

## AG decisions in Vivint Solar case raise concerns

By Kevin Robinson-Avila / Journal Staff Writer

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A Corrales lawmaker has asked for an investigation into the attorney general's handling of a now-settled case that alleged unfair trade practices by a massive solar company.



State Rep. Daymon Ely

State Rep. Daymon Ely, a Democrat, has asked the Office of the State Auditor to look into why Attorney General Hector Balderas agreed to seal all documents in a case against Vivint Solar Inc., and why the AG didn't pursue any specific restitution for thousands of consumers in a settlement it reached with Vivint last fall.

Ely says Balderas agreed to a protective order requested by Vivint that apparently bars public access to more than 1 million documents in the case. The order, approved in August 2020 by 2nd Judicial District Court Judge Clay Campbell, obstructs the ability of consumers to gather critical evidence when pursuing individual complaints against Vivint, and it may violate the state's Inspection of Public Records Act, according to Ely and attorneys seeking restitution for clients.

Ely asked State Auditor Brian Colón to investigate the AG's handling of the case, requesting in particular that Colón examine why no relief was included in the settlement agreement for roughly 2,300 New Mexicans who were allegedly defrauded by Vivint, and why the AG didn't oppose Vivint's request to seal most documents produced during discovery in the case.



AG Hector Balderas

“The AG’s office appears to be complicit in hiding from public scrutiny what could be a million documents, including critical documents on the allegedly abusive practices employed by Vivint,” Ely said in a June 21 letter to Colón. “... An investigation into why the AG did not oppose sealing these documents will help me understand if the Legislature needs to review current IPRA statutes to close what appears to be an unacceptable, gaping loophole to our philosophy of open public records.”

Stephanie Telles, spokesperson for the State Auditor, said Colón’s staff is looking into Ely’s request.

“An examination was opened as a result of receiving the letter,” Telles told the Journal.

### **Background**

Balderas initially filed the case against Vivint in 2018, accusing the solar installation firm of deceptive marketing practices that resulted in consumer fraud and racketeering involving thousands of homeowners in central New Mexico. The lawsuit said Vivint applied “high pressure” and “illegal” door-to-door sales tactics to “ensnare” uninformed consumers into binding 20-year power-purchase agreements that ended up costing homeowners more for the electricity they consume over time than they previously paid Public Service Company of New Mexico.

Although Vivint denied the allegations, it finalized a settlement with the AG in December agreeing to modify its marketing practices to ensure all prospective future customers are fully informed about the details of contracts. It also agreed to a \$1.95 million settlement payment, including about \$1.24 million for the AG’s office and \$709,000 in legal expenses and attorney fees for a private law firm that represented the AG in the case.

Vivint was acquired by national firm SunRun last fall, but the legal agreements bind the new owners as well.

### **No restitution**

The settlement, however, included no restitution for individual consumers impacted by Vivint’s previous marketing practices. The original lawsuit did ask the court to declare all Vivint’s prior agreements with homeowners as “voidable” if affected customers choose to cancel them, plus monetary compensation for customers lured into contracts under false premises.

But those items weren’t included in the final settlement.

Balderas told the Journal in May that the case outcome can help shield potential solar customers from deceptive marketing going forward, and that settlement funds will be reinvested in future AG consumer protection efforts. In addition, the outcome may strengthen individual claims by Vivint customers who pursue restitution on their own with private lawyers, Balderas added.

Those comments – included in Journal stories published in May – encouraged Ely to look deeper into the Vivint case. And that, in turn, raised concerns about the settlement, which provides no direct relief for victims, the legislator said.

“It seems clear to me this is not a good settlement,” Ely told the Journal. “It doesn’t appear to benefit consumers.”

Balderas said individual consumers can achieve better results on their own than the AG can.

“Private parties can potentially secure three times more in damages than the state could,” Balderas told the Journal on Thursday. “It’s more advantageous for consumers to pursue their own claims.”

### **Shielded from scrutiny?**

Nevertheless, the protective court order shielding most case documents from public scrutiny makes it harder for individuals to seek relief.

“Vivint produced more than 1 million documents in the case, and they’re all sealed,” Ely said. “... They should be public record, and I don’t get why they’re not. By not opposing Vivint’s request to make all those documents confidential, the AG has basically agreed to a broad exception to IPRA, and the Legislature needs to look at that.”

Balderas said his office agreed to the confidentiality order because it protects private information about individuals gathered during discovery.

“My priority is to protect the privacy of victims,” Balderas told the Journal. “I don’t oppose disclosure as long as there’s consent from the victims. Our interest was to protect their privacy until they provide that consent.”

### **Threat to IPRA?**

But lawyers representing individual consumers said the protective order has impeded efforts to gather evidence.

Consumer protection attorney Nicholas Mattison, for example, was unable to access case documents last year when representing a married couple suing Vivint over a solar contract the couple signed under allegedly false promises by Vivint.

Mattison filed a court brief opposing Vivint’s confidentiality request before Judge Campbell signed the order, but to no avail. Mattison’s brief – which accused Vivint of hiding information under the guise of “trade secrets” – said the order sets a “dangerous” precedent for IPRA.

“If information could be shielded from IPRA by a private agreement between a public body (the AG) and the party providing the information (Vivint), the IPRA would be severely weakened,” Mattison wrote in his brief. “... More troubling still, it seems likely that Vivint’s express intent was to evade IPRA.”

Patrick Griebel of Mars Griebel Law Ltd. has also been unable to access most documents in cases he’s pursuing.

“It’s my belief that information and evidence gathered by the AG when investigating a case belongs to the people of New Mexico,” Griebel told the Journal. “The victims in this case should have the tools to pick up where the AG left off. The AG’s investigation was done on taxpayers’ money, and if the settlement agreement means everyone is on their own to pursue restitution, then we should have access to the fruits of that investigation.”

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