they just don't fit;

1 and therefore, the definition, however broad,
2 should be read in that context, not to apply to
3 them, and therefore they should not be covered
4 by the Commission's regulation of competitive
5 suppliers.

6 We did note, finally, that the
7 restructuring law, R.S.A. 374-F:7 appears to be
8 broad enough. And in particular, the
9 definition of "electricity supplier" under
10 374-F is broad enough to cover the types of
11 business practices that Vivint and the
12 residential solar developers are engaged in.
13 But the current 2000 rules do not seem to be an
14 appropriate vehicle to reach those business
15 practices. So that's, you know, arguably not
16 directly relevant to the petition before you,
17 but we thought that it was worth raising that
18 and making it clear that our view is that the
19 Commission actually has the statutory authority
20 to regulate these types of business practices,
21 but in fact has not done so. And I'll just
22 say, as I did in the brief, that Staff at this
23 point is not requesting that there be any such
24 rule-making commenced, whereby the Commission

1 would seek to regulate behind-the-meter
2 residential solar development. I think that's
3 all I have.

4 CHAIRMAN HONIGBERG: Thank you,
5 Mr. Wiesner.

6 What I'm going to do now is ask
7 the Commissioners if they have questions and
8 then circle back to you, Mr. Glass, for the
9 last word after the Q&A. And if anybody else
10 wants to say something, you'll have a chance.

11 Commissioner Scott?

12 CMSR. SCOTT: Thank you. And
13 for the remote parties, thank you for coming in
14 on this.

15 I want to start with Vivint, but
16 I want to give an opportunity for any of the
17 parties. I just want to understand in my
18 mind -- I'll start first with Vivint. But is
19 there a size limit to -- is there a
20 component -- let me start with Vivint. I'm
21 sorry. I'll restate.

22 So, for Vivint, do you have a
23 size limit on what your business model is at
24 the homes? I know one of your filings talked

1 about up to 2.5 kilowatts. Do you go beyond
2 that, typically?

3 MR. GLASS: Garner and Dan, as a
4 factual matter, I'll hand it over to you.

5 But I will say, as a preliminary
6 point, that Vivint attempts to build the amount
7 of solar generation on the rooftop to match or
8 be slightly less than the customer's energy
9 usage. In other words, they go in. Obviously
10 there's a natural limit with the size of the
11 roof and its orientation and whatnot. But
12 generally, Vivint Solar builds a solar system
13 to take care of most of the energy needs of the
14 residential customer behind the meter.

15 Dan or Garner, did I get that
16 roughly right?

17 MR. BLACK: This is Dan Black.
18 That's correct, Todd. We size our residential
19 solar systems so that they are sized to
20 primarily the customer's usage needs, between
21 90 to 100 percent. But there are a number of
22 physical factors that make sizing of a system,
23 such as roofs, shade, other obstructions, that
24 prevent going that large. But practically

1 speaking, usage is tied to what they
2 historically need.

3 CMSR. SCOTT: So I ask that
4 question. So in a hypothetical, let's say your
5 customer wanted twice the capacity that they
6 would realistically use at their own residence.
7 Would this business -- would the rulings you're
8 asking us to make, would they still apply?
9 Would the regulatory scheme still apply, in
10 your opinion?

11 MR. BLACK: Yes. Go ahead,
12 Todd. Sorry.

13 MR. GLASS: Well, I would say
14 that I don't think that the rules and the
15 declaratory ruling that we've stated would
16 change in that situation. But in reality,
17 Vivint Solar and its business model would not
18 support a 2X oversizing of the system. The
19 financial -- or actually, the revenue stream
20 that the customer's PPA or solar lease produces
21 is a stream on which Vivint Solar seeks
22 third-party financing. As Dan was mentioning
23 before, the underwriting for the financing
24 requirements relative to that will not allow

1 for a 2X oversizing.

2 Dan, anything you care to add?

3 MR. BLACK: No, that's accurate.

4 CMSR. SCOTT: So maybe I'll ask
5 Staff, and this will be a little bit easier
6 since you're right here.

7 So is the real differential
8 being the fact that we're talking behind the
9 meter, no matter how much is generated? Is
10 there a bright line here where these regulatory
11 rulings would or would not take effect?

12 MR. WIESNER: I don't think we
13 identified sort of a bright-line demarcation as
14 to when it would be appropriate to recognize
15 this non-regulatory treatment, if you will. We
16 did -- we were, I think, pleased to see that
17 Vivint would represent that it was not sizing
18 these systems well above the customer's
19 requirements. And that appears to be their
20 business model, and I think that makes -- that
21 relieves some questions that might otherwise be
22 addressed about how these things are
23 structured. And typically, I believe these
24 customers will be taking advantage of net

1 metering where it's available. But I don't
2 think it's the business model of the company,
3 or really an option available, as I understand
4 it, to the customers to oversize their systems
5 to take advantage of group net metering, for
6 example.

7 CMSR. SCOTT: Thank you. That's
8 all I have.

9 CHAIRMAN HONIGBERG: Commissioner
10 Bailey.

11 CMSR. BAILEY: Thank you. Just
12 a quick follow-up on that. Is there any size
13 limitation as to what you can build or will
14 build on a residential building?

15 MR. GLASS: Garner and Dan, I'll
16 hand that one off to you.

17 MR. BLACK: So there are
18 physical limitations based on roof size and
19 electrical distribution system in the home,
20 based on amperage, but --

21 CMSR. BAILEY: No, I understand
22 that. I'm asking you, if you have a mansion,
23 can you build kind of any size solar system
24 that will fit on the roof to go to five

1 megawatts or whatever?

2 MR. BLACK: Yes, if their
3 historic usage supports a large system, in like
4 a mansion situation, we will size it to offset
5 their usage needs.

6 CMSR. BAILEY: But your business
7 is only residential?

8 MR. BLACK: We do have a small
9 commercial business unit as well.

10 CMSR. BAILEY: Could you build a
11 system that's bigger than five megawatts?

12 MR. BLACK: Could we?

13 CMSR. BAILEY: Yes.

14 MR. BLACK: The sizing on a
15 home -- on a rooftop solar system, I'm not
16 aware of a home that could support that. Our
17 largest systems that we see are in the
18 25-kilowatt to 50-kilowatt range in the
19 residential space.

20 CMSR. BAILEY: Well, in the
21 residential space. But I'm asking about, you
22 know, your small business space maybe grows to
23 a bigger business and gets a bigger rooftop.

24 MR. BLACK: Yes, in the

1 industrial, small commercial industrial space,
2 you could have systems sized in the megawatt
3 range.

4 CMSR. BAILEY: Okay.

5 MR. KEYES: This is Jason Keyes.
6 Can I chime in there?

7 CMSR. BAILEY: Yes.

8 MR. KEYES: So, a megawatt takes
9 roughly, depending on the kind of panels you're
10 using, it takes something like 6 acres. So
11 you're talking about a 250,000-square-foot
12 building. So a megawatt is about as big as
13 you'll ever see on a rooftop. And you asked
14 about larger sizes. SolarCity and SunRun both
15 do residential, like Vivint. A large system is
16 10 kilowatts. But there are the occasional
17 mansions that have 20 kilowatts. I can't think
18 of larger systems than that on residential.
19 SunRun just does residential. SolarCity does
20 commercial business as well, systems up to a
21 megawatt in size. But again, it's all reliant
22 on net metering, so never over-generating.

23 CMSR. BAILEY: Thank you.

24 That's helpful.

1 Okay. In the Stipulation of
2 Facts -- yes, in the Stipulation of Facts, it
3 says Vivint has the right to terminate the PPA
4 or lease if the customer fails to make payments
5 when due, but it won't place a lien on a
6 customer's real property. So what happens if
7 you terminate the PPA or the lease?

8 MR. GLASS: Well, it's important
9 to realize that, from a financing and legal
10 standpoint, Vivint Solar, and I think all
11 members of the residential solar community,
12 consider the solar panels and system to be
13 personal property and not real property.
14 Therefore, we do not put any type of
15 real-estate lien on the homeowner; but rather,
16 we may file, for instance, a UCC-1 filing,
17 which is a notice that the property, the
18 personal property, that we own it. In the case
19 where an entity -- or a homeowner stops paying,
20 or otherwise there's a termination of the PPA,
21 Vivint Solar would go out and remove the
22 equipment.

23 CMSR. BAILEY: So there is no
24 way you can take their house away from them to

1 be repaid.

2 MR. GLASS: No. Correct. This
3 is the personal property versus real property
4 distinction I think gives -- you know,
5 separates that type of remedy that you might
6 seek in a case where, for instance, something
7 was actually part of the real property. Here,
8 it's more contractual and that we would remove
9 the property. And we might seek monetary
10 damages from them for failure to pay under the
11 long-term contract, but it's not something in
12 which the owner of the solar property would
13 somehow foreclose on the home itself.

14 CMSR. BAILEY: Okay. Thank you.

15 I have some questions about the
16 various definitions in the laws. So, in
17 374-F:2, which is the electric utility
18 restructuring statute, it defines "electricity
19 suppliers" as suppliers of electricity
20 generation services that arrange for the supply
21 of electricity generation to meet retail
22 customer demand. Do you think that that
23 definition is -- defines what you're doing?

24 MR. GLASS: I think that, as Mr.

1 Wiesner stated, and his brief makes clear, as
2 well as ours, the definition as written is
3 broad, in that arguably you could take a look
4 at what Vivint Solar and affiliates are
5 providing and arguably say, yes, you meet that
6 definition. I think that when you take a
7 broader look at the entire regulatory body that
8 has been created, the intent of the legislation
9 was not aimed at that. But I would say that it
10 is broad enough to be read in that manner.

11 CMSR. BAILEY: Okay. And so,
12 Mr. Wiesner, your position is that this
13 definition would include this kind of provision
14 of energy service, but that the 2000 rules are
15 written for a different kind of electricity
16 supplier and would not apply to this kind of
17 electricity supplier.

18 MR. WIESNER: Essentially, the
19 legislature has granted the Commission
20 rule-making authority that could cover
21 "electricity suppliers," as defined in the
22 statute, and as Attorney Glass referenced, that
23 that could be read to cover the type of
24 business practices that Vivint and other

1 residential solar developers are engaged in.
2 However, the current PUC 2000 rules which
3 govern competitive electric power suppliers in
4 the state seem clearly designed to cover a
5 different type of business model where
6 competitive suppliers are providing electric
7 service to retail customers using the
8 transmission and distribution system of the
9 electric utilities and are usually billing
10 through the electric utilities and have a
11 different set of consumer protection concerns
12 that are not covered clearly -- that are
13 covered in those rules for those type of
14 business practices and not for those that apply
15 to behind-the-meter, rooftop, residential solar
16 development, such as Vivint and the others are
17 engaged in.

18 CMSR. BAILEY: Okay. Thank you.

19 In the LEEPA provisions at
20 362-A:1-a, there's a definition of "eligible
21 customer generator," which means an electric
22 utility customer who owns, operates or
23 purchases power from an electrical generating
24 facility, either powered by renewable energy

1 for purposes here, up to one megawatt located
2 behind the meter.

3 So, would your residential
4 customers then be eligible customer generators?

5 MR. GLASS: Arguably you could
6 put a customer in a relationship with Vivint
7 Solar into that relationship or into that
8 definition. You could probably fit that in
9 under the same, you know, type of thing that
10 Mr. Wiesner just described.

11 CMSR. BAILEY: Okay. And again,
12 in the LEEPA statute, the electricity suppliers
13 are defined in 374-F, which is what we just
14 talked about.

15 MR. WIESNER: If I can jump in?
16 Commissioner Bailey, the definition of
17 "eligible customer generator" really has
18 greatest applicability to net metering. And
19 the expectation, I believe, of residential
20 solar developers is that their customers will
21 participate in that metering. Because even if
22 the systems are sized so as not to exceed the
23 peak or average load of a particular homeowner,
24 there will be times when the system is

1 generating more power than the homeowner can
2 consume, and there will be power exported into
3 the utility grid. And in that situation, the
4 eligible customer generator -- which in this
5 case would be the residential homeowner with
6 the system installed on the roof -- will take
7 advantage of net-metering programs to receive
8 credits from their utility.

9 CMSR. BAILEY: And they will
10 only very often [sic] be drawing electricity
11 from the grid because most of the time they'll
12 be generating enough electricity to cover their
13 needs.

14 MR. GLASS: In the absence of
15 storage, when the sun's not shining, they'll be
16 drawing from the grid.

17 CMSR. BAILEY: Okay. All right.
18 Back to Mr. Glass.

19 The difference between the PPA
20 and the lease, you, throughout your pleadings,
21 talk about both, together, as if -- when I
22 first started reading it, I thought the
23 customer had to sign a lease and a PPA, and
24 then I realized that it's one or the other.

1 And you clearly prefer, it seems, the PPA, but
2 you only say that once. And I'm wondering
3 whether there's a legal difference between a
4 lease and a PPA. So, under -- what I'm
5 thinking is, under a PPA, they would be buying
6 electricity. Would they be buying electricity
7 under the lease?

8 MR. GLASS: No, and that's the
9 legal, contractual difference. A power
10 purchase agreement, a PPA, is the contract for
11 the purchase of power. In that case, the
12 customer is only paying for the energy that's
13 produced, and the relationship is one of
14 purchasing the energy. Under the solar lease,
15 which is not a preferred means to do it, but
16 rather, Vivint Solar would lease the equipment
17 on the rooftop to the residential homeowner.
18 In that case, the residential customer pays a
19 lease payment for the right to, you know,
20 receive the power, but it does not pay for the
21 power itself; rather, by leasing the equipment,
22 such as you would lease a car or lease
23 something else, you gain the benefit of having
24 that solar system on the rooftop, but you're

1 not actually purchasing the power itself.

2 And to clarify, you're
3 absolutely right. Vivint Solar -- and I
4 believe you can ask Mr. Keyes -- prefers the
5 PPA arrangement between the customer and the
6 company. It is cleaner, clearer, more
7 understandable and more straightforward from a
8 variety of perspectives. So you are correct
9 that that's a strong preference.

10 CMSR. BAILEY: Is it clearer to
11 the customer? Is that why it's the preference?

12 MR. GLASS: Yes. Yes, the
13 customer understands that if the solar system
14 on the rooftop is producing power, they're
15 going to buy that energy, and if it is not
16 producing, they don't have to pay for the
17 energy. That type of a relationship -- and
18 they also understand that they're offsetting
19 the energy by paying Vivint Solar for the
20 energy. That is offsetting what they would
21 otherwise be buying from their utility or other
22 electric supplier. On the other hand, a lease
23 is less clear as to what they're actually
24 buying. It's more of a complex financing

1 arrangement in which they're leasing equipment.

2 And most customers prefer [sic] that.

3 I might ask Dan and Garner --
4 Mr. Black and Mr. Meads, sorry -- if they want
5 to add to it because obviously they're closer
6 to the front lines of what customers understand
7 and desire.

8 MR. BLACK: Sure. This is Dan
9 Black. The one thing I would add is that, in a
10 leasing context, it is more difficult for a
11 consumer to understand, as Todd has -- as
12 Mr. Glass pointed out. The lease is based on a
13 fixed rental payment, regardless of how the
14 solar system performs or how the sun shines.
15 So, for the customer to save money or
16 understand their offset with respect to their
17 utility power, it isn't the same on a
18 month-by-month basis in a lease context. So,
19 in July, where the system is producing more
20 power, they pay the same amount as the system
21 would produce in December. And so what ends up
22 happening is that the customer is not in
23 real-time, or month-by-month, paying for what
24 the system is producing. Now, we do try to

1 size the lease payments to coincide with the
2 estimated or projected performance of the
3 system, and we provide a performance guaranty
4 in our leased products, so that at the end of
5 an annual cycle, if the system has not
6 performed as expected, we will refund the
7 customer for the shortfall. So the customer
8 will remain in similar economic footing as the
9 PPA on a year-by-year basis, but that's not
10 true, you know, over the course of during the
11 months. So it is a much preferred business
12 model, both for consumer understanding, but
13 also economically to the consumer.

14 One other thing to note. It's
15 also better for the companies here -- I think
16 this is true not only for Vivint Solar, but
17 others in the industry -- that lease financing
18 rules are more cumbersome and have more
19 federally mandated disclosures and requirements
20 associated with leases that aren't exactly
21 applicable to residential solar because they're
22 driven out of auto leasing and other similar
23 industries. So, for those reasons, and many
24 others, PPAs are better for the consumer and

1 better for the industry.

2 CMSR. BAILEY: Okay. Thank you.

3 Is the reason that you have to
4 use leases, in the three states that you use
5 leases in, because their laws only permit you
6 to not be a regulated public utility if you're
7 leasing rather than selling energy?

8 MR. GLASS: Correct.

9 MR. BLACK: That's correct. We
10 would offer a PPA in every market where that is
11 permitted. As we pointed out, leases are less
12 preferred.

13 CMSR. BAILEY: Okay. Thank you.
14 I think that's all I have.

15 CHAIRMAN HONIGBERG: Mr.
16 Wiesner, I have a question for you. It might
17 just be speculation, or maybe you have some
18 knowledge or information.

19 Picking up on something Mr.
20 Rodier said, I was interested that none of the
21 utilities came in here as intervenors or in
22 some other capacity. Perhaps they're just
23 watching through reading what's on the Internet
24 that's been filed. Do you have any thoughts on

1 that?

2 MR. WIESNER: I think that may
3 have surprised us initially, but I'm not
4 totally surprised. It's not been -- we've
5 never been asked this question before. But
6 it's also never been the practice of the
7 Commission to seek out behind-the-meter
8 generation and look to apply the regulatory
9 structure to that type of model. And, you
10 know, the pace of development of residential
11 rooftop solar has accelerated in the state just
12 in the past year with some major national
13 players coming in, as well as a burgeoning
14 local industry. But there's been
15 behind-the-meter generation, you know,
16 inside-the-fence co-gen and other types of
17 onsite generation for years. And my
18 understanding is that the Commission has never
19 sought to regulate those sorts of business
20 models. And it's not clear that the regulatory
21 framework, in a legal framework, would have
22 even permitted that type of regulation.

23 So, in effect, this is a case of
24 first impression, but only in the sense that

1 this is the first time anyone's ever clearly
2 asked, that I'm aware of. And I gather that
3 the utilities did not take enough interest to
4 actively participate and take a position.

5 CHAIRMAN HONIGBERG: Mr. Glass
6 and then Mr. Keyes. In other states, have the
7 utilities been interested in or tried to take a
8 role in the business that the companies have
9 tried to engage in?

10 MR. GLASS: Definitely. I'll
11 start and then hand off to Mr. Keyes.

12 I think that the easiest way to
13 separate the states out is those states that
14 have allowed retail access since the '90s, in
15 those states, generally the utilities are more
16 accommodative. And likely, utilities in the
17 state of New Hampshire are not particularly
18 interested in engaging in those because they've
19 already gone through the process of allowing
20 customer choice and dealing with the stranded
21 costs and the like, as was done, you know,
22 several years ago. In states in which you
23 still have a vertically integrated monopoly
24 type of system, in which the utility currently

1 serves that customer all service and whatnot,
2 and also has a net metering, you see utilities
3 that are taking a much more active role and
4 having opinions about these types of things.

5 But Mr. Keyes and TASC, I think,
6 you know, are in some of those battles, so I'll
7 let him speak to that.

8 CHAIRMAN HONIGBERG: Mr. Keyes.

9 MR. KEYES: I'd echo what Mr.
10 Glass said. It hasn't been as contentious in
11 deregulated states. In states where we have
12 addressed third-party ownership in isolation,
13 it hasn't been as contentious. Sometimes it's
14 gone through legislation. Where it's gone
15 through in rule-making, sometimes it's mixed in
16 with other programs like net metering. So the
17 utilities are already there for the net
18 metering and asked about third-party ownership.
19 They may say they would prefer to continue to
20 serve all their customers' needs rather than
21 having their customer use onsite solar, but
22 generally we've won the argument. And there
23 are 25 states that allow third-party ownership.
24 So if I was a utility in New Hampshire, I would

1 say that it just wasn't worth joining,
2 intervening in this docket, because it's likely
3 that it would recognize the right to
4 third-party ownership.

5 CHAIRMAN HONIGBERG: Thank you.
6 That was helpful.

7 Commissioner Scott.

8 CMSR. SCOTT: Thank you. One
9 more follow-up on the scoping issue. I just
10 want to confirm for the record. So, most of
11 filing talks about homeowners and uses phrases
12 like "largely residential" or "mostly." I just
13 want to confirm that the request for
14 declaratory ruling isn't limited to residential
15 installations. Am I correct in that?

16 MR. GLASS: Yes. The petition
17 itself did not have a demarcation as to
18 residential and commercial. And I will note
19 that at the very first hearing and technical
20 conference I was made aware that, given various
21 historical things in New Hampshire, you have
22 various customers that fall on various sides of
23 the line, whether it be outbuildings or farms
24 or things of that nature, where it's not

1 technically "the house." They might be
2 separately metered. In that type of way, we do
3 not want any type of a bright line and have not
4 sought one.

5 CMSR. SCOTT: Thank you.

6 CHAIRMAN HONIGBERG: Commissioner
7 Bailey.

8 CMSR. BAILEY: I have one more
9 area that I wanted to cover.

10 Do these systems -- will they
11 produce RECs, and will the RECs be sold into
12 the market?

13 MR. GLASS: Dan and Garner, I'll
14 hand that over to you as to what you do with
15 the RECs. You could probably --

16 (Court Reporter interrupts.)

17 CHAIRMAN HONIGBERG: Mr. Glass,
18 would you repeat the last thing you just said
19 that ended with "or more broadly."

20 MR. GLASS: Yes. I was inviting
21 Mr. Black and Mr. Meads to answer the question
22 posed either with regard to New Hampshire or
23 more broadly, because in a number of states the
24 RECs and whatnot are different due to the

1 incentives. So I was basically broadening the
2 question out for them.

3 MR. MEADS: Yes. To answer your
4 question, these systems do generate RECs. And
5 under our agreements with our customer, we
6 would retain the rights to those RECs, and we
7 then go out to the market and sell them either
8 on the spot or through Forward contracts.

9 CHAIRMAN HONIGBERG: All right.
10 Before we give Vivint the last word, is there
11 anything else any of the others feel we need to
12 know or hear?

13 MR. RODIER: Mr. Chairman, this
14 is Jim Rodier. May I make one quick comment,
15 if you don't mind?

16 CHAIRMAN HONIGBERG: Absolutely.
17 Go ahead, Mr. Rodier.

18 MR. RODIER: I think the one
19 thing that differentiates New Hampshire is the
20 Supreme Court's decision and appeal of
21 Zimmerman, which made it very clear for the
22 first time that you cannot -- if you sell to
23 the undifferentiated public, you're a utility.
24 If you have an affinity with the end user --

1 not sure how broadly that's defined -- then you
2 are not a public utility. And I think that
3 these folks here have done a very good job on
4 relying on that. Certainly the utilities are
5 aware that they now cannot say -- it's very
6 difficult to say to one customer, "We have a
7 special deal," selling to the undifferentiated
8 public. If you have some kind of affinity with
9 the customer, whatever it may be, you are not a
10 public utility offering service to all-comers.

11 CHAIRMAN HONIGBERG: Thank you,
12 Mr. Rodier.

13 Is there anyone else who has
14 anything they want to say?

15 MR. KEYES: No, thank you.

16 CHAIRMAN HONIGBERG: All right.
17 Mr. Glass, the floor is yours.

18 MR. GLASS: Well, thank you,
19 Chairman and Commissioners. And thanks to all
20 the participants in this docket.

21 Vivint Solar's appreciated the
22 thoughtful consideration and discussions that
23 we've had. We will rest our arguments on our
24 brief and stipulations as filed. We appreciate

1 that New Hampshire has recognized the
2 importance of competition and customer choice.
3 Vivint Solar seeks to compete, and Mr. Keyes
4 and his representatives, they also seek to
5 compete, and provide the best services and the
6 most innovative services to customers in the
7 state of New Hampshire. We simply ask for the
8 rulings here so that we have regulatory clarity
9 as to how it would be regulated or --
10 hopefully, that we would not be regulated. And
11 we do not seek necessarily to create a new law
12 as to how -- you know, invite some type of a
13 rule-making. We're simply trying to get
14 clarity so that we can enter and offer the
15 services. And once again, we thank the
16 Commission and Commission Staff for their time.

17 CHAIRMAN HONIGBERG: Thank you
18 very much, Mr. Glass. Thank you all for your
19 willingness to participate this way. I'm
20 hopeful that this was a good thing for those
21 who would have had to travel a long way to be
22 here. We don't do it very often. When we do,
23 it's always going to be a question about how it
24 works. I want to thank all our staff here who

1 did such a good job to set this up.

2 I'll put on the record that
3 every five minutes or so the camera that was on
4 the Bench would turn off and a commercial would
5 come on, and it looked like a very fun birthday
6 party that was going on. I'm sorry we're not
7 there. But this was interesting as well.

8 So I think we're done. We're
9 ready to adjourn, and we'll take this matter
10 under advisement. Thank you all.

11 (WHEREUPON the hearing concluded at 2:10 p.m.)

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C E R T I F I C A T E

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