STATE OF MAINE
PUBLIC UTILITIES COMMISSION

January 26, 2024

Docket No. 2023-00236

PITTSFIELD SOLAR I LLC,
CORINNA SOLAR I LLC,
PISCATAQUIS VALLEY SOLAR LLC,
GUILFORD HIGH STREET SOLAR LLC,
SNAKEROOT SOLAR, LLC
USS BLAINE SOLAR LLC
Request for Good Cause Exemption
Pursuant to 35-A M.R.S. § 3209-A

REPLY BRIEF OF MAINE RENEWABLE ENERGY ASSOCIATION AND COALITION FOR COMMUNITY SOLAR ACCESS

Pursuant to the Commission's December 28, 2023 Procedural Order, Maine Renewable Energy Association ("MREA") and Coalition for Community Solar Access ("CCSA") hereby submit this Reply Brief in response to the Office of Public Advocate's (the "OPA") Brief.

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I. INTRODUCTION

Petitioners Pittsfield Solar I LLC ("Pittsfield Solar"), Corinna Solar I LLC ("Corinna Solar"), Piscataquis Valley Solar LLC ("Piscataquis Valley Solar"), Guilford High Street Solar LLC ("Guilford Solar"), USS Blaine Solar LLC and Snakeroot Solar LLC (collectively the "Petitioners") have expended millions of dollars and invested thousands of hours of labor resources over the course of several years to bring these projects to fruition. Petitioners heeded the Maine legislature's call to develop new distributed generation resources in furtherance of its ambitious climate goals and have complied with every eligibility criterion and development milestone imposed on them.

Despite their best efforts, and through no fault of their own, Petitioners have experienced external delays beyond their control. Because of these external delays, Petitioners will be unable to meet the December 31, 2024 deadline for commercial operation and, accordingly, have petitioned the Commission for a good cause exemption from this requirement.

The Commission is duty-bound to adjudicate these ripe and statutorily authorized Petitions for good cause exemption. Because Petitioners have satisfied the statutory requirements to petition for good cause exemption, the Commission should grant these Petitions.

II. ARGUMENT

A. The Petitions are ripe for consideration and the OPA's position on ripeness is untenable and inconsistent with prior Commission decisions.

The OPA argues, without substantiation, that Petitioners' requests are "not ripe for consideration by the Commission because the statutory deadline is still 12 months away."[1] However, there is nothing in 35-A M.R.S. § 3209-A or Commission precedent to suggest that the Commission cannot adjudicate good cause exemptions before the December 31, 2024 commercial

[1] *Pittsfield Solar I, LLC, et al.*, Request for Approval of Good Cause Exemption Pursuant to 35-A M.R.S. § 3209-A, Docket No. 2023-00236, Brief of the Office of the Public Advocate at 4 (Jan. 12, 2024) (the "OPA Brief").

operation deadline (the "COD Deadline").

In support of its position, the OPA cites a sole order where the Commission granted a good cause exemption from the COD Deadline.[2] However, that decision is *consistent* with the proposition that these Petitions are ripe for Commission review. In *TPE Development, LLC*, the Commission initially declined to decide the petition for good cause exemption from the COD Deadline because the statutory milestone was still two years away and the delay at issue, caused by the Non-Wires Alternative project, was the subject of a Commission-initiated investigation.[3] The Commission directed TPE Development, LLC ("TPE") to file a 90-day status report regarding the delay and the anticipated impact on the project timeline.[4] In June 2023, *more than 18 months before the COD Deadline*, the Commission granted TPE's petition for good cause exemption.[5] In a footnote, the Commission noted that TPE's petition presented an "unusual situation" and that other good cause exemptions from the COD Deadline "may not be ripe given that the milestone is more than one and one-half years away."[6]

Here, the COD Deadline is less than one year away and Petitioners will be required to make significant financial investments in the interconnection facility prior to the COD Deadline. Petitioners' situation is analogous to the "unusual" circumstances in *TPE Development, LLC*. In that petition, CMP informed TPE that the timeline for construction was "unknown, with completion unlikely until 2025 or later."[7] Here, CMP informed Cluster 6 projects that its

[2] OPA Brief at 5 (citing *TPE Development, LLC (Pond Road Project)*, Petition for Good-Cause Exemption Pursuant to 35-A M.R.S. § 3209-A, Docket No. 2022-00365 (Jun. 7, 2023) ("*TPE Development, LLC*")).

[3] *TPE Development, LLC* at 1-2.

[4] *TPE Development, LLC* at 2

[5] *TPE Development, LLC* at 4.

[6] *TPE Development, LLC* at n.5.

[7] *TPE Development, LLC* at 4.

interconnection facility construction will extend into the end of 2025.[8]

These Petitions are ripe for adjudication because Petitioners will be required to fund the cost of the MVAR capacitor bank before the December 31, 2024 COD Deadline, have made a commitment to paying those interconnection costs, and have met all other statutory milestones under 35-A M.R.S. § 3209-A. CMP estimates it will take 24-30 months to construct the capacitor bank and cost approximately $7.5 million.[9]

The OPA's assertion that Petitioners "are requesting good cause exemptions with no deadline to accommodate any changes to the interconnection facility construction schedule"[10] is disingenuous. Petitioners specifically requested an extension of the commercial operation deadline until the earliest date on which the utility can complete its interconnection facility construction and energize the facility.[11] The Projects will need to pursue all necessary development efforts in order to be ready to energize once CMP finishes its construction. There is no suggestion in the record that the Petitioners are asking for more time to interconnect beyond what is necessary for CMP to complete its interconnection facilities. It would not be prudent to construct a project before there is a clear timeline for the utility to complete its work – the unenergized project would require ongoing maintenance and repair, and risk damage or degradation while Petitioners wait for CMP.

The OPA's position would effectively deny Petitioners any meaningful ability to pursue good cause exemption until after the projects are no longer viable. The OPA seems to suggest that Petitioners should fund the capacitor bank and build their projects to mechanical completion without any path toward maintaining eligibility for NEB during the process. This absurd result is

[8] *See*, *e.g.*, *Pittsfield Solar I LLC Corinna Solar I LLC*, Petition for Good Cause Exemption Regarding Net Energy Billing Eligibility, Docket No. 2023-00236, Ex. E at 5 (Sept. 8, 2023) ("Pittsfield Solar and Corinna Solar Petition").

[9] Pittsfield Solar and Corinna Solar Petition at 5.

[10] OPA Brief at 4.

[11] *See, e.g.*, Pittsfield Solar and Corinna Solar Petition at 3.

not commercially reasonable, contravenes the 35-A M.R.S. § 3209-A safe harbor provision, and contradicts legislative intent. The Commission should reject the OPA's unsustainable position regarding ripeness to petition for good cause exemption and proceed with the merits of Petitioners' claims.

B. The NEB Reports should not inform the Commission's decision because they contain information that has not been vetted and is inaccurate.

MREA and CCSA continue to object to the introduction of reports prepared by CMP and Versant Power regarding the amount of "active operational" and "active non-operational" distributed generation resources in their service territories (the "NEB Reports").[12] The OPA relies on these reports to show that "the ratepayer impact of NEB is already enormous and growing rapidly."[13]

As a threshold matter, the Commission should not rely on the NEB Reports as reliable or probative in the calculation of the number of active operational or active non-operational resources in each utility's respective territories because these reports have not been subject to authentication or cross-examination. The NEB Reports were not prepared by Commission staff, nor the OPA, and have not been authenticated under the Maine Rules of Evidence, as adopted by the Commission. 65-407 C.M.R. Ch. 110 §10.B. The authors of the reports did not authenticate the reports, did not swear as to the truth or accuracy of methods used to prepare the reports, and were not available for questions on these reports or limitation of information presented.

The NEB Reports are also irrelevant to and outside the scope of the instant proceeding. The amount of potential future distributed generation across the state has little to no bearing on whether these Petitioners have stated meritorious claims for good cause exemption. The scope of

[12] *See Pittsfield Solar I, LLC, et al.,* Request for Approval of Good Cause Exemption Pursuant to 35-A M.R.S. § 3209-A, Docket No. 2023-00236, Brief of MREA and CCSA at 13 ("MREA and CCSA Brief") .

[13] OPA Brief at 10.

this proceeding is narrowly focused on six individual projects, it is a not a holistic or programmatic review of the NEB program or of the 750 MW goal. This is an adjudicative docket focusing specifically on Petitioners' well-supported requests for good cause exemptions for their individual, mature projects. Furthermore, even a cursory analysis of the NEB Reports shows that they contain significant factual errors and inconsistencies, and therefore are not appropriate records from which the Commission can take administrative notice.

First, they are inappropriate for measuring the 750 MW goal because the NEB Reports include projects with a generating capacity of less than 2 MW. The statutory goal of 750 MW explicitly applies only to projects under Sections 3209-A(7) and 3209-B(7), which include only projects between 2-5 MW.[14] Second, the NEB Reports contain multiple factual errors, including projects that are double counted and projects listed as "operational" that are "withdrawn" according to CMP's interconnection queue.[15] Third, the NEB Reports contain hydropower and other pre-existing generation facilities that should not count toward the 750 MW goal, which is for the "***development*** of commercially operational distributed generation projects."[16] Because the 2021 Amendments explicitly apply the 750 MW goal to new development, repackaged hydropower facilities that existed prior to the 2021 Amendments should not count toward the total.[17]

The NEB reports are not competent evidence for the purposes presented for the above reasons. These errors and inconsistencies were discovered after only a superficial, non-exhaustive review. The NEB reports would surely contain many more discrepancies and mischaracterizations

[14] 35-A M.R.S. § 3209-A(7).

[15] *See* MREA and CCSA Brief at 14.

[16] MREA and CCSA Brief at 14 (quoting 35-A M.R.S. § 3209-A(7)).

[17] The Commission is aware that no new hydropower has been developed in Maine since the inception of the NEB program, and can take judicial notice of this fact as within its expertise. 65-407 C.M.R. Ch. 110 §10.B.

if subjected to the proper examination. Accordingly, the unauthenticated and misleading NEB Reports are not appropriate for Commission consideration in this docket. If these reports are used to assess trajectory towards the 750 MW goal, the Commission needs to scrutinize the reports for accuracy and carefully consider the projected attrition of non-viable projects that are listed in these reports.

C. The OPA's Position Regarding Good Cause Exemptions and the 750 MW Goal is Contrary to Legislative Intent.

When the Legislature amended the NEB Act pursuant to L.D. 936 (the "2021 Amendments"), it could have placed a statutory cap on the size of the NEB program or imposed eligibility criteria without qualification. Indeed, prior to the enactment of the 2021 Amendments, the Legislature considered changes to the NEB Act that would constrain the program's costs while ensuring fairness and equity to those projects already underway.[18] Critically, the Legislature (i) explicitly declined to set a "cap" and (ii) included a good cause exemption safe harbor for the finite number of current NEB projects already in the queues that may become hamstrung by external delays outside of their control.

1. 750 MW is a goal, not a cap.

The OPA argues that the Commission should deny the Petitions because "NEB projects are on track to greatly exceed the Legislature's target of 750 MW."[19] This argument fails because it applies an additional, extra-statutory criterion on the requirements to petition for good cause exemption. The statutory language permitting projects to petition for good cause exemptions specifically states that if "[a]n entity proposing the development of a distributed generation resource that does not meet one or more of the requirements of this subsection may petition the

[18] *See Report on the Effectiveness of Net Energy Billing in Achieving State Policy Goals and Providing Benefits to Ratepayers*, Maine Public Utilities Commission (Nov. 10, 2020) at 12 (Commission raised concerns about the fairness of retroactively terminating NEB agreements for existing projects).

[19] OPA Brief at 7.

commission for a good-cause exemption due to external delays outside of the entity's control."[20] The statute does not require consideration of the 750 MW goal, but rather only the requirement is that but for an external delay beyond the control of petitioner, a distributed generation resource would meet the requirements.

The Commission itself has acknowledged that only the Legislature has the authority to impose a cap on NEB and it is not appropriate to treat the 750 MW target as a cap.[21] The former director of MREA testified that "the goal was adopted specifically because it is not a cap. The Legislature was clear on it being a goal. It is therefore not a mandatory cap."[22] This testimony is the only record evidence of contemporaneous legislative intent by someone who participated in the legislative discussions surrounding the 2021 Amendments. The OPA has not supplied any record evidence to support its interpretation that the Commission's statutory analysis should be broader than what the plain language of the statute requires, instead pushing an interpretation that functionally turns the 750 MW goal into a cap and ignores statutory criteria for granting good cause exemptions.

2. The Commission should grant meritorious petitions for good cause exemption.

The OPA argues that the Commission should deny petitions for good cause exemption "[u]nless there is some truly unusual or exceptional circumstance that was the primary cause for missing a milestone."[23] However, the OPA's heightened standard of "truly unusual or exceptional circumstance" finds no support in the statute, which only requires a petitioner to demonstrate (i) an external delay beyond their control and (ii) a reasonable expectation of meeting the milestone in

[20] 35 A M.R.S. § 3209-A(7).

[21] *See* MREA/CCSA Brief at 12-13.

[22] MREA and CCSA Response to OPA-001-018.

[23] OPA Brief at 8.

the absence of the delay.[24] Neither the OPA nor the Commission have a statutory or legislative intent basis to read additional requirements into the statute or limit the scope of statute's applicability.[25] Here, Petitioners have demonstrated a series of external delays outside of their control that are the proximate cause of their inability to meet the COD Deadline. They have satisfied the statutory requirements to petition for good cause exemption.

In addition to imposing extra-statutory requirements on Petitioners, the OPA's rigid opposition also ignores existing statutory language addressing good cause exemptions. A fundamental principle of statutory construction followed in Maine is the rule against surplusage. The rule against surplusage requires that each word in a statute be given independent meaning and that no word be treated as unnecessary.[26] Here, the legislature explicitly provided for good cause exemptions when a petitioner satisfies the statutory requirements. It would be arbitrary to hold that the Commission has absolute discretion to ignore the statutory good cause exemption provision entirely and deny otherwise meritorious petitions based on OPA's policy concerns about the size or cost of the NEB program that have been repeatedly rejected by the Legislature itself.

D. The OPA's Denial of the Existence of External Delays Ignores the Factual Record.

The OPA argues that Petitioners do not satisfy the good cause exemption criteria because "they have not identified any external delays outside of their control, only *processes that have taken longer than anticipated*."[27] The fact that a "process has taken longer than anticipated" is in

[24] 35-A M.R.S. §3209-A.

[25] *See* OPA Brief at 13 (arguing that good cause exemptions should be "limited in scope and granted under unusual or extraordinary circumstances.").

[26] *See Stromberg-Carlson Corp. v. State Tax Assessor*, 2001 ME 11 ("When construing the language of a statute … [w]ords must be given meaning and not treated as superfluous.")

[27] OPA Brief at 11 (emphasis added).

fact the plain language meaning of "delay"[28] and the Commission should not be persuaded by this "hear no delay, see no delay, acknowledge no delay, re-define the word delay" approach that the OPA takes here.

The OPA's assertion that "lengthy cluster study processes and construction schedules are an ordinary development risk"[29] ignores the facts in the record: the CMP and ISO-New England ("ISO-NE") processes that extended from 2020 NEB and interconnection approvals into 2021, then 2022, then 2023, then 2025 were delays well outside of the Petitioners' control which prevented them from achieving one or more of the NEB Act's eligibility criteria.

Petitioners have adequately pleaded for good cause exemptions and submitted extensive evidence to the record to prove external delays related to both the interconnection study process and the utility construction timeline. There is nothing in the record to suggest that Petitioners had any control over the delays in the cluster study process or the CMP interconnection facility construction schedule. On the contrary, the record is replete with undisputed evidence that these delays were caused by the utility's deficient response to the Transmission Ground Fault Overvoltage ("T-GFOV") issue which impacted these specific projects, the management and duration of the ISO-NE Cluster 6 Study process, and long lead times for interconnection facility equipment procurement and upgrade construction, which CMP testified would have been different when the projects filed years ago and were impacted by the Ukrainian invasion and post-COVID issues.

1. The Commission found CMP delays in the interconnection study process caused by the T-GFOV Issue.

Parties, including MREA, CCSA, and the OPA, entered into a Commission-approved

[28] Pittsfield Solar, Corinna Solar, Piscataquis Valley Solar and Guilford Solar Brief at 16-17 ("Delay" is defined as "the act of postponing or slowing" and "the act of postponing, hindering, or causing something to occur more slowly than normal.")

[29] OPA Brief at 2.

Stipulation to resolve the investigation into CMP's management of the T-GFOV issue.[30] In the T-GFOV Stipulation, CMP admitted that it failed to timely identify, mitigate and resolve the T-GFOV issue and committed, in part, to meet the cluster study timelines published by CMP in October 2021. Here, the Commission identified delays caused by CMP and CMP committed to concluding the Cluster 6 study process by March 2022. But, the Cluster 6 study process did not conclude until August 31, 2023. The doctrine of *res judicata* prevents the OPA from arguing that the T-GFOV issue did not constitute a delay, as that fact has already been litigated and adjudicated with MREA, CCSA and OPA as parties in the prior litigation.[31]

2. The OPA does not dispute that CMP provided a March 2021 Cluster 6 Completion Date.

CMP initially indicated the Cluster 6 study process would take approximately four months and conclude in March 2021.[32] The cluster study process did not conclude in March 2021 because the target date for I.3.9 approval was pushed back more than 12 times.[33] Cluster 6 did not receive I.3.9 approval until August 31, 2023, *a delay of approximately two years and five months after CMP's initial March 2021 target*.[34] The OPA does not dispute, and indeed ignores, this series of incremental delays which were wholly outside of Petitioners' control. Had Cluster 6 received I.3.9 approval in March 2021, Petitioners' timelines would have been able to accommodate a 24-30 month utility construction period and still achieve commercial operation in advance of the COD Deadline.

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[30] *MREA and CCSA Request for Commission Investigation into Interconnection Practices Pertaining to Central Maine Power Company*, Docket No. 2021-00035, 2, 4 (Jan. 10, 2022) ("T-GFOV Stipulation").

[31] *See generally Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 9, A.2d 1097, 1100 ("[i]ssue preclusion, or collateral estoppel, prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment, and the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding … Collateral estoppel can be applied to administrative proceedings as well as to court proceedings.")

[32] Pittsfield Solar, Corinna Solar, Piscataquis Valley Solar and Guilford Solar Brief at 6.

[33] *Id.* at 7.

[34] *Id*.

3. The OPA does not dispute the Cluster 6 Study timeline far exceeded CMP's own Terms and Conditions.

OPA argues that "even if the cluster study had concluded a year earlier (within the time estimate included in CMP's terms and conditions), the petitioners' projects might still not have been energized by the end of 2024."[35] This assertion refers to Section 60 of CMP's Terms and Conditions, governing cluster studies, and concedes that the Cluster 6 study process did not comply with the timelines therein.

CMP Terms and Conditions, Section 60 contemplates 290 business days from cluster closure to conclusion of the Phase 2 cluster study.[36] 290 business days from the February 1, 2021 cluster closure date is April 1, 2022 and this timeline is instructive because it was surely reasonable for Petitioners to expect the cluster study process to conclude well before August 31, 2023. Contrary to the OPA's assertion, if Cluster 6 had received I.3.9 approval in March 2022 or any of CMP's four cluster completion timelines provided to Petitioners, Petitioners would have been able to build and energize before the COD Deadline, even accounting for a 24-30 month utility interconnection facility construction timeline.

4. The OPA does not dispute the substantial evidence that neighboring utilities and jurisdictions are able to process cluster studies more expeditiously.

The OPA does not dispute, or address, record evidence that the Cluster 6 interconnection study timeline exceeded reasonable timelines in other jurisdictions, as observed by industry associations. The OPA mischaracterizes the prior testimony of MREA and CCSA as standing for the proposition that "lengthy cluster study timelines are the norm, not the exception."[37] This false assertion is directly contrary to the substantial evidence in the record illustrating that timelines in

[35] OPA Brief at 14-15.

[36] Pittsfield Solar, Corinna Solar, Piscataquis Valley Solar and Guilford Solar Brief at 29.

[37] OPA Brief at 13.

Massachusetts, North Carolina, and Nevada have been substantially shorter than the Cluster 6 study period.[38]

5. The OPA does not dispute that the timeline to construct interconnection facility upgrades is longer than usual.

The OPA argues that "CMP's interconnection facility construction schedule is not a 'delay' because it is a typical timeline for the type of upgrades required by the cluster study."[39] The OPA cites CMP testimony claiming "[T]his is the state of the industry right now and this what it takes to procure this equipment and construct these types of projects"[40] but neglects to provide broader context for this assertion. In fact, in the same exchange, CMP acknowledged construction timelines were "different five years ago, six years ago … [CMP] did get some information from a vendor who claimed, you know, coronavirus situation. They also even referenced the Russian/Ukraine war as creating delays."[41] CMP concedes that timelines for construction are longer now then they have been in the past. As the record indicates, when Petitioners began to develop these projects over four years ago, it was reasonable to expect a shorter interconnection facility construction timeline.

There is nothing in the record to suggest that Petitioners would not have been able to achieve commercial operation in advance of the COD Deadline if CMP had initiated its Cluster 6 study process in 2020 as indicated to Petitioners in June of 2020 or even soon after closing the cluster in February 2021, if CMP adhered to any of its earlier targets for cluster study completion, or if CMP was able to construct the interconnection facility on a timeline without supply disruptions. Indeed, Petitioners reasonably expected to achieve commercial operation in advance

[38] *See* Pittsfield Solar, Corinna Solar, Piscataquis Valley Solar and Guilford Solar Brief at 31-32; *see also* MREA and CCSA Response to OPA-001-001.

[39] OPA Brief at 14.

[40] OPA Brief at 14 (citing 10/19/23 Tr. at 36).

[41] 10/19/23 Tr. at 36: 4-8.

of the COD Deadline up until the point at which they learned that CMP would be unable to construct the requisite interconnection facility upgrades before the end of 2025.[42]

III. CONCLUSION

Petitioners have worked in earnest, and in good faith with CMP, the Commission, the Department of Environmental Protection, and appropriate local government to develop these NEB projects over the course of several years, investing millions of dollars to advance Maine's climate goals. Petitioners know today that they will be unable to satisfy the eligibility criterion requiring commercial operation by December 31, 2024 (which the OPA does not actually dispute), and, accordingly, seek relief from many delays beyond their control to maintain eligibility. These Petitions are ripe for Commission review and adjudication.

The statutory authority allows mature projects that date back to September of 2019 and January of 2020 to maintain eligibility for the NEB program when each can demonstrate that it has been delayed by external factors beyond its control, which delays will prevent it from achieving COD by the end of 2024. Petitioners in this proceeding have met their burden.

Maine's position as a climate leader is currently in jeopardy due to the persistent obstacles facing highly developed projects that were brought to the state because of Maine's commitment to its climate goals and its good business environment. The Commission has an opportunity in this case to assure the distributed generation community that Maine remains committed to its climate goals and to encouraging the development of renewable energy in the State. MREA and CCSA urge the Commission to fairly grant good cause exemptions where justified as clearly is the case in these Cluster 6 Petitions. Here, the Commission should exercise its discretion to grant good cause exemptions and extend the COD Deadline until that date on which CMP is able to complete interconnection facility construction and energize these Projects.

[42] Pittsfield Solar and Corinna Solar Petition at 4.

Dated: January 26, 2024

Respectfully submitted,

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