

MAINE SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT  
LAW DOCKET NO. PUC-25-60

ELLSWORTH ME SOLAR, LLC  
Appellant

v.

PUBLIC ADVOCATE ET AL.  
Appellees

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On Appeal from the Order of the Public Utilities Commission

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**Brief of Appellant Ellsworth ME Solar, LLC**

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## I. **INTRODUCTION**

Ellsworth ME Solar, LLC (“Ellsworth Solar”) hereby submits this brief on appeal from the Order of the Public Utilities Commission (the “Commission”) denying its good cause petition to accommodate the late start of participation by its solar photovoltaic generator (the “Generator”) in the Net Energy Billing program (the “NEB program”). The Generator now sits idle in Ellsworth, Maine, after Ellsworth Solar completed construction in reliance upon an interconnection schedule that the utility could not maintain due to late deliveries by its equipment suppliers. The good cause exemption was created for circumstances precisely like those of Ellsworth Solar’s Generator. Ellsworth Solar has invested millions of dollars and fully constructed the Generator after the Legislature expanded the program in 2019. The Legislature’s subsequent retroactive amendments to the NEB program would have nullified the investment by Ellsworth Solar in the Generator had the amendments not included the exemption based upon “good cause.” The Commission, however, has failed to reasonably and consistently apply its past decisions that late deliveries of utility equipment provide “good cause” for an exemption. Because the Commission has misapplied its clear precedent for exemptions where late utility equipment delays the start of participation in the Program, Ellsworth Solar seeks relief from this Court.

## **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

### **A. Facts**

#### *1. The Expansion and Reforms of the Net Energy Billing Program*

In 2019, the Legislature enacted an Act to Promote Solar Energy Projects and Distributed Generation Resources in Maine, P.L. 2019, ch. 478 (effective Sept. 19, 2019) (the “Act”), substantially changing Maine’s then-existing NEB program. Under the NEB program, participating customers receive either kilowatt-hour or dollar credits to discount their electricity bills for energy generated from qualifying renewable energy projects. The Act significantly expanded the NEB program by (i) increasing the maximum size of eligible projects from 660 kilowatts (kW) to 5 megawatts (MW), (ii) generally eliminating the limit on the accounts associated with an eligible project, and (iii) adding a commercial and institutional category of projects. The Legislature expanded the NEB program to encourage more generation of electricity from renewable energy and, at the same time, enacted legislation requiring renewable generators to supply 100% of Maine’s electricity by 2050. P.L. 2019, ch. 477 (effective Sept. 19, 2019).

The Act had its intended effect, and by July 31, 2024, more than 14,413 renewable generation projects up to 5 MW in size had been proposed or were operating. Notice of the Office of the Public Advocate of the Net Energy Billing Reports, Attachment 1 at Summary Tab (Aug. 20, 2024). To limit the number of



eligible projects, two years after its initial expansion of the NEB program, the Legislature added several new eligibility criteria for projects between 2-5 MW in size (“2021 NEB Reforms”). P.L. 2021, ch. 107, 307 (amending 35-A M.R.S. §§ 3209-A, 3209-B effective Oct. 18, 2021); *see* Appendix at 0010 (hereinafter A. \_\_\_\_). The 2021 NEB Reforms required projects between 2-5 MW to achieve certain development milestones. Specifically, eligibility hinged upon the project having (i) a fully executed NEB or interconnection agreement prior to December 31, 2020, (ii) a fully executed interconnection agreement, all non-ministerial local permits, and submission of all required permit applications to the Department of Environmental Protection (DEP), prior to December 31, 2021, and (iii) started commercial operation by December 31, 2024 (“COD Deadline”). 35-A M.R.S. § 3209 A(7)(A-D).

The 2021 NEB Reforms set a target for the program to yield 750 MW of distributed renewable generation capacity of facilities between 2-5 MW. 35-A M.R.S. § 3209 A(7)(E). None of the 2021 NEB Reforms, including the 750 MW target, apply to facilities of 2 MW or less. *Id.*

Recognizing that changing the eligibility standards just two years after expanding the Program potentially undermined the reliance interests and investments of participating developers, the Legislature authorized the Commission to grant exemptions from these development milestones. Specifically,

the 2021 NEB Reforms included a two-part test for the issuance of exemptions for “good cause”: (1) the subject deadline was missed due to “external delays outside of the entities control,” and (2) “without the external delays, the entity could reasonably have been expected to meet the requirements.” *Id.*

In 2023, the Legislature further amended the NEB program and required that projects between 1 and 2 MW satisfy the COD Deadline, but not the other milestones that applied to larger projects. P.L. 2023, ch. 411 (enacting 35-A M.R.S. § 3209-A(9)) (enacted July 6, 2023, signed by the Governor on July 10, 2023, and effective Oct. 25, 2023). As with the 2021 NEB Reforms, the Legislature expressly allowed smaller projects to petition for exemptions from the new COD Deadline based upon “external delays outside of the entity’s control.” 35-A M.R.S. § 3209-A(9).

In 2025, the Legislature further reformed the NEB Program by (i) sunseting the program through a December 31, 2025, cutoff date for executing new net energy billing agreements; (ii) reducing the tariff credit rates received by all participating projects above 3 MW and their subscribers; and (iii) imposing a monthly fee on projects receiving kWh credits, beginning January 1, 2026. P.L. 2025, ch. 430 (effective September 24, 2025). These most recent changes are intended to reduce the cost of the NEB program.

## 2. *Ellsworth Solar enters the NEB Program*

Shortly after the 2019 NEB Legislation took effect, Ellsworth Solar initiated development of its now fully built Generator, a 1.99 MW solar facility. A. 0016. On May 27, 2020, Ellsworth Solar executed a land lease option for the Generator's site. *Id.* On May 28, 2020, Ellsworth Solar applied with Versant Power, the local transmission and distribution utility ("Versant") to interconnect the Generator. Versant confirmed that it accepted Ellsworth Solar's interconnection application on September 1, 2020. A. 0017. After an initial system impact study specific to the Generator, Versant and Ellsworth Solar executed an Interconnection Agreement on February 17, 2021. *Id.*

In March of 2021, the Generator and other facilities that had recently applied for interconnection entered a further transmission-level study by Versant. A.0010. Seventeen months later, Versant concluded the transmission-level study and received approval from ISO-NE to interconnect the Generator. A.0010. On September 6, 2022, ISO-NE sent Versant a letter approving the Generator's interconnection and anticipating a June 30, 2024, in-service date. A. 0040.

While the Generator remained in the cluster study, over nearly 17 months, the 2021 NEB Reforms were enacted. The Generator did not have a signed NEB or interconnection agreement in place prior to December 31, 2020, and therefore could not meet all the eligibility requirements for larger projects that were enacted

by the 2021 NEB Reforms.<sup>1</sup> Accordingly, Ellsworth Solar reduced the size of the proposed Generator to below 2 MW, as smaller facilities were not subject to the requirements of the 2021 NEB Reforms, including the COD deadline. A.0010. On April 29, 2022, Ellsworth Solar submitted a modification request with Versant to downsize the Generator's interconnection request, from 4.98 MW to its current nameplate capacity of 1.99 MW. *Id.* At that time, no COD deadline applied to the Generator or any other facility under 2 MW. P.L. 2021, ch. 107, 307.

3. *Procurement of Equipment by Versant and Construction of the Generator by Ellsworth Solar*

On October 4, 2022, Versant provided an updated cost estimate addendum to the interconnection agreement to reflect the Generator's reduced capacity of 1.99 MW. A.0010. As relevant here, the interconnection agreement provides the estimated cost and scope of upgrades to the transmission and distribution system that the utility must construct prior to authorizing a new facility to interconnect and start operating. Ellsworth Solar was required to match its timeline for constructing the Generator with Versant's equipment procurement and construction schedule for the interconnection upgrades. The construction completion dates are particularly

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<sup>1</sup> On September 8, 2021, Ellsworth Solar filed an initial good cause petition seeking an exemption from the interconnection agreement deadline for the larger 4.98 MW generation facility it had planned prior to the 2021 NEB Reforms. The petition was withdrawn without prejudice in February of 2022. The initial good cause petition did not seek relief from the deadline for commercial operation. *See* Petition for Good Cause Exemption of Ellsworth Solar, LLC, Docket 2021-000287 (filed Sept. 8, 2021).

important to align because the Generator cannot interconnect until Versant completes its interconnection upgrades.

According to the ISO-NE letter dated as of September 6, 2022, Versant had communicated an anticipated COD of June 30, 2024, for the Generator. Based upon that initial schedule from Versant, Ellsworth Solar began its construction preparations in earnest. On September 19, 2022, Ellsworth Solar ordered the racking for the Generator, and on October 8, 2022, it ordered inverters, as those pieces of equipment had longer delivery times. Ameresco Response to Data Request EXM-001-008.

As of October 2022, Versant began invoicing Ellsworth Solar for the estimated costs of the interconnection equipment and upgrade construction. A.0010. On February 17, 2023, Ellsworth Solar fully paid Versant the estimated interconnection cost of \$723,327. (*Id.*). On February 22, 2023, Versant confirmed receipt of the full interconnection payment, which allowed Versant to begin procuring equipment for its interconnection upgrades. A.0010.

By the end of February 2023, Ellsworth Solar had all permits in hand for initiating site work and construction for the Generator.<sup>2</sup> A.0010. On March 14, 2023, Ellsworth Solar ordered the modules for the Generator, the only other major

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<sup>2</sup> In an apparent typographical error, the Order states that the Department of Environmental Protection (the “DEP”) issued its permit on January 24, 2024, but the underlying record evidence demonstrates that DEP issued that permit on January 24, 2023. A.0010.

component with a long delivery time. Ameresco Response to Data Request EXM-001-008. As of February 17, 2023, Ellsworth Solar had paid Versant over \$723,000 for the interconnection and ordered over \$1.93 million in equipment to construct the Generator. A. 0041, 0010.

At this time, Ellsworth Solar and Versant began close coordination and frequent communications via email and regular videoconferences to discuss and align their respective schedules for construction. Ameresco Response to Data Request ODR-001-003, Attachments 9 and 10. After Ellsworth Solar had paid in, Versant “began the process of procuring interconnection equipment for the project.” Versant Response to Data Request ODR-002-001. In February 2023, Versant stated that the longest anticipated lead time for its equipment was 34 weeks. A.0086; A.0011. Ellsworth Solar commenced tree clearing and civil construction work at the site for the Generator on March 25, 2023. A.0010.

The first detailed schedule for Versant’s equipment procurement and upgrade construction anticipated that the Generator would receive authorization to begin commercial operation in 2024. A. 0010, 0043. Specifically, in Versant’s interconnection schedule dated March 27, 2023, Versant anticipated the Generator achieving its Commercial Operation Date (COD) on November 25, 2024 (the “March 2023 Schedule”). A. 0010, 0043.

On April 5, 2023, Versant timely communicated the March 2023 Schedule to Ellsworth Solar at the first of many bi-weekly interconnection meetings convened remotely on Microsoft Teams. A. 0043, 0054, 0060. According to Versant’s discovery responses, the written interconnection schedules include updated procurement timing provided by Versant’s suppliers filling the equipment orders. A.0086, 0087 (explaining that in March 2023 the longest equipment delivery times were 34 weeks, then the delivery time increased in April 2023, and Versant revised the Generator’s schedules based on the updated delivery times). On April 18, 2023, Versant ordered the regulator, which the supplier expected to deliver in 64 weeks—confirming the March 2023 Schedule’s anticipated COD in November 2024. A. 0011.<sup>3</sup>

Versant and Ellsworth Solar subsequently met on April 21, May 3, and May 10, 2023. A. 0054. At each of those meetings, Versant continued to track the expected COD as November 25, 2024.

On June 21, 2023, Versant communicated the first anticipated procurement delay from its equipment suppliers. A.0011, 0042. As of June 2023, Versant expected its supplier would deliver the meter required for the interconnection later

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<sup>3</sup> This was somewhat later than the June 2024 in-service date that Versant had shared with ISO-NE and was reflected in the ISO-NE letter. The postponed in-service date was caused by an initial increase in the procurement timeline described by Versant as a “standardized 34 weeks” as of March 2023. A.0086. When Versant finalized its March 2023 schedule, the longest equipment delivery time had increased to 64 weeks. A.0043.

than initially scheduled. *Id.* According to Versant’s schedule dated June 21, 2023, the total equipment procurement time had increased to 70 weeks (the “June 2023 Schedule”). A. 0042, 0086 (adjusting for Versant’s start of procurement as of April 18, 2023, as communicated in response to EXM-002-005, the timeframe for material procurement was April 18, 2023, to August 28, 2024). The late meter delivery increased Versant’s equipment delivery time to at least 70 weeks, adding six weeks to the March 2023 schedule’s maximum procurement time (of 64 weeks). A.0011. As a result, Versant expected the meter would delay the Generator’s expected in-service date to February 11, 2025. *Id.* That meant the meter would likely delay the Generator’s COD by over two months and into the winter of 2025. At this time there was no COD deadline applicable to the Generator, and even though construction had already started, Ellsworth Solar elected to postpone further construction until Versant provided further updates concerning delivery of its meter. *Id.*

Before the end of 2023, Versant received the meter earlier than expected and shared that information with Ellsworth Solar. A.0011. Upon learning Versant had received the meter early, Ellsworth Solar remobilized its construction efforts. In February 2024, Ellsworth Solar resumed construction. *Id.*

After Ellsworth Solar had resumed construction, Versant notified Ellsworth Solar that the supplier of the regulator had postponed its expected delivery date,



delaying the Generator's scheduled COD to March 6, 2025. In the March 2024 schedule from Versant (the "March 2024 Schedule"), the lead time for the regulator had increased from 34 to 70 weeks. *Id.* As of Versant's scheduling update in April 2024, the regulator's delivery timeline increased again to 75 weeks, although the Generator's expected COD remained March 6, 2025. A. 0011, 0085 (as Versant actually placed its first equipment order on April 18, 2023, the April 2024 schedule indicates a material procurement timeframe of April 18, 2023 to August 28, 2024, or 75 weeks). If the regulator had arrived as initially expected, in 34 or even 64 weeks, then the anticipated COD would have been on or before November 25, 2024.

Ellsworth Solar continued construction through the spring of 2024, and the Generator was completely constructed as of August 30, 2024. A. 0011. Despite the Generator being otherwise ready to commence operation well ahead of the COD Deadline, Versant's regulator did not arrive in time to allow Versant to complete its construction and authorize the Generator's start of operation. A. 0011, 0086.

## **B. Procedural History**

On May 7, 2024, Ellsworth Solar petitioned the Commission for a good cause exemption from the COD Deadline due to Versant's equipment procurement delays. A.0015. Timely petitions to intervene were filed by the Office of the Public Advocate (OPA) and the Industrial Energy Consumer Group (IECG), both of

which were granted. A. 0003. Versant did not intervene as a full party but agreed to answer questions about its interconnection process for the Generator. A.0010.

In discovery, the Commission staff and OPA requested data from Ellsworth Solar and Versant concerning the Generator's development, construction, and interconnection timelines as well as Versant's procurement delays. A.0007.

Among its requests, the OPA asked for all "written communications" between Versant and Ellsworth Solar related to the Generator from January 1, 2023, to August 2, 2024. A.0007. Ellsworth Solar confidentially submitted copies of all responsive and non-privileged email communications on August 13, 2024. *Id.*

By Procedural Order dated August 20, 2024, Commission staff indicated their belief that the record was complete and requested comments by the parties on the case record and readiness for briefing. A.0004. Ellsworth Solar and the OPA filed letters stating their agreement that the record was complete and ready for briefing. A. 0003. The Commission requested briefing and Ellsworth Solar and OPA timely filed briefs on October 3, 2024, and replies on October 17, 2024. A.0003.

On November 18, 2024, staff issued an Examiner's Report recommending that the Commission exempt the Generator from the COD Deadline. A. 00067. Staff based its recommendation upon "the delay of two pieces of equipment: the meter and the regulator" constituting good cause to grant Ellsworth Solar's

requested relief from the COD Deadline. A. 0072. Staff concluded the equipment delays postponed the expected COD by over three months, from late November 2024 to early March 2025. A.0071, 0073. Parties filed exceptions and comments concerning the Examiner's Report on December 2, 2024. A. 0003. Ellsworth Solar commented in support of the Examiner's Report. A. 0003.

In exceptions to the Examiner's Report, OPA theorized that Ellsworth Solar may not have timely receive the March 2023 Schedule, as it was making decisions to move forward with construction. Exceptions to Examiner's Report of the Office of Public Advocate ("OPA Exceptions") at 1-2. Because the record includes no email from Versant sharing the schedule, OPA recommended denying the exemption. *Id.* The OPA provided no evidentiary support to overcome the existing record evidence that the Generator and utility were in regular communication and that Ellsworth Solar was aware of the Generator's schedule because the utility had shared it at this critical juncture of the interconnection process. *Id.*

At its December 10, 2024, voting meeting, the Commissioners raised an issue—for the first time in this proceeding—concerning whether Ellsworth Solar could have "reasonably relied" upon the March 2023 Schedule and other record evidence of Versant's initial schedule for the Generator. A.0012. Based on the unsupported theory in OPA's exceptions that Versant had not timely shared its schedule in writing, two of the three Commissioners voted to deny the exemption.

A.0013. The dissenting Commissioner voted to grant the exemption based on the March 2023 Schedule that memorialized Versant’s anticipated COD for the Generator in 2024, and Ellsworth Solar’s payment in full for the interconnection prior to starting construction. *Id.* Thereafter, the Commission issued the December 13 Order denying the petition. A.0013.

On January 2, 2025, Ellsworth Solar timely moved for reconsideration and to supplement the record with evidence that Versant promptly communicated the March 2023 Schedule to Ellsworth Solar. The supplemental evidence included an affidavit from Versant’s project manager affirming that the March 2023 Schedule was shared with Ellsworth Solar at the first bi-weekly interconnection meeting on April 5, 2023. A. 0060. The Commission declined to act upon the reconsideration request or re-open the record, and it was deemed denied by operation of Commission rule on January 22, 2025.<sup>4</sup> On February 11, 2025, Ellsworth Solar timely appealed the Order. A.0003.

### **III. STATEMENT OF ISSUES FOR REVIEW**

- A. Whether the Undisputed Record Evidence Demonstrates that Ellsworth Solar Satisfied the Commission’s Test for Exemptions based on Utility Equipment Procurement Delays, and the Commission Abused its Discretion by Denying Relief Notwithstanding the Fact that the Statutory Standard was Met.

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<sup>4</sup> Maine Public Utilities Commission Rules, Chapter 110, § 11(D) (“Any petition for rehearing, reopening or reconsideration not granted within 20 days from the date of filing is denied.”)

- B. Whether the Commission Erred as a Matter of Law by Impermissibly Establishing a Third Requirement for the Exemption that is Absent from the Statute.
- C. Whether it was Legal Error for the Commission to Deny Relief based on an Alleged Lack of Corroborating Evidence and then Refuse to Consider Such Evidence.

#### **IV. SUMMARY OF ARGUMENT**

This appeal addresses three issues requiring this Court to vacate the Order and remand this case with instructions for the Commission to grant Ellsworth Solar's requested exemption. The Order on appeal rests upon a faulty application of the Commission's precedent of exempting NEB projects unable to satisfy the COD Deadline due to late deliveries of utility equipment occurring at the "eleventh hour" and after full payment for the interconnections. Ellsworth Solar paid in full for interconnection and achieved all the same milestones as other facilities exempted from the COD Deadline, and the Commission abused its discretion and erred as a matter of law by concluding otherwise and denying Ellsworth Solar's petition.

Next, the Order impermissibly alters the governing statute by adding a reasonable reliance condition to the good cause standard, absent any basis in the statutory language, and then erroneously concluding that condition was unmet.

Finally, the Commission legally erred and abused its discretion by imposing a new evidentiary standard after the record had closed and then refusing Ellsworth

Solar any opportunity to satisfy that new standard, thereby depriving Ellsworth Solar the procedural guarantees of due process and the Maine Administrative Procedure Act.

## **V. Standard of Review**

It is reversible error for an agency to issue a decision that is irrational, unsupported by the record evidence, or in violation of a statutory mandate.

*See Industrial Energy Cons. Grp. v. Me. Pub. Utils. Comm’n*, 2024 ME 60 ¶ 33, 320 A.3d 437 (citing *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm’n*, 2020 ME 34, ¶¶ 37-38, 227 A.3d 1117). In reviewing agency actions, this Court reviews the agency “decision for abuse of discretion, error of law, or findings unsupported by substantial evidence in the record.” *Cassidy Holdings, LLC v. Aroostook Cnty. Commissioners*, 2023 ME 69, 304 A.3d 259. The Court applies “a two part inquiry ‘[w]hen reviewing an agency’s interpretation of a statute that is both administered by the agency and within the agency’s expertise.’” *NextEra Energy Res., LLC*, 2020 ME 34, ¶ 22, 227 A.3d 1117 (quoting *Competitive Energy Servs., LLC v. Me. Pub. Utils. Comm’n*, 2003 ME 12, ¶ 15, 818 A.2d 1039). First, the Law Court “determine[s] de novo whether the statute is ambiguous.” *NextEra Energy Res., LLC*, 2020 ME 34, ¶ 22, 227 A.3d 1117 (citations omitted). The Law Court does not defer to an agency’s statutory interpretation where the “statute plainly compels a contrary result” or the agency’s construction is unreasonable. *Snakeroot Solar*,

*LLC v. Pub. Utils. Comm’n*, 2025 ME 64 ¶¶ 26, 30, --- A.3d ---- (quoting *Cent. Me. Power Co. v. Pub. Utils. Comm’n*, 2014 ME 56, ¶ 18, 90 A.3d 451).

When an agency reverses its prior position, the agency’s decision “is ‘entitled to considerably less deference’ than a consistently held view.” (*Kokojo v. F.E.R.C., Respondent, CMP, Intervenor*, 873 F.2d 419, 420 (1st Cir. 1989)). Even where the changes in agency position are matters of policy, not statutory mandates, acknowledgment or reasoned explanation of the change is required, otherwise the order altering the agency position is entitled to no deference, *Encino Motor Cars, LLC v. Navarro*, 579 U.S. 211, 223 (2016), and results in a decision that is irrational.

## **VI. Argument**

### **A. All Record Evidence Establishes that Ellsworth Solar Satisfied Standard for an Exemption based on Utility Equipment Delays, and the Order’s Conclusion to the Contrary Constitutes Legal Error.**

The undisputed evidence demonstrates that equipment procurement delays by Versant were the sole reason that the Generator failed to meet the COD Deadline and, as such, it met the test for a good cause exemption. Any suggestion that the Commission could deny the exemption for unstated reasons, even if Ellsworth Solar satisfied the statutory requirements, is unavailing. *See* Order at 5. Although the Commission has discretion in applying the statutory requirements, it does not have unbridled discretion, and it cannot arbitrarily grant or deny a petition

for good cause if the statutory standards are met. *See, e.g., Uliano v. Bd. of Env't'l Protection*, 2009 ME 89, 977 A.2d 400 (2009) (discussing the prohibition on unconstitutionally vague standards and unlawful delegation of legislative authority). Because “the record compels a contrary conclusion to the exclusion of any other inference,” this Court should vacate the Order and remand to the Commission with instructions to grant Ellsworth Solar a good cause exemption. *Anderson v. Maine Pub. Employees Ret. Sys.*, 2009 ME 134, ¶ 28, 985 A.2d 501, 507 (citing *Kelley v. Maine Pub. Employees Ret. Sys.*, 2009 ME 27, ¶ 16, 967 A.2d at 682); 5 M.R.S. § 11007(3)).

*1. The Exemption Statute Contains a Two-Part Standard Requiring External Delays Outside the Entity's Control and a Reasonable Likelihood of Satisfying the Deadline Absent the Delays; and the Evidence Demonstrates Both Standards Were Met Here.*

In reviewing the good cause exemption provisions in 35-A M.R.S. § 3209-A, the Law Court defers to the Commission's interpretation unless “the statute plainly compels a contrary result” or the Commission's construction is unreasonable. *Snakeroot Solar, LLC v. Pub. Utils. Comm'n*, 2025 ME 64 ¶¶ 26, 30, --- A.3d --- (quoting *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 2014 ME 56, ¶ 18, 90 A.3d 451). As discussed below, the Commission's interpretation and application of the statute in prior cases compels the conclusion that the procurement delays that occurred here “constitute external delays outside of the



entity’s control.” An interpretation of the statute that leads to a different outcome here—in this otherwise factually analogous case—is unreasonable and contrary to law.

Title 35-A M.R.S. § 3209-A(9) sets out the two requirements for the Commission granting an exemption from the COD Deadline for facilities between 1 and 2 megawatts. As acknowledged by the Commission, the two requirements are that (i) there were “external delays outside of the entity’s control;” and (ii) but for such external delays, the entity would have been reasonably likely to satisfy the COD Deadline. A.0011. Here the record and Commission precedent demonstrate that Versant’s late equipment deliveries were external delays and that without those late deliveries, the Generator would have satisfied the COD Deadline.

The same factors relied on previously by the Commission in prior exemption orders, including one recently cited by this Court, compel the conclusion that the postponed delivery of Versant’s equipment was an external delay justifying exempting the Generator from the COD Deadline. *Pembroke Solar Farm LLC, Request for Good Cause Exemption*, Docket No. 2023-00304 Order (June 20, 2024) (Copy included with Supplement of Legal Authorities) (“*Pembroke Solar Order*”); *Ellsworth Renewables, LLC, Request for Good Cause Exemption*, Docket No. 2023-00333 Order (Sept. 25, 2024) (Copy included with Supplement of Legal Authorities) (“*Ellsworth Renewables Order*”).

In *Pembroke Solar* and *Ellsworth Renewables*, the Commission granted exemptions from the COD Deadline based upon nearly identical delays to Versant's equipment and the projects achievement of certain development milestones. Both Pembroke Solar's and Ellsworth Renewables' projects are in Versant's service territory and received ISO-NE approval letters, dated as of September 6, 2022, that anticipated in-service dates prior to December 31, 2024. *Pembroke Solar Order* at 5; *Ellsworth Renewables Order* at 5. Pembroke Solar fully paid for its interconnection in February 2023, and the Versant schedule at that time tracked an in-service date prior to December 31, 2024. *Pembroke Solar Order* at 5. On July 13, 2023, however, Versant notified the project of a delay in the regulator's arrival, which postponed the scheduled COD to March 6, 2025. *Id.* Pembroke Solar did not commence construction until July 2023 and continued with construction notwithstanding Versant's expectation that the regulator delay would alter the scheduled COD to March 6, 2025, after the project's COD Deadline enacted in 2021. *Id.* The Commission exempted that project from the deadline, holding that "the manufacturer's lead time extension for voltage regulators constitutes an external delay beyond the control of the developer." *Id.* at 6.

In the other analogous case, Ellsworth Renewables started constructing its project in March 2023, prior to completing its interconnection payments in May 2023. *Ellsworth Renewables*, Order at 5. At that time, Versant had communicated a

scheduled in-service date in April 2024. *Id.* In July 2023, however, Versant informed Ellsworth Renewables that a delay in delivery of a regulator (the same procurement delay that plagued the Pembroke Solar and Ellsworth Solar projects), pushed the scheduled in-service date into March 2025. *Id.* Ellsworth Renewables continued with construction notwithstanding the regulator delaying Versant’s scheduling of COD beyond December 31, 2024—the COD deadline applicable to the project as of 2021. *Id.* at 6. In granting the exemption, the Commission concluded “[t]he delay of a critical piece of equipment caused by the manufacturer after the completion of 100% of payments for upgrades and completion of the procurement process constitutes an external delay beyond the control of the Project Sponsor.” *Id.*

Here, Ellsworth Solar received the Generator’s approval from ISO-NE in September 2022 (A.0010),<sup>5</sup> paid in full for the interconnection costs in February 2023 (A.0010, 0041), and started construction as of late March 2023. (A.0010). As of March 2023, Ellsworth Solar had also purchased all of the Generator’s equipment with long delivery times. Ameresco Response to Data Request EXM-001-008. Lastly, Versant had also started ordering the equipment at issue in mid-April 2023. A.0010.

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<sup>5</sup> There is no dispute Ellsworth Solar received and relied upon the ISO-NE letter. A. 0010. The ISO-NE letter signaled the end of the cluster study and the start of Versant’s invoicing of interconnection payments. A. 0010.

During this entire period, Versant was tracking the Generator achieving an in-service date prior to December 31, 2024. As the Order finds, Versant's March 2023 Schedule contemplated the Generator starting operation in November 2024. *Id.* Importantly, the Generator's construction began several months prior to the COD Deadline's enactment. 35-A M.R.S. § 3209-A(9) (effective Oct. 25, 2023); A. 0011.

In June 2023, Versant told Ellsworth Solar it had rescheduled the in-service date to February 2025 because a supplier anticipated delivering a meter later than scheduled. Specifically, Versant expected the meter would delay the Generator's in-service date from November 24, 2024, to February 11, 2025. A. 0010-0011. That anticipated eleven-week delay from the meter's late delivery constituted the first "external delay outside the entity's control."<sup>6</sup>

At that time, there was still no COD Deadline applicable to the Generator. 35-A M.R.S. § 3209-A(9) (effective Oct. 25, 2023). Ellsworth Solar's primary concern was minimizing the time between finishing construction of the Generator and the date Versant authorized commercial operation after completing its interconnection upgrade construction. For that reason, Ellsworth Solar elected to

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<sup>6</sup> According to the March 2023 Schedule, the procurement timeline of all Versant's equipment for the Generator was 65 weeks (from March 9, 2023 to June 11, 2024). Based on that procurement timeline, Versant expected the Generator's COD would occur on November 25, 2024. A. 0043. However, on June 18, 2023, Versant received notice that the meter would take 70 weeks to arrive, which was five weeks longer than the 65-week baseline procurement timeline of Versant's initial March 2023 schedule. A.0011.

pause construction until Versant had more information about the timing for the meter's delivery. A. 0010-0011.

Versant received the meter earlier than anticipated and informed the Ellsworth Solar of this in late 2023. A. 0011. As all of the equipment for the generator was still on schedule, the Project elected to continue with construction as of late February 2024. A. 0011. Around one month thereafter, Versant communicated that its regulator was now expected to arrive late.

As of its March 2024 Schedule, Versant postponed the Generator's expected start of operation to March 6, 2025. *Id.* The Commission accurately found that the regulator supplier's extension of its delivery time had caused Versant to delay the Generator's scheduled COD. "[I]n March 2023, the expected lead time of this interconnection equipment was a standardized 34 weeks." *Id.* In March 2024, the regulator's delivery time had grown to 70 weeks, delaying the Generator's COD into March 2025, as Versant's schedule and discovery responses indicate. A. 00011, 0042-00423, 0081-0085. In April 2024, Versant shared that the regulator's arrival was expected to take five additional weeks, extending its total delivery time to 75 weeks. A. 00011, 0081-0085.

This Court recently acknowledged that such late deliveries of utility equipment support granting a good cause petition. Specifically, in *Snakeroot Solar*, this Court explained that an "eleventh-hour, unanticipated change in the utility

equipment schedule” constitutes an external delay if the schedule change “occurs *after* (i) the cluster study had been finally approved in September 2022, (ii) the developer had been invoiced for, and paid, the full amount due for its interconnection and grid upgrades, (iii) construction of its generating facility was well underway, and (iv) all equipment necessary for the upgrades had been ordered.” *Snakeroot Solar, LLC*, 2025 ME 64, ¶ 42 (citing *Pembroke Solar Order*) (original emphasis).

Ellsworth Solar achieved all the same development and interconnection milestones prior to facing delays from Versant equipment suppliers nearly identical to those in *Pembroke Solar* and *Ellsworth Renewables*. In fact, Versant ordered the regulators for the Generator and Pembroke Solar’s project on the same day: April 18, 2023. *Pembroke Solar*, Order at 5; Order at 3. In *Ellsworth Renewables*, *Pembroke Solar*, and this case, Versant’s suppliers took over twice the initially expected time to deliver the regulators. *Pembroke Solar*, Order at 5 (finding the delivery time increased roughly 47 weeks from 34 weeks in February 2023 to 81 weeks in July 2023); *Ellsworth Renewables*, Order at 5-6 (finding the regulator’s delivery time increased to 75 weeks, delaying the expected in-service date by 11 months or approximately 44 weeks); Order at 3 (finding that the regulator’s delivery time increased from 34 weeks, in March 2023, to 70 and then 75 weeks,

respectively, in March and April 2024).<sup>7</sup>

The Order fails to explain why the meter and regulator were not also “external delays” outside of Ellsworth Solar’s control. The near identity of facts and circumstances of the late equipment in *Pembroke Solar, Ellsworth Renewables*, and here required the Commission to conclude that the Generator faced external delays outside Ellsworth Solar’s control and would have satisfied the COD Deadline without those “eleventh hour” equipment delays. In its Order denying relief, the Commission abused its discretion by misapplying its prior good cause standard for utility equipment delays in a manner that is contrary to the statute and the record.

2. *This Case is Distinguishable from those with “Baseline” Utility Schedules Missing the Deadline or Affected by the 750 MW Target.*

This case is distinct from the Commission’s denial of good cause in the *Snakeroot Solar*, *Penobscot River Solar*, and *Roxbury Solar* decisions. *Snakeroot Solar, LLC v. Pub. Utils. Comm’n*, 2025 ME 64 ¶ 43, 30, --- A.3d ----; *Roxbury*

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<sup>7</sup> Although the Commission’s *Ellsworth Renewables* order does not specify, Versant could not have ordered that project’s regulator until the developer’s full payment as of May 1, 2023. *Ellsworth Renewables, LLC, Request for Good Cause Exemption*, Docket No. 2023-00333 Order at 5-6 (Sept. 25, 2024). Notably, the full payment by Ellsworth Solar for interconnecting the Generator as of February 22, 2023 (A.0010), made the Generator even further along in Versant’s equipment procurement process than the project in *Ellsworth Renewables* when the delays to Versant’s equipment occurred. *Ellsworth Renewables*, Order at 5 (“Ellsworth Renewables paid 100 percent of its interconnection costs by May 1, 2023.”).

*Solar Farm LLC, Request for Good Cause Exemption*, Docket No. 2024-00043 Order (Dec. 23, 2024); *Penobscot Reiver Solar LLC, Request for Good Cause Exemption*, Docket No. 2024-00091 Order on Reconsideration (March 6, 2025).

*Snakeroot Solar* is clearly distinguished based on its initial interconnection schedule extending well into 2025, as of that project’s interconnection approval by ISO-NE. Simply put, there was no scenario in which that project would be interconnected prior to December 31, 2024, nor did the project achieve any of the milestones satisfied in the other decisions granting exemptions. *Cf. Snakeroot Solar, LLC v. Pub. Utils. Comm’n*, 2025 ME 64 ¶ 43, 30, --- A.3d ---- (citing a lack of full interconnection payments, no construction, and an initial utility schedule extending well into 2025). Additionally, Snakeroot Solar’s project was subject to the NEB Program’s 750 MW target for participating facilities over 2 MW, a factor cited by the Commission and the Court, whereas the Generator here is not. *Compare* 35-A M.R.S. § 3209-A(7)(E) (containing a 750 MW goal for development of 2-5 MW projects under “*subsection 3209-A(7) and section 3209-B, subsection 7*”) with 35-A M.R.S. § 3209-A(9) (containing no development goal for NEB projects under 2 MW).

In *Roxbury*, the baseline schedule had an expected in-service date in early 2025. *Roxbury Solar Farm LLC, Request for Good Cause Exemption*, Docket No. 2024-00043 Order (Dec. 23, 2024) (“*Roxbury Order*”) at 11 (finding that prior to



executing its interconnection agreement “CMP told Roxbury Solar that it could not expect its project to be operational before early 2025.”). The facility in *Roxbury* had not executed its interconnection agreement, paid any interconnection invoices, or started construction when the utility shared the initial in-service date of February 2025. *Roxbury Order* at 8-9.

In *Penobscot River*, the utility notified the project of a delay to its expected COD prior to the project achieving the key milestones recited in *Pembroke Solar* and *Ellsworth Renewables*. *Penobscot River Solar LLC, Request for Good Cause Exemption*, Docket No. 2024-00091 Order on Reconsideration (March 6, 2025) at 4-5 (“*Penobscot River Order*”) (denying relief because the utility schedules provided to the project after the COD deadline took effect indicated CODs in early and mid-2025). In *Penobscot River*, the project had only just paid the second of three interconnection payments in May 2023, before receiving its first detailed schedule anticipating a February 2025 COD. *Penobscot River Order* at 4.

Unlike the projects in *Roxbury* and *Penobscot River*, *Ellsworth Solar* proceeded with and achieved major project milestones during a period when the utility was estimating an in-service date in 2024. The equipment delays that pushed the Generator’s in-service date into 2025 occurred after all relevant milestones to the external delay analysis had been achieved. The same reasoning and conclusions in *Pembroke Solar* and *Ellsworth Renewables* have equal if not greater

applicability here where the COD Deadline did not apply until October 2023, well after the project had advanced through the construction and initial interconnection process.

**B. The Order Errs as a Matter of Law by Impermissibly Establishing a Third Requirement for the Exemption that is Absent from the Statute But is Satisfied Here in Any Event.**

The Order errs as a matter of law by grafting onto Section 3209-A(9) a “reasonable reliance” test despite the lack of such language in the statute. Because neither the statute nor prior Commission orders granting exemptions for utility equipment delays include any reasonable reliance analysis, it was legal error for the Commission to introduce and apply such a requirement here.

*1. The Order’s Reasonable Reliance Requirement Constitutes an Unlawful Interpretation Departing from the Statutory Language.*

The relief offered by Section 3209-A(9) lacks any suggestion that a qualifying “external delay” hinges upon a reasonable reliance analysis. Similarly, the prior orders of the Commission interpreting the term “external delays outside of the entity’s control” are devoid of any reasonable reliance analysis. As discussed, the statute authorizes good cause exemptions for a NEB project that missed a deadline due to “external delays outside of the entity's control” and if without such delays, the deadline would likely have been met. This Court owes no

deference to this aspect of the Commission’s statutory interpretation because it unlawfully alters the plain statutory language.

More specifically, the Commission appears to have denied relief based on the erroneous conclusion that the statute required Ellsworth Solar to demonstrate reasonable reliance on the utility’s schedule. In its reasoning, the Order concludes “the record does not establish that Ellsworth Solar reasonably relied on representations from Versant to support a 2024 COD.” A.0012. No prior Commission decision on an exemption based on utility equipment delays have interpreted the term “external delays outside of the entity’s control” to contain an element of “reasonable reliance,” including in *Ellsworth Renewables*, the only case the Commission cites in support of such analysis. *Ellsworth Renewables Order* at 6-7; *Pembroke Solar Order* at 5-7. Simply put, the Order’s reasonable reliance analysis lacks any statutory basis or support from precedent exemption cases, and stands in direct conflict with the analysis from analogous cases involving late utility equipment.<sup>8</sup>

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<sup>8</sup> To the extent the Commission first introduced its reasonable reliance standard in its order denying the Ellsworth Solar petition, it violates the change in policy doctrine discussed in Section VI.C below.

*2. Ellsworth Solar Starting, Pausing, and then Resuming Construction Was Reasonable and Based Upon the Interconnection Schedules Provided by Versant.*

The sole basis for the Commission’s denial of the exemption was its finding that Ellsworth Solar did not reasonably proceed with construction after Versant indicated that its meter was expected to arrive behind schedule and delay the Generator’s COD into quarter one of 2025. A. 0012. However, construction-related activities had started well before Versant’s June 2023 scheduling communication. Moreover, the subsequent decisions to pause and then restart construction were reasonable—and once the COD Deadline took effect in October 2023, restarting construction was necessary.

Following receipt of the ISO-NE letter in September 2022, which communicated Versant’s anticipated in-service date on June 30, 2024, Ellsworth Solar began preparing for construction. A. 0010. In September and October 2022 and February 2023 purchase orders, Ellsworth Solar procured the Generator’s equipment with the longest delivery times. Ameresco Response to Data Request EXM-001-008. In mid-February of 2023, Ellsworth Solar advanced its full payment to Versant for its interconnection work. A.0010. After confirming payment in full for the interconnection, Versant “began the process of procuring interconnection equipment for the project.” Versant Power Responses to Data Request ODR-002-001. On March 25, 2023, Ellsworth Solar commenced tree

clearing and civil work at the site. A.0011. Thus, by April of 2023, not only had Ellsworth Solar purchased all the major equipment, it had proceeded with construction by clearing the site, and Versant had placed orders for the necessary interconnection equipment.

In regular interconnection meetings to discuss the schedule from March – June of 2023, Versant confirmed the scheduled COD for the Generator remained November 25, 2024. A.0053. Versant also ordered the regulator on April 18, 2023, which the supplier expected to deliver in 64 weeks, in keeping with the March 2023 Schedule. A.0011. All of the construction-related activities by Ellsworth Solar and Versant from September 2022 through June 2023 were reasonable, consistent with typical construction practices, and based on an anticipated interconnection date prior to December 31, 2024. There is no factual basis to conclude otherwise.

Although there is no acknowledgement of it in the Order, the initial construction activities occurred prior to the COD Deadline becoming a condition of the Generator's participation in the NEB program. Specifically, the Legislation requiring that smaller projects meet the COD Deadline was not enacted until July 10, 2023, and did not take effect until October 25, 2023. P.L. 2023, ch. 411 (enacting 35-A M.R.S. § 3209-A(9)) (enacted by the Legislature on July 6, 2023, signed by the Governor on July 10, 2023, and effective Oct. 25, 2023). In the

absence of any deadline for the Generator's COD, Ellsworth Solar's decisions to commence and then pause construction were objectively reasonable.

Prior to the COD Deadline becoming a condition of the Generator participating in the program, Ellsworth Solar's primary interest was in a timely interconnection and start of operations after the Generator was fully built. If the interconnection and start of commercial operation were delayed, the Generator would risk unnecessary exposure and degradation of its installed but not yet operational electrical equipment, particularly in the case of exposure to winter weather. Thus, the construction activities were delayed--until after the winter of 2024--to align construction of the Generator with the completion of the utility interconnection upgrades in late 2024. For that reason, Ellsworth Solar elected to pause the continued construction over the summer of 2023 (A.0019), when Versant shared, in June 2023, that its meter would arrive later than expected. A.0011. It was also reasonable for Ellsworth Solar to re-start construction, once Versant received the meter ahead of schedule near the end of 2023. *Id.*

Moreover, when the COD Deadline took effect in mid-October 2023, Ellsworth Solar had no choice but to continue with construction. If Versant received the regulator ahead of schedule—as had occurred with the meter, then Ellsworth Solar had to continue construction to meet the COD Deadline under that

scenario.<sup>9</sup> Alternatively, if the equipment delays prevented Versant from completing its work necessary to timely interconnect the project by the deadline (which is what occurred here), the project still had to demonstrate that but for those delays, it would have met the deadline. Therefore, continuing construction in 2024 was not only reasonable but also necessary to preserve the Generator's eligibility for the Program.

Under these circumstances, Ellsworth Solar reasonably decided to begin ordering its equipment in the Fall of 2022, fully pay for the interconnection in February 2023, start construction in March 2023, then pause construction due to Versant's expectation that its equipment would arrive late. It was equally reasonable for Ellsworth Solar to restart construction upon learning Versant had received the meter ahead of schedule, as receipt of the meter eliminated the delay reflected in Versant's June 2023 Schedule. Just as in *Ellsworth Renewables* and *Pembroke Solar*, Ellsworth Solar continued with construction in the face of the late regulator delivery to either satisfy the COD Deadline or demonstrate the Generator's qualification for the exemption.<sup>10</sup>

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<sup>9</sup> The Commission would likely construe any delay to operations beyond the COD deadline that resulted from a project voluntarily halting construction on the assumption the utility would not timely complete its work as a delay within the control of the developer. Thus, an indefinite pause of work by Ellsworth Solar had the potential to disqualify the Generator from receiving a good cause exemption in the event Versant completed its upgrade construction ahead of schedule.

<sup>10</sup> There is also no legal or evidentiary basis for the Commission to assume that construction activities were commenced in bad faith with knowledge that satisfying an eligibility requirement

**C. The Commission Erred as a Matter of Law by Denying Relief due to a Purported Lack of Corroborating Evidence and Then Refusing to Consider or Allow the Submission of Such Evidence.**

The Commission committed legal error and abused its discretion by seeking “corroborating evidence” of an undisputed fact for the first time during its deliberations and thereafter denying Ellsworth Solar’s proffer of such evidence. In an adjudicatory proceeding like the exemption request, the basic procedural requirements of due process and the Maine Administrative Procedure Act (“MAPA”) require the Commission to provide notice of the applicable legal standard and a meaningful opportunity to build a record addressing the standard. U.S. Const. amend. V, XIV; 5 M.R.S. §§ 9052, 9056. Here, the Commission

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was not possible. As noted, significant construction activities occurred well in advance of the COD Deadline being enacted. This Court has also weighed the significance of starting construction in other contexts where the mere potential for future impediments did not undermine a finding that construction began in good faith. In *NECEC Transmission LLC et al. v. Bureau of Parks and Lands et al.*, 2022 ME 48, 281 A.3d 618, this Court considered whether CMP’s knowledge of “widespread opposition” to the project undermined its claim to having started construction in good faith. This Court stated “[w]e do not accept the argument’s implicit premise that, to be acting in good faith, a developer must wait to commence construction pursuant to a valid permit if there is a possibility that a retroactive change in the law could affect the right to complete a project.” *Id.* at ¶ 51, n. 17.

Applying similar reasoning here, the Order is not faithfully applying the good cause statute when it denies relief based upon Ellsworth Solar having “proceeded at its own risk, without any assurance that the project could be online prior to the statutory deadline.” A.0012. At the time that Versant shared the March 2023 Schedule, the deadline applicable to the Generator had not yet been enacted. Because there was no deadline about which Versant would have been providing any assurances to Ellsworth Solar, the Commission cannot rationally hold it was unreasonable for Ellsworth Solar to start construction based on a deadline that did not exist at the time. P.L. 2023, ch. 411 (amending 35-A M.R.S. §§ 3209-A to add § 3209-A(9) (effective Oct. 25, 2023)).



waited until after the close of evidence to identify a new evidentiary standard and then compounded that error by disregarding the affidavit proffered on reconsideration in response to that new standard.

*1. The Order Violates the Change in Policy Doctrine by Adopting a Novel Corroborating Evidence Test Not Present in Prior Exemption Cases.*

The Commission appears to have concluded that only utility interconnection schedules shared in writing are worthy of reliance. The Order effectively concludes that, absent such written scheduling documentation, it was not reasonable for the Generator's construction to proceed in reliance on a schedule shared by Versant and known to Ellsworth Solar. A. 0010-0011. Importantly, there is undisputed record evidence that Versant and the Generator were in regular communication, and Versant had initially scheduled a COD prior to December 31, 2024--a fact shared with and relied upon by Ellsworth Solar. *Id.* The requirement for evidence corroborating that Versant timely emailed Ellsworth Solar the written schedule was a new evidentiary standard not applied in prior proceedings. Assuming for the sake of argument that it was reasonable for the Commission to require such

“corroborating evidence”,<sup>11</sup> the Order violates the change in policy doctrine and fails to acknowledge the novelty of or explain the basis for this new requirement.

At a minimum, application of a new standard requires (i) acknowledgement, (ii) explanation of the change, and (iii) an opportunity for the impacted party to provide information responsive to the new standard. None of that occurred here. This Court recently applied the U.S. Supreme Court’s change in policy doctrine. *See, e.g., Cassidy Holdings, LLC v. Aroostook County Commissioners*, 2023 ME 69, ¶ 16, n. 4, 304 A.3d 259 (Nov. 9, 2023). According to that doctrine, “[a]n ‘unexplained inconsistency’ in agency policy is ‘a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.’” *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 223 (2016) (quoting *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005)). The doctrine requires that “agencies must acknowledge the fact of change, offer good reasons for the change, take cognizance of reliance interests, and explain why they are disregarding facts and circumstances that underlay or

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<sup>11</sup> In this case it was unreasonable for the Commission to impose such a requirement. The Commission’s focus on whether the utility shared the initial interconnection schedule in writing assumes that achieving an in-service date in 2024 was even necessary for the Generator to participate in the NEB program at that time. The Commission further assumes that proceeding with construction was reasonable if, and only if, there was a documented path to meet the COD Deadline. The Order fails to acknowledge, however, that during the period in question – September 2022 through June 2023, the Generator was not subject to the COD Deadline. Here, the utility and Generator were sharing information and advancing the project through the construction and interconnection process based on the normal course, before they were required to achieve COD by any date certain.

were engendered by the prior policy.” *Id.* (quoting *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009)). In determining whether the doctrine applies, the Supreme Court has stated a change in policy “occurs when an agency acts inconsistently with an earlier position, performs a reversal of its former views as to the proper course, or disavows prior inconsistent agency action as no longer good law.” *Food and Drug Adm’n v. Wages and White Lion Investments, LLC*, 145 S.Ct. 898, 918 (April 5, 2025) (citations omitted). A simple comparison of the Order here with the decisions in *Pembroke Solar* and *Ellsworth Renewables* highlight the unacknowledged change in policy that occurred in this case. *Compare Pembroke Solar Order* at 6; *Ellsworth Renewables Order* at 6 with A. 00012.

In *Pembroke Solar*, the Commission granted an exemption from the COD Deadline without requiring corroborating evidence that the utility emailed the utility’s initial construction schedule. In that case, Versant ordered the regulator in April 2023 after having shared an interconnection schedule in March 2023 anticipating an in-service date before the deadline. *Pembroke Solar Order* at 5. In that case there was no reasonable reliance analysis concerning the initial schedule from Versant or the developer’s decision to start construction. Similarly, in *Ellsworth Renewables*, the Commission granted relief from the COD Deadline due to the late delivery of a Versant regulator without mentioning corroborating

evidence or the reasonableness of reliance on the utility schedule. *Ellsworth Renewables Order* at 2. The Order here fails to acknowledge the Commission’s past conclusions that it is reasonable for projects to rely on schedules and other information that are communicated to it by the utility without providing additional evidence that such information was provided in writing.

In *Cassidy Holdings*, this Court explained why the change in policy doctrine supported the conclusion that a tax commission order dismissing an appeal for lack of jurisdiction misconstrued the statute. *Cassidy Holdings v. Aroostook Cnty. Commissioners*, 2023 ME 69, ¶ 10, n. 4, 304 A3d. 259. The Court observed that the agency could not rely on recent state tax guidance suggesting the agency lacked jurisdiction because a prior version of the same guidance stated the agency and courts shared appellate jurisdiction. *Id.* The change in policy doctrine, this court explained, requires a Maine agency to “acknowledge that it is making a change, explain why, and give due consideration to the serious reliance interests on the old policy.” *Id.*

The Order erred as a matter of law by failing to even acknowledge its policy change, let alone explain or consider the impacts to the reliance interest of developers like Ellsworth Solar. The prejudice from this error was further exacerbated by the Commission’s refusal to allow Ellsworth Solar an opportunity

to submit evidence addressing the new standard announced by the Order ending the case.

2. *Due Process and the Maine Administrative Procedures Act Required the Commission to Give Ellsworth Solar Notice of and a Meaningful Opportunity to Satisfy the New Standard.*

Due process safeguards extend to hearings before the Commission where the “deprivation of . . . property is plainly in issue.” *Mechanic Falls Water Co. v. Maine Public Utilities Comm’n*, 381 A.2d 1080 (1977) (quoting *Smith v. Pennsylvania Pub. Utility Comm’n*, 192 Pa.Super. 424, 162 A.2d 80 (1960); see also *Berry v. Maine Pub. Utilities Comm’n*, 394 A.2d 790, 793 (Me. 1978). In considering the requirements of due process and the MAPA, this Court has long concluded that they “undoubtedly include[ ] notice to the [petitioner] sufficient to enable it to present evidence on any issue relevant to that proceeding.” *Mechanic Falls*, 381 A.2d at 1103; 5 M.R.S. §§ 9052, 9056 (mandating, in Section 9052, that agency proceedings where “legal rights, duties or privileges are at issue . . . afford an adequate opportunity to prepare and submit evidence and argument” and affording, in Section 9056, “the right to present evidence and arguments on all issues”). However, changes in policy require more than a simple notice of the old or prior standards. See *Mechanic Falls*, 381 A.2d at 1103.

Prior to the record’s close and voting by the Commissioners here, Ellsworth Solar lacked any notice that the Commission would demand additional evidence

that Versant timely shared the March 2023 Schedule. Importantly, the Order does not suggest, nor could it, that the utility did not share the contents of the March 2023 Schedule with Ellsworth Solar between March and June of 2023. The record evidence supports the testimony by Ellsworth Solar that the substance of the March 2023 Schedule—a timely path to interconnection in 2024—was discussed on numerous occasions between March and June of 2023, and there is absolutely no evidence to the contrary. Versant Response to Data Request ODR-002-001; A. 0010-0011, 0047-0048, 0086.

The Commission apparently concluded, however, that it was not sufficient that the utility shared the content of the schedule, nor was it reasonable for Ellsworth Solar to rely on communications from the utility absent written corroborating evidence confirming the content of those communications. A.0010-0011. This new standard was articulated for the first time during deliberations in this case, and the applicable procedural safeguards required that the Commission afford Ellsworth Solar a meaningful opportunity to address a novel and late-stage request for “corroborating evidence” concerning Versant’s initial schedule. The Commission, however, rejected the very “corroborating evidence” it alleged was missing when Ellsworth Solar submitted such evidence in its request for reconsideration and reopening of the record.

The proposed evidence in Ellsworth Solar’s post-judgment petition included

an affidavit from Versant’s project manager confirming the March 2023 Schedule was timely shared with Ellsworth Solar. A.0060. In the affidavit, Versant attests that Ellsworth Solar “received the construction schedule it claims it relied upon when it made decisions about moving ahead with its project in 2023.” A.0012, 0060. By refusing to address the petition for reconsideration and supplemental evidence, the Commission elected to ignore the very corroborating evidence it first deemed required as of the voting meeting. Moreover, the refusal to re-open the record is also contrary to the Commission’s actions in other exemption cases. In at least two other good cause matters, the Commission re-opened the record based upon the Commissioner’s identification of a need for further evidence on a particular issue.<sup>12</sup>

The motions for reconsideration and reopening of the record were the first opportunities to address the Commission’s newly articulated standards. It was an abuse of discretion and legal error for the Commission to foreclose Ellsworth Solar any opportunity to address the corroborating evidence standard announced at the eleventh-hour.

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<sup>12</sup> *Roxbury Solar Farm LLC, Request for Good Cause Exemption*, Docket No. 2024-00043 Procedural Order Re-Opening Record (Nov. 7, 2024) (re-opening the record pursuant to Commissioners’ deliberations at the voting meeting); *Penobscot Reiver Solar LLC, Request for Good Cause Exemption*, Docket No. 2024-00091 Procedural Order on Reconsideration (Dec. 17, 2024) (tolling the Chapter 110, § 11(D) rule that would have deemed the reconsideration request denied and proposing to revise the examiner’s report based on additional evidence).

VII. **CONCLUSION**

For the foregoing reasons, the record evidence and precedent exemption cases cited here require this Court to vacate the Order and remand this case for the Commission's entry of an order granting Ellsworth Solar's petition.

Dated at Portland, Maine this 31st day of July 2025.

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## **CERTIFICATE OF SERVICE**

I, Hans Eysenbach, hereby certify that on this 31st day of July 2025, I served by email the foregoing Brief and will serve a copy by first class mail, postage-prepaid when prompted by the Law Court to counsel of record as follows:

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