



The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 11-10-A

February 17, 2012

Order Adopting Regulations pursuant to G.L. c. 30A, § 2, and 220 C.M.R. § 2.00 et seq. to Amend 220 C.M.R. § 18.00 et seq. by Implementing the Net Metering Provisions of An Act Making Appropriations for the Fiscal Years 2010 and 2011 to Provide for Supplementing Certain Existing Appropriations and for Certain Other Activities and Projects, St. 2010, c. 359, §§ 25-30.

ORDER ADOPTING REGULATIONS

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I. INTRODUCTION AND PROCEDURAL HISTORY

On October 15, 2010, Governor Patrick signed into law Chapter 359 of the Acts of 2010, An Act Making Appropriations for the Fiscal Years 2010 and 2011 to Provide for Supplementing Certain Existing Appropriations and for Certain Other Activities and Projects (“Act”). The Act requires the Department of Public Utilities (“Department”) to adopt rules and regulations implementing certain changes to the net metering provisions of G.L. c. 164, §§ 138 and 139. St. 2010, c. 359, §§ 25-30. With this Order, the Department adopts final regulations contained in 220 C.M.R. § 18.00 et seq.¹ On July 22, 2011, the Department issued an Order proposing draft regulations and soliciting comments from interested persons. Rulemaking on Net Metering, D.P.U. 11-10 (2011). Pursuant to the requirements of G.L. c. 30A, § 2, the Department published notice of the proposed rulemaking in the Massachusetts Register on August 5, 2011, and a public hearing was held on September 6, 2011.² Initial written comments were due on September 6, 2011,³ and reply comments were

¹ The final regulations are attached to this Order as Appendix A.

² The following commenters testified at the public hearing: Town of Barnstable (“Barnstable”); Boreal Renewable Energy Development (“Boreal”); Community Energy, Inc.; Cape Light Compact and Cape and Vineyard Electric Cooperative, jointly (together, “CLC and CVEC”); No Fossil Fuel; Renewable Resource Development Coalition (“RRDC”); and TransCanada Power Marketing.

³ Initial written comments were submitted by the following twelve commenters: Attorney General of the Commonwealth (“Attorney General”); Barnstable; Boreal; CLC and CVEC; Capital Dynamics U.S. Solar-MA 1, LLC (“Capital Dynamics”); Department of Energy Resources (“DOER”); My Generation Energy, Inc. (“My Generation”); Town of Nantucket (“Nantucket”); Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid (together, “National Grid”); NSTAR Electric Company (“NSTAR Electric”); Plymouth Public Schools; and RRDC.

due on September 13, 2011.⁴ The Department appreciates the comments, which have assisted us in better understanding the issues related to the net metering provisions of the Act.

II. NET METERING PROVISIONS OF THE ACT

The Act changes the net metering provisions of G.L. c. 164, §§ 138 and 139 in several ways. First, the Act creates two caps — one cap reserved for municipalities and other governmental entities, and another cap for all other net metering facilities. Specifically, G.L. c. 164, § 139(f) provides:

The aggregate net metering capacity of facilities that are not net metering facilities of a municipality or other governmental entity shall not exceed 1 per cent of the distribution company's peak load. The aggregate net metering capacity of net metering facilities of a municipality or other governmental entity shall not exceed 2 per cent of the distribution company's peak load.

Second, G.L. c. 164, § 138 defines net metering facility of a municipality or other government entity as:

a Class II or III net metering facility: (1) that is owned or operated by a municipality or other governmental entity; or (2) of which the municipality or other governmental entity is assigned 100 per cent of the output.

Third, the Act sets the maximum amount of net metering generating capacity eligible for net metering by a municipality or other governmental entity at 10 megawatts ("MW").

G.L. c. 164, § 139(f).

⁴ Reply comments were submitted by the following eleven commenters: Attorney General; CLC and CVEC; DOER; Fitchburg Gas and Electric Light Company d/b/a Unital, National Grid, NSTAR Electric, and Western Massachusetts Electric Company, jointly (together, "Distribution Companies"); Town of Kingston and No Fossil Fuels, jointly (together, "Kingston/No Fossil Fuels"); Massachusetts Net Metering Coalition ("NMC"); National Grid; NuGen Capital Management, LLC ("NuGen"); RRDC; State Senator Daniel A. Wolf and State Representative Timothy P. Madden, jointly (together, "Nantucket legislators"); and Solventerra, LLC ("Solventerra").

III. THE PROPOSED REGULATIONS

The Department's proposed regulations incorporated the statutory changes described above. Specifically, the proposed regulations included new limits on the aggregate capacity of all net metering facilities, creating one cap for net metering facilities of a municipality or other governmental entity (i.e., two percent)⁵ and another cap for all other net metering facilities (i.e., one percent). The proposed regulations also limited the amount of generating capacity eligible for net metering facilities of a municipality or other governmental entity to 10 MW.

To define a net metering facility of a municipality or other governmental entity, the proposed regulations employed the same language as the Act. Specifically, the proposed regulations defined a net metering facility of a municipality or other governmental entity as a Class II or III net metering facility⁶ (a) that is owned or operated by a municipality or other governmental entity; or (b) of which the municipality or other governmental entity is assigned 100 percent of the output ("assigned output provision").

In D.P.U. 11-10, at 2-3, the Department solicited comments on the proposed regulations. The Department sought specific comment on the Department's proposed interpretation of the assigned output provision, by which it required a municipality or other governmental entity to receive all benefits associated with the output of a Class II or III net

⁵ In this Order, we refer to the two percent cap on net metering facilities of a municipality or other governmental entity as the "public cap." Also, we refer to the cap on all other net metering facilities as the "private cap."

⁶ See G.L. c. 164, §§ 138 and 139 for definitions of Class I, II, and III net metering facilities.

metering facility. D.P.U. 11-10, at 2. Under the Department's proposed interpretation, to receive 100 percent of the benefits, a municipality or other governmental entity had to: (1) be the Host Customer;⁷ and (2) assign, if applicable, all net metering credits to accounts of the municipality or other governmental entity. D.P.U. 11-10, at 3.

IV. COMMENTS

A. Introduction

In general, commenters asserted that the Department's regulations should provide more clarity with regard to the definition of municipality or other governmental entity and the assigned output provision. Commenters addressed, among other things: (1) what entities should qualify as a municipality or other governmental entity; (2) how the 10 MW cap should apply; (3) whether a municipality or other governmental entity should serve as the Host Customer in order to qualify under the public cap; and (4) how a Host Customer should be allowed to allocate net metering credits generated from a net metering facility of a municipality or other governmental entity.

B. Definition of Municipality or Other Governmental Entity

Without proposing a specific definition, the Attorney General, Barnstable, the Distribution Companies, and NuGen request that the regulations include a definition of other governmental entity (Attorney General Reply Comments at 3; Barnstable Comments at 6-7; Distribution Companies Reply Comments at 3; NuGen Reply Comments at 3). The Distribution Companies contend that while the term municipality is straightforward and defined

⁷ See 220 C.M.R. § 18.02 for the definition of a Host Customer.

in G.L. c. 4, § 7, other governmental entity is not defined in any statute (Distribution Companies Reply Comments at 3). According to the Distribution Companies, the Department will have to resolve all disputes regarding eligibility for other governmental entity status on a case-by-case basis (Distribution Companies Reply Comments at 3). While DOER agrees that a clear distinction between public projects and private projects is required, DOER is concerned about the implications of the Department's proposal for public projects, and proposes that definition of a public facility include more flexible criteria (DOER Comments at 4-5).

Specifically, Boreal proposes that other governmental entity include entities created or chartered directly by a public vote or act of the legislature or of the executive branch of the Commonwealth or its municipalities and counties, as well as federal governmental entities (Boreal Comments at 1). According to Boreal, its proposed definition would include local fire, water, and sewer districts, regional water and sewer authorities, regional planning agencies, and state and federal agencies and departments, but would not include charitable non-profit corporations or for-profit entities (Boreal Comments at 1-2). Boreal contends that a specific definition would: (1) provide clarity to interested parties; and (2) facilitate the completion of projects in a timely manner (Boreal Comments at 2).

CLC and CVEC propose that the Department adopt the following definition:

Other Governmental Entity shall mean a city, town, district, regional school district, county, or an agency or authority thereof, a regional planning commission however constituted, a state agency as defined in section 1 of chapter 6A (which shall include any department, office, commission, committee, council, board, division, bureau, institution, officer or other agency within the executive department), a combination of two or more such cities, towns, districts, regional school districts or counties, or agencies or authorities thereof, a public authority, or a governmental body: (i) as an energy supplier

under a license granted by the department of public utilities pursuant to section 1F of chapter 164; (ii) in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164; or (iii) in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164

(CLC and CVEC Comments at 15; CLC and CVEC Reply Comments at 7). According to CLC and CVEC, this definition implicitly includes Boreal's proposed definition, and expressly includes additional entities (CLC and CVEC Reply Comments at 7-8). CLC and CVEC oppose DOER's definition of other governmental entity (as described below) because it: (1) does not account for districts or governmental bodies such as CLC and CVEC; and (2) is over-inclusive because it would allow each individual location of an eligible entity to qualify as an other governmental entity (CLC and CVEC Reply Comments at 8). NMC asserts that, until a better definition is proposed, it supports CLC and CVEC's definition; however, that the definition should be expanded to include federal governmental entities (NMC Reply Comments at 2).

DOER proposes that other governmental entity be defined as:

any agency, authority, board, bureau, commission, committee, council, department, division, institution, office, officer, agency of the Commonwealth doing business at a specified location.

(DOER Comments at 5). DOER argues that the Commonwealth's agencies include a wide range of entities, and that limitations on the amount of renewable generation beyond any specific site limitation would be inconsistent with existing statutes, including the Green Communities Act⁸ and the Global Warming Solutions Act⁹ (DOER Comments at 5-6). NMC

⁸ See St. 2008, c. 169, An Act Relative to Green Communities.

disagrees with DOER's claim that each location of an entity should have a 10 MW cap (NMC Reply Comments at 2-3).

According to Plymouth Public Schools, the definition of a municipality or other governmental entity should center on the financial independence of the entity in question (Plymouth Public Schools Comments at 1). As such, Plymouth Public Schools contends that a city, town, school district, enterprise organization, or another financially separate non-profit organization within the Commonwealth should be considered a municipality or other governmental entity (Plymouth Public Schools Comments at 1).

C. Ten Megawatt Cap

With regard to the 10 MW cap on the net metering projects of a municipality or other governmental entity, commenters propose different ways that the Department could interpret the 10 MW cap on "the generating capacity eligible for net metering by a municipality or other governmental entity." CLC and CVEC claim that a net metering project's capacity should be assigned to any entities that actually benefit from the project (i.e., any recipients of net metering credits), rather than assigning all capacity to the Host Customer, thereby allowing a Host Customer to pursue more than 10 MW of net metering capacity as long as the benefits (i.e., the net metering credits) are shared with others (CLC and CVEC Comments at 12-13; CLC and CVEC Reply Comments at 5-6). Barnstable and NMC both support the proposal of CLC and CVEC for the treatment of capacity (Barnstable Comments at 5-6; NMC Reply Comments at 2). In addition, Barnstable proposes that the net metering cap be increased to

⁹ See St. 2008, c. 298, An Act Establishing the Global Warming Solutions Act.

3,510 MW, so that every city and town in the Commonwealth may obtain the benefits of 10 MW of net metering (Barnstable Comments at 5).¹⁰ DOER contends that the Department should determine that the 10 MW cap applies to each individual location of a municipality or other governmental entity (DOER Comments at 5-6). According to the Attorney General, the application of the 10 MW cap per municipality or other governmental entity should be further addressed and resolved in Inquiry Into Net Metering and Distributed Generation,

D.P.U. 11-11¹¹ (Attorney General Reply Comments at 2-3).

D. Net Metering Facility of a Municipality or Other Governmental Entity

1. Host Customer Requirement

The Attorney General, My Generation, and National Grid support the Department's view that, in order to meet the definition of a net metering facility of a municipality or other governmental entity, the municipality or other governmental entity must be the Host Customer (Attorney General Reply Comments at 1; My Generation Comments at 1; National Grid Comments at 1). The Attorney General recommends that the Department codify its proposal in regulations (Attorney General Reply Comments at 1-2).

RRDC and NuGen support the Department's proposal to require a municipality or other governmental entity to be the Host Customer, assuming that the definition would still allow for any of the following circumstances: (1) the net metering facility is located on land owned by a municipality or other governmental entity; (2) the municipality or other governmental entity is

¹⁰ That is, 10 MW multiplied by 351 cities and towns in the Commonwealth.

¹¹ In D.P.U. 11-11, the Department is conducting an ongoing inquiry into implementation issues concerning net metering.

the account holder where the net metering facility's output is delivered; or (3) the net metering facility is a stand-alone facility and 100 percent of its output is being allocated to one or more municipalities or other governmental entities (RRDC Comments at 2; NuGen Reply Comments at 2).

In contrast, Capital Dynamics as well as CLC and CVEC contend that the Department should not limit eligibility as a net metering facility of a municipality or other governmental entity with its proposed Host Customer requirement (Capital Dynamics Comments at 2-5; CLC and CVEC Comments at 4-11). Capital Dynamics explains that such a requirement is unnecessary if little electricity is being used on-site (Capital Dynamics Comments at 2-4).

2. Allocation of Credits

The Distribution Companies, My Generation, National Grid, and NSTAR Electric support the Department's proposal to require Host Customers to allocate net metering credits only to their own accounts (Distribution Companies Reply Comments at 2-3; My Generation Comments at 1; National Grid Comments at 1; and NSTAR Electric Comments at 2).

According to the Distribution Companies, the Department's proposal is consistent with the plain and explicit language of the Act (Distribution Companies Comments at 2). The Distribution Companies contend that there is no plausible basis for interpreting the statute to allow net metering credits to be allocated to more than one municipality or other governmental entity (Distribution Companies Comments at 2). In addition, NSTAR Electric supports the Department's conclusion that the assigned output provision must include 100 percent of the benefits provided by the output of the net metering facility (NSTAR Electric Comments at 2).

My Generation contends that the Department's proposal appropriately draws distinct boundaries between public projects and private projects (My Generation Comments at 1).

While the Attorney General and DOER generally support the Department's approach to the assigned output provision, both recommend that the Host Customer be permitted to allocate net metering credits to additional municipalities and other governmental entities (Attorney General Reply Comments at 1-2; DOER Comments at 4-5; DOER Reply Comments at 2-3). The Attorney General argues that the Department should allow allocations to more than one municipality or other governmental entity in order to make net metering available to municipalities and other governmental entities that otherwise would be unable to participate (Attorney General Reply Comments at 2). The Attorney General further states that the Department should codify its proposal in regulations (Attorney General Reply Comments at 1-2). DOER states that it encourages small communities to collaborate with one another and develop renewable energy projects to optimize the economics of the projects (DOER Comments at 4). As such, DOER is concerned about the implications of the Department's allocation proposal, particularly on projects in smaller towns (DOER Comments at 4; DOER Reply Comments at 2-3).

Barnstable, Capital Dynamics, CLC and CVEC, Kingston/No Fossil Fuel, NuGen, NMC, and RRDC all oppose the Department's proposal to require that the assigned output provision permit a Host Customer to allocate net metering credits only to the Host Customer's accounts, arguing that the Department should allow allocations of net metering credits to other municipalities or other governmental entities (Barnstable Comments at 3-5; Capital Dynamics

at 5; CLC and CVEC Comments at 4-11; CLC and CVEC Reply Comments at 1-5; Kingston/No Fossil Fuel Reply Comments at 3; NuGen Reply Comments at 2-3; NMC Reply Comments at 2, RRDC Comments at 2-3; RRDC Reply Comments at 1-4). Barnstable along with CLC and CVEC argue that the Department's interpretation: (1) is inconsistent with the intent of the Green Communities Act; (2) would limit viable project structures; (3) would discriminate against smaller towns and towns without sufficient land for net metering projects; and (4) would render 220 C.M.R. § 18.05(1)¹² meaningless for municipalities and other governmental entities (Barnstable Comments at 3-4; CLC and CVEC Comments at 4-11; CLC and CVEC Reply Comments at 2, 4). CLC and CVEC further claim that the Department's proposal would be erroneously restrictive and, if any restrictions are to be imposed, the Department should distinguish between projects located on governmental land and projects located on private land (CLC and CVEC Comments at 5-7). Kingston/No Fossil Fuel strongly oppose the Department's proposal, claiming that the requirements of the statute would be met by assigning output from a net metering facility to a town, and that the additional requirements proposed by the Department appear nowhere in the Act (Kingston/No Fossil Fuel Reply Comments at 3). RRDC argues that the Department should not restrict the right of the municipality or other governmental entity to allocate net metering credits to other

¹² The Department's regulation 220 C.M.R. § 18.05(1) states, "[f]or a . . . [Net Metering Facility], each Distribution Company shall allocate Net Metering credits as designated in writing by the Host Customer, to other Customers who are in the Distribution Company's service territory and are located in the same ISO-NE load zone. The manner and form of credit designation shall be as specified in the Distribution Company's Net Metering Tariff pursuant to 220 CMR 18.09(2)."

municipalities and other governmental entities (RRDC Comments at 2-3; RRDC Reply Comments at 1-4). According to RRDC, limiting allocations of net metering credits to the accounts of one municipality or other governmental entity is inconsistent with the overall net metering framework, the Department's regulations, and the law of the Commonwealth (RRDC Reply Comments at 2, citing G.L. c. 164, § 139(a)(1); 220 C.M.R. § 18.05(1)). RRDC further claims that assigning net metering credits to multiple off-takers is: (1) a fundamental tool for allowing small public entities to benefit from net metering; and (2) an important way to make projects financeable (RRDC Reply Comments at 3-4). NuGen supports the requests of DOER and RRDC to allow a Host Customer that is a municipality or other governmental entity to allocate net metering credits to more than one municipality or other governmental entity (NuGen Reply Comments at 2-3).

E. Other Issues

1. Reporting Requirements

In addition to the topics described above, commenters identified a number of other issues for resolution in this rulemaking. The Attorney General, Barnstable, CLC and CVEC, and NMC all address the reporting requirements in the regulations¹³ (Attorney General Reply Comments at 3; Barnstable Comments at 7; CLC and CVEC Comments at 15-16; NMC Reply Comments at 3). Barnstable as well as CLC and CVEC request that the Department require the Distribution Companies to report updated, separate aggregate capacity figures for net

¹³ The net metering reporting requirements for Distribution Companies in the current regulations are at 220 C.M.R. § 18.08.

metering facilities under the private cap as well as the public cap, on a monthly basis (Barnstable Comments at 7; CLC and CVEC Comments at 15-16). The Attorney General contends that because complete and accurate information and reporting on both the public and private net metering caps will facilitate the development of net metering projects, she supports the reporting clarification requested by Barnstable (Attorney General Reply Comments at 3). NMC also supports the proposals offered by Barnstable as well as by CLC and CVEC (NMC Reply Comments at 3).

2. “Per Unit” for Solar PV Projects

Barnstable as well as CLC and CVEC request that the Department clarify the term “per unit”¹⁴ with regard to solar photovoltaic (“PV”) projects in order to provide additional guidance on how such projects should be physically designed (Barnstable Comments at 7-8; CLC and CVEC Comments at 16-17). The Attorney General agrees that the definition of “per unit” should be explored further, but she recommends undertaking this activity in D.P.U. 11-11 (Attorney General Reply Comments at 3). According to NMC, to appropriately address the “per unit” issue, there needs to be more dialogue among stakeholders, and the current rulemaking has not afforded that opportunity (NMC Reply Comments at 6).

3. National Grid Net Metering Cap(s)

Nantucket argues that National Grid should have a single net metering cap, instead of two individual caps for Massachusetts Electric Company and Nantucket Electric Company

¹⁴ The term “per unit” is used twice in 220 C.M.R. § 18.02, to define: (1) a Class II net metering facility; and (2) a Class III net metering facility.

(Nantucket Comments at 1-3). The Nantucket legislators agree and assert that the Department should clarify in this rulemaking that National Grid has a single net metering cap based on the combined highest historical peak load for Massachusetts Electric Company and Nantucket Electric Company (Nantucket legislators Reply Comments at 1-2). According to National Grid, if the Department deems it appropriate for National Grid to administer a single net metering cap, then the Department must amend its net metering regulations, perhaps using National Grid's proposed revised language (National Grid Reply Comments at 1-3). The Attorney General argues that the implementation of a single net metering cap for National Grid should be examined by the Department, but that such an examination is outside of the scope of this rulemaking (Attorney General Reply Comments at 4).

4. “Cash-Outs” of Net Metering Credits

The Attorney General recommends that the Department address the legal ramifications associated with “cash-outs” of net metering credits by Distribution Companies, but that it do so in D.P.U. 11-11 (Attorney General Reply Comments at 2). The Attorney General asserts that such an analysis would benefit all interested parties (Attorney General Reply Comments at 2). In addition, the Attorney General contends that the Department should address the effects on allocation of (or receipt of monetary payments for) net metering credits if a municipality or other governmental entity ceases to exist (Attorney General Reply Comments at 2).

5. Definition of Output

NMC asserts that output, as used in the assigned output provision within the definition of a net metering facility of a municipality or other governmental entity, should not include any

attributes other than: (1) electrical output, as measurable in kilowatt-hours (“kWh”); and (2) net metering credits (NMC Reply Comments at 3-4). According to NMC, other benefits of a net metering facility such as renewable energy certificates (“RECs”), carbon offsets, reductions in demand, and capacity payments should not automatically be deemed owned by a municipality or other governmental entity simply because the facility is included within the public cap (NMC Reply Comments at 4).

6. Effective Date of Net Metering Regulations

NMC and Kingston/No Fossil Fuels addressed the effective date of the Department’s net metering regulations (NMC Reply Comments at 5-6; Kingston/No Fossil Fuel Reply Comments at 3). NMC contends that any new requirements within the Department’s regulations should not apply to projects developed in reliance solely on the language of the Act (NMC Reply Comments at 5). According to Kingston/No Fossil Fuels, if the Department departs from the statutory language and implements additional requirements for eligibility as a net metering facility of a municipality or other governmental entity, then the Department should: (1) delay the effective date for the additional requirements until June 30, 2012; and (2) clarify that the additional requirements do not apply to any net metering facilities that have, prior to June 30, 2012, received a signed interconnection service agreement and filed a Schedule Z¹⁵ (Kingston/No Fossil Fuel Reply Comments at 3).

¹⁵ Schedule Z is the application for net metering services to be submitted by the Host Customer to the Distribution Company.

V. ANALYSIS AND FINDINGS

A. Introduction

In adopting final regulations, the Department seeks to provide clarity and guidance to Distribution Companies, customers, renewable energy developers, and other stakeholders regarding the changes to net metering allowed by G.L. c. 164, §§ 138 and 139, as amended by the Act. In developing these regulations, the Department considered the various and sometimes opposing views of commenters. Because some recommendations were outside the scope of this rulemaking, the Department's final regulations do not address every issue raised by commenters. Also, the final regulations do not resolve issues that would be better addressed in other proceedings. As discussed in Section V.E., below, the Department will address certain additional implementation details in Net Metering Tariff, D.P.U. 12-01, a new docket to revise the model net metering tariff.

In the Department's view, the provisions of the Act must be given careful weight and meaning within the overall net metering framework. If the Department construes the Act's provisions too broadly, a net metering project may seek to qualify under the public cap, with a municipality or other governmental entity serving as a mere "pass-through" for a private entity. If allowed, such arrangements would accord far less meaning to the definition of net metering facility of a municipality or other governmental entity in Section 138, as well as its designation in Section 139(f), providing for: (1) a special cap for such projects; and (2) special limits on the amount of net metering associated with a municipality or other governmental entity. We take due note of the fact that the Legislature created a special cap for the net

metering projects of a municipality or other governmental entity, imposed a capacity limit on such net metering projects, and included a special assigned output provision for such net metering projects. Accordingly, the Department must establish parameters to ensure that the conditions for being a part of this special class are effectively implemented.

Here, the Department analyzes four specific implementation issues raised by the language of the Act and addressed by commenters: (1) what entities will qualify as a municipality or other governmental entity;¹⁶ (2) how the 10 MW cap will apply to each municipality or other governmental entity; (3) whether a municipality or other governmental entity must serve as the Host Customer in order to qualify under the public cap; and (4) how a Host Customer may allocate net metering credits generated by a net metering facility of a municipality or other governmental entity. We also address additional issues raised by commenters in Section III.E, below.

¹⁶ Prior to analyzing eligibility as a municipality or other governmental entity, we note that, as provided in G.L. c. 164, § 139(e), a net metering facility or net metering customer may not be an electric utility, generation company, aggregator, supplier, energy marketer, or energy broker, within the meaning of those terms as defined in G.L. c. 164, §§ 1 and 1F. Rulemaking on Net Metering, D.P.U. 08-75-A at 13-14 (2009). This restriction is not specific to either cap and applies to all net metering projects. Accordingly, even if a municipality or other governmental entity is eligible for the public cap, if it is also an electric utility, generation company, aggregator, supplier, energy marketer, or energy broker as defined in G.L. c. 164, §§ 1 and 1F, it is ineligible for net metering pursuant to G.L. c. 164, § 139(e).

B. Definition of Municipality or Other Governmental Entity and Relationship to the Ten MW Cap

1. Introduction

According to most commenters, the terms municipality and other governmental entity are sufficiently broad to warrant further definition. Commenters have also requested the Department's guidance on how the 10 MW cap will be applied to a municipality or other governmental entity. We agree that both the terms and the application of the 10 MW cap require clarification.

2. Municipality and the Ten MW Cap

With respect to the definition of "municipality," G.L. c. 4, § 7, cl. Nineteenth A, defines a municipality as "a city or town."¹⁷ We find it appropriate to use this definition for our net metering regulations. Thus, each city and town served by the Distribution Companies will qualify as a municipality within the meaning of G.L. c. 164, §§ 138 and 139.

With respect to the applicability of the 10 MW cap, some commenters have recommended that each subdivision or department of a municipality qualify for up to 10 MW of net metering capacity. Others have suggested that each separate location of a public entity could qualify for up to 10 MW of net metering capacity. Specifically with respect to municipalities, the Department declines to adopt either of these recommendations for a number of reasons.

The plain language of the Act states that a municipality shall not exceed 10 MW of net metering capacity, which means that considering each department or separate location as

¹⁷ G.L. c. 4, § 7 provides definitions for construing Massachusetts statutes.

eligible for up to 10 MW of net metering capacity would conflict with the Act.¹⁸ G.L. c. 164, § 139(f). One commenter also recommends that the Department increase the cap to 3,510 MW so that each of the 351 cities and towns in the Commonwealth may develop 10 MW of net metering facilities, which goes beyond the Department's authority.

Thus, the Department finds that the net metering facilities of a city or town cannot exceed the 10 MW cap, regardless of whether the facilities are installed by separate departments or subdivisions of the city or town or at dispersed locations.

3. Other Governmental Entity and the Ten MW Cap

The Department declines to adopt in their entirety any of the commenters' proposed definitions of other governmental entity.

As a matter of common understanding, the Department concludes that other governmental entity, at a minimum, includes both the state and federal government. That leads us to consider whether the state and federal government should each qualify for only 10 MW of net metering capacity, which would be analogous to our conclusion for municipalities, or

¹⁸ Even if the statutory language were not clear, at present the public cap is insufficient to allow each municipality to develop 10 MW of net metering capacity, much less for every department of a municipality to develop 10 MW. Based on information provided by the Distribution Companies regarding their highest historical peak loads, the Department estimates that the capacity for net metering available under each electric distribution company's public cap represents a combined total of approximately 220 MW available to municipalities and other governmental entities within the Commonwealth. See, e.g., <http://www.unitil.com/energy-for-residents/electric-information/distributed-energy-resources/net-metering>, http://www.nationalgridus.com/masselectric/home/energyeff/4_net-mtr.asp, http://www.nstar.com/business/rates_tariffs/interconnections/other.asp, and <http://www.wmeco.com/residential/understandbill/ratesrules/NetMetering.aspx>.

whether each state and federal department and subdivision may install up to 10 MW of net metering capacity.

Although, as we have discussed, the term municipality is unambiguous, that is not the case with respect to the term other governmental entity. Accordingly, the Department has discretion to determine what entities will qualify as an other governmental entity and how to apply the 10 MW cap to such entities. Cleary v. Cardullo's, Inc., 347 Mass. 337, 344 (1964).¹⁹ The Department finds that each department and agency of the Commonwealth will be considered a separate governmental entity, such that each will be subject to its own 10 MW cap. For example, the Department of Corrections will be subject to a 10 MW cap, such that all of the state correctional facilities in the aggregate will be eligible for a combined 10 MW of net metering capacity. We adopt the same approach for the federal government. For example, all U.S. Department of Veterans Affairs facilities in the Commonwealth will be subject to a combined 10 MW cap. We find that this resolution strikes the appropriate balance in terms of allotting net metering capacity among different branches of government, given the difference between the size, scale, and operations of a municipality and those of the state and federal government.

Further, we recognize that, while some governmental entities are clearly eligible for the public cap, it is less obvious whether certain others qualify. We will not attempt to identify

¹⁹ “The duty of statutory interpretation is for the courts. Nevertheless, particularly under an ambiguous statute . . . the details of legislative policy, not spelt out in the statute, may appropriately be determined, at least in the first instance, by an agency charged with administration of the statute.” Cleary, 347 Mass. at 344.

every eligible governmental entity here. Instead, we note that for net metering purposes, certain criteria will guide our future determinations, which will be performed on a case-by-case basis in response to an applicant's request to the Department. To make such a request, an applicant must complete a standardized form²⁰ and supply adequate supporting information, as described below. Upon review of the form and the supporting information, the Department will issue a written determination. Any applicant who is dissatisfied with the Department's determination may petition in a timely manner for reconsideration.

In general, to receive net metering services under the public cap, a governmental entity must demonstrate qualities such as a governmental character, a governmental purpose, and the performance of a governmental function. These factors likely exist when the entity can show some or all of the following: (1) it has officers who are popularly elected or appointed by public officials; (2) it ensures a high degree of transparency by meeting public reporting requirements and providing public access to records; and (3) it is able to levy taxes or issue tax-exempt debt. Accordingly, some entities that are likely to be eligible as a governmental entity include but are not limited to public transportation and roadway authorities, public water authorities, and public housing authorities. Any applicant that seeks a determination regarding its eligibility as an other governmental entity must file a petition with the Department and adequately demonstrate its governmental character, purpose, and function.

²⁰ This form will be designed and issued by the Department following the issuance of this Order.

Finally, we note that, in order to determine whether a municipality or other governmental entity is exceeding its 10 MW cap, we must decide whether the total capacity of a net metering project should be attributed to Host Customers or whether it should be attributed to recipients of the net metering credits. We will review this and other questions in Section III.C.2., below.

C. Net Metering Facility of a Municipality or Other Governmental Entity

1. Host Customer Requirement

Next, the Department addresses our proposal to require a municipality or other governmental entity to be the Host Customer in order to qualify for the public cap. While some commenters supported the Department's proposal, others opposed it, claiming that it is overly restrictive. In this section, the Department considers whether it is appropriate to require a municipality or other governmental entity to be the Host Customer of a net metering facility included under the public cap.

A net metering facility of a municipality or other governmental entity is defined as a Class II or Class III Net Metering Facility: (1) that is owned or operated by a municipality or other governmental entity; or (2) of which the municipality or other governmental entity is assigned 100 percent of the output. G.L. c. 164, § 138. In our Order proposing regulations, the Department suggested that a municipality or other governmental entity should receive 100 percent of the benefits provided by the electricity output of a net metering facility, which, we said, would require the municipality or other governmental entity to: (1) be the Host

Customer; and (2) assign, if applicable, all net metering credits to its own accounts.

D.P.U. 11-10, at 2-3.

Pursuant to the Department's current regulation at 220 C.M.R. § 18.02, a Host Customer is defined as

a Customer with a Class I, II, or III Net Metering Facility or Neighborhood Net Metering Facility that generates electricity on the Customer's side of the meter.

The definition of Host Customer can accommodate various types of development arrangements because, as the Department has previously clarified, the definition provides flexibility regarding who may qualify as a Host Customer as well as where a net metering facility may be located.

As long as (1) a person or entity satisfies the definition of a Customer, and (2) the applicable facility generates electricity on the person's or entity's side of the meter, that person or entity qualifies as a Host Customer and is eligible to receive Net Metering services from its Distribution Company. For all these reasons, the Department concludes that requiring the output of Net Metering facilities to flow through a Host Customer's meter is consistent with the Green Communities Act and provides appropriate flexibility regarding facility location.

Rulemaking on Net Metering, D.P.U. 08-75-A at 6-7 (2009). Based on this definition of Host Customer from our existing regulations and our interpretation in D.P.U. 08-75-A, we conclude that the location of a net metering facility will not dictate who may qualify as its Host Customer, and that a Host Customer need not own or lease the property on which a net metering facility is located.²¹ Accordingly, any customer of a Distribution Company who

²¹ For example, in their comments, CLC and CVEC identified Provincetown as an example of a municipality that is unable to site net metering projects within its own boundaries (CLC and CVEC Reply Comments at 4). Nothing in our regulations prohibits a municipality from becoming the Host Customer of a net metering facility

requests net metering services for a Class II or III net metering facility generating electricity behind the meter is deemed the Host Customer for the net metering facility of a municipality or other governmental entity. While the Department requires that a single person or entity be the Host Customer, this will not prevent a variety of development paradigms, in which the location of the facility as well as ownership and control of the facility site are all flexible aspects of a project.

Several commenters have suggested that the identity of the Host Customer should not matter. We disagree. A Host Customer enjoys two important benefits of a net metering facility: (1) 100 percent of the output (i.e., the electricity); and (2) the net metering credits, which it may then allocate to certain other accounts (see Section V.C.2, below). We can envision no circumstance under which a facility should qualify for inclusion under the public cap unless the municipality or other governmental entity is the Host Customer.

2. Allocation of Net Metering Credits

As we noted in our Order on proposed regulations, our suggested interpretation of “assigned 100 percent of the output” included the requirement that the municipality or other governmental entity assign, if applicable, all net metering credits to its own accounts.

D.P.U. 11-10, at 2-3.

located in a different municipality. Thus, nothing in our regulations prohibits Provincetown from opening an account as a Host Customer of a net metering facility located within the same Distribution Company service territory and the same load zone and allocating any net metering credits to other Provincetown municipal accounts (or certain others, as discussed in Section IV.C.2). G.L. c. 164, §§ 139(a)(1), (b)(1); 220 C.M.R. § 18.05(1).

Commenters took different positions on the Department's proposal to require a Host Customer who is "assigned 100 percent of the output" to allocate net metering credits only to its own accounts. Some commenters supported the Department's proposal.²² Other commenters recommended that the Department's proposal be modified to allow the Host Customer of an assigned output net metering facility of a municipality or other governmental entity to allocate credits to itself as well as the accounts of additional municipalities or other governmental entities, reasoning that this would make net metering available to more municipalities or other governmental entities.²³ Another group of commenters opposed the Department's proposal, stating that the Department should allow Host Customers to allocate net metering credits without restriction because to do otherwise would: (1) be inconsistent with the intent of the Green Communities Act; (2) limit viable project structures; (3) discriminate against smaller towns and towns without sufficient land for net metering projects; and (4) render the allocation of net metering credits meaningless for municipalities and other governmental entities.²⁴

²² See, e.g., Distribution Companies Reply Comments at 2-3; My Generation Comments at 1; National Grid Comments at 1; and NSTAR Electric Comments at 2.

²³ See, e.g., Attorney General Reply Comments at 1-2; DOER Comments at 4-5; DOER Reply Comments at 2-3.

²⁴ See, e.g., Barnstable Comments at 3-4; Capital Dynamics at 5; CLC and CVEC Comments at 4-11; CLC and CVEC Reply Comments at 2, 3, 4; Kingston/No Fossil Fuel Reply Comments at 3; NuGen Reply Comments at 2-3; NMC Reply Comments at 2; RRDC Comments at 2-3; RRDC Reply Comments at 1-4.

After considering the positions of the commenters, we are persuaded that our proposed interpretation is overly restrictive. As noted by some commenters, limiting the allocation of net metering credits from an assigned output facility to a Host Customer's own accounts would be inconsistent with G.L. c. 164, §§ 139(a)(1) and (b)(1),²⁵ as well as 220 C.M.R. § 18.05(1), all of which allow net metering credits to be allocated to the accounts of other customers. The Department agrees that a ban on the allocation of net metering credits to other customers would be inconsistent with statute and the Department's own regulations. Instead, we conclude that "output," for the purpose of this provision, refers only to electricity. Therefore, the output of a Class II or Class III net metering facility is "assigned" when ownership of the electricity is transferred to the Host Customer, which must be, as discussed above, a municipality or other governmental entity (e.g., as a result of a behind-the-meter transaction, such as a power purchase agreement to which the Host Customer is a party). Accordingly, the "assignment" of electricity is separate and distinct from both the conversion of any excess generation into net metering credits, as provided in 220 C.M.R. § 18.04, and any resulting allocation of net metering credits, as provided in 220 C.M.R. § 18.05(1). As such, the Department finds that Host Customers of net metering facilities of a municipality or other governmental entities may allocate net metering credits beyond their own accounts.

²⁵ In opposing the Department's proposal, CLC and CVEC correctly note that G.L. c. 164, § 139(b)(1) allows net metering credits attributable to Class III facilities to be allocated to other customers. Similarly, G.L. c. 164, § 139(a)(1) allows net metering credits from Class I and II facilities to be allocated to other customers.

As stated above, however, the Department must establish parameters to ensure that the special statutory provisions for net metering facilities of a municipality or other governmental entity are realized. We conclude that the statute does not allow the Host Customer of a net metering facility of a municipality or other governmental entity to allocate net metering credits to any other customer it chooses, without restriction. For example, the statute imposes two geographic limits on the allocation of net metering credits for all Host Customers.²⁶

G.L. c. 164, §§ 139(a)(1) and (b)(1). In addition, if the Department were to provide Host Customers of net metering facilities of municipalities and other governmental entities with the unfettered ability to allocate net metering credits to any other customer, whether private or public, it would be inconsistent with the statutory creation of a special category of public facilities and a public cap. Also, if the Host Customer of a net metering facility within the public cap were allowed to allocate net metering credits to private entities, the facility could actually be a “pass-through” facility, and any distinction between the two types of facilities and caps would be obfuscated. Thus, the Department will allow all Host Customers of a net metering facility under the public cap to allocate net metering credits only to the accounts of other customers that could also qualify as a municipality or other governmental entity. Accordingly, 220 C.M.R. § 18.05(1) is hereby amended to include this restriction.

Next, as some commenters acknowledged and recommended, if more than one municipality or other governmental entity receives credits from a net metering facility, the

²⁶ Net metering credits can be allocated only within: (1) a Distribution Company’s service territory; and (2) the same ISO-NE load zone. 220 C.M.R. § 18.05(1).

Department must determine whether such credits count towards a municipality's or other governmental entity's 10 MW maximum cap.²⁷ Specifically, the Department must decide whether to attribute the capacity associated with a net metering facility of a municipality or other governmental entity to: (1) only the Host Customer; or (2) all designated recipients of net metering credits from that facility. Some commenters recommended that a net metering project's capacity be apportioned among the entities that benefit from the project (i.e., the recipients of net metering credits) rather than to the Host Customer only.²⁸ The Department declines to adopt this recommendation for several reasons.

First, while multiple entities may benefit from a net metering project, only one entity (i.e., the Host Customer) will actually receive net metering services pursuant to a net metering tariff. Receiving net metering credits does not mean that a customer is taking service under a net metering tariff; instead, the customer takes service under a general service tariff and the net metering credits are applied to the customer's account. As such, it is appropriate to assign all net metering capacity of a facility only to the entity that actually receives net metering services pursuant to a net metering tariff, which is the Host Customer.

Second, the commenters' recommendation to apportion the capacity among the recipients of credits would likely create confusion about a municipality's or other governmental entity's progress towards its 10 MW cap. Pursuant to Section I of Schedule Z of each

²⁷ See, e.g., CLC and CVEC Comments at 12-13; CLC and CVEC Reply Comments at 5-6; Barnstable Comments at 5-6; NMC Reply Comments at 2.

²⁸ See, e.g., CLC and CVEC Comments at 12-13; CLC and CVEC Reply Comments at 5-6; Barnstable Comments at 5-6; NMC Reply Comments at 2)

Distribution Company's interconnection tariff, a Host Customer may revise as often as twice per year its designated recipients of net metering credits and the percentage of credits that they receive. Nothing requires the Host Customer or the recipients of net metering credits to enter into long-term or permanent agreements for such transfers. If the capacity of a net metering facility were somehow apportioned on a pro rata basis among all municipalities or other governmental entities that received net metering credits, periodic "counts" would have to be conducted and verified to ensure that no municipality or other governmental entity exceeds its statutory maximum generating capacity of 10 MW. In contrast, even if more than one municipality or other governmental entity were receiving credits but all of the capacity of a net metering project were associated with the Host Customer, periodic "counts" of net metering capacity would be unnecessary.²⁹ Instead, a Host Customer's progress towards its 10 MW cap would be tracked on a predictable and cumulative, project-by-project basis. Accordingly, even if more than one municipality or other governmental entity is receiving net metering credits from a net metering facility under the public cap, all capacity of the facility will be associated with the Host Customer and apply towards its 10 MW maximum generating capacity.

Further, to facilitate stakeholders' understanding of the distinctions between the public and private caps, we note here some additional conclusions that follow from our findings above regarding maximum amounts of capacity. G.L. c. 164, § 139(f) states that

²⁹ Even if the Host Customer of a net metering facility of a municipality or other governmental entity changed over time, the account associated with the net metering facility would have to be closed and re-opened by the Distribution Company, which is a less frequent, more discrete, and more easily tracked event than potential biannual revisions to the list of recipients of net metering credits on Schedule Z.

[t]he aggregate net metering capacity of facilities that are not net metering facilities of a municipality or other governmental entity shall not exceed 1 per cent of the distribution company's peak load. The aggregate net metering capacity of net metering facilities of a municipality or other governmental entity shall not exceed 2 per cent of the distribution company's peak load. The maximum amount of generating capacity eligible for net metering by a municipality or other governmental entity shall be 10 megawatts. For the purpose of calculating the aggregate capacity, the capacity of a solar net metering facility shall be 80 per cent of the facility's direct current rating at standard test conditions and the capacity of a wind net metering facility shall be the nameplate rating.

First, in light of the definition of net metering facility of a municipality or other governmental entity in G.L. c. 164, § 138, we find that the public cap will include only Class II and Class III net metering facilities. Accordingly, while a public entity may develop Class I net metering facilities, such facilities are excluded from the public cap. Nothing prohibits a municipality or other governmental entity from developing Class I net metering facilities for inclusion in the private cap instead of—or in addition to—any facilities that it develops within the public cap.

Second, if a municipality has already installed 10 MW of net metering facilities included under the public cap, nothing in our net metering regulations prohibits private entities—and even other public entities that have not yet reached their 10 MW limit—from installing net metering facilities within the boundaries of the municipality.

Finally, with regard to calculating the aggregate capacity of net metering facilities, the Act directs that the capacity of a solar net metering facility must be 80 percent of the facility's direct current rating at standard test conditions, whereas the capacity of a wind net metering facility shall be the nameplate rating. G.L. c. 164, § 139(f). Upon consideration of this

provision, we find that this “reduced weighting” of solar net metering facilities will be used to determine Distribution Companies’ progress towards reaching the public and private net metering caps, but that it does not apply to how these caps are set (i.e., the caps are determined as a percentage of highest historical peak load). This provision also does not apply to the calculation of the 10 MW maximum generating capacity of net metering facilities of a municipality or other governmental entity (e.g., if a municipality installs 5 MW of wind facilities and 5 MW of solar facilities, it has reached its 10 MW cap).

D. Other Issues

Here, the Department addresses other issues raised by commenters in this rulemaking proceeding. These issues are: (1) Distribution Company reporting requirements; (2) the definition of “per unit” for solar PV projects; (3) National Grid net metering cap(s); (4) cash-out of net metering credits; (5) the Department’s view on other attributes of a net metering facility; and (6) the effective date of the final regulations.

As an initial matter, while the Department finds that the recommendations of commenters regarding Distribution Company reporting requirements, the definition of “per unit” for solar PV projects, National Grid’s net metering cap(s), and the cash-out of net metering credits are important issues for future resolution, these issues were not identified for resolution by the Department in D.P.U. 11-10 and are largely unrelated to our implementation of changes to net metering rules required by the Act. As a result, these issues fall outside of the scope of this rulemaking and are inappropriate to decide here. Because the Department is

refining its guidance and requirements regarding net metering, we will address these issues in other proceedings as appropriate (see e.g., D.P.U. 11-11).

Nonetheless, the Department will provide some guidance on NMC's request for clarification of the Department's view of other attributes of a net metering facility, as raised by the Department's interpretation of the assigned output provision within the definition of net metering facility of a municipality or other governmental entity. G.L. c. 164, § 138; St. 2010, c. 359, § 27. The Department has yet to formally identify attributes other than electricity or net metering credits that may be produced by net metering facilities (e.g., RECs, carbon offsets, reductions in demand, capacity payments) in the context of the net metering regulations or to determine who should be deemed the owner of such attributes, especially in the absence of an agreement between the parties. While stakeholders may petition the Department to clarify these issues in the future, at present, it is premature for the Department to formulate policy on this question. Accordingly, the Department declines to rule on these matters at this time.

Finally, the Department is not persuaded by NMC or Kingston/No Fossil Fuels that the effective date of the final regulations should be suspended or delayed. The Department recognizes the importance of its net metering regulations to the distributed generation industry and the challenges posed by any unanticipated regulatory changes. Furthermore, the language of the statute explicitly directs the Department to promulgate regulations, which means that all stakeholders had ample notice as of October 15, 2010, that regulatory changes were certain to occur. Moreover, NMC and Kingston/No Fossil Fuel have not provided a compelling

rationale for delaying the effective date of the regulations or for affording special treatment to any projects that are currently or soon to be under development, nor can the Department formulate one. As such, the Department will not delay the effective date of the regulations or provide for a transitional period for projects that are either currently or soon to be under development.

E. Conclusion

In developing its final net metering regulations, the Department sought to provide clarity and guidance to all stakeholders regarding the Act's amendments to G.L. c. 164, §§ 138 and 139. Some issues that were raised in this proceeding, however, will be better addressed in one of the Department's other proceedings related to net metering, which include: Inquiry Into Net Metering and Distributed Generation, D.P.U. 11-11; Investigation into Interconnection of Distributed Generation, D.P.U. 11-75; Cape and Vineyard Electric Cooperative, D.P.U. 11-96; and Investigation into Model Net Metering Tariff, D.P.U. 12-01. We expect that, together, these proceedings will adequately address the questions that commenters have raised in the course of this rulemaking with respect to the provision of net metering services in the Commonwealth.

The Department adopts the final regulations contained in 220 C.M.R. § 18.00 et seq. and attached to this Order as Appendix A. The effective date of these regulations will be the final date of publication in the Massachusetts Register.

