112 State Street
4th Floor
Montpelier, VT 05620-2701
TEL: 802-828-2358

TTY/TDD (VT: 800-253-0191)
FAX: 802-828-3351
E-mail: puc.clerk@vermont.gov
Internet: http://puc.vermont.gov

State of Vermont
Public Utility Commission

January 2, 2024

Rep. Trevor Squirrell, Chair
Sen. Mark A. MacDonald, Vice Chair
Sen. Christopher Bray
Sen. Virginia "Ginny" Lyons
Sen. David Weeks
Rep. Seth Bongartz
Rep. Mark Higley
Rep. Carol Ode
Charlene Dindo, Committee Assistant

Dear LCAR members:

The Vermont Public Utility Commission ("Commission") is submitting these supplemental comments in response to comments made during the December 14, 2023, meeting of the Legislative Committee on Administrative Rules ("LCAR" or "Committee") addressing the Commission's proposed amendments to its existing Rule 5.100, the Net-Metering Rule.

At the LCAR meeting on December 14, the commenters raised concerns about two amendments to the rule: (1) the limits on forest clearing on "preferred sites" (Rule 5.103) and (2) the treatment of rates for expanded net-metering systems (Rules 5.108(C) and 5.109(D)). The Commission addresses both areas in these supplemental comments.

1. The Forest Clearing Limitation is Not Arbitrary

The Administrative Procedure Act states that a rule is arbitrary when: (i) there is no factual basis for the decision made by the agency; (ii) the decision made by the agency is not rationally connected to the factual basis asserted for the decision, or (iii) the decision made by the agency would not make sense to a reasonable person.[1] A rule is not arbitrary merely because a party argues that the Commission should have made a different decision than it did.[2]

First, in regard to the factual basis underlying the rule: Section 8010 of Title 30 directs the Commission to "adopt a net-metering rule that advances Vermont's renewable energy and greenhouse gas requirements; achieves a level of net-metering deployment consistent with the

[1] 3 V.S.A § 801(b)(13).

[2] *Beyers v. Water Res. Bd.*, 2006 VT 65, ¶ 18 (2006) ("The real thrust of plaintiff's arguments is that the [agency] should have made a different decision than it did. But it is not the role of the Court to determine whether the [agency] made the correct policy decision.")

comprehensive energy plan; to the extent feasible, ensures that net metering does not shift costs between net-metering customers and other customers; accounts for all costs and benefits of net metering; allows customers to participate in net-metering; balances the pace of deployment and cost of the program with the program's impact on rates; accounts for changes over time in the cost of technology; and addresses the ownership of renewable energy credits." The statute also directs the Commission to consider whether there should be a limit on the cumulative capacity of net-metering installations. This is a long list of considerations, some of which are in tension with each other. The Legislature gave the Commission a road map with general policy directions but asked the Commission to fill in many details.

Net-metering is an incentive program with costs – and it is in fact the most expensive renewable energy program in the state.[3] The net-metering rule includes guardrails to ensure that the costs and benefits of net-metering are balanced.

A key element of the current net-metering rule is the concept of "preferred sites." Preferred sites are defined areas where the Commission seeks to promote the beneficial development of net-metering because the sites have fewer environmental and land-use impacts. Examples of preferred sites include brownfields, parking lots, roofs, and land close to the load served by the net-metering system. Facilities greater than 150 kW must be on preferred sites to participate in the net-metering program because net-metering offers owners of net-metering systems greater financial benefits than would otherwise be available to them if they did not participate in the net-metering program. Facilities greater than 150 kW can be constructed on sites that are not preferred but must be developed outside the net-metering program through a lower-priced mechanism, such as the standard-offer program or a competitive utility contract.

In its 2017 report to the Legislature on net-metering, the Commission stated:

> Larger net-metering systems … are more like merchant generators. Such systems rely on the grid to export power to other retail users. As a matter of policy this type of development should be compensated through bilateral contracts or through participation in the regional wholesale market and not through the preferential terms offered by net-metering. Furthermore, given the size and scope of these facilities, it is appropriate to review proposals for these facilities that are located on green fields using the full procedures of Section 248. For these reasons, the [Commission] finds that it is in the public good to require that large net-metering systems be located on preferred sites in order to justify the significant financial and procedural advantages that net-metering systems receive in comparison to other generation projects.[4]

---

[3] *See e.g., 2022 Vermont Comprehensive Energy Plan* at 246-250.

[4] VERMONT PUB. UTILITY COMM., REPORT TO THE VERMONT GENERAL ASSEMBLY ON THE NET-METERING PROGRAM PURSUANT TO ACT 99 OF 2014 at 21 (*available at* https://puc.vermont.gov/document/act-99-legislative-report-net-metering).

Since the net-metering rule was last revised in 2017, many large net-metering facilities have been sited on previously disturbed sites like gravel pits. This is what the Commission had hoped the rule would encourage. However, not all large net-metering projects followed this trend. Some have been located in undeveloped areas that required the clearing of significant areas of forest. This concerned the Commission because such projects are not consistent with the rule's intent to drive development to previously developed sites with reduced environmental impacts. The Commission realized that the net-metering program was still providing incentives for developers to clear significant areas of forest. In response, the Commission engaged with stakeholders through this rulemaking about how to address this impact.

After reviewing data from the Agency of Natural Resources on all net-metering applications, the Commission learned that the vast majority of net-metering applications have not involved any forest clearing, or only a small amount of forest clearing. However, approximately 40 projects accounted for a disproportionate amount of forest clearing. The Commission also found that this subset of net-metering projects tended to clear significantly more forest per MW of installed capacity than larger, competitively priced projects like standard-offer projects.

The Commission concluded that a limit on the amount of clearing associated with a net-metering project was a reasonable response to these facts. The Commission originally considered a more stringent limitation of one acre, but ultimately revised its proposal to a limit of three acres per net-metering system. This number was chosen after reviewing application data and balancing the goal of protecting forests while trying to minimize the impact of the proposed rule on net-metering deployment. Ultimately, the Commission believes this rule will not affect many potential projects because most can be designed so as to clear less than three acres of forest. While the rule does not eliminate all tree and forest loss, it will protect larger areas of contiguous forest and its associated habitat from being permanently converted for net-metering systems.

The Commission's definition of "forest" is based on the U.S. Forest Service's definition of forest. The definition is tailored to ensure that single trees and small clumps of trees do not count as forests and that only contiguous areas of trees greater than one acre count towards the overall three-acre limitation.[5] REV criticizes the rule's use of a 10% canopy cover standard as overbroad but ignores that the rule requires canopy cover to also include "associated naturally occurring vegetation." Therefore, contrary to REV's arguments, the rule does not apply to a few trees in a field or agricultural areas. The intent of the rule is to capture areas that are functioning as forests.

A reasonable person would understand the need for this rule. The Commission does not believe it is appropriate to give developers financial incentives to construct net-metering systems in areas that require significant forest clearing. Vermont pays a premium for net-metered power, and that premium should be used to encourage development of truly preferred sites like roofs and previously disturbed sites. Solar projects that propose significant forest clearing may still be developed under lower-cost programs.

[5] Proposed Rule 5.103, "To qualify as forest, an area must be at least one acre in size and 120 feet wide."

REV argues that the rule should only prohibit sites that are affirmatively demonstrated to result in an increase in atmospheric CO_2 over a project's expected lifespan. Similarly, REV argues that the rule should differentiate between forests with different habitat values. These comments recognize that it may be appropriate to limit the development of net-metering in certain areas; REV just disagrees with how the Commission is accomplishing this reasonable policy goal. REV's framing of the argument assumes a false choice between clearing forests and constructing net-metering systems. There is no evidence that it is not feasible to construct net-metering systems without significant forest clearing. Even if it were the case that Vermont must clear forests to build sufficient new renewable energy sources to meet our greenhouse gas reduction requirements, then those projects should not participate in net-metering because the program is more expensive than other comparable forms of in-state renewable energy.

Finally, REV's argument that the proposed rule impinges on local control ignores the fact that Vermont law vests decision-making authority over the siting of electric generation facilities with the Commission and not local bodies. The Commission notes that the sites identified by local bodies as "preferred" are often not identified in a local or regional plan, but instead are identified on an ad hoc basis by developers who then request a letter from the town or regional planning body identifying their chosen site as preferred. This rule provides additional guidance to local planners about which sites should be identified as preferred for net-metering systems.

With respect to individual sites that are identified in a local or regional plan, State law provides that the specific policies contained in approved local and regional enhanced energy plans should be given "substantial deference" in Section 248 proceedings. However, even in those cases the Commission may override a local or regional energy plan where "there is a clear and convincing demonstration that other factors affecting the general good of the State outweigh the application of the measure or policy."[6] The Commission has determined that it is not in the general good of the State to allow sites that involve substantial forest clearing to participate in the net-metering program because of the program's additional costs and streamlined permitting process. If towns or regional plans designate forested areas as preferred sites for development of energy facilities, those areas may still be developed using less costly programs, subject to the comprehensive environmental review afforded in a full Section 248 proceeding.

2. <u>The Rates Applicable to Expanded Net-Metering Systems</u>

Section 8010 directs the Commission to adopt rules establishing the value of a net-metering credit that, among other things, reflect changes in the cost of technology over time and consider the impact of net-metering development on retail electric rates. The Commission has found that the net-metering program has had a measurable impact on retail rates and that the cost of installing solar technology has decreased substantially over the past decade. Accordingly, the

[6] 30 V.S.A. § 248(b)(2)(C).

level of the financial incentives provided by the rule has decreased over time since 2017.[7] However, when a customer installs a net-metering system, the customer is guaranteed that that the value of any net-metering credits for that system will remain the same for a period of 10 years.

The Commission has observed a recent trend in which some existing large net-metering systems, installed a number of years ago, have applied for significant expansions of their capacity to take advantage of their legacy net-metering rates that are no longer available to new customers. Also, pre-2017 net-metering systems are allowed to retain their renewable energy credits without financial penalty. This means that these systems are effectively selling brown power to the utility at a price significantly above market rates.[8] As a result, treating the expanded portion of a system under the rules applicable to the original system would increase the sale of brown power to the utility.

Rules 5.108(C) and 5.109(D) address this issue by applying the current net-metering rates and rules to systems that expand by more than 15 kW or 10%. This clarification accommodates the interests of small net-metering customers who might need to expand an existing system – for example, to accommodate additional load on a residential scale for beneficial electrification – while protecting the interests of non-participating customers who should not pay more than necessary for net-metered power.

REV and other commenters argue that the Commission should be encouraging the development of already disturbed sites through the expansion of existing systems. The Commission has found that the current rates are sufficient to encourage such development. The Commission does not believe it is appropriate to provide net-metering customers with a financial windfall when they significantly expand an existing system. Furthermore, existing customers are not prohibited from constructing separate, new net-metering systems subject to current rates while retaining their old rates for their existing systems. This rule only applies where a customer expands an existing net-metering system by more than 15 kW or 10%.

The Commission thanks the Committee for this opportunity to provide these supplemental comments in response to concerns raised during the December 14 Committee meeting.

---

[7] Retail rates have increased during this timeframe, partially offsetting the Commission's reductions in incentives. For example, net-metering customers in 2016 received credits for excess generation valued at $0.19 or $0.20 per kWh. Currently, new customers receive credits for excess generation worth between $0.15 and $0.11 per kWh.

[8] "Brown power" refers to electricity that does not include any associated renewable energy attributes. The utility reselling that power cannot claim that this power is renewable and would need to purchase other renewable attributes as required by Vermont's Renewable Energy Standard.

Sincerely,

/s/ Jake Marren
Jake Marren, Esq.