23. Rule 5.123. Appeals of Board Decisions. This section is beyond the Board's authority because the language purports to require that a notice of appeal to the Supreme Court be submitted within a specified time frame and purports to determine whether an appeal stays the effect of a Board order. I understand from the Jan. 20, 2017 report that the Board's intent is to provide notice to recipients of Board orders. However, such an intent does not confer authority to adopt rules on these matters that have the force and effect of law. The period in which to file an appeal is governed by rule of the Supreme Court and not Board rules. The issue of whether an appeal acts as a stay is governed by statute, 30 V.S.A. § 12. If the Board wishes to place recipients on notice of appeal requirements, it could adopt a rule or procedure stating that its decisions will provide notice of appeal requirements.

As stated above, the Board's intent is to provide notice of appeal and stay requirements to persons participating in the review of net-metering CPG applications. The Board proposes the following changes to Section 5.123 to make clear that the rule does not intend to supplant any statutory requirements:

5.123 Appeals of Board Decisions

~~Notice of appeal of any Board decision under this Rule to the Supreme Court of Vermont must be filed with the Clerk of the Board within 30 days. Appeal will not stay the effect of Board decisions, absent further order by the Board or appropriate action by the Supreme Court of Vermont.~~ Information about how to appeal a Board decision to the Vermont Supreme Court will be provided with any final order from the Board.

24. Rule 5.124. Pre-Existing Net Metering Systems.

(C). Applicable Rates for Pre-Existing Net Metering Systems. This section does not seem to state clearly what rates will apply to pre-existing net metering systems.

Instead, it spells out how to calculate the incentive known as the "solar adder" required under the prior 30 V.S.A. § 219a(h)(1)(K), which will continue for 10 years from the commissioning of a pre-existing solar net metering system. In this regard, I read the term "incentive" as used in this section to mean only the incremental amount of the adder itself. If that meaning is not intended, please consider clarifying language.

The language of Section 5.124(C) is meant to refer only to the incremental amount of the adder itself.

a. The Board's response to comments states that it amended the section to make clear that the "blended residential rate" definition in Rule 5.103 will apply to these systems at the end of the 10-year period. However, such application is not clear to this reader. Please explain how the rules apply that definition to these systems.

Section 5.124(C) states that at the end of the 10 year period, pre-existing systems will be subject to the energy measurement provisions of Section 5.125. Section 5.125 provides that excess generation will be credited at the blended residential rate.

b. Suppose a pre-existing solar net metering system is in the territory of a utility whose general residential rate schedule includes inclining blocks, with the highest block at

$0.16/kWh. As I read the section, the calculation of the solar adder results in additional $0.03/kWh.

i. Would the system's total bill credit per kWh during the 10-year period necessarily be $0.19? Or would it be $0.03 plus the lowest rate listed in the definition of blended residential rate under Rule 5.103?

The Board's intent was that the sum of the adder and the retail rate would be 19 or 20 cents, depending on the size of the system interconnected. Your comments on this issue show that this section could benefit from clarification. The Board proposes the following clarification to Section 5.124(C).

. . .

(C) Applicable Rates for Pre-Existing Net-Metering Systems. Customers using pre-existing net-metering systems shall, for a period of 10 years from the date of the net-metering system's commissioning, ~~receive the~~ be credited for generation according to the rates and incentives provided for in 30 V.S.A. § 219a~~(h)(1)(k)~~, as the statute existed on December 31, 2016, and the Board's rules implementing that statute. ~~In calculating this incentive, if the electric company's general residential rate schedule includes inclining block rates, the calculation shall be done using the highest block rate.~~ If the customer's system was commissioned before the electric company's first rate schedule to comply with Section 219a(h)(1)(K) took effect, then the 10-year period ~~customer shall receive the incentive provided for in Section 219a(h)(1)(K) as the statute existed on December 31, 2016, for 10 years after the customer took service under that rate schedule~~ shall run from the effective date of the electric company's first rate schedule implementing the incentive. At the end of ~~this~~ the applicable 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.

ii. At the end of the 10-year period, would the system's bill credit be at the lowest rate listed in the definition of blended residential rate under Rule 5.103?

Yes.

c. Aside from the application of "blended residential rate," do the rules in any other way change the bill credit rates for pre-existing net metering systems?

No.

d. *If the rules do change the bill credit rates for pre-existing net metering systems, please address why the application of new rules regarding bill credit rates to pre-existing systems does not exceed the Board's authority and is not contrary to legislative intent.*

I read 2014 Acts and Resolves No. 99, Sec. 10 and 2015 Acts and Resolves, Sec. 28, in concert with Vermont Supreme Court case law, to vest the rights of a pre-existing net metering system in the statute and rules in effect as of the date a complete application was filed, that is, the former 30 V.S.A. § 219a and the rules under that statute.

- *2014 Acts and Resolves No. 99, Sec. 10(f) states: "30 V.S.A. § 219a and rules adopted under that section shall govern applications for net metering systems filed prior to January 1, 2017."*
- *2015 Acts and Resolves No. 56, Sec. 28(g) stats: Sec. 12 (net metering systems; environmental attributes) shall amend 30 V.S.A. § 8010 as added effective January 1, 2017 . . . . Sec. 12 shall not affect a net metering system for which a complete application was filed before January 1, 2017.*
- *The Supreme Court's vested rights doctrine, developed in land use cases, states: [A]pplicant gains a vested right in the governing regulations in existence when a full and complete permit application is filed. In re Paynter 2-Lot Subdivision, 2010 VT 28, ¶ 9.*

The rate of a bill credit is central to a net metering system application because the application is for approval of the construction of a system to receive net metering benefits in the form of bill credits.

Under Sec. 10(f) of Act 99, the prior statute and rules govern the application. There is no further limiting language such as "application process" or "review of the application."

In the response to comments, the Board cites a provision of net metering CPGs that require compliance "with all applicable future statutes, rules, and orders."

To the extent the Board may be relying on this condition to support changing the bill credit rates for pre-existing net metering systems, an act of the General Assembly vesting the rights of those systems would take precedence this condition.

Changing the bill credit rates for pre-existing net metering systems could negatively affect the investment expectations of system owners and lead to litigation against the State. While the Board's rationale for these changes may be to lower the long-term costs of these systems to ratepayers, such a rationale does not confer statutory authority.

It is the Board's position that the Legislature intended to allow the Board to change the bill credit rates for pre-existing customers after the 10-year period set forth in Section 10(c) of Act 99. It is a canon of statutory construction to give meaning to every word in a statute and to assume that the words chosen by the General Assembly were done so advisedly. The General Assembly enacted Sections 10(c) and (f) as separate provisions that apply to different subjects. First, Section 10(c) dictates how the repeal of Section 219a will affect the preferential rates that were provided to pre-existing "*systems*" ("a solar net-metering system receiving a mandatory

incentive . . .") and affirms the validity of a "certificate of public good" ("CPG") issued prior to January 1, 2017.

In contrast, Section 10(f) only governs what law applies to "applications." Applications are distinct from systems and CPGs, and applications have no regulatory purpose after they are reviewed. After an application is approved, the applicant is granted a CPG and the applicant constructs a system. The General Assembly's choice to use different nouns as the subjects of Section 10(c) and (f) indicates that the Sections pertain to different things. If Section 10(f) is read to mean that Section 219a and the rules adopted under that section will govern not only applications, but also net-metering systems and CPGs, then Section 10(c) would be superfluous because Section 10(f) would dictate that the incentives provided by Section 219a still applied. It is more reasonable to read Section 10(c) as specifying what rights attach to pre-existing systems and CPGs, while reading Section 10(f) as describing what law governs applications. Therefore, the Board believes that the General Assembly intended for Section 10(f) to provide rights only to applications and that those rights extend only to the provisions of Section 219a and its rules that relate to applications.

The fact that Section 10(f) does not contain the word "review" or "process" does not alter the analysis of this question. Applications for net-metering CPGs under Section 248 are necessary to authorize "site preparation and construction" for "electric generation facilities." [3] The Board's review of net-metering applications do not address what rates will be received or what terms of service will apply. Upon approval, the application case is closed and a CPG is issued. In the same vein, a CPG does not grant any rights to any specific rates. To the contrary, each CPG issued by the Board is conditioned upon the system complying with all applicable future statutory requirements and Board rules and orders. For these reasons, it makes sense that Section 10(c) of Act 99 specifically vests *CPGs* issued prior to January 1, 2017, in the "incentive" that was offered pursuant to Section 219a(h)(1)(k) because otherwise the repeal of Section 219a would have eliminated the payment of the incentive entirely.

Turning to the discussion of the vested rights, the doctrine articulated in <u>*In re Paynter 2-Lot Subdivision*</u> is a land-use doctrine, and the Vermont Supreme Court has not extended the application of the doctrine to the field of rate regulation. In *Petition of Department of Public Service*, 157 Vt 120, 127 (1991), the Vermont Supreme Court held that:

> The question here is whether we can require electricity consumers to pay rates above those established by the marketplace to protect the producer's investment in facilities and development costs. Ordinarily, the private producer of any commodity must take the risk that the price available at the time of production will result in a sufficient profit.
>
> In this special case, however, we are willing to reduce the marketplace risk to achieve a public benefit of increased reliance on renewable energy sources. The equation of public benefit and public burden is set out in PURPA and its implementing regulations. We will not apply vested rights doctrine to change the

[3] 30 V.S.A. § 248(a)(2).

> equation to expand private rights at the expense of an added public burden.

This case dealt with whether the owner of an electric generation facility had a vested right in preferential rates that had been provided by law. The Board finds this case very instructive in the question of whether the holder of a CPG issued prior to January 1, 2017, has a vested right to the preferential rates in Section 219a. The answer is likely that a net-metering customer's rights are limited to the rights described in Act 99. Based on the analysis of Sections 10(c) and (f) above, the Board believes that the General Assembly has already set the balance between the expectations of pre-existing net-metering systems to receive preferential rates and the future costs of those rates to the public. The right provided by Section 10(c) is constrained to the time-limited "incentive" provided by Section 219a(h)(1)(K). Any expansion of these rights would come at a public cost borne by other ratepayers. Therefore, the Board does not believe a court would expand the vested-rights doctrine in this case.

Outside of the land-use arena, the Vermont Supreme Court has recognized that a protected property interest may give rise to a vested right under the Vermont and United States Constitutions.[4] However, the case law is clear that only a "legitimate claim of entitlement" constitutes a property interest, as opposed to a "unilateral expectation." Section 10(c) of Act 99 only provides a legitimate claim of entitlement to the incentives of Section 219a(h)(1)(A) for a limited period time. Act 99 conveys no other rights to net-metering systems or CPGs. Similarly, the CPGs issued to net-metering systems do not convey any expectation of receiving any particular rate or terms of service. To the contrary, the CPGs are each conditioned upon compliance with future enactments and rules.

In summary, it is the Board's position that Section 10(c) of Act 99 reflects the Legislature's intent to maintain the status quo for existing customers' rates for a limited period of time. The Board does not believe that the General Assembly intended to strip the Board of its responsibility to ensure that the rates available to pre-existing net-metering customers are fair. Such a construction would result in ratepayers who do not net-meter shouldering additional costs to benefit a limited number of customers for an indefinite period of time. Additionally, this cross-subsidization would continue regardless of any future change in circumstances. This result is contrary to Act 99's direction that the Board reduce cost-shift between customers to the extent feasible. For these same reasons the Board believes that a Vermont court would not determine that net-metering customers have a vested right to a particular net-metering rate beyond the ten-year period set forth in Act 99.

Finally, the rule also complies with the directive contained in Section 12 of Act 56. No "pre-existing system" will be subject to any REC adjustor implemented pursuant to Section 12 of Act 56.[5] For comparison's sake it is worth noting that in Act 56, the General Assembly used the word "net-metering system" as opposed to "application" when it wanted to exempt pre-existing systems from a new rate adjustment. The use of the word "application" in Act 56 would have made no sense because the statute addresses RECs, which are generated by net-metering systems, as opposed to applications. The Board believes that the General Assembly intended for Sections 10(c) and (f) of Act 99 to be read in a similar fashion.

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[4] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)

[5] *See* Section 5.124(E).

25. *Rule 5.124(D). Non-Bypassable Charges. Please explain how changing which charges are non-bypassable for pre-existing net metering systems is within the Board's authority and not contrary to legislative intent. See discussion above regarding 5.124(C).*

For the reasons discussed under 24, above, the Board believes it has authority to apply non-bypassable charges to pre-existing customers after the 10-year period provided for in Section 5.124(D).

26. *Rule 5.124(G). Existing Groups Using Pre-Existing Net Metering Systems. Please explain how the former 30 V.S.A. § 219a allowed more than 500 kW of net metering systems to be attributed to a group or customer. In this regard, the definition of "net metering system" was limited to 500 kW in capacity. 30 V.S.A. § 219a(a)(6). The legislation authorized "group net metering systems" (emphasis added), which necessarily included the 500 kW limit. 30 V.S.A. § 219a(f), (g). If the rule grandfathers a practice that was not in compliance with statute, the rule may be beyond the Board's authority.*

The Board's previous rules permitted more than one "net-metering system" to be attributed to a group. A net-metering system is defined as a "facility for generation of electricity" and in turn, "facility" means:

> a structure or piece of equipment and associated machinery and fixtures that generates electricity. A group of structures or pieces of equipment shall be considered one facility if it uses the same fuel source and infrastructure and is located in close proximity. Common ownership shall be relevant but not sufficient to determine that such a group constitutes a facility.

Many groups include multiple separate facilities that constitute separate group net-metering systems. It has been the Board's understanding that the 500 kW limit contained in Section 219a applied to "group net-metering systems" but that there was no prohibition against a group controlling multiple, separate group net-metering systems that cumulatively exceeded 500 kW. It has not been previously suggested to the Board that this arrangement was contrary to an implied 500 kW group-limit contained in Section 219a. If it is the Legislature's determination that such existing arrangements are illegal, the Board will remove the provision of the proposed rule that purports to grandfather them.

27. *Rule 5.124(H). Provisions of This Rule Applicable to Pre-existing Net Metering Systems. Please explain how it is within the Board's authority and not contrary to legislative intent to apply these provisions of this rule to pre-existing net metering systems. See discussion above regarding 5.124(C).*

Please see response to 24.

28. *Rule 5.125. Energy Measurement for Net Metering Systems.*