

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 21-3587-NMP

Petition of Norwich Upper Loveland Solar, LLC. for a certificate of public good, pursuant to 30 V.S.A. §§ 248 and 8010, authorizing the installation and operation of a 500 kW (AC) group net-metering solar electric generation system in Norwich, Vermont	
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Order entered: 10/15/2021

ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING REQUESTS FOR WAIVERS OF COMMISSION RULES 5.107(C)(10)(A) AND (13)

I. INTRODUCTION

This case concerns an application filed with the Vermont Public Utility Commission (“Commission”) by Norwich Upper Loveland Solar, LLC (“Applicant”) to construct and operate a 500 kW solar electric generation project in Norwich, Vermont (the proposed “Project”). In this Order we deny the Applicant’s requests for reconsideration of Commission staff’s determination that the application was incomplete on August 31, 2021, and waivers of Commission Rules 5.107(C)(10)(a) and (13), requested for the sole purpose of determining that the application is administratively complete as of August 31, 2021.

II. PROCEDURAL HISTORY

On August 31, 2021, the Applicant filed an application for the Project. Concurrently, the Applicant filed a motion requesting that the Commission waive Commission Rule 5.107(C)(10)(a) in order to deem the application administratively complete even though it did not include a letter from Green Mountain Power Corporation (“GMP”), the interconnecting utility, confirming that the Project could be safely interconnected to its system. On September 8, 2021, Commission staff issued a memo determining that the August 31 application was incomplete because, in addition to not containing the letter from GMP required by Rule 5.107(c)(10)(A), the application did not contain a “document describing whether the construction

of the proposed net-metering system will interfere with the satisfaction of any condition contained in the Act 250 Land Use Permit” as required by Commission Rule 5.107(C)(13).¹

On September 22, 2021, the Applicant filed an affidavit affirming that the Project would not interfere with any conditions of the host parcel’s Land Use Permit. After the signature line of the affidavit, and without a separate motion or heading, the Applicant appended legal arguments to this affidavit contending that the documents filed as part of its initial August 31, 2021, filing were sufficient to satisfy the requirement of 5.107(C)(13), and, in the alternative, requesting that the Commission grant a waiver of 5.107(C)(13) for the purpose of finding the application administratively complete as of August 31, 2021.

While not required to by rule, the Commission has decided to consider the legal arguments appended to the end of the Martha Staskus September 22, 2021, affidavit as (1) a motion to reconsider Commission staff’s September 8, 2021, determination that the application was incomplete because it did not include a statement of consistency with the Land Use Permit, and (2) a motion for a waiver of 5.107(13) in the event that the Commission declines to reconsider Commission staff’s incompleteness determination.²

III. MOTION FOR RECONSIDERATION OF COMMISSION STAFF’S INCOMPLETENESS

DETERMINATION

The Applicant contends that the application was “thorough and contained all requisite information prescribed by Commission Rule 5.107.”³ The Applicant states that the Project site plan identifies the location of the cell tower governed by the Land Use Permit and demonstrates

¹ Commission Rule 5.107(C)(13) (“If the host parcel is subject to an Act 250 Land Use Permit, the applicant must file a document describing whether the construction of the proposed net-metering system will interfere with the satisfaction of any condition contained in the Act 250 Land Use Permit.”). For an example of a sufficient statement of consistency with an Act 250 Land Use Permit, see *Petition of Hartland GUVSMD Solar, LLC*, Case No. 21-0443-NMP.

² Motions should be identified as such when filed as such in ePUC so that the Commission and parties are properly notified of a pending request for relief. Requests for relief should not added to the end of an affidavit, as was done in this case. See V.R.C.P. 7(b)(1) (“An application . . . for an order shall be by motion”); Commission Rule 2.103 (incorporating the Vermont Rules of Civil Procedure into Commission proceedings). See also Memorandum from Chair Anthony Z. Roisman and Commissioners Margaret Cheney and Sarah Hofmann re Filing of motions, responses to motions, and replies to responses in ePUC, dated July 27, 2017 (available on the Commission’s website at: <https://puc.vermont.gov/document/filing-motions-responses-motions-and-replies-responses-epuc>).

³ Affidavit at 3.

that the cell tower is outside the Project's limits of disturbance. The Applicant asserts that it is implicit, if not explicit, from this documentation that the Project will not interfere with the cell tower and therefore will not interfere with any Land Use Permit conditions related to the cell tower. The Applicant states that a liberal interpretation of the Commission's net-metering rule would conclude that the application was administratively complete (subject to the Commission's waiver of 5.107(C)(10)(a)) on August 31. The Applicant argues that Commission Rule 2.106 requires the Commission to liberally construe its rules to secure a just and timely determination of issues presented.

Commission Rule 5.107(C) states that "[a]pplications for net-metering systems subject to this Section 5.107 must contain the following information. Failure to provide any required information will result in the application being deemed incomplete." A completeness review by Commission staff usually occurs within 5 business days of receipt.⁴ The Commission has published a checklist for applicants to use to ensure that an application is complete before it is filed.⁵ Commission staff use the same checklist when performing completeness reviews.

Commission Rule 5.107(C)(13) states that an applicant proposing a net-metering system on a parcel of land that is subject to an Act 250 Land Use Permit "must" include with the application "a document describing whether the construction of the proposed net-metering system will interfere with the satisfaction of any condition contained in the Act 250 Land Use Permit." This requirement is repeated on the checklist.

In this case, the Applicant provided testimony stating that the Project parcel is subject to a Land Use Permit. The Applicant did not include a statement that the Project would not interfere with the satisfaction of any condition contained in such permit. Therefore, we find no error in the determination that the application was not complete on August 31, 2021.

We disagree with the Applicant's arguments that the documents filed on August 31, 2021, made it implicitly clear that the Project would not interfere with any conditions contained in the Land Use Permit. The Commission cannot assume that Land Use Permit conditions related to the cell tower only involve the location of the cell tower and have no application to adjacent areas of the parcel. For example, Land Use Permits could potentially have conditions

⁴ Commission Rule 5.107(D).

⁵ The checklist is available online at: <https://puc.vermont.gov/document/applicant-checklist>.

related to the conservation of lands outside of the approved development or conditions governing the truck traffic using the cell tower's access road. The purpose of Commission Rule 5.107(c)(13) is to make sure that the Commission's approval of a net-metering system does not inadvertently interfere with the satisfaction of other state regulatory requirements. It is the Applicant's responsibility to inform the Commission whether any such conflicts exist, as opposed to putting the burden on Commission staff to infer that no conflict exists on the basis of site plans. The site plan cited by the Applicant does not describe whether the cell tower is subject to any Land Use Permit conditions and therefore is inadequate to explicitly or implicitly satisfy the requirements of Rule 5.107(c)(13).

Further, even if an applicant could show that a proposed net-metering system will not interfere with the conditions of a Land Use Permit by filing a site plan placing the net-metering system in a different location from the Act 250 development, the site plan filed in this case does not clearly do that. The cell tower and its infrastructure are in fact adjacent to or contiguous with the Project and its infrastructure. For example, the Project's proposed overhead power line (dark line labeled "OHP" in *Figure 1*, below) crosses the driveway of the cell tower. The Project's proposed new gravel access road (gray mottled shading in *Figure 1*, below) is an extension of the cell tower's access road. Accordingly, the site plan provided by the Applicant reasonably raises questions about whether and Land Use Permit conditions could be affected by the construction of the Project.

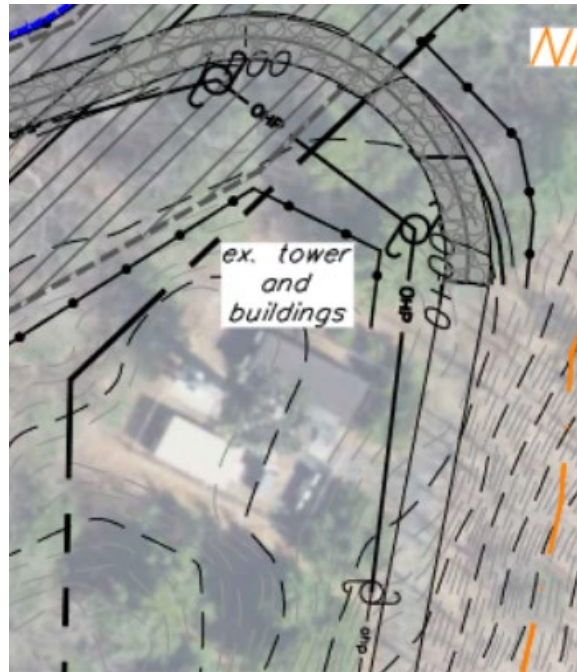


Figure 1

In summary, the Applicant did not provide with its application a description of whether the Project will interfere with any conditions of a Land Use Permit, as required by our rules. The Applicant's contention that consistency with the Land Use Permit was addressed by the site plan is not clearly supported because the site plan does not clearly demonstrate that the Project will have no effect on the cell tower and because the site plan does not provide information about whether there are Land Use Permit conditions that may apply to areas where Project infrastructure would be located. Therefore, the Applicant's request for reconsideration of the determination that the application was incomplete on August 31, 2021, is denied.

IV. APPLICANT'S MOTION FOR A WAIVER OF RULE 5.107(C)(13)

The Applicant moves that, if the Commission does not reconsider the reviewer's finding that the application was administratively incomplete as of August 31, 2021, the Commission waive Rule 5.107(13) for the express purpose of finding the application administratively complete as of that date.

The Applicant states that the Commission may grant waivers of its rules for good cause and that waivers are appropriate when they will materially advance the interests of fair process. The Applicant argues that good cause for a waiver exists because the application was thorough

and met the application requirements of Rule 5.107(C) in all other respects. The Applicant also notes that its application clearly identified the existence of the Land Use Permit, included the associated Act 250 site plan, and identified the location of the cell tower on the Project site plan, while reiterating its assertion that the information conveyed by the site plan is enough to establish that the Project will not interfere with the Land Use Permit.

The Applicant states that failing to grant this waiver request “would cause unnecessary hardship to the Applicant, the host landowner, the Project’s proposed off-takers, the Town of Norwich and Regional Planning Commission, and the State of Vermont all of whom will benefit from the greenhouse gas emissions reductions that this Project will provide the State and global community, consistent with the climate mitigation mechanisms called for by the Vermont Global Warming Solutions Act of 2020, the Paris Agreement, and the U.S. Climate Alliance.”⁶

The Commission has broad authority to waive the application of a rule in order to prevent unnecessary hardship or delay, in order to prevent injustice, or for other good cause.⁷ The Applicant has framed potential hardship in terms of an effect on greenhouse gas emissions. However, the Applicant has not represented that the ordinary operation of our rules would result in the Project not moving forward. The only result is a difference in the net-metering incentives that the Project would receive. Therefore, it is not clear how failure to grant the requested waiver would have any effect on greenhouse gas emissions.

The Commission understands that if a waiver is not granted, the Project will not receive pre-September 1 net-metering incentives, which will have a negative financial impact on the Applicant. The Commission has established that a change affecting the compensation a Project will receive is *one* factor that *can*, combined with other factors, amount to good cause to grant a waiver.⁸ As part of previous decisions to grant a waiver when a rate change is imminent, the Commission has relied on the fact that circumstances outside of an applicant’s control prevented the applicant from filing a complete application before the change occurred. Here, the Applicant’s decision to file the application without a description of whether the Project would interfere with the satisfaction of any Land Use Permit conditions was entirely within the

⁶ Affidavit at 4.

⁷ Commission Rule 2.107.

⁸ See, e.g., *Petition of Spear Street Solar, LLC*, Case No. 21-3624-NMP (Order granting a waiver of Rule 5.107(C)(10)(a) in part due to impending changes to net-metering program).

Applicant's control.⁹ Therefore, we do not find good cause to grant a waiver. The Applicant's motion for waiver of 5.107(C)(13) is denied.

V. APPLICANT'S MOTION FOR A WAIVER OF RULE 5.107(C)(10)(A)

The Applicant seeks a waiver of Commission Rule 5.107(C)(10)(A), which requires an applicant to file as part of its application a letter from the interconnecting utility stating that a net-metering facility can be safely interconnected and identifying any system upgrades that will need to be completed. The Applicant provided a copy of correspondence with GMP indicating that the Project failed at least one of GMP's Fast Track criteria, and that a Feasibility Study will be required.

The Applicant states that there is good cause for the Commission to grant the requested waiver because it has granted waivers in similar cases when an applicant has demonstrated that (1) the utility's interconnection review has been delayed for reasons outside of the applicant's control; (2) the applicant has agreed in advance to pay for all required upgrades; (3) the applicant has agreed to file the results of a utility interconnection study when it is completed; (4) the application for the project was otherwise complete; and (5) but for the delay in the utility's interconnection review, the applicant would have been able to file a complete petition before the date that new rates were to take effect under an update of the net-metering program.

Here, the Applicant has cited several cases where the Commission granted a waiver of Rule 5.107(C)(10)(a) based on the five criteria described above. This request differs from those cases because the initial application was missing the required statement of consistency with the Land Use Permit and therefore was not otherwise complete before the date that new incentives were to take effect under an update of the net-metering program. The primary purpose for granting a waiver of Commission Rule 5.107(C)(10)(a) is to prevent a project from receiving less favorable net-metering adjustors than it would have but for a delay caused by the interconnecting utility. Here, the application for the Project was administratively incomplete as of September 1 regardless of the status of GMP's interconnection review because the application was missing

⁹ As the Commission has stated on numerous occasions, the best practice is to file net-metering applications more than five business days before any significant deadline so that an applicant may have an opportunity to cure any defects in its filing before such deadline. Here, the Applicant filed the application one day before the deadline.

the required statement of consistency with the Land Use Permit.¹⁰ For that reason, even if a waiver were granted, the Project would not receive the pre-September 1 net-metering incentives. Consistent with past precedent, the Commission declines to grant a waiver of Rule 5.107(C)(10)(a) for completeness purposes when the waiver would not affect the incentives the Project would receive.¹¹

The Applicant's application remains administratively incomplete until the Applicant files a letter from GMP in accordance with Rule 5.107(C)(10)(a).

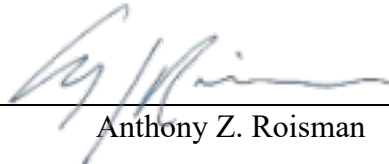
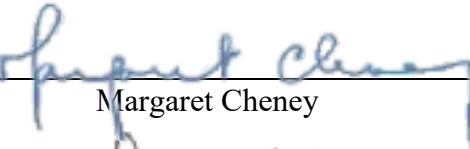
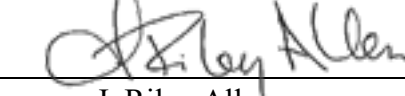
SO ORDERED.

¹⁰ Because this petition was filed the day before changes to the net-metering program went into effect, the Applicant could not have reasonably anticipated an opportunity to cure any defects of its filing before September 1.

¹¹ See, e.g., *Petition of Danville Roosevelt Solar LLC*, Case No. 20-2254-NMP, Order of 9/9/20, at 4; *Petition of St J Old Center Solar LLC*, Case No. 20-2481-NMP, at 4 (“[T]he Commission does not find good cause to grant the Petitioner’s [Rule 5.107(C)(10)(a)] waiver request because there is no impending deadline after which net-metering rates or adjustors are scheduled to change.”).

SO ORDERED.

Dated at Montpelier, Vermont, this 15th day of October, 2021.

)	
Anthony Z. Roisman)	PUBLIC UTILITY
)	
)	
Margaret Cheney)	COMMISSION
)	
)	
J. Riley Allen)	OF VERMONT

OFFICE OF THE CLERK

October 15, 2021

Filed:

Attest:



Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

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