

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

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

Case 14-E-0151

Petition of Solar Energy Industries Association,  
Alliance for Clean Energy New York, the Vote  
Solar Initiative, the National Resources Defense  
Council and The Alliance for Solar Choice to  
Clarify the Process for Utilities to Seek Relief  
from Net Metering Caps

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Case 14-E-0422

**PETITION FOR CLARIFICATION OR EXTENSION OF TIME**

Paul T. Lavoie, General Counsel  
Solar Liberty Energy Systems, Inc.

Dated: August 7, 2017

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PUBLIC SERVICE COMMISSION

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Case 14-E-0422

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**I. INTRODUCTION**

On April 17, 2015, the Public Service Commission (the “Commission”) issued an *Order Granting Rehearing in Part, Establishing Transition Plan, and Making Other Findings* in Cases 14-E-0151 and 14-E-0422 (the “Transition Order”)<sup>1</sup>. The Transition Order adopted a Transition Plan containing certain requirements and deadlines which, if satisfied, would entitle developers of certain photovoltaic generating projects (“PV projects”) to the grandfathering of monetary credits for remote net metered projects (the “Transition Plan”). On December 16, 2016, the Commission modified the Transition Plan, in large part due to utility delays in completing necessary engineering

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<sup>1</sup> 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, Case 14-E-0422 Petition of Solar Energy Industries Association, et al. to Clarify the Process for Utilities to Seek Relief from Net Metering Caps Order Granting Rehearing In Part, Establishing Transition Plan, and Making Other Findings (issued Apr. 17, 2015).

designs, and implemented new requirements that PV projects must also satisfy to retain the grandfathering of monetary remote net metered credits (the “Modifying Order”)<sup>2</sup>.

Solar Liberty is the developer of a photovoltaic system that will be owned by Emmi & Sons, Inc. and affiliated family owned businesses (“Emmi Family Businesses”) that it believes qualifies for grandfathering of monetary remote net metered credits (“MRNM credits”). To confirm this, however, Solar Liberty on behalf of its customer, Emmi Family Businesses requires extension of certain deadlines including the Mechanical Completion Milestone (defined below) of the Modified Order from November 30, 2017, to November 30, 2018 or the In-Service Deadline (defined below) of the Transition Plan from December 31, 2017 to December 31, 2018.

For the each of the Projects listed below, Solar Liberty respectfully requests the following relief:

- 1) Extension of the In-Service Deadline to December 31, 2018; or
- 2) Extension of the Mechanical Completion Milestone to November 30, 2018; or
- 3) Confirmation that completion of a grandfathered project of a size greater than 200 kW DC rating by the NYSERDA NY Sun MW Block In-Service Deadline will retain the MRNM grandfather status.

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<sup>2</sup> 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, Case 14-E-0422 Petition of Solar Energy Industries Association, et al. to Clarify the Process for Utilities to Seek Relief from Net Metering Caps, Order Modifying Transition Plan and Making Other Findings (Issued December 16, 2016).

## II. BACKGROUND

### A. The Effect of Legal and Business Uncertainty on the Photovoltaic Market Has Caused Delays in the Development.

Founded in 2003 in Western New York, Solar Liberty installs, sells, and leases solar panel energy systems, known as photovoltaic (PV) systems, to homes, business, schools, universities and other facilities and provides turnkey service to its customers. Solar Liberty provides a wide variety of services to its clients, including securing the land necessary to house PV solar components, procurement of and payment for components, and construction and installation.

To obtain financing for a PV project, Solar Liberty first engages in an arduous financial, technical, and legal review to ensure that a particular project is sound and likely to deliver a competitive return on investment for Solar Liberty's equity investor. Market uncertainty resulting from unexpected costs and risks such as (1) municipal PILOTs, (2) unexpectedly high interconnection costs, (3) loss of priority in the interconnection queue, (4) loss of New York State Energy Research and Development Authority ("NYSERDA") funding, or (5) loss of grandfather status in monetary remote net metering will likely result in termination of a project due to lack of investment.

To Solar Liberty's knowledge, a number of projects receiving incentives under the NY Sun Megawatt block program remain incomplete and in jeopardy of termination. The failure of such a large number of projects to be placed in service is a strong indicator that the measures taken by the Commission in the transition from monetary remote net metering to volumetric remote net metering may have an unintended effect of disqualifying a large number of bona fide projects that have been diligently pursued by developers. It would not serve any further purpose to disqualify more projects that have been pursued in good faith.

Due to the existence of these and other factors, investors backing the Emmi Family Businesses have delayed providing much needed funds for their PV System. As a result, developers, including Solar Liberty, and Emmi Family Businesses that rely upon investor funding have been required to carry the financial burden of PV projects longer than anticipated

Additionally, money earmarked for development activities have, by necessity, been spent by Solar Liberty and the Emmi Family Businesses on legal fees to resolve one or more of the foregoing. Lacking financial backing of a lender, projects have been forced to be put on hold causing delay in core development activities such as engineering, procurement and construction. The time expended to resolve these issues can be viewed as development gaps that raise questions of diligence. Notwithstanding these difficulties, to date, Solar Liberty has invested an estimated \$50,000.00 of resources in the development of the Emmi Farm PV System. Emmi Family Businesses have paid significant legal fees towards the PILOT and securing financing. More significantly, they have paid the required \$727,500.00 interconnection fee on January 27, 2017, as required under the Modified Order and have been carrying this expense for more than six months. This is a crippling financial burden that is imposed on the customer.

Moreover, with speculation that the US Trade Commission will impose a tariff on Chinese panel manufacturers, there has been a rush to purchase panels leaving panel shortages and spiking prices.<sup>3</sup> This may result in further delays and project cancellations as the market reacts to the news of the tariff.

The greatest impact that the Orders have had on the photovoltaic industry when it causes loss of expected investment that was pursued in good faith is to undermine the credibility of the State of New York's commitment to photovoltaic energy, and the credibility of companies like

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<sup>3</sup> <http://www.utilitydive.com/news/us-tells-wto-it-is-considering-tariffs-on-solar-panels/443835/>

Solar Liberty who promised to deliver customers a solar system at a specific price. Unfinished photovoltaic systems hurt the credibility of the photovoltaic industry for years to come. If a solar enthusiast like the Emmi Family Businesses are promised a system and it is cancelled because municipalities can hold systems hostage due to timelines imposed, or the Commission too aggressively pursues cancellation of grandfathered rights affecting good faith investment in megawatt block solar, then the ability of solar developers like Solar Liberty to get customers to commit their resources, including time and financial resources, is greatly damaged. The Emmi Farm PV System is highly illustrative. Solar Liberty seeks relief from the Commission.

## **B. The Transition Plan Grandfathering Criteria**

Under the Transition Plan, one of five events must have occurred by June 1, 2017, to qualify for Grandfather Status. They are as follows:

- 1) Projects that have been interconnected; or
- 2) Projects for which developers have submitted a completed preliminary interconnection application to the relevant utility; or
- 3) Projects that have completed applications for grants through Program Opportunity Notices (PONs) 2112, 2439, 2589, 2860, and 2956 conducted by the New York State Energy and Research Development Authority (NYSERDA) or the Request for Proposals (RFP) process conducted by New York City for development of renewable facilities at the Freshkills Landfill; or,
- 4) Projects that have completed applications for grants in NYSERDA's NY-Sun MW Block Program for projects sized at more than 200 kW; or
- 5) Projects that a State, municipal, district, or local governmental entity has solicited through a Request for Proposals or a Request for Information issued in conformance with applicable law<sup>4</sup>.

The Transition Plan further provides that a project that has qualified for grandfathering status was required to be placed in service by a specific date. The relevant language is as follows:

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<sup>4</sup> Transition Plan @ Attachment A, pg. 2-3.

“To retain monetary crediting, a project must enter service by the date specified in a NYSERDA PON or in its NY-Sun MW Block Program for projects sized at more than 200 kW, or the New York City Freshkills Landfill RFP, or another governmental entity process, as that date may be extended by the relevant governmental entity, or by December 31, 2017, if no date is specified by a governmental entity (“In Service Milestone”).”<sup>5</sup>

The Modifying Order provided additional criteria for grandfather status. If a developer relies in criteria 2 from the Transition Plan, i.e. projects for which developers have submitted a completed preliminary interconnection application to the relevant utility prior to June 1, 2015, satisfaction of all of the following four deadlines is also required:

- 1) the project developer has provided payment, prior to March 1, 2016, for a CESIR study (“CESIR Study Milestone”);
- 2) the project developer has demonstrated that, upon receipt of the CESIR study results, the estimated construction schedule indicates a final authorization to interconnect on or after July 1, 2017 (“Estimated Interconnection Criteria”);
- 3) the project developer has made payment, of the full or at least the first installment amount, for the estimated utility interconnection costs necessary to support the project, by January 31, 2017 (“Interconnection Payment Milestone”); and,
- 4) the project developer has, by November 30, 2017, submitted an affidavit from the engineer of record for the project, attesting that substantially all of the equipment on the end-use customer’s side of interconnection point has been physically constructed and that the only remaining requirements to interconnect the equipment depend upon utility, such as remaining utility construction and/or authorization to interconnect (“Mechanical Completion Milestone”)<sup>6</sup>.

## **C. The Emmi Project**

Solar Liberty is petitioning on behalf of its customers, Emmi Family Businesses, who plan to own the system and be the off-taker of the electricity and/or MRNM credits. Emmi

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<sup>5</sup> Transition Plan @ Attachment A, p. 3.

<sup>6</sup> Modifying Order @ p. 18.

Family Businesses have been and continue to be enthusiastic about these systems. The systems directly benefit the constituents that these municipal leaders serve. Emmi Family Businesses have patiently endured significant developmental delays due to circumstances beyond the control of developers. Failing in their efforts would be a significant loss for a customer who had entered an agreement in good faith. It would be likely that Emmi Family Businesses and other customers like them that enthusiastically embraced a clean energy product, will not be inclined in the future to believe the representatives of the New York photovoltaic industry, NYSERDA or the Public Service Commission of the State of New York.

Emmi & Sons Inc. (“Emmi Farms”) is a third generation diversified 300-acre fruit and vegetable farm located in Baldwinsville, New York. Anthony Emmi started the farm during WWII in the Syracuse area. The main operation has been located in Baldwinsville, New York since 1994. The farm consists of a packing facility, greenhouses, maintenance shop, and housing for 60 legally-hired, seasonal employees. The farms are still owned and operated by the family of Anthony Emmi. The majority of the crops sold are wholesale for fresh market. Emmi Farms also operated two farm markets, featuring fresh produce from the farm daily, and an ice cream stand.<sup>7</sup>

Emmi & Sons has always made environmental conservation a priority. They have made a large investment in micro-irrigation for conservation of water, fertilizer, and fuel. Integrated pest management practices are used to limit the impact of pesticides on the environment, as well as improving local soils and sustainability. Emmi & Sons is committed to raising and delivering high quality, safe fruit and vegetable crops for their customers as well as taking care of the environment.<sup>8</sup>

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<sup>7</sup> <http://www.emmifarms.com/about.html>

<sup>8</sup> Ibid.

Emmi & Sons, Inc. began discussions early in 2015 with Solar Liberty to purchase and construct a 2.0 MW DC solar system to supply clean energy to their agribusiness and hospitality businesses in the Syracuse area.

The Emmi Farm's photovoltaic project is a 2.0 MW photovoltaic system located at 1482 W. Genesee Road, Baldwinsville, NY 13027, in the Village of Baldwinsville, Lysander County ("Emmi Project")<sup>9</sup>. The photovoltaic system will be built on their main farm facility. The electricity generated will be supplied to the Emmi Family Businesses.

Solar Liberty filed a completed interconnection application on behalf of Emmi & Sons on Monday, June 1, 2015.<sup>10</sup> Thus, Solar Liberty satisfied the Transition Plan's qualification requirement for monetary remote net metering by filing its interconnection application for the project by June 1, 2015. The Preliminary CESIR Study was returned on October 20, 2015.<sup>11</sup> A fee of \$20,000.00 for the final CESIR Study was paid on February 1, 2017.<sup>12</sup> An Engineering, Procurement and Construction Agreement (the "Emmi EPC Agreement") was signed on February 2, 2016, between Solar Liberty and Emmi & Sons, Inc.

The Final CESIR contained interconnection costs that made the project not feasible. Accordingly, a request for a revised CESIR was made. The Coordinated Electric System Impact Review For Emmi & Sons Incorporated 2.0 MW Solar Photovoltaic Generator System, 1482 W. Genesee Road, Baldwinsville, NY 13027, was revised and returned on December 15, 2016.<sup>13</sup>

Additional delays have been incurred due to stalling of PILOT negotiations with the Baldwinsville Central School District. On November 10, 2016, Solar Liberty filed a TP-487 with

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<sup>9</sup> Exhibit A: Emmi Project, Site Plan, Rev 0, (June 1, 2015).

<sup>10</sup> Exhibit B: Interconnection Application dated June 1, 2015.

<sup>11</sup> Exhibit C: Preliminary Coordinated Electric System Impact Review (CESIR) For Emmi & Sons Incorporated 2000 kW AC PV 1482 W. Genesee Road, Baldwinsville, NY 13027 dated October 20, 2015.

<sup>12</sup> Exhibit D: Check dated February 1, 2016 to National Grid for \$20,000.00

<sup>13</sup> Exhibit E: The Revised Coordinated Electric System Impact Review for Incorporated 2.0 MW Solar Photovoltaic Generator System 1482 W. Genesee Road, Baldwinsville, NY 13027 dated December 15, 2016.

the Tax Assessor requesting a tax exemption for all entities for whom the Tax Assessor coordinates requesting a tax exemption. Based upon information and belief, the Tax Assessor informed the Board of Supervisors and the Baldwinsville Board of Education of the TP-487 filing shortly after November 10, 2016.<sup>14</sup> By January 10, 2017, neither the School District nor the Town had requested a PILOT, disqualifying both from enforcing a PILOT. On February 17, 2017, Town of Lysander chose to opt out of the exemption of New York's Real Property Tax Law (RPTL) Section 487,<sup>15</sup> disqualifying the Town from requesting a PILOT thereafter. On February 7, 2017, Baldwinsville Central School District also chose to opt out of the exemption of New York's Real Property Tax Law (RPTL) Section 487, disqualifying the School District from requesting a PILOT as well. Nonetheless, on March 8, 2017, the Town of Lysander and the Baldwinsville Central School District refused to acknowledge the tax exemption and refused to engage in PILOT discussions. Without favorable resolution of the tax issue, this project is not likely to obtain financing. Solar Liberty and the Emmi Family Businesses would like to pursue legal action to resolve the tax issue before they invest in this 2.0 MW system.

The Emmi Project is not on schedule to be completed and in service by the December 31, 2017 In-Service Deadline. Emmi Farms and the other Emmi Family Businesses would like to have that deadline extended to December 31, 2018.

The status of the milestones/criteria of the Modified Order are as follows: The CESIR Payment Milestone occurred on February 1, 2016, before the March 1, 2016 deadline. The Estimated Interconnection Criteria was satisfied. The Interconnection Payment Milestone was satisfied on January 27, 2017, before the January 31, 2017 deadline.<sup>16</sup> In fact, despite diligent

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<sup>14</sup> Exhibit F: Town of Lysander, Board of Supervisor's Meeting Minutes dated November 17, 2016

<sup>15</sup> Exhibit G: Town of Lysander, Board of Supervisor's Meeting Minutes dated February 16, 2017.

<sup>16</sup> Exhibit H: Email showing proof of 100% Interconnection Payment on January 27, 2017.

efforts, the Emmi Project is not likely to meet the Mechanical Completion Milestone until a time in 2018.

#### **D. ARGUMENT**

**a. COMPLETION OF A NY-SUN MW BLOCK PROGRAM PROJECT SIZED AT MORE THAN 200KW BY THE NYSERDA IN-SERVICE DEADLINE SATISFIES THE MILESTONE CRITERIA**

The Milestone Section of the Transition Plan reads:

“To retain monetary crediting, a project must enter service by the date specified in a NYSERDA PON or in its NY-Sun MW Block Program for projects sized at more than 200 kW.”<sup>17</sup>

The Emmi Farms project qualified for grandfather status by reason of filing a complete interconnection application by June 1, 2015. The purpose of that milestone was to ensure that projects were sufficiently progressed to justify grandfathering. The Emmi Project is funded under NYSERDA’s NY-Sun MW Block Program. The deadline for completion is August 25, 2018.<sup>18</sup> Thus, completion of this project by August 25, 2018 will demonstrate good-faith development consistent with NYSERDA’s independent oversight and goals, regardless of whether the grandfather qualifying event is the filing of a NYSERDA application or the filing of an interconnection application. Any decision on NYSERDA’s part to extend a deadline would be based upon a neutral governmental agencies decision and is consistent with the public policy of the State of New York. Solar Liberty requests clarification that project completion by the NYSERDA NY-Sun MW Block Program for a project sized at more than 200 kW by the NYSERDA In-Service Deadline satisfy the Milestones criteria for grandfathering.

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<sup>17</sup> See Transition Plan @ page 3.

<sup>18</sup> Exhibit I: Screenshot of NYSERDA Program Website for Emmi Project, showing In-Service Deadline of August 25, 2018.

**b. PETITION FOR A ONE YEAR EXTENSION OF THE NOVEMBER 30, 2017 MECHANICAL COMPLETION MILESTONE OR THE DECEMBER 31, 2017 IN-SERVICE DEADLINE**

Solar Liberty requests the Secretary of the Public Service Commission to, in her sole discretion, to grant Solar Liberty a one-year extension of the In-Service Deadline to December 31, 2018, or to grant Solar Liberty a one year extension of the Mechanical Completion Milestone to November 30, 2018. Under the April 2015 Transition Order, the Commission explicitly reserved the right of the Secretary to grant an extension of any deadline provided that the request for extension occurred prior to the deadline. In Part 5 of the Transition Order, the Commission states:

“The Secretary in her sole discretion may extend the deadlines set forth in this Order.

Any requests for an extension must be in writing, must include a justification for the extension, and must be filed at least one day prior to the deadline.”<sup>19</sup>

In the Transition Plan, the Commission established five criteria and, if one was satisfied, the developer was entitled to grandfathering of monetary remote net metering credits.<sup>20</sup> The project qualified for net metering by filing a completed interconnection application prior to June 1, 2015. The Commission also established certain milestones - one being that all projects must be placed in service by a default date of December 31, 2017. Accordingly, as of April 2015, a developer only needed to satisfy one of the five criteria and place a project in service by December 31, 2017, to be grandfathered.

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<sup>19</sup> April 2015 Transition Order @ page 16.

<sup>20</sup> Transition Plan @ pages 2-3.

In December 2016, the Commission modified the Transition Plan.<sup>21</sup> In light of utility delays, the Modifying Order gave developers relying on Transition Plan criteria 2 (i.e. an interconnection application filed before June 1, 2015) an **OPTION** to the Transition Plan's requirement of a December 31, 2017 In-Service date.

When the original Transition Plan was approved, the Commission set the default In-Service Deadline at December 31, 2017. The Commission also provided that a project could use the date set in its NY-Sun incentive grant as the In-Service Deadline. At the time of the Transition Plan, the NYSERDA program manual required that all projects be in service 18 months from the date of the incentive. Because the associated grandfathering criteria required that a NYSERDA NY-Sun application be complete by June 1, 2015, the 18-month deadline in the NYSERDA Program Manual coincided with the December 31, 2017 deadline.

NYSERDA, recognizing the many delays encountered by developers, has modified the Program Manual to require projects be placed in service within 30 months of an award. The Commission should have a deadline that is consistent with the NYSERDA expected build time. Accordingly, building the system by December 31, 2018 would be consistent with NYSERDA revised timing. Solar Liberty has demonstrated a good faith attempt to develop the Emmi Farm Project with reasonable commercial diligence according to the development timelines shown above.

The loss of monetary remote net metering grandfather status would result in a total loss of its investment, which Solar Liberty estimates to exceed \$75,000.00. Furthermore, Emmi Farms has paid 100% of its interconnection fee--\$727,500.00. The Emmi Farm PV System is shovel ready with permits in hand. Equipment has been ordered, but without certainty that the

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<sup>21</sup> See December 2016 Modified Order.

project can be built without loss of MRNM. Justice and fairness require the Secretary to grant Solar Liberty an extension of the In-Service Deadline to December 31, 2018.

The Modifying Order allowed developers the **OPTION** to satisfy four additional criteria and be grandfathered. The remaining criteria allows developers to submit an engineer certification by November 30, 2017, establishing that the project is mechanically complete but for the interconnection. Here, Solar Liberty has complied with the first three of the four milestones in the Modifying Order for Emmi & Sons, but expects that the timing to submit an engineer certification by November 30, 2017 will be difficult to obtain. Unless this deadline is extended until November 30, 2018, or other adequate relief is granted, this project is likely to be discontinued with losses suffered by both Solar Liberty and its customer. Solar Liberty requests extension of the Mechanical Completion Milestone to November 30, 2018.

#### **E. CONCLUSION**

For the Emmi Project, Solar Liberty respectfully requests the following alternative relief:

1. Confirmation that completion of a grandfathered project of a size greater than 200 kW DC rating by the NYSERDA NY Sun MW Block In-Service Deadline will retain the MRNM grandfather status; or
2. Ordering the Extension of the In-Service Deadline to December 31, 2018 pursuant to the authority reserved by the Secretary of the Commission in the Transition Order for each of the projects listed above; or
3. Extending the Mechanical Completion Milestone to November 31, 2017.

Respectfully submitted this 7th<sup>th</sup> day of August, 2017.

*P. J. Cawley*

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Paul T. Lavoie, General Counsel  
On behalf of:  
SOLAR LIBERTY ENERGY SYSTEMS, INC.