

**PUBLIC UTILITIES COMMISSION OF NEVADA
MEMORANDUM**

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DATE: November 21, 2018

TO: Commissioners

FROM: Office of General Counsel (JD)

RE: Agenda 20-18; Item 4B; Docket No. 18-10008: Petition of Ovation MM, Inc., and its affiliated companies, for an Advisory Opinion finding that both the facility and the sale of output from distributed generation systems installed on multi-family dwellings are not jurisdictional public utilities under Assembly Bill 405 (2017).

INTRODUCTION

On October 11, 2018, Ovation MM, Inc. and its affiliated companies (together, “Ovation” or “Petitioner”) filed with the Public Utilities Commission of Nevada (“Commission”) a Petition, designated as Docket No. 18-10008, for an advisory opinion finding that both the facility and the sale of output from distributed generation systems installed on multi-family dwellings are not jurisdictional public utilities under Assembly Bill (“AB”) 405 (2017).

The Regulatory Operations Staff of the Commission (“Staff”), Vote Solar, Great Basin Solar Coalition (“GBSC”), Solar Energy Industries Association (“SEIA”), and Nevada Power Company d/b/a NV Energy and Sierra Pacific Power Company d/b/a NV Energy (together, “NV Energy”) each filed comments.

SUMMARY

The Commission’s Office of General Counsel (“General Counsel”) recommends the Commission deny Ovation’s Petition for an Advisory Opinion.

PETITION AND COMMENTS

Petitioner

Ovation requests that the Commission find that both the facility and sale of the output from distributed generation systems installed on multi-family dwellings are not jurisdictional public utilities pursuant to AB 405. (Petition at 11.)

Ovation states that it has developed a concept, referred to as “Tenant Solar,” whereby an apartment owner directly installs, or contracts with a third party to install, a distributed energy system on the rooftops or common areas of an apartment complex and that energy output is then consumed by the tenants of the apartment complex. All generation infrastructure would be located on the same premises where the tenants reside, and the system would be large enough to

accommodate all or a portion of the daily demand for each tenant in the apartment complex. The pricing structure would ensure that energy generated would be available to tenants at a cost at or less than the kilowatt-hour price charged by the electric utility serving the complex, never more. (*Id.* at 2-3.)

Ovation notes that Nevada has no administrative rules or utility tariffs in existence that would guide or control any Tenant Solar installations and states that the details of what types of transactions are allowed under Nevada law and all relevant consumer protections are properly the subject of future dockets. (*Id.* at 3.)

Ovation argues that the new renewable energy rights established by AB 405 directly contradict the prescriptive language found in Nevada Revised Statutes (“NRS”) 704.020 and 704.021, which define “public utility” and “utility” for purposes of the Commission’s regulation, and that AB 405 now controls under Nevada law. Ovation states that AB 405 includes Nevada’s Renewable Energy Bill of Rights (“REBR”), which affirmatively declares that each person who is a resident of this state has certain absolute rights to renewable energy and does not distinguish Nevada residents who own single-family homes from those who live in multi-family homes. Ovation recommends that if the Commission cannot harmonize AB 405 with the provisions of NRS 704.020 and 704.021, it should find that AB 405 supersedes or impliedly repealed NRS 704.021(10) insofar as it applies to Tenant Solar initiatives of the type Petitioner proposes. (*Id.* at 4-7.)

Ovation further argues that the REBR ensures that all Nevada residents, including tenants in apartments, have the right to generate, consume, and export renewable energy and reduce their use of electricity that is obtained from the grid. Additionally, Ovation states that Tenant Solar is directly in line with the Legislature’s stated intent with respect to investment in net energy metering systems. (*Id.* at 8-9.)

Noting that NRS 704.020 states that the Commission “may” supervise, regulate and control all such utilities subject to the provisions of that chapter, Ovation argues that, as an alternative to issuing an advisory opinion in Ovation’s favor, the Commission can select to not regulate Tenant Solar. (*Id.* at 10-11.)

Staff

Staff disagrees with Ovation and believes that pursuant to the plain language of NRS 704.020, provision of power as described by Ovation in its Petition falls within the definition of a public utility. Staff further recognizes that there are some configurations by which a multi-family dwelling may avail itself of distributed generation renewable energy and not trigger the public utility provisions of NRS 704.020, but this is not the type of service described by Ovation in its Petition. Staff requests that the Commission deny Ovation’s request and find that the facility and the sale of output from distributed generation systems installed on multi-family dwellings as described in the Petition are jurisdictional public utilities. (Staff Comments at 8.)

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Vote Solar

Vote Solar supports the Tenant Solar Initiative proposed by Ovation and urges the Commission to provide the relief requested in the form of an advisory opinion that acknowledges that the generating facility and the sale of energy from such a generating facility to tenants of a multi-family apartment building are not subject to regulation by this Commission. Vote Solar notes that Ovation's proposed Tenant Solar is analogous to existing policies in other states, including community solar and virtual net metering. (Vote Solar Comments at 2-3, 5.)

GBSC

GBSC states that it supports Ovation's Petition and believes that an advisory opinion on this matter is "an important first" to meeting Nevadans' demand for and support of clean energy and access to it. (GBSC Comments at 1.)

SEIA

SEIA states that the Commission should issue the requested advisory opinion because the plain language of the REBR gives all Nevadans—not just those who reside in single family dwellings—the right to generate, consume, and export renewable energy without being a "public utility," as that term is defined. SEIA states that it believes that the REBR should be explicitly inclusive of all income levels, recognizing that low-income Nevadans often face unique barriers to renewable energy access. Finally, SEIA states that any other interpretation is inconsistent with the plain meaning of the REBR, would render the REBR meaningless as it relates to the type of distributed generation described by Ovation, and result in an absurd result, all in violation of the tenants of statutory construction. (SEIA Comments at 1.)

NV Energy

NV Energy requests that the Commission deny Ovation's Petition on the following bases: community solar was specifically excluded from AB 405, Petitioner's proposal should be considered during the 2019 legislative session, and the Petition is factually deficient to support any affirmative decision. (NV Energy Comments at 7, 2, 5, 6.)

NV Energy states that the Petition is lacking in details but that it appears to ask the Commission to issue a rule of general applicability and have the decision applicable to all apartment complex owners and all tenants of all apartments statewide. NV Energy also argues that, to the extent the transaction proposed by the Petition is community solar, it is not currently permitted under Nevada law and in fact was previously addressed by the Nevada Legislature in the early stages of AB 405 but eventually removed from the bill. NV Energy states that Petitioner is attempting to circumnavigate the legislative process by asking the Commission to effectuate public policy that the Nevada Legislature has to date declined to enact. (*Id.* at 2-5.)

Further, NV Energy states that Petitioner's Tenant Solar concept is similar to the concept of community solar gardens, which were considered in Senate Bill 392 (2017), which was vetoed by Governor Sandoval. NV Energy also states that the Governor's Committee on Energy Choice

recommended that the Nevada Legislature revisit community solar questions during the 2019 legislative session. NV Energy contends that Ovation's Petition attempts to "shortcut the legislative process and have the Commission render a decision either ahead of, or contemporaneously with, the Nevada Legislature." (*Id.* 5-6.)

Finally, NV Energy suggests that, if the Commission should set this Petition for further consideration, the Petition should be amended to include sufficient detail regarding the operation and scope of the proposed Tenant Solar Initiative. (*Id.* at 6-7.)

ANALYSIS

Ovation requests that the Commission issue an advisory opinion stating that both the facility and the sale of output from distributed generation systems installed on multi-family dwellings are not jurisdictional public utilities. In the alternative, Petitioner requests that the Commission determine that jurisdictional authority is "not needed" and select not to regulate Tenant Solar.

Pursuant to NAC 703.825, the Commission has the authority to issue declaratory orders or advisory opinions "as to the applicability of any statutory provision or any regulation or decision of the Commission."

Pursuant to NRS 703.025, the Commission also has the authority to adopt "such regulations consistent with law as the Commission deems necessary for the operation of the Commission and the enforcement of all laws administered by the Commission," but such regulations must be promulgated pursuant to NRS Chapter 233B. A regulation, as defined by NRS 233B.038, includes "an agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy." Notably, advisory opinions are explicitly excluded from the definition of regulation established in NRS 233B.038, but only those advisory opinions that are "not of general applicability." For clarification on when a Commission decision moves into the realm of "agency rule," the Commission can look to the Nevada Supreme Court, which has held that "[a]n agency makes a rule when it does nothing more than state its official position on how it interprets a requirement already provided for and how it proposes to administer its statutory function."¹

General Counsel agrees with NV Energy that although Tenant Solar pertains to multi-family dwellings and Ovation is the developer of 38 separate apartment communities consisting of more than 9,220 units, the relief requested in the Petition makes no reference to a specific project or projects, or specific multi-family complexes, and would conceivably apply to *all* multi-family dwellings (and residents thereof) in Nevada. Relying on the REBR, Ovation argues that "all Nevada residents, including tenants in apartments," have the right to generate, consume, and export renewable energy; Petitioner does not argue that the Commission's opinion would or should apply only to residents of Ovation's developments, or any specific Ovation property.

General Counsel believes that an advisory opinion that grants or denies Ovation's requested relief regarding Tenant Solar, or, alternatively, that chooses not to regulate Tenant Solar, would

¹ *Coury v. Whittlesea-Bell Luxury Limousine*, 102 Nev. 302, 305, 721 P.2d 375, 377 (1986)

be a statement of the Commission's official position on its interpretation of AB 405 and NRS Chapter 704 as it applies to Tenant Solar on all multi-family dwellings in Nevada. Ovation seems to acknowledge that the Commission's decision would be an "agency rule" in that it specifically notes on page 3 of its Petition that no administrative rules in existence would guide or control the installation of Tenant Solar.

General Counsel believes that if the Commission were to grant Ovation's request and issue an advisory opinion on the applicability of current law to the proposed Tenant Solar Initiative—regardless of whether or not the findings in the opinion aligned with Ovation's analysis—that advisory opinion would be impermissible ad hoc rulemaking in violation of NRS Chapter 233B.

Should the Commission wish to further explore the Tenant Solar proposal, it could open an investigatory docket with the intent to later initiate a rulemaking or make a recommendation to the Legislature. General Counsel agrees with NV Energy that more information about the specifics of Tenant Solar would be beneficial for thorough consideration of the proposal. And, as Staff noted, there are ways residents of multi-family dwellings can achieve increased access to distributed generation renewable energy that do not create a public utility as defined by NRS 704.020 and 704.021. Those options, and other related topics like community solar and virtual net metering, could be further fleshed out in an investigatory proceeding.

RECOMMENDATION

Based on the foregoing analysis, General Counsel recommends that the Commission deny Ovation's Petition for an Advisory Opinion filed in Docket No. 18-10008.