Steven S. Michel
Western Resource Advocates
227 E. Palace Avenue, Ste. M
Santa Fe, NM 87501
505-690-8733

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF AN INVESTIGATION REGARDING THIRD-PARTY ARRANGEMENTS FOR RENEWABLE ENERGY GENERATION	)	**Docket No. 09-999-12** **LEGAL BRIEF OF WESTERN RESOURCE ADVOCATES**

COMES NOW Western Resource Advocates ("WRA") and, pursuant to the Utah Public Service Commission's ("Commission") October 12, 2009 Notice of Investigation and Procedural Order, submits the following Legal Brief.

1. Introduction

The Commission by its Procedural Order has asked interested parties to submit comments or legal briefs on issues associated with specific third-party arrangements. A third-party arrangement is typically one in which a vendor of distributed generation (e.g. rooftop solar PV), builds and operates solar facilities on premises belonging to utility customers. The third-party provider finances the cost of solar generating facilities, owns and maintains the facilities, and takes advantage of subsidies available under federal and state law. The third-party investor sells the electricity generated from the solar facility to the customer who owns or occupies the premises. This arrangement is especially beneficial for entities that cannot take advantage of tax

credit subsidies, such as governmental agencies, schools, churches, non-profit organizations, and a long list of other entities, and individuals, that do not have significant tax liability.

The specific issues provided by the Commission for the parties to address are:

(a) Whether the third party is a public utility under Utah law;

(b) Whether the third party is a public utility under Utah law when arrangements are entered into primarily as a financing mechanism for distributed renewable energy generation systems whereby a third party owns the renewable generation equipment, which is installed on a utility customer's premises, there is a long-term contract with the customer to supply a portion of that customer's electricity use, and payments are based on kilowatt-hours;

(c) Whether the third party is a public utility under Utah law when (i) there is a single relationship between the third-party owner of the generation and a customer or (ii) there are multiple customers taking power from the same third party;

(d) Whether the third party is a public utility under Utah law when arrangements involve the leasing of distributed generation equipment from non-utility lessors to lessees that are also retail customers of utilities.

The scenarios provided by the Commission describe various types of third-party provision of electricity to customers. In scenario (b), customer-sited facilities are owned by the third party, with the electricity sold to the customer. In scenario (c), the third-party arrangement is duplicated with multiple customers. In scenario (d), the facilities are owned by the third party, but leased to the customer, and there is no sale of electricity.

In this Legal Brief, WRA will demonstrate that Utah law specifically excludes third-party *lessors* of distributed renewable generation from "public utility" designation. Moreover, third-party developers that *sell* electricity to a customer, or multiple customers, are also exempt from regulation as public utilities. These developers would be considered "independent energy providers" under Utah law. Utah specifically exempts these types of providers from regulation if they sell electricity used by state-owned facilities, or by a user or users located on real property

managed by the third-party provider and contiguous to property owned or controlled by the third-party provider. In other words, if the customer(s) allows the third-party provider to manage, own or control the real property on which the facility is located, which is typically the case, then the third-party provider will not be a public utility. Finally, even if the third-party provider is not exempted under the rather obscure "real property" provisions, they are still not subject to utility regulation because they do not serve the general public, and consumers have no right to demand their service.

This Brief is organized to first describe Utah's statutory framework and demonstrate why Utah statutes exempt the described third-party arrangements from regulation as public utilities. Next, WRA will examine Utah case law and show that it, too, supports the conclusion that public utility regulation should not be extended to third-party providers. Finally, WRA will present law and decisions from other jurisdictions that similarly support regulatory restraint over third-party entities.

Based on the legal analysis and reasoning provided in this Legal Brief, WRA believes that the third-party entities in question are not public utilities and that, therefore, the arrangements described in the Commission's inquiry are permissible under Utah law. WRA urges the Commission to declare the same.

2. Utah's Statutory Framework

The threshold question with respect to third-party arrangements is whether third-party renewable energy providers are "public utilities" under Utah law. As will be explained, the third-party provider arrangements described by the Commission in this docket would not cause the providers to become "public utilities" under Utah law.

a) The *lessor/lessee* third-party scenario does not cause the third party to become a public utility.

In its Procedural Order, the Commission has described three specific scenarios of third-party arrangements for comment or briefing. Because the final scenario, involving the lease of facilities to an end-user, is very straightforward, we will address that issue first. Simply put, those arrangements would not cause the third-party lessor to become a public utility.

UCA Section 54-2-1(16)(f)(i) provides:

> "Public utility" does not include any person… because of that person's ownership of an interest in an electric plant, cogeneration facility, or small power production facility…if…the ownership interest… is leased to… a person or government entity that is exempt from commission regulation as a public utility….

b) The third-party *seller* scenarios also do not cause the third party to become a public utility.

Unlike the lessor/lessee situation, the determination of whether third-party providers that *sell* electricity to one or multiple customers are "public utilities," is much more difficult – though the result is the same.

The statutory framework by which Utah law determines whether an entity is a "public utility" is very complex. Utah has defined a "public utility" in UCA Section 54-2-1 (16) as including:

> every … electrical corporation… and independent energy producer not described in Subsection (16)(d), where … the commodity [is] delivered to, the public generally, or in the case of a[n] … electrical corporation where the…electricity is sold or furnished to any member or consumers within the state for domestic, commercial or industrial use.

The definition goes on to say:

> (b)(i) If any… electrical corporation… or independent energy producer not described in Subsection (16)(d), … delivers a commodity to the public, it is considered to be a public utility….
>
> (ii) If a[n] independent energy producer not described in Subsection (16)(d), or electrical corporation sells or furnishes… electricity to any member or consumers within the state, for domestic, commercial or industrial use, for which any compensation or payment is received, it is considered to be a public utility….

In short, this section can be read as saying that if the third-party provider is not an electrical corporation, or is an independent energy producer described by subsection (16)(d), then it would not be a public utility. If the provider is an electrical corporation or independent power producer not described in Subsection (16)(d), and the electricity is delivered "to the public" or sold "to consumers within the state," then it may be classified as a public utility. In other words, there are several levels of inquiry to examine before making the determination requested by the Commission.

1) The third-party providers described by the Commission are exempt independent energy producers, and are not electrical corporations.

UCA Section 54-2-1(7) defines an "electrical corporation" as including:

> every corporation, cooperative association, and person, their lessees, trustee, and receivers, owning, controlling, operating, or managing any electric plant, or in any way furnishing electric power for public service or to its consumers or members for domestic, commercial or industrial use, within this state, except independent energy producers…

Section 54-2-1(13) defines an "independent energy producer" as:

> every electrical corporation, person, corporation or government entity, their lessees, trustees or receivers, that own, operate, control or manage an independent power production or cogeneration facility

Section 54-2-1(13) defines an "independent power production facility" as:

> a facility that: (a) produces electric energy solely by the use, as a primary energy source, of biomass, waste, a renewable resource, a geothermal resource, or any combination of the preceding resources….

Because the scenarios presented by the Commission all involve renewable energy resources, we can conclude that the facilities at issue are "independent power production facilities." The third parties in question would also "own, operate, control or manage" these facilities, and therefore would be considered "independent energy producers." Because they are "independent power producers," they are *not* "electrical corporations" – which by definition do not include "independent power producers." Therefore, going back to the definition of "public utility," because they are not an "electrical corporation," the third-party providers can only be public utilities if they are "independent energy producers" as described in 54-2-1(16)(d), and they sell electricity.

2) The third-party providers described by the Commission are not public utilities because they meet the criteria of Subsection (16)(d).

The relevant portion of UCA 54-2-1(16)(d) states that an independent energy producer is exempt from commission regulation with respect to its facility if

(i) the commodity or service is produced or delivered, or both, by an independent energy producer solely for the uses exempted in Subsection (7) or for the use of state-owned facilities;

(ii) the commodity or service is sold by an independent energy producer solely to an electrical corporation …; or

(iii) (A) the commodity or service delivered by the independent energy producer is delivered to an entity which controls the independent energy producer… or to a user located on real property managed by the independent energy producer; and

(B) the real property on which the service or commodity is used is contiguous to real property which is owned or controlled by the independent energy producer.

With respect to subsection (i), the uses exempted in Subsection (7) are "where electricity is generated on or distributed by the producer solely for the producer's own use, or the use of the producer's tenants…." Because the producer in the Commission scenarios is not using the electricity, the exemptions of Subsection (7) would not apply. Nevertheless, under this section, if the electricity is for state-owned facilities, the provider would be exempt from public utility regulation.

The exemption in (16)(d)(ii) may or may not apply to the third-party providers described by the Commission, depending on whether the user of the electricity is an "electrical corporation." Revisiting the definition of "electrical corporation," if the user is a "person… owning, controlling, operating or managing" the facilities, then the exemption would apply. This is because, although the users described by the Commission's scenarios would not own the facilities, it is possible they would control, operate or manage them. If they do, the third-party provider would not be a public utility. (It is worth noting that if the user is an "electrical corporation," it would still not be a "public utility" because the user is not selling or furnishing the electricity to a consumer.)

Finally, the exemptions in (16)(d)(iii) would likely also apply, depending upon the arrangement between the third-party provider and the customer. If the third-party provider "manages" real property of the user (e.g. the roof space for solar installations[1]), and the user's

[1] "Real property" is generally construed to include land and improvements, fixtures, etc. For example, Utah real estate law, UCA 57-1-1 defines "'Real property' or 'real estate' … [as] any right, title, estate, or interest in land, *including … all buildings, fixtures and improvements* on the land, *…and appurtenances belonging to, used, or enjoyed with the land* or any part of the land." (emphases added).

premises where the electricity is used is contiguous to the location of the facilities, then the provider would be exempt from Commission regulation.

What all this boils down to is that third-party providers selling electricity to one or multiple customers under the arrangements described by the Commission will not be public utilities if the power is used by state-owned facilities, if the customer controls, operates or manages the facilities, or if the user or users are located on real property managed by the third-party provider and the use of the electricity is on property contiguous to that owned or controlled by the third-party provider. So, it appears that if the customer(s) allows the third-party provider to manage, own or control the real property on which the facility is located, then the third-party provider *will not* be a public utility.

This begs the question, however, of whether these third-party providers *will* be public utilities if they are not selling to state-owned facilities and do not manage, own or control the real property on which the facility is located. For this analysis, we need to turn to other Utah statutory sections and case-law. The conclusion reached from this further analysis is also that these providers would not be public utilities - even if they lack Subsection (16)(d) exemption

3) The third-party providers described in the Commission's procedural order are not public utilities because the do not "deliver a commodity to the public" and "do not furnish electricity to consumers."

If a third-party provider is not "exempt" from regulation as a public utility under Subsection (16)(d), they would nevertheless not be public utilities under the definitions set forth in Utah law. The reason is that these third-party providers are not serving consumers or the public. The applicable portion of Utah's definition of a "public utility" is:

> (16) (a) … [a public utility is] every … independent energy producer not described in Subsection (16)(d), where … the commodity [is] delivered to, the public generally ….
>
> (b)(i) If any… independent energy producer not described in Subsection (16)(d), … delivers a commodity to the public, it is considered to be a public utility….
>
> (ii) If a[n] independent energy producer not described in Subsection (16)(d)… sells or furnishes… electricity to any member or consumers within the state, for domestic, commercial or industrial use, for which any compensation or payment is received, it is considered to be a public utility….

UCA Section 54-2-1(16). The definitions here provide that if an independent energy producer delivers energy to "the public generally," or sells electricity to "consumers," it will be considered a public utility. The question that must be answered then, with regard to these third-party providers, is what is meant by "consumers" and "the public generally." Utah case law is clear that selling or furnishing electricity to one, or select, customers, as the Commission's scenarios describe, would not trigger the creation of a "public utility."

3. Utah Case Law

In the case of Medic-Call, Inc. v. Utah Public Service Commission, 24 Utah 2d 273, 470 P.2d 258 (1970), the Utah Supreme Court was faced with the issue of whether a limited telephone answering service was a "public utility" under Utah law. The Court's decision explained that these types of limited services are not to be regulated as public utilities, and began its analysis by citing the well-accepted test found in 73 C.J.S. Public Utilities:

> "… The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.
>
> … It has been stated that the true criterion by which to determine whether a plant or system is a public utility is whether or not the public may enjoy it of right or by permission only…."

> Accordingly, a utility must act toward all members of the public impartially, and treat all alike; and it cannot arbitrarily select the persons for whom it will perform its service or furnish its commodity, or refuse to one a favor or privilege which it has extended to another, since the term 'public utility' precludes the idea of service which is private in its nature and is not to be obtained by the public….

Ibid. at 274-5. The Court then went on to discuss and re-affirm an earlier case involving transportation service to specific attendees of an outdoor camp. That case, State ex rel. Public Utilities Comm. of Utah v. Nelson, 65 Utah 457, 238 P. 237 (1925), held:

> In other words, the state may not, by mere legislative fiat or edict, or by regulating orders of a commission, convert mere private contracts or a mere private business into a public utility or make its owner a common carrier. (Citations omitted.) So, if the business or concern is not public service, where the public has not a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission.

Medic-Call at 276. Using the criteria of the *Medic-Call* Court, one must conclude that when the statute refers to "the public generally" or "consumers," it is intending to designate a service to a broad class of customers that have a legal right to demand service. Third-party providers serve select customers, do not hold themselves out as serving the public as a class, and consumers have no right to demand service from these providers. As such, these providers are not utilities under Utah law. And this conclusion is widely supported by other regulatory commissions.

4. Decisions in Other Jurisdictions

Court and Commission decisions in other jurisdictions support the conclusion that third-party providers as described in the Procedural Order are not public utilities. New Mexico, Pennsylvania and Colorado have all determined that the arrangements described by the Utah Commission do not involve "public utility" service.

New Mexico case law has addressed the question of whether an entity is a public utility under its Public Utility Act numerous times and supports a determination that third-party providers of electricity or equipment leases are not "public utilities." The New Mexico Supreme Court has held that to be a public utility, an entity must hold itself out as providing service to the public at large:

> These cases define a public utility as an individual or entity that holds itself out " 'expressly or impliedly, as engaged in the business of supplying [its] product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding [itself] out as serving or ready to serve only particular individuals.' " In *Llano* we noted that the principle determinative feature of a public utility "'is that of service to or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services or commodities,' ". Thus, public utilities are clearly characterized by an interest in serving the public at large…, or a willingness to extend service to an indefinite public, without restricting service to privileged individuals. [Citations omitted].

El Vadito de los Cerrillos Water Ass'n v. N.M. Public Service Commission, 115 N.M. 784, 791, 858 P.2d 1263, 1270 (1993).

Moreover, in an ongoing docket before the New Mexico Public Regulation Commission ("NMPRC"), 09-0217-UT, the NMPRC has posed third-party issues virtually identical to those presented by the Utah Commission in its Procedural order. A recommended decision was recently entered by the Hearing Examiner in that case, and it has determined that the third-party entities in question are not public utilities, (unless the entities transmit power across transmission or distribution lines). Without restating the rationale of that Recommended Decision, the findings were as follows:

> 3. A developer who owns a distributed generation system at its host's premises and who sells electricity generated by the distributed generation system to the host for only the host's use is not a public utility.

4. A developer who owns multiple distributed generation systems, serving multiple hosts, but in each instance selling electricity from a given system to only one host, is not a public utility.

5. A developer who (i) owns multiple distributed generation systems on a single host's property; (ii) does not transport electricity generated from the systems from one location to another; and (iii) sells all of the electricity generated from the systems to the single host, is not a public utility.

6. Except as allowed by § 62-3-4(A)(1), a developer who serves multiple customers from a single distributed generation facility by transporting electricity from one location to another via distribution lines constructed by the developer is a public utility.

7. A developer who serves multiple customers from a single distributed generation facility by transporting electricity from one location to another using a public utility's distribution lines, engages in unlawful retail wheeling.

8. A developer who owns a distributed generation system at its host's premises and who leases the distributed generation equipment to the host for only the host's use is not a public utility.

In the Matter of Declaratory Order Regarding Third-Party Arrangements for Renewable Energy Generation, NMPRC Docket 09-00217-UT, Recommended Decision, October 23, 2009 at 27-8. And while New Mexico statutory law is different from that of Utah, the common-law principles of public utility regulation are the same in both States.

Similarly, in a 2006 Pennsylvania Public Utility Commission policy statement regarding the implementation of the Alternative Energy Portfolio Standards Act of 2004, the Commission declared that it will interpret Pennsylvania's Public Utility Code so as not to consider an alternative source of energy a public utility if the facility is designed to serve a specific group of customers and cannot serve others without significant revision. The Pennsylvania Commission also found that no "public utility" finding would be made if the service was provided to one customer or a "defined, privileged and limited group" and the provider selected its customers by contractual arrangement. Implementation of the Alternative Energy Portfolio Standards Act of 2004; Doc. No. M-00051865, Final Policy Statement, November 30, 2006.

The Colorado Commission has determined, too, that third-party providers of solar power are not public utilities. In a renewable energy standard compliance docket, the Colorado Public Utility Commission ("PUC") analyzed whether the "Developer Model" met state law requirements. (Docket No. 06A-478E, Decision No C07-0676, 2007 WL 2302112 (Colo. PUC August 8, 2007). Under the Developer Model, a third-party developer owned and maintained the solar installations on customer sites, and contracted with the end-use customer for the sale of the electricity generated. The end-use customer would be eligible for net metering and would receive the financial benefit of excess generation being returned to the grid. *Id.* at 3. The Colorado PUC ruled that such an arrangement was legal, and that in this arrangement the developer was not a public utility:

> 95. We find the tension between the competing statutes is further relieved through the role of the third party developer. We agree with the OCC that the developers are not public utilities as contemplated under applicable statutes. The energy generated by the solar facility will be used only by the customer or exported into Public Service's system should the customer's generated energy exceed usage. The third party developer will not sell any excess generation from the solar facility to any other entity. There is no opportunity for a developer to 'cherry pick' customers or impose additional burdens on residential and commercial customers of Public Service. Consequently, we find that third party developers do not meet the statutory definition of a public utility. They are not required to hold themselves out to serve all who request service within a geographic area. The third party developer merely provides a service to those with whom it contracts. As such, the formalities required pursuant to § 40-5-105(1), C.R.S., for the assignment of a CPCN are not necessary in these Developer Model contracts.

Ibid.

Oregon, California, and Michigan have all also determined, based on specific statutory analysis, that third-party providers are not public utilities. In each of these jurisdictions, however, state law specifically exempts solar and/or wind or renewable resource power producing facilities from the definition of public utility.

5. Conclusions

WHEREFORE, for the foregoing reasons, Western Resource Advocates prays for a Commission Order finding that the third-party arrangements described by the Commission's Procedural Order do not cause the providers to become public utilities, and for such other and further relief as the Commission deems just and proper.

Dated: November 16, 2009

Respectfully submitted,

WESTERN RESOURCE ADVOCATES

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Steven S. Michel
227 E. Palace Avenue, Suite M
Santa Fe, New Mexico 8750l
505-690-8733
smichel@westernresources.org