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State of Vermont
Public Service Board
MEMORANDUM

To: Senate Committee on Natural Resources and Energy

From: Jake Marren, Esq., Staff Attorney, Vermont Public Service Board

Date: February 21, 2017

Subject: Response to testimony provided at the February 17, 2017, committee meeting concerning the Vermont Public Service Board's proposed net-metering rule

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This memorandum is submitted in response to testimony provided by Legislative Counsel concerning the Vermont Public Service Board's proposed net-metering rule.

Issue: Whether the Board has authority to change the rates and terms of service applicable to pre-existing net-metering customers.

The Board's rule complies with Section 10(c) or Act 99 because the rule will preserve the incentives identified by Section 10(c). The rule also complies with Section 10(f) and (g) of Act 99 because "applications" filed prior to January 1, 2017, will be subject to the substantive requirements of Section 219a and the Board's prior rules that govern applications.

It has been suggested that Sections 10(f) and (g) of Act 99 should be read as exempting "systems" from the requirements of Act 99 and the proposed rule.[1] This interpretation ignores the plain language of Act 99 and renders Section 10(c) of the Act meaningless. To give effect to the Legislature's intent, one first looks to the plain, ordinary meaning of the statutory language.[2] The Legislature included two provisions concerning the effect of the repeal of Section 219a. Section 10(c) provides "systems" with certain rates, while Sections 10(f) and (g) specify what law will govern "applications." In using two separate and clear provisions that address different subjects ("systems" vs. "applications"), the Legislature expressed an intent to subject pre-existing net-metering systems to future changes in rates after the 10-year period described in Section 10(c). Reading Section 10(f) and (g) of Act 99 as dictating what rates are received by

[1] Memorandum from Legislative Counsel to Senator Bray, dated February 16, 2017 at 2 ("These *systems* would be governed by the prior statute, 30 V.S.A. § 219a").
[2] *In re Painter 2-Lot Subdivision*, 2010 VT 28, ¶ 6 (citations omitted).

"systems" ignores the Legislature's choice to use the word "applications" and would render superfluous Section 10(c), which deals with the rates available to "systems."

In conclusion on the subject of the legislative intent of Act 99, the Board observes that the topic of "grandfathering" was a topic of significant debate over the two-year public process that led to the proposed rule. Many participants advocated for various grandfathering periods (generally 10-25 years) based on the policy need to balance the time necessary for net-metering customers to recoup their investment and impacts on other ratepayers. This experience indicates that Act 99 was commonly understood to give the Board discretion to alter the rates available to net-metering customers after the expiration of the 10-year period provided in Section 10(c) of Act 99.

It has been further suggested that 1 V.S.A. § 214(b) prohibits the application of the new net-metering program to pre-existing net-metering systems. Pursuant to Section 214(b), "[t]he amendment or repeal of an act or statutory provision, . . . shall not . . . affect any right, privilege, obligation, or liability acquired, accrued, or incurred prior to the effective date of the amendment or repeal." The purpose of Section 214(b) is "to prevent the unintended retroactive application of statutes."

Therefore, it is necessary to delineate the rights that were acquired by pre-existing net-metering customers prior to January 1, 2017, in order to analyze what rights are protected by Section 214(b). Nothing in Section 219a suggests that pre-existing customers are immune from future changes in law. In fact, Section 219a(h)(1)(K)(vi) expressly recognizes that net-metering rates could change in the future and creates a limited exemption from such changes for solar customers. Pursuant to that subsection:

> "[a] solar net metering system shall receive the amount of the credit under this subdivision (K) that is in effect for the service territory in which the system is installed as of the date of the system's installation and shall continue to receive that amount for not less than 10 years after that date *regardless of any subsequent modification to the credit as contained in the electric company's rate schedules*."

This statutory language creates a right to receive the special solar incentive rate for a period of 10 years, but recognizes that there may be subsequent changes to net-metering rates. The Board's proposed rule is consistent with the rights provided by Section 219a(h)(1)(K)(vi) because pre-existing net-metering customers will continue to receive this credit for 10 years and will not be subject to any other changes to the net-metering rate structure during this period.

In conclusion, the Board's rule complies with Section 10(c) or Act 99 because the rule will preserve the incentives and rates identified by Section 10(c). The rule also complies with Section 10(f) and (g) of Act 99 because "applications" filed prior to January 1, 2017, will be reviewed pursuant to the substantive requirements of Section 219a.

Issue: Whether the rule may permit utilities to specify certain charges as "non-bypassable"

It has been argued that the definition of "non-bypassable charges" exceeds the Board's authority and is contrary to legislative intent because it allows "the utilities to provide for different charges applicable to net metering customers."[3] This statement is inaccurate because the definition of non-bypassable charges does not authorize a utility to create new charges that would be applicable only to net-metering customers. Section 5.103 defines "non-bypassable charges as "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." The underlined language makes clear that only charges that are applicable to all customers (not just net-metering customers) may be non-by passable.

The definition does give utilities flexibility to determine whether any standard charge contained in the utility's tariff can be labeled "non-bypassable" which means that such charges cannot be offset by credits but must be paid with dollars. Allowing utilities to determine the appropriate manner of payment for its charges is different than allowing utilities to propose new, net-metering customer specific charges and nothing in state law prohibits the Board from providing such flexibility. The Board will have the opportunity to review and approve all utility net-metering tariffs. In doing so, the Board may consider whether it is appropriate for the utility to designate any charge as non-bypassable.

[3] Memorandum from Legislative Counsel to Senator Bray, dated February 16, 2017, at 4.