Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

NY Solar Project Order Creates Uncertainty For Developers

By **Kimberly Nason and Kaitlin Vigars** (June 14, 2021, 5:14 PM EDT)

Kimberly Nason

Kaitlin Vigars

In an order issued April 15, the New York Public Service Commission issued a major change to its requirements for solar projects in the state operating under the Value of Distributed Energy Resources, or VDER, tariff.[1]

Specifically, the commission modified an earlier ruling regarding the 5-megawatt capacity limit for projects under the VDER tariff that mandated projects must be located on separately deeded parcels to be considered separate projects.

This modification, which amended the requirement for separate deeds, represents a significant departure from the commission's prior orders, and is intended to support the continued development of renewable energy resources.

Support for renewable energy is especially important as New York state pursues the aggressive climate change goals articulated in the Climate Leadership and Community Protection Act. Notwithstanding the laudable goals underlying such change, the commission's about-face raises a number of questions, and increases uncertainty for solar project developers.

Pursuant to a 2014 order establishing a two-megawatt limit on project size for remote net metered projects, the commission acknowledged that multiple projects could be sited next to one another. However, for purposes of the 2-MW limit, they must be separate projects, rather than segmented projects that were otherwise interconnected to one another.[2]

The commission established a three-part test to determine whether a project was separate for purposes of meeting the project size cap. Under that test, a project is considered separate if it is: (1) separately metered and interconnected to the utility grid; (2) located on a separate site; and (3) operates independently of other projects.

With regard to the separate site requirement, the commission explained that a project would satisfy this requirement if it was located on a separately deeded parcel. The commission explicitly noted that this requirement did not prevent a developer from locating projects in close proximity to one another, or from developing solar on a larger parcel of land.

Indeed, the commission expressly stated that a solar developer could site multiple projects on a larger parcel, if that larger parcel was subdivided into smaller, separately deeded parcels. Ultimately, the commission expanded the cap on project size to 5 MW and established the VDER tariff, but the separate site requirement remained applicable.[3]

Notwithstanding the commission's clear directive on the necessary criteria to meet the separate site requirement, the separate site requirement was often interpreted inconsistently by the utilities, and projects were developed on singular, rather than separately deeded parcels. Such deviation from the commission's regulatory requirements placed these noncompliant projects in jeopardy — and risked the ability of the projects to interconnect to the grid, since a utility has no obligation to interconnect a project that does not meet the commission's regulatory requirements.

Indeed, it is precisely the development of noncompliant projects, and the associated risk to the viability of those projects, that prompted the commission's recent changes to the separate site requirement. Specifically, Borrego Solar Systems Inc. developed nine solar projects that were not sited on separately deeded parcels, as required by the commission at the time of development.

To rectify the projects' noncompliance and mitigate risk for these projects, Borrego filed a petition with the commission seeking a declaratory ruling that obviated the requirement for projects to be located on separately deeded parcels.

In their petition, Borrego attributes their noncompliance to an erroneous interpretation of the separate site requirement by National Grid PLC. Borrego alleges that it was told by National Grid that the commission's separate site requirement was met if each project had its own lease, including a metes and bounds description and a unique section-block-lot, or SBL, number.

Although Borrego acknowledges that National Grid later amended its interpretation, and asked Borrego for documentation showing that the projects were sited on separately deeded parcels, Borrego maintains that such clarification came so late in the development process that subdivision of the underlying parcels would have been both cost-prohibitive and time-consuming.

In support of their request that the commission jettison its separate deed requirement, Borrego argued that, in general, the commission's separate deed requirement created zoning impacts for solar projects that threatened project viability and, in turn, discouraged renewable energy development. In particular, Borrego pointed out that municipal approval was required to subdivide a larger property, which required solar developers to go through a lengthy subdivision process, and created uncertainty for developers, since subdivision approval was not guaranteed.

Borrego also noted that subdivision could potentially result in a diminished project size, because subdividing multiple smaller lots would implicate other requirements for access, setback and lot coverage. Borrego alleged that this requirement for separately deeded parcels threatened the viability of solar projects without any benefit to the utility or ratepayer, and was, therefore, unwarranted.

Ultimately, the commission granted Borrego's petition, determining that a project no longer needs to be on a separately deeded parcel to meet the separate site requirement under the three-part test for a separate project.

Instead, the separate site requirement may be met by showing that the project is on a parcel that has a unique SBL or borough-block-lot, or BBL, number; a separate lease; and a separate metes and bounds

description recorded via a separate memorandum of lease uniquely identifying each project. A separate deed will still satisfy the separate site requirement, but it is no longer the only means for doing so.

While this is a significant change, it does not specifically address Borrego's concerns regarding zoning impacts to solar projects. Questions and concerns about zoning impacts as a result of the commission's separate site requirement have existed since the commission first established such requirement, but the commission's order does little to resolve this uncertainty.

In fact, the commission's order actually exacerbates this inherent uncertainty, as it is unclear how the commission's new separate site requirement will function in practice.

Most notably, it is not clear how a developer could obtain a unique SBL or BBL number for a parcel without formal subdivision of the underlying lot or a separate deed. Normally, in accordance with guidance from the New York State Department of Taxation and Finance, a county will only create a parcel number in the context of a subdivision.

Likewise, it is typical practice for a county to require a new deed in order to amend its tax map. Thus, it is unclear whether a county would be willing, or even able, to provide a new SBL or BBL number for a parcel without a formal subdivision of the underlying parcel or a separate deed.

In fact, many counties have already indicated that both are required, regardless of the commission's order. Even if a county were willing to create a new SBL or BBL number in the absence of a formal subdivision process and without a new deed, some sort of underlying determination, permission or documentation from the municipality where the parcel is located will likely still be required, which necessitates coordination with both the municipality and the county.

Likewise, it is not clear how a municipality would interpret the access, setback, lot coverage or other bulk requirements otherwise contained in its zoning code as applied to a parcel that is not formally subdivided, but has a unique SBL or BBL number, lease, and metes and bounds description. Depending on the applicable zoning code, a municipality could still require compliance with those bulk requirements in the context of site plan review, review for a special use permit, or as a prerequisite for a building permit — which could have the same adverse impacts to project size and viability.

Borrego's noncompliant projects offer a poignant example of the importance of understanding and complying with the commission's regulatory requirements. Although Borrego ultimately obtained a favorable result, and was able to remedy their projects' compliance issues, the broader implications of the commission's order remain unknown.

The commission's order indicates that the commission is concerned about potential zoning impacts that could have negative ramifications for solar project viability. But the resolution provided in the order does not clearly settle the underlying issues.

Project proponents should still plan to consult with the municipality and county where they are considering a project for development, to confirm the process and documentation necessary to meet the commission's regulatory requirements. Depending on the requirements in each municipality and county, a project may still face certain impacts to timing, project size and viability.

Kimberly R. Nason is a partner and Kaitlin N. Vigars is an associate at Phillips Lytle LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Case No. 15-E-0751, In the Matter of the Value of Distributed Energy Resources, Order Modifying Separate Site Requirements (April 15, 2021).

[2] Case No. 14-E-0151, Net Energy Metering, Order Raising Net Metering Minimum Caps, Requiring Tariff Revisions, Making Other Findings, and Establishing Further Procedures (Dec. 15, 2014).

[3] Case No. 15-E-0751, Value of Distributed Energy Resources, Order on Phase One Value of Distributed Energy Resources Project Size Cap and Related Matters (Feb. 22, 2018).