

15-07041

Public Utilities Commission of Nevada
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Reply to: Reno

December 2, 2015

Breanne Potter
Assistant Commission Secretary
Public Utilities Commission of Nevada
1150 East William Street
Carson City, Nevada 89701-3109

Re: Docket Nos. 15-07041/15-07042; Legal Brief of The Alliance for Solar Choice

Dear Ms. Potter:

Please accept for filing in the above-referenced dockets, the attached Legal Brief Pursuant to Procedural Order No. 4 on behalf of The Alliance for Solar Choice ("TASC").

If you have any questions, please contact me directly at 775-326-4369.

Sincerely,

MCDONALD CARANO WILSON LLP


Kathleen M. Drakulich

KMD/ajb
Enclosures (as stated)
cc: All Parties of Record



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BEFORE THE PUBLIC UTILITIES COMMISSON OF NEVADA

Application of Nevada Power Company
d/b/a NV Energy for approval of a cost of
service study and net metering tariffs.

Docket No. 15-07041

Application of Sierra Pacific Power
Company d/b/a NV Energy for approval of a
cost of service study and net metering tariffs.

Docket No. 15-07042

FINAL LEGAL BRIEF PURSUANT TO PROCEDURAL ORDER NO. 4

The Alliance for Solar Choice (“TASC”), by and through its counsel Kevin Fox of the law firm Keyes, Fox & Wiedman, LLP and Kathleen M. Drakulich of the law firm of McDonald Carano Wilson, LLP, submits this Final Legal Brief Pursuant to Procedural Order No. 4 (“Brief”). This Brief is submitted to the Public Utilities Commission of Nevada (“Commission”) in connection with the Application of Nevada Power Company d/b/a NV Energy for Approval of a Cost of Service Study and Net Metering Tariffs (“Nevada Power Application”) and the Application of Sierra Pacific Power Company d/b/a NV Energy for Approval of a Cost of Service Study and Net Metering Tariffs (“Sierra Pacific Application”) (together with Nevada Power Application, “Applications”).

I. BACKGROUND

A. Procedural background and proposals of the parties.

NV Energy filed the Applications on July 31, 2015.¹ The Applications were assigned Docket Nos. 15-07041 (Nevada Power) and 15-07042 (Sierra Pacific) (together, “Dockets”). In the Applications, NV Energy proposes new net energy metering (“NEM” or “Net Metering”) tariffs that would impose discriminatory demand charges on residential and small commercial customers with DG for the first time and significantly increase the fixed charges paid by these

¹ Exhibit 1a at 2 and Exhibit 4a at 2.

1 customers.² The result is a significant reduction in bill savings for NEM customers, dramatically
2 undermining the financial benefits of Net Metering in Nevada. NV Energy attempts to justify its
3 proposed NEM rates with distribution and transmission load shapes that rely on a faulty
4 assumption that NV Energy must stand by to serve the total pre-solar loads of all NEM
5 customers, which could only happen if all NEM customers suffered an outage at once.³

6 Pursuant to the Commission's Procedural Order, the Commission's Regulatory
7 Operations Staff ("Staff") and interveners in the Dockets, including TASC, filed prepared direct
8 testimony on October 27, 2015. In its prepared direct testimony, Staff advanced a
9 counterproposal that would apply to both NEM1 and NEM2 customers.⁴ Staff's proposal—
10 based entirely on marginal cost of service studies approved by the Commission in Docket Nos.
11 14-05004 and 13-06002 in contravention of the Commission's direction in Docket No. 14-06009,
12 completely changes the Net Metering billing mechanics, essentially ending NEM and replacing it
13 with dramatically increased fixed charges and a payment for exported energy that would not
14 compensate NEM customers for the full value their energy exports provide. Like NV Energy's
15 proposal, Staff's proposal results in sharp decreases in bill savings for NEM customers,
16 threatening the economic viability of Net Metering as an option for Nevada's residential
17 ratepayers.

18 The Attorney General's Bureau of Consumer Protection ("BCP") also put forth a
19 counterproposal. According to BCP, the Commission should make no changes to the NEM rate
20 design until such changes may be considered in a general rate case.⁵ If at that time the
21

22 ² *The Alliance for Solar Choice v. Public Service Commission of Wisconsin*, Case No. 15CV153 (Cir. Ct. Oct. 30,
23 2015), p. 69, ll. 7-16 (questioning whether it would be discriminatory to treat net metering customers differently
24 than other customers that consume less than the average amount of electricity).

25 ³ Beyond Nevada law, which is discussed below, NV Energy's approach raises significant legal questions under
26 FERC regulations, which prohibit the imposition of discriminatory charges on qualifying facilities, *See* 18 C.F.R. §
27 292.305(a)(1)(ii), which include net-metered generators. *Sun Edison LLC*, 129 FERC ¶ 61,146 (2009) (recognizing
28 onsite generators that participate in NEM as eligible for QF status even if they make no net sale of electricity to a
utility). FERC regulations state that rates for sale of back-up power "Shall not be based upon an assumption (unless
supported by factual data) that forced outages or other reductions in electric output by all qualifying facilities on an
electric utility's system will occur simultaneously, or during the system peak, or both." *See*, 18 C.F.R. §
292.305(c)(1). NV Energy has not met this burden.

⁴ Exhibit 64a at 13-14.

⁵ Exhibit 62a at 3.

Commission finds that there is an unreasonable cost shift between NEM and non-NEM customers, the BCP urges the Commission to “adopt new NEM tariffs that reduce the rate paid for banked energy credits to exclude a portion of the volumetric distribution rate, positive payments for interclass subsidies, and riders recovering the costs of energy efficiency and other defined costs.”⁶ Alternatively, if the Commission finds no unreasonable cost shift, the Commission should adopt new NEM tariffs “in substantially the same form as presently exists.”⁷

For its part, TASC proposed that NEM customers continue to be subject to existing retail rates for residential and small commercial customers and that any additional costs associated with Net Metering be collected through interconnection and NEM application fees.⁸ The wealth of testimony generated by TASC in these Dockets demonstrates that this is the only outcome that satisfies the objectives of SB 374 and clearly advances the stated policy objectives of the state of Nevada by encouraging private investment in renewable resources, stimulating economic growth in Nevada, enhancing the continued diversification of energy resources in Nevada and streamlining the process for customers of a utility to apply for and install Net Metering systems.

At the conclusion of the hearing on November 20, 2015, the presiding Commissioner ordered the parties to brief a single over-arching legal question: “What provisions of NRS Chapter 704, as modified by Senate Bill 374, apply to NEM2?”⁹ In doing so, the Commission acknowledged the right of the parties to raise (and brief) specific legal issues under that broad inquiry.¹⁰ The presiding Commissioner’s request was premised in part on TASC’s request for such briefs relating to the legality of NV Energy’s proposal that NEM customers bear the cost of additional generation meters necessary to facilitate NV Energy’s proposed NEM tariffs.

Because TASC’s brief is responsive to the legal issue posed by the presiding Commissioner, this brief does not address all of the legal issues that may be associated with these Dockets, and any such issues are preserved for appeal notwithstanding the fact that they are

⁶ *Id.*

⁷ *Id.*

⁸ Exhibit 76a at 25.

⁹ Procedural Order 4 at ¶ 34; Transcript at pg. 1159, Line 20 through pg. 1160, Line 1.

¹⁰ Transcript at pg. at 1157, Lines 21 through pg. 1158, Line 1.

1 not addressed here. TASC in no way waives its right to assert any and all legal issues associated
2 with these Dockets on reconsideration or appeal of this matter. TASC's discreet legal issues
3 under the presiding Commissioner's directive are detailed below.

4 **B. Legal framework.**

5 NRS 704.766-NRS 704.775 codifies Nevada's NEM policy ("NEM provisions"). The
6 stated purpose of the NEM provisions is to "1. Encourage private investment in renewable
7 energy resources; 2. Stimulate the economic growth of this State; 3. Enhance the continued
8 diversification of the energy resources used in this State; and 4. Streamline the process for
9 customers of a utility to apply for and install net metering systems."¹¹ Towards that end, the
10 NEM provisions allow users of NEM systems, termed "Customer-generator[s],"¹² to offset their
11 requirements for electricity with energy produced by those systems.¹³

12 As originally enacted, NV Energy, as a "utility" under the NEM provisions,¹⁴ was
13 required to offer Net Metering to up to 100 customer-generators.¹⁵ As the financial and
14 environmental benefits of the NEM program have proved appealing to customer-generators over
15 time, the customer-generator threshold has increased to allow greater participation in the
16 program. In 2005, the threshold was increased to one (1) percent of peak capacity;¹⁶ in 2011, it
17 was increased to 2 percent of peak capacity;¹⁷ and in 2013, it was increased to three (3) percent
18 of peak capacity.¹⁸

19 Earlier this year, the Nevada Legislature ("Legislature") again modified the NEM
20 customer-generator threshold as the number of customer-generators was on course to exceed the
21 three (3) percent threshold before the next scheduled legislative session. As such, the Legislature
22 enacted Senate Bill 374 ("SB 374"). With SB 374, the Legislature completely removed the
23 customer-generator threshold, instead opting to make the NEM program a permanent part of
24

25 ¹¹ NRS 704.766(1)-(4).

26 ¹² *Id.* at 704.768.

27 ¹³ *Id.* at 704.775(2).

28 ¹⁴ *Id.* at 704.020; NRS 704.772

¹⁵ 1997 Statutes of Nevada at 778.

¹⁶ 2005 Statutes of Nevada at 1816.

¹⁷ 2011 Statutes of Nevada at 986.

¹⁸ 2013 Statutes of Nevada at 3341.

1 Nevada law. In removing the customer-generator threshold, the NEM provisions now provide
2 for the participation in the NEM program by an unlimited number of customer-generators that
3 otherwise satisfy the requirements of the NEM provisions as modified by SB 374.¹⁹

4 The Legislature provided for expanded and continued participation under two sequential
5 legal frameworks. Thus, Section 2.95(1)(a) of the bill provides as follows:

6 A utility shall offer net metering: (a) In accordance with the provisions of this
7 section, NRS 704.774 and 704.775, to the customer-generators operating within its
8 service area until the date on which the cumulative capacity of all net metering
9 systems for which all utilities in this State have accepted or approved completed
10 applications for net metering is equal to 235 megawatts.²⁰

11 And section 2.95(1)(b) states:

12 A utility shall offer net metering: . . . (b) After the date on which the cumulative
13 capacity requirement described in paragraph (a) is met, in accordance with a tariff
14 filed by the utility and approved by the Commission pursuant to section 2.3 of this act.²¹

15 Pursuant to this language, the Legislature directed that customer-generators continue to
16 be afforded Net Metering under the current NEM provisions until Section 2.95's 235 MW
17 threshold is met.²² After that threshold is met, customer-generators are entitled to participate in
18 the NEM program pursuant to a new NEM tariff approved by the Commission.²³

19 As stated above, to facilitate the adoption of a new NEM tariff, SB 374 requires that
20 "[e]ach utility . . . file with the Public Utilities Commission of Nevada a tariff required by section
21 2.3 of this act and a cost-of-service study."²⁴ Like Section 2.95(1)(b), Section 2.3 provides that
22 each utility must "in accordance with a tariff filed by the utility and approved by the
23 Commission, offer net metering to customer-generators who submit applications to install net
24 metering systems within its service territory" after the 235 MW threshold is met.²⁵ Section 4.5
25 states that the tariff filed by the utility "must establish the terms and conditions for net metering

26 ¹⁹ See SB 374 at Section 2.95.

27 ²⁰ *Id.* at Section 2.95(1)(a). (For purposes of this memorandum, this will be called the "235 MW threshold" or the
28 "235 MW cap.")

²¹ *Id.* at Section 2.95(1)(b).

²² *Id.* at Section 2.95(1)(a).

²³ *Id.* at Section 2.95(1)(b).

²⁴ *Id.* at Section 4.5.

²⁵ *Id.* at Section 2.3(1).

1 service for customer-generators who submit an application to the utility to install net metering
2 systems within the service territory of the utility after the date on which the tariff takes effect.”²⁶

3 II. DISCUSSION

4 **A. The plain language, structure and legislative history of SB 374 dictate that NRS**
5 **704.773(2) is applicable to NEM2 customers; therefore, NV Energy must pay the**
6 **costs of any additional meters required by the NEM2 tariff**

7 Under Nevada law, “when words in a statute are clear on their face, they should be given
8 their plain meaning unless such reading violates the spirit of the act.”²⁷ Thus, the plain meaning
9 of a statute controls unless it is clear that this meaning was not intended.²⁸ Moreover, “[i]t is a
10 well-recognized tenet of statutory construction that multiple legislative provisions be construed
11 as a whole, and where possible, a statute should be read to give plain meaning to all its parts.”²⁹
12 A construction that renders provisions or clauses of a statute meaningless should be avoided.³⁰ It
13 is only where a statute is ambiguous that the plain meaning rule becomes inapplicable and the
14 drafter’s intent becomes the controlling factor in the construction of the statute.³¹

15 As stated above, Section 2.95 of SB 374 establishes the parameters under which Net
16 Metering shall be made available both before and after the 235 MW threshold is met. Although
17 Section 2.95 amends NRS 704.773 to provide for the availability of Net Metering after the 235
18 MW threshold is met pursuant to a tariff approved by the Commission, nothing in SB 374’s
19 amendatory language renders the balance of NRS 704.773, or any other pre-existing provision of
20 NRS 704 not explicitly repealed by the bill, inapplicable to NEM2. Importantly, NRS
21 704.773(2) provides that “a utility . . . [m]ay, at its own expense and with the written consent of
22 the customer-generator, install one or more additional meters to monitor the flow of electricity in
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26 ²⁶ *Id.* at Section 4.5(2).

27 ²⁷ *Anthony Lee R., A Minor v. State*, 113 Nev. 1406, 1414, 951 P.2d 1, 6 (1997).

28 ²⁸ *Harris Associates v. Clark County School Dist.*, 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003).

29 ²⁹ *Diamond v. Swick*, 117 Nev. 671, 676, 28 P.3d 1087, 1090 (2001).

30 ³⁰ *Eggleston v. Costello*, 116 Nev. 492, 495, 998 P.2d 560, 562 (2000).

31 ³¹ *Harris Associates*, 81 P.3d at 534.

1 each direction.”³² And NRS 704.774(2) provides that a NEM customer whose Net Metering
2 system meets certain safety and quality standards “must not be required by the utility to . . .
3 [c]omply with additional standards or requirements . . . [or] [i]ninstall additional controls.”³³

4 NV Energy’s proposal for a NEM2 tariff includes the imposition of a charge upon new
5 customer-generators for a generation meter.³⁴ On cross-examination, NV Energy witness Laura
6 Walsh conceded that it was their view that the law allowed NV Energy to require NEM
7 customers to pay those costs. Specifically, Laura Walsh testified that the requirements of NRS
8 704.773(2), which requires the utility’s to bear the costs of additional meters for NEM
9 customers, “doesn’t apply [to NEM2].”³⁵ Ms. Walsh indicated that NV Energy’s view is that
10 Section 4.5 of SB 374 “gives the Commission, in approving the tariff under NEM2 for those
11 customers who install net metering after the cap is met, an ability to set the terms and conditions
12 which would include the ability to approve terms and conditions that require a generation meter,
13 and those terms and conditions must also include rates which would include the rate for recovery
14 of that generation meter.”³⁶ However, contrary to Ms. Walsh’s assertion, because nothing in SB
15 374 amended or repealed the requirements of NRS 704.773(2), 704.774(2) or any other pre-
16 existing NEM provision not explicitly repealed by the bill, the utility may not require NEM
17 customers to pay the expense of a generation meter.
18
19

20 The language of Section 2.95 merely describes the basic format of the rules to be
21 applicable to NEM2—a tariff approved by the Commission. It does not repeal, displace or make
22 inapplicable any pre-existing NEM provisions that are not specifically called out for repeal. As
23 such, the requirements of NRS 704.773(2) and NRS 704.774 apply to NEM2. Any other reading
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25

26 ³² NRS 704.773(2)(b).

27 ³³ *Id.* at 704.774(2)(a) & (c).

28 ³⁴ Table 3-4 of Vol. 2 (Narrative), page 48 of 187.

³⁵ Transcript at pg. 1104, Line 2.

³⁶ *Id.* at pg. 1104, Lines 11-19.

1 renders nugatory these provisions without an explicit statement to that effect from the
2 Legislature. Such a reading is inconsistent with basic principles of statutory construction, as
3 outlined above. Simply put, if the Legislature intended the particular NEM provision in NRS
4 704 to be inapplicable to NEM2, it would have stated so explicitly. And here that is not the case.
5 Therefore, NRS 704.773(2)(b), NRS 704.774(2)(b) and all other pre-existing NEM provisions
6 not explicitly repealed by SB 374 are applicable to NEM2.
7

8 The Legislature's amendments to NRS 704.773(5)(c) underscore the applicability of
9 NRS 704.773(2) and other pre-existing NEM provisions to NEM2. In allowing the Commission
10 to approve a tariff that must include the charges or rates it determines must be assessed pursuant
11 to Section 2.3 among the other charges the utility must assess pursuant to NRS 704.773(5), the
12 Legislature clearly made subsection 5 of NRS 704.773 applicable to NEM2. It raises form over
13 substance to suggest that the Legislature made subsection 5 applicable to NEM2, but not
14 subsection 2, or any of the other pre-existing NEM provisions not explicitly repealed. To
15 construe the statute as such would require the implicit repeal of a numerous statutory
16 provisions—a construction that would be inconsistent with the structure of the act.
17

18 Because the plain language and structure of SB 374 indicate that all the pre-existing
19 NEM provisions in NRS 704 not explicitly repealed by SB 374 apply to NEM2, there is no need
20 to resort to legislative history. That said, there is nothing in the legislative history that compels a
21 different conclusion. In describing the amendatory language to SB 374 that resulted in the
22 requirement that the Commission approve a NEM2 tariff, Kelly Richard, the committee analyst
23 for the Senate Committee on Commerce and Labor stated, with respect to the rules applicable to
24 NEM2, “[a]fter the date on which the cumulative capacity requirement is met, the utility is
25 required to offer net metering in accordance with a tariff filed by the utility pursuant to the bill
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1 and approved by the Commission.”³⁷ Shawn Elicegui, testifying for NV Energy, testified as to
2 his understanding of the process for establishing NEM2 rules as follows: “Specifically, the
3 company will file a tariff. The PUCN will follow its standard procedures, conduct an evidentiary
4 public hearing, accept input from all stakeholders, and issue a ruling in the process it does for
5 every other tariff or pricing filing made by the company.”³⁸ At no point did any of the
6 participants in the hearing—neither the sponsors of the amendment nor the stakeholders present,
7 including NV Energy—indicate that any of the pre-existing NEM provisions in NRS 704 not
8 explicitly repealed would be inapplicable to the NEM2 tariff.
9

10 In light of the foregoing, the plain language and structure of SB 374 indicates that NRS
11 704.773(2)(b) and NRS 704.774(2)(b), as well as all the pre-existing NEM provisions in NRS 704
12 not explicitly repealed, apply to NEM2. This is the only construction that adheres to the plain
13 meaning of the language, avoids rendering specific statutory provisions meaningless and reads
14 the entire statutory scheme in a harmonious fashion. This reading is also the only reading
15 consistent with the legislative history underlying the bill. Therefore, to the extent NV Energy
16 proposes that NEM customers provide additional meters at their own expense, the proposal must
17 be rejected as inconsistent with NRS 704.773(2)(b). NV Energy must provide for such meters at
18 its own expense.
19

20 **B. The Commission cannot adopt the proposals offered by either Staff or BCP**
21 **because neither constitutes “Net Metering” under Nevada law.**

22 SB 374 clearly provides that a utility must offer Net Metering to customer-generators
23 both prior to and after the 235 MW cap provided by Section 2.95(1)(a) of SB 374 is met.³⁹ SB
24 374 preserves the basic mechanics of Net Metering, including the netting of electricity, and now
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27 ³⁷ Senate Committee on Commerce and Labor, May 25, 2015 (Testimony of Kelly Richard).

28 ³⁸ *Id.* (Testimony of Shawn Elicegui).

³⁹ Section 2.3 of SB 374 states that a utility “shall... offer net metering,” and Section 2.95 of SB 374 also states that a utility “shall offer net metering.”

1 allows the Commission to determine appropriate rates for all NEM2 customers.⁴⁰ SB 374 did not
2 intend to allow the Commission to replace Net Metering with a completely different construct.⁴¹

3 The term “Net Metering” is specifically defined in NRS 704.769 as “measuring the
4 difference between electricity supplied by a utility and electricity generated by a customer-
5 generator and then fed back to the utility over the applicable billing period.”⁴² Looking to the
6 clear and unambiguous provisions of the statute, electricity is what is being measured pursuant to
7 NRS 704.769; the valuation of that electricity is not.⁴³ Furthermore, NRS 704.775, which
8 establishes criteria for Net Metering billing and the calculation of net energy measurement of
9 excess electricity, will not be complied with if Staff’s proposal is adopted.⁴⁴ Subsection 2(c)(2)
10 of NRS 704.775 is as follows:

11 2. The net energy measurement must be calculated in the following manner:

12 (c) If the electricity generated by the customer-generator which is fed
13 back to the utility exceeds the electricity supplied by the utility during the billing
14 period:

15 (2) The excess electricity which is fed back to the utility during the
16 billing period is carried forward to the next billing period as an addition to the
17 kilowatt-hours generated by the customer-generator in that billing period. If the
18 customer-generator is billed for electricity pursuant to a time-of-use rate schedule,
19 the excess electricity carried forward must be added to the same time-of-use
20 period as the time-of-use period in which it was generated unless the subsequent
21 billing period lacks a corresponding time-of-use period. In that case, the excess
22 electricity carried forward must be apportioned evenly among the available time-
23 of-use periods.⁴⁵

24 Clearly, the netting of energy and the use of kilowatt-hours as the measurement creates the
25 fundamental structure that the Net Metering program is based upon.

26 Since the plain language of NRS 704.769 and NRS 704.775 shows that electricity itself is
27 what is being measured, there is no need to resort to legislative history. Nevertheless, the
28 conclusion is supported by the legislative history of SB 255 (1997), which originally created the

26 ⁴⁰ See, Section 2.3 of SB 374.

27 ⁴¹ *Id.*

28 ⁴² NRS 704.769.

⁴³ *Id.*

⁴⁴ NRS 704.775

⁴⁵ *Id.*

1 Net Metering paradigm in Nevada. During a discussion that occurred in a meeting of the Senate
2 Committee on Commerce and Labor on May 7, 1997, the Committee was advised by Nevada's
3 Consumer Advocate as to how the Net Metering program would function. Discussing the
4 mechanics of the Net Metering program, Fred Schmidt, from The Consumer Advocate's office,
5 had the following information to offer, which was captured in the committee minutes from that
6 day:

7
8 Fred Schmidt, Consumer's Advocate, Office of Advocate for Customers of Public
9 Utilities, Office of the Attorney General, noted a number of states and several
10 countries who have adopted similar provisions. He asserted S.B. 255 reflected the
11 wishes of many constituents who favor solar power development. Mr. Schmidt
12 maintained this legislation would essentially give customers a choice to develop
13 this technology by putting a photovoltaic system on their home. He contended
14 S.B. 255 was about homeowners acquiring energy independence, as well as
15 reflecting how an electric meter can work both ways; so when you (the customer)
16 are taking electricity from the utility it records the amount of kilowatt hours being
17 purchased. However, when a homeowner would generate (electricity) a meter can
18 read the amount of electricity going back into the system, since electricity flows
19 both ways. This would insure those customers who put a photovoltaic system on
20 their property have the opportunity to have this credited to their account.⁴⁶

21 Additionally, the sponsor of SB 255 (1997), Senator Dina Titus, addressed the Nevada Assembly
22 Committee on Government Affairs on June 21, 1997 in support of the legislation, and described
23 the mechanics of Net Metering to allow a customer-generator to receive a "credit for the energy
24 he/she produced by running the meter backwards."⁴⁷

25 In 2015, when SB 374 was adopted, the legislature did not amend NRS 704.769 or NRS
26 704.775, thus incorporating the existing definition and ensuring that the existing electricity-
27 netting structure remains.⁴⁸ As noted above, the plain language and structure of SB 374 requires
28 that the pre-existing Net Metering provisions in NRS 704 apply to NEM2. Therefore, in order to
qualify as Net Metering under Nevada law, the electricity must be measured and netted as
described in NRS 704.769. This requirement does not leave room for a separate and distinct
valuation and cannot allow for a buy-sell energy pricing structure.

⁴⁶ Senate Committee on Commerce and Labor, May 7, 1997. (Testimony of Fred Schmidt.)

⁴⁷ Assembly Committee on Government Affairs, June 21, 1997. (Testimony of Senator Dina Titus.)

⁴⁸ SB 374 (2015).

Staff's proposal would create a different value for the "excess" portion of the electricity generated, as compared to what the customer-generator would pay at retail.⁴⁹ Because such a proposal is not measured in netted electricity, and is instead measured by a valuation of that electricity, such would not be Net Metering under Nevada law. Similarly, BCP's proposal that the Commission reduce the rate paid for "banked" energy would also create a value calculation for customer-generators instead of an electricity-based measurement as required by NRS 704.769.⁵⁰ For these reasons, Staff and BCPs recommendations are inconsistent with the requirements of NRS Chapter 704 and SB 374, which require utilities to continue to offer Net Metering as that term is defined in Nevada law, and therefore must be rejected.

In addition, Staff's proposal, which is based entirely on the marginal cost of service studies approved by the Commission in Nevada Power (Docket No. 14-05004) and Sierra Pacific Power's (Docket No. 13-06002) last general rate cases,⁵¹ is contrary to the direction that the Commission provided in Docket No. 14-06009 regarding the foundation for determining whether NEM customers should be subject to different treatment. In that Docket, the Commission stated that the "basis for reexamination" of the treatment of NEM customers "would be a formal cost of service study" and that "[t]o date no such study has been conducted in Nevada. So, there is no basis to conclude whether the current arrangements are just and reasonable."⁵² The Commission further found that a "cost of service study will allow the Commission and all participants the opportunity to examine if there is any meaningful cost difference in serving NEM customers from currently existing customer classes such that establishment of a new customer class for NEM customers would be appropriate and justified...Failure to gather this information commits customers to a course of inaction and the potential for unjust and unreasonable rates—a potential outcome that is unlawful and fully avoidable."⁵³ Staff's proposal, based on cost of service studies that gave no consideration to the cost to serve NEM versus non-NEM customers, results in the

⁴⁹ Testimony of Anne Marie Cuneo, page 27, October 27, 2015.

⁵⁰ Testimony of William Marcus, page 3, October 27, 2015.

⁵¹ See, Hearing Transcript at page 513, line 11 through page 526, line 15.

⁵² Docket No. 14-06009, Order at Report of the Commission, page 23. March 31, 2015.

⁵³ *Id* at 24, 25

1 “unjust and unreasonable rates” identified by the Commission in Docket No. 14-06009, a result
2 that the Commission identified as “unlawful and fully avoidable”.

3 **C. The proposals of NV Energy and Staff fail to comply with the Nevada**
4 **Legislature’s stated purpose behind Nevada’s Net Metering laws.**

5 NRS 704.766-NRS 704.775 codifies the state of Nevada’s Net Metering policy. The
6 stated goal of Nevada’s NEM provisions, which is reiterated by SB 374, is as follows:

7
8 It is hereby declared to be the purpose of the Legislature in enacting NRS 704.766-
9 704.775, inclusive to:

- 10 1. Encourage private investment in renewable energy resources;
11 2. Stimulate the economic growth of this State;
12 3. Enhance the continued diversification of the energy resources used in this
13 State; and
14 4. Streamline the process for customers of a utility to apply for and install net
15 metering systems.”⁵⁴

16 As noted above, under Nevada law, “when words in a statute are clear on their face, they should
17 be given their plain meaning unless such reading violates the spirit of the act.”⁵⁵ The plain and
18 simple meaning behind the statutory authority copied above requires that any Net Metering
19 structure be inclusive of all four of these objectives. This would include any NEM2 tariff. It is
20 also important to recognize that these are not just general goals of the State, these are the policy
21 objectives behind Net Metering specifically. Private investment of infrastructure by NV Energy
22 unrelated to Net Metering is irrelevant to these four requirements.

23 Instead of furthering the stated goals of the Nevada legislature, NV Energy’s proposal in
24 these Dockets would frustrate them. NV Energy has acknowledged that the NEM2 rates
25 proposed in these Dockets might not reduce a customer’s overall energy costs.⁵⁶ It is therefore
26 difficult to ascertain how any of the four stated policy goals could be furthered if the economic

27 ⁵⁴ NRS 704.766(1)-(4).

28 ⁵⁵ *Anthony Lee R., A Minor v. State*, 113 Nev. 1406, 1414, 951 P.2d 1, 6 (1997).

⁵⁶ Narrative, p. 48.

1 motivation for pursuing an independent energy resource is captured by the utility and not the
2 customer through additional charges and fees. With respect to Staff's proposal, Staff cannot
3 possibly argue that the four policy requirements are implicitly included in its proposal when such
4 would also result in dramatically reduced bill savings for all NEM customers, and the proposal is
5 not even Net Metering under Nevada law. In fact, during the hearing Staff acknowledged that it
6 conducted no analysis to determine whether its proposal will encourage private investment in
7 renewable energy, will enhance continued diversification of energy resources used in Nevada or
8 will stimulate economic growth in Nevada.⁵⁷

10 The provisions of NRS 704.766 clearly survive the adoption of SB 374, and indeed were
11 restated in SB 374 itself. Therefore, the Commission should demand a proposal that is reflective
12 of each of these four policy goals in both design and implementation.

13
14 **D. Staff's Proposal to apply NEM2 rates to all Net Metering customers violates
Nevada law and must be rejected.**

15
16 A considerable amount of discussion and testimony offered in these Dockets centered on
17 the notion of "grandfathering" NEM1 customers.⁵⁸ Only Staff's proposal would apply NEM2
18 rates to NEM1 customers. No other party to these Dockets, including NV Energy, suggested
19 such a result. As demonstrated below, Staff's proposal with regard to "grandfathering" fails to
20 comply with existing Nevada law and the provisions of SB 374.

21
22 **1. The Commission cannot adopt Staff's proposal to apply NEM2 rates to NEM1
customers that have purchased and installed Net Metering systems prior to the
23 realization of the 235 MW cap pursuant to Nevada law.**

24
25
26
27 ⁵⁷ Hearing Transcript at page 545 line 19 through page 546 line 2.

28 ⁵⁸ For purposes of this brief, the term "grandfathering" refers to the determination that the new tariff established by
the Commission pursuant to SB 374 will not apply to NEM1 customers.

1 As a preliminary matter, pursuant to SB 374, there are now two subsets of NEM1
2 customers.⁵⁹ The first subset consists of NEM1 customers that have purchased, installed, and
3 interconnected Net Metering systems prior to the realization of the 235 MW cap.⁶⁰ The second
4 subset consists of those remaining NEM1 customers that have only submitted completed
5 applications for Net Metering prior to the realization of the 235 MW cap, but have not yet
6 interconnected a NEM system.⁶¹ Staff's proposal would apply the new NEM2 rate to all NEM
7 customers, including both subsets of NEM1 customers. As stated above, Staff's proposal does
8 not meet the definition of Net Metering in NRS 704.769, would not net electricity as required by
9 NRS 704.769, and would not account for such in accordance with NRS 704.775.⁶² For this
10 reason alone, such a proposal may not be implemented and imposed upon NEM1 customers, or
11 any future NEM customers.
12

13 Furthermore, in SB 374, the Legislature draws clear distinctions between NEM1
14 customers and NEM2 customers, with the 235 MW cap being the bright-line distinction between
15 the two sets of customers.⁶³ Specifically, pursuant to Section 2.95(1)(a) of SB 374, a utility must
16 offer Net Metering to customer-generators operating within its service area until the date on
17 which the cumulative capacity of all Net Metering systems is equal to 235 MW.⁶⁴ Stated
18 differently, a utility must offer Net Metering, as defined in NRS 704.769, to all NEM1
19 customers. After establishing that requirement, Section 2.95(1)(b) addresses future NEM2
20 customers.⁶⁵ Section 2.95(1)(b) requires the utility to offer Net Metering to NEM2 customers
21
22
23
24

25 ⁵⁹ Section 2.3(3) of SB 374.

26 ⁶⁰ *Id.*

27 ⁶¹ *Id.*

28 ⁶² Exhibit 64a, at 27.

⁶³ Section 2.95(1) of SB 374.

⁶⁴ Section 2.95(1)(a) of SB 374.

⁶⁵ Section 2.95(1)(b) of SB 374.

pursuant to a new tariff approved by the Commission.⁶⁶ But, in Section 2.3(3) of SB 374, the Legislature creates a carve-out for those NEM1 customers that have submitted completed applications for NEM Systems, and authorizes the Commission to specifically consider this subset of NEM customers into any NEM2 tariff.⁶⁷ Simply put, if the Legislature intended for those NEM1 customers that have already installed and interconnected NEM systems to be subject to the same tariff as NEM2 customers, it would have plainly provided for such a requirement in this section and not instead established the NEM1 / NEM2 dichotomy that now exists. It also would not have made the carve-out for those customers that have merely submitted completed applications. This demonstrates that the Legislature did not intend for any NEM2 proposal that would group all NEM customers into the same rate tariff. It further and more specifically demonstrates that those NEM1 customers that have already installed and interconnected NEM systems may not be subjected to any new NEM2 tariff.

Finally, any decision to apply the NEM2 rates to those NEM1 customers that have already purchased and installed net-metering systems prior to the realization of the 235MW cap could be considered a governmental taking and therefore should not be imposed. Takings under the U.S. Constitution's 5th Amendment (applied to the states thorough the 14th Amendment) can occur when a "regulation goes too far."⁶⁸ The Nevada Courts have interpreted the Nevada's taking's clause to specifically apply to all types of privately owned property, including personal

⁶⁶ *Id.*

⁶⁷ Section 2.3(3) of SB 374. One might argue that all persons that participate in the Net Metering program have, at one point in time, submitted completed applications for participation, and therefore the new NEM2 tariff can apply to any participating customer-generator dating all the way back to 1997. While perhaps it is true that every customer-generator has at some time submitted a completed application, it would be illogical to assume that the "submitted completed applications" provision of SB 374 is meant to be so broadly inclusive because, had the Legislature really intended for such, it could have simply included all customer-generators within the Commission's determination explicitly.

⁶⁸ *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306, 122 S. Ct. 1465, 1470, 152 L. Ed. 2d 517, 530, 2002 U.S. LEXIS 3028, *1, 70 U.S.L.W. 4260, 2002 Cal. Daily Op. Service 3495, 10 A.L.R. Fed. 2d 681, 32 ELR 20627, 54 ERC (BNA) 1129, 15 Fla. L. Weekly Fed. S 203 (U.S. 2002)

1 property.⁶⁹ The Supreme Court of Nevada has stated that the Nevada taking clause
2 "contemplates expansive property rights" and provides the foundation of Nevada's "rich history
3 of protecting private property owners against government takings," while allowing for public
4 safety and police powers.⁷⁰ Applying a NEM2 tariff to a NEM1 customer that has made an
5 investment in infrastructure pursuant to a Nevada initiative that promotes private investment in
6 renewable resources, a stated policy that still exists today, could possibly have takings
7 implications and therefore should be avoided.
8

9 For all these reasons, existing Nevada law and the provisions of SB 374 require that all
10 NEM1 customers that have installed and interconnected Net Metering systems be
11 "grandfathered" and not subject to any NEM2 rates, and the Commission must reject Staff's
12 proposal with respect to applying any NEM2 tariff to all NEM1 customers who have purchased
13 and installed net-metering systems prior to the realization of the 235MW cap.
14

15 **2. The Commission should find that all NEM1 customers that have submitted a**
16 **completed application to install a Net Metering system but have not yet**
17 **interconnected such system should take service under existing NEM1 rates.**

18 As noted above, Staff's proposal to apply any NEM2 rate tariff to NEM1 customers that
19 have installed and interconnected their NEM systems is not authorized under NRS Chapter 704
20 and SB 374. For those customers that have submitted completed applications, but not yet
21 interconnected their NEM facilities, the Legislature has provided the Commission with explicit
22 instructions with respect to the applicability of a NEM2 rate tariff.⁷¹ Section 2.3(3) of SB 374
23 requires that the Commission determine whether and to the extent which any NEM2 tariff is
24 applicable to customer-generators that have "submitted a complete application" to install a Net
25

26
27 ⁶⁹ *Asap Storage, Inc. v. City of Sparks*, 123 Nev. 639, 646-647, 173 P.3d 734, 739, 2007 Nev. LEXIS 79, *11-13,
123 Nev. Adv. Rep. 61 (Nev. 2007)

28 ⁷⁰ *Id.*

⁷¹ *Id.*

1 Metering system before the 235MW cap is reached.⁷² The Legislature chose to direct the
2 Commission to examine the applicability of the new tariff to just those customers that have
3 submitted completed applications, as opposed to tying it to all existing customer-generators and
4 those customers that have submitted complete applications.⁷³

5
6 The NEM2 rate should not apply to the subset of NEM1 customers that have submitted a
7 completed application only. NRS 704.7822 provides that a solar photovoltaic system will be
8 deemed to have generated 2.4 kilowatt-hours of electricity for each 1.0 kilowatt of actual energy
9 it produces, if certain criteria are met, one of which being that the system must have been placed
10 into operation on or before December 31, 2015.⁷⁴ Since NV Energy will realize these portfolio
11 credits at this 2.4x multiplier for every NEM system installed pursuant to its SolarGenerations
12 program before the end of the year, it follows and is consistent with the Legislature's stated
13 policy goals in NRS 704.766 that the existing NEM1 rates should be applicable so as to further
14 encourage private investment in renewable energy resources in Nevada.⁷⁵ Such is also consistent
15 with the Legislature's stated policy initiatives for Nevada's Solar Systems Incentive Program,
16 namely:
17

18 The Legislature hereby finds and declares that it is the policy of this State to:

- 19 1. Expand and accelerate the development of solar distributed generation
20 systems in this State; and
- 21 2. Establish a sustainable and self-sufficient solar renewable energy industry in
22 this State in which solar energy systems are a viable mainstream alternative for
23 homes, businesses and other public entities.⁷⁶

24 Clearly the Nevada Legislature has delivered a policy objective of expanding and promoting the
25 development and investment in renewable resources. For all these reasons, the NEM2 rate

26 ⁷² *Id.*

27 ⁷³ *Id.*

28 ⁷⁴ NRS 704.7822.

⁷⁵ NRS 704.766

⁷⁶ NRS 701B.190

1 should not apply to the subset of NEM1 customers that have submitted a completed application
2 only.

3 **3. The Commission should also “grandfather” all NEM1.5 customers**
4 **into existing NEM1 rates.**

5
6 There are many NEM customers that have submitted applications to install NEM systems
7 prior to the existence and application of an order from the Commission in these Dockets and also
8 before the deadline of December 31, 2015 established by SB 374, who initiated the
9 interconnection process following the realization of the 235 MW cap (for purposes herein, these
10 customers may be called “NEM1.5” customers). Many of these customers would have been
11 under the impression that the 235 MW cap would not be reached until the first quarter of 2016
12 given NV Energy’s testimony to the legislature when SB 374 was being discussed and the
13 resultant media coverage of the same.⁷⁷ Not surprisingly, given these facts, SB 374 does not
14 guide the Commission as to what tariff should apply to these NEM1.5 customers, and,
15 importantly, does not preclude the Commission from treating these customers as NEM1
16 customers. For these reasons, the existing NEM1 tariff, the tariff in place when these NEM1.5
17 customers made their decision to participate in this program, should apply. Such a determination
18 would be consistent with the four overarching policy principals that guide the entirety of the
19 NEM process as well.⁷⁸
20
21

22 **III. CONCLUSION**

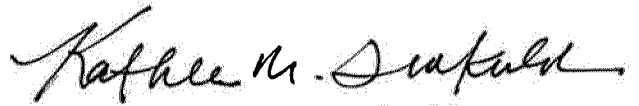
23 In light of the foregoing, the Commission should reject the proposals of NV Energy, Staff
24 and the BCP. NV Energy’s proposal is inconsistent with the requirements of the pre-existing
25 NEM provisions, including the requirement that it pay the costs of additional meters, and the
26

27 ⁷⁷ See, Hidalgo, Jason. “Net Metering, Solar Cap Debate Sizzles in Nevada.” *Reno Gazette-Journal*. N.p., 20 May
28 2015. Web. [http://www.rgj.com/story/money/business/2015/05/17/net-metering-solar-cap-debate-sizzles-](http://www.rgj.com/story/money/business/2015/05/17/net-metering-solar-cap-debate-sizzles-nevada/27481471/)
[nevada/27481471/](http://www.rgj.com/story/money/business/2015/05/17/net-metering-solar-cap-debate-sizzles-nevada/27481471/)

⁷⁸ NRS 704.766.

1 stated policy objectives of the state of Nevada relating to Net Metering. Neither Staff nor BCP's
2 proposals constitute "Net Metering," as that term is defined under Nevada law. And Staff's
3 proposal, like NV Energy's, is inconsistent with Nevada's Net Metering policy. Staff's proposal
4 is also inconsistent with state law, and therefore must be rejected, because it provides for the
5 applicability of NEM2 rates to all NEM customers, including NEM1. The only proposal
6 consistent with the requirements of state law and policy is that of TASC. The Commission
7 should therefore approve TASC's proposal without modification.

8 RESPECTFULLY SUBMITTED on the 2nd day of December, 2015.

9
10 

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I hereby certify that I have on this 2nd day of December, 2015, caused to be served by hand-delivery, electronic mail or U.S. Mail, a true and correct copy of the foregoing document via email to each of the persons identified on the following list:

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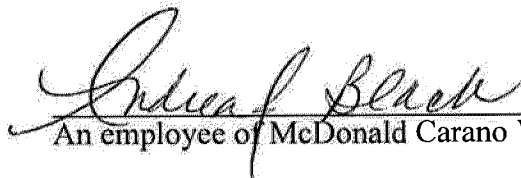
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22 Respectfully submitted this 2nd day of December, 2015.

23 
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