

Department of Public Service Pursuant to Act No. 70,
Section 12, Report on the Feasibility of Using Billback
Mechanisms to Recover Costs Relating to Review of
Applications Under 30 V.S.A. § 248 of 5 Megawatts and
Above

A Report to the Vermont House Committees on Ways and Means and
Energy and Technology, and the Senate Committee on Finance

DRAFT REPORT January 2020

Introduction

Act 70 of 2019 at Section 12 requires the Department of Public Service (“Department”), in consultation with the Public Utility Commission (“Commission”), to evaluate the feasibility of using billback mechanisms to recover the costs related to reviewing applications for in-state facilities under Section 248 of Title 30 for projects that produce five megawatts or more of electricity. The Act further requires the Department, on or before January 15, 2020, to submit a report to the House Committees on Ways and Means and on Energy and Technology and to the Senate Committee on Finance with its findings.

Discussion

Pursuant to 30 V.S.A. § 21, the Department and the Commission have authority to allocate staff and additional personnel costs back to applicants or companies involved in particular proceedings, including Section 248 proceedings:

- (a) An agency may allocate the portion of the expense incurred or authorized by it in retaining additional personnel pursuant to section 20 of this title to the applicant or the company or companies involved. In this section, “agency” means an agency, board, or department of the State enabled to authorize or retain personnel under section 20 of this title.
- (b) When regular employees of an agency are employed in the particular proceedings and activities described in section 20 of this title, the agency may also allocate the port of its costs and expenses to the applicant or the company or companies involved. The costs of regular employees shall be computed on the basis of working days within the salary period, except that the Department of Public Safety, Division of Emergency Management and Homeland Security may allocate the full cost of the regular employee. The manner of assessment and of making payments shall otherwise be as provided for additional personnel in subsection (a) of this section. However, with respect to proceedings under section 248 of this title, the Agency of Natural Resources shall not allocate the costs of regular employees.

This billback authority is uniformly applicable to all Section 248 projects regardless of their size. In general, the current practice of the Department and the Commission is to billback out-of-pocket expenses for reviewing a Section 248 project (for instance, an aesthetics expert hired by the Department or court-reporter fees incurred by the Commission), but not billback for time spent by agency employees.

The Department has previously explored the feasibility of using the billback provisions set forth in 30 V.S.A. §§ 20 and 21 to recover all of its costs for its review of merchant projects under Section 248, using the rationale that merchant generators, unlike the state's regulated utilities, do not pay the gross receipts tax provided for in 30 V.S.A. § 22 and therefore do not pay toward the cost of providing regulatory oversight by the Department and the Commission. In 2019, the Department undertook to track staff time related to merchant projects under Section 248. The Department ultimately concluded that a lack of administrative resources, as well as the uncertainty as to the ultimate permitting cost for a developer in any given matter, posed significant barriers to adequate and consistent recovery of litigation expenses. In the same vein, the Department has observed that generation projects of 5 megawatts or above are exceptionally uncommon,¹ and therefore are unlikely to be a meaningful source of revenue to support the regulatory activities of the Department and the Commission.

With highly litigious developers in particular, the Department found that there is a significant consumption of State resources that cannot be adequately recovered through either billback mechanisms or Section 248 application filing fees. Moreover, such developers frequently do not timely pay billback assessments, thus putting further strain on Department resources. Further, nonpayment of billback expenses has a potential chilling effect on cost recovery because it prospectively opens the door for additional litigation where a developer contests payment of such expenses.

The Commission has also experienced difficulty collecting billback assessments from some developers of merchant projects, both in the original Section 248 application cases and in subsequent enforcement cases related to those projects. For instance, in February 2019, when

¹ From January 1, 2017 through December 31, 2019, just one petition for a generation project of 5 megawatts or larger was filed with the PUC. *See* Case No. 18-3709-PET. During that time period an incomplete petition for a 5 MW generation project was also submitted to the Commission; the incomplete petition was subsequently withdrawn by the petitioner. *See* Case No. 17-3443-PET.

the Commission sent a bill to recover approximately \$2,400 in out-of-pocket court reporter expenses, a petitioner refused to pay the bill and instead filed a 10-page petition for extraordinary relief with the Vermont Supreme Court. An Assistant Attorney General then had to file a motion to dismiss, which the Vermont Supreme Court granted,² but only after extensive use of state resources at both the Commission and the Attorney General's Office. If the Commission were to billback larger expenses, such as its use of staff time on Section 248 proceedings, it would likely lead to more frequent and more contentious litigation.³ This would greatly tax the Commission's legal staff and legal staff at other agencies like the Attorney General's Office.

That said, there may be a benefit to modifying billback authority granted under Section 21(b) so that it is not restricted to allocating agency staff costs and expenses based on the number of working days within a salary period. Removing that restriction could be beneficial in more contentious cases that require additional time and resources beyond the standard 8-hour workday, 5-day workweek.

In addition, the Department and the Commission recommend the following clarifying changes to 30 V.S.A. § 21 to explicitly address arguments that have been made by some merchant developers regarding billback expenses.

30 V.S.A. § 21

Particular proceedings and activities; assessment of costs

(a) An agency may allocate the portion of the expense incurred or authorized by it in retaining additional personnel pursuant to section 20 of this title to the applicant or the company or companies, including any private developers, individuals, and companies, involved. In this section, "agency" means an agency, board, or department of the State enabled to authorize or retain personnel under section 20 of this title.

(i) If an invoice under this section is not paid within 45 days after being sent, an agency may charge simple interest of 1% per month from the date payment was first due, and may also seek to collect principal and interest through a collection service or through the Vermont Setoff Debt Collection Program in Subchapter 12 of Chapter 151 of Title 32.

² *In re Petition of Swanton Wind LLC*, No. 2019-071 (Mar. 19, 2019).

³ *See, e.g., Ustrak v. Fairman*, 851 F.2d 983, 987 (7th Cir. 1988) ("Fee litigation has become a heavy burden on the federal courts. It can turn a simple civil case into two or even more cases—the case on the merits, the case for fees, the case for fees on appeal, the case for fees for proving fees, and so on ad infinitum, or at least ad nauseam.").

Furthermore, the Department and the Commission recommend linking payment of billback expenses to the determination on whether to issue the merchant project developer's Certificate of Public Good ("CPG") in cases where the developer either neglects to pay or withholds payment of billback amounts due. Simply put, the Commission would have the express authority to either withhold a decision on whether to issue a CPG or revoke a CPG where billback expenses remain unpaid.

The Department and the Commission agree that the potential benefits of recovering costs for Section 248 applications for projects of 5 megawatts or above are far outweighed by the inefficiencies of utilizing billback mechanisms for this purpose. Further, in 2019 the Vermont Legislature amended Section 248c of Title 30 to impose a fee on merchant generators based generally on the generator's plant capacity for the purpose of maintaining the Department and the Commission. It would be advisable to allow time to pass so as to review and understand the impacts and efficacy of this new funding mechanism before considering billback as an additional mechanism of cost recovery for projects of this scale. Therefore, for now the Department and the Commission intend to continue their practice of using the billback mechanisms under Sections 20 and 21 when practicable to recover their out-of-pocket expenses related to obtaining outside legal counsel, expert witness, advisors, temporary employees, and other research services for all applications under Section 248.