

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on April 15, 2021

COMMISSIONERS PRESENT:

John B. Howard, Interim Chair
Diane X. Burman, concurring
James S. Alesi
Tracey A. Edwards

CASE 15-E-0751 - In the Matter of the Value of Distributed Energy
Resources.

CASE 14-E-0151 - Petition of Hudson Valley Clean Energy, Inc. for
an Increase to the Net Metering Minimum
Limitation at Central Hudson Gas & Electric
Corporation.

ORDER MODIFYING SEPARATE SITE REQUIREMENTS

(Issued and Effective April 15, 2021)

BY THE COMMISSION:

INTRODUCTION

On September 3, 2020, Borrego Solar Systems Inc.
(Borrego or Petitioner) filed a petition for a declaratory
ruling or clarification (Petition) regarding the Public Service
Commission's (Commission) requirements for determining whether
two or more projects are deemed sufficiently "separate" to
comply with the 5 megawatt (MW) capacity limit for Value Stack
compensation under the Value of Distributed Energy Resources

(VDER) tariffs.¹ In particular, the Commission requires three factors, including: 1) each facility must be separately metered and interconnected; 2) each facility must be operationally independent; and, 3) each facility must be located on a separate site.² Borrego seeks relief from the requirement that projects be located on separately deeded properties in order to satisfy the separate site factor.

By this Order, the Commission addresses the Petition filed by Borrego and finds that the separate site requirement may be satisfied through other means than a separate deed. While a separate deed will continue to be sufficient, developers such as Borrego may also satisfy the separately sited component of the three-factor test by providing a unique Section-Block-Lot (SBL) or Borough-Block-Lot (BBL) number and a separate metes and bounds description recorded via a separate memorandum of lease.

THE PETITION

Borrego reports that it is a solar project developer that is developing nine Community Distributed Generation (CDG) projects in the service territory of Niagara Mohawk Power Corporation d/b/a National Grid (National Grid). Borrego notes in the Petition that each of these projects holds a fully executed interconnection services agreement with National Grid, and seven of the nine are fully permitted. Borrego explains that it contacted National Grid in December 2019 for guidance on

¹ Case 15-E-0751, Value of Distributed Energy Resources, Order on Phase One Value of Distributed Energy Resources Project Size Cap and Related Matters (issued February 22, 2018) (Project Size Cap Order).

² Case 14-E-0151, et al., Net Energy Metering, Order Raising Net Metering Minimum Caps, Requiring Tariff Revisions, Making Other Findings, and Establishing Further Procedures (issued December 15, 2014) (Net Metering Tariff Order).

interpretation of the three-factor test and the separate site requirement. According to Borrego, National Grid stated that the requirements were satisfied if the project had its own lease, including a metes and bounds description and a unique SBL number. However, Borrego states that in August 2020, National Grid admitted a misinterpretation of the three-factor test and advised Borrego that each project would now require a separate deed.

Borrego argues that it relied on National Grid's original interpretation and did not plan to seek formal subdivision of the nine projects. Borrego argues that requiring formal subdivisions to create separate deeds will create delays in construction and financing, adding carrying costs for the redesign of the projects, and the potential loss of the investment tax credit (ITC). Borrego claims that because these nine projects are already located on separate sites and comply with the 5 MW rated capacity limits under the CDG program and the Project Size Cap Order, adhering to strict deeded parcel requirements provides no real benefits and only imposes a significant hardship.

Borrego requests one of the following forms of relief from the Commission: 1) issuance of a declaratory ruling that finds the requirements and Value Stack eligibility are met where projects have unique SBL numbers, separate leases, and separate metes and bounds descriptions recorded via a separate memorandum of lease uniquely identifying each project within a 5 MW rated capacity limit; 2) a ruling clarifying that the definition of a separate site is not limited to those projects with a separate deed but also projects with unique SBL numbers, separate leases, and separate metes and bounds descriptions recorded via a separate memorandum of lease uniquely identifying each project

within a 5 MW rated capacity limit; or 3) a declaratory ruling establishing that Borrego's nine separately leased projects meet the requirements for net metering and Value Stack eligibility.

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking (Notice) was published in the State Register on September 30, 2020 [SAPA No. 15-E-0751SP33]. The time for submission of comments pursuant to the Notice expired on November 30, 2020. Comments were received from Certain Solar, Inc. d/b/a NineDot Energy (NineDot Energy), Distributed Sun LLC (Distributed Sun), the Joint Utilities,³ New York Solar Energy Industries Association (NYSEIA), and U.S. Light Energy. The comments are summarized in Appendix A and addressed below.

LEGAL AUTHORITY

The Commission has the authority to direct the treatment of Distributed Energy Resources (DER) by electric corporations pursuant to, inter alia, Public Service Law (PSL) Sections 5(2), 66(1), 66(2), and 66(3). Pursuant to the PSL, the Commission may determine what treatment will result in the provision of safe and adequate service at just and reasonable rates consistent with the public interest and the efficiency of the electric system.

³ The Joint Utilities include Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

DISCUSSION AND CONCLUSION

In evaluating whether solar projects meet the 2 MW limit for purposes of remote net metering under PSL §66-j, the Commission adopted a three-factor test whereby each facility must be: 1) "separately metered and interconnected to the utility grid;" 2) "operate[d] independently of the others;" and 3) "located on a separate site."⁴ The Commission expounded upon the third factor by defining a separate site as "within the ambit of a description in a properly recorded deed," such that "only one remote net metered facility may be located within the bounds of a site as described in a deed."⁵ The Commission also observed that "[u]nder remote net metering, a customer then may own or lease the underlying property, once it is properly identified. Nothing, however, would prevent owners of property from subdividing a larger property into separately deeded parcels, just as they would for other real estate purposes."⁶

In developing the three-factor test, the Commission intended to prevent segmentation proposals whereby a facility is divided into 2 MW segments, each tied to a meter, which are then combined behind a cumulative master meter that is used for billing and determining net metering credits. As the Commission noted, such arrangements would subvert the intent of remote net metering, which is designed to promote the installation of numerous small facilities that are widely distributed across utility service territories.⁷ The Commission subsequently sought

⁴ Net Metering Tariff Order, p. 22. Pursuant to PSL §66-j(1)(d)(i)(C), the rated capacity of a remote solar generation system is limited to a size of not more than 2 MW.

⁵ Net Metering Tariff Order, p. 23.

⁶ Id.

⁷ Id., p. 16.

to enable economies of scale and reduce inefficiencies by expanding the eligibility for participation in Value Stack compensation under the VDER tariffs to projects sized up to 5 MW.⁸

In laying out the three factors and how they should be applied, the Commission designated the utilities to "apply the factors to interconnection proposals as they are presented."⁹ Where a disagreement arises between the utility and the developer in how the three factors should be applied, the Commission noted that a petition for relief should be filed.

It is apparent from the Petition and the comments received that the utilities have been applying the "separate site" factor in different ways, and at times have provided conflicting information to developers. National Grid acknowledges that it incorrectly advised Borrego of the separate site requirements as part of the three-factor test. Moreover, the utility tariffs contain varying levels of details as to how the separate site requirement may be met. For instance, Consolidated Edison Company of New York, Inc.'s tariff explicitly references a separate deed, while National Grid's tariff does not. Given this ambiguity and the uncertainty that has arisen for developers, further clarity with respect to the separate site requirements is necessary.

The Commission agrees with Borrego that a significant number of CDG projects throughout the State are located on leased properties, and in certain case those leases are not coterminous with the underlying deeded property in order to preserve agricultural, residential, and other uses outside the

⁸ Project Size Cap Order.

⁹ Id.

solar energy production. Metering, operations, and safety protocols are unaffected by whether the host parcel is subdivided or leased. Formal subdivision generally requires the consent of local land-use authorities and may involve multiple local decision-making boards in a process that entails risk and delay. The Commission further agrees with Borrego that the separate site requirement should be satisfied if a project obtains its own SBL or BBL numbers and a metes and bounds description that is included in either a deed or in an memorandum of lease. Importantly, we note that the remote net metering provisions contained in PSL §66-j(3)(e)-(g) provide that a net energy meter must be "on property owned or leased by [the] customer." The recognition under the PSL of a lease arrangement is consistent with the relief sought by Borrego.

Distributed Sun, U.S. Light Energy, and NineDot Energy support the relief sought by Borrego and argue that strict adherence to the deed parcel requirement discourages renewable energy development while providing no benefit to ratepayers or the utilities. NYSEIA and NineDot Energy suggest broader relief and urge the Commission to eliminate the separate site requirement altogether as part of the three-factor test. Further, NYSEIA states that projects on multiple deeded properties should be eligible for net metering or Value Stack compensation, as long as they are separately metered and interconnected and do not exceed the aggregated capacity limits for each compensation methodology. The Commission declines to eliminate the separate site requirement, which, as modified herein, should not act as a deterrent to renewable energy development. Coupled with the separate meter/interconnection and separate operation factors, it will continue to serve as a

useful factor in evaluating whether a project is within prescribed size limitations.

While the Joint Utilities generally oppose Borrego's Petition, they support the requested relief for the seven projects for which Borrego has already obtained permits. Further, the Joint Utilities argue that the Commission intended the separately deeded parcel requirement as a way to protect adjacent landowners and municipalities by ensuring that developers comply with local land-use regulations. This is particularly important, according to the Joint Utilities, since the memorandum of lease process provides no opportunity for stakeholder input by municipalities and affected landowners on its own. In allowing developers to satisfy the separate site requirement with a lease arrangement, however, the Commission rejects the claim that it would be less protective of land-use regulations. Developers will still be required to comply with local zoning and permitting requirements.

Accordingly, the separate site portion of the three-factor test should also allow for an adequate demonstration of separate lease agreements that may relate to a single underlying deeded parcel. The Commission directs the Joint Utilities to file tariff amendments on not less than 10 days' notice, to become effective on May 1, 2021, to modify the language surrounding the separate site requirement if a project obtains its own SBL or BBL numbers and a metes and bounds description is included in either in a deed or in an memorandum of lease. Given the notice and comment process undertaken in this proceeding, newspaper publication is not necessary.

The relief granted herein is specific to onsite and remote net metering and Value Stack eligibility requirements and does not extend to the other contexts in which the Commission

applies size limitations, such as the 80 MW limit for determining whether a "Qualifying Facility" is exempt from regulation under PSL §§2(2-a) - (2-c), or a facility is below the 25 MW limit that excludes electric generation siting review under PSL Article 10.¹⁰

As discussed above, the Commission grants the relief requested in the Petition and modifies the separate site component of the three-factor test used to determine whether projects are separate and distinct for purposes of onsite and remote net metering and VDER compensation. The separate site requirement, therefore, may be met where projects have a separate deed or a unique SBL or BBL number, a separate lease, and a separate metes and bounds descriptions recorded via a separate memorandum of lease uniquely identifying each project. This action is within the public interest by supporting the continued development of renewable energy resources while ensuring that developers comply with applicable size eligibility requirements.

The Commission orders:

1. Central Hudson Gas and Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation are directed to file tariff amendments on not less than 10 days' notice, to become

¹⁰ Net Metering Tariff Order, pp. 20-22 (citing Case 07-E-0674, Advocates For Prattsburg, et al., Declaratory Ruling on Electric Corporation Jurisdiction (issued August 24, 2007) and Case 13-F-0436, Town of Brookhaven, Declaratory Ruling Concerning Jurisdiction Over Proposed Generating Units (issued January 24, 2014)).

CASES 15-E-0751 and 14-E-0151

effective on May 1, 2021, incorporating the modifications addressed in the body of this Order.

2. The requirements of Public Service Law §66(12)(b) and 16 NYCRR §720-8.1 as to newspaper publication of the further tariff revisions directed in Ordering Clause No. 1 are waived.

3. In the Secretary's sole discretion, the deadlines set forth in this order may be extended. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least three days prior to the affected deadline.

4. Case 14-E-0151 is opened, pending compliance with Ordering Clause No. 1 above, and shall thereafter be closed. Case 15-E-0751 is continued.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary

SUMMARY OF COMMENTSCertain Solar, Inc. d/b/a NineDot Energy (NineDot)

NineDot strongly supports NYSEIA's proposal to eliminate the separate site requirement in the three-factor test. NineDot believes that separately deeded land parcels is a burdensome bureaucratic process involving multiple jurisdictions over an extended period and acts as an additional deterrent for property owners hosting distributed energy resources (DER). NineDot recommends that the Commission should clarify when the separate site test is to be performed, and argues that it should not be performed at any earlier point in the interconnection process because it does not provide sufficient time for a DER developer and property owner to undergo required procedural steps with the relevant local authority.

NineDot notes that the utility interconnection study and permitting process directly inform the DER project's design and site layout, and argues that it is impossible for a DER developer to anticipate how to properly divide a parcel without first completing all the technical, engineering, and permitting steps. NineDot agrees with the current policy to perform the test at the in-service date. NineDot argues that the utilities have not uniformly and consistently applied the "separate deed" test and have a long-standing policy to accept unique Section-Block-Lot (SBL) or Borough-Block-Lot (BBL) to meet the separate site requirement. NineDot states that hundreds of megawatts (MW) of community solar host site "clusters" have followed the common practice of dividing a larger site into a multiple 5 MW or smaller interconnections.

Distributed Sun, LLC (Distributed Sun)

Distributed Sun agrees with Borrego that strict adherence to the deeded parcel requirement hinders renewable energy development and provides no benefit to ratepayers.

Distributed Sun supports Borrego's position that the requirements for net metering and Value of Distributed Energy Resources (VDER) Value Stack eligibility are met when a project has a unique SBL number, a separate lease, and a separate metes and bounds description recorded via a separate memorandum of lease (MOL).

The Joint Utilities

The Joint Utilities recommend that the Commission grant relief to Borrego for seven of the nine projects in National Grid's service territory that have completed the permitting process. However, the Joint Utilities argue that Borrego's objection to separate deeds should be rejected. The Joint Utilities presume that the Commission recognized the difference between deeds and leases when it established the separate deed, and note that the beneficiaries of a separately deeded parcel requirement are the adjacent property landowners and the municipality.

The Joint Utilities dispute Borrego's assertion that the separate deed requirement constitutes an undue hardship without discernible ratepayer or utility benefits. According to the Joint Utilities, Borrego's proposal to only require a MOL with attached metes and bounds descriptions for each leased parcel is similarly problematic. The Joint Utilities argue that the issue is not the MOL itself, but the MOL process that circumvents an appropriate opportunity for stakeholder comment by municipalities and landowners provided by the subdivision process.

Noting that net metering is intended to foster development of small-scale generation statewide, the Joint Utilities observe that the three-factor test has been established for several years without issue and urge the

Commission to adopt specific and appropriate relief in response to this petition, rather than initiating overarching changes to a well-considered statewide policy. However, should the Commission relax the separately deeded parcel requirement, the Joint Utilities request that it detail explicit requirements to be met by interconnection applicants so that there is no uncertainty concerning necessary documentation. Further, the Joint Utilities request that the Commission explicitly require that each filed MOL include a metes and bounds description and a site survey.

The Joint Utilities recommend that seven of the nine Borrego projects be granted relief for the separately deeded parcels requirement and only their Krumkill Road North and South projects should be required to comply, since National Grid acknowledges that it incorrectly advised Borrego of the separate site requirements as part of the three-factor test.

New York Solar Energy Industries Association (NYSEIA)

NYSEIA supports the Borrego petition and urges the Commission to eliminate the separate site requirement of the three-factor test. NYSEIA contends that adherence to the first two conditions of the three-factor test satisfies eligibility requirements for compensation intended for distributed projects. NYSEIA argues that the separate site requirement provides no real ratepayer or utility benefit beyond the first two conditions. NYSEIA asserts that a separate site requirement adds unnecessary uncertainty, time, and costs to project development and will hamper the achievement of the Climate Leadership and Community Protection Act mandates.

NYSEIA recommends that the Commission consider requirements for net metering and Value Stack eligibility where projects have unique SBL numbers, separate leases, and a

separate metes and bounds recorded in a separate memoranda. NYSEIA requests that the Commission clarify that any projects located on multiple deeded land parcels are eligible for net metering or Value Stack compensation as long as the aggregate rated capacity does not exceed 5 MW.

U.S. Light Energy

U.S. Light Energy agrees with Borrego's argument that requiring projects to be separately deeded is a barrier to community solar development. U.S. Light Energy supports Borrego's petition and agrees that projects identified with unique SBL numbers and separate metes and bounds descriptions recorded in the MOL should be sufficient. U.S. Light Energy contends that these standards fulfill the requirements of net metering and Value Stack eligibility rules.