kBEFORE 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

COMMENTS OF THE INTERSTATE RENEWABLE ENERGY COUNCIL

On October 12, 2009, the Public Service Commission of Utah ("Commission") issued a Notice of Investigation and Procedural Order in the Matter of an Investigation Regarding Third-Party Arrangements for Renewable Energy Generation ("Notice") in the above referenced docket. The Commission requested comments or legal briefs to determine whether, and the extent to which, certain third-party arrangements for renewable energy generation are subject to the Commission's jurisdiction. Accordingly, the Interstate Renewable Energy Council ("IREC") appreciates the opportunity to submit these comments.

IREC is a non-profit organization that has worked for over two decades to accelerate the sustainable utilization of renewable energy resources through the development of programs and policies that reduce barriers to renewable energy deployment. To that end, IREC has participated in workshops, proceedings and rulemakings before over twenty state public utility commissions during the past year, addressing topics that directly impact the development of renewable energy resources, including net metering, interconnection, and third-party financing of renewable energy systems.

The Commission's Notice set forth four questions for parties to consider. In Section I of these comments, IREC provides background information on third-party financing arrangements. In Sections II and III, IREC provides specific answers to the Commission's questions:

- In Section II, we explain why a provider of third-party financing is not a public utility under Utah statutory and case law.
- In Section III, we explain why a provider of third-party financing is not a public utility when the provider owns renewable generation equipment 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.

- In Section III (A), we explain why a third-party is not a public utility regardless of the number of customers served.
- In Section III (B), we explain why a third-party is not a public utility regardless of whether services are provided through a lease or a PPA.

I. BACKGROUND ON THIRD-PARTY FINANCING

At its most fundamental level, third-party financing of renewable energy systems, whether through a lease or a power purchase agreement ("PPA"), is akin to a home mortgage or an automobile lease. In each case, the customer enjoys the use of the equipment and the various benefits that access to the equipment provides without having to own the asset or provide 100% of the purchase price up front. Arrangements of this sort are particularly important when financing capital intensive investments, such as a home, automobile, or solar photovoltaic ("PV") system.

Providers of third-party financing assist customers with this upfront cost hurdle and also offer an attractive bundle of services that are highly desirable to customers considering investment in solar PV systems, the most common customer-sited renewable energy system. IREC explains below how the introduction of third-party financing, particularly PPA arrangements, has facilitated a rapid deployment of solar PV systems in many markets, particularly the states with the most installed solar capacity. We also explain that among the third-party financing options, PPAs are particularly important for nonprofits, schools, places of worship and government entities. For these reasons, IREC encourages the Commission to allow the use of third-party financing arrangements in Utah.

A. Providers Of Third-Party Financing Offer An Attractive Bundle Of Services That Are Highly Desirable to Customers (or Hosts) And Have Facilitated A Rapid Deployment of Solar PV Systems In Many Markets.

According to a recent report by Lawrence Berkeley National Laboratory ("LBNL Report"), third-party financing structures have emerged as a way to help customers finance the high upfront cost of a solar PV investment and help customers extract the most value from a patchwork of available federal and state policy incentives.[1] At the federal level, tax benefits include a 30% investment tax credit and accelerated depreciation.[2] Together, these federal tax incentives can reduce the installed cost of a solar PV system by 56%.[3]

State policy makers have also made a number of programs available, including net metering, streamlined interconnection procedures, solar-friendly retail electric utility rate options, and direct incentives (typically paid on either an upfront basis or based on the output of a system).[4] Together, the available federal and state benefits and incentives can make it financially attractive to invest in solar PV. However, from a customer's perspective, it can be overwhelming to figure out how to tap into these benefits.

Providers of third-party financing address this obstacle by providing a bundle of services that makes it easy for a customer to install a solar PV system. This bundle of services includes analysis of customer load characteristics; sizing, acquisition and installation of a solar generation facility; financing (including monetizing of tax benefits – an especially important feature for customers who cannot otherwise take advantage of federal tax incentives); permitting and interconnection of a facility; provision of ongoing maintenance and protections to ensure customers receive ongoing value from a solar facility; and the offering of defined buy-out rights in a system.

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1 Bolinger, Mark, "Financing Non-Residential Photovoltaic Projects: Options and Implications." Lawrence Berkeley National Laboratory. January 2009. LBNL-1410E, at pp. i-ii. (Attached)

2 *Id.* at pp. 5-7.

3 *Id.* at p. 6 ("Taken together, then, the 30% ITC and accelerated depreciation provide a combined Tax Benefit equal to 56% of the installed cost of a commercial PV system.")

4 *Id.* at pp. 8-11.

The attractiveness of this bundle of services makes intuitive sense when one contemplates the patchwork of available incentives from a customer's perspective. Commercial, institutional, non-profit, governmental and residential customers are generally not familiar with the various solar PV technologies available to them and do not necessarily have the desire or competency to size, finance, permit, install, interconnect, net meter, own and manage a solar PV system despite the fact that they want to invest in solar energy to green their power supply or hedge against public utility price increases. These skills sets are simply not part of their core competency, which lies in running their businesses, non-profit enterprises and government agencies. To gain this competency would cost both time and money, both of which could be better spent steering their enterprises.

The LBNL Report summarizes the benefits third-party financing provides from a customer's perspective:

> "due to financial innovation, non-residential entities interested in PV no longer face prohibitively high up-front costs, no longer need to be able to absorb Tax Benefits in order to make the economics pencil out, no longer need to be able to operate and maintain the system, and no longer need to accept the risk that a system does not perform as expected."[5]

Due to the attractiveness of these benefits, third-party financing has become a highly desirable financing option for many customers.

B. PPAs Have Become A Preferred And Widely Accepted Means of Financing A Solar PV Investment.

In recognition of the benefits of third-party financing, a number of states allow the use of this financing tool without subjecting PPA providers to public utility regulation. IREC is aware of statutory exemptions from public utility status for third-party financing in California,[6] New Jersey,[7] New York,[8] and Michigan.[9] Exemptions have also been extended by order of state

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5 LBNL Report at p. i.

6 Cal. Pub. Util. Code §§ 218, 2868.

7 N.J. Stat. § 48:3-51.

8 NYCLS § 2.14.

public utility commissions in Colorado,[10] Massachusetts,[11] Nevada,[12] Oregon[13] and Hawaii.[14] In New Mexico, a Hearing Examiner recently issued a Recommended Decision finding that providers of third-party financing are not public utilities subject to regulation in that state.[15] The regulatory status of PPA providers is also under active consideration in Arizona.[16] In total, 9 of top 10 states for installed solar capacity currently allow unregulated use of PPAs with the issue

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[9] MCLS § 460.10a(12).

[10] Decision No. C07-0676, *In the Matter of the Application of Public Service Company of Colorado for Approval of Its 2007 Renewable Energy Standard Compliance Plan and for Waiver of Rule 3661(F)(I)*, Colorado Public Utilities Commission Docket No. 06A-478E, pp. 26-33 (August 9, 2007); Decision No. C09-0990, *In the Matter of Proposed Amendments to the Rules of the Colorado Public Utilities Commission Relating to the Renewable Energy Standard*, Colorado Public Utilities Commission Decision No. C09-0990 (adopted Sept. 2, 2009) (adding rule 3658 to incorporate provisions of Colorado SB09-051 allowing for third-party owners or operators to serve on-site solar customers).

[11] Order Adopting Final Regulations, *Order Instituting a Rulemaking Pursuant to G.L. c. 30A, § 2 and 220 C.M.R. § 2.00 et seq. to Implement the Net Metering Provisions of An Act Relative to Green Communities, St. 2008, c. 169, § 78 and to Amend 220 C.M.R. § 8.00 et seq., Qualifying Facilities and On Site Generating Facilities, and 220 C.M.R. § 11.00 et seq., Electric Industry Restructuring*, Massachusetts Department of Public Utilities D.P.U. 08-75-A, pp. 10-14 (filed June 26, 2009).

[12] Order, *Investigation and Rulemaking to Adopt, Amend, or Repeal Regulations Pertaining to Chapters 703 and 704 of the Nevada Administrative Code Regarding Prescribing the Form and Substance for a Net Metering Prescribing the From and Substance for a Net Metering Contract and Other Related Utility Matters in Accordance with Assembly Bill 178*, Nevada Public Utilities Commission Docket Nos. 07-06024 and 07-06027 (filed Nov. 26, 2008).

[13] Order No. 08-388, *In the Matter of Honeywell International, Inc., and Honeywell Global Finance, LLC*, Oregon Public Utility Commission Docket No. DR 40 (entered July 31, 2008).

[14] Decision and Order No. 20633, *In the Matter of the Petition of Powerlight Corporation for a Declaratory Ruling*, Hawaii Public Utilities Commission Docket No. 02-0182 (filed Nov. 13, 2003).

[15] Recommended Decision, *In the Matter of a Declaratory Order Regarding Third-Party Arrangements for Renewable Generation,* New Mexico Public Regulation Commission, Case No. 09-00217-UT (issued October 23, 2009).

[16] *In the Matter of the Application of Solar City for a Determination That When It Provides Solar Service to Arizona Schools, Governments, and Non-profit Entities It Is Not Acting As A Public Service Corporation Pursuant to Art. 15, Section 2 of the Arizona Constitution*, Arizona Corporation Commission Docket No. E-20690A-09-0346

being actively addressed in AZ, the only state in the top 10 states for installed solar PV that is still addressing this issue.[17]

In markets where third-party financing options are available, customers have demonstrated a strong preference for financing solar systems in this manner. One estimate finds that PPA agreements have grown from roughly 10% of the non-residential solar market in 2006 to an estimated 90% of the U.S. non-residential solar market in 2008.[18] According to the Energy Trust of Oregon, more than 80% of commercial solar installations in Oregon involved third-party ownership arrangements in 2008, which represented approximately $35 million of private investment in clean energy resources.[19] In California, the use of PPAs has facilitated the installation of at least 147 MW of solar.[20] Coupled with the fact that non-residential PV systems comprise an ever growing portion of aggregate installed capacity, it is clear that PPA's have become an important, if not essential, part of facilitating customer investment in solar PV.

C. PPAs Are Essential to Financing Solar PV Systems For Nonprofits, Schools, Places of Worship and Government Entities.

Among the third-party financing options, PPAs are essential for financing solar PV systems for nonprofits, schools, places of worship and government entities. In order for tax-exempt entities such as these to be able to adopt solar PV systems, they must reduce the upfront costs for such equipment in order for systems to be economically viable. Therefore, these entities must find a way to capitalize on the available federal tax benefits for solar PV systems.

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[17] In order of cumulative installed grid-connected PV capacity through 2008, these states are as follows: California (528 MW); New Jersey (70 MW); Colorado (36 MW); Nevada (34 MW); Arizona (25 MW); New York (22 MW); Hawaii (14 MW); Connecticut (9 MW); Oregon (8 MW); and Massachusetts (8 MW). Sherwood, L., U.S. Solar Market Trends 2008, IREC, p. 7 (July 2009), available at: http://www.irecusa.org/fileadmin/user_upload/NationalOutreachDocs/SolarTrendsReports/IREC_Solar_Market_Trends_Report_2008.pdf.

[18] LBNL Report at p. 18.

[19] Energy Trust of Oregon, Inc., Opening Brief and Waiver of Paper Service of Energy Trust of Oregon, Inc., Oregon Public Utility Commission Docket No. DR 40, (filed Jun. 20, 2008).

[20] *See* California Solar Initiative: Annual Program Assessment, California Public Utilities Commission (June 30, 2009) at p. 32.

Without these benefits, which can reduce the cost of a PV system in half, systems may simply be cost-prohibitive.

IRS rules make it clear that PPAs are the only way for a tax-exempt entity to adopt solar while allowing a third party to capitalize on available tax incentives. If a tax-exempt or governmental entity is the lessee or owner of a solar system, then it is considered the "user" of the system and the IRS will not allow tax credits to be taken for that system.[21] However, the IRS has stated that if a tax-exempt entity is simply paying a third-party owner a fee based on the amount of power produced from that system (i.e. a PPA), then the third party owner will be considered the "user" and thus can take advantage of available tax benefits. Accordingly, in the case of governmental and other tax-exempt entities, PPAs allow those organizations to access the benefits of solar generating equipment at attractive rates because a third-party can utilize tax benefits that are unavailable to the tax-exempt customer and pass through the financial benefits in the form of reduced payments. Importantly, this also preserves the investment capital of the customer so that it can be employed in the primary activities of the organization.

D. IREC Encourages The Commission To Allow The Use of Third-Party Financing in Utah.

IREC encourages Utah to follow the lead of the numerous states that allow third-party financing to be provided to instate customers without subjecting the financing entity to regulation as a public utility. Allowing a regulatory environment permissive of third party financing structures will bring the benefits of renewable energy generation and services to the broadest group of Utah citizens and businesses, and do so more quickly than a reliance on direct purchase or self-financing arrangements. This is in part because these facilities generate favorable tax attributes that investors value and can utilize, and in part because the balance sheets and purchasing capacity of Utah citizens, businesses and tax-exempt entities are limited in quantity and scope, as they are in all states.

As set forth below, Utah code exempts providers of third-party financing from public utility regulation and such entities are not public utilities as that term is defined in Utah case law. Accordingly, IREC encourages the Commission to determine that the provision of third-party

[21] IRS Code § 50 (b)(3) and (4), 26 U.S.C. § 50(b)(3) and (4).

financing is consistent with Utah policy goals and should be available in Utah without regulation.

II. THIRD-PARTY FINANCING ENTITITES ARE NOT PUBLIC UTILITIES UNDER UTAH LAW

The Commission is vested with power and jurisdiction to supervise and regulate every "public utility" in this state, and to supervise all of the business of every such "public utility," and to do all things necessary or convenient in the exercise of such power and jurisdiction.[22]

For the reasons set forth below, providers of third-party financing are not public utilities under Utah law. Such entities operate under a clear statutory exemption that removes third-party financing of onsite solar PV systems from public utility regulation. Moreover, Utah case law clarifies that public utility regulation is inappropriate for entities that do not provide service to the public generally. Applying Utah law to the matter at hand, it is clear that providers of third-party financing are not public utilities and therefore should not be subject to regulation as such.

A. Utah Code Exempts Providers of Third-Party Financing From Public Utility Regulation.

As a creation of the Legislature, the Commission has only those powers specifically granted or clearly implied by statute.[23] U.C.A. § 54-4-1 gives the Commission authority to regulate public utilities, and U.C.A. § 54-2-1 defines the term "public utility" as:

> "every * * * electrical corporation * * * and independent energy producer not described in Subsection (16) (d), where the service is performed for, or the commodity delivered to, the public generally, or in the case of a * * * electrical corporation where the * * * electricity is sold or furnished to any member or consumers within the state for domestic, commercial, or industrial use."[24]

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22 U.C.A. § 54-4-1.

23 *Williams v. Public Service Comm'n*, 754 P.2d 41, 50 (Utah 1998) (stating with respect to the Commission's jurisdiction that "any reasonable doubt of the existence of any power must be resolved against the exercise thereof.").

24 U.C.A. § 54-2-1 (16).

Under this definition, a provider of third-party financing may only be subject to regulation as a public utility if such provider fits within the definition of "electrical corporation" or meets the definition of "independent energy producer" and provides service beyond that which is described in U.C.A. § 54-2-1 (16)(d). As set forth below, providers of third-party financing meet the definition of independent energy producers. As such, they do not fit within the definition of "electrical corporation." Moreover, because the service provided by such entities is of the sort described in U.C.A. § 54-2-1 (16)(d), providers of third-party financing are not public utilities.

1. Third-Party Financing Entities Are Independent Energy Producers.

The term "independent energy producer" includes:

> "every electrical corporation, person, corporation, or government entity, their lessees, trustees, or receivers, that own, operate, control, or manage * * * a facility that 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 sources."[25]

Providers of third-party financing fit squarely within the definition of "independent energy producer." Such entities are corporations[26] that own, operate and manage facilities that produce electric energy solely by the use of solar energy, a renewable energy resource.

2. Because Third-Party Financing Entities Are Independent Energy Producers, They Are Not Electrical Corporations.

The term "electrical corporation" includes:

> "every corporation, cooperative association, and person, their lessees, trustees, 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*, and except 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, or for the use of members of an association of unit owners

[25] U.C.A. § 54-2-1 (13) and (14).

[26] A "corporation" is defined in U.C.A. § 54-2-1 (5)(a) as "an association, and a joint stock company having any powers or privileges not possessed by individuals or partnerships."

> formed under Title 57, Chapter 8, Condominium Ownership Act, and not for sale to the public generally."[27] (italics added)

By its express terms, the definition of "electrical corporation" excludes "independent energy producers," regardless of the type of service such entities provide. As discussed above, providers of third-party financing fit squarely within the definition of "independent energy producers." Therefore, they are excluded from the definition of electrical corporation.

3. Third-Party Financing Entities Provide Services As Described In U.C.A. § 54-2-1 (16)(d).

Utah code exempts independent energy producers from the jurisdiction and regulations of the Commission if such entities provide service of the sort described in U.C.A. § 54-2-1 (16)(d)(i), (ii), or (iii), or any combination thereof.[28] Subsections (16)(d)(i) and (iii) are both relevant in the context of third-party financing of solar systems. Subsection (16)(d)(i) provides a narrow exemption for service to facilities owned by a political subdivision of the state, and Subsection (16)(d)(iii) provides a broad exemption that encompasses third-party financing of all customer-sited renewable generation.

Subsection (16)(d)(i) applies when service is provided "for the use of state-owned facilities."[29] "State-owned facilities" is not a defined term in U.C.A § 54-2-1. However, "state-owned facilities" arguably include facilities owned by political subdivisions of the state, including facilities owned by entities such as Salt Lake County.

Subsection (16)(d)(iii) provides a much broader exemption that encompasses third-party financing more generally, regardless of the identity of the customer hosting the system. Subsection (16)(d)(iii) applies when: "(A) the commodity or service delivered by the independent energy producer is delivered to an entity which controls, is controlled by, or affiliated with 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

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27 U.C.A. § 54-2-1 (7).

28 U.C.A. § 54-2-1 (16)(d).

29 U.C.A. § 54-2-1 (16)(d)(i).

independent energy producer."[30] Providers of third-party financing satisfy both the control and contiguous property requirements.

The terms "control" and "affiliate" are not defined in U.C.A. § 54-2-1. Under Utah rules of statutory construction, words and phrases are to be construed according to the context and the approved usage of the language.[31] According to Black's Law Dictionary, 7th Ed., control means "To exercise power or influence over" or "To regulate or govern." This is consistent with the meaning given in other sections of Utah code. For instance, in the detailed description of control in the Utah Insurance Code, control may be by contract for the "indirect possession of the power to direct or cause the direction of management and policies of a person."[32] Under a third-party financing relationship, a host and provider are contractually bound to each other under the terms of a lease or PPA agreement, which governs the nature of the relationship between the host and third-party financing entity. As such, the host and provider are controlled by each other pursuant to the terms of a negotiated contract.

As an alternative to control, the independent energy provider and the customer may simply be "affiliated" according to Subsection (16)(d)(iii). As a noun, "affiliate" is typically defined in terms of control; for instance, the Utah Insurance Code defines an "affiliate" as "a person who controls, is controlled by, or is under common control with, another person …"[33] However, the adjective "affiliated" is used in Subsection (16)(d)(iii), which carries a broader connotation. "Affiliated" is defined as "being in close formal or informal association; related."[34] Such standard usage would clearly incorporate the relationship between a provider of third party financing and a host.

Looking next at the contiguous property requirement, to fit within the (16)(d)(iii) exemption, "the real property on which the service or commodity is used [must be] contiguous to real property which is owned or controlled by the independent energy producer." Solar leases

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30 U.C.A. § 54-2-1 (16)(d)(iii).

31 U.C.A. § 68-3-11.

32 U.C.A. § 31A-1-301 (28)(a), with "control" being a term used in the definition of "affiliate".

33 U.C.A. § 31A-1-301 (5).

34 Random House Unabridged Dictionary, 2nd Ed.

and PPAs contain contractual provisions that include an easement, license, or permit allowing a third-party provider to occupy and access a certain portion of a host's property upon which a solar facility is located. That easement, license, or permit creates a property right in the third-party. Thus, the host's property at large is the "real property on which the service or commodity is used" and the area covered by the easement, license, or permit is the "real property which is owned or controlled by the independent energy producer." According to Subsection (16)(d)(iii), "parcels of real property separated solely by public roads or easements for public roads shall be considered as contiguous for purposes of this Subsection (16)." In the case of a third-party financed system, the distance is far less. Energy is merely distributed from the rooftop area controlled by the third-party financing entity to the contiguous premises beneath. Accordingly, providers of third-party financing satisfy both the control and contiguous property requirements and therefore provide service as described in Subsection (16)(d)(iii).

4. Because Third-Party Financing Entities Are Independent Energy Producers That Provide Services As Described In U.C.A. § 54-2-1 (16)(d), They Are Not Public Utilities.

All powers retained by the Commission are derived from and created by statute.[35] The Commission has no inherent regulatory powers and can only assert those which are expressly granted or clearly implied as necessary to discharge the duties and responsibilities imposed on it.[36] To ensure that the administrative powers of the Commission are not over-extended, "any reasonable doubt of the existence of any power must be resolved against the exercise thereof."[37]

Utah code clarifies that independent energy producers are not public utilities when they provide service as described in U.C.A. § 54-2-1 (16)(d).[38] As discussed above, providers of third-party financing provide service of the sort described in U.C.A. § 54-2-1 (16)(d)(i) and (iii). When service is provided to a facility owned by a political subdivision of the state, Subsection (16)(d)(i) applies. When service is provided to customers on contiguous property, Subsection (16)(d)(iii) applies. Although these statutory exemptions are clear on their face, the Utah

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[35] *Williams v. Public Service Comm'n*, 754 P.2d 41, 50 (Utah 1998).

[36] *Id.*

[37] *Id*.

[38] U.C.A. § 54-2-1 (16)(a).

Supreme Court has clarified that any reasonable doubt as to the Commission's authority to regulate "must be resolved against the exercise thereof." For these reasons, the Commission should find that third-party financing entities are not public utilities under Utah law.

B. Third-party Financing Entities Do Not Perform A Service Or Deliver a Commodity To The Public Generally And Therefore Are Not Public Utilities.

An independent energy producer, such as a third-party financing entity, is only a "public utility" if service is performed or a commodity is delivered to "the public generally."[39] In addition to fitting squarely within the exemptions provided in Subsection (16)(d)(iii), providers of third-party financing do not provide service to the public generally.

Through a line of cases dating back nearly 85 years, the Utah Supreme Court has had occasion to interpret what it means to provide service to the public generally.[40] In *Medic-Call, Inc. v. Public Service Commission of Utah*, the Court adopted the following test:

> "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."[41]

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[39] U.C.A. § 54-2-1 (16)(a) requires service to "the public generally" and Subsection 16(b) requires the sale or furnishing of electricity "to any member or consumers within the state." The reference to a "member or consumers" was added in 1965 when the Legislature extended the Commission's oversight to include non-profit electric cooperatives. *See Cottonwood Mall Shopping Center, Inc. v. Public Service Comm'n*, 558 P.2d 1331, 1332 (Utah 1977); *Cottonwood Mall Shopping Center, Inc. v. Utah Power& Light Co.*, 440 F.2d 36, 39 (10th Cir. 1971).

[40] *Holmgren v. Utah-Idaho Sugar Co.*, 582 P.2d 856 (Utah 1978); *Medic-Call, Inc. v. Public Service Comm'n*, 470 P.2d 258, 275 (Utah 1970); *San Miguel Power Association v. Public Service Comm'n*, 292 P.2d 511 (Utah 1956); *Garkane Power Co., Inc. v. Public Service Comm'n*, 100 P.2d 571 (Utah 1940); *Public Utilities Comm'n v. Nelson*, 238 P. 237 (Utah 1925).

[41] In the 1971 decision of *Cottonwood Mall Shopping Center, Inc.*, 440 F.2d at 41, the Tenth Circuit Court of Appeals questioned whether the Utah courts would continue to adhere to the holdings of *Garkane Power Co.* and prior cases following Legislative amendments made to U.C.A. § 54-2-1 in 1965. In 1977, the Utah Supreme Court limited the precedential value of the Tenth Circuit's holding. *See Cottonwood Mall Shopping Center, Inc. v. Public Service Comm'n*, 558 P.2d 1331 (Utah 1977) ("The conclusions of law made by the federal courts in such cases are not binding upon us nor upon the Public

Thus, "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."[42] Applying this test in a variety of factual circumstances,[43] the Utah Supreme Court has been steadfast in holding that the provision of service under contract to a limited class of customers, and not to the public at large, is not public utility service.[44]

Applying this test to the facts at hand removes any doubt that providers of third-party financing are not public utilities. Regardless of whether service is provided under lease or PPA, third-party financing is provided under contract. Moreover, providers of third-party financing do not accept all requests for service. The suitability of a customer for hosting an onsite solar facility depends on a number of factors including site adequacy, shading, roof orientation, available space, current electricity usage, roof condition or soil condition, ease of installation, etc. Hosts are also evaluated for their credit rating and ability to pay for services. Thus, third-party financing is not a service that is provided to the public at large in the sense that the public may have access to it as a right. Rather, service is available only to a limited class of customers who meet location and customer specific eligibility factors. Accordingly, providers of such service do not serve the public generally and therefore are not public utilities.

This conclusion has been reached in a number of states. Applying precisely the same test of public utility status as is used by the Utah courts, the Public Utilities Commission of Hawaii

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Service Commission."). In 1978, the Utah Supreme Court reaffirmed the approach taken to defining "public utility" in *Garkane Power Co.* and reiterated that the test set forth in *Medic-Call* remains the law of Utah. *Holmgren*, 582 P.2d 856.

[42] *Medic-Call*, 470 P.2d at 275 ("if the business or concern is not public service, where the public has a right to 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.")

[43] *Holmgren*, 582 P.2d 856 (delivery of water under contract to a class of water users numbering in excess of 1600); *Medic-Call*, 470 P.2d 258 (operation of one way message transmission service to approximately 100 physicians); *San Miguel Power Association*, 292 P.2d 511 (provision of electrical generation and transmission service to members of nonprofit electrical corporation); *Garkane Power Co*, 100 P.2d 571 (provision of electrical generation and transmission service to members of nonprofit electrical corporation); *Nelson*, 238 P. 237 (transportation under contract of approximately 900 persons per year to an outdoor camp).

[44] *See*, *e.g.*, *Holmgren*, 582 P.2d at 860.

concluded that when energy is sold from an onsite PV system to a single on-site customer, service is not being furnished for the public's use.[45] Therefore, the provider of such service is not a public utility.[46] Similar conclusions have also been reached by order of public utilities commissions in Colorado[47] and Nevada[48] and by recommended decision of a hearing examiner of the New Mexico Regulation Commission.[49]

III. PROVIDERS OF THIRD-PARTY FINANCING ARE NOT PUBLIC UTILTIIES UNDER UTAH LAW REGARDLESS OF THE NUMBER OF CUSTOMERS A PROVIDER MAY SERVE OR WHETHER SERVICE IS PROVIDED UNDER A LEASE OR A PPA.

In the Commission's October 12, 2009 Notice, the Commission asked whether a third-party financing entity is a public utility under Utah law "when arrangements are entered into primarily as a financing mechanism for distributed renewable 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."

As discussed above, providers of third-party financing for solar PV systems are not acting as a public utility when providing service of the sort described above. Rather, providers of such service are independent energy producers (not electrical corporations) that provide service of the type described in U.C.A. § 54-2-1 (16(d)(i) and (iii). Third-party financiers provide service

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45 Decision and Order No. 20633, Docket No. 02-0182 at p. 4 (filed Nov. 13, 2003).

46 *Id.*

47 Decision No. C07-0676, Docket No. 06A-478E, p. 32 (August 9, 2007) ("third party developers do not meet the statutory definition of a public utility [as] [t]hey are not required to hold themselves out to serve all who request service within a geographic area.").

48 Order, Docket Nos. 07-06024 and 07-06027 at Attachment 1, p. 4 (filed Nov. 26, 2008) ("A net metering system provider in these circumstances does not serve the public, but rather serves a single customer-generator pursuant to private contract.").

49 Recommended Decision, Case No. 09-00217-UT (issued October 23, 2009) at p. 16 (quoting from the Nevada Public Utilities Commission that "a developer is not a public utility because it does not serve the public, but rather serves a single customer-generator pursuant to a private contract.")

under Subsection (16)(d)(i) when serving a facility owned by a political subdivision of the state, and Subsection (16)(d)(iii) when serving any onsite customer. As such, providers of third-party financing are not public utilities under Utah law. This result is a matter of reasonable interpretation of statutes governing the Commission's jurisdiction and comports with Utah case law holding that the provision of service under contract to a limited class of customers, and not to the public at large, is not public utility service. This result also comports with decisions that have been reached legislatively or by public utility commission decision in California, New Jersey, New York, Michigan, Colorado, Massachusetts, Nevada, Oregon and Hawaii.

A. A Third-party Is Not A Public Utility Regardless Of The Number Of Customers Served.

There are a number of third-party financing structures. Some involve the creation of a separate corporate entity (typically a limited liability company) to finance each installation. Other structures may include a bundling of multiple installations under ownership of a single corporate entity. Regardless of how many systems are financed (and correspondingly how many customers are served) by a particular corporate entity, the test of "public utility" character is not the number of customers served, but "whether or not the public may enjoy it of right or by permission only."[50]

The public may not enjoy third-party financing as a right. Rather, the suitability of a customer for hosting an onsite solar facility depends on a number of factors discussed above, including site adequacy, shading, orientation to due south, available space, current electricity usage, roof condition or soil condition, ease of installation, credit rating and ability to pay for services.[51] Moreover, the Utah Supreme Court has determined that if service is under contract to a limited class of customers, and not to the public at large, it is not public utility service.[52] As discussed herein, third-party financing is provided under contract to a limited class of customers

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50 *Medic-Call*, 470 P.2d at 275.

51 Recommended Decision, New Mexico Case No. 09-00217-UT at p. 19 (determining that although the selectivity of a third-party financing entity is one characteristic indicating that such entity is not a public utility, "[o]f more importance is that the PPA model does not give any individual the legal right to demand service.").

52 *Holmgren*, 582 P.2d at 860.

who meet certain threshold requirements necessary to establish suitability for service. Because service is not of the sort the public can enjoy as a right, a third party is not a public utility regardless of the number of customers served.

B. A Third-party Is Not A Public Utility Regardless Of Whether Services Are Provided Through A Lease Or A PPA.

Providers of third party financing who own customer-site renewable generation appear to be exempt from Commission regulation regardless of whether third-party financing involves a lease or a PPA. The definition of an independent energy producer includes "every * * * person * * * that owns[s] * * * [a] facility that produces electric energy solely by the use [of] * * * a renewable resource * * *" Like a PPA provider, a lessor of customer-sited renewable generation is an owner and is therefore an independent energy producer. Like a PPA provider, a lessor falls within the definition of an independent energy provider that is not a public utility under the exemption in U.C.A. § 54-2-1 (16)(d)(iii). In the case of a lessor, the "service" being provided is the lease of a renewable generation system (typically, a solar PV system).

The definition of an independent energy producer includes "lessees" of an independent energy producer. Thus, both the lessor and the lessee of a third-party financed system are independent energy producers under Utah law. The lessee is providing electricity for the lessee's own use, which exempts the lessee from treatment as a public utility based the reference in U.C.A. § 54-2-1 (16)(d)(i) to the exemptions listed in U.C.A. § 54-2-1 (7).

IV. UTAH'S RENEWABLE ENERGY POLICY SUGGESTS THAT PROVIDERS OF THIRD PARTY FINANCING SHOULD NOT BE REGULATED.

Nearly 25 years ago, the Utah Legislature declared that it is the policy of the state to "promote the more rapid development of new sources of electrical energy, to maintain the economic vitality of the state through the continuing production of goods and the employment of its people, and to promote the efficient utilization and distribution of energy."[53] In furtherance of these goals, the Legislature declared that "it is desirable and necessary to encourage independent energy producers to competitively develop sources of electric energy not otherwise

[53] U.C.A. § 54-12-1 (1).

available to Utah businesses, residences, and industries served by electrical corporations, and to remove unnecessary barriers to energy transactions involving independent energy producers and electrical corporations."[54]

As independent energy producers, third-party financing entities competitively develop sources of electric energy that many not otherwise be available to Utah businesses, residents, and industries. This is particularly true for nonprofits, schools, places of worship and government entities that have no other means of accessing significant federal tax benefits. By providing third-party financing, such entities promote the more rapid development of new sources of electrical energy in furtherance of the Legislature's goals.

The economic reality is that there are only so many dollars available to a given electrical corporation to facilitate the utilization of solar energy within its service area, whether the technology is distributed generation or central station generation in nature. The supplemental provision of solar products and services by providers of third-party financing will, in effect, enable electrical corporations to experience broader utilization of solar technology within their respective service areas, thereby "stretching" the electrical corporation's solar dollar and advancing the role of solar energy within the state of Utah.

In furtherance of the Legislature's goals, this expansion of the solar dollar also maintains the economic vitality of the state and the employs its people by leveraging federal and private dollars to promote instate investment and economic activity. The California Public Utilities Commission has estimated that for every $1 of ratepayer-funded incentives, an additional $6 of private and federal funding is harnessed.[55] This has resulted in over $5 *billion* in investment in California, much of which has been facilitated by third-party financing arrangements.[56] In addition, new PV manufacturing facilities are likely to locate in states with the most PV market activity. The ability to use third-party financing in Utah could in turn expand new manufacturing opportunities and promote further instate economic activity.

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[54] *Id.*

[55] *See* California Solar Initiative: Staff Progress Report, California Public Utilities Commission (Jan. 2009), at p. 4.

[56] *See* Id.

V. CONCLUSION

For the reasons stated herein, and in furtherance of the policy goals set forth by the Utah Legislature, IREC encourages the Commission to determine that providers of third-party financing, whether service is provided through a lease or PPA, are not public utilities under Utah law regardless of the number of customers a provider may serve.

Respectfully submitted this 16th day of November 2009.

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