STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 22-1136-NMP

Petition of TES Solar, LLC for authorization to amend the Thetford School District's existing 120 kW ground-mounted solar group net-metering system approved in Case NM-5037 by increasing the plant's total capacity to 495 kW

VERMONT ELECTRIC COOPERATIVE, INC.'S PROPOSAL FOR DECISION

DATED at Montpelier, Vermont, this 28 th day of March 2023.

VERMONT ELECTRIC COOPERATIVE, INC.

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I. INTRODUCTION

This case requires the Public Utility Commission (Commission) to resolve a dispositive legal question about TES Solar, LLC's (Petitioner) proposed 375 kW solar net-metering project (2022 Project): whether the PUC's Biennial Update on the Net-Metering Program (Biennial Update) in effect when the Petitioner filed a complete CPG application for its 2022 Project establishes the rates and adjustors for the 2022 Project regardless of whether the Petitioner has an existing net-metering system on the same parcel of land.[1] For the reasons set forth below, the Commission answers this question in the affirmative because based on the current net-metering Rule 5.100 and 30 V.S.A. § 8010, the Petitioner cannot receive 2014 rates for its 2022 Project regardless of the Commission's findings and conclusions under the Section 248 criteria. Even though this legal determination is dispositive, the Commission, however, has also reviewed the 2022 Project under the Section 248 criteria and finds and concludes that the Petitioner's proposed 2022 Project is not in the public good under Section 248(a), and cannot satisfy the criteria in Section 248(b)(2), (4) and (7).

A brief overview of the key facts related to the dispositive legal issue are provided here, and the Commission makes specific findings below related to its review of the Section 248 criteria. In April 2022, the Petitioner filed a major amendment net-metering application for an additional

[1] The Applicant's legal position is contained in the Applicant's submissions, for example: (1) "As an amendment to an existing array grandfathered pursuant to PUC Rule 5.125(C), the Applicant will retain the RECs associated with the output of the new 375 kW (AC) solar array", Petition ¶ 8; (2) "If one system is permitted and already in service and the second is not, the CPG request for the additional system must be filed as an amendment to the existing system and both systems are compensated at the existing system's rate," Prefiled Rebuttal Testimony of J. Merriam at page 3; (3) the expanded portion of a pre-existing system retains the same compensation arrangement as the pre-existing system, Prefiled Rebuttal Testimony of G. Martin at pages 4-5; and (4) "an expanded pre-existing net-metering system maintains the same rates and incentives (i.e., the solar adder) for a 10-year period beginning from the date the pre-existing system was commissioned," Petitioner's Discovery response to Q.DPS.1-3 (October 7, 2022).

375 kW of incremental capacity from a solar generation facility where the Petitioner will retain the renewable energy credits (referred to as the "2022 Project" to distinguish it from the existing project at the same site). The Petitioner seeks to have the 2022 Project paid at the now-outdated and superseded 2014 net-metering rates that apply to the Petitioner's existing 120 kW solar net-metered system, which received a certificate of public good (CPG) in 2014 (the "2014 Project").

II. DISPOSTIVE LEGAL ISSUE

The 2022 Project is a solar array that, as a matter of law, does not qualify for the net-metering rate in effect eight years ago when the 2014 Project was permitted. The Biennial Update in effect when a net-metering Petitioner files a complete application for a major amendment establishes the rates and adjustors for the major amendment project. The Commission's rates and adjustors established in the Biennial Update, Case. No. 20-0097 (2020 Biennial Update), apply to the proposed 2022 Project as it was in effect on April 26, 2022, when the Petitioner filed its Petition for the 2022 Project.[2]

To adopt the Petitioner's legal position would undermine the purpose of the net-metering statute, which requires the Commission to implement a net-metering program that "balances, over time, the pace of deployment and the cost of the program with the program's impact on rates" and "accounts for changes over time in the cost of technology."[3] To implement that statutory directive, the Commission adjusts net-metering rates every two years to account for changes in the market and other factors. If a large net-metering system were allowed to more than double its size and still be compensated at outdated rates from years earlier, that would impose undue additional costs on ratepayers – a result contrary to the manifest legislative intent.

[2] 2020 Biennial Update, Case No. 20-0097, page 42, Order of November 12, 2020 [hereinafter "2020 Biennial Update"].
[3] 30 V.S.A. § 8010(c)(1)(D) and (F).

A. The Commission's 2020 Biennial Update and the current Rule 5.100 establishes the rates and adjustors for the 2022 Project.

i. Current Commission Rule 5.100 subjects major-amendment projects to the currently applicable rates and adjustors.

Rule 5.100 does not exempt major-amendment projects from complying with the current Rule 5.100 or associated Biennial Updates. In fact, Rule 5.100 requires that a major-amendment project is subject to the current Biennial Update in effect as shown in a utility's net-metering tariff as set forth below.

Specifically, for amendments to approved net-metering systems, Rule 5.109(B) requires major-amendment Petitioners to follow the same application procedure that pertain to applications for new solar array net-metering systems: "The procedure for obtaining authorization to implement a major amendment is the same as the application procedure for the category of net-metering system applicable to the amended net-metering system." The application procedures in Rule 5.109(B) include the rate and adjustor provisions in Rule 5.100 and the associated Biennial Updates. Rule 5.126 (Energy Measurement for Net-Metering Systems) directs electric companies to use the "applicable blended residential rate" if the electricity produced by the "net-metering system" exceeds the electricity consumed. Rule 5.127 (Determination of Applicable Rates and Adjustors) establishes how to calculate the value of net-metering credits for all net-metering systems, including how to calculate the blended residential rate and adjustors. Reading Rules 5.126 and 5.127 together, an electric utility must apply the current blended residential rate and adjustors to all net-metering systems, including major-amendment projects as these rules include no exclusions for major-amendment projects.

Neither the 2020 Biennial Update or Rule 5.100 include exemptions for major-amendment CPG applications, and neither entitles a major-amendment Petitioner to benefit from

outdated rates and adjustors. Rule 5.128 (Biennial Update Proceedings) and the language in the Biennial Update requires electric utilities to apply the blended residential rate and adjustors established in each update to determine the value of net metering credits for all net-metering system applications, including major-amendment applications, filed during the effective periods.[4] Here, the 2020 Biennial Update applies to the 2022 Project because by its express terms, it governs CPG applications filed after February 1, 2021 for incentives, and changes the siting adjutors starting on September 1, 2021.[5]

Rule 5.125(C) speaks directly to rates for "pre-existing system[s]." Nothing in that rule entitles major-amendment net-metering systems that are proposed years later and on the same parcel as a pre-existing system to receive the same rate treatment as the old net-metering system. Indeed, the rule does not address rate and adjustor treatment for expansions of pre-existing systems; it focuses only on the rates for originally-permitted, pre-existing system:

> 5.125 - (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*, 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 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 shall run from the effective date of the electric company's first rate schedule implementing the incentive. At the end of the applicable 10-year period, customers using pre-existing net-metering systems shall be credited for excess generation as provided in Section 5.126 of this Rule or its successor. (Emphasis added).

Additionally, the remaining subsections of Rule 5.125 also limit their applicability to net-metering systems that were commissioned on or before January 1, 2017. Thus, the pre-

[4] 2020 Biennial Update page 42.
[5] The Commission's Biennial Update issued on June 17, 2022 establishes rates for complete CPG applications filed between September 1, 2022 and June 30, 2024.

existing net-metering provisions are inapplicable to major-amendment projects like the Petitioner's 2022 Project.

Moreover, nothing in Rule 5.100 or Title 30 entitles the expanded portion of a single plant to the initial rate of the original system.[6] Here, the Petitioner claims that by combining two net-metering projects, the later project is entitled to outdated rates. The Petitioner's rebuttal testimony argues that the determination of whether separately-developed facilities are a single plant "indicates the rates that apply to the facility."[7] It further contends that where separately-developed systems are legally considered a single plant "both systems are compensated at the existing system's rate."[8] This legal argument is a red-herring because a determination of whether the existing 2014 Project and the 2022 Project are a single plant has no relevance to the rates and adjustors available to the 2022 Project.

In fact, Title 30, Chapter 89, contains numerous provisions that define the legal consequence of a single plant determination. These are primarily limited to establishing whether a proposed plant qualifies for the standard offer program[9], whether a plant exceeds the "cumulative plant capacity" for net-metering systems[10], whether a net-metering system needs to address the so-called Quechee test,[11] and whether multiple wind turbines constitute a plant.[12] Had the legislature intended the "single plant" determination to carry additional legal consequences, such as those claimed by Petitioner, it could have specified those in statute

[6] The Commission does not reach the issue of whether the 2014 and 2022 Project are a single plant.
[7] Rebuttal prefiled testimony of Jim Merriam, January 11, 2023, at page 3.
[8] *Id.*
[9] Section 8005 (defining "new standard offer plant" as a "renewable energy plant that is located in Vermont, that has a plant capacity of 2.2 MW or less…")
[10] Section 8010(c)(2)(A) ("The rules shall include provisions that govern: (A) whether there is a limit on the cumulative plant capacity of net metering systems to be installed over time and what that limit is, if any . . .")
[11] Section 8010(c)(3)(D) ("With respect to net metering systems that exceed 150 kW in plant capacity, the rules shall apply the so-called 'Quechee' test for aesthetic impact as described by the Vermont Supreme Court in the case of *In re Halnon*, 174 Vt. 515 (2002) (mem.).")
[12] Section 8002 (18) (defining "plant" in part to mean a group of wind turbines).

alongside all the other applicable single-plant provisions of Chapter 89. Instead, neither Title 30 nor the net-metering rules exempt the subsequently-expanded portion of a single plant from compliance with the Biennial Update rate requirements. Stated differently, neither of those controlling authorities entitle a subsequently-expanded portion of a single plant to receive a CPG with superseded rates and adjustors.

Contrary to Petitioner's position, the single plant analysis was not intended to qualify net-metering developers for a financial windfall when they propose to subsequently expand an existing system many years and Biennial Updates after an existing, adjacent system was first permitted. Rather, the Commission has repeatedly explained that the single plant analysis is intended to protect ratepayers by preventing developers from artificially breaking up larger projects into smaller projects to take advantage of the financial incentives in the net-metering and standard offer program. For example, the Commission has stated:

• "The definition of 'plant' in Section 8002 was written to ensure that large projects do not take advantage of incentives intended for small projects. Projects can gain economies of scale based on their large size, or they can obtain incentives based on their small size, but not both."[13]

• "Vermont's statutory renewable energy policy strikes a balance between encouraging small, distributed generation—with the statutory capacity limits of the net-metering and standard-offer programs as the distinction between small and large projects—and the ratepayer consequences and potential environmental and aesthetic impacts of renewable energy projects. The single-plant

[13] Case No. 17-5024, *In re Chelsea Solar LLC under Section 248 for a 2 MW solar project on Willow Road* (Final Order Denying CPG) (6/12/19), page 59.

definition operates in tandem with the siting requirements of § 248(b) to ensure that generation is appropriately and responsibly sited throughout the state."[14]

• "The Commission pointed out that the Legislature enacted the statutory definition of 'plant,' primarily with wind facilities in mind, to encourage the dispersed siting of energy generating projects applying for financial incentives available only to smaller facilities."[15]

• "[T]he Legislature's intervening amendment of § 8002(18) casts a new light on its policy goals and suggests a legislative intent to prevent developers from realizing the benefits of statutory programs targeted at smaller projects by essentially splitting up larger projects into collocated smaller projects with redundant equipment."[16]

Preventing the Petitioner from obtaining an outdated and superseded rate for the proposed 2022 significant expansion of the existing plant is consistent with this precedent and the purpose behind the single plant limitations in Title 30.

ii. Applying the 2020 Biennial Update rate and adjustors to the 2022 Project ensures that the Commission applies rates and adjustors that reflect updated market and other factors and that such rates comply with 30 V.S.A. § 8010.

Rule 5.128 required that the Commission conduct the first Biennial Update in 2018, and then every two years thereafter, to update the statewide blended residential rate, siting adjustors, REC adjustors, and the eligibility criteria for net-metering systems. "The purpose of this assessment is to ensure that the pace of net-metering deployment is consistent with Vermont's policy objectives and to ensure that the net-metering program is not having an undue adverse impact on ratepayers. Considerations include the changing cost of installing net-metering

[14] Case No. 19-2484-NMP, *Petition of Portland Street Solar LLC for a net-metering CPG for a 500 kW solar project* (Order finding facilities are a single plant and denying CPG) (12/23/20) footnote 52 (affirmed by Vermont Supreme Court).
[15] *In re Petition of Portland Street Solar, LLC*, 2021 VT 67, ⁋⁋ 7 & 23-24 (Supreme Court affirming PUC's interpretation and purpose of "plant").
[16] *Id.* at ⁋ 23.

systems, the pace of past net-metering deployment, and the impact of net-metering on ratepayers."[17]

The Commission explained in the 2018 Biennial Update that in developing the current net-metering program effective July 1, 2017, it found "that net-metered power was more expensive than comparable alternative sources of renewable energy," "the prior net-metering program was not necessarily effective at supporting Vermont's renewable energy goals because net-metered generators were electing to keep the renewable energy certificates . . . generated by their systems," and "the new rule was intended to calibrate the incentive payments in a manner that balanced the interests of ratepayers, net-metering customers, and the businesses that install net-metering systems."[18]

The 2018 Biennial Update reduced the value of net-metering credits as compared with the net-metering program that applies to the 2014 Project. In doing so, the Commission explained that the changes "will also reduce, though not eliminate, the extent by which the cost of net-metered power exceeds the cost of other sources of renewable power, thereby helping to ease some of the upward pressure on electric rates paid by residential and business customers statewide."[19]

In the 2020 Biennial Update, the Commission decreased the incentives compared with the 2018 Biennial Update because "[w]ithout the decreases to incentives announced today, the cost of new net-metered power also would have increased, shifting even more costs to ratepayers who do not net-meter and further increasing statewide electric rates."[20] The Commission

[17] 2020 Biennial Update, page 1.
[18] *In re: biennial update of the net-metering program*, Case No. 18-0086, page 4, Order of May 1, 2018 [hereinafter "2018 Biennial Update"].
[19] 2018 Biennial Update, page 9.
[20] 2020 Biennial Update, page 2.

explained that the "[c]urrent net-metering compensation is approximately 17.4 cents per kWh, while the price of other in-state solar facilities has fallen further, to less than 9 cents per kWh. According to Green Mountain Power Corporation [], the additional cost of net-metering means that each 20 MW of new capacity creates a cost shift of $47.4 million to non-participating customers over 25 years. In 2019, GMP interconnected over 29 MW of new net-metering systems."[21] The Commission acknowledged that "[w]hile the installation of new renewable energy is a positive development," it adjusted rates downward because it "remains concerned about the overall cost of the net-metering program" and that "the cost of installing solar generation has also decreased."[22]

With respect to RECs, the 2022 Biennial Update includes extensive discussion on the need to update REC adjustors to reflect market rates and to ensure that the customer's overall compensation is not excessive:

> In contrast to a fixed-cost contract, net-metering customers receive bill credits that are valued at the blended residential rate, which is significantly more than a utility's avoided cost and which fluctuates in value over time as residential rates change. In exchange for this preferential pricing arrangement, generators must agree to transfer their RECs to the utility. If a net-metering customer chooses to retain ownership of the RECs, then it is subject to a negative adjustment that is based in part on the value of the REC and also ensures that the customer's overall compensation is not excessive.[23]

The Commission's Biennial Update process and the compliance of major-amendment projects with these updates ensures that rate treatment for major-amendment projects complies with the statutory mandates in Title 30, Section 8010. Section 8010 requires that the Commission's net-metering rules must, in part, "to the extent feasible, ensure[] that net metering does not shift costs included in each retail electricity provider's revenue requirement between net

[21] 2020 Biennial Update, page 3.
[22] 2020 Biennial Update, page 3.
[23] 202 Biennial Update, page 30 (footnote omitted).

metering customers and other customers," § 8010(c)(1)(C), and "balance[], over time, the pace of deployment and cost of the program with the program's impact on rates," § 8010(c)(1)(F).

Petitioner's position would result in shifting undue additional costs on ratepayers and would not support Vermont's renewable energy goals because RECs are not transferred – results contrary to the statute's express purpose and the Biennial Update process. For example, the 2014 Project rates are governed by a now repealed law— 30 V.S.A. § 219a— and superseded net-metering rule. This superseded net-metering program did not value net-metering credits based on biennially updated blended residential rates and adjustors. In contrast, the current Rule 5.100 and the 2020 Biennial Update require net-metering systems to comply with the updated blended residential rate and adjustors.[24] Unlike the current Rule 5.100, the old net-metering program also did not establish eligibility requirements to participate in the net-metering program (Rule 5.104 and "preferred site" definition), or base siting adjustors on the category of net-metering system. Further, the superseded net-metering program entitles those vintage net-metering projects to receive a solar adder,[25] but current Rule 5.100 and the 2020 Biennial Update do not.

These significant differences between the old and current net-metering program result in net-metering Petitioners getting paid more per kWh under the expired net-metering program than under the current program. The old program was a product of market conditions that have changed dramatically since its enactment and subsequent repeal. Rule 5.100 and Section 8010

[24] Rule 5.103 and 5.128.

[25] 30 V.S.A. § 219a(h)(1)(K)(i) states in relevant part: "The credit required by this subdivision (K) shall be $0.20 minus the residential rate per kWh charged by the company as of the date it files with the board a proposed modification to its rate schedules to effect this subdivision (K) or to revise a credit previously instituted under this subdivision (K). For the purposes of this subdivision (K), the residential rate shall be the kWh rate charged by the company under its general residential rate schedule that consists of two rate components: a service charge and a kWh rate, and shall exclude time-of-use rates and demand rates."

require the Commission to implement the law as it now exists, and to consider those changed market conditions. Thus the 2020 Biennial Update applies to the 2022 Project, thereby avoiding undue ratepayer impacts.

iii. Applying the 2020 Biennial Update and current Rule 5.100 to the 2022 Project comports with Vermont's vested rights rule.

Under the vested rights doctrine, a "permit Petitioner gains a vested right in the governing laws and regulations in existence when a complete permit application is filed."[26] There is no dispute among the parties that the 2014 Project is entitled to the rates and adjustors in place in 2014 as required under Rule 5.125.

The vested rights doctrine does not, however, entitle the Petitioner's 2022 Project to take advantage of laws and regulations in place in 2014 simply because its original net-metering system received a CPG in 2014.[27] As the Vermont Supreme Court has explained in the context of a zoning case, newly-filed applications that present substantial revisions to an earlier project are subject to the laws in effect at the time of its filing.[28] Here, the Petitioner has filed a major amendment on its own accord. Vermont's vested rights doctrine does not entitle the 2022 Project to take advantage of laws and regulations in effect in 2014.

The dictates of Rule 5.100 are consistent with the vested rights doctrine, and the vested rights doctrine prevents major-amendment net-metering Petitioners from cherry picking which laws and regulations apply to major amendments as Petitioner seeks to do here.[29]

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[26] *In re Times and Seasons, LLC*, 2011 VT 76, ¶ 12, 190 Vt. 163, 27 A.3d 323.
[27] *In re Jolley Associates*, 2006 VT 132, ¶ 16, 181 Vt. 190, 915 A.2d 282 (substantial revisions to applications "should dictate a loss of vested rights").
[28] *In re Jolley Associates*, 2006 VT 132, ¶ 16, 181 Vt. 190, 915 A.2d 282.
[29] See e.g., *In re Times and Seasons, LLC*, 2011 VT 76, ¶ 11, 190 Vt. 163, 27 A.3d 323 (vested rights doctrine prevents applicants from "simultaneously tak[ing] advantage of the laws in effect at the time of the initial application and those in effect at the time of the reconsideration application").

Specifically, on the one hand, the Petitioner expects that its 2022 Project will receive the same rate treatment that the 2014 Project received under then-prevailing laws and regulations. This is despite the extensive changes in the net-metering program that occurred in 2017, such as the Commission's creation of the current net-metering rule, and the subsequent Biennial Updates.[30]

On the other hand, the Petitioner relies on the laws and regulations in effect when it filed its 2022 Project application to justify Commission approval of other aspects of the Project:

- Petitioner filed its Petition under the current Commission net-metering rules that went into effect July 2017, relying on Rule 5.100's "preferred site" categories, which did not exist in 2014;
- Petitioner relies on the Commission's decommissioning rule, Rule 5.904, that became effective in 2017;[31]
- Petitioner relies on the Thetford Town Plan from 2020 and the Regional Plan from 2020;[32] and
- Petitioner's natural resource assessment relies on rules in effect when it prepared the report, such as the 2020 erosion prevention and sediment control rules and the 2020 Vermont wetland rules.[33]

Petitioner cannot have its cake and eat it too. Applying the current Biennial Update to major-amendment projects like the 2022 Project advances the vested rights doctrine's goals of

[30] See 2020 Biennial Update, pages 4-12 (detailing the history of the net-metering program).
[31] Application ¶ 15.
[32] Exh. TES-MS-5.
[33] Exh. TES-DB-2.

"practicality of administration, avoidance of extended litigation and maneuvering, and certainty in the law and its administration."[34]

Petitioner's 2022 Project is not one designed via major amendment to address concerns of the Commission, public, or neighbors such as occurred in *Application of Orchard Road Solar I, LLC*, Case. No. 16-0042-NMP. There, the Commission created a narrow exception to the general vested-rights rule explained above. That narrow exception was tailored to unique circumstances absent and altogether different from those in this case.

In *Orchard Road*, neighbors opposed a proposed 500 kW net-metered solar project, in part, under the aesthetic criterion. During the proceeding, the Petitioner explained that it would rather have sited the project on a parcel directly across from the proposed site but did not do so because it believed the Agency of Natural Resources would oppose the alternative site. After a hearing officer issued a proposal for decision recommending approval of the project, the Commission reopened the evidentiary record to review this alternative site under the Commission's aesthetic test that required a petitioner to prove that it had not failed to take available mitigation steps.[35] The Commission stated that "In these particular circumstances, if the Petitioner determines that the Project can in fact be built at one of the alternate sites, we would treat an amended application as a continuation of the current Application for vested rights purposes, including the preferable rates that the Petitioner is entitled to under its current Application."[36]

Subsequently, the Petitioner filed an amended application to move the project to the alternative site across the street. The project opponents argued that because the amendment was

[34] *In re Times and Seasons, LLC*, 2011 VT 76, ¶ 12, 190 Vt. 163, 27 A.3d 323.
[35] *Application of Orchard Road Solar I, LLC*, Case No. 16-0042-NMP, Order Reopening the evidentiary record, Order of July 20, 2018 [hereinafter "Orchard Road"].
[36] *Orchard Road*, footnote 8.

a substantial change, the Commission should treat it as a new application and review it under the rules and laws in effect when the amended application was filed.[37] The Commission concluded that it would be "unjust in these circumstances" to apply the Commission's current rules to the amendment application because it encouraged the Petitioner to propose the project on the alternative site to address concerns raised in the proceeding. The Commission explained that the "vested rights doctrine is part of the Commission's jurisprudence and has been used by the Commission in cases like this one, where a Petitioner changes a project to address the concerns of the public and neighbors."[38]

Here, the facts do not support application of the narrow *Orchard Road* exception. The Petitioner did not file the 2022 Project application as part of a continuing net-metering proceeding to respond to concerns raised in that proceeding. Rather, the 2022 Project application seeks to build a new solar array and accordingly, must be subjected to the rules prevailing for all other proposed new net-metering systems.

B. <u>The Commission has not yet ruled on the dispositive legal issue presented here in a contested case with the benefit of briefing.</u>

Commission case law interpreting the pre-existing facilities sections of the net-metering rule (Rule 5.125) is scarce and cursory. In the Petitioner's response to VEC's motion to intervene, the Petitioner cited three cases for the proposition that the "Commission's precedent approv[ed] expansions of pre-existing net-metering systems." Two of the cases cited by Petitioner did not result in a Commission order and thus no party raised or briefed the legal issue

[37] *Orchard Road,* Order Denying Lattuca Motions for Reconsideration, Interlocutory Appeal, and Stay of the Proceedings, page 2, Order of May 1, 2019.
[38] *Orchard Road,* Order Denying Lattuca Motions for Reconsideration, Interlocutory Appeal, and Stay of the Proceedings, page 2, Order of May 1, 2019.

presented in this case and the Commission did not address it.[39] The Commission cannot locate the third case cited by Petitioner, (Case No. 20-0973-NMR), as ePUC does not recognize this case number.

A further review of Commission cases revealed cursory conclusions reached without the benefit of briefing by any party. In one case involving a relatively small pre-existing system (having an application completeness date of June 24, 2016), the Commission concluded that an addition to the facility (to 27 kW) should be paid the same rates as the pre-existing facility.[40] The Commission reached the same conclusion about the expansion of another small facility (11.4 kW to 26.4 kW), where the original facility did not meet the definition of pre-existing facility in Rule 5.103.[41] In another case involving an Petitioner's request to expand a small 2014 pre-existing system (6.525 kW and additional 15 kW), the Commission explained that if the facilities were a single plant, then the proposed facility would receive the rates that the existing facility currently receives.[42] In another case, the Commission stated that an initial project and an expansion of that project "are subject to different rules and rates because the [first] project applied for a CPG before January 1, 2017 and the [subsequent] project filed after that date."[43] In a case involving a 2015 pre-existing system of 73.3 kW and a proposed additional 76.6 kW of capacity in 2017, the Commission applied the 2015 rates to the 2017 system.[44]

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[39] Applicant's Response to VEC's Motion to Intervene, footnote 9 (Applicant cites *Dealer.com/Cox Communications*, Case No. 22-0420-NMR; *Jesse S McDougall*, Case No. 20-0973-NMR, and *Sandstone Real Estate LLC*, Case No. 18-2608-NMR).
[40] *Application of Bill and Lara Calfee*, Case No. 18-1474, Order of August 2, 2018.
[41] *Application of Emmett Dunbar and Mrinalini Mazumbdar*, Case No. 21-4867-NM, Order of February 25, 2022.
[42] *Application of Chanterelle Solar LLC*, Case No. 21-3219, Order of September 28, 2021.
[43] *Request of Troy Minerals, Inc.*, Case No.19-0605, Order of April 12, 2019.
[44] *Petition of Southshire Community Solar, LLC for a CPG, pursuant to 30 V.S.A. §§ 219(a), 248, 8010 and Rule 5.100, authorizing the installation of a 149.9 kW (AC) solar group net-metered electric generation facility in Shaftsbury, Vermont*, Case No. 17-3797-NMP, pages 4-5, and n.2, Order of September 20, 2018.

In these cases, the Commission reached these conclusions without the benefit of any briefing or analysis – and presumably without objection of any party. Specifically, the Commission has simply concluded that (in the Calfee and Chanterelle cases) "an amendment to a pre-existing net-metering system does not affect the rates that the system receives" and (in the Dunbar and Southshire cases) "[p]re-existing systems do not lose their pre-existing status because of a major amendment." In each case, the Commission cited to its Report to the Vermont General Assembly on the Net-Metering program Pursuant to Act 99 of 2014, at 31-32.

That report does not support the conclusions that an expansion to a net-metering system should be compensated at the same rates as an earlier installed net-metering system – and it certainly does not support allowing a large, group net-metering system to more than double or triple its capacity and be paid the same compensation as the prior system. In describing comments received on a proposed net-metering rule, the report includes the following language:

> Other comments suggested that causing pre-existing systems to lose their pre-existing status because of a major amendment would discourage homeowners from expanding their systems to accommodate electric vehicles in the future. The Board has removed this language from the final proposed rule in response to these comments. Pre-existing systems will not lose their pre-existing status because of a major amendment. However, a CPG amendment will not extend the 10-year period during which a pre-existing system will receive the incentive provided for in Section 219a(h)(1)(A).

The Commission's assertion that a major amendment would not cause a pre-existing system to lose its status ensures that such a system would not be subsequently compensated at reduced rates. It says absolutely nothing about the compensation to be paid for incremental capacity added to a pre-existing facility after net-metering rates and adders have changed.

The Commission will not rely on these limited precedents to justify applying outdated net-metering rates to expansions of larger net-metering systems. Here, the 2022 Project involves a solar array that would increase the exiting facility's nameplate capacity by over 300%. The

paucity of prior precedent on this issue addresses primarily expansion of smaller projects in cases where no one contested the rates and adjustors applicable to the fractionally-expanded system. Thus, it is not surprising that the orders in those cases contain conclusions unsupported by the type of analysis called for here.

C. The Applicant's alleged reliance on an informal e-mail exchange between an employee of the regional planning commission and Commission employees does not satisfy the Vermont Supreme Court's high bar for applying equitable estoppel against the government.

The Applicant's testimony states that it disagrees with the legal position that the 2022 Project is not entitled to the same compensation as the 2014 net-metering system because a former employee of the regional planning commission (RPC), Geoff Martin who now works for the Applicant, received "guidance . . . that a pre-existing system may be expanded and will retain the same compensation arrangement as the pre-existing system" from the "Public Utility Commission's Solar Net-Metering Program Manager."[45] The Applicant appears to be asserting an estoppel claim based on its reliance on the advice of a former RPC employee who in turn relied on "an informal e-mail exchange with a Commission employee in an uncontested case. Such reliance provides no basis for the Commission to adopt-or be estopped from rejecting-- the Applicant's legal position.

The purpose of equitable estoppel is to "prevent a party 'from asserting rights which may have existed against another party who in good faith has changed his or her position in reliance upon earlier representations.'"[46] "The party seeking equitable estoppel against the government *must* establish all four of its traditional elements:

[45] Rebuttal Testimony of G. Martin at page 4.
[46] *State v. Central Vermont Ry., Inc.*, 153 Vt. 337, 571 A.2d 1128 (Vt. 1989) (internal citations omitted).

(1) the party to be estopped must know the facts;

(2) the party being estopped must intend that his conduct shall be acted upon;

(3) the party asserting estoppel must be ignorant of the true facts; and

(4) the party asserting the estoppel must rely on the conduct of the party to be estopped to his detriment."[47] (Emphasis added).

Additionally, the party seeking to estop the government must demonstrate that "the injustice that would ensue from a failure to find an estoppel sufficiently outweighs any effect upon public interest or policy that would result from estopping the government in a particular case."[48] The Vermont Supreme Court has analyzed numerous regulatory cases under the doctrine of equitable estoppel "but only rarely found that estoppel was warranted."[49]

Here, the Applicant cannot satisfy the equitable estoppel test for several reasons. First and most important, the RPC employee's inquiry focused on the rates of the *existing* net-metering system and not the applicable rates for the *expanded portion* of the existing net-metering facility—the primary legal question in this case. In fact, witness Martin admitted that he made the inquiry to the Commission employee "[p]rimarily to make sure that if this array was expanded that we -- that the School District would not lose the rates of the existing system."[50] An inquiry by the Commission Chairman of witness Martin at the evidentiary hearing confirmed the narrow purposes of this inquiry:

> CHAIR ROISMAN: And had Norwich Solar indicated to you anything about whether the project would be feasible with or without the rates that were applied in 2014 to the smaller preexisting project?
> THE WITNESS: No.
> CHAIR ROISMAN: So how did you think to focus on that issue?

[47] *In re Lyon*, 178 Vt. 232, 882 A.2d 1143, 2005 VT 63, ¶ 17.
[48] *Id.* (quoting *In re Letourneau*, 168 Vt. 539, 547, 726 A.2d 31, 37 (1998)).
[49] *In re Griffin*, 904 A.2d 1217, 2006 VT 75, ¶ 18 (collecting cases).
[50] Transcript pages 51, and 53-54.

> THE WITNESS: My -- again, my concern was if the -- and the concern of the Town, of the school, was if the array were expanded, would the original system lose those existing rates. So we didn't want to expand an array if they were going to lose those old rates.
> CHAIR ROISMAN: So your focus was on the rates applicable to the existing facility, not on the rates that might be applied to the addition to the existing facility. Is that true?
> THE WITNESS: I would say that was the focus. Yes.

This testimony demonstrates that the e-mail inquiry by witness Martin did not involve the dispositive legal issue here. It also demonstrates that the Applicant could not have intended to base its conduct on the outcome of the informal email exchange because Norwich Solar (the developer here) did not indicate to witness Martin "anything about whether the project would be feasible with or without the rates that were applied in 2014 to the smaller preexisting project." Thus, given the narrow and limited purpose of witness Martin's inquiry, the informal guidance by the Commission employee has no bearing on the disputed legal issue in this case and the Applicant could not have reasonably relied on such guidance.

The Applicant's estoppel argument also fails the Court's test because the RPC is not a party to the case and the estoppel test focuses on reliance by a "party" to whom the government communication was directed.[51] The RPC made the inquiry to understand the rate impacts on the existing net-metering system. The Applicant chose to rely on this RPC employee's informal e-mail exchange with a Commission employee to make its legal determination on rates for the expanded portion of a net-metering system. Because the Applicant was not involved in this email inquiry with Commission employees (nor was any other party to this case), no party in this case received representations or commitments from the government.

The Applicant also cannot meet the estoppel test because (in addition to not being the party that inquired with the government), witness Martin knew that he should not rely on the

[51] *In re Lyon*, 2005 VT 63, ¶ 16 (the doctrine's purpose "is to forbid one to speak against his own act, representations or commitments to the injury of one *to whom they were directed* and who reasonably relied thereon.") (emphasis added).

informal guidance given by a Commission employee when he sent the email inquiry. At the hearing, witness Martin admitted that he sent his email inquiry to the Commission clerk, he knew that the clerk was not a Commissioner, and he was aware that he did not email the impacted electric utility or the Department, both of which are entities that would participate in the resolution of this legal issue.[52] Witness Martin also admitted that his email inquiry did not mention any specific net-metering project, and when he sent the inquiry, he knew that the Commission clerk had no authority to provide him with a legal decision.[53]

When the Commission employee Rowen Cornell Brown responded with the aforementioned guidance, witness Martin acknowledged that it was only "guidance" rather than a binding legal opinion, he knew that the Commission employee was not a Commissioner, not a hearing officer, and was not appointed in any role to resolve a contested issue that the RPC had raised.[54] Witness Martin was also aware that the electric utilities and Department still had no opportunity to participate in this email exchange. Finally, witness Martin agreed that the RPC did not ask the Commission for a formal legal opinion on the issue presented in the email exchange.[55] Thus, witness Martin knew that neither the Commission Clerk nor Rowen Cornell Brown were government officials charged with authority to issue formal legal decisions or issue CPGs.

The Applicant is a sophisticated solar developer that is charged with being aware that neither the Commission Clerk nor the net-metering program coordinator can issue CPGs or render dispositive legal rulings. It is common knowledge that only the Commission can issue

[52] Transcript at page 48.
[53] Transcript at page 49.
[54] Prefiled Rebuttal Testimony of G. Martin at page 4, Transcript at pages 50-51.
[55] Transcript at page 51.

CPGs and resolve legal questions dispositively.[56] The contested case rules under the Vermont Administrative Procedure Act, Sections 809 and 812, and the declaratory judgment rules (Sections 807-808 and the Commission's associated rules) also require a final decision by the Commission and would have required notice and opportunity for participation by impacted entities, such as the electric utility and the Department, which did not occur here. The Applicant thus knew that the net-metering program coordinator's guidance to the RPC was only advisory in nature.[57]

Moreover, the Applicant has not proved that it has reliance injuries (a prong of the estoppel test). The most the Applicant can argue based on the existing record is that it has incurred extra expenses in the permitting process because of its filing for the expired rates and the challenge to those rates by VEC and other parties. Such costs alone are insufficient to support estoppel against the government as there is no evidence to support sunk costs beyond the permitting process.[58]

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[56] See e.g, 30 V.S.A. § 8 (one Commissioner member may examine matters, and/or a hearing officer must report findings of fact in writing to the Commission); 30 V.S.A. § 248 ("No company, as defined in section 201 of this title, may: . . . begin site preparation for or construction of an electric generation facility . . . unless the Public Utility Commission first finds that the same will promote the general good of the State and issues a certificate to that effect.")

[57] Contrast with *In re Lyon*, 2005 VT 63, 178 Vt. 232, 882 A.2d 1143 where Court estopped the Agency of Natural Resources from revoking an improperly issued wastewater permit when a government official (regional wastewater engineer) was the official charged with issuing wastewater permit applications, and the permittee thus reasonably relied on the issued permit; compare with *Wesco, Inc. v. City of Montpelier*, 169 Vt. 520, 739 A.2d 1231 (1999) (Court declining to allow a municipal permit applicant to benefit from its reliance on incorrect guidance from Montpelier's zoning administrator because zoning administrator had not made any decision on the merits of the developer's application and thus the reliance was misplaced and premature); and *In re McDonald's Corp.* 146 Vt. 380, 505 A.2d 1202 (1985) (Court declining to estop "the Environmental Board from requiring a restaurant to obtain an Act 250 permit where an Environmental Coordinator involved with the restaurant's application opined that the project would not require a permit" because the Coordinator's opinion was only "advisory in nature.") (case discussed in *In re Lyon,* 2005 VT 63, ¶ 30.)

[58] Contrast with *In re Lyon* where applicant had actually installed a wastewater system in reliance on improperly issued permit and the permit was a cloud on the applicant's title; *compare with In re Griffin,* 904 A.2d 1217, 2006 VT 75, ¶ 20-22 (concluding that landowner failed to satisfy the detrimental reliance requirement when "[w]ith respect to the legal expenses of this proceeding, the [landowners] are exactly in the same position as they would have been if the former zoning administrator had provided the correct advice…Thus, their legal expenses are caused by their decision to contest the zoning administrator and ZBA decisions, and not by detrimental reliance on the incorrect opinions of the former zoning administrator.")

Turning to the fifth injustice/public-interest element, the testimony provided by VEC, GMP, and the Department identified below in the findings makes clear that adopting the Applicant's legal position will have a substantial negative impact on the public—i.e., ratepayers—in the form of substantially added net-metering costs. This impact is far greater than the negative impact to this Applicant, which is limited to the added expenses of litigating the rate issue in a CPG proceeding that otherwise would not have involved evaluation of otherwise-waived criteria now in dispute.

The Commission concludes based on Rule 5.100 and Title 30 that (1) that the 2020 Biennial Update and the PUC's Rule 5.100 (effective in 2017) apply to the Petitioner's 2022 Project; and (2) the 2022 Project is not entitled to 2014 rates that the legislature established in a now-repealed statute and outdated net-metering program.

III. REVIEW OF SECTION 248 CRITERIA

The Commission's review of the 2022 Project's compliance with the Section 248 criteria requires us to determine a fundamental question about the Petitioner's proposal to compensate its proposed 375 kW solar net-metering project at 2014 rates: does the price of power from this proposed net-metering facility present the least cost option when the Petitioner seeks outdated and superseded rates and other net-metering projects that provide the same benefits are available at lower cost? This question inevitably follows from the Petitioner's burden of demonstrating that there is a present and future need for the additional 375 kW of power at the offered price based on 2014 rates, that such project will result in an economic benefit to the State and its

residents, that the such project will comply with the Comprehensive Electric Energy Plan, and that such project is in the public good, in accordance with Section 248(a), (b)(2), (4), and (7).[59]

The Department of Public Service, VEC, and Green Mountain Power (GMP) all agree that the Petitioner's proposal to apply 2014 rates to the 2022 Project does not satisfy Section 248.[60] The Commission agrees and concludes that: (1) the 2022 Project is not needed under 30 V.S.A. § 248(b)(2)(need) at 2014 rates because the 2014 rates result in total costs for the Project's incremental output that are $762,531 higher on a nominal dollar basis, and $497,296 higher on a Net Present Value (NPV) basis when compared to the rates established in the 2020 Biennial Update for a similarly sized and located project; (2) for similar reasons, the 2022 Project's negative financial impact to ratepayers is not outweighed by the Project's positive economic benefits to the state and its residents under 30 V.S.A. § 248(b)(4)(economic benefit); and (3) because the 2022 Project does not comply with least cost planning principles, would not be subject to the updated net-metering rate, and would not provide affordable energy, it does not comply with the spirit of the Vermont Comprehensive Energy Plan (CEP) under § 248(b)(7)(compliance with the State Comprehensive Energy Plan). The Commission therefore denies the 2022 Project a CPG because Petitioner has not met its burden under § 248(b)(2), § 248(b)(4), and § 248(b)(7), and the 2022 Project is not in the public good. This denial is without

[59] *Petition of East Georgia Cogeneration, L.P.*, Docket No. 5179, Order of 6/25/91 at PDF page 48 [hereinafter *Georgia Cogen*], affirmed 158 Vt. 525, 537 (1992) (Public Service Board asking similar questions when reviewing Section 248 petition for a generation project).

[60] See Prefiled Testimony of T.J. Poor (December 9, 2022) (concluding that the proposed Project is not consistent with the Vermont Electric Plan "at the proposed rates," page 12, "enabling new capacity added to pre-existing systems to receive the pre-existing system's rates [is not] least cost for ratepayers," page 13, and "[a]llowing the proposed amendment to receive net-metering rates of the pre-existing system will negatively impact Vermont ratepayers," page 3.)

prejudice to allow the Petitioner to refile its Petition under the current net-metering rule and applicable Biennial Update.[61]

A. Burden

In November 2022, the Commission "revoked the conditional waivers of the Section 248(b)(4) (economic benefit) and (b)(7) (consistency with the Comprehensive Energy Plan) criteria because the Petitioner's proposed compensation and net-metering credits for the Project raised a significant issue with respect to these criteria."[62] The Petitioner must also satisfy the need criterion under Section 248(b)(2) as that criterion is not conditionally waived for this application.[63] Thus, the Petitioner has the burden of production and persuasion to satisfy these and all other Section 248 criteria.[64] As explained below, the Petitioner did not meet its burden to demonstrate that the Project complies with Section 248.

B. Findings

Based upon the Petition and accompanying documents, the Commission hereby makes the following findings in this matter.

Project History and Description

1. On September 24, 2014, the Thetford School District received a CPG to install and operate a 120 kW net-metered solar array in CPG No. NM-5037 (2014 Project). Martha Staskus, TES Solar ("Staskus") at 1-3 (April 4, 2022).

[61] VEC, GMP, and the Department would not oppose the 2022 Project's rate if it was reimbursed under the current net-metering rate and applicable Biennial Update. Prefiled Testimony of Craig Kieny (VEC) at 3; Prefiled Testimony of TJ Poor (Department) at 14; Prefiled Testimony of Josh Castonguay (GMP) at 3.
[62] PUC's November 7, 2022 Order, Page 3.
[63] PUC's November 7, 2022 Order, Page 1.
[64] *Georgia Cogen*, 158 Vt. at 525, 530-532, 537 (explaining that Section 248 Petitioners have burden to meet statutory requirements and denying project a CPG because significantly less expensive alternate power sources were available).

2. On April 5, 2022, the Petitioner filed a Petition to modify the 2014 Project. Petitioner's Petition.

3. The Commission deemed the Petition complete on April 26, 2022. Commission Memorandum Deeming Petition Complete, April 26, 2022.

4. The Petition seeks approval to install and operate the 2022 Project, which is a 375 kW (AC) solar array on the same parcel as the 2014 Project. Petitioner's Petition; Staskus pf. at 1-3.

5. The 2022 Project is a Major Amendment to the 2014 Project's CPG. Staskus pf. at 2-3.

6. The Petition states that "As an amendment to an existing array grandfathered pursuant to PUC Rule 5.125(C), the Petitioner will retain the RECs associated with the output of the new 375 kW (AC) solar array." Petitioner's Petition ¶ 8.

Explanation of rates and adjustors set forth in the Commission's 2020 Biennial Update compared with the 2014 rates and adjustors that Petitioner claims apply to the 2022 Project.

7. Under 2014 rates, the incremental 375 kW of new capacity would receive roughly two years of compensation at well above $0.20/kWh (including the solar credit that existed under the 2014 net-metering program) until 2024, and then would receive the blended retail rate with no applicable siting or REC adjustors for the system's remaining life. Craig Kieny, VEC ("Kieny") pf. at 3; exh. VEC-CK-5.

8. Today, a Category III system that retains RECs would be subject to a negative $0.04/kWh siting adjustor and a negative $0.04/kWh REC adjustor. Kieny pf. at 4.

9. As a result, the 2014 rates that the Petitioner seeks to apply to its 2022 Project, are $762,531 ($497,296 on an NPV basis) higher than the rates that apply to similarly sized and located net-metering projects under the Biennial 2020 Update. Kieny pf. at 4; exh. VEC-CK-3;

exh. VEC-CK-5; TJ Poor, Department ("Poor") at 3 ("The Department estimates that if the proposed additional 375 kW is afforded the net-metering rates enjoyed by the pre-existing 120 kW system ("2014 Project"), ratepayers will pay $765,167 more, over a 20-year period, than they would for a new, stand-alone 375 kW project with similar attributes, all else being equal.").[65]

10. In other words, if the 2022 Project were allowed to receive the 2014 Project rates until December 31, 2024, it would receive $0.14894/kWh more than any other new 375 kW system on a preferred site which retains its RECs. After the preexisting incentives expire, the 2022 Project would receive $0.08/kWh more than an alternative new project. Poor pf. at 4.

11. The Petitioner agrees that the 2022 Project is more expensive to ratepayers under the 2014 rates than under the current rates. Jim Merriam, TES Solar, ("Merriam"), at 14.

12. These calculations demonstrate that the proposed 375 kW system would receive significantly higher compensation than a similar system installed today. Yet, the interconnecting utility would receive no REC value. Consequently, the 2022 Project would not be as helpful towards meeting Vermont's renewable energy goals compared with a net-metering project that transferred RECs because the 2022 Project does not satisfy Tier II requirements. Kieny pf. at 4.

13. The Petitioner's position in this case has a significant, negative impact to Vermonters, and Vermont ratepayers, above and beyond that which would occur because of a new, similarly sized and sited project within the net-metering program. Poor pf. at 5.

14. When projecting the 2014 rates that would apply to the 2022 Project, the Petitioner's approach in Exhibit TES-JM-2 incorrectly did not account for the updated statewide blended residential rate that occurred on September 1, 2022, and the fact that rates change

[65] Mr. Kieny's prefiled testimony at pages 8-9 explains how he arrived at $762,531.

biennially. VEC's exhibit VEC-CK-5 uses the figures in Exhibit TES-JM-2, but uses the correct 2014 rates. Kieny pf. at 3; exh. VEC-CK-5.

15. Witness Merriam described his exhibit revised TES-JM-2 as involving a cost benefit analysis, but also explained that he was not an expert in providing such an analysis. Transcript of Hearing on February 21, 2023 at pages 99-100 and 108-109 (Witness Merriam: "And I don't want to be submitted as expertise on cost/benefit. I've done them in course work, but I'm not trying to say I am an expert.").

16. The Petitioner admitted that the 2022 Project's hourly and annual output as shown in Exhibit TES-JM-2, column P would be the same regardless of the rate being paid to the Petitioner by GMP's customers. exh. VEC-CK-2; Kieny pf. at 4.

17. The Petitioner admitted that the Project's reduced carbon emissions and the Avoided Societal Cost of Carbon from the 2022 Project's output as shown in column H of Exhibit TES-JM-2 would be the same regardless of the rate being paid to the Petitioner by GMP's customers. Kieny pf. at 5; exh. VEC-CK-2.

18. The Petitioner admitted that all benefits to GMP's customers resulting from the 2022 Project's output shown in columns C-E of Exhibit TES-JM-2 would be the same regardless of the rate being paid to the Petitioner by GMP's customers. Kieny pf. at 5; exh. VEC-CK-2.

19. The Petitioner admitted that the costs to the Petitioner to construct the 2022 Project as shown in cell J3 of Exhibit TES-JM-2 would be the same regardless of the rate being paid to it by GMP's customers. Kieny pf. at 5; exh. VEC-CK-2.

Need for Present and Future Demand for Service

(30 V.S.A. § 248 (b)(2))

20. The 2022 Project permitted at 2014 rates is not needed to meet the need for present and future demand for service which could not otherwise be provided in a more cost-effective manner through energy conservation programs and measures and energy efficiency and load management measures, including but not limited to those developed pursuant to the provisions of subsection 209(d), section 218c, and subsection 218(b) of Title 30. This finding is supported by the findings above and findings 21 through 26, below.

21. The 2022 Project paid at the 2020 Biennial Rates results in greater economic benefit to ratepayers as compared with 2014 rates. Applying the 2020 Biennial Rates to the 2022 Project would result in a Net Economic Benefit of $623,450, in NPV terms, to ratepayers, or $472,431 more than the $151,019 provided at 2014 rates. Kieny pf. at 9[66]; exhs. VEC-CK-4 & 5.

22. In VEC's service territory, VEC has received 599 net metering applications for a total of 6,660 kW since February 2, 2021 (the 2020 Biennial Update's effective date). In GMP's service territory, from September 1, 2021 to September 1, 2022, GMP has received 1,923 completed net metering applications for a total capacity of 25,603 kW. Since September 1, 2022, GMP has received 278 completed net-metering applications for a total capacity of 2,233 kW. Kieny pf. at 6.

23. Given the pace of new net-metering applications and the high price the Petitioner seeks, the 2022 Project is inconsistent with least cost planning principles and not needed at 2014 rates. Kieny pf. at 6-10; Josh Castonguay, GMP, "Castonguay" at 4.

[66] Mr. Kieny's prefiled testimony explains how he arrived at these numbers.

24. The Petitioner did not prepare a least-cost analysis or any other analysis proving that if the 2022 Project was compensated at the 2014 rates, it would present the lowest present value life cycle cost including environmental and economic costs. Kieny pf. at 7.

25. VEC has 20 projects, totaling 2,998.3 kW that are 50 kW or greater and less than 500 kW that are considered "pre-existing net-metering systems" under PUC Rule 5.103 (definitions) because a completed CPG application was filed prior to January 1, 2017. GMP likely has significantly more "pre-existing net-metering systems" than VEC. Under Petitioner's theory, there is a possibility that these projects can expand up to 500 kW at outdated and superseded rates as it makes common business sense to do so. Kieny pf. at 12; Transcript of Hearing on February 21, 2023 at page 12.

26. The Commission would be opening the door for the theoretical potential of 7,001 kW in VEC's territory alone if they were all to expand to 500 kW, which would result in substantial additional increased costs over the next 20 years to VEC members. It would be difficult for VEC to plan its energy supply costs not knowing when or how many of these projects will seek to expand. It is poor policy to expose Vermont ratepayers to an unspecified and potentially very large degree of new net-metering generation at rates that are significantly more expensive than those currently allowed for new net-metering projects. Kieny pf. at 13.

DISCUSSION

The Commission is required by statute to find that the 2022 Project:

> … is required to meet the need for present and future demand for service that could not otherwise be provided in a more cost-effective manner through energy conservation programs and measures and energy-efficiency and load management measures, including those developed pursuant to the provisions of subsection 209(d), section 218c, and subsection 218(b) of this title. In determining whether this criterion is met,

> the Commission shall assess the environmental and economic costs of the purchase, investment, or construction in the manner set out under subdivision 218c(a)(1) (least cost integrated plan) of this title and, as to a generation facility, shall consider whether the facility will avoid, reduce, or defer transmission or distribution system investments. Section 248(b)(2).

Least cost planning includes planning to meet "the public's need for energy services . . . at the lowest present value life cycle cost, including environmental and economic costs, through a strategy combining investments and expenditures on energy supply, transmission, and distribution capacity, transmission and distribution efficiency, and comprehensive energy efficiency programs."[67]

As part of the least cost analysis, the Commission has explained that the "need for power is 'inextricably linked with the price for that power,"[68] and that it must apply this standard to consider whether the proposed price for a generation project "remains appropriate today."[69] "The [Commission] could not fulfill its responsibility under [Section 248(b)], without considering the price output from . . . the proposed project. Analysis of need and economic benefit under 248(b)(2) and (4) . . . requires the [Commission] to weigh the cost of a proposed project against its likely benefits."[70]

Compensating the 2022 Project at 2014 rates does not satisfy these least cost planning principles for several reasons. First, the Commission has concluded that using outdated rates shifts even more costs to customers who do not net-meter. The Commission's 2020 Biennial

[67] 30 V.S.A. § 218c(a)(1); Kieny pf. at 7.
[68] *In Re ER Salvage Yard Solar, LLC*, Case No. 19-4602 at page 12 (Final Order 6/3/20) (quoting *Petition of Marble Mill Hydro Corp.*, Docket No. 5171, Order of 5/6/1992 at 4 citing *Georgia Cogeneration*, Docket No. 5179, Order of 6/25/91 at 70); Kieny pf. at 6.
[69] *Georgia Cogen*, PUC Final Order at pfd 52.
[70] *Petition of Coolidge Solar I, LLC*, Doc Nos. 8586 and 8685, pages 4-6 (Order of 4/13/16) citing *Georgia Cogen*, 158 Vt. 525, 537 (1992).

Update explained that it decreased the financial incentives as compared with 2018 rates because "[w]ithout the decreases to incentives announced today, the cost of new net-metered power also would have increased, shifting even more costs to ratepayers who do not net-meter and further increasing statewide electric rates."[71] This reasoning is even more compelling when comparing current rates with very outdated 2014 rates.[72]

Second, the Petitioner has admitted that the 2022 Project would provide the same benefits regardless of whether the Petitioner was paid the 2014 or 2022 rates. Paying more for equivalent benefits is antithetical to least-cost planning.[73]

Third, GMP customers would pay approximately $762,531 more for the same product under Petitioner's proposal as compared with a similar project proposed under the current net-metering rates.[74] Vermont ratepayers do not need power if it is $762,531 more expensive than power that is otherwise available from projects compensated under the 2020 Biennial Update rates with the same benefits.[75] Given the number of net-metering applications that were filed since the 2020 Biennial Update, net-metering projects are viable under current rates and therefore there is no need for a net-metering project that would be paid outdated rates. The Commission took a similar approach in *Petition of East Georgia Cogeneration* when it denied a generation project a CPG under the need criterion because less expensive energy was available, and the petitioner sought above-market rates.[76]

[71] 2020 Biennial Update, page 2.
[72] Kieny pf. at 7-8.
[73] Kieny pf. at 8; Prefiled Testimony of Josh Castonguay (GMP) at 4.
[74] See Finding 9, above and Kieny pf. at 8-9; exhs. VEC-CK-3 and 5.
[75] Kieny pf. at 6.
[76] *Georgia Cogen*, PUC Final Order at pdf. 19 and 54.

Fourth, the 2022 Project paid at the 2020 Biennial Rates results in greater economic benefit to ratepayers as compared with 2014 rates. Looking at the 2022 Project from this perspective demonstrates that it is inconsistent with the principles of least-cost planning.[77]

The Petitioner provided no evidence to show that its proposal that the 2022 Project be reimbursed at 2014 rates is least cost and agrees that the 2022 Project would be more expensive under the current net-metering rates than under the outdated 2014 rates. The Petitioner's only testimony under the need criterion focused on the Town of Thetford's need to meet its renewable energy goals, and Thetford's ability to receive net-metering credits from the 2022 Project to "offset the cost of energy on the Thetford School District's electric bills."[78] This proposed arrangement simply transfers benefits from one group of Vermonters (GMP customers) to another (Town of Thetford taxpayers) while requiring GMP customers to pay the most expensive rate to provide these benefits to the Town. Such an arrangement does not result in the Commission selecting the least cost alternative.

The Petitioner inappropriately relies on an avoided costs analysis to support applying the 2014 rates to the 2022 Project.[79] Such an approach would require the Commission to determine the net-metering rates applicable to the 2022 Project based on avoided costs. A net-metering project's avoided costs do not determine a net-metering project's rate. Rather, the applicable net-metering rule (in this case, Rule 5.100, effective July 1, 2017) and the associated Biennial Update establishes the net-metering compensation.[80] Further, the Commission does not give great weight to the economic cost benefit analysis prepared by Jim Merriam in Exhibit revised TES-JM-2 as the witness admitted that he was not an expert in preparing such analysis.

[77] Kieny pf. at 9; exhs. VEC-CK-4 & 5.
[78] Prefiled Testimony of Martha Staskus, at pages 2-3 (April 22, 2022).
[79] Merriam rebuttal testimony (A16).
[80] Kieny surrebuttal pf. at 2-3; Rule 5.100 (no mention of avoided costs as basis for net-metering rate).

Even assuming the Petitioner's avoided cost projections are correct, the 2022 Project at 2014 rates is still not the least cost option because ratepayers would pay $762,531 more over 20 years in nominal dollars and $497,296 more on a net present value basis than they would pay for a similar-sized and located project using the rates established in the Commission's 2020 Biennial Update.[81]

The Petitioner also claims that under its business model, the 2022 Project would not be viable at 2022 rates. That argument is not relevant to whether the 2022 Project is needed or would result in an economic benefit to the state.[82] A net-metering petitioner does not obtain a higher net-metering rate based on a project's financial viability or unique benefits a project might provide as the Petitioner argues here. The Commission's applicable rate in Rule 5.100 and the 2020 Biennial Update is already above market rates and takes into account many factors, such as the "interests of ratepayers, net-metering customers, and the businesses that install net-metering systems."[83] As the Commission has explained, the negative adjustor that applies when a participant retains RECs serves to protect Vermont ratepayers:

> Net-metering is a voluntary program for generators and is not the only option for generators to sell their output. For example, small renewable generators are entitled to sell their energy and capacity to the interconnecting utility at fixed, avoided-cost rates under Commission Rule 4.100. If a generator opts for such a contract, the generator retains ownership of its RECs and may sell them in the market. In contrast to a fixed-cost contract, net-metering customers receive bill credits that are valued at the blended residential rate, which is significantly more than a utility's avoided cost and which fluctuates in value over time as residential rates change. In exchange for this preferential pricing arrangement, generators must agree to transfer their RECs to the utility. If a net-metering customer chooses to retain ownership of the RECs, then it is subject to a negative adjustment that is based in part on the value of the REC and also ensures that the

[81] Kieny surrebuttal pf. at 3.
[82] Kieny surrebuttal pf. at 3-4.
[83] Kieny surrebuttal pf. at 3-4 (quoting the 2020 Biennial Update at page 8 and 32: ("[N]et-metering compensation should be decreased because the costs of net-metering outweigh the benefits and because the benefits of behind-the-meter solar can be achieved through more competitively priced forms of solar."); and n. 51 (explaining why net-metering is the most expensive of the generation options discussed in the update).

customer's overall compensation is not excessive.[84]

The 2022 Project presents more harmful ratepayer impacts than would have been experienced had the Derby Solar project in Case No. 17-1247 been approved. In *Derby Solar*, the incremental cost impacts to ratepayers would have been approximately $210,000 assuming a 20-year life cycle. For the 2022 Project, ratepayers would pay approximately $762,531 more at the 2014 rates, a greater negative economic impact than that posed by the rejected Derby Solar project.[85]

Although *Derby Solar* presented a slightly different scenario in that the negative economic impacts were due to transmission constraints, the Commission ruling in that case addressed issues that are relevant to the proposed 2022 Project. The Commission generally found that the magnitude of ratepayer impacts identified above provide no benefit to ratepayers when other less expensive renewable energy is available. For instance, the Commission found that the increased costs resulting from the proposed net-metering project's location in a grid-constrained area were slightly over $10,000 on an annual basis and totaled over $250,000 (in nominal dollars) over a 25-year time horizon. The Commission concluded that these increased costs would not be paid by the net-metering petitioner, but instead by ratepayers, and these costs are "meaningful and harm ratepayers." Further, the Commission concluded that these negative financial impacts were undue because they "provide no benefit to ratepayers relative to the less expensive renewable generation that is already available during times of curtailment."[86]

Like the situation with the Derby Solar project, compensating the 2022 Project at outdated and superseded 2014 rates would result in a cost increase to ratepayers that is

[84] Kieny surrebuttal pf. at 4 (quoting 2020 Biennial Update at page 30 (footnotes omitted)).
[85] Kieny pf. at 10-11; exh. VEC-CK-6.
[86] Kieny pf. at 11; exh. VEC-CK-6.

meaningful and harmful, and other less expensive renewable generation is available (in this case, net-metering generation).[87] The Petitioner's decisions, including where and how to construct a solar project and whether to retain or transfer RECs, are business decisions within the Petitioner's control and have no bearing on the applicable net-metering rate. The Petitioner seeks to have the right to retain RECs and retain the renewability, but have its business plan funded by other GMP customers merely because it does not like the results of its financial viability analysis.[88] Petitioner's position is not relevant to the need criterion and does not support a conclusion that its proposed 2022 Project is the least cost option. For these reasons, the 2022 Project cannot satisfy the need criterion if reimbursed at 2014 rates.

Economic Benefit to the State
(30 V.S.A. § 248(b)(4))

27. The 2022 Project would not result in an economic benefit to the State or its residents if reimbursed at 2014 rates as demonstrated by the findings above, and below in 28 through 32.

28. The 2022 Project's positive economic impacts do not outweigh its negative impacts to the State of Vermont and its residents for similar reasons as set forth under the need criterion. In fact, less value is provided under Petitioner's proposal because it is not transferring RECs to GMP. Kieny pf. at 13; exh. VEC-CK-3.

[87] Kieny pf. at 11-12; exh. VEC-CK-6.
[88] Kieny surrebuttal pf. at 5.

29. In addition to the 2022 Project being unnecessarily more expensive when compared to other net-metering projects, the 2014 rates are also substantially above Standard Offer rates. Based on results of recent Standard Offer auctions, utilities can acquire solar energy from RES Tier II resources at less than 9.0 cents/kWh. Kieny pf. at 13.

30. The entities developing and receiving net-metering credits from the 2022 Project are the only ones receiving an economic benefit from the 2022 Project if it is approved at 2014 rates. The fact that the entity receiving net-metering credits is a public elementary school implies some additional benefit to Town of Thetford taxpayers (or those of the broader school district, to the extent they contribute). Ultimately, however, the savings to those taxpayers becomes a cost to other ratepayers of the utility, including other taxpayers supporting other public schools. Poor pf. at 9-10

31. "[T]he economic benefits provided by construction, associated jobs, etc. would be essentially the same with a hypothetical new net-metered system of comparable size, but at far less total cost to ratepayers." Poor pf. at 9-10.

32. "[U]nnecessarily high rate-based incentives (such as allowing 2022 capacity to receive 2014 rates) disproportionately and inequitably affects low-income Vermonters." Poor pf. at 9-10.

DISCUSSION

Section 248(b)(4) states that before the Commission can issue a CPG for a project, it shall find that the project "will result in an economic benefit to the State and its residents." "The extent of the economic benefit is one consideration among many that the [Commission] must weigh while engaged in the 'legislative, policy-making process' necessary for the issuance of a

CPG."[89] The primary focus of the economic benefit inquiry is a project's financial impact to ratepayers.[90] A net-metering petitioner cannot meet "the requirements of Subsection (b)(4) based purely on the economic benefits of the Project's construction and associated jobs and taxes."[91] To "meet the requirements of Subsection (b)(4), any negative economic impacts must be 'outweighed by positive impacts so that the net result is economic gain.'"[92] Similar to the Commission's assessment of the 2022 Project under the need criterion, the Commission must also compare the 2022 Project's purported economic benefit under the 2014 rates with similarly sized and located projects under the current net-metering rates.[93]

In the Commission's review of the East Georgia Cogeneration facility and the Deerfield wind project, the Commission focused on the proposed project's costs to ratepayers under the economic benefit criterion. In *East Georgia*, a developer sought a Section 248 CPG to develop a cogeneration facility under the Federal Public Utility Regulatory Policies Act (PURPA). The developer argued that the project resulted in an economic benefit to the State because the project's rate was based on rates set by the Commission under Rule 4.100.

The Commission disagreed. The Commission found that there was an excess of capacity in Vermont and that the project would displace cheaper energy, with the result being that Vermont ratepayers would pay more for power produced by the project over the project's life than it would for the same quantity of power from existing sources.[94] The Commission noted

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[89] *In re Amended Petition of UPC Vermont Wind, LLC*, 185 Vt. 296, 2009 VT 19, ¶ 11, 185 Vt. 296 (quoting *Vt. Elec. Power Co.*, 179 Vt. 370, 2006 VT 69, ¶ 6, 895 A.2d 226).
[90] *Georgia Cogen*, 158 Vt. at 534, 536-37 (1992) (explaining that under the economic benefit criterion, Commission can favor concern for ratepayers over concern for entrepreneurs and must consider the project price and weigh the cost of a proposed project against its likely benefits).
[91] Exh. VEC-CK-6, Derby Solar Order, n.3.
[92] *Id.* (citing *Joint Petition of GMP, VEC, and VELCO to construct up to a 63 MW wind electric generation facility, Docket 7628*, Order of 5/31/11 at 39-40); *Georgia Cogen*, at 158 Vt. at 536-37.
[93] *Georgia Cogen*, PUC Final order, at finding 112, pdf. 23-24 (concluding that project would not result in an economic benefit when cheaper alternative resources were available).
[94] *Georgia Cogen*, 158 Vt. at 530.

"that its paramount obligation is to ensure that Vermont's ratepayers are not burdened with uneconomical power purchases."[95] The Commission ultimately concluded that "given the availability of significantly less expensive alternate power sources, the project did not provide an economic benefit to the state" and denied the developer a Section 248 CPG.[96] The Commission explained that its rate setting under Rule 4.100 could not supplant the inquiry required under Section 248(b)(4), which serves as a "safeguard" for ratepayers.[97]

The Supreme Court affirmed the Commission's decision, explaining that the Commission had to decide whether the "proposed project, at the requested rates, would provide needed power and economic benefit to the State of Vermont," and that those issues could not have been litigated at the rate-setting hearing under Rule 4.100.[98] The Court concluded that the Commission correctly decided that the project "was not needed at the requested rates and the project would not provide an economic benefit to Vermont."[99]

In *Deerfield*, while the Commission found that the proposed generation project would result in some economic benefit from jobs and tax payments, it concluded that a positive finding of economic benefit depended upon whether the Project would actually provide "benefits to ratepayers."[100] The Commission weighed the project's environmental impacts against the project's lack of favorably priced electric power to Vermont ratepayers. The Commission concluded that the wind project would not result in an economic benefit unless the wind developer entered into stably-priced contracts "that are favorable relative to expected market

[95] *Id.* at 533.
[96] *Id.* at 527, 531.
[97] *Id.* at 536.
[98] *Id*. at 536.
[99] *Id*. at 539.
[100] *Amended Petitioner of Deerfield Wind, LLC*, Doc. No. 7250, at page 38 (Order of 4/16/09) [hereinafter "Deerfield"].

values" with Vermont utilities.[101] The Commission explained that a stably priced contract alone was not sufficient because contracts "well above market prices may not help ratepayers if the alternative is lower-priced market purchases (even factoring in the environmental costs of fossil fuel generation)."[102]

With respect to the *Derby Solar* order, while the Commission did not determine whether the Derby Solar project complied with the economic benefit criterion because it denied the CPG under two other criteria, the Commission denied that project a CPG primarily because of negative financial impacts to ratepayers. There, the Commission found that the magnitude of ratepayer impacts that the proposed net-metering project would have resulted in provided no benefit to ratepayers when other less expensive renewable energy is available. The Commission concluded that "Vermont ratepayers ultimately bear the cost of the SHEI curtailments because retail electric rates (the amount a utility charges its customers for electric service) are set based on the distribution utility's costs to provide service to its customers.[103] The same concerns are present here and are relevant under the economic benefit criterion.

Similar to *Deerfield*, *East Georgia*, and *Derby Solar*, the proposed 2022 Project would inflict an unnecessary financial burden on ratepayers given that other net-metering projects are available under current rates that are significantly less than the 2014 rates. Moreover, the current net-metering rates are above market and already account for the economic benefits that the 2022 Project would produce, such as jobs and tax payment. The "only difference" between compensating the 2022 Project at current or 2014 rates "is the amount of incentive (above market

[101] *Deerfield*, at pages 3-5, 43.
[102] *Deerfield*, at pages 43-44.
[103] Exh. VEC-CK-6, Derby Solar Order, at page 18.

cost) that is borne by ratepayers to achieve such development."[104] Because the benefits are the same regardless of whether the 2022 Project receives 2014 rates or current net-metering rates, and the negative economic impact is substantial under Petitioner's proposal, the Petitioner has not shown that the 2022 Project results in a net economic gain.

Putting aside economic benefits already accounted for in the 2022 net-metering rates, such as construction jobs and tax payments, the only remaining economic benefits accrue solely to the Town, while Vermont ratepayers pay for these benefits. This transfer of benefits from Vermont ratepayers to the Town does not result in a net economic benefit to the State and its residents. The Commission reached a similar conclusion in *East Georgia Cogeneration* where the petitioner claimed that the Commission should consider that the proposed project's economic benefits would accrue to Vermont's dairy industry from the project's steam sales. The Commission concluded that despite this benefit, this arrangement would "simply transfer benefits from one group of Vermonters to another [, and] [t]here is no clear net "economic benefit to the state and its residents."[105]

In addition, as discussed above, compensating the 2022 Project at 2014 rates conflicts with the mandates in 30 V.S.A § 8010, and the goals of the net-metering program. In sum, the Petitioner has not met its burden to demonstrate that the 2022 Project will result in an economic benefit to Vermont at 2014 rates.

Compliance With Twenty Year Electric Plan
(30 V.S.A. § 248(b)(7))

33. The Project does not comply with Vermont's State CEP for the reasons set forth

[104] Poor pf. at 8; see also C. Kieny pf. at 8 ("the Applicant has admitted that the 2022 Project would provide the same benefits regardless of whether the Applicant was paid the 2014 or 2022 rates").
[105] *Georgia Cogen.,* PUC Final Order at pdf. 23 & 55.

in the above findings, and findings 34 through 44 below.

34. The Electrical Energy Plan is part of the 2022 CEP and is based on, in significant part, the principles of least-cost integrated planning as set out in 30 V.S.A. § 218c. Poor pf. at 10; Kieny pf. at 14-15.

35. The CEP at page 221 states: "The concept of least-cost planning is a central component to the decision making of Vermont's electric utilities and regulatory policies. By statute, electric utilities are required to develop least-cost integrated resource plans (IRPs) that set forth the approach the utility takes for providing reliable, least-cost service to customers while meeting Vermont's renewable and environmental requirements and goals." (footnote omitted). Kieny pf. at 14.

36. The CEP also states: "The underlying principles of least-cost planning have been embedded in Vermont law since 1991, and represent a key regulatory concept in the state. Least-cost planning does not mean that only the lowest-cost resources are selected. As with a portfolio approach to retirement planning, a portfolio approach to electric resources minimizes risk; and the resources must further GHG reduction and other requirements." CEP at page 221; Kieny pf. at 14.

37. The CEP also identifies the on-going need to fine tune net-metering rates at pages 246-247, portions of which are copied below.

- "The Legislature enabled the PUC, starting in 2017, to determine rates paid for net-metered production and to make modifications to those rates every two years (see 30 V.S.A. § 8010). Adjustors are applied to the base compensation, which is based on retail rates, depending on whether the RECs are assigned to the utility for its RES compliance and the category of the system (size and type of site). This mechanism has enabled better

fine-tuning of the net-metering program's rates. Excess generation from a new residential rooftop solar system is currently compensated at about two-thirds the 2016 rate for the same system (generation that offsets on-site load in a month is valued at retail rate), while all generation from new large, remote system is currently compensated at 60%-80% of the 2016 rate for the same system (though a 500 kW net-metering project is still 30% more expensive than the most expensive Standard Offer project selected in the most recent solicitation)."

- "The net-metering program has seen rapid growth in the past few years, as a result of the technology costs significantly decreasing while the rate paid for net-metering production decreased much more gradually. As the number of net-metering systems increased exponentially, it changed the characteristics of the electric system —for example, it reduced load during midday, during what were typically times of higher prices, thus pushing the net peak hour to later in the day or into the evening when solar production is less effective or non-existent. In turn, value of a new net-metering resource has declined, in part because new solar-only net-metering systems only produce energy during daylight and therefore cannot reduce customers' load during the new evening peaks that are new utility cost drivers."
- "The fact that solar output no longer coincides with the most expensive hours for utilities to purchase energy, capacity, and transmission to serve customers, combined with alternative mechanisms through which utilities can purchase distributed solar at significantly lower costs than the current net-metering rates, means there is now a cost shift; non-net-metered customers are subsidizing those customers who have the means to net-meter. In 2019, Vermonters paid more than $40 million more for net-metering than if

> this solar generation had been procured through bilateral contracts between solar developers and utilities. This amount reflects the higher compensation that was paid in prior years. While compensation rates for net-metering have more recently declined slightly, the compensation currently paid to net-metering systems continues to significantly exceed the wholesale energy price and market-based Class I REC prices combined, and therefore results in a higher cost of compliance for meeting the RES and serving Vermont customers with electricity than would alternative resources." Kieny pf. at 16-17.

38. The CEP also emphasizes affordability of energy resources around 110 times. The CEP "balances the principles articulated in 30 V.S.A. § 202a of energy adequacy, reliability, security, and affordability, which are all essential for a vibrant, resilient, and robust economy and for the health and well-being of all Vermonters." CEP executive summary at 1. The CEP's "overarching goal for the grid" is: "A secure and affordable grid that can efficiently integrate, use, and optimize high penetrations of distributed energy resources to enhance resilience and reduce greenhouse gas emissions." CEP at page 20; Kieny pf. at 18.

39. The CEP further discusses the implications of over-reliance on the most expensive programs to meet the Renewable Energy Standard (RES): "As emphasized throughout the CEP, it is essential to keep electricity affordable to make progress in decarbonizing the emission-heavy thermal and transportation sectors." CEP at 258; Poor pf. at 12-13.

40. Equity – a theme throughout the CEP – is also a key consideration in evaluating how rate pressures from programs that contribute to meeting the RES, such as net-metering, impact different Vermont communities:

> As Vermont considers the next steps for the RES, it will be critical to consider such changes through a lens of equity. As previously noted, the RES even under

> its current design is anticipated to produce moderate upward rate pressure for Vermonters. As a result, it will be imperative to consider how such rate pressures might impact different communities in Vermont, and deploy mechanisms to mitigate those impacts as future policies strive to reduce, and not exacerbate, existing energy burdens within the state. This includes cost shifts created by renewable energy programs and other design parameters associated with electricity policy. Given the potential impacts of a redesign of the RES, such efforts should be informed by robust stakeholder engagement to understand the needs of and implications for a wide array of stakeholders, and to consider the inclusion of accountability mechanisms for ensuring that the RES advances equitable access to affordable renewable or carbon-free electricity for all Vermonters.
>
> CEP at 258; Poor pf. at 12.

41. The Petitioner's proposal to apply outdated 2014 rates to the 2022 Project disregards the CEP's emphasis on the need to update net-metering rates. Kieny pf. at 16-17.

42. The 2022 Project at 2014 rates is not affordable and not least cost given that it is $762,531 higher than other similarly sized and located net-metering projects that are subject to the 2020 Biennial Rates. Kieny pf. at 18.

43. The Department concluded that the 2022 Project as proposed is inconsistent with the Vermont Electric Plan in the CEP. "Net-metering is the most expensive program to meet Vermont's renewable energy requirements. Modest reductions to net-metering rates since 2017 reduce that disparity to some extent. If the 2022 Project receives 2014 rates, it will be one of the most - if not the most - expensive project permitted in 2022 that *could* help meet Vermont's renewable energy requirements; except that it will not help meet those requirements because it will retain the RECs, and the utility will have to acquire and pay for other, additional resources to serve that need. This creates rate pressure that - especially if replicated in other instances - can be significant and impact the economics of electrification for Vermonters, potentially even placing it out of reach." Poor pf. at 12-13.

44. In sum, the 2022 Project violates the CEP because other net-metering projects are available and have been proposed under the current net-metering rates. Thus, there is no need for ratepayers to pay $762,531 for the same set of benefits. See Finding 9 above.

DISCUSSION

Section 248(b)(7) requires that before the Commission issues a Section 248 CPG, it shall find that the Project is in "compliance with the electric energy plan approved by the Department under section 202." The Petitioner has not met its burden to demonstrate that the 2022 Project compensated at the outdated 2014 rates complies with the CEP.

The Department has determined that the Project is not consistent with the CEP at the proposed rates.[106] The Commission affords this determination deference unless the agency decision is "wholly irrational and unreasonable in relation to its intended purpose."[107] As discussed below, the Department's determination comports with the CEP because the 2022 Project runs counter to the goals that the CEP seeks to achieve through distributed generation and there is also no good cause to compensate the 2022 Project at 2014 rates.

As set forth above, the CEP emphasizes least-cost procurement of energy resources, the on-going need to fine tune net-metering rates, and affordability of energy resources. While the CEP encourages the development of net-metering projects, the CEP more strongly encourages value-based renewable generation and maximizing ratepayer value when developing energy portfolios. CEP at 221.

The Commission in the *Derby Solar* matter applied a least-cost analysis to the proposed

[106] Poor pf. at 12-13.
[107] Derby Solar Order, page 29-30 (quoting *In re Korrow Real Estate, LLC Act 250 Permit Amendment Application*, 2018 VT 39, ¶ 21, 187 A.3d 1125, 1132, (citing *Plum Creek Me. Timberlands*, LLC, 2016 VT 103, ¶ 28, 203 Vt. 197, 155 A.3d 694).

net-metering project based on the CEP then in effect and found that the proposed project did not comply with the CEP's requirement of meeting the RES in a least cost manner.[108] The Commission found that "Renewable energy projects should not be developed without consideration of their relative cost impact" and relied on the CEP's provision that Vermont should "plan carefully to meet all three tiers of the [RES] in the least-cost manner [and] strive to lower both energy bills and electric rates."[109] Here, the current CEP similarly requires the Commission to apply least cost planning principles based on the provisions cited in the findings above.

The Commission reaches the same conclusion here as it did in *Derby Solar* that the 2022 Project compensated at 2014 rates does not comply with the CEP because it does not represent cost-effective power that provides ratepayer value.[110] Every increment of financial cost above the current net-metering rates that the 2022 Project places on GMP further diminishes ratepayer value. The 2022 Project paid at 2014 rates is not least cost for ratepayers.[111] Other net-metering projects are available and have been proposed under the current net-metering rates and thus there is no need for ratepayers to pay $762,531 more for the same set of benefits. Further, the 2014 rates are no longer fine-tuned or affordable.

General Good of the State
(30 V.S.A. § 248(a)(2)(b))

45. The Project does not promote the general good of the State for reasons set forth in the findings above.

[108] Exh. VEC-CK-6, Derby Solar Order at 30-31.
[109] Exh. VEC-CK-6, Derby Solar Order at finding 53.
[110] Exh. VEC-CK-6, Derby Solar Order at 31.
[111] Kieny pf. at 14-15; Poor pf. at 14.

DISCUSSION

"Section 248 also requires the [Commission] to make an overall determination as to whether the Project promotes the general good of the State. In making this determination, [the Commission] must weigh the impacts and benefits of the Project and find that the benefits outweigh the impacts."[112]

Section 8010 of Title 30 requires the Commission to ensure to the extent feasible that net-metering does not *inappropriately* shift costs. The Commission must consider that net-metering projects can and are in fact being developed under current rates and no party has disputed this fact. Given that net-metering projects do not need to be compensated at 2014 rates to be viable, the Commission cannot permit net-metering projects at outdated and superseded rates. Otherwise, the Commission would not meet the statutory requirements under Section 8010 to limit the extent to which net-metering unnecessarily shifts cost and risks onto ratepayers.

The current net-metering Rule 5.100 also does not allow a net-metering developer to obtain a higher rate just because: (1) it is otherwise not cost-effective to meet their business strategy; or (2) an analysis (whether it is correctly done or not) shows that a proposed net-metering project avoids costs that exceed the applicable net-metering rate. If either of those bases allowed net-metering petitioners to argue for higher net-metering rates, net-metering petitioners would not have to follow the net-metering compensation rules.[113]

The Petitioner seeks to place all the financial burden on ratepayers without providing sufficient benefits. The above market 2022 net-metering rate already accounts for the typical economic benefits generated by net-metering projects and the Petitioner has not offered any

[112] *In re UPC Vermont Wind, LLC*, 185 Vt. 296, 2009 VT 19, ¶ 2, 299, 969 A.2d 144 (citing *In re Vt. Elec. Power Co.*, 179 Vt. 370, 2006 VT 69, ¶ 6, 895 A.2d 226).
[113] Kieny surrebuttal pf. at 5.

additional benefits that would justify paying substantially higher and outdated net-metering rates. The Petitioner's proposal would unnecessarily shift dollars from ratepayer's pockets to developer's pockets. Therefore, the 2022 Project does not promote the public good at the outdated and superseded 2014 rates.

IV. CONCLUSION

Based upon all of the above evidence, the Project will not promote the general good of the State of Vermont, is not needed at outdated and superseded rates, does not result in an economic benefit to the State or its residents, and does not comply with the CEP.

V. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Utility Commission of the State of Vermont that the Commission denies TES Solar, LLC a Certificate of Public Good without prejudice to refile a petition seeking the net-metering rates that will apply upon filing a complete petition.

DATED at Montpelier, Vermont, this _____ day of _____, 2023.

_____	)
	) PUBLIC UTILITY
_____	) COMMISSION
	) OF VERMONT
_____	)

OFFICE OF THE CLERK

FILED: _____

ATTEST: _____
Clerk of the Commission

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within thirty days. Appeal will not stay the effect of this order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within ten days of the date of this decision and order.