

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: January 24, 2019

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Harper) *DEH S.M.C.*
Office of Industry Development and Market Analysis (Crawford) *BC CH*

RE: Docket No. 20180221-EQ – Petition by Tesla, Inc. for declaratory statement concerning leasing of solar electric equipment.

AGENDA: 02/05/19 – Regular Agenda – Parties May Participate at Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Fay

CRITICAL DATES: 3/4/19 (Final Order must be issued by this date pursuant to Section 120.565(3), Florida Statutes)

SPECIAL INSTRUCTIONS: None

Case Background

On December 3, 2018, Petitioner, Tesla, LLC (Tesla), filed a petition for a declaratory statement (Petition). Tesla asks the Commission to declare that based on the facts presented by Tesla:

- (1) Tesla’s leasing of solar electric equipment to residential lessees, pursuant to Tesla’s standard form lease known as Tesla’s SolarLease, does not constitute a sale of electricity;
- (2) Tesla’s offering to lease solar electric equipment to residential electricity users will not cause Tesla to be deemed a public utility under Florida Law; and

- (3) The residential solar equipment lease described in its Petition (Tesla's SolarLease) will not subject either Tesla or Tesla's customer-lessees to regulation by the Commission.

The Commission's recent decisions in Order No. PSC-2018-0251-DS-EQ, issued May 17, 2018, in Docket No. 20170273-EQ, *In re: Petition of Sunrun Inc. for a declaratory statement concerning the leasing of solar equipment (Sunrun)* and Order No. PSC-2018-0413-DS-EQ, issued August 21, 2018, in Docket No. 20180124-EQ, *In re: Petition of Vivint Solar Developer, LLC. for a declaratory statement concerning the leasing of solar equipment (Vivint)*, state the Commission does not have jurisdiction over an individual company that offers residential leases for solar equipment when the lease payments do not vary based on generation.

Pursuant to Rule 28-105.0024, Florida Administrative Code (F.A.C.), a Notice of Declaratory Statement was published in the December 4, 2018, edition of the Florida Administrative Register, informing interested persons of the Petition. There were no requests to intervene filed. This recommendation addresses Tesla's Petition for Declaratory Statement. The Commission has jurisdiction pursuant to Section 120.565, F.S., and Chapter 366, F.S.

Discussion of Issues

Issue 1: Should the Commission grant Tesla's Petition for Declaratory Statement?

Recommendation: Yes. Based on the facts presented by Tesla, the Commission should grant Tesla's Petition and declare: (1) Tesla's proposed residential solar equipment lease, as described by its Petition, will not be deemed to constitute a sale of electricity; (2) Offering its solar equipment lease, as described in its Petition, to consumers in Florida will not cause Tesla to be deemed a public utility; and (3) The residential solar equipment lease described in its Petition will not subject Tesla or Tesla's customer-lessees to regulation by this Commission. The Commission should also state that its declaration is limited to the facts described in Tesla's Petition and would not apply to different, alternative facts. However, for those with an identical fact pattern to Sunrun's, Vivint's, or Tesla's Petitions, these declarations have precedential significance and individual declaratory statements are not necessary. (Harper, Crawford)

Staff Analysis: Tesla's Petition asks the Commission to declare that Tesla's solar leasing program as described in Tesla's Petition will not make Tesla or its lease customers a public utility subject to the Commission's jurisdiction under Section 366.02(1), F.S. Tesla's Petition also asks the Commission to apply Rule 25-6.065, F.A.C., which allows leases for solar equipment that include a maintenance agreement so long as the lease payments do not depend on electric generation. According to Tesla's facts, the customer will be the end-user, and the lease payments do not depend on electric generation. Tesla's proposed solar equipment lease program shows that the lease customers must utilize their utility's service and interconnection and net metering provisions.

Tesla's Petition also states that it is aware that the facts in Sunrun's and Vivint's Petitions are substantively the same as the facts in Tesla's request for declaratory statement. According to Tesla, the *Sunrun* and *Vivint* orders were limited only to the specific facts described in *Sunrun* and *Vivint*'s petitions and are therefore not binding or applicable to Tesla.

Staff believes that the *Sunrun* and *Vivint* orders are applicable to any individual entity where the alleged facts show that the company offers residential solar lease programs with lease payments that do not vary based on generation. Both of these orders applied the facts presented in the petitions to Rule 25-6.065, F.A.C, which states that "[t] customer-owned renewable generation does not preclude the customer of record from contracting for the purchase, lease, operation, or maintenance of an on-site renewable generation system with a third-party under terms and conditions that do not include the retail purchase of electricity from the third party." The notice provision in Section 120.565, F.S., suggests that a declaratory statement, although not binding as precedent, has precedential significance. *Chiles v. Dep't of State, Div. of Elections*, 711 So. 2d 151, 155 (Florida 1st DCA 1998).

Tesla also states that requirements of investors who will provide financing for Tesla's SolarLease program in Florida compel Tesla to seek the declaratory statement. Tesla's Petition states it is requesting a declaratory statement as a "real-world business necessity" to meet the "requirements of investors." The purpose of a declaratory statement is to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular

circumstances.¹ Staff believes that there is no controversy because the facts in Tesla's Petition are virtually identical to the facts set forth in both the Sunrun's and Vivint's Petitions. Thus, a company's financing or investor requirements are irrelevant to the determination of whether a declaratory statement should be granted.

Nonetheless, an agency has an obligation to issue a declaratory statement explaining how a statute or rule applies in the petitioner's particular circumstances even if the explanation would have a broader application than to the petitioner. *Soc'y for Clinical & Med. Hair Removal, Inc. v. Dep't of Health*, 183 So. 3d 1138, 1144 (Fla. 1st DCA 2015). Thus, staff believes that Tesla's petition for declaratory statement should be granted.²

Conclusion

For the reasons set forth above, staff recommends that the Commission grant Tesla's Petition for Declaratory Statement and declare: (1) Tesla's leasing of solar electric equipment to residential lessees, pursuant Tesla's standard form lease known as Tesla's SolarLease, and as described in its Petition, will not be deemed to constitute a sale of electricity; (2) Tesla's offering to lease solar electric equipment to residential electricity users, as described in its Petition, will not cause Tesla to be deemed a public utility under Florida Law; and (3) The residential solar equipment lease as described its Petition (Tesla's SolarLease) will not subject either Tesla or Tesla's customer-lessees to regulation by the Commission. The Commission should also state that its declaration is limited to the facts described in Tesla's Petition and would not apply to different, alternative facts. However, for those with an identical fact pattern to Sunrun's, Vivint's, or Tesla's Petitions, these declarations have precedential significance and individual declaratory statements are not necessary.

¹Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, provides that declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority.

²As the Commission stated previously in the *Sunrun* and *Vivint* orders, approving Tesla's draft lease does not fall within the Commission's jurisdiction and review of the lease is not necessary for the Commission's determination of Tesla's Petition. Staff's analysis is limited solely to the jurisdiction question raised by the Petition, not the draft lease. Provisions in Tesla's draft lease that involve statutes and rules that are outside our jurisdiction, such as those provisions that relate to Tesla's compliance with the consumer protection laws, are not relevant and were not considered in staff's analysis. See *Deltona Corp. v. Mayo*, 342 So. 2d 510 (Fla. 1977), wherein the Florida Supreme Court held that consumer protection was outside the bounds of the Commission's jurisdiction: "If Deltona engaged in an unfair business practice or committed fraud, however, it may be a concern of other state agencies or the basis for private law suits (on which we express no opinion), but it is not a matter of statutory concern to the Public Service Commission."

Issue 2: Should this docket be closed?

Recommendation: Yes, if the Commission votes to either grant or deny the Petition for Declaratory Statement, the docket should be closed. (Harper)

Staff Analysis: Whether the Commission grants or denies Tesla's Petition, a final order will be issued. Upon issuance of the final order, the docket should be closed.