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OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: Sen. Chris Bray, Chair
House Committee on Energy and Technology

From: Aaron Adler, Legislative Counsel

Date: February 16, 2017

Subject: Rule 16-P62; Public Service Board/Net metering systems

This memo concerns the final proposed rule of the Public Service Board (PSB or Board) on net metering systems submitted on January 20, 2017. As requested, this memo addresses two parts of the rule that, in my opinion, exceed the Board's authority and are contrary to legislative intent:

- Changing, for preexisting net metering systems, the bill credit rate structure and application of bill credits to the customer's bill. In my opinion, the letter and intent of 2014 Acts and Resolves No. 99 (Act 99) were to retain the status quo for these systems, and to vest their rights under the statute that formerly applied, 30 V.S.A. § 219a, including the bill credit structure under that statute. In addition, under 1 V.S.A. § 214, the amendment or repeal of a statute does not affect rights acquired under that statute. Former § 219a provided these systems with the right to bill credits at the retail rate and to apply those credits to any part of the bill.
- Allowing utilities to propose, in their rate schedules, additional charges to which net metering customers cannot apply their bill credits, rather than providing for such charges in Board rules adopted through the rulemaking process. 30 V.S.A. § 8010 requires that net metering customers pay the same rates and charges as other customers except as provided in section 8010 and the Board rules. Therefore, under section 8010, the rules must state any such charges for the charges to be authorized.

I. Bill Credits; Preexisting Net Metering Systems

On the issue of preexisting net metering systems, it is my opinion that the last sentence of proposed Rule 5.124(C) and the 10-year limit in proposed Rule 5.124(D) are subject to objection under 3 V.S.A. § 842(b) because they are beyond the Board's authority and contrary to legislative intent. These provisions: (a) change the rate structure for bill credits issued to these systems; and (b) limit the charges on the bill to which these systems may apply the credits.

In Act 99, the General Assembly directed the Public Service Board (Board) to reestablish the net metering program on a prospective basis effective January 1, 2017, passing an entirely new statute to govern the program, 30 V.S.A. § 8010.

Under Sec. 10 of that act, the new net metering program would apply to applications filed on or after January 1, 2017. The status quo would be maintained for net metering systems for which

applications were filed before that date (preexisting net metering systems). These systems would be governed by the prior statute, 30 V.S.A. § 219a. Act 99, Sec. 10(f) and (g). This result is required by 1 V.S.A. § 214(b) , under which "[t]he amendment or repeal of an act or statutory provision, except as provided in subsection (c) of this section, shall not . . . affect any right, privilege, obligation, or liability acquired, accrued, or incurred prior to the effective date of the amendment or repeal . . ." As shown below, under former § 219a, preexisting net metering systems had the right to bill credits at their retail rate for energy from the utility and to apply those credits to any part of the utility bill.

However, the relevant provisions of the final proposed rule would change rather than maintain the status quo for preexisting net metering systems and therefore may affect the investments of system owners encouraged by and made in reliance on prior law. While the provision likely would reduce the cost of the net metering program for all ratepayers, the issue presents a policy decision that should be made by the standing committees.

Rate Structure; Bill Credits

In proposed Rule 5.124(C), the Board proposes that, after 10 years, preexisting net metering systems will be credited for excess generation in the same manner as with net metering systems for which applications are filed under the new program, that is, on or after January 1, 2017. The rule states: "At the end of this 10-year period, customers using pre-existing net-metering systems shall be credited for excess generation as provided in Section 5.125 of this Rule or its successor."

The effect of this rule is to subject preexisting net metering systems, after 10 years, to the lowest of one of three bill credit rates, as defined by the Board under "blended residential rate." See Rules 5.103, 5.125, 5.126. The rate would be the lowest of: the utility's general residential service rate; a blend of the utility's block rates, if it has block rates; or a statewide average rate calculated by the Board. Rule 5.103.

The blended residential rate alters the status quo from and has the potential to be lower than the bill credit rate to which preexisting net metering systems were entitled under 30 V.S.A. § 219a, which was the utility's rate applicable to the customer's rate class. 30 V.S.A. § 219a(e)(3), as amended by Act 99, Sec. 1. If the customer paid block rates, those blocks would be blended, except that solar installations would receive compensation at the highest block for ten years following installation. Id. There was no provision for lowering the bill credit rate based on a statewide average.

Bill Credits; Applicability to Charges on Bill

In proposed Rule 5.124(D), the Board proposes to impose a 10-year limit on the ability of preexisting net metering systems to apply bill credits for excess generation to what the rules calls "non-bypassable charges," meaning charges that apply to a customer whether they net met or not, with examples being the customer charge and energy efficiency charge. See Rule 5.103. Rule 5.124(D) states: "For a period of 10 years from the date that a pre-existing net-metering system was commissioned, a customer using that net-metering system may apply any accrued net-metering credits to any charge irrespective of whether that charge is a non-bypassable charge."

The effect of this rule, when read in concert with Rules 5.124(C) and 5.125(A), is that after this 10-year period, preexisting systems will be unable to apply bill credits to "non-bypassable charges."

This rule therefore alters the status quo from the rights granted to preexisting net metering systems under the former 30 V.S.A. § 219a, which directed utilities to apply the credit for excess generation to all portions of the bill. The section provided:

> The electric company shall calculate a monetary credit to the customer by multiplying the excess kWh generated during the billing period by the kWh rate paid by the customer for electricity supplied by the company and *shall apply the credit to any remaining charges* on the customer's bill for that period.

30 V.S.A. § 219a(e)(3)(A).

Board Responses

Attached is an excerpt from a February 7, 2017 memorandum (the February 7 memorandum) to me from Jake Marren, Board staff attorney, sets forth questions and comments from me and responses from the Board on the issue of bill crediting for preexisting net metering systems.

I disagree with the Board's responses for several reasons:

- Under 1 V.S.A. § 214, the repeal of 30 V.S.A. § 219a does not affect the rights of preexisting net metering systems to the bill credit structure under that statute.
- In addition, Sec. 10(f) of Act 99 vests, as of the date of the application, the rights of preexisting net metering systems in the law and regulations applicable prior to January 1, 2017, that is, 30 V.S.A. § 219a and implementing Board rules.
- The Board attempts to limit the reach of this provision by claiming that it only governs the application process. This interpretation is inconsistent with 1 V.S.A. § 214. It is also inconsistent with the paramount principle of statutory construction, which is to give effect to legislative intent. State v. O'Neill, 165 Vt. 270, 275 (1996). The language refers to the application for the date of vesting and is not limited, stating what statutes govern the application process.
- With respect to net metering systems, bill credits are part and parcel of the application, which seeks approval of a system in order to receive credits on the bill.
- The Board erroneously states that the application is separate from the certificate of public good (CPG). The CPG for a net metering system typically requires that "[o]peration and maintenance of the Project shall be in accordance with the plans and evidence submitted in this proceeding." The plans and evidence are submitted with and include the application.
- The Board seeks to distinguish the Supreme Court's vested rights case law by artificially labeling bill credits as separate from land use. The two cannot be separated in the case of net metering, which represents an instance in which a land use – the net metering system – is induced by legislation offering bill credits. Former 30 V.S.A. § 219a; 30 V.S.A. § 8010.
- The Board characterizes maintaining the status quo as expanding the rights of preexisting net metering system owners at public expense. However, maintaining the status quo does not expand rights. The Board's rule narrows the rights of these owners in order to reduce public expense. This policy objective may be appropriate but must be determined by the General Assembly.

II. "Non-bypassable Charges" in Utility Tariffs

In proposed Rule 5.103, the Board proposes to define charges to which net metering customers cannot apply bill credits as "non-bypassable charges" and to allow utilities the authority to provide for such charges in their rate schedules. In relevant part, proposed Rule 5.103 states:

> "Non-Bypassable Charges" means those charges on the electric bill *defined in an electric company's tariffs* that apply to a customer regardless of whether they net-meter or not. Non-bypassable charges may not be offset using current or previous net-metering credits. A customer is liable for payment of these charges regardless of whether the customer has a credit balance resulting from net-metering. The customer charge, energy efficiency charge, energy assistance program charge, any on-bill financing payment, and any equipment rental charge are non-bypassable charges.

(Emphasis added.)

This definition exceeds the Board's authority and is contrary to legislative intent by allowing the utilities to provide for different charges applicable to net metering customers. To prevent discrimination against net metering customers, section 8010 specifically requires that net metering pay the same rates and charges as other customers, with the only exception being charges which section 8010 itself or the rules provide. The statute states:

> A net metering customer shall pay the same rates, fees, or other payments and be subject to the same conditions and requirements as all other purchasers from the interconnecting retail electricity provider in the same rate-class, *except as this section or the rules adopted under this section may provide*, and except for appropriate and necessary conditions approved by the Board for the safety and reliability of the electric distribution system.

30 V.S.A. § 8010(b).

Attached is an excerpt from the February 7 memorandum that discusses this issue. In the memo, the Board states that the provision is within its authority because it refers to rules and the proposed rules authorize the utilities to provide for the non-bypassable charges in their rate schedules. But this result is exactly contrary to the statute because it means that the rate schedule, adopted outside the rulemaking process, will provide for the charge and not the rule. The statute requires such a charge to be provided for by rule.

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