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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

<p>IN THE MATTER OF THE INVESTIGATION OF THE COSTS AND BENEFITS OF PACIFICORP'S NET METERING PROGRAM</p>	<p>Docket No. 14-035-114</p> <p>DIVISION OF PUBLIC UTILITIES' RESPONSE TO THE PETITION FOR CLARIFICATION AND REVIEW OR REHEARING OF THE ALLIANCE FOR SOLAR CHOICE, UTAH CLEAN ENERGY, SIERRA CLUB AND VIVIENT SOLAR, INC.</p>
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Pursuant to Utah Code Ann. § 54-4a-1 and Utah Admin. Code r746-100 the Utah Division of Public Utilities (“Division”), hereby submits this this response to the Petition for Clarification and Review or Rehearing filed by The Alliance for Solar Choice, Utah Clean Energy, Sierra Club and Vivint Solar, Inc. (“Joint Parties”) on December 10, 2015. The Joint Parties request the Public Service Commission of Utah (“Commission”) to review or rehear and clarify the Commission’s November 10, 2015 Order (“Order”). The Commission should deny the Petition and decline to

clarify, review or rehear.

I. INTRODUCTION

The Joint Parties Petition this Commission to either rehear or review and clarify the findings made in the Order. The Order “constitutes a further step toward fulfilling the task of the Legislature set for the Commission in Utah Code Ann. §54-14-105.1.” (Order at 1.) The Joint Parties participated fully throughout the course of this docket. The Joint Parties have failed to demonstrate any legal or factual errors in the Order. The Joint Parties have further failed to demonstrate the need for any clarification or modification of the Order. For these reasons the Commission should deny the Petition.

II. ARGUMENT

A. THE COMMISSION REASONABLY LIMITED THE FRAMEWORK ANALYSIS TO TEST YEAR COSTS AND BENEFITS.

The Commission was reasonable and rational in its limitation of costs and benefits to those in the test year. The statute states that:

The governing authority shall:

- (1) determine, after appropriate notice and opportunity for public comment, whether costs that the electrical corporation or other customers will incur from a net metering program will exceed the benefits of the net metering program, or whether the benefits of the net metering program will exceed the costs; and
- (2) determine a just and reasonable charge, credit, or ratemaking structure, including new or existing tariffs, in light of the costs and benefits.

Utah Code Ann. § 54-15-105.1 The Joint Parties argue that the Commission’s Order relying on the test year cost of service analysis violates the statute by limiting the “other customers” to current other customers. In order to reach this conclusion Joint Parties make a creative argument that the statutory language regarding “other customers” can only be applied without temporal

limitation to an absolute idea of customers. In effect a customer must, according to Joint Parties, be any customer that may exist at any time.

In support of this position the Joint Parties argue that if only current customers are considered the Commission may also only consider the current utility. This analogy does little to support the Joint Parties' position. During any period in which the net metering rates are set, only the then current electrical corporation would be considered along with the then current customers. That is exactly what the Order contemplates and there is no reason why such an interpretation is inconsistent with the intent or language of the statute.

In the alternative it would be illogical to follow the Joint Parties' view that, like customers, the electrical corporation also means any electrical corporation without temporal reference. The mixing and matching of infinite projections of future customers and future electrical corporations would be impossible to manage. It is difficult to even conceive of a method to value net metering that considers for example how a benefit that occurs in 2021 impacts a 2045 residential customer and whatever form of electric utility exists at that time.

The Commission's limitation to current customers is reasonable. Net metering customers are not agreeing to provide anything on a going forward basis. They are not agreeing to be bound to any level of energy delivery, any time period of resource availability, or providing any assurance to rate payers of their continued participation. Because net metering customer relationships are short term in nature and rates and rate design is intended to cover costs of the utility during the current period it is only reasonable and logical to interpret the "customers" as current customers during the current period for which rates are to be set. The "[p]otentially significant benefits" as described by the Joint Parties should be recovered with potential future value to be offset in the same period that the benefits occur. To do otherwise would cause

significant intergenerational cost shifts and put other current customers at risk with no corresponding current benefit and would be based on projections bound to be in error to some degree.

The Commission's use of test year data to analyze the costs and benefits of net metering to other current customers and the then current utility is a reasonable application of the language in the statute. The Commission should deny review or rehearing on the issue of the use of a typical test year as a basis for assigning costs and benefits to net metering customers.

B. THE COMMISSION RELIED ON SUBSTANTIAL EVIDENCE IN FINDING THAT NET METERING CUSTOMERS ARE NOT SYSTEM RESOURCES.

Joint Parties argue that the Commission's finding that NEM is not a system resource lacks substantial evidence. Utah Code Ann. § 63G-4-403(4)(g) provides statutory grounds for reversal of an administrative decision when, among other alternatives, "the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court." "A decision is supported by substantial evidence if there is a quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Provo City v. Utah Labor Com'n*, 2015 UT 32, ¶ 8 (citing *Becker v. Sunset City*, 2013 UT 51, ¶ 10.) "Substantial evidence is more than a 'scintilla of evidence,' though 'less than the weight of the evidence.'" *Commercial Carriers v. Industrial Com'n of Utah*, 888 P.2d 707, 711 (Utah App., 1994) (citing *Grace Drilling v. Board of Review*, 776 P.2d 63, 68 (Utah App., 1989), *superseded on other grounds*, 819 P.2d 361 (1991)). "[W]hen reasonably conflicting views arise, it is the [agency's] province to draw inferences and resolve these conflicts." *Provo City*, 2015 UT 32, ¶ 8 (citing *Becker v. Sunset City*, 2013 UT 51, ¶ 10.)

The Joint Parties rely on §54-14-105.1 language requiring a determination of “whether costs that the electrical corporation or other customers will incur from a net metering program will exceed the benefits of the net metering program” to expand into an interpretation that the treatment of net metering customers as a system resource must also be viewed as a “program” not individually. The conclusion reached by the Joint Parties that an aggregate view requires a conclusion that the group is a system resource is not supported by the plain language or the evidence.

The Order is consistent with statute and supported by substantial evidence. The statute is entirely silent with respect to the treatment of customers as system resources. Whether treated as a homogenous group or individually is largely irrelevant. The rate design that will ultimately be applied to net metering customers will involve individual customers’ voluntary decisions and individual choices to participate or not at any given time. As recognized by the Commission from the evidence presented, net metering “customers may elect, at any time, to use their electricity however they choose.” (Order at 13-14.) Net metering customers, whether as a group or individually, have no obligation to provide energy for any period of time.

Net metering customers as a group are not similar to system resources that provide guarantees of performance. A very simple demonstration of this would be the economic availability of batteries. Assuming the customers are rational actors as proposed by the Joint Parties, if battery technology were to become economical, one would expect that all similarly situated net metering customers could leave the system together. This hypothetical example simply and easily demonstrates the nature of net metering customers’ relationship with the utility and other customers that were recognized in the Order when determining that they should not be considered system resources. The Commission recognized the significant difference between

such customers and other system resources upon which the Company may rely with a level of certainty to deliver future benefits. Net metering customers do not provide that assurance.

The Commission's inferences are well founded upon evidence that is adequate to convince reasonable minds of the conclusion drawn. The Commission's Order references the multiple examples of the evidence relied upon for support of its conclusions. (Order at 13-15.) The Commission's finding that NEM customers are not system resources is well within the range of reasonable conclusions to be drawn from the evidence. The Commission did not err in determining that NEM customers are not system resources and the Commission should not reconsider its finding.

C. THE COMMISSION PROVIDED A REASONED BASIS FOR ITS FINDINGS AND CONCLUSIONS IN THE ORDER.

The Joint parties further argue that the Commission errs by departing from prior practice “without giving a reasoned basis for the inconsistent treatment.” (Pet. at 22.) The Joint parties contend that the Commission provided insufficient justification for adopting an analytical framework that departs from current treatment of such customers and therefore erred as a matter of law. This argument is unpersuasive because the current review is based upon new legislation and there is no prior treatment of customers under the new statute. .

In 2014 the Utah Legislature enacted the new Section 54-14-105.1 on net metering at issue before the Commission through S.B. 208 effective May 13, 2014. The new language requires the Commission to conduct a new analysis of net metering. This alone is not only sufficient basis for new evaluation of the treatment of NEM customers, but a legislative mandate to do so. The Commission, as guided by the statute, evaluated and reviewed thousands of pages of prefiled testimony and many hours of live witness testimony.

Even if it had not been directed by statute to conduct such a task, the Commission provided ample notice and opportunity for all interested parties to participate. The Commission has substantial evidence in the record to justify departure from current practice. Furthermore the Commission has provided significant analysis and explanation of why it made the findings it did in the Discussion, Findings, and Conclusions section of the Order.

The Commission's Order is consistent with its legislative mandate to conduct this review. It is not inconsistent with prior commission practice because the evaluation is under new law. To the extent that any parts of the Order vary from any prior practice it does so with full reasoned explanation supported by the evidence on the record. The Commission should not reconsider its determinations on this basis.

D. THE COMMISSION IS NOT MAKING ADMINISTRATIVE RULES AND IS NOT SUBJECT TO THE ADMINISTRATIVE RULEMAKING ACT.

The Commission's Order does not amount to administrative rulemaking.

The Utah Administrative Rulemaking Act requires an agency to undertake formal rulemaking procedures when "issu[ing] a written interpretation of state or federal mandate" but not when "an agency issues policy or other statements that are advisory, informative, or descriptive." Utah Code Ann. § 63G-3-201(3), (4). When determining whether rulemaking is required under the statute, we focus our attention on whether an agency action amounts to a rule. Defined both statutorily and in case law, a rule is a policy or statement that is generally applicable, implements or interprets law, and results in a change in clear law. Conversely, an agency action is not a rule when it provides informal guidelines for implementing agency rules or answers a technical question within the agency's expertise.

Utah Chapter of Sierra Club v. Air Quality Bd., 2009 UT 76, ¶ 50, 226 P.3d 719, 735

(citations omitted.)

The Order does not meet the requirement for administrative rulemaking. There is little argument that it will have broad applicability to NEM customers. However, like the technical guidance reviewed in *Sierra Club* the Order is subject to additional review and analysis by the Commission before any party is actually effected. It does not by itself impose any new requirements on NEM customers. It is an intermediate Order giving guidance to parties on how the Commission intends to proceed with the second stage of implementing §54-14-105.1. Additionally this is a new analysis directly mandated by the Legislature. It does not represent a change in clear law as there has not previously been clear law on the implementation of §54-15-105.1. For these reasons it does not satisfy either of the second or third elements of the test for administrative rulemaking.

This argument by the Joint Parties is further undercut by the Joint Parties' request that their own proposal be adopted. If the Joint Parties genuinely believed the current docket to be rulemaking in violation of the statute, why would the Joint Parties argue in favor of their own desired outcome only to be rendered ineffective by the argument on rulemaking? The Joint Parties have failed to raise this issue at the appropriate time and have failed to demonstrate that the current docket and Order at issue are in fact rulemaking as defined by statute and case law. The Commission should reject this argument.

III. CONCLUSION

The Joint Parties Petition for Review or Rehearing is without merit and should be denied. The Commission has conducted a very thorough and rigorous evaluation of the evidence in this docket. Parties including all of the Joint Parties had ample opportunity to present evidence as they wished and a robust record was created. The Commission's Order fully and thoroughly explained each finding and supported each finding with the evidence presented. Simply because the Joint Parties are unsatisfied with the outcome does not render the Order unsupported by the

evidence or in violation of statute. The Commission's Order clearly and concisely as well as consistently with statute, found that the cost of service analysis was a reasonable and appropriate method for evaluating costs and benefits to current customers and the current utility. The Order appropriately recognized based on substantial evidence that net metering customers are dissimilar from system resources and should not be treated as such. The Order followed new statutory guidance and all findings whether entirely novel or related to orders under prior law are supported with reasonable, rational, and fair explanations based on the evidence. Finally the Order does not create new administrative rule. There is nothing to clarify and no basis for review or rehearing. The Commission should deny the Petition.

Submitted this 28th day December, 2015.

/s/ Justin C. Jetter

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