STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 22-3947-TF

Tariff filing of City of Burlington Electric Department to revise its net-metering tariff effective October 1, 2022	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

City of Burlington Electric Department ("BED"), by and through its attorneys, McNeil, Leddy & Sheahan, P.C., respectfully submits this Memorandum of Law in Support of its Motion for Summary Judgment.

INTRODUCTION

This case involves BED's proposed revisions to its Net-Metering Tariff effective October 1, 2022. On September 30, 2022, the Commission issued its *Order Approving Certain Revisions to City of Burlington Electric Department's Net-Metering Tariff and Directing Further Process*. That Order approved BED's proposed revisions to its Net-Metering Tariff with the exception of the proposed deletion of Section V.F. (5) and (6) and directed further process to ensure the Commission had an adequate record. BED has since responded to Information Requests propounded by the Commission on January 23, 2023, and discovery requests propounded by the Department of Public Service ("DPS" or "Department") on January 17, 2023. BED now moves for summary judgment on the grounds that its Statement of Undisputed Material Facts filed contemporaneously herewith establishes BED's entitlement to judgment as a matter of law. Vt. P.U.C. Rule 2.219(A).

The undisputed material facts may be summarized as follows: In 2010, BED petitioned the Commission's predecessor, the Vermont Public Service Board ("Board"), for approval of its optional Renewable Energy Resource Tariff Rider. BED's proposed tariff provided, *inter alia*, that if production from a participating customer's approved energy source results in a credit, BED will carry that credit forward indefinitely, and if the cumulative credits equal or exceed $100, the customer may request payment by BED of the value of the credit and set the carry-forward amount back to $0. In a Proposal for Decision ("P for D") in Docket 7629, the Hearing Officer found that BED's proposed tariff was inconsistent with statutory requirements for net metering and recommended denial of BED's request for approval. Subsequent to the Hearing Officer's issuance of the P for D but prior to the Board's final Order in Docket 7629, the Vermont General Assembly enacted Public Act No. 47 (2011 Vt., Biennial Session). Act No. 47 provided in part that an electric company may in its rate schedules offer credits or other incentives that may include monetary payments to net metering customers. Based on Act No. 47, the Board concluded that BED's proposed tariff should be approved. Since the Board/Commission's approval of BED's net-metering tariff in Docket 7629, the Commission has approved the indefinite credit carry-forward and $100 cash-out provisions in all subsequent reviews of BED's net-metering tariff to date.

In 2016 BED filed a revised net-metering tariff effective January 1, 2017. This version of the Net-Metering Tariff differed from earlier versions of the tariff in that it was, *inter alia*, reorganized and reformatted. That tariff limited the credit carry-forward and cash-out provisions to BED's solar incentive credit of $0.052265, rather than applying to both the solar incentive and net-metering credits. There had been no change in statute or Commission rules that required BED to limit the credit carry-forward and cash-out provisions to BED's solar incentive credit in its net-metering tariff effective January 1, 2017. Such a limitation was the result of inadvertence on the part of BED. BED has continuously applied the credit carry-forward and cash-out provisions to the aggregate balance of the solar incentive and net-metering credits since the Board approved BED's net-metering tariff in 2011 to date.

As of January 25, 2023, there were approximately 148 pre-existing net-metering systems receiving the benefit of the credit carry-forward and cash-out provisions of BED's net-metering tariff. The latest commissioning date for BED's pre-existing net-metering systems is March 9, 2018, so the carry-forward and cash-out provisions will have fully expired by early 2028.

ARGUMENT

BED's argument in support of summary judgment is simple: Commission Rule 5.125(C) provides that "customers using pre-existing net-metering systems shall, for a period of 10 years from the date of the net-metering system's commissioning, be credited for generation according to the rates and incentives provided for in 30 V.S.A. § 219a, as the statute existed on December 31, 2016, and the Commission's rules implementing that statute." Because Section 219a of Title 30, as in effect on December 31, 2016, contained the language the Commission relied upon in making its Order in Docket 7629, BED should be permitted to continue to provide cash payments and carry-forward credits beyond 12 months for pre-existing net metering customers for the remainder of the ten years from the date of system commissioning.

The facts establish that limiting the carry-forward and cash-out provisions in the January 1, 2017, version of BED's Net-Metering Tariff to the solar incentive credits was not intentional but rather the result of inadvertence. First, there had been no change in law that required limiting the credit carry-forward and cash-out provisions to the solar incentive credit. Second, the tariff language concerning the carry-forward and cash-out of "the aggregate" credits remained the same through each iteration of the tariff. If the intent was to limit the carry-forward and cash-out provisions to the solar incentive credit, there would have been no need to continue to reference "aggregate" credits. Third, BED's billing system was incapable of automatically differentiating a customer's solar incentive credit from its net-metering credit balances for purposes of expiring credits or for issuing cash-out payments, so it would make no sense to propose this policy change. Finally, BED has continued the practice of applying the credit carry-forward and cash-out provisions to the aggregate balance since the Board approved its tariff in 2011. These facts establish that the limitation in the 2017 tariff was not intentional, but rather the unintended result of reorganizing and reformatting the tariff.

On October 21, 2022, the Department filed its comments on BED's proposal to withdraw its tariff changes to Section V.F.(5) and (6). *Department of Public Service Comments on the City of Burlington Electric Department's Proposed Refund and Withdrawn Tariff Changes*, Case No. 22-3497-TF, 10/21/22 ("Department Comments"). In that filing the "Department recommends that BED's exception to the 12-month net-metering credit expiration should be struck and maintains that BED has not met its burden in justifying continued payments." *Id*. at 2. The Department does cite to the Board's Order of September 8, 2011 in Docket 7629, but otherwise ignores the import of that Order in its filing. *Id*. at 3, fn. 3.

The Commission should not allow the Department to oppose BED's request to continue the carry-forward and cash-out provisions in this proceeding for a few reasons. First, the Department supported the same request in 2011. *See* Docket No. 7629, Order of 09/08/2011 at 6 ("On August 19, 2011, the Department filed a letter with the Board recommending that the tariff be approved by the Board."). More importantly, the Department is collaterally estopped from relitigating this issue in this proceeding. "Collateral estoppel, or issue preclusion, bars the subsequent relitigation of an issue that was actually litigated and decided in a prior case where that issue was necessary to the resolution of the dispute." *Scott v. City of Newport*, 2004 VT 64 ¶ 8, 177 Vt. 491 (2004) (quoting *Alpine Haven Prop. Owners Ass'n v. Deptula*, 2003 VT 51, ¶ 13 (other citations omitted). "Whether issue preclusion applies to a given set of facts is a question of law, which we review de novo." *Id*. (quoting *In re Cent. Vt. Pub. Serv. Corp.*, 172 Vt. 14, 19, 769 A.2d 668, 673 (2001). Application of the doctrine requires that:

> (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

Id. (citations omitted). All five elements are satisfied here.

The Department was a party to Docket 7629; the issue of whether BED's tariff could include carry-forward and cash-out provisions was resolved by the Board's Final Order in that proceeding; that issue is the same one the Department seeks to relitigate here; and it had the opportunity to litigate the issue back in 2011. Finally, there would be nothing unfair about precluding the Department from taking a position in 2023 that is contrary to the position it took in 2011.

In summary, the carry-forward and cash-out provisions of BED's Net-Metering Tariff were approved by the Board in 2011. Those provisions were authorized by Act No 47, which was subsequently codified at 30 V.S.A. § 291a(h)(1)(J) and were in existence as of December 31, 2016. BED's incentives therefore continue to apply to customers using pre-existing net-metering systems for 10 years post-commissioning by virtue of Commission Rule 5.125(C). For all the foregoing reasons, BED should be able to continue to carry-forward and pay out the aggregate solar incentive and net-metering credits until the last of those pre-existing systems reaches the 10-year mark.

CONCLUSION

WHEREFORE, because the undisputed material facts establish BED's entitlement to judgment as a matter of law, BED respectfully requests that the Commission grant BED's Motion for Summary Judgment.

Dated at Burlington, Vermont this 28th day of February 2023.

Respectfully submitted,

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