STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on September 14, 2017

COMMISSIONERS PRESENT:

John B. Rhodes, Chair
Gregg C. Sayre
Diane X. Burman, abstaining
James S. Alesi

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

ORDER REGARDING COMPENSATION TERM FOR CERTAIN PROJECTS

(Issued and Effective September 18, 2017)

BY THE COMMISSION:

INTRODUCTION

On March 9, 2017, the Commission issued the VDER Phase One Order.[1] The VDER Phase One Order limited Phase One Net Energy Metering (NEM) compensation for those projects that met certain eligibility requirements to a 20-year term, and Value Stack compensation to a 25-year term, but stated that developers could file petitions requesting an extension of that term for particular projects where "pre-existing financing or other contractual arrangements ... contemplated a longer period."[2]

On June 12, 2017, SUN8 PDC LLC (SUN8 or the Company), an affiliate of Distributed Sun LLC (Distributed Sun), filed a

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[1] Case 15-E-0751, et al., Value of Distributed Energy Resources, Order on Net Energy Metering Transition, Phase One of Value of Distributed Energy Resources, and Related Matters (issued March 9, 2017) (VDER Phase One Order).

[2] VDER Phase One Order, p. 54.

Request to Extend the Phase One NEM Term to 30 Years for Multiple Community Distributed Generation Projects (the Petition). The Petition requests that an extension of the Phase One NEM compensation term, to 30 years, be granted for 14 projects under development by SUN8 based on existing lease agreements, negotiations for lease agreements, and applications for Payment in Lieu of Tax (PILOT) agreements related to those projects.

This Order grants the Petition in part, providing an extension of the Phase One NEM compensation term to 25 years for eight of the 14 projects described in the Petition. For those eight projects, SUN8 had entered into leases with a term of 25 years before the issuance of the VDER Phase One Order, with the option for up to two five-year extensions at SUN8's election. Therefore, an extension to a 25-year term is appropriate under the standards described by the Commission in the VDER Phase One Order.[3] For the remaining six projects, SUN8 relies on lease negotiations and PILOT applications to support its request for an extension. Those documents fail to meet the standard of a "pre-existing financing or other contracting arrangement," and therefore do not warrant an extension.

BACKGROUND AND SUMMARY OF PETITION

As noted in the Reforming the Energy Vision (REV) Track Two Order,[4] Case 15-E-0751 was established to provide a process for determining the value of Distributed Energy Resources (DER), for both planning and transactional purposes. After an extensive stakeholder outreach process, the VDER Phase

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[3] Id.

[4] Case 14-M-0101, Reforming the Energy Vision, Order Adopting a Ratemaking and Utility Revenue Model Policy Framework (issued May 19, 2016) (REV Track Two Order), p. 19.

One Order was approved. The VDER Phase One Order established a framework for the transition in compensation methodologies from net metering to a more granular appraisal of the value of distributed energy resources (DERs) in order to capture the temporal and locational values created by these resources.

The VDER Phase One Order created two compensation methodologies, which will be used for all projects interconnected after the issuance of that Order (i.e., Phase One NEM and the Value Stack). Each compensation methodology was subject to a limited term. Phase One NEM applies to eligible projects for a 20-year term, while the Value Stack applies to eligible projects for a 25-year term. After the expiration of its compensation term, a project will be compensated based on the then-current tariff, which is expected to be a further evolution of a value-based compensation methodology.

The VDER Phase One Order also permitted developers or customers to file petitions requesting a longer compensation term "based on pre-existing financing or other contractual arrangements that contemplated a longer period" (the Extension Provision).[5] The Extension Provision was based on a similar allowance in a previous order, which permitted developers to request a longer term for monetary crediting net metering grandfathering where "the contractual arrangement for financing a particular project cannot be accomplished within a 25-year period, and a longer period is necessary."[6] An extension of the

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[5] VDER Phase One Order, p. 54.

[6] Case 14-E-0151 et al., Petition of Hudson Valley Clean Energy, Inc. for an Increase to the Net Metering Minimum Limitation at Central Hudson Gas & Electric Corporation, Order Granting Hearing in Part, Establishing Transition Plan, and Making Other Findings (issued April 17, 2015) (Transition Plan Order).

term for monetary crediting net metering grandfathering was granted to several projects developed by Distributed Sun under this provision based on a demonstration that the projects had been the subject of Power Purchase Agreements (PPAs) with a 30-year term.[7]

SUN8's Petition was filed based on the Extension Provision and requests an extension of the compensation term to 30 years for 14 projects broken up into three groups: an extension for two solar photovoltaic (PV) projects totaling 3.7 MWs located in Middlesex, New York (the Middlesex Projects);[8] an extension for six solar PV projects totaling 12 MW located in Dryden, New York (the Ellis Projects);[9] and a conditional extension for six solar PV projects totaling 16 MW located in Spencer, New York (the Spencer Projects).[10] The Petition explains that the Middlesex Projects and the Dryden Projects are eligible for Phase One NEM compensation, while the Spencer Projects are eligible for Value Stack compensation.

SUN8 explains that it conducts its planning and modeling, which includes the development of an expected "Energy Payment Rate" that Community Distributed Generation subscribers will be charged, lease and rent payments, and PILOT agreements with municipalities, based on an assumed 30-year project lifetime. SUN8 also states that it has entered into agreements

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[7] Case 16-E-0007, Petition of Distributed Sun LLC, Building Energy Development US, LLC, and Cornell University to Extend the Monetary Crediting Period to 30 Years for Five Solar Photovoltaic Projects, Order Granting Modified Relief and Making Other Findings (issued April 27, 2016) (Monetary Crediting Extension Order).

[8] NYSEG Project Nos. 10769 and 10770.

[9] NYSEG Project Nos. 7593, 7594, 7595, 10495, 10496, and 10497.

[10] NYSEG Project Nos. 10787, 10993, 10994, 10995, 10996, and 10997.

based on this financial approach for the projects. With respect to the Middlesex Projects, SUN8 explains that it entered into a 25-year lease agreement with two five-year extensions at SUN8’s option on August 16, 2016, as well as filing a PILOT application based on a 30-year term with the Finger Lakes Economic Development Center on April 17, 2017. For the Ellis Projects, SUN8 explains that it is currently pursuing a definitive lease agreement for a 25-year term with two five-year extensions at SUN8’s option and submitted a PILOT application with the Tompkins County Industrial Development Agency on March 17, 2017. Regarding the Spencer Projects, SUN8 explains that it entered into a 25-year lease agreement with two five-year extensions at SUN8’s option on September 28, 2016, as well as filing a PILOT application with a 30-year term with the Tioga County Industrial Development Agency on April 19, 2017. SUN8 attaches the relevant leases, PILOT applications, and related documents to the Petition as exhibits.

SUN8 explains that while the Spencer Projects are currently eligible for compensation only under the Value Stack and not under Phase One NEM, it is considering requesting authorization to switch the Spencer Projects with all or a portion of the Middlesex Projects and/or the Ellis Projects, such that the Spencer Projects are compensated based on Phase One NEM and the Middlesex and/or Ellis Projects are compensated based on the Value Stack (the Swap). SUN8 requests that the Commission grant a conditional extension to the Spencer Projects, such that if the Swap is approved and consummated the Spencer Projects receive Phase One NEM with a compensation term of 30 years.

NOTICE OF PROPOSED RULEMAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in the State Register on July 26, 2017 [SAPA No. 15-E-0751SP8]. The time for submission of comments pursuant to the Notice expired on September 11, 2017. One comment was received.

COMMENT SUMMARY

In response to the Petition, New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, Central Hudson Gas and Electric Corporation, Consolidated Edison Company of New York, Inc., Niagara Mohawk Power Corporation d/b/a National Grid, and Orange and Rockland Utilities, Inc. (the Joint Utilities) argue that SUN8 has failed to meet the requirement of a pre-existing financial or contractual arrangement as set forth in the Phase One VDER Order and therefore urge the Commission to deny Petitioner's request to extend the compensation term to 30 years for the Projects.

The Joint Utilities argue that the financial or contractual arrangements the Petition describes are not sufficient to comply with the Phase One VDER order. The Petition describes, according to the Joint Utilities, one lease, two agreements to enter a lease, two applications for PILOT agreements completed after the Commission's issuance of the Phase One VDER Order establishing a 20-year compensation period, and receipt of a PILOT agreement also after issuance of the Commission's Phase One VDER Order. Moreover, the Joint Utilities argue that since December 23, 2015, the Commission has put entities interested in participating in the New York market on notice that the Commission was moving forward with changes that would impact developers. SUN8 should have reasonably known or actually knew that its longer compensation term assumptions could not reasonably be assumed to continue. Instead, Petitioner apparently opted to continue with business as usual, according to the Joint Utilities.

LEGAL AUTHORITY

As described in the VDER Phase One Order, the Commission has the authority to direct the treatment of DERs 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 determines 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.

DISCUSSION

The Extension Provision was designed to ensure that changes to the compensation methodology related to the VDER Phase One Order did not disturb existing contracts. For example, in the Monetary Crediting Extension Order, the Commission found that an extension was appropriate because the developer and the customer had entered into PPAs for each project with a 30-year term, which included rates and other terms that might have been materially different had the PPA been negotiated based on a shorter term or with knowledge of a shorter compensation term. For that reason, the leases that SUN8 presents for the Middlesex and Spencer Projects meet the requirements of the Extension Provision for their 25-year term. The Commission recognizes that, had SUN8 been negotiating those leases based on a 20-year Phase One NEM term, the price and other provisions of the leases would likely have been different. While the Joint Utilities are correct that developers were on notice well before the issuance of the VDER Phase One Order that compensation methodologies were likely to change, it would be unreasonable to expect those developers to completely stop or drastically limit their commitments during the two-year consideration period identified by the Joint Utilities, and therefore contracts actually entered into prior to the issuance of the VDER Phase One Order do justify an extension.

However, the Extension Provision was not designed to protect unconsummated plans. For that reason, the fact that SUN8 performed its planning and modelling for the projects based on a 30-year compensation term does not justify any extension. SUN8 is not bound to the results of that modelling and can conduct new modelling based on the modifications to compensation methodologies and terms resulting from the VDER Phase One Order. It can then set an "Energy Payment Rate" and make other business decisions based on that new modelling. This stands in contrast to the situation in the Monetary Crediting Extension Order, where the developer and the customer had already entered into a contract containing an "Energy Payment Rate."

In the same way, the Extension Provision is not intended to protect negotiations or plans that were not finalized prior to the issuance of the VDER Phase One Order. For that reason, SUN8's statement that it was, and is, pursuing a 25-year lease for the Ellis Projects is irrelevant. Because SUN8 had not entered into such a contract prior the issuance of the VDER Phase One Order, it remains free to reconsider and renegotiate those contracts based on the shorter compensation term. Similarly, because none of the PILOT applications have resulted in finalized agreements, they do not meet the requirements of the Extension Provision. Indeed, many of the PILOT applications were not even filed until after the issuance of the VDER Phase One Order, when SUN8 knew or should have known that a 30-year compensation term was not guaranteed.

Furthermore, the two optional five-year extensions built into the lease agreements for the Middlesex and Spencer Projects are not sufficient to justify a 30-year extension. Because the leases end at the 25-year mark unless SUN8 chooses to extend them, SUN8 is not locked into a contract past 25 years and therefore does not require an extension to a 30-year term.

With respect to the Spencer Projects, the Swap, as described in the Petition, would require Commission approval. SUN8 has not at this time filed a request for such approval. However, because SUN8 has presented the necessary information for a determination on whether the Extension Provision should be applied if the Swap occurs, the Commission will grant the request for a conditional extension to the Spencer Projects. This Order makes no final determination on whether the Swap would be permitted. In order for a Swap as described to be acceptable, the developer would need to demonstrate, at a minimum, that: (1) there is no resulting change in Tranche sizes, increase in net annual revenue impact, or other impact on non-participating ratepayers; (2) it involves projects with a common developer and will not impact other projects or developers; (3) each project meets all applicable requirements for the Tranche it is moved into, including, for Tranche 0, the requirement that the developer made the 25% interconnection payment or, where no payment is required, signed the interconnection agreement within 90 business days of the issuance of the VDER Phase One Order;[11] and (4) the developer still intends to pursue all projects involved.

The Commission notes that projects will receive compensation beyond the end of their Phase One NEM or Value Stack compensation term, based on the tariff then in effect.

[11] VDER Phase One Order, p. 40.

While the value of the generation cannot be predicted with any precision 20 or more years in the future, it is expected that value-based methodologies will continue to evolve and that future Commissions will compensate DERs at just and reasonable rates for all of the values they create.

For the foregoing reasons, SUN8's Petition is granted in part, and denied in part. The Phase One NEM compensation term for the Middlesex Projects is extended to 25 years, consistent with the term of the lease entered into prior to the issuance of the VDER Phase One Order. Furthermore, should the Swap occur such that some or all of the Spencer Projects are compensated based on Phase One NEM, the Phase One NEM compensation term for those projects shall be 25 years, consistent with the term of the lease entered into prior to the issuance of the VDER Phase One Order. SUN8's request for an extension in the compensation term for the Ellis Projects is denied.

The Commission orders:

1. New York State Electric & Gas Corporation (NYSEG) shall compensate NYSEG Project Nos. 10769 and 10770 based on Phase One Net Energy Metering (NEM) compensation for twenty-five years from each project's in-service date, unless and until the Commission approves a change in compensation methodologies or the project owner elects to opt into a different compensation methodology, as discussed in the body of this order.

2. New York State Electric & Gas Corporation (NYSEG) shall compensate NYSEG Project Nos. 10787, 10993, 10994, 10995, 10996, and 10997 based on Phase One NEM compensation for twenty-five years from each project's in-service date, in the event the Commission approves a change in compensation methodologies to

Phase One NEM for such projects, as discussed in the body of this order.

3. The Request of SUN8 PDC LLC to Extend the Phase One NEM Term to 30 Years for Multiple Community Distributed Generation Projects is granted to the extent provided in Ordering Clause Nos. 1 and 2 and is otherwise denied.

4. This proceeding shall be continued.

By the Commission,

(SIGNED) KATHLEEN H. BURGESS
Secretary