NYSERDA SEEKS $573 MILLION AND POLICY CHANGES TO REBOOT NY-SUN

Petition is first move towards New York's aggressive goal of 6,000 Megawatts of solar by 2025
Hodgson Russ Renewable Energy Alert
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Attorneys

Joseph Endres
Michael Hecker
Elizabeth Holden
Charles Malcomb
Paul Meosky
Daniel Spitzer
Jeffrey Stravino
Brianne Szopinski
Sujata Yalamanchili
John Zak
Henry Zomerfeld

Introduction

On November 25, 2019, the New York State Energy Research and Development Authority (NYSERDA) filed its Petition Requesting Additional NY-Sun Program Funding and Extension of Program Through 2025 (NY-Sun Petition) with the New York State Public Service Commission (Commission). Filing of the petition commences the first of many regulatory proceedings to implement the lofty goals of New York State's 2019 Climate Leadership and Community Protection Act (CLCPA).

In its petition, NYSERDA seeks authority to fund NY-Sun, the State's flagship solar incentive program, through 2025 (and beyond for certain post-completion activities) at a total of $573 million. NYSERDA projects this would enable the State to reach the CLCPA's mandate of 6,000 megawatts (MWs) of solar by 2025. Prior funding for NY-Sun has helped New York State achieve its current distributed solar capacity installed and in the pipeline of approximately 2,000 MWdc. NYSERDA's request for approximately 50 percent of the prior funding total to reach the CLCPA's mandate of 6,000 MWs (more than three times current capacity) reflects both the extraordinary cost declines and scaling of the solar industry in New York over the last five years, and NYSERDA's confidence in the efficiency of the strategies proposed in its petition. As Shyam Mehta, Executive Director of the New York Solar Energy Industry Association, noted, "The policies detailed in the NYSERDA Petition will go a long way toward achieving the Empire State's ambitious goals and guaranteeing a fair and equitable clean energy future."

The breakdown of funding contained in the petition reflects the CLCPA's priorities and is also an indicator for market participants about where to focus project development efforts in 2020 and beyond. Specifically, the petition focuses the State's future funding and efforts on upstate commercial and industrial projects, including community solar, as well as projects that serve low-to-moderate income (LMI) communities and affordable housing.

In this alert, we note the significant specific funding requests, CLCPA interpretations, market assumptions and policy implications this petition reflects. This alert also describes what comes next and likely timeframes for the State's implementation of NY-Sun 2.0.

The Funding Requests

An assessment of NYSERDA's requested funding allocations within the $573 million total demonstrates consistency with both the CLCPA direction to focus on LMI and disadvantaged communities as well as the high ceiling for upstate commercial, industrial and community solar projects. Specifically, NYSERDA proposes:

- $290 million for continuation of NY-Sun's MW Block incentive program – a familiar structure for New York's solar industry, which provides incentives at set levels by geography that decline when capacity thresholds are achieved. Of that amount, $199 million is to be allocated to upstate commercial and industrial ("C&I") (between 750 kWdc and 7.5 MWdc, which includes community solar projects), $48 million for upstate residential, and $44 million to supplement blocks where needed as the market and prices evolve;
- $111 million for a Community Adder incentive, on top of the C&I MW block incentives described above, to support development of community solar once the current Community Credit tranche capacities have been fully allocated;
- $135 million for projects benefitting LMI customers, affordable housing, environmental justice communities and disadvantaged communities, with proposed adders for projects paired with storage that serve such communities (and $200 million total that would support LMI customers, affordable housing, environmental justice and other disadvantaged communities when CDG projects receiving the Community Adder are included);
- $19 million for various other incentive adders for projects that meet certain criteria, such as being sited on brownfields or landfills; and
- $3 million for customer education

The remainder of the funding is proposed to be allocated to program administration, evaluation and the statutorily-required Cost Recovery Fee that NYSERDA pays to the State.

These proposed allocations will no doubt give rise to significant activity on the Department of Public Service's (DPS) docket. For example, questions will likely be raised and suggestions made with respect to:

- support for the numbers proposed in the petition, which NYSERDA backs up through analysis of build-out track records in certain markets and sectors;
- whether the $44 million NYSERDA requests to supplement MW blocks depending upon market evolution should be made available up front, enabling flexibility and responsiveness to market needs, or whether NYSERDA should have to seek further authorization for such allocations upon some demonstration of need;
- whether the proposed funding allocations, including the $135 million in LMI programs, are sufficient to satisfy the CLCPA's direction that 40% percent of the benefits of the State's energy programs be targeted to "disadvantaged" communities (subject to future decision-making, of course, through the CLCPA's Climate Action Council recommendations regarding, among other moving pieces, the identification of those communities, how to target funding

and to attribute benefits); and

- whether the adders to encourage siting and co-location decisions consistent with state policies – *e.g.*, away from prime soils, and toward brownfields, parking lots and landfills, and with storage paired – are sufficient to balance the countervailing market factors, such as costs of land and construction and contracting complexity

CLCPA Interpretations: "Distributed" and DC versus AC

The language of the CLCPA's 6 GW solar mandate left much to the State's regulators to interpret – significantly the questions whether the funding for those gigawatts of capacity would be directed at "distributed" solar generally interpreted to be for NY-Sun program funding (and, generally, projects 7.5 MWdc and smaller) or for solar more broadly, including large-scale projects; and whether the 6 GW would be interpreted as DC or AC current. DC measures the total electricity produced by panels; AC current the electricity after conversion by an inverter, and a smaller number, sometimes by 25 to 30%. NYSERDA chose "distributed" and DC in its petition. Adoption of these choices by the Commission would effectively answer the questions. These choices are logical based upon the current structure of New York's clean energy programs (with large-scale solar funded through the Clean Energy Standard, a load serving entity-backed renewable energy credit program) and prior goals having been based upon DC.

Without express direction in the CLCPA, however, these choices regarding the distributed focus of the 6 GW goal and being measured in DC may well be subject to comment by parties. The Commission will have broad discretion to consider them as it determines the correct level of funding and program goals.

NYSERDA's Market Assumptions

Both in estimating total program cost to meet the 6 GW goal and in the allocation of resources by sector, the petition assumes certain market conditions and evolutions. Predictably, these assumptions include the continued fall in solar hard costs, that the federal tax and tariff policy will continue to step away from the robust support previously provided, and that solar technology, like trackers and bi-facial modules, will continue to improve capacity factors. But, less predictably, NYSERDA also assumes (without assigning a value) that "consolidated billing for community distributed generation (CDG) will be implemented by the investor owned utilities by 2021," and that "labor costs for distributed solar projects of less than 5 MWac will remain stable."

With respect to consolidated billing, at the time of NYSERDA's filing of its NY-Sun petition, the Commission had not acted upon National Grid's September 11, 2019 petition to approve such a system. There is no uniform agreement within the CDG industry about the merits of such a system, [1] and, in particular, whether consolidated billing necessarily "improve[s] the overall CDG customer experience," as NYSERDA states in its NY-Sun petition. Even if the Commission acts on the National Grid petition at its December 12, 2019 session, significant questions will likely remain regarding the details of consolidated billing implementation, the sectors in which it will be rolled out, at what pace and the costs and benefits to ratepayers of such an endeavor.

On the topic of labor costs, the last New York State legislative session saw significant activity around whether renewable energy generation projects smaller than 5 MWac should be subject to prevailing wages – either through a redefinition of a Public Work under the state's Labor Law or by way of separate authority. If that discussion re-emerges in the State's 2020 legislative session (which runs from January through June), market participants should pay close attention and certain costs associated with NYSERDA's program calculations may need to be considered.

Notable Additional Policy Statements

In addition to funding requests, NYSERDA's NY-Sun 2.0 petition describes evolving state policies regarding the development of its solar market that may affect either directly or indirectly the operation of NY-Sun for years to come. Furthermore, the petition previews forthcoming comments in the proceeding this petition kicks off and discussions to be had on other dockets, in the legislature and in other forums.

Forthcoming Solar / Agriculture Policy Stakeholder Process

In the "Other Adders" section of the petition, NYSERDA states that, in addition to increased incentives for projects proposed for brownfields, landfills, and parking lots, it will continue to consider and may adopt other "incentive-based strategies." Specifically, NYSERDA suggests plans "to engage interested stakeholders in considering ways to ensure that deployment of solar under the NY-Sun program is done in a manner that is sensitive and responsive to the need to support the agricultural industry and agricultural land use."

The push and pull of solar and the use of land in agricultural districts, in particular land designated as "prime soils," has been a hot topic in both municipal and state-level permitting processes. The solar/agriculture conflict often arises in State Environmental Quality Review Act (SEQRA) reviews, Article 10 Siting Board deliberations regarding generation facilities of 25 MW or larger, and at the State Department of Agriculture and Markets (DAM). Under Section 305 of the Agriculture and Markets Law, the DAM has required significant process and sometimes project configuration changes for facilities slated in Agricultural Districts. This process will no doubt be an important one for developers, municipalities, installers and other market participants.

Policymaking With CLCPA Implementation Still In Process

NYSERDA proposes a "Solar Energy Equity Framework," and $135 million dedicated "exclusively" to programs within that framework, citing the CLCPA's requirement that 40% of the benefits of the state's energy spending be targeted to disadvantaged communities, and that no less than 35% of the benefits of the spending accrue to such communities. But since that language is yet-to-be elaborated upon or otherwise implemented on a statewide basis, NYSERDA states that it "anticipates revisiting program design . . . upon implementation steps related to the CLCPA." In the meantime, NYSERDA proposes to develop program rules to incentivize LMI participation in community solar, and to provide adders and technical support to developers seeking to build in locations that can directly reduce emissions from "peaker plants."

NYSERDA's petition makes clear that it will press forward with necessary program design and implementation even as the interpretive and regulatory exercises flowing from the CLCPA are still in motion. Indeed, CLCPA implementation may unfold for years to come, and so this is likely only the first of many processes the terms and conditions of which will need to include provisions for mid-stream adjustment.

Regulatory Changes NYSERDA Suggests Will Make NY-Sun More Cost-Effective

In its petition, NYSERDA previews three specific changes that market participants should expect will be a focus of the Commission in 2020. These changes are: (i) reducing restrictions on remote net-metering (RNM) – *i.e.,* allowing multiple offtakers for RNM projects, as is allowed in the CDG market; (ii) enabling "Opt-Out CDG" in Community Choice Aggregation (CCA) in coordination with consolidated billing, as proposed by National Grid and to be soon considered by the Commission; and (iii) "utility-administered community solar enrollment for low income customers," the details of which are not yet laid out, but which may be addressed in conjunction with the Commission's consideration of National Grid's September 11, 2019 proposal of a customer acquisition platform for CDG customers.

With each of these regulatory changes now previewed by NYSERDA on the docket, one can expect that the Commission and commenters will pick up the batons and these proposals will gain momentum.

What Comes Next In The NY-Sun Proceeding?

Department of Public Service staff will likely soon issue a notice pursuant to the State Administrative Procedure Act regarding NYSERDA's petition, which will commence a notice and comment process. After the required 60-day comment period, and potentially a short period for reply comments, the Commission could be expected to issue an Order authorizing NY-Sun 2.0 in the second quarter of 2020. This would be followed quickly by NYSERDA's filing of an Implementation Plan, providing further details on specific adder values, service territory breakdowns, MW block amounts and sizes in keeping with the Commission's Order. In short, market participants should expect that the redesigned and extended NY-Sun program will be up and running by mid-late summer of 2020.

And What About Long Island?

The Long Island Power Authority (LIPA) is not subject to the Commission's jurisdiction. Generally, ratepayer collections from the jurisdictional investor-owned utilities may not be spent for programming and projects on Long Island. Accordingly, NYSERDA's NY-Sun petition does not include funding or program proposals for the Long Island market (where the residential market has been subsidy free since 2016). NYSERDA only states that it "remains cognizant of the opportunities and challenges facing the Long Island market, and will continue to work with stakeholders and LIPA to ensure" that Long Island contributes to the State's 6 GW target.

But LIPA appears to be moving in a different direction from the rest of the state – with respect to community solar in particular. In fact, the LIPA Board of Trustees recently voted to approve a community solar credit that is a fraction of what is already offered in competing markets. NYSERDA's proposal providing further support for community solar could potentially leave LIPA even farther behind. Proceeds from the Regional Greenhouse Gas Initiative (RGGI) are the usual funding source for Long Island clean energy initiatives, but there is significant pressure on that funding source from other needs. Thus, the question of where the Long Island solar market goes from here is largely unknown.

Takeaways

When it was passed, the CLCPA was criticized for large promises but few specifics. The NYSERDA petition is thus an important step forward creating the policies and funding mechanisms for achieving certain of the CLCPA's primary goals. How promptly -- and how strongly -- the Commission moves the proposal forward will dictate whether New York can continue renewable energy growth essential to its emissions reduction goals and further growing the State's strong solar industry.

For more information, please contact Hodgson Russ's Renewable Energy Practice attorneys at https://www.hodgsonruss.com/practices-renewable-energy.html.

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[1] *See, e.g.*, Comments of Community Solar Providers, Case 19-M-0463 (Dec. 2, 2019), available at: http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?Mattercaseno=19-M-0463.