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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Investigation of the Costs and Benefits of PacifiCorp's Net Metering Program	**Docket No. 14-035-114** **Motion to Dismiss of Vivint Solar, Inc.**

In accordance with the Public Service Commission's ("Commission") November 18, 2016 Scheduling Order and Utah Administrative Rules R746-100-3 J,[1] Vivint Solar, Inc. respectfully moves the Commission to dismiss Rocky Mountain Power's ("RMP" and where applicable RMP includes PacifiCorp) November 9, 2016 filing which it titled Compliance Filing and Request to Complete all Analyses Required under the Net Metering Statute for the Evaluation of the Net Metering Program. ("Compliance Filing"). Vivint Solar makes this motion for three principal reasons. First, RMP's so-called Compliance Filing fails to comply with the Commission's Order issued in this Docket November 10, 2015. Second, RMP's Compliance Filing is an illegal single-item rate case, and if the Commission considers the proposal at all, it must only consider it in a general rate case. Third, considering the Compliance Filing in this Docket outside of a general rate case would be inefficient, duplicative, wasteful of regulatory and

[1] This rule allows parties generally to file any motion. Utah Admin. Code R746-100-1 C. states where there is no specific rule, the Utah Rules of Civil Procedure govern. This motion, therefore, is authorized generally under R746-100-3 J. and also specifically under Utah Rules of Civil Procedure Rules 7 and 12.

other resources, and poor public policy. Vivint Solar therefore moves this Commission to dismiss RMP's Compliance Filing.

I. BACKGROUND

On November 10, 2015, the Commission issued its order in the first phase of this Docket establishing an analytical framework through which to analyze the costs and benefits of the net metering program under Utah Code Ann. § 54-15-105.1. The Commission limited the framework very narrowly to comparing two cost studies the Division of Public Utilities ("Division") proposed. One is RMP's actual cost of service, including net metering customers where RMP provides for only their net load and accounts for the power they generate ("ACOS"). The second is a counterfactual study that ignores the power net metering customers generate and assumes that RMP will meet their entire load ("CFCOS"). The difference between the two is intended to be considered by the Commission in assessing whether and to what extent the benefits of net metering exceed its costs. The Commission mandated that the test period of the studies be the 12 month test period of RMP's next general rate case.

A year later, on November 9, 2016, RMP filed its Compliance Filing, representing that it had followed the Commission's November 10, 2015 Order. Not surprisingly, RMP argues that the costs of net metering exceed the value of the benefits of net metering by $2 million and projects that that difference will increase. Relying on this assertion in isolation, without providing the market context or evidence of costs required in a general rate case, RMP requests the approval of a new and unprecedented rate structure to apply only to net metering customers.

On November 18, 2016, the Commission issued a scheduling order inviting parties to file dispositive motions by December 20, 2016 to allow the Commission to consider whether RMP failed to meet statutory or Commission requirements before reaching the substantive issues of

the proceeding. Accordingly, Vivint Solar hereby moves to dismiss RMP's Compliance Filing because it is not compliant, illegal, and not appropriately before the Commission in this Docket.

II. ARGUMENT

A. RMP'S COMPLIANCE FILING FAILS TO COMPLY WITH THE COMMISSION'S NOVEMBER 10, 2015 ORDER.

RMP's Compliance Filing fails to comply with the Commission's November 10, 2015 Order. As stated before, the Commission required RMP to file two costs studies using the test period of RMP's next general rate case. RMP failed to abide by the terms of the Order. Instead, it incorrectly used its actual results from the 12 months of 2015 for both the ACOS and the CFCOS. [2]

The Commission's instruction that net metering's costs and benefits be evaluated over the same period as the next general rate case is iterated several times throughout the Order. [3] As an initial matter, the very heading of Section 2.3 of the November 10, 2015 Order outlines the Commission's expectation: "The CFCOS and ACOS Should be Commensurate with the Test Period in PacifiCorp's Next General Rate Case."[4] The Commission also found and concluded, "We are persuaded that relying on the rate case test period is consistent with the Statute and will

[2] Gary Hoogeveen pre-filed testimony, lines 55-57.

[3] Not only do the ACOS and the CFCOS use a test period contrary to the Commission's November 10, 2015 Order, they are based on an inadequate sample size of 52 customers which was further reduced to 36 customers who gave permission to RMP to install production profile meters. Robert Meredith pre-filed testimony, lines 183-186.

[4] November 10, 2015 Order at 7. On the first page of this Order the Commission cited its November 21, 2014 procedural order and said that the Commission would analyze the costs and benefits of net metering in ". . . a general rate case or other appropriate proceeding." While this phrase seems to open the door to an analysis outside of a rate case, the November 10, 2015 substantive Order made it clear that the analysis would have to use the test period of the next RMP general rate case and that occurs in a rate case.

yield useful results in the rate setting context."[5] In adopting the Division's very limited analytical framework the Commission concluded: "At this juncture, we adopt the Division's proposed framework of developing the ACOS or CFCOS over the next general rate case test period to serve as the basis for evaluating the costs and benefits attendant to net metering."[6] Finally on this point, in the fourth ordering paragraph the Commission ordered: "4. The period of time covered by each of the cost of service studies shall be commensurate with the test period in PacifiCorp's next general rate case."[7]

RMP did not follow the Commission's unambiguous instruction, rendering the Compliance Filing invalid and unusable for the Commission's purposes in this Docket. Using actual data from 2015 blatantly disregards the Commission's mandate to use the test period in RMP's next general rate case. Additionally, unlike a general rate case, this Docket is not a "rate setting context" and based on the Commission's Order, 2015 actual data is of no practical use for rate setting if it is not the test period of RMP's next general rate case.

The Commission's direction to use the period of the next general rate case was not incidental or advisory. To the contrary, in four places in the Commission's November 10, 2015 Order the Commission mandated clearly and repetitively that the cost studies be based on the test period of RMP's next general rate case. RMP's failure to comply is blatant and constitutes grounds for dismissal of the Compliance Filing.

Moreover, the Commission's designation of the period of the next general rate case as the measurement period for net metering cost and benefit studies was not arbitrary, but represented

[5] November 10, 2015 Order at 8.

[6] *Id.* at 12-13.

[7] *Id*. at 16.

the Commission fulfilling its "crucial role in protecting ratepayers from overreaching by entities with monopoly power that provide essential services." *MCI Telecommunications Corporation v. Utah Public Service Commission*, 840 P.2d 765, 773 (Utah 1992). Using the same period as in the general rate case is necessary to ensure that the costs and benefits of net metering are correctly determined with relation to other general rate customers. Otherwise, the rates applicable to net metering customers will fail to align with general rates, resulting in a skewed determination of costs and a windfall (depending on how rates and costs change) to one or more parties. The Commission cannot allow rates to be determined for a particular subclass of general ratepaying customers based on a different set of costs and profit data than it uses for the general rate case.

B. RMP'S FILING IS AN ILLEGAL SINGLE-ITEM RATE CASE.

RMP's Compliance Filing violates the longstanding regulatory principle against addressing and changing rates of single items within a utility's operations outside of a general rate case. Single-item rate cases are illegal in Utah. In *Stewart v. Utah Public Service Commission*, 885 P.2d 759, 765 (Utah 1994), the Utah Supreme Court quoted specific Commission findings in the proceeding below that stated clearly "It was further argued that such pass-throughs are single-item rate cases which have been declared illegal in this jurisdiction." *See also, Utah Dept. of Business Regulation v. Public Service Commission*, 614 P.2d 1242 (Utah 1908). The Utah legislature has enumerated certain limited exceptions to this prohibition against single-item rate cases,[8] but this regulatory principle otherwise remains intact in Utah.

Single-item ratemaking occurs when a commission considers a cost or revenue item within a utility's operations alone without considering all other costs, revenues, and investments

[8] Utah Code Ann. 54-7-12(1)(a)(ii).

of the utility. Considering and acting on items separately often results in mismatching of costs and revenues which then can lead to unjust and unreasonable rates. Having just one item of expense or one item producing revenue in a case before the Commission does not allow the Commission to take into account other possible offsetting costs or revenues. The result in a proceeding like that would almost certainly be unjust and unreasonable.

Commission consideration of RMP's Compliance Filing and net metering alone would be a classic single-item rate case. Without having all of RMP's current costs and revenues before it together in a rate case, the Commission cannot adequately set the just and reasonable charge or credit in light of the costs and benefits of net metering required by Utah Code Ann. § 54-15-105.1(2).

RMP briefly suggests in its testimony that it could defer the revenues from a new net metering rate until the next general rate case and then amortize any balance.[9] It does not appear from the Compliance Filing, however, that RMP is proposing to defer all revenues and costs of net metering, which could cause the kind of mismatch the rule against single-item rate cases is designed to prevent. Revenues from the interconnection charges paid by net metering customers, for example, are in base rates now and will not be deferred.

RMP said it made this recommendation to defer revenues to keep the proposal revenue neutral, but RMP may attempt to argue for the application of the deferred accounting exception[10]

[9] Joelle Steward pre-filed testimony, Lines 722-730. The proposed deferral, however, is contrary to other RMP testimony indicating that the proposed new rates would be effective at the conclusion of this proceeding. *E.g.*, *Id*. at, Lines 253-256, ". . . the Company proposes to implement Schedule 135A as a transition tariff that will provide explicit notice to <u>new</u> net metering applicants that there may be changes to the service of rates for net metering customers following the conclusion of this proceeding."

[10] Utah Code Ann. § 54-7-12(1)(a)(ii)(A).

to the prohibition against single-item rate cases. If RMP's proposal to defer revenues from new net metering rates qualifies for the exception then a utility could propose deferred accounting treatment for any single expense or revenue at anytime, forgo a general rate case, and subject ratepayers to unjust and unreasonable rates. This is an abuse of the purpose for the deferred accounting exception and would set a terrible precedent.

In setting standards for deferred treatment and accounting orders in Docket Nos. 06-035-163, 07-035-04, and 07-035-14, the Commission applied exceptions to the rule against retroactive ratemaking to determine whether an item qualified for deferred accounting treatment. In its January 3, 2008 order in these three dockets the Commission cited *MCI Telecommunications Corporation v. Utah Public Service Commission*, 840 P.2d 765 (Utah 1992) for the proposition that for the an expense to be recovered retroactively, or in this case for an accounting order to be issued, it must not only be extraordinary and unforeseeable, but it must also have an extraordinary effect on the utility's earnings.[11] That means that the impact of any change is outside the normal ranges of variance that occur in projecting future expenses.[12] Otherwise, rates generally do not change between rate cases.

Even if RMP's projections are correct, net metering will not extraordinarily affect RMP's earnings, and certainly not before RMP's next general rate case. Neither net metering nor the Compliance Filing meet the standard the Commission established in these three dockets and therefore do not qualify for deferred treatment.

The Commission should also not permit RMP to disguise the anticompetitive effects of its proposed net metering rate structure behind the illusory premise of deferred revenue. The

[11] Docket Nos. 06-035-163, 07-035-04, and 07-035-14; January 3, 2008 Order at 15-16.

[12] *Id*. at 16.

proposed rate structure is far from a simple accounting matter, and the suggestion that it can be made "revenue neutral" simply by deferring net metering revenue demonstrates a fundamental disregard for the dangers to customers by the exercise of monopoly power. While the clear public policy of the State of Utah favors the free market and fair competition, public utilities are permitted to exercise well-regulated monopoly power because, historically, the market has not provided consumers with competitive alternatives. The introduction to the market of distributed solar energy systems has begun to change that. By providing consumers with at least partial alternatives for their energy needs, distributed solar has begun to introduce competitive pressures that will only increase as technology improves over time.

The Compliance Filing's proposed net metering rates will increase costs to consumers with solar energy systems and thereby affect the market. The issue for customers is not only how the revenues from a deferred account tracking differences in rates between rate cases will be allocated, but also whether the rates have a chilling effect on the market. That is why the Commission must consider these effects in their entirety in a general rate case. The impact to RMP's bottom line from its net metering charges might be evened out in the next general rate case through deferred revenue, but the effect on the market will not. If RMP's proposed rates and charges are adopted, the effect on the market and consumer choice will not be reversible. This is another reason why single-item rate cases are impermissible under Utah law.

Allowing RMP's Compliance Filing to take effect and deferring any new revenues from an increase in net metering customers' rates is an illegal circumvention of the prohibition against single-item rate cases and the Commission should dismiss it. There is no reason why the analysis set forth in the Compliance Filing should not be redone, and any resulting proposal considered in

RMP's next general rate case, particularly in light of the Commission's clear mandate that RMP base its cost study analyses on the test period of its next general rate case.

C. CONSIDERING RMP'S COMPLIANCE FILING OUTSIDE OF A GENERAL RATE CASE WOULD BE INEFFICIENT AND WASTEFUL OF REGULATORY RESOURCES.

If the Commission allows this proceeding to go forward and parties are then required to completely dissect the Compliance Filing, hire experts to help analyze and critique it, and employ lawyers to present the case at hearing in August, it will be duplicative and a tremendous waste of resources. Litigating RMP's Compliance Filing outside of a general rate case only means that it will have to be re-litigated in RMP's next rate case. There is no reason for the Commission or the parties to have to address the proposal and then address it again, particularly given the fact that the RMP's cost studies in the Compliance Filing do not analyze the costs and benefits of net metering as the Commission required. This is simply poor public policy.

To promote judicial and administrative economy, Vivint Solar encourages the Commission to dismiss this case to prevent duplication of effort. In addition, Vivint Solar requests that the Commission require RMP to comply with the Commission's November 10, 2015 Order.

III. CONCLUSION AND RELIEF SOUGHT

RMP's Compliance Filing fails to comply with the Commission's November 10, 2015 Order, it is an illegal single-item rate case, and addressing it outside of a general rate case makes no sense, it is duplicative and wasteful, and it is very poor public policy. For the Compliance Filing to meet the Commission's mandate, RMP will have to completely re-do the ACOS and the CFCOS studies and its entire analysis. There is no point for RMP to do that and then not consider the matter as part of a full-blown general rate case, particularly if there are other reasons

for the Commission to review RMP's rates. Vivint Solar, therefore, respectfully moves this Commission to dismiss RMP's Compliance Filing and to require RMP to perform the cost studies and analysis the Commission mandated.

Respectfully submitted this 20th day of December, 2016.

STEPHEN F. MECHAM LAW, PLLC

/s/Stephen F. Mecham_____
Stephen F. Mecham

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2016, I sent a true and correct copy of Vivint Solar, Inc.'s Motion to Dismiss by email to the following:

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