STATE OF MAINE
PUBLIC UTILITIES COMMISSION

September 24, 2020

ADVISORY RULINGS

BORREGO SOLAR SYSTEMS, INC.,
Petitions for Advisory Rulings Regarding
Chapters 312 and 313 – Discrete Electric
Generating Facility

Docket No. 2020-00187

TPE DEVELOPMENT, LLC,
Petitions for Advisory Rulings Regarding
Chapters 312 and 313 – Discrete Electric
Generating Facility

Docket No. 2020-00188

Request for Advisory Ruling Pertaining to
Clean Energy Collective, LLC

Docket No. 2020-00213

BARTLETT, Chairman; WILLIAMSON and DAVIS, Commissioners

I. SUMMARY

The Commission issues this Advisory Ruling finding that three of the four proposed pairs of projects that are the subject of the Petitions for Advisory Rulings do not meet the definition of "discrete generating facility" set forth in statute. This Advisory Ruling contains a safe harbor provision that will apply to the evaluation of whether projects being proposed for participation in the Net Energy Billing program and the Distributed Generation program meet the definition of being a discrete electric generating facility as that term is defined in statute and rule. Applying the safe harbor provision, one of the pairs of projects meets the definition of discrete electric generating facility.

II. STATUTORY BACKGROUND

During its 2019 session, the Legislature enacted "An Act To Promote Solar Energy Projects and Distributed Generation Resources in Maine." P.L. 2019, ch. 478 (Act). Part A of the Act, now codified at 35-A M.R.S. § 3209-A and § 3209-B, made substantial changes to Maine's Net Energy Billing (NEB) program, including increasing the facility size limitation to under 5 MW. Part B of the Act, now codified at 35-A M.R.S. §§ 3481-3488, created a distributed generation (DG) procurement process requiring the Commission to solicit long-term contract proposals for targeted amounts of energy, capacity and renewable energy credits (RECs) from renewable distributed generation

facilities that are less than 5 MW. Thus, the Act contains the same less than 5 MW facility limitation for both NEB and DG procurement.

The purpose of this legislation is to promote the development and operation of smaller renewable "distributed generation," which the statute defines as facilities with a capacity of less than 5 MW. Thus, in implementing the Act, the Commission must ensure that qualifying facilities are, in fact, less than 5 MW, rather than part of another facility development. This primary statutory mandate applies to co-location with both a larger development (*i.e.*, above 5 MW), as well as smaller facilities of less than 5 MW.

III. RULES

In response to the Act, the Commission amended Chapter 313, which governs net energy billing, setting forth the following definition of “discrete electric generating facility”:

> “Discrete electric generating facility” means a facility that is not co-located with or otherwise in geographic proximity to (i) another eligible facility or (ii) a distributed generation resource as defined in Chapter 312 of the Commission’s rules in which there is a common financial or other interest that is contrary to the purpose of Title 35-A, sections 3209-A, 3209-B, chapter 34-C.[1]

The Commission also adopted Chapter 312 to govern the procurement of distributed generation resources, using the same definition of discrete electric generating facility.[2] In its Order amending Chapter 313, the Commission stated that

> The adopted rule adds a definition of “discrete electric generating facility” as a facility that is not co-located with or otherwise in geographic proximity of an “eligible facility” as defined in Part A of the Act or a “distributed generation resource” as defined in Part B of the Act in which there is a common financial or other interest that is contrary to the purpose of the statute that eligible facilities be 5 megawatts or less.[3]

Section 3(E) of Chapter 313 defines an “eligible facility” as a discrete electric generating facility that is less than 5 MW. Section 2(K) of Chapter 312 set forth a similar definition of a “distributed generation resource.” In its Order amending Chapter 313, the Commission commented on the co-location issue as follows:

> Turning Point Energy and SunPower commented that each eligible facility be located on a single parcel to ensure that the facility is not actually 5 MWs or greater in violation of the statute. The Commission agrees that it is crucial to ensure the Legislative requirement that eligible facilities are actually below 5 MW. Accordingly, the adopted rule

[1] Chapter 313, § 2(E) of the Commission’s Rules.
[2] Chapter 312, § 2(J).
[3] Order Amending Chapter 313 at 3.

specifies that an eligible facility must be a "discrete electric generating facility," which is defined in the rules as not co-located or otherwise in close proximity to another eligible facility or a distributed generation resource as defined in Part B of the Act in which there is a common financial or other interest that is contrary to the purpose of the Legislation.[4]

IV. REQUESTS FOR ADVISORY RULINGS

On June 24, 2020, Borrego Solar Systems, Inc. (Borrego) and TPE Development (TurningPoint) each filed two petitions for advisory rulings relating to four pairs of projects. Borrego and TurningPoint are seeking clarity as to whether these projects qualify as "discrete electric generating facilities" so as to be eligible for participation in the NEB Program or DG procurement.

In making these petitions, Borrego and TurningPoint provided facts and arguments responding to the nine-factor test that the Commission established in a previous Advisory Ruling in determining whether a project that is co-located with or in geographic proximity to another project is a "discrete electric generating facility" for purposes of Chapter 312 and Chapter 313:

1. Were the projects at any point in time the subject of unified ownership, management, or supervision?

2. Will the projects now or have they ever shared common equipment or labor?

3. Is there common financing of the projects?

4. Are the projects that are co-located or in geographic proximity under common ownership or have a shared financial interest?

5. Are the projects being developed at or about the same time?

6. Are the projects being managed or developed by the same entity or entities?

7. Do the projects otherwise exhibit characteristics of a unified or common approach?

8. Are there likely to be economies of scale with respect to the development of the projects that would make their development and costs more favorable compared to a stand-alone project of less than 5 MW?

[4] *Id.* at 6.

9. Are the projects capable of being interconnected at the same location? If not, what are the reasons for separate interconnection locations?[5]

On July 21, 2020, the Presiding Officers issued a Request for Information, which requested Borrego and TurningPoint to provide details regarding the four pairs of projects in the categories of Engineering, Procurement, and Construction (EPC), interconnection, financing, permitting, site issues, and timeline. On August 7, 2020, Borrego and TurningPoint submitted responses to the requests for information, including information that was confidential and subject to a protective order.

A. Borrego Solar Projects

Borrego filed two Petitions for Advisory Rulings Regarding Chapters 312 an0d 313 – Discrete Electric Generating Facility. One of the Petitions contains facts related to a pair of Borrego solar projects (referred to as Projects A and B), and the other Petition contains separate facts but the same question for another pair of Borrego solar projects (referred to as Projects C and D). In its petitions, Borrego requested the Commission issue an advisory ruling adopting a clear standard that the pairs of projects are not "co-located" or in "geographic proximity," and would therefore be considered discrete electric generating facilities under both Chapters 312 and 313, "where the shortest distance between the two closest points on the projects' fence line is 2,000 feet or more." Borrego proposes that "[p]rojects developed or owned by the same company that meet this proposed 2,000-foot clear standard would not need to file additional advisory requests."[6]

In the alternative, Borrego requests the Commission find that its projects meet the definition of discrete electric generating facility based on the Commission's multi-factor analysis set forth in its Advisory Ruling of March 23, 2020.[7] Below are the facts Borrego presented with request to each pair of projects.

1. Projects A and B

Project A is a ground-mounted solar photovoltaic generating facility with an installed capacity of approximately 4.99 MW. Project A will be interconnected to a 12.47 kV line of Central Maine Power's (CMP) distribution system. Project A has an interconnection agreement with CMP, and it intends to participate in either the NEB or DG program.

Project B is also a ground-mounted photovoltaic generating facility with an installed capacity of approximately 4.99 MW. Project B will be interconnected to a 12.47 kV line of CMP's distribution system. Project B has applied for interconnection but as of June 24, 2020 had not yet completed a system impact study or executed an

[5] *Maine Public Utilities Commission, Request for Advisory Ruling Regarding Chapters 312 and 313 Interpretation of Discrete Electric Generating Facility*, Docket No. 2020-00006, Advisory Ruling at 1 (Me.P.U.C. Mar. 23, 2020) (Advisory Ruling 2020-00006).
[6] Borrego Petition 2020-00187 at 1.
[7] Advisory Ruling 2020-00006 at 10.

interconnection agreement. Project B intends to participate in either the NEB or DG program. Borrego reports that it has made a "significant investment in the development of Project B," but is now delaying the project while awaiting Commission guidance.

The areas that Borrego has leased for Project A and Project B are separated by 4,300 feet (three quarters of a mile) at their closest point and are 6,400 feet apart at their farthest points. With respect to the nine-factor test, Borrego provided the following arguments:

- *Unified ownership, management or supervision:* "The projects are currently under development and owned by separate Borrego subsidiaries. However, it is anticipated that the projects will ultimately be transferred prior to construction, as individual projects, to separate owners who will manage the projects. Because the projects will likely be transferred, Borrego cannot represent whether final ownership will be by the same entity, though it is likely the projects may be acquired by different entities. The projects have different development, financing, and construction timelines; the development and construction timeline for Project B is approximately 12 months behind Project A's timeline."[8]

- *Shared common equipment or labor:* "The projects will have separate Engineering, Procurement, and Construction (EPC) contracts and will likely have separate EPC contractors. Since the projects will have different EPC contracts and very different timelines, there will be no shared common equipment or labor between the two projects."[9]

- *Common financing:* "Projects A and B are on different development timelines. The success of Projects A and B is not reliant on both projects receiving financing by the same lender or as part of the same portfolio."[10]

- *Common ownership or shared financial interest:* Borrego acknowledged that the projects share a parent company but stated that "due to differing business models of solar companies that acquire solar sites for construction or those that engage in long-term ownership and operation, the projects will most likely be transferred prior to construction to different companies that will have different financial interests."[11]

- *Development at or about the same time:* Borrego reported that Project A has already executed an interconnection agreement with CMP, while Project B, though it has initiated the interconnection process, has not yet completed a

[8] Borrego Petition 2020-00187 at 8.
[9] *Id.*
[10] *Id.* at 9.
[11] *Id.*

system impact study. Borrego stated that Project A is approximately 12 months ahead of Project B, which has not commenced permitting.[12]

- *Managed or developed by the same entity or entities:* Borrego acknowledges that the projects share the same parent company but points out that "the projects will likely be owned by different entities after the projects are transferred to long-term owners prior to construction." Borrego also stated that it "cannot affirmatively represent that the projects will never share the same upstream owner."[13]

- *Characteristics of a unified or common approach:* Borrego argues that the projects are not contingent upon each other because of the reasons already set forth in response to the other factors. "These independent projects do not share any characteristics, beyond sharing the same developer, that indicate the projects are unified or part of an approach to carve up a larger project into smaller, sub-5 MW portions."[14]

- *Economies of scale:* Borrego argues that there are no economies of scale in the development of Project A and Project B "beyond efficiencies that occur from a company developing two projects anywhere in the same utility service territory." Borrego argues that the projects "will individually go through the interconnection, engineering, procurement, construction, and financing processes with no economic or logistical benefit from the other project."[15]

- *Capable of being interconnected at the same location:* Borrego explains that the two projects will be interconnected to the same feeder into a common substation but at points that are more than one mile apart. "It would not make sense from an engineering, economic, or logistical perspective to interconnect the projects at the same location (e.g., it would be more expensive to do so with no operational or technical benefit)."[16]

2. Projects C and D

Project C is a ground-mounted solar photovoltaic generating facility with an installed capacity of approximately 4.99 MW. Project C will be interconnected to a 34.5 kV line of CMP's distribution system. Project A has an interconnection agreement with CMP, and it intends to participate in either the NEB or DG program.

Project D is also a ground-mounted photovoltaic generating facility with an installed capacity of approximately 4.99 MW. Project D will be interconnected to a 12.47 kV line of CMP's distribution system. Project D has applied for interconnection but as of

[12] *Id.*
[13] *Id.*
[14] *Id.* at 9-10.
[15] *Id.* at 10.
[16] *Id.* at 10-11.

June 24th had not yet completed a system impact study or executed an interconnection agreement. Project D intends to participate in either the NEB or DG program.

Projects C and D are located on parcels held by different landowners. The lease areas for each of Project C and D will be separated by 3,600 feet at their closest points and are 5,500 at their farthest points. The projects are roughly two-thirds of a mile apart at their closest points.

With respect to the nine-factor test set forth in the Commission's Advisory Ruling in Docket No. 2020-00006, Borrego offered identical arguments for Projects C and D as it had for Projects A and B.

In response to the Request for Information, Borrego provided additional information regarding many of the issues covered in the multi-factor test for both pairs of projects. With respect to EPC, for example, Borrego emphasized that under its business model, it will not be the entity selecting the EPC. Rather, its "development business sells and assigns developed projects to a project owner (separate from and unaffiliated with Borrego), who will select an EPC contractor (and secure financing)."[17] Borrego also explained that it "may group projects together into portfolios based on timing of development and expected commencement of construction – this is true of its development projects generally, and not just Projects A – D. Whether projects are grouped into a portfolio depends on timing of development and construction, and not on physical distance from or proximity to other projects in the portfolio."[18]

Borrego rejects the notion that there are linkages or interdependencies between the projects due to geographic location. "In the event that Projects A and B or C and D are transferred to the same owner, the EPC contracts would remain distinct due to the differences in development stage."[19] If the ultimate owner ends up using the same EPC firm for these projects, the efficiencies would be "the same efficiencies that would arise for projects located 10, or 50, or 100 miles apart."[20] For example, a purchaser of a portfolio of projects use of a master contract that would streamline the process and create efficiencies. In such a circumstance, Borrego argues that efficiencies gained from such an arrangement do not arise from the specific location of the projects.[21]

With respect to interconnection issues, Borrego notes that Chapter 324 requires the utility to disclose "whether there are any Contingent Upgrades that are potentially required for a later queued project to interconnection; and under that scenario cost sharing is possible. To date the T&D Utility has not identified any Contingent Upgrades to Projects B and D that would result in the share of upgrades between Projects A and B and Projects C and D, respectively."[22]

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[17] Borrego Response to Request for Information at 2.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 3.
[22] *Id.* at 4.

With respect to financing, Borrego explained that permanent financing will be provided by the ultimate owner and that the interim financing "is not altered by whether any two or pairs of projects go forward or not."[23]

As for permitting, Borrego stated there are no interdependencies or interrelationships between any of the projects. "Each project has completed its own site-specific analysis and has received or will receive a site-specific permit."[24] With respect to site issues, Borrego states there are no common elements, such as access roads, perimeter fencing, or lighting.[25]

With respect to timelines for the projects, Borrego provided the following information:

- The first projects for each pair (A&C), or "earlier queued" project, is ahead in the interconnection process and has obtained an Interconnection Agreement.
- The first projects for each pair (A&C) have completed state and local permitting.
- Project C has completed a transmission level analysis, whereas Project D has not.
- Due to the difference in maturity timelines, these projects may be eligible for different incentive programs, such as blocks in the DG Procurement.[26]

Borrego also submitted confidential information in response to the request for information regarding DEP permitting to further elucidate many of these answers.

B. Turning Point Projects

TurningPoint's two Petitions contain facts related to a pair of TurningPoint solar projects (referred to as Projects E and F), and the other Petitions contains separate facts but the same question for another pair of TurningPoint solar projects (referred to as Projects G and H).

1. Projects E and F

Projects E and F are both ground-mounted solar photovoltaic generating facilities with installed capacities of 4.99 MW. They will both be interconnected into CMP's distribution network. Project E would interconnect to a 12.47 kV line. Project F would interconnect to a 34.5 kV line. Both projects are located on separate parcels owned by different landowners. The perimeter fence lines of the projects are 2.45 miles apart at

[23] *Id.*
[24] *Id.* at 5.
[25] *Id.*
[26] *Id.* at 6.

their closest points. Their interconnection points are 2.37 miles apart. TPE intends for both projects to participate in either NEB or DG procurement. TPE has submitted an interconnection request for Project E but not for Project F until it receives "clarity" regarding its eligibility. TPE has paused investment in Project F to avoid "significant financial risk."

With respect to the nine-factor test set forth in the Commission's Advisory Ruling in Docket No. 2020-00006, TurningPoint provided the following arguments:

- *Unified ownership, management, or supervision:* TurningPoint stated that the projects are owned by separate entities but that it was the ultimate parent company of those entities. "TurningPoint anticipates, as is consistent with the business model of most developers, that the projects will ultimately be transferred prior to the start of construction. TurningPoint cannot represent at this time whether the projects will share ultimate ownership, though it is likely the projects will be acquired by different entities." Project E is 6 to 12 months ahead of Project F and therefore "it may well be transferred first as the sale of Project E is not contingent on or linked to the sale of Project F."[27]

- *Shared common equipment or labor:* The projects are physically separate projects, and as such will not share common labor or equipment. Project E is ahead of Project F in the development timeline, and each project is anticipated to have a separate EPC contract.[28]

- *Common financing:* "At this early stage it is unclear what mechanisms will be used to finance the projects. Factors such as program availability, customer type, development variables, and timeline will play a role in determining the financing mechanism. In this way, these projects are entirely and factually independent. In addition, it remains to be decided if the projects will ultimately have the same lender(s). The financing of Project E is not dependent on successful financing of Project F, and the converse is also true."[29]

- *Common ownership or shared financial interest:* The projects are currently owned by affiliated entities. "It is too early to be able to say whether the projects will likely have different owners, however TurningPoint can represent that the successful sale and operation of one project, is not dependent on the sale and/or operation of the other."[30]

- *Development at or about the same time:* The projects are on different timelines. "Based on the interconnection procedures as of the time of this submission, it is likely that Project E will be completed 6-12 months in

[27] TurningPoint Petition 2020-00188 at 9.
[28] *Id.* at 10.
[29] *Id.*
[30] *Id.*

advance of Project F, but TurningPoint does not control the timing of utility interconnection studies or construction schedules."[31]

- *Managed or developed by the same entity:* Both projects are currently owned by subsidiaries of TurningPoint. "Each project's success is not dependent on the other project being ultimately owned by the same or different company."[32]

- *Characteristics of a unified or common approach:* TurningPoint reiterated the information provided in previous answers, concluding the projects "do not share any characteristics other than the same developer, and characteristics that will be common across projects" that will seek to participate in NEB or DG procurement. TurningPoint also urged the Commission not to use permitting as a factor in the analysis, stating that the policy goals of the Department of Environmental Protection are not applicable with respect to the Legislature's policy goals in the NEB and DG statutes of encouraging the development of solar projects in Maine.[33]

- *Economies of scale:* TurningPoint stated that there is "nothing unique" about the development of these projects that would provide "economies of scale advantaging either of these projects over another project being developed" for NEB or DG procurement. "The only conceivable 'economy of scale' is from TurningPoint's significant institutional knowledge as a successful developer of renewable energy projects, but such perceived advantage is unrelated to the location of its projects."[34]

- *Capable of being interconnected at the same location:* "The geographic location of the projects results in the interconnection points for the projects being more than two miles apart. It is not technically or logistically feasible to interconnect the projects at the same location."[35]

2. Projects G and H

Project G and H are both ground-mounted solar photovoltaic generating facilities with installed capacities of 4.99 MW. They will both be interconnected into CMP's distribution network. Project G would interconnect to a 12.47 kV line. Project H would interconnect to either a 12.47 kV or 34.5 kV line. Both projects are located on separate parcels but are owned by the same landowner. The perimeter fence lines of the two projects are 0.77 miles apart at their closest points. Their interconnection points are 0.62 miles apart.

With respect to the nine-factor test set forth in the Commission's Advisory Ruling in Docket No. 2020-00006, TurningPoint offered the same arguments for Projects E and

[31] *Id.*
[32] *Id.* at 11.
[33] *Id.*
[34] *Id.* at 12.
[35] *Id.*

F, with the exception of the final factor, that is, whether the two projects are "capable of being interconnected at the same location." TurningPoint's answer reported that the "geographic location of the projects results in the interconnection points for the projects being 0.62 miles apart."[36]

TurningPoint submitted responses to the Request for Information for both pairs of projects.

With respect to EPC, TurningPoint emphasizes the business practice of hiring an EPC with regional experience, which could lead to the use of a common EPC as well as many other contractors to build the projects: "[U]se of the same EPC contractor is not an indicator of common development or colocation. Rather, it is an indicator of good and successful business practice and creation of a working relationship with one or more EPC contractors, who successfully execute on time or budget."[37] TurningPoint acknowledges that when project sites "are directly across a public road or generally within sight of each other, it is possible to capture efficiencies only when EPC work is undertaken simultaneously for both projects. Since these sites are neither adjacent nor do they share any site infrastructure, none of those linkages, interdependencies, or efficiencies exist for these sites."[38]

With respect to interconnection, TurningPoint explained that it has yet to be determined by the utility whether there are any "shared upgrades from ISO-NE Level 3 I.3.9 aggregate studies among" the two project pairs in issue.[39]

With respect to financing, TurningPoint provided confidential information regarding interim and permanent financing for the project pairs. It argues against project financing playing any role in the analysis: "Portfolio financing is common for all energy resources, not just renewable projects. TPE respectfully urges the Commission not to inadvertently adopt a financial element test that could have unforeseen impacts on the ability to finance projects under a law intended to support distributed energy resource development – such a test could impact the ability to finance projects on sites separated by more than 100 miles."[40]

As for permitting, to the extent TurningPoint provided non-confidential information, it explained that each pair of projects would be managed by the same project manager and that the factors of adjacency and similar timing were not present, so it does not "expect, anticipate or estimate any efficiencies, interdependencies, or interrelationships between projects E/F and/or projects G/H."[41] TurningPoint further

[36] *Id.*
[37] TurningPoint Response to Request for Information at 2 (Aug. 7, 2020).
[38] *Id.* at 3.
[39] *Id.* at 4.
[40] *Id.* at 1.
[41] *Id.* at 5-6.

explained that it had not scheduled pre-application meetings with DEP for any of the four projects.[42]

For site issues, TurningPoint responded that "[n]one of the projects will share existing or new access roads, fencing, solar equipment, or interconnection facilities. The projects are not physically or electrically connected in any manner."[43] TurningPoint provided confidential information relating to project timelines.

V. COMMENTS

The Commission received comments from three entities in this docket. The Governor's Energy Office (GEO) highlighted the need for further clarity:

> It is in all our interest that solar and other distributed generation developers have clear rules of the road when it comes to participating in the state's programs. To the maximum extent possible, the PUC should seek to avoid iterative processes in order to meet this requirement as these could be overly burdensome and increase costs. If the Commission were to consider financial portfolio information an element under this definition, doing so after full notice and comment on implications for ability to finance development, ownership and operations would be prudent given the potential unforeseen implication for solar companies of possible financing conditions. A clear, transparent definition will allow all developers to meet this standard, protecting their investments, and most importantly, protecting Maine ratepayers.[44]

The Coalition for Community Solar Access and Maine Renewable Energy Association (CCSA/MREA) filed comments generally endorsing the GEO comments. They note that while the Commission's hesitance to draw a bright line may have initially been appropriate "it is clear that continued lack of clarity will undoubtedly harm development efforts, and potentially redirect revenue opportunities and other benefits away from landowners and municipalities."[45]

On September 2, 2020, BlueWave submitted a proposal for a "parcel policy" to inform the term "geographic proximity," as follows

1. The facility must be located on a parcel, or multiple parcels of land, created prior to the date of the Act, that is, June 30, 2019;

2. The total capacity of the facility or facilities located on a parcel cannot exceed 5 MW;

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[42] *Id.* at 6.
[43] *Id.*
[44] Comments of Governor's Energy Office at 2 (Aug. 14, 2020).
[45] CCSA/MREA Comments (Aug. 21, 2020).

3. A facility may be placed on land that includes 1 or more adjoining parcels, provided that the total capacity on those parcels cannot exceed 5 MW;

4. A facility must have its own distinct point of interconnection with the utility, including its own separate metering and ability to be connected or disconnected to the utility;

5. Neighboring facilities can share non-operational infrastructure, such as access roads, utility poles, etc. necessary to provide utility and physical access to each facility; and

6. The generation components of a facility (panels, inverters, etc.) must be separate, including separately fenced and not co-mingled or connected with neighboring facilities, other than by the utility's distribution or transmission systems.[46]

On July 20, 2020, Clean Energy Co. (CEC) filed a letter with the Commission requesting that its comments and recommendations relating to geographic proximity be considered in a new docket or as part of an existing docket. The Commission opened Docket No. 2020-00213 to address these comments.

CEC recommends the Commission adopt the same "Parcel Policy" put forth by BlueWave. CEC believes that "diligent enforcement" of the Parcel Policy will "forestall developers pretending that large arrays are actually several DG projects."[47] CEC also commented that the current definition of discrete electric generating facility has the potential to "pit neighbor against neighbor" in the rush to establish sites to locate these facilities, which could lead to "community discord."[48] CEC also urged the Commission to incentivize developers to "find sites that can cluster generation around substations."[49]

On August 9, 2020, Longroad Energy filed comments in that docket that are supportive of the Parcel Policy approach. Longroad points out that it has projects that are in a "gray zone" as to whether they will qualify as discrete electric generating facilities and that the Parcel Policy will provide the needed bright line for developers.[50]

VI. DECISION

The definition of "discrete electric generating facility" in both Chapters 313 and 312 refers specifically to co-location or geographic proximity of an eligible facility under

[46] Comments of BlueWave Solar at 1 (Sept. 2, 2020).
[47] *Maine Public Utilities Commission, Request for Advisory Ruling Relating to Clean Energy Collective, LLC*, Docket No. 2020-00213, Comments and Request for Commission Order on Geographic Proximity in Particular and the Siting of Distributed Generation Facilities at 3 (July 20, 2020).
[48] *Id.*
[49] *Id.* at 4.
[50] *Maine Public Utilities Commission, Request for Advisory Ruling Relating to Clean Energy Collective, LLC*, Docket No. 2020-00213, Comments of Longroad Energy at 2 (Aug. 9, 2020).

either rule with another facility that is eligible under either rule. As set forth in the Advisory Ruling in Docket No. 2020-00006, the purpose of these provisions is to ensure that an eligible facility is actually less than 5 MW, rather than a portion of a larger facility. As set forth in this previous ruling, the Commission must interpret the co-location restrictions in Chapters 312 and 313 to prohibit projects that should not qualify under the Act because they are not the kind of small renewable facilities the legislation was designed to encourage and promote.

Both Borrego and TurningPoint, as well as the commenters, emphasize that the lack of clarity regarding the term "geographic proximity" and the case-by-case nature of determination of what constitutes a discrete electric generating facility has not been helpful for developers, who require more certainty as they make siting decisions and begin the planning process for construction and operation of distributed generation resources. The Commission agrees that the time has come for more of a "bright-line" test to provide this clarity. The Commission therefore sets forth a safe harbor provision that will apply to projects seeking to qualify for NEB or DG procurement.

Prior to discussing the safe harbor, however, the Commission must address the Petitions for Advisory Ruling filed by Borrego and TurningPoint for their respective projects.

A. Borrego's Projects A through D.

In its petition, Borrego describes its business model as one in which it serves as the pre-construction developer. That is, Borrego selects the site, negotiates with the landowner, procures financing for obtaining site control, engages in the permitting processes, and seeks interconnection from the utility. In short, Borrego does everything necessary to make the site "shovel-ready" before selling it to a developer who will construct the facility, negotiate the agreement to sell energy, obtain any customers or subscribers and then operate the facility.

In light of this approach, therefore, with respect to Commission's multi-factor test, Borrego conceded that it served as the entity developing all four of the projects, and that because of that, there were connections and efficiencies. In each case, however, Borrego emphasized that any economies that resulted from its involvement were not related to the location of the facilities and therefore should not be disqualifying. Borrego argues that "several of the factors identified by the Commission in its colocation analysis (e.g., identity of the EPC contractors or financing parties) generally are not known and may not even be within control of the early-stage developer who selects and invests in project sites. Relying on factors that are not related to physical distance and that depend on decisions and actions to be taken by as-yet unidentified future owners or financiers of projects greatly complicates the analysis."[51]

The Commission is not convinced that Borrego's business model shields it from the analysis that must be done to determine whether, at this present moment, Projects

[51] Borrego Response to Request for Information at 1 (Aug. 7, 2020).

A and B, and Projects C and D, are sufficiently distinct to meet the definition of discrete electric generating facility. Applying the Commission's multi-factor test, Borrego is the developer of all these projects and has admittedly used or will use its expertise and resources to bring them all forward to the point when they are ready to be sold to the ultimate owner. There is nothing in the statute or rule that requires the question of whether these projects are discrete be determined only after the projects are in the hands of the ultimate owner. To do so would ignore the very decision to develop the individual projects, which is at the heart of the question of whether the projects will ever qualify as discrete facilities. To put off the decision until there is a "real" owner of the project would essentially ignore the entire pre-construction phase of the project, which is surely not what the Legislature intended. Moreover, such a delay would render the eligibility of a project to be unresolved until after it was sold to the ultimate owner, which seems to inject uncertainty and risk into any potential purchase decision by an ultimate owner.

Borrego also admits that it decided to delay the progress of Projects B and Projects D, until it had clarity from the Commission as to whether the projects meet the definition of being discrete electric generating facilities. Borrego argues that because the projects are now on different timelines, they cannot enjoy efficiencies from being developed simultaneously. This separation in time did not occur naturally. Rather, Borrego created the separation. Had Borrego continued to work on the projects on the same timeline, they would presumably have reached the finish point, that is the point when Borrego would ready them for sale, at roughly the same time. In short, Borrego does not answer the question as to whether the individual projects in each pair of projects truly constitute a project that is less than 5 MW and not, instead, capable of development as a larger project.[52]

Even if the Commission were to accept Borrego's arguments with respect to its business model and the temporal separation of these projects, there is the issue relating to their actual physical distance. Projects A and B are three-quarters of a mile apart at their closest point. Projects C and D are two-thirds of a mile apart at their closest point. The Federal Energy Regulatory Commission (FERC) uses a one-mile rule to determine whether facilities located within an area considered as one site are qualified to participate as small power production facilities.[53] In its previous Advisory Ruling, the Commission did not adopt this standard. Borrego urges the Commission to adopt a threshold of 2,000 feet of separation on the ground that it "scales the PURPA one-mile rule by one-third, even though the maximum 5 MW size of an eligible Maine distributed generation project is merely one-sixteenth of the 80 MW capacity of a PURPA project."[54]

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[52] *See* Advisory Ruling 2020-00006 at 11 ("while Solar Company states that it plans to proceed with both projects, it does not state that it could not proceed with its development plan such that both projects could be combined into one facility that would be eligible to participate in the Class IA project solicitation or future long-term contract solicitations under section 3210-C").
[53] Advisory Ruling 2020-00006 at 6.
[54] Borrego Petition 2020-00187 at 6.

Scaling the distance to 2,000 because of the size difference between the 5 MW limitation in Maine and the 80 MW size of projects under the FERC ruling does not serve a useful purpose. Maine is a state with large tracts of land available for development. Borrego's two pairs of projects are within a mile of each other and therefore are at a geographic proximity that does not meet the definition of discrete electric generating facility. In addition, due to the close distance of these projects, these two pairs of projects do not meet the safe harbor provision, set forth below, which requires the projects to be at least one mile apart at their closest point to qualify.

In light of this determination, the Commission concludes that Borrego's two pairs of projects do not meet the definition of discrete electric generating facility.

B. TurningPoint's Projects E through G

TurningPoint's business model is similar if not identical to Borrego's approach. It identifies and describes itself as an "early stage developer."[55] TurningPoint makes many of the same arguments as Borrego and urges the Commission to adopt the 2,000 foot distance as a standard to apply to projects, along with the projects being physically distanced, that is, not sharing electrical facilities, separately interconnected, and located on separate parcels that pre-exist the proposed solar developments.[56]

Applying the multi-factor test to TurningPoint's two pairs of projects, the Commission would conclude that even at this early stage of development, there are efficiencies and commonalities that flow from the fact that TurningPoint is the current owner. The fact that it plans to sell the facility does not change that analysis. The ultimate owner is not known and therefore the determination must be made on the facts as they exist on the ground.

Having said that, Projects E and F are located a distance of more than two miles from their closest point. As such, these projects will be examined and analyzed under the safe harbor provision set forth below.

VII. SAFE HARBOR

To provide clarity and certainty to developers, the Commission establishes the following safe harbor provision to projects seeking to qualify as discrete electric generating facilities for purposes of participating in Maine's NEB or DB Procurement Programs. Facilities that will be located less than one mile apart at their closest point would not qualify as discrete under the safe harbor. Facilities that are closer than one mile apart are not presumed to be disqualified but instead must apply the multi-factor test set forth in Advisory Ruling 2020-00006 to determine whether they are discrete electric generating facilities. The Commission will continue to accept Requests for Advisory Ruling with respect to any such facility.

[55] TurningPoint Response to Request for Information at 3.
[56] TurningPoint Petition at 7.

Facilities that are located more than five miles distance at their closest point are at a distance that is sufficiently separate so as to qualify as discrete facilities. For facilities between the one to five mile range from each other, there remains a question as to whether they are within geographic proximity and thus the safe harbor criteria provides guidance for developers and landowners as to whether the projects qualify as discrete electric generating facilities.

By establishing a safe harbor, the Commission hopes to provide developers with guidance that will allow them to plan and manage their projects so that they would be eligible for these programs. Developers of projects that do not meet the safe harbor provisions may seek an Advisory Ruling requesting guidance as to whether, notwithstanding not being in the safe harbor, the project would still be considered to be discrete.

Discrete DG/NEB Facility "Safe Harbor" Criteria

(The following criteria are applicable to facilities whose capacity in the aggregate is equal to or greater than 5MW and which are owned and/or being developed by the same entity, an affiliated entity, or in partnership or otherwise in cooperation, coordination, or with which there is a shared financial interest with an unaffiliated entity. Facilities that are more than 5 miles apart at their closes point are presumed to be discrete)

- *Facility sites must be at least one mile apart at their closest point;*
- *Facilities that are between one mile and 5 miles apart at their closest point must meet all remaining criteria;*
- *Facilities must not share development or EPC contractors or other resources unless a developer can demonstrate that doing so provides no economies of scope or scale;*
- *The Maine DEP has not determined that the facilities will be reviewed consistent with the "Common Scheme of Development" standard;*
- *Facilities may not share common interconnection facilities or costs;*
- *Facilities may not share common long-term or permanent investment or financing sources, but developers may use common financing sources for early development activities such as site control and permitting;*
- *Balance of System (BOS)[57] elements and costs must not be shared or otherwise common to the facilities;*
- *Facilities may not share common access roads or rights of way.*

As part of the DG Procurement or NEB application process, as applicable, an owner/developer must provide an affidavit or other attestation that each of its projects meets these "Safe Harbor" criteria or has otherwise been found by the Commission to be a Discrete Generation Facility. In addition, developers must ensure that any transfer

[57] Balance of System elements and cost are generally considered to include all elements and costs of a project other than panels and inverters.

of ownership of a project includes the prohibition on common long-term or permanent investment or financing.

Applying the safe harbor to Borrego's two pairs of projects, the Commission concludes that Borrego's projects do not meet the safe harbor standard. Borrego's Projects A and B as well as Projects C and D are less than one mile apart at their closest point. They do not qualify as discrete electric generating facilities pursuant to the Commission's multi-factor test, which was in effect at the time that Borrego filed its petition, nor do they qualify under the safe harbor provision established in this Order.

Applying the safe harbor to TurningPoint, Projects G and H are also less than one mile apart and thus do not qualify under the safe harbor. As set forth above, they also do not meet the multi-factor test set forth in the Commission's previous Advisory Ruling.

The Commission concludes that TurningPoint's Projects E and F meet the safe harbor. Based on the information provided in TurningPoint's petitions as well as the information provided in response to the Request for Information, TurningPoint has shown that (1) the projects are more than 2 miles apart at their closest point; (2) the projects do not currently share EPC or contractors that demonstrate economies of scale; (3) there is at present no DEP determination of common scheme of development; (4) the projects do not share interconnection; (5) TurningPoint has provided confidential information upon which the Commission may conclude it has met the criteria as to their being no provision of common financing; (6) there are currently no shared Balance of Systems elements or costs; and (7) the projects do not share access roads.

Finally, in light of the adoption of this safe harbor, the Commission will not adopt the Parcel Policy proposed by BlueWave. The Commission is appreciative of BlueWave's proposal as well as the comments filed by the Governor's Energy Office and CCSA/MREA, as well as the comments filed by Clean Energy Co. and Longroad Energy in Docket No. 2020-00213. The Commission is cognizant of the fact that developers are eager to make progress on their projects and that obtaining more certainty regarding regulatory review of site locations and qualification for the NEB and DG Procurement programs is necessary. Nevertheless, as stated in Advisory Ruling 2020-00006, the Commission has an obligation to oversee the growth of these programs, which are still in their early stages. The decisions made today will have long-term consequences and, as has been pointed out by some commenters, will result in winners and losers. The Commission seeks to carry out the legislative intent of enhancing the opportunities for the growth of distributed generation while at the same time ensuring that development of these programs is not to the detriment of Maine's transmission and distribution system or, most important, Maine ratepayers.

While the safe harbor is perhaps an imperfect method for determining whether projects qualify as discrete electric generating facilities, it is hoped that it will provide clarity and certainty to the renewable energy developers as they seek to participate in these programs, while preventing projects that should not be eligible from being developed.

Dated at Hallowell, Maine, this 24th day of September, 2020.

/s/ Harry Lanphear
Harry Lanphear
Administrative Director

COMMISSIONERS VOTING FOR: Bartlett
Williamson
Davis

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 11(D) of the Commission's Rules of Practice and Procedure (65-407 C.M.R. 110) within **20** days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought. Any petition not granted within **20** days from the date of filing is denied.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21** days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.