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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Investigation of the  
Costs and Benefits of PacifiCorp’s Net  
Metering Program

**Docket No. 14-035-114**  
OBJECTION TO ROCKY MOUNTAIN  
POWER’S MOTION FOR FORMAL  
DISCOVERY AND STATEMENT OF  
DISCOVERY ISSUES OR MOTION TO  
STRIKE

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Pursuant to Utah Admin. Code R746-1-501 and Rule 37 (a)(3) of the Utah Rules of Civil Procedure (“URCP”), Vivint Solar, Inc. (“Vivint Solar”) files this objection to Rocky Mountain Power’s, (“RMP”) motion for formal discovery and statement of discovery issues or motion to strike (“Motions”). Vivint Solar respectfully requests that the Commission deny the Motions.<sup>1</sup>

**I. RMP FAILED TO MEET AND CONFER**

RMP failed to meet and confer with Vivint Solar and misrepresented that it has, or that in good faith it was exempted from the obligation to meet and confer. URCP 37(a)(2)(b) requires RMP to meet and confer with Vivint Solar to try to resolve discovery disputes before it can file the Motions with the Commission. Vivint Solar served its responses to RMP’s Second Set of Data Requests on 7/27/17.<sup>2</sup> Six days later, on the afternoon of 8/2/17, RMP’s outside counsel sent the following email message to Vivint Solar’s outside counsel, Steve Mecham (“Mecham”):

Steve: We are in receipt of Vivint Solar, Inc.’s Responses to Rocky Mountain Power’s Second Set of Data Requests. In those responses, Vivint has in some cases refused to provide requested information or documents. Pursuant to the Commission’s rules and Utah law, we would like to meet

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<sup>1</sup> RMP’s Motions violate Commission Rule R746-1-203(1)(d) and should be rejected. If the Motions did conform, it would exceed the strict four-page limit imposed by URCP 37(a)(2), pursuant to which they were filed.

<sup>2</sup> See Vivint Solar’s responses attached to RMP’s Motions.

and confer with you regarding those responses to determine whether we can reach an agreement regarding the production of necessary information. Rocky Mountain Power is willing to agree that confidential information should be subject to a protective order, but we are uncertain whether that will resolve Vivint's objections.

Please let us know when you are available by phone to meet and confer on this issue.

Cameron L. Sabin

Mecham responded to Mr. Sabin's, email by 10:00 a.m., 8/3/17 and received an automatic response that Mr. Sabin was out of the office until 8/5/17. After 11:00 a.m., a follow-up message came asking that Mecham contact Matthew Moscon ("Moscon"), additional outside counsel for RMP.

On 8/3/17 at 1:17 p.m., Moscon sent an email asking Mecham if the dispute could be resolved that same day since surrebuttal testimony in this docket was due 8/8/17. Mecham responded to Moscon's email before 4:00 p.m. and asked what additional information RMP needed. Moscon replied a few minutes later. Rather than asking for specific information, which Mr. Sabin referred to as "some cases" in which Vivint allegedly refused to provide information, Moscon asked for responses to 12 of the 13 original requests. It was clear RMP and Vivint Solar would not resolve their dispute that day.

At 4:47 p.m., before Mecham read Moscon's response, Moscon sent the following message to Mecham, virtually simultaneously with the filing of these Motions at the Commission:

Steve I look forward to discussing the requests and any suggestions you have for responses at your earliest convenience. Because we are down to 3 business days until surrebuttal is due, I feel like we must get a motion on file. I'm happy to withdraw the motion if something can be resolved.

The testimony about which RMP complained is direct testimony filed 6/8/17, but RMP waited until 7/13/17 to submit its Second Set of Data Requests. In addition, RMP had Vivint Solar's responses to its data requests for a week and has known since the Commission issued the scheduling order in this docket that surrebuttal testimony was due on 8/8/17. Vivint Solar did not know RMP had issues with its responses until 8/2/17 and had no reasonable time to address them. That RMP waited until 7/13/17 to file its data requests and until 8/2/17 to seek to meet and confer does not

create an emergency for the Commission and does not warrant expedited treatment abridging Vivint Solar's right to adequately respond.<sup>3</sup> RMP's tactics of delay and overreach do not meet the requirements of Rule 37 and the Commission should reject RMP's Motions.

## II. VIVINT SOLAR TIMELY ANSWERED RMP'S DATA REQUESTS

Vivint Solar timely answered RMP's Second Set of Data Requests, in spite of some

objections. For example, Request 2.1 asks:

On lines 38 through 40 of his Direct Testimony, Mr. Plagemann states that “[i]n the aftermath of the [Nevada] Commission’s ruling, Nevada lost thousands of jobs in the solar industry and there was a 99% decrease in net metering applications year-over-year.” Please provide any documents, research papers, studies, information or analyses relating to these claims.

Vivint Solar responded:

The Nevada solar advocacy website bringbacksolar.com (<http://bringbacksolar.org/faq/>) states: “The solar rate hike made solar unaffordable. Since the solar rate hike, rooftop solar applications *have fallen 99%, from 1,368 applications in December 2015 to just 15 in February 2016*. Without customers, the dozens of independent solar companies in Nevada are unable to do business here and have been forced to *lay off thousands of Nevada workers* or send those jobs out of state.” (Italics and bolding added.)

The events in Nevada speak for themselves, yet Vivint Solar provided the source as requested.

Request 2.10 asks:

Please provide the documentation or other information necessary to show what Vivint has told or shown to its customers about the period of time in which they will be able to recoup their costs for purchasing solar power equipment and installation costs in the state of Utah. In responding to this Data Request, please provide all brochures, handouts, flyers, or other documents reflecting any such information ever used by Vivint or its contractors in this state.

Vivint Solar responded:

Please see response to RMP's Data Request 3 in RMP's First set of Data Requests to Vivint Solar.

Vivint Solar provided sample confidential documents it uses with its customers in its response to

RMP's First Set of Data Requests. It is not obligated to answer the same question twice.

The only data request Vivint Solar did not answer is 2.9 which asked for documentation showing “...the commission structure Vivint Solar uses and the commission amounts Vivint pays or

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<sup>3</sup> The Commission's order setting this matter for hearing 8/9/17 relieved the timing issue, but it did not change the fact that RMP failed to meet and confer and that Vivint Solar answered the requests. The Motions should be denied.

has paid to compensate its sales force for solar installations from January 1, 2012 to the present.”

This question is irrelevant to the matters at issue in this case and has no bearing on any information that is relevant.<sup>4</sup> Despite RMP’s claims to the contrary 2.9 and many of its other requests do not meet the standards of proportionality enumerated in URCP 26 (b)(2), all of which are required for a matter to be discoverable.<sup>5</sup> The information RMP seeks in its data requests exceeds anything that is necessary to understand that RMP’s proposed three-part rate structure will result in significant job loss in the solar industry in Utah. Vivint Solar requests that the Commission reject the Motions.

### **III. THE COMMISSION SHOULD DENY RMP’s ALTERNATIVE MOTION TO STRIKE**

In its Motions, RMP cited accurately parts of Vivint Solar’s direct testimony to which Vivint Solar’s witnesses will testify under oath at hearing. All of these witnesses are prepared to face cross examination by RMP and other parties in this case. If the Commission determines any of the testimony is unsubstantiated as RMP incorrectly alleges, the Commission can give the testimony little or no weight in its final decision. Motions to strike are generally not favored and in this matter RMP’s Motions will unduly and unnecessarily prejudice Vivint Solar in favor of RMP.

### **IV. REQUESTED RELIEF**

Based on the foregoing, Vivint Solar requests that the Commission deny RMP’s Motions. Given the importance of these Motions, Vivint Solar requests the Commission hear them en banc.

Respectfully submitted this 7th day of August, 2017,

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<sup>4</sup> RMP’s suggestion in its Motions that Vivint Solar’s responses could be treated under the Commission’s confidentiality rule does not address Vivint Solar’s concern about giving RMP information. In *USA Power v. PacifiCorp*, 2016 UT 20, the Utah Supreme Court upheld a multimillion judgment against RMP for misappropriating trade secrets of RMP’s competitor in violation of a confidentiality agreement.

<sup>5</sup> Among other things it is not relevant to the claims of any party, it is not reasonable considering the needs and complexity of the case, the likely benefits of the proposed discovery do not outweigh the burden or expense, and it will not further the just and inexpensive determination of this case.

/s/Stephen F. Meham

## CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, I sent a true and correct copy of foregoing Objection to RMP's Motions of Vivint Solar, Inc. in Docket No. 14-035-114 by email to the following:

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