

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: July 26, 2018

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Harper) *AGC S.M.C.*
Office of Industry Development and Market Analysis (Crawford) *TSC CH*

RE: Docket No. 20180124-EQ – Petition for declaratory statement concerning leasing of solar equipment, by Vivint Solar Developer, LLC.

AGENDA: 08/07/18 – Regular Agenda – Parties May Participate at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

CRITICAL DATES: 08/21/18 (Final Order must be issued by this date pursuant to Section 120.565(3), Florida Statutes)

SPECIAL INSTRUCTIONS: None

Case Background

On May 23, 2018, Petitioner, Vivint Solar Developer, LLC (Vivint), filed a petition for a declaratory statement (Petition). Vivint asks the Commission to declare that based on the facts presented by Vivint:

- (1) Vivint’s proposed residential solar equipment lease, as described by its petition, will not be deemed to constitute a sale of electricity;
- (2) Offering its solar equipment lease to consumers in Florida will not cause Vivint to be deemed a public utility; and
- (3) The residential solar equipment lease described in its petition will not subject Vivint or Vivint’s customer-lessees to regulation by this Commission.

Pursuant to Rule 28-105.0024, Florida Administrative Code (F.A.C.), a Notice of Declaratory Statement was published in the May 29, 2018, edition of the Florida Administrative Register, informing interested persons of the Petition. There were no requests to intervene filed.

This recommendation addresses Vivint's Petition for Declaratory Statement. The Commission has jurisdiction pursuant to Section 120.565, F.S., and Chapter 366, F.S.

Discussion of Issues

Issue 1: Should the Commission grant Vivint's Petition for Declaratory Statement?

Recommendation: Yes. Based on the facts presented by Vivint, the Commission should grant Vivint's Petition and declare: (1) Vivint's proposed residential solar equipment lease, as described by its petition, will not be deemed to constitute a sale of electricity; (2) Offering its solar equipment lease, as described in its petition, to consumers in Florida will not cause Vivint to be deemed a public utility; and (3) The residential solar equipment lease described in its petition will not subject Vivint or Vivint's customer-lessees to regulation by this Commission. The Commission should also state that its declaration is limited to the facts described in Vivint's Petition and would not apply to different, alternative facts. (Harper, Crawford)

Staff Analysis: Vivint's Petition asks the Commission to declare whether Vivint's solar leasing program as described in Vivint's Petition will make Vivint or its lease customers a public utility subject to the Commission's jurisdiction under Section 366.02(1), F.S. Although Vivint provided a copy of a draft solar equipment lease, approving Vivint's draft lease does not fall within the Commission's jurisdiction and review of the lease is not necessary for the Commission's determination of Vivint's Petition.

The facts in Vivint's Petition are virtually identical to the facts set forth by Sunrun Inc. in Docket No. 20170273-EQ. Thus, staff is unsure as to why Vivint saw a need to request a declaratory statement. Vivint's Petition states that it is aware of the Commission's recent decision in Order No. PSC-2018-0251-DS-EQ, issued May 17, 2018, in Docket No. 20170273-EQ, *In re: Petition of Sunrun Inc. for a declaratory statement concerning the leasing of solar equipment* and that the order was limited to the specific facts described in Sunrun's Petition. According to Vivint, it is seeking this declaratory statement to remove questions or doubts concerning the applicability of the statutes, rules and orders identified in its particular set of circumstances, including its proposed long-term lease of solar generation equipment to residential customers throughout Florida.

Vivint's Petition states that its proposed residential equipment lease program will have fixed lease payments that are independent of electric production. This is consistent with Rule 25-6.065, F.A.C., which allows customers to lease an on-site renewable generation system from a third-party without triggering the Commission's jurisdiction. This is also consistent with the Commission's recent decision in *Sunrun*. Staff recommends the Commission grant Vivint's Petition for Declaratory Statement. Below is a more detailed explanation of staff's recommendation.

Law Governing Petitions for Declaratory Statements

A declaratory statement procedure is intended to enable members of the public to definitively resolve ambiguities of law arising in the planning of their future affairs and to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts. *Department of Business and Professional Regulation, Div. of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374, 382 (Fla. 1999). Declaratory statements are

governed by Section 120.565, F.S., and the Uniform Rules of Procedure in Chapter 28-105, F.A.C. Section 120.565, F.S., states, in pertinent part:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

If a petitioner requesting a declaratory statement meets the filing requirements provided by Rule 28-105.002, F.A.C., an agency must issue the declaratory statement.¹ Rule 28-105.003, F.A.C., provides the requirements for how agencies must dispose of declaratory statements. The rule states that an agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts.

Vivint's Petition for Declaratory Statement

Vivint's particular circumstances and facts

The Petition states that Vivint is one of the nation's largest dedicated residential solar, storage, and energy services company with over 125,000 customers in 21 states and the District of Columbia. Vivint offers solar equipment cash sales in those 21 states and also offers a solar equipment lease program to homeowners in a number of states including Arizona, California, and South Carolina, with plans to expand the program to additional states. Vivint now seeks to offer its residential equipment lease program to Florida residential customers.

In Florida, Vivint currently sells solar equipment to residential customers but does not offer a lease option.² Vivint offers customers who cannot pay cash for their solar generation equipment an option to finance the purchase of their solar equipment. Vivint's Petition states its proposed solar equipment lease will provide another financing option to Florida homeowners who prefer not to or cannot afford to purchase and pay upfront for a residential solar system. Vivint states that its proposed Florida residential solar equipment lease complies with Florida law, is consistent with prior Commission precedent, and will consist of a 20 year lease of solar

¹ An agency has an obligation to issue a declaratory statement explaining how a statute or rule applies in the petitioner's particular circumstances even if the explanation would have a broader application than to the petitioner. *Soc'y for Clinical & Med. Hair Removal, Inc. v. Dep't of Health*, 183 So. 3d 1138, 1144 (Fla. 1st DCA 2015).

² See www.vivintsolar.com/state/florida.

equipment intended to provide a homeowner with the means to generate much of the electricity needed for that residence. Vivint's Petition states its residential solar equipment lease will include the following provisions:

- Monthly lease payments will be fixed for a 20-year lease term. The payment amounts will be based on costs to purchase the solar equipment and install the system, plus a rate of return for Vivint's investment. The customer-lessee payments will be independent of electricity generated by the solar system, utility prices, maintenance activities, solar irradiance, or any other operating operational variable of the leased equipment.
- Vivint will hold legal title to the leased equipment and will receive all Investment Tax Credits, and any other benefits associated with the investment.
- Vivint will have no control over the use of the equipment other than as the beneficiary of the representations and covenants from the customer-lessee contained in the lease.
- At the lease expiration, the customer-lessee will be able to purchase the solar equipment at fair market value, renew the lease on an annual basis, or request removal of the equipment at no additional cost.
- Vivint will provide industry standard workmanship warranties to ensure the highest quality installation and protect the customer-lessee's home from damage during the installation process. The customer-lessee will bear the costs of ongoing system maintenance through their specified monthly lease payment. The system's equipment warranties and maintenance services will be triggered by damage to or malfunction of the system, or its components, and are not dependent upon electrical generation or system production rates.
- The customer-lessee will be responsible for the cost of non-warranty maintenance, repair, and replacement, including for example, alteration of the system and any damage to the system due to windstorm, vandalism, negligence or other events not directly caused by Vivint.
- Once the system is installed and interconnected, the costs and expenses of maintaining and insuring the equipment are all borne by the customer-lessee except to the extent assumed by Vivint through the maintenance provisions of the lease.
- The customer-lessee will be responsible for all taxes assessed on or arising from installation or operation of the leased equipment.
- Lease terms and conditions will be compliant with applicable Florida state law, and applicable IRS and accounting standards.

Vivint provided the Commission with a draft solar lease for the limited purpose of assisting the Commission to further understand the facts in the Vivint Petition. Although staff reviewed the lease and its relevant provisions appear to be consistent with the petition, staff believes a review of the lease is not necessary for the Commission's determination of Vivint's Petition. Instead, staff's analysis primarily focuses on whether Vivint's Petition meets the standards for a declaratory statement. Staff need only look to Vivint's Petition for this analysis. Other provisions in Vivint's draft lease that involve statutes and rules that are outside the Commission's

jurisdiction, such as those provisions that relate to Vivint's compliance with the consumer protection laws, are not relevant to and therefore were not considered in staff's analysis.³ The analysis is limited solely to the jurisdiction question raised by the Petition.

Statutes, Rules, and Commission Orders Applicable to Vivint's Facts

The statute to be applied is Section 366.02(1), F.S., which states, in pertinent part, that the Commission's jurisdiction extends to public utilities defined as:

Every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas...to or for the public within the state.

The rule that applies is Rule 25-6.065, F.A.C., which provides, in pertinent part:

The term 'customer-owned renewable generation' does not preclude the customer of record from contracting for the purchase, lease, operation, or maintenance of an on-site renewable generation system with a third-party under terms and conditions that do not include the retail purchase of electricity from the third party.

Rule 25-6.065, F.A.C., allows customers to contract to lease an on-site renewable generation system with a third-party. The rule allows leases for solar equipment that include a maintenance agreement so long as the lease payments do not depend on electric generation.

The Commission order applicable to Vivint's Petition is Order No. PSC-2018-0251-DS-EQ, issued May 17, 2018, in Docket No. 20170273-EQ, *In re: Petition of Sunrun Inc. for a declaratory statement concerning the leasing of solar equipment*. In *Sunrun*, the Commission declared that consistent with Rule 25-6.065, F.A.C., the Commission does not have jurisdiction to regulate a company or its customer-lessees when customers-lessees lease solar generation equipment, pay a flat monthly lease payment for their personal use of the equipment, and that flat monthly lease payment is not based on electric generation.

Staff's Analysis of Vivint's Petition for Declaratory Statement

Vivint's Petition asks the Commission whether Vivint's proposed solar leasing program triggers the Commission's jurisdiction under Section 366.02(1), F.S. In its Petition, Vivint states that the declaratory statement procedure can assist Vivint with planning its future conduct and will help avoid costly administrative litigation by selecting the proper course of action in advance. Because Vivint seeks to offer and market the residential solar equipment lease program in Florida only if the Commission grants, in the affirmative, its request for a declaratory statement, Vivint is a substantially affected person and has standing to bring its Petition.

According to the declaratory statement rules, the Commission's analysis of Vivint's Petition is limited to the facts presented in the Petition, and the Commission may answer the question

³See *Deltona Corp. v. Mayo*, 342 So. 2d 510 (Fla. 1977), the Florida Supreme Court held that consumer protection was outside the bounds of the Commission's jurisdiction: "If Deltona engaged in an unfair business practice or committed fraud, however, it may be a concern of other state agencies or the basis for private law suits (on which we express no opinion), but it is not a matter of statutory concern to the Public Service Commission."

without taking any position with regard to the validity of the facts.⁴ Because the Commission's analysis in this case is limited solely to the jurisdiction question raised by Vivint's Petition, staff has analyzed the facts presented under Section 366.02(1), F.S, prior Commission orders, and Rule 25-6.065, F.A.C., to determine if Vivint's proposed program constitutes a sale of electricity.

Rule 25-6.065, F.A.C., Interconnection and Net Metering of Customer-Owned Renewable Generation

In 2002, the Commission adopted Rule 25-6.065, F.A.C., "to promote the development of small customer-owned renewable generation, particularly solar and wind energy systems."⁵ In 2008, Rule 25-6.065, F.A.C., was amended to include net-metering and expedited interconnection, and to allow customers to lease solar equipment from a third party. The rule allows for a maintenance agreement to be included in the lease so long as the lease payments do not depend on electric generation.

According to Vivint's facts, the customer will be the end-user, and the lease payments do not depend on electric generation. Vivint's proposed solar equipment lease program shows that the lease customers must utilize their utility's service and interconnection and net metering provisions. This is consistent with Rule 25-6.065, F.A.C. Therefore, staff believes the lease program model as described in Vivint's Petition is consistent with Rule 25-6.065, F.A.C.

Vivint's Petition is Consistent with the Sunrun Order

In *Sunrun*, Sunrun requested a declaratory statement from the Commission stating that its proposed residential solar equipment lease did not constitute a sale of electricity and that the lease programs described in its petition would not subject Sunrun or its customer-lessees to regulation by the Commission. Sunrun provided a draft lease to the Commission at the request of the Commission for the limited purpose of assisting the Commission to further understand the facts in its petition.

The Commission answered Sunrun's request for a declaratory statement in the affirmative because Sunrun's Petition described fixed lease payments that would not vary based on electric generation. The Commission held that the proposed lease arrangement did not constitute a sale of electricity. The Commission found the Sunrun leasing model as described in its Petition was consistent with Rule 25-6.065, F.A.C., which allows customers to lease solar equipment from a third party and allows for a maintenance agreement so long as the lease payments do not depend on electric generation.

Like *Sunrun*, Vivint's lease payments are fixed and are therefore independent of electric production. Vivint's proposed residential solar equipment lease program will allow individual customers to generate electricity for personal use. Vivint's maintenance arrangement allows the company to maintain the solar panels without affecting the lease payments. Because the lease payments would not vary based on generation, the lease arrangement would not be considered a sale of electricity.

⁴See Rule 28-105.003, F.A.C.

⁵In 2005, the Florida legislature echoed the Commission's intent to promote customer-owned renewable generation when it enacted Section 366.91, F.S., to require public utilities to develop a standardized interconnection agreement and net metering programs for customer-owned renewable generation.

Staff believes that the Vivint Petition is consistent with both *Sunrun* and Rule 25-6.065, F.A.C. If Vivint goes outside the clear bounds of its Petition, then the Commission's declaratory statement would not apply. It is well settled that declaratory statements are inherently limited to the facts upon which they are based.⁶ The declaratory statement will be controlling only as to the facts in Vivint's Petition and not as to other, different or additional facts.

Conclusion

For the reasons set forth above, staff recommends that the Commission grant Vivint's Petition for Declaratory Statement and declare: (1) Vivint's proposed residential solar equipment lease, as described by its petition, will not be deemed to constitute a sale of electricity; (2) Offering its solar equipment lease, as described in its petition, to consumers in Florida will not cause Vivint to be deemed a public utility; and (3) The residential solar equipment lease described in its petition will not subject Vivint or Vivint's customer-lessees to regulation by this Commission. The Commission should also state that its declaration is limited to the facts described in Vivint's Petition and would not apply to different, alternative facts.

⁶Rule 28-105.003, F.A.C. (agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts). See also Order No. 23729, issued November 7, 1990, in Docket No. 900699-EQ, *In re: Petition of Seminole Fertilizer Corporation for a declaratory statement concerning the financing of a cogeneration facility*. (The Commission stated its conclusion was limited to the facts presented by the Petitioner.)

Issue 2: Should this docket be closed?

Recommendation: Yes, if the Commission votes to either grant or deny the Petition for Declaratory Statement, the docket should be closed. (Harper)

Staff Analysis: Whether the Commission grants or denies Vivint's Petition, a final order will be issued. Upon issuance of the final order, the docket should be closed.