

Dear Senator Bray,

Below, please find public comment I submitted to the Public Service Board in relation to proposed Draft Rule 5.100 dated February 19, 2016. I believe the issue raised in the comment is worthy of consideration and investigation by the Senate Committee on Natural Resources & Energy. I would like the comment to be added to the list of testimony for S.230.

Dear PSB,

This public comment pertains to section 5.105(B)(1) of the proposed Draft Net Metering Rule dated February 19, 2016 (bottom pg. 11). Section 5.105(B)(1) states in pertinent part that “[a]ll RECs shall be transferred to the electric company unless the customer elects to retain ownership of such credits.” If the PSB has not already performed a legal analysis on whether this provision violates the Takings Clause of the U.S. Constitution, then I would encourage the Board to do so in light of the recent U.S. Supreme Court decision in [*Horne vs. U.S. Department of Agriculture*](#), decided on June 22, 2015.

In *Horne II*, the Court held that:

(a) personal property is subject to the same protection under the U.S. Constitution as is real property. RECs are personal commercial property and would be afforded the same protection as raisins that enter the interstate market.

(b) the government may not require a property owner to relinquish his/her property interest without just compensation. In the case of solar RECs, not only would the property owner be required to give up a property interest without compensation, but would be required to pay a penalty for not doing so. This situation is analogous to that in *Horne* where the U.S.D.A. levied a penalty for the property owner’s refusal to give up raisins, as required by the U.S.D.A.’s raisin marketing order program. The fact that the State of Vermont would require the property to be transferred to a utility instead of the government would not change the result. A government regulation that requires a property transfer from A to B for a public use is subject to Takings Clause analysis. A transfer of property related to a Certificate of Public Good would undoubtedly be considered a public and not a private use since the utility would be required to retire the RECs against the State’s mandatory targets. Additionally, the fact that the property transfer is a permanent taking of personal property is made clear by the fact that the proposed rule goes on to say that the election by the property owner is irrevocable.

In short, the utility is gaining a property interest for free and the government is facilitating the transfer. I would encourage the PSB’s counsel to study whether this provision, and any similar provision in State law related to the transfer of RECs, might violate the Takings Clause of not just the U.S. Constitution, but potentially the Vermont Constitution as well.

Best regards,
Scott Woodward
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