



**MATTHEW P. DENN**  
ATTORNEY GENERAL

**DEPARTMENT OF JUSTICE**  
KENT COUNTY  
102 WEST WATER STREET  
DOVER, DELAWARE 19904

CIVIL DIVISION (302) 739-7641  
FAX (302) 739-7652  
CRIMINAL DIVISION (302) 739-4211  
FAX (302) 739-6727

TO: Chairman Winslow  
Commissioner Conaway  
Commissioner Drexler  
Commissioner Gray  
Commissioner Karia

FROM: Brenda R. Mayrack, Esq., Deputy Attorney General

DATE: November 18, 2015

RE: PSC Docket No. 15-1358: Legal Memorandum Advising Against Issuance of Declaratory Order

---

On August 28, 2015, the Commission received a Petition from Vivint Solar, Inc. (“Vivint Solar”) requesting that the Commission issue a Declaratory Order “clarifying that, in offering solar power purchase agreements (‘PPAs’) or solar leases (‘Solar Leases’) to residential customers in the State of Delaware, neither Vivint Solar nor its subsidiary Vivint Solar Developer, LLC, nor any of their affiliates, will be regulated by the Commission as (1) a ‘public utility’ under 26 *Del. C.* § 201 or (2) an ‘electric supplier’ under 26 *Del. C.* § 1012.”<sup>1</sup>

By Order No. 8800, the Commission set deadlines for the publication of public notice and the filing of petitions for leave to intervene and written comments in this docket. At the November 24, 2015 meeting, the Commission will conduct an evidentiary hearing on the Petition.

---

<sup>1</sup> Petition for Declaratory Order at 1.

On November 10, the Energy Freedom Coalition of America, LLC (“EFCA”), which represents several member companies providing solar energy facilities and services in Delaware, filed a timely petition for leave to intervene and comments on the Petition. Specifically, EFCA’s comments note:

EFCA respectfully requests that the Commission grant the Petition and find that ***all*** solar leases and PPAs similar to those described by Vivint are exempt from regulation by this Commission.... The Commission should be cautious not to create uncertainty for the rest of the solar industry by granting Vivint’s requested relief too narrowly.<sup>2</sup>

Regardless of the substantive arguments of Vivint Solar and the EFCA, the Commission should refrain from issuing the requested Declaratory Order because 1) the Commission lacks the legal authority to do so under these circumstances; 2) issuance of declaratory orders by administrative agencies is generally disfavored; 3) the issues raised by the parties are more appropriately addressed by this Commission in its rulemaking capacity or by seeking a private legal opinion. The reasoning supporting this legal advice is further explained below:

- 1) The Commission lacks the legal authority to issue a Declaratory Order as requested under these circumstances. The Commission’s enabling statute and regulations do not give the Commission the authority to issue a Declaratory Order. *See 26 Del. C. ch. 1, subch. 1, 2, 4, 5; 26 Del. Admin. C. § 1001.*

Although Delaware’s Administrative Procedures Act (“APA”), *29 Del. C. § 10101 et seq.*, does contemplate that a “case” or “case decision” is an “administrative adjudication” that does “include, without limitation, those of a *declaratory* nature respecting the payment of money or resulting in injunctive relief requiring a named party to act or refrain from acting or

---

<sup>2</sup> Comments of Energy Freedom Coalition of America, LLC at 2 (emphasis in original).

threatening to act in some way required or forbidden by law or regulation under which the agency is operating,” none of those factors are at issue in the Petition before the Commission. 29 *Del. C.* § 10102(3) (emphasis added). Vivint Solar’s petition seeks a declaration of the Commission that it does not fit certain statutory definitions that would subject it to the Commission’s regulatory authority. Nowhere in its Petition does Vivint Solar seek the Commission’s declaration regarding the payment of money or the requirement that a party act or refrain from acting. Furthermore, as explained further below, Vivint Solar’s Petition is more appropriately considered a request for rulemaking that affects a class of similarly situated parties, rather than a “case” or “case decision.”

- 2) The issuance of declaratory orders by administrative agencies is generally disfavored,<sup>3</sup> particularly when the declaratory order functions more like a rule or regulation. Although no Delaware court has decided this issue, the Supreme Court of Missouri invalidated a “declaratory judgment” issued by the State Board of Registration for the Healing Arts (the “Board”). *Missouri Ass’n of Nurse Anesthetists, Inc. v. State Board of Registration for the Healing Arts*, 343 S.W.3d 348 (Mo. 2011). Here, the Board had received numerous letters, including from a doctor, the Missouri State Medical Association, and an organization representing certain nurses, requesting guidance as to whether advanced practice nurses could perform certain procedures. *Id.* at 351. The Board responded by sending a letter to the

---

<sup>3</sup> Similarly, courts only issue declaratory judgments in limited circumstances and do not allow parties to obtain “advisory opinions” for hypothetical facts. *See, e.g., Baker v. Delaware Dep’t of Natural Resources & Environmental Control*, 2015 WL 5971784, \*9 (Del. Super. 2015) (declaratory judgments “not to be used as a means of eliciting advisory opinions from the courts”); *O’Neill v. Town of Middletown*, 2006 WL 205071, at \*38 (Del. Ch. Jan. 18, 2006) (“Declaratory relief must be premised upon an actual controversy: one that involves the rights or other legal relations of the party which seeks declaratory relief; one in which the claim of right is asserted against one who has an interest in contesting the claim; one between parties whose interests are real and adverse; and one in which the issue is ripe for judicial determination.”), citing *Gannett Co., Inc. v. Bd. of Mgrs. of Del. Crim. Justice Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003).

doctor and organization with its determination that the nurses were not qualified to perform the procedures. *Id.* at 352. The Missouri Supreme Court found that the Board’s letter was void and of no legal effect because it was “a statement of general applicability that interpreted the law and prescribed policy” and required promulgation under the state’s APA “to have any force and effect of law as a ‘rule’” or regulation. *Id.* at 357. The Court noted:

Whatever the Board’s intent, its letter was written with language that is generally applicable to all physicians and APNs. The letter’s language was not confined to a specific set of facts, but instead has a future effect and potential impact on any physician wishing to delegate the procedure to an APN and, in turn, on any APN wishing to engage in the procedure.

*Id.* Thus, the Board’s attempt to issue a declaratory order in response to a specific request or set of facts – when the impact of the declaratory order affects other parties more generally – was invalidated.

Similarly, Vivint Solar’s Petition presents an analogous situation to the Commission. Vivint Solar is asking this Commission, like the Missouri Board, to “interpret law and prescribe policy” in the context of one company when any such determination will likely impact other similarly situated companies. The very fact that at least one party, the EFCA, has requested on behalf of three of its members that the Commission “find that **all** solar leases and PPAs similar to those described by Vivint Solar are exempt from regulation by this Commission” and that the Commission “should be cautious not to create uncertainty for the rest of the solar industry by granting Vivint Solar’s requested relief too narrowly” suggests that any Commission decision will be “generally applicable ... [and] not confined to a specific set of facts” or company. As such, if the Commission issues the requested Declaratory Order in the

context of the Petition as a “case decision” rather than “rulemaking,” it is likely that such a Declaratory Order will have no force of law and may be invalidated by a court.

- 3) The issues raised by the parties are more appropriately addressed by this Commission in its rulemaking capacity or by seeking a private legal opinion. As suggested by the Missouri Supreme Court decision discussed in detail above, if the Commission wishes to offer guidance on the question posed by Vivint Solar, it may properly do so via its rulemaking authority pursuant to 26 *Del. C.* § 209(a)(1). Of course, this will require the Commission to comply with the notice and comment requirements of the Delaware APA for rulemaking, which will necessarily afford other parties, such as EFCA and others in the industry who may not have been aware of Vivint Solar’s Petition, the opportunity to participate in a meaningful way. The APA-mandated rulemaking process would likely yield a more robust factual record than is available in the instant case on which the Commission could base its determination, if any.

Finally, it is a commonly accepted commercial practice to obtain a legal opinion from a private law firm when the application of a law is unclear. Certainly nothing prevents Vivint Solar from obtaining such an opinion from any qualified Delaware law firm. However, it is inappropriate – for the reasons discussed above – for the Commission to provide such a legal opinion under the guise of a Declaratory Order, as requested in the Petition.