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SUSAN MERRIWETHER
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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

-000-

VOTE SOLAR,

Petitioner,

v.

THE PUBLIC UTILITIES COMMISSION
OF NEVADA,

Respondents.

And all participating parties.

CASE NO. 16 OC 00052 1B

DEPT. 2

ORDER GRANTING IN PART AND
DENYING IN PART PETITION FOR
JUDICIAL REVIEW

PROCEDURAL BACKGROUND

Vote Solar filed a Petition for Judicial Review (the "Petition") requesting this Court vacate and set aside both the Order on Reconsideration and Rehearing and the Modified Final Order of the Public Utilities Commission of Nevada ("PUCN"). The Alliance for Solar Choice ("TASC"), Great Basin Solar Coalition ("Great Basin"), the Nevada Attorney General's Bureau of Consumer Protection ("BCP"), Nevada Power Company d/b/a NV Energy ("Nevada Power") and Sierra Pacific Power Company d/b/a NV Energy ("Sierra") (collectively, "NV Energy"), Nevadans for Clean Affordable Reliable Energy ("NCARE"), and the Solar Energy Industries Association ("SEIA") filed statements of intent to participate in the Petition for Judicial Review. Vote Solar, TASC, Great Basin, BCP, NCARE, and SEIA (collectively, "Petitioners") filed memoranda of points and authorities in support of the petition, and the PUCN and NV Energy filed memoranda of points and authorities in opposition to the petition.

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1 The memoranda filed in support of the Petition contain various arguments that
2 the PUCN Order should be set aside because it prejudiced the substantial rights of
3 Petitioners. These arguments can be grouped into five categories: 1) the PUCN Order
4 violates the due process rights of existing customer-generators; 2) the PUCN Order is
5 contrary to statute; 3) the PUCN Order is arbitrary or capricious; 4) the PUCN Order
6 violates the due process rights of the Petitioners; and 5) the PUCN Order violates the
7 Contract Clause of the United States Constitution.

8
9 **FACTS**

10 NV Energy filed applications for approval of a cost of service study and net
11 metering tariffs. Both applications state: "This filing does not ... [a]ffect the rights of
12 NEM1 customers in any way."

13 The PUCN filed a Notice of Application for each application which state in part:

14 The applications sought "approval of a cost of service
15 study and net metering tariffs."

16 "The Commission will make a determination at an open
17 meeting regarding whether to grant the relief requested, which may
18 have an impact on consumers."

19 NV Energy "filed [the Applications] pursuant to Nevada
20 Revised Statutes ('NRS') and the Nevada Administrative Code
21 ('NAC'), Chapters 703 and 704, including but not limited to Section
22 4.5 of Senate Bill 374 (2015) and NAC 703.535."

23 The PUCN also filed a Notice of Prehearing Conference and Notice of Hearing
24 regarding each application. Each notice stated in part:

25 As the title: "Application of [the Companies] for approval of a
26 cost of service study and net metering tariffs."

27 The Companies "filed [the Applications] pursuant to Nevada
28 Revised Statutes ('NRS') and the Nevada Administrative Code

1 ('NAC'), Chapters 703 and 704, including but not limited to Section
2 4.5 of Senate Bill 374 (2015) and NAC 703.535.”

3 “The purpose of the hearing is to address interim proposals to
4 facilitate the interconnection of additional renewable distributed
5 generation, if the 235-MW limitation for existing net energy metering
6 rules is met prior to January 1, 2016.”

7 During the scheduled hearings the PUCN considered a PUCN’s Regulatory
8 Operations Staff (Staff) proposal which, unlike NV Energy’s application, included a rate
9 design that did affect NEM1 customers. The PUCN did not continue the scheduled
10 hearing or issue a new notice that the PUCN would hear Staff’s proposal which could
11 affect NEM1 customers. The PUCN issued orders that affected NEM1 customers’ rate
12 design.

13 Several parties filed petitions for reconsideration or rehearing. The PUCN
14 ordered the hearing be reopened solely on the issue of grandfathering existing solar
15 customers. The PUCN then issued the two orders at issue in this case, the Order on
16 Reconsideration and Rehearing and the Modified Final Order.

17 The PUCN wanted, in its Modified Final Order (the “PUCN Order”), to
18 implement Senate Bill 374 (“SB 374”) of the 2015 legislative session. The PUCN adopted
19 new net energy metering rates for customer-generators within NV Energy’s service
20 territories. The Nevada Supreme Court recently explained the purpose of SB 374:

21 For the last two decades, Nevada law has required utility
22 companies to offer renewable energy system owners credits
23 for excess energy produced, through a program of net
24 metering. Because net metering apparently imposed an
25 unfair financial burden on non-net metering customers, see
26 Hearing on SB 374 Before the Assembly Commerce and
27 Labor Comm., 78th Leg., at 47 (Nev., May 20, 2015), the net
28 metering program was capped at 3% of the total peak
capacity of all utilities in the state. *Id.*; see 2013 Nev. Stat.,
ch. 510, at 3341 (amending NRS 704.773). During the last
legislative session, however, the legislature allowed for net
metering beyond the cap, albeit at a tariff, and placed
regulatory authority over the net metering program with the
Public Utilities Commission of Nevada (PUCN), charging
that entity with maintaining fairness between customers of

1 the net metering program and non-net metering customers
2 and giving it certain tools to do so. Hearing on SB 374, at
3 47-48 (Nev., May 20, 2015); see 2015 Nev. Stat., ch. 379, at
4 2146-55.

5 In describing the tools the Legislature gave the PUCN through the passage of SB
6 374, the Nevada Supreme Court stated that “[f]or example, the new law gives discretion
7 to the PUCN to act in the public interest, authorizing it to establish different rate classes
8 for net metering customers ..., to limit enrollment in net metering, and to determine
9 whether the [new net metering rates] should be applied to existing net metering
10 customers. 2015 Nev. Stat., ch. 379, §§ 2.3 and 2.5, at 2148-49.”

11 The PUCN Order, which approves cost-of-service studies that identify annual
12 cost-shifts of \$623 per customer-generator in Nevada Power’s service territory and \$471
13 per customer-generator in Sierra’s service territory, finds that the net metering rates
14 that were in effect prior to 2016 allowed customer-generators to avoid paying their full
15 share of the fixed costs of electricity service. (R. at 413.) The PUCN found that the
16 under-recovery of fixed costs from customer-generators caused other customers to pay
17 more than their fair share of fixed costs, resulting in an expected \$16 million annual
18 cost-shift. (R. at 457, 476, 519-20.) The PUCN found that this shift of costs from
19 customer-generators to other customers was unreasonable and therefore adopted
20 revised rates to gradually eliminate the cost-shift.

21 The PUCN Order gradually implements the following changes to net metering
22 rates with the changes occurring in five incremental steps (one every three years) over a
23 total period of 12 years: 1) fixed monthly charges (the Basic Service Charges) increase to
24 provide for the recovery of certain fixed costs of providing standby electric service to
25 customer-generators; 2) volumetric rates (the Base Tariff General Rates) decrease to
26 account for the recovery of fixed costs through fixed charges; 3) netting (measuring the
27 difference between kilowatt-hours received from the utility and kilowatt-hours fed back
28 to the grid) occurs once each hour, rather than once each month; and 4) the
compensation provided for net excess electricity decreases from the retail rate to a
value-based rate.

1 **STANDARD OF REVIEW**

2 NRS 703.373(11) prohibits this Court from substituting its judgment for that of
3 the PUCN as to the weight of the evidence on questions of fact and shall affirm the
4 PUCN Order unless “the substantial rights of the petitioner have been prejudiced
5 because the final decision of the PUCN is: (a) In violation of constitutional or statutory
6 provisions; (b) In excess of the statutory authority of the PUCN; (c) Made upon unlawful
7 procedure; (d) Affected by other error of law; (e) Clearly erroneous in view of the
8 reliable, probative and substantial evidence on the whole record; or (f) Arbitrary or
9 capricious or characterized by abuse of discretion.”

10 Under NRS 233B.135(2) Petitioners have the burden of proving that the final
11 decision is invalid under 233B.135(3).

12
13 **NEM1 CUSTOMERS**

14
15 *Issue*

16 The dispositive issue on notice is whether – in light of the PUCN’s consideration
17 of Staff’s proposed rate design and orders affecting NEM1 customers’ rate design – the
18 notices violate constitutional and statutory requirements. To determine whether the
19 notices violate constitutional and statutory requirements the court must decide whether
20 the notices contain a brief description of the purpose of the filing or proceeding,
21 including, without limitation, a clear and concise introductory statement that
22 summarizes the relief requested or the type of proceeding scheduled. Another way of
23 stating the dispositive issue on notice is whether the PUCN exceeded its subject matter
24 jurisdiction when, in light of the notice it had provided, it heard and entered orders on
25 Staff’s proposed rate design which affected NEM1 customers.

26
27 *Notice Requirements*

28 NRS 703.320(1) requires the PUCN give notice of hearings. The legislature
delegated to the PUCN to specify by regulation the manner of giving notice. NAC

1 703.160 is the PUCN regulation specifying the manner of giving notice. NAC
2 703.160(4)(c) is the relevant subsection in this case. It provides:

3 4. The public notice ... must include, as appropriate:

4 ...

5 (c) A brief description of the purpose of the filing or proceeding,
6 including, without limitation, a clear and concise introductory
7 statement that summarizes the relief requested or the type of
8 proceeding scheduled;

9 ...

10 Some Petitioners mistakenly cited and argued that subsection (c) includes
11 language that requires the introductory statement to also include the effect of the relief
12 or proceeding upon consumers. The PUCN amended 703.160(4) on March 19, 2015 by
13 filing a temporary regulation with the Secretary of State, docketed as LCB File No.
14 T008-14. The amendment eliminated the effect-of-the-relief requirement.

15 The Nevada Supreme Court has provided judicial gloss to the notice requirement.
16 In *Public Serv. Comm'n v. Southwest Gas*, 99 Nev. 268, 662 P.2d 624 (1999)
17 proceedings were initiated by the utilities as rate increase applications. The Public
18 Service Commission (PSC) notices stated: "All rate schedules, special charges, service
19 contract rules and regulations pertaining to Applicant's operation are subject to review
20 in this proceeding." *Id.* 271. In the rate increase application proceedings the PSC moved
21 to change the utilities' rate design. The court stated: "Inherent in any notice and hearing
22 requirement are the propositions that the notice will accurately reflect the subject
23 matter to be addressed and that the hearing will allow full consideration of it;" and
24 "notice must be specific enough to alert all interested persons of the substance of the
25 hearing." *Id.* 271. The court quoted a PSC order in an earlier case in which the PSC said:
26 "[A] person examining [the utilities'] applications should be able to rely on the factors
27 stated by the Applicant in its applications Therefore, were the Commission to hear
28 and issue orders on matters not submitted by the Applicant in its application, there

1 would to that extent be a denial of fairness and due process through inadequate Notice.”
2 *Id.* 271-72. The court continued, “[t]he PSC recognizes that it should not hear matters
3 and issue orders on matters not submitted by the applicant nor provided for with some
4 degree of specificity in the notice. Such would be and is a ’denial of fairness and due
5 process through inadequate Notice.” *Id.* 272. The court noted that rate changes are
6 substantially different from rate design and pointed out that the subject matter of the
7 PSC action, rate design, did not appear in the notices. The court found that the general
8 language of the notices “clearly could not and did not give the utilities an opportunity to
9 oppose the proposed change in the rate design,” and held as a result that all matters
10 relating to rate design were improperly heard and decided. *Id.* 271.

11 *Southwest Gas* noted that the dispositive issue in that case was whether proper
12 and *jurisdictional* notice had been given. *Id.* 270. That court cited *Checker, Inc. v.*
13 *Public Serv. Comm’n*, 84 Nev. 623, 446 P.2d 981 (1968) for the proposition that the
14 Commission was without jurisdiction because it had not complied with the notice and
15 hearing requirements imposed by the legislature. Those courts were talking about
16 subject matter jurisdiction. Subject matter jurisdiction may be raised by the parties at
17 any time or by a court *sua sponte*. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163,
18 179 (2011). Subject matter jurisdiction cannot be conferred or waived by the parties.
19 *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990).

20 *Checker* includes an important reminder of the need for the “inexorable
21 safeguard” of a fair and open hearing. *Checker* cited the United States Supreme Court in
22 *Ohio Bell Tel. Co. v. Public Util. Comm’n*, 301 U.S. 292, 304 (1937):

23 Regulatory commissions have been invested with
24 broad powers within the sphere of duty assigned to them by
25 law. Even in quasi-judicial proceedings their informed and
26 expert judgment exacts and receives a proper deference from
27 courts when it has been reached with due submission to
28 constitutional restraints. Indeed, much that they do within
the realm of administrative discretion is exempt from
supervision if those restraints have been obeyed. All the
more insistent is the need, when power has been bestowed so
freely, that the “inexorable safeguard” of a fair and open
hearing be maintained in its integrity. The right to such a

1 hearing is one of “the rudiments of fair play” assured to every
2 litigant by the Fourteenth Amendment as a minimal
3 requirement. There can be no compromise on the footing of
4 convenience or expediency, or because of a natural desire to
be rid of harassing delay, when that minimal requirement
has been neglected or ignored.

5 *Analysis*

6 The court will now apply the law regarding notice to the facts of this case.

7 NV Energy’s applications did not seek NEM1 rate design changes. Both
8 applications state: “This filing does not ... [a]ffect the rights of NEM1 customers in any
9 way.” The PUCN filed a Notice of Prehearing Conference and Notice of Hearing
10 regarding each application. Each notice stated that “[t]he purpose of the hearing is to
11 address interim proposals to facilitate the interconnection of additional renewable
12 distributed generation if the 235-MW limitation for existing net energy metering rules is
13 met prior to January 1, 2016.” At the noticed hearing the PUCN considered Staff’s
14 proposal and entered orders that affect NEM1 customers’ rate design.

15 The PUCN notices do not contain, in the purpose-of-the-hearing section or
16 anywhere else, notice that the PUCN would consider changing NEM1 customers’ rate
17 design. As the *Southwest Gas* court pointed out, “[i]nherent in any notice and hearing
18 requirement are the propositions that the notice will accurately reflect the subject
19 matter to be addressed ...” and “notice must be specific enough to alert all interested
20 persons of the substance of the hearing.” One subject matter addressed by the PUCN
21 was NEM1 customers’ rate design. Because the Notices do not contain notice that the
22 PUCN would consider NEM1 customers’ rate design, or ever use the term “rate design”
23 at all, the Notices did not accurately reflect subject matter the PUCN addressed and the
24 Notices were not specific enough to alert all interested persons that the PUCN would
25 address NEM1 customers’ rate design.

26 The *Southwest Gas* court also stated, “[t]he PSC recognizes that it should not
27 hear matters and issue orders on matters not submitted by the applicant nor provided
28 for with some degree of specificity in the notice. Such would be and is a denial of

1 fairness and due process through inadequate Notice.” Because the PUCN heard matters
2 and issued orders on matters neither submitted by the applicant nor provided for with
3 any degree of specificity in the Notice there was a denial of fairness and due process
4 through inadequate Notice.

5 The PUCN, NV Energy, or both, argued as follows:

6 1. Petitioners participated in all hearings and no one ever objected to the
7 notices until after the final orders were issued. The argument fails because the due
8 process and NRS 703.320 (through NAC 703.160(4)) notice requirements are
9 jurisdictional. Therefore, Petitioners participation and failure to object cannot and does
10 not remedy the defect in notice, or confer subject matter jurisdiction on the PUCN to
11 change NEM1 customers’ rate design in the hearing as noticed.

12 2. The Notices are sufficient because they refer to Section 4.5 of SB 374
13 which expressly states that “[t]he Commission may make modifications to the
14 tariff [filed by the utility], including modifications to the rate design and the terms
15 and conditions of [NEM] services to customer-generators.” This argument fails
16 because, although Section 4.5 of SB 374 expressly states what the PUCN *may* do,
17 the public and NEM1 customers have a constitutional due process and statutory
18 right to know specifically what matters the PUCN *will* hear and enter orders on.
19 Further, the same Notices of Hearing that refer to Section 4.5 of SB 374 also refer
20 to NV Energy’s applications which specifically state that “[t]his filing does not ...
21 [a]ffect the rights of NEM1 customers in any way.” So even if their argument were
22 true, the Notices would be contradictory and unclear and therefore
23 unconstitutionally and statutorily defective.

24 3. *Public Serv. Comm’n v. Southwest Gas* is distinguishable because in
25 that case the type of proceeding changed, while here the proceedings have always
26 involved rate design, and in *Southwest Gas* the utilities did not have an
27 opportunity to present evidence, whereas in this case Petitioners actually
28 presented evidence. The first part of the argument fails because it is factually

1 incorrect. The proceedings did not involve NEM1 customers' rate design until the
2 PUCN decided to hear and make orders based upon Staff's proposal which was
3 different from NV Energy's filing which did "not ... [a]ffect the rights of NEM1
4 customers in any way." The second part of the argument fails because
5 participation in the hearings cannot and does not cure the lack of subject matter
6 jurisdiction.

7 4. The PUCN used the word "standing" one time. If it is making an
8 argument that Petitioners lack standing the argument fails because the PUCN
9 failed to support the argument with any legal authority or argument. The
10 argument also fails because the court can address subject matter jurisdiction *sua*
11 *sponte* as discussed above.

12 5. The PUCN's notices did not state that the PUCN's decision would be
13 limited to granting or denying NV Energy's applications. The statement is true but
14 cannot justify the PUCN's hearing matters and issuing orders on NEM1 rate
15 design when that matter was not submitted by NV Energy nor provided for with
16 some degree of specificity in the PUCN Notices.

17 6. The public and NEM1 customers should have familiarized
18 themselves with the law that precipitated the applications. This argument fail
19 because the PUCN failed to support the arguments with any legal authority. The
20 argument also fails because the PUCN established the manner of giving notice,
21 and the PUCN regulation, NAC 703.160(11), does not require the public or NEM1
22 customers to familiarize themselves with the law and then guess what the PUCN
23 intends to or will hear and issue orders on.

24 7. It is unreasonable to require notice so specific that the PUCN must
25 describe in detail the laws and outlining the scope of a proceeding. Petitioners
26 have not argued that the PUCN must describe in detail the laws or outline the
27 scope of a proceeding. As the Nevada Supreme Court has said, the notice must
28 accurately reflect the subject matter to be addressed and be specific enough to

1 alert all interested persons of the substance of the hearing. If matters arise during
2 the hearing process that were not covered in a notice of hearing, the PUCN can
3 issue new notice.

4 8. Even if interested persons failed to read SB 374 sec. 4.5, they still
5 could have intervened. This argument fails because the PUCN failed to support the
6 arguments with any legal authority. There is a procedure to intervene, but a
7 procedure to intervene does not remedy the lack of subject matter jurisdiction that
8 results from constitutionally and statutorily defective notice. The PUCN cannot
9 fail to give notice or give defective notice because there is a procedure to intervene.
10 Stated another way, the PUCN must comply with the notice requirements even
11 though there is a procedure to intervene.

12 9. Petitioners propose the PUCN be limited to accepting or denying
13 applications without the option of making modifications. Petitioners have not
14 made this argument. Modifications to proposals made in an application may be
15 made so long as the PUCN does not hear matters and issue orders on matters not
16 submitted by the applicant nor provided for with some degree of specificity in the
17 notice.

18 10. NEM customers' interests were represented at the hearings. The
19 argument fails because representation at the hearings does not cure the lack of
20 subject matter jurisdiction caused by the constitutionally and statutorily defective
21 Notices. The argument also fails because it fails to consider the interests of
22 members of the public.

23 11. Substantial rights of Petitioners were not prejudiced. The argument
24 fails because lack of prejudice to substantial rights does not cure the lack of
25 subject matter jurisdiction caused by the constitutionally and statutorily defective
26 Notices.

27 12. NEM1 rates were discussed several times before the hearing. This
28 argument fails because discussing matters not covered in notices does not remedy

1 the lack of subject matter jurisdiction caused by constitutionally and statutorily
2 defective notices.

3 13. Any defects in notice was cured by the rehearing. This argument fails
4 because the rehearing was limited to the issue of grandfathering. Because the
5 rehearing was limited to the issue of grandfathering it does not remedy the lack of
6 subject matter jurisdiction caused by constitutionally and statutorily defective
7 Notices.

8
9 *Conclusion*

10 Because the PUCN heard matters and issued orders on matters not
11 submitted by the applicant nor provided for with any degree of specificity in the
12 Notices there was a denial of fairness and due process through inadequate Notice.
13 The PUCN lacked subject matter jurisdiction to hear matters and issue orders on
14 NEM1 customers' rate design because that matter was not submitted by the
15 applicant nor provided for with any degree of specificity in the Notices. The
16 PUCN's consideration of and orders on NEM1 customers' rate design violated
17 constitutional due process and NRS 703.320 (through NAC 703.160(4))
18 provisions, and the orders were made upon unlawful procedure.

19
20 **NEM2 CUSTOMERS**

21 Some Petitioners argued that the PUCN Orders should be set aside, at least
22 as to NEM1 customers, because the PUCN violated NEM1 customers' due process
23 rights by failing to provide required notice. The at-least-as-to-NEM1-customers
24 language implies that maybe the PUCN Orders should be set aside as to NEM2
25 customers as well. But none of the petitioners provided any legal authority or
26 argument to support this implied assertion. Without legal authority or argument
27 to support the implied assertion, and the fact that the position of the NEM1 and
28 NEM2 customers are different – for example, the fact that the applications state

1 “[t]his filing does not ... [a]ffect the rights of NEM1 customers in any way” – the
2 court declines to consider *sua sponte* whether PUCN’s Order should be set aside
3 because the PUCN violated NEM2 customers’ due process rights by failing to
4 provide required notice.

6 **The PUCN Order Is Not Contrary to Law**

7 The PUCN Order is consistent with legislative declarations regarding
8 renewable energy and economic development. Moreover, notwithstanding the
9 PUCN’s authority to limit enrollment in net metering and to close net metering to
10 new customer-generators, the PUCN Order does neither and provides that net
11 metering will continue to be offered to both existing and future customer
12 -generators. Electric utilities in Nevada continue to offer net metering by “taking
13 the difference between (i) the electricity a customer generates and sends to the
14 utility, and (ii) the electricity that a utility sends to the customer.” (Vote Solar
15 Mem. at 11.) The PUCN Order increases the frequency of the “netting” so that it
16 occurs on an hourly basis over the billing cycle. (R. at 515.)

17 Additionally, NRS 704.775, which outlines a rate design requiring the
18 “banking” of excess kilowatt-hours for retail compensation in future billing
19 periods, was applicable only to the net metering rates offered prior to the date on
20 which the cumulative capacity of net metering systems reached 235 megawatts. SB
21 374, Sec. 2.95. Therefore, the PUCN Order, which was issued after the
22 235-megawatt threshold was reached on August 20, 2015 (R. at 16145.), does not
23 violate the law by replacing the banking of electricity (kilowatt-hours) with the
24 banking of value-based bill credits.

26 **The PUCN Order Is Not Arbitrary or Capricious**

27 For a court to find that an administrative agency’s decision is arbitrary or
28 capricious, the agency’s decision “must be in disregard of the facts and

1 circumstances involved.” *Meadow v. Civil Service Bd. of LVMPD*, 105 Nev. 624,
2 627, 781 P.2d 772, 774 (1989). Nevada courts have traditionally upheld PUCN
3 decisions “if there [is] substantial evidence in the record to support the [PUCN’s]
4 orders.” *Public Service Comm’n of Nevada v. Continental Tel. Co.*, 94 Nev. 345,
5 348, 580 P.2d 467, 469 (1978). Substantial evidence is that which “a reasonable
6 mind might accept as adequate to support a conclusion.” *Nevada Power Co. v.*
7 *Public Utilities Commission, et al.*, 122 Nev. 821, 834, 138 P.3d 486, 495 (2006).

8 The PUCN’s decision in this case is not arbitrary or capricious because the
9 PUCN did not disregard the facts or circumstances involved. Rather, the PUCN
10 relied on substantial evidence in the form of extensive cost-of-service studies and
11 voluminous testimony submitted by various parties to the underlying proceedings.
12 Based on substantial evidence, the PUCN reached a finding that
13 customer-generators cause NV Energy to incur costs that were not being recovered
14 from customer-generators under the prior net metering rates. Also, based on
15 substantial evidence, the PUCN imposed increased fixed charges on
16 customer-generators to ensure that NV Energy is not forced to recover from other
17 ratepayers the fixed costs associated with providing standby electric service to
18 customer-generators. Finally, the PUCN relied on substantial evidence in the
19 record when it adopted its market-based valuation of the net excess electricity
20 produced by customer-generators. This court cannot substitute its judgment for
21 that of the PUCN as to the weight of the evidence on questions of fact such as the
22 cost of serving customer-generators or the value of net excess electricity.

23
24 **The PUCN Order Does Not Violate the Contract Clause of the United**
25 **States Constitution**

26 There is no evidence supporting the assertion that the PUCN Order impairs
27 any contractual rights in violation of the Contract Clause. The record does not
28 show that there was any contract or contractual provision promising a particular

1 utility rate to customer-generators. Rooftop solar companies and their customers
2 remain free to perform their obligations under contracts that were executed prior
3 to the PUCN Order being issued. The PUCN Order could result in certain
4 customers receiving returns on their investments that fail to meet expectations,
5 but expectations alone are not sufficient to sustain a contract impairment claim.
6 In light of the powers bestowed upon the PUCN by the Legislature, net metering
7 customers entered into agreements with their solar companies “subject to any
8 regulating legislation which the State might enact to protect its citizens.” *Koscot*
9 *Interplanetary, Inc. v Draney*, 90 Nev. 450, 458, 530 P.2d 108, 113 (1974).
10 Statutes do not provide “contractual” benefits or guarantees. *Id.*; see also *K-Mart*
11 *Corp v. State Indus. Ins. Sys.*, 101 Nev. 12, 20, 693 P.2d 562, 567 (1985). By
12 establishing net metering statutes, the Nevada Legislature did not promise that
13 net metering rates would remain at any particular level in perpetuity or that the
14 law would never change. See *id.*; see also *Robertson v. Kulongoski*, 466 F.3d 1114,
15 1117 (9th Cir. 2006).

16
17 *Conclusion*

18 The Court must affirm the challenged orders as to NEM2 customers
19 because Petitioners failed to carry their burden of proof that the orders violate
20 constitutional or statutory provisions, exceed the statutory authority of the PUCN,
21 were made upon unlawful procedure, affected by other error of law, are clearly
22 erroneous in view of the reliable, probative, and substantial evidence on the whole
23 record, are arbitrary or capricious, or characterized by abuse of discretion.

24
25 **ORDER**

26 IT IS ORDERED:

27 The Petition for Judicial Review is granted in part. The orders, insofar as
28 they concern NEM1 customers, are set aside and remanded because the orders

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were made in violation of constitutional and statutory provisions, and were made upon unlawful procedure.

The Petition is denied in part. The orders, insofar as they concern NEM2 customers, are affirmed.

September 12, 2016.


JAMES E. WILSON JR.
DISTRICT JUDGE

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the First Judicial District Court of
3 Nevada; that on the 12 day of September, 2016, I served a copy of this
4 document by placing a true copy in an envelope addressed to:

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6 the envelope sealed and then deposited in the Court's central mailing basket in the
7 court clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City,
8 Nevada, for mailing.

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Gina Winder
Judicial Assistant