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State of Vermont
Public Service Board
MEMORANDUM

To: Legislative Committee on Administrative Rules

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

Date: April 17, 2017

Subject: Proposed Rule 16-P62; Public Service Board/Net Metering

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The Vermont Public Service Board ("Board") respectfully offers the following comments on the memorandum from Legislative Counsel to the Legislative Committee on Administrative Rules (LCAR or Committee) dated April 10, 2017 (the "memorandum"). The Board would like to correct a few statements contained in the memorandum and to address a new argument concerning 2015 Acts and Resolves No. 56 ("Act 56") that the Board has not previously had an opportunity to comment on. To the extent that any argument raised in the memorandum is not addressed in these comments, the Board believes that its previous submissions of February 7, 2017, and March 15, 2017, adequately address those issues.

Discussion

The Board has specific authority to apply 30 V.S.A. § 8010 to preexisting systems.

Legislative Counsel asserts that "[t]he Board cites no specific authority stating that it may apply the bill credit provisions of Section 8010 to preexisting net metering systems." Section 8010 gives the Board specific authority to establish a revised net-metering program that governs both the installation and operation of "net-metering systems," which include preexisting ones. This authority requires the Board to ensure that cost shifts between net-metering customers and other customers do not occur. Section 8010(c)(2)(F) specifically authorizes the Board to adopt rules that prescribe the value of net-metering credits and how they may be applied to a customer's bill. This language is broad and encompasses customers using preexisting net-metering systems. Therefore, the Board has cited specific authority to apply the bill credit provisions of Section 8010 to preexisting net-metering systems.

Section 214(b) of Title 1 is not applicable in this case because the Rule does not affect any substantive rights that arose prior to January 1, 2017.

Legislative Counsel asserts that the Board's analysis omits consideration of 1 V.S.A. § 214(b). Section 214(b) is not applicable to this matter because the Board has not affected the substantive rights of any preexisting net-metering system that arose prior to January 1, 2017. Section 214(b) reflects the general preference against retroactive application of new statutes.[1] Legislative Counsel has correctly pointed out the "traditional presumption against applying statutes affecting substantive rights, liabilities, or duties *to conduct arising before their enactment.*"[2] Therefore the question is whether the Board has applied the bill credit provisions of Section 8010 to any "conduct" arising before the enactment of Act 99. The answer is no.

Section 219a provided that net-metering systems could receive credits for "electricity generated . . . during the billing period."[3] Accordingly, the "conduct" that triggers the application of Section 8010(c)(2)(F) is the generation of electricity and receipt of bill credits. Pursuant to Act 99, the Board may adopt rules that prescribe rates for net-metering systems, effective January 1, 2017. The Board's rule does not involve the retroactive application of any statute because it would apply only to electricity that was generated after the enactment of Act 99.

Legislative Counsel asserted that "the repeal of Section 219a could not and did not affect the right of preexisting net metering systems to receive bill credits at the retail rate paid for utility power or to apply those credits to all parts of the bill." These rights, however, do not arise until a net-metering system generates electricity. Because the Board's rule would not affect the credit rates for any electricity generated prior to January 1, 2017, the rule does not run afoul of Section 214(b).

The Board's interpretation of Act 99 does not lead to irrational results.

The memorandum states that "the Board's narrow interpretation [of Section 10 of Act 99] would lead to irrational results because under it that law would preserve the procedural rights of preexisting net-metering system [sic] relating to application process but not the substantive rights of those systems with respect to bill credits." The Board respectfully points out that this argument is based on misconceptions.[4]

First, the Board's rule does not preserve only "procedural rights" for preexisting systems. Section 219a and Section 8010 contain different substantive requirements for net-metering applications as well. For example, under Section 219a, certain types of net-metering systems were allowed to be as large as 5 MW.[5] In contrast, under Section 8010,

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[1] *State v. Willis*, 145 Vt. 459, 466, 494 A.2d 108, 112 (1985) ("Both statutory law and case law normally prohibit the retroactive application of new statutory law.").
[2] Landgraf v.USI Film Prod., 511 U.S. 244, 278 (1994) (emphasis added).
[3] 30 V.S.A. § 219a(e)(2) (2014).
[4] The Board also notes that Legislative Counsel's analysis rests on the assumption that net-metering systems have a substantive right to bill credits. As discussed above, this assumption is incorrect because the conduct triggering the application of Section 8010 would not occur until after the repeal of Section 219a.
[5] 30 V.S.A. § 219a(m) (2014).

systems are limited to 500 kW.[6] Therefore, the filing of an application prior to January 1, 2017, can vest an applicant with the substantive right to build a system that would otherwise be illegal if the application was filed after January 1, 2017.

Additionally, Section 219a obligated utilities to make net-metering available to customers until the cumulative capacity of net-metering systems reached 15% of the utility's peak capacity.[7] Section 8010 has no such limitation. Therefore, the date an application was filed implicates significant substantive rights related to the review and legality of such applications in the service territories of utilities that reached the 15% cap. Therefore, the Board's reading of Act 99 preserves important substantive requirements that affect the review of net-metering applications. The omission of these facts undercuts the conclusion that the Board's interpretation of Act 99 would lead to irrational results.

Act 56 demonstrates that preexisting systems are subject to Section 8010.

Legislative Counsel asserts that Act 56 prohibits the application of Section 8010 to preexisting net-metering systems. The Board respectfully submits that this reading of Act 56 is incorrect. To the contrary, the provisions of Act 56 show that Section 8010 generally applies to preexisting systems.

In Section 12 of Act 56, the General Assembly significantly amended the bill-credit provisions of Section 8010. The amendments required, for the first time, that the Board "reduce[] the value of the [bill] credit" for customers who choose to retain ownership of Renewable Energy Credits ("RECs").[8] The relevant portion of the amendment contained in Section 12 is reproduced below:

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> (F) the amount of the credit to be assigned to each kWh of electricity generated by a net metering customer in excess of the electricity supplied by the interconnecting provider to the customer, the manner in which the customer's credit will be applied on the customer's bill, and the period during which a net metering customer must use the credit, after which the credit shall revert to the interconnecting provider~~; and~~
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> ~~(G) the ownership and transfer of the environmental attributes of energy generated by net metering systems and of any associated tradeable renewable energy credits.~~ When assigning an amount of credit under this subdivision (F), the Board shall consider making multiple lengths of time available over which a customer may take a credit and differentiating the amount according to the length of time chosen. For example, a monthly credit amount may be higher if taken over 10 years and lower if taken over 20 years. Factors relevant to this consideration shall include the customer's ability to

[6] 30 V.S.A. § 8002(16) (defining net-metering systems as plants with a maximum capacity of 500 kW).
[7] 30 V.S.A. § 219a(h)(1)(A) (2014).
[8] 30 V.S.A. § 8010(c)(1)(H).

> finance the net metering system, the cost of that financing, and the net present value to all ratepayers of the net metering program.

Note that the Board's general authority to assign the value of a bill credit is unchanged by Act 56. These amendments required the Board to "consider" assigning different bill credit values to net-metering customers based on the term over which a credit could be received. There is a limitation to the amendments as well. Section 28(d) of Act 56 states that "Sec. 12 shall not affect a net metering system for which a complete application was filed before January 1, 2017."

Legislative Counsel concludes that this limiting language means that "the bill credit provisions in Section 8010(c)(2) cannot affect preexisting net metering systems and therefore prohibits the Board from applying them to these systems." However, this conclusion requires a reader to add words to the statute that are not included in Section 28(d). Legislative Counsel's interpretation requires one to substitute the words "bill credit provisions of Section 8010(c)(2)" instead of the words "Section 12."

The two terms are not synonymous, however. Section 12 of Act 56 did not create the Board's authority to set bill credit rates for preexisting systems; it only amended it.[9] The Board's authority to set bill credit rates was conferred by Act 99 of 2014, which adopted Section 8010 generally. The statement that "Section 12 shall not affect" preexisting systems does not abrogate the authority created by Act 99. The more straightforward reading of Section 28(d) is that the *amendments* to Section 8010(c)(2)(F), which would have otherwise applied to preexisting net-metering systems, do not apply to these systems. In other words, if the Board was going to "consider" setting differing credit values to net-metering systems, it could not do so for preexisting ones. This seems sensible because preexisting systems were already entitled to receive a 10-year incentive credit pursuant to Section 219a and the Board was statutorily prohibited from changing that rate arrangement.[10] There is no reason, however, that the Board cannot "assign the amount of the credit" and determine "the manner in which the customer's credit will be applied on the customer's bill" as allowed by the portions of Section 8010(c)(2)(F) that were not amended by Act 56.

In conclusion, the language of Act 56 undermines the other arguments advanced by Legislative Counsel contending that preexisting systems are somehow exempt from Section 8010. If they were, then Act 56's statement that "Section 12 shall not affect" preexisting net-metering systems would be wholly unnecessary. Under normal principles of statutory interpretation, such a reading is disfavored. Therefore, Section 8010 as it existed prior to Act 56 still applies to preexisting systems. As a result, it is the Board's conclusion that the Legislature intended for the Board to be able to set the rates for such systems.

Conclusion

The Board appreciates the thoughtful review of these issues by the Committee. The

[9] Section 12 of Act 56 ("Sec. 12. 30 V.S.A. § 8010(c) is *amended* to read").
[10] *See* Section 10(c) of Act 99 of 2014 ("A solar net metering system receiving a mandatory incentive under 30 V.S.A. § 219a(h)(1)(K) shall continue to receive that incentive through the end of the 10-year period set forth in that subdivision.")

Board respectfully requests that the Committee withdraw its objection to Section 5.125 of the net-metering rule. In addition to my legal analysis of the authority vested in the Board to make the changes to the net-metering rule the Board has proposed, the Board has asked me to reiterate the policy building block that the section 5.125 was built upon. That policy is that all customers of a utility, whether they net-meter or not, use the grid to either receive electricity from or send electricity back to the grid. As such, all users of the grid must support its maintenance and the attendant charges, such as for efficiency measures, without regard to whether a customer net-meters or not, through Board-approved non-bypassable charges. The health of the grid into the future depends on everyone paying a fair share of the fixed costs.