NEW YORK STATE OF OPPORTUNITY. Department of Public Service

Public Service Commission
Audrey Zibelman
Chair

Patricia L. Acampora
Gregg C. Sayre
Diane X. Burman
Commissioners

Paul Agresta
General Counsel
Kathleen H. Burgess
Secretary

Three Empire State Plaza, Albany, NY 12223-1350
www.dps.ny.gov

October 6, 2016

SENT VIA ELECTRONIC FILING
Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. EL16-107 – Southern Maryland Electric Coop., Inc. and Choptank Electric Coop., Inc..

Dear Secretary Bose,

For filing, please find the Notice of Intervention and Protest of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 473-4953.

Very truly yours,

Theodore F. Kelly
Assistant Counsel

Attachment

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Southern Maryland Electric Coop., Inc.	)	
	)	**Docket No. EL16-107-000**
Choptank Electric Coop., Inc.	)	
	)	

NOTICE OF INTERVENTION AND PROTEST
OF THE NEW YORK STATE
PUBLIC SERVICE COMMISSION

INTRODUCTION

Pursuant to Rules 211 and 214 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214, the Notice of Petition, issued on August 23, 2016, and the Notice of Extension of Time, issued on August 30, 2016, the New York State Public Service Commission (NYPSC) hereby submits its Notice of Intervention and Protest in response to the Petition for Declaratory Order filed by Southern Maryland Electric Cooperative, Inc. and Choptank Electric Cooperative, Inc. (collectively, the Petitioners). The Petitioners, electric cooperatives serving customers in Maryland, argue that regulations issued by the Maryland Public Service Commission (MDPSC) for a pilot community solar generation program do not comply with federal law, including the Public Utilities Regulatory Policy Act (PURPA) and the Federal Power Act (FPA).

Specifically, Petitioners claim that the regulations would require Maryland electric companies to make purchases of excess energy from community solar energy generation systems (CSEGSs), that those purchases would be governed by the FPA or PURPA, and that the regulations would require Maryland electric companies to pay rates to subscribers that would be inconsistent with PURPA avoided cost standards.[1]

As a state utility commission that has recently authorized community distributed generation,[2] NYPSC has a significant interest in this proceeding. At least 25 states have developed community solar programs or pilots[3] and in 2014 there were approximately 42,000 participants in community solar programs.[4] Any determination regarding the applicability of

---

1 At certain points in the Petition, the Petitioners suggest that their complaint also extends to purchases of unsubscribed generation from the CSEGS itself. However, those purchases are governed by a separate provision of the regulations, not cited in the Petition, that directly employs the PURPA avoided cost standard for calculation. MD. CODE REGS. §20.62.02.08 (2016); MD. CODE ANN., Public Utilities Article § 7-306.2(d)(7).

2 NYPSC Case 15-E-0082, Proceeding on Motion of the Commission as to the Policies, Requirements and Conditions for Implementing a Community Net Metering Program, Order Establishing a Community Distributed Generation Program and Making Other Findings (issued July 17, 2015).

3 U.S. Department of Energy, Community Shared Solar FAQ (updated October 28, 2015), available at http://apps3.eere.energy.gov/greenpower/community_development/community_solar_faq.html.

4 Eric O'Shaughnessy, Jenny Heeter, Chang Liu, and Erin Nobler, National Renewable Energy Laboratory (NREL), Status

federal law to community solar programs must recognize that each state has a unique program such that a decision appropriate for one state may prove inapplicable or even harmful in another.[5] In New York, more than one thousand community distributed generation projects are under development. A change to the regulatory framework applicable to community solar programs could disrupt this growing market.

This Protest focuses on one specific deficiency of the Petition: even assuming that the CSEGS program would involve transactions subject to the Commission's jurisdiction under the FPA or PURPA, the CSEGS regulation does not conflict with those statutes or any Commission regulation because it permits electric companies to pay for excess generation at an avoided cost rate.[6] Because the Petitioners have failed to demonstrate even a potential conflict between the CSEGS regulations and

---

and Trends in the U.S. Voluntary Green Power Market (2014 Data) (October 2015).

[5] For example, the Petition focuses on Maryland's rules regarding payment to a subscriber for excess generation credits at the end of an annual period or when the subscriber leaves the program, while New York's program does not permit payment for excess generation credits at any time.

[6] By these comments, NYPSC is not expressing any opinion on other claims made by the Petitioners and is not conceding that the CSEGS program, as described in the Petition, involves any transaction subject to the Commission's jurisdiction under the FPA or PURPA.

federal law, the Petition is without merit and should be dismissed.

NOTICE OF INTERVENTION

The NYPSC submits its Notice of Intervention pursuant to the Commission's Notice and Rule 214(a)(2) (18 C.F.R. §385.214) of the Commission's Rules of Practice and Procedure.[7] The NYPSC requests that all correspondence and communications concerning this filing be sent to each of the following persons, and that each person be included on the Commission's official service list for this proceeding:

Theodore F. Kelly, Esq.
Assistant Counsel
New York State Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350
(518) 473-4953
theodore.kelly@dps.ny.gov

William Heinrich
Chief, Policy Coordination
New York State Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350
(518) 473-3402
william.heinrich@dps.ny.gov

DISCUSSION

The Maryland CSEGS Regulation Permits the Use of Avoided Cost Rates for Compensation and Therefore Creates No Potential for Conflict with Federal Law.

The Petitioners claim that a declaratory order is necessary because the CSEGS regulations require payments to

---

[7] The views expressed herein are not intended to represent those of any individual member of the NYPSC. Pursuant to Section 12 of the New York PSL, the Chair of the NYPSC is authorized to direct this filing on behalf of the NYPSC.

subscribers at higher-than-avoided-cost rates in violation of PURPA. However, even if their arguments regarding the application of PURPA to certain transactions are correct, the CSEGS regulations permit participating electric companies[8] to file compliance plans and tariffs that set compensation based on avoided cost rates, which Petitioners acknowledge would comply with PURPA.[9] For this reason, the Petitioners' assertion that they have "exhausted their options . . . under MDPSC's procedures" is incorrect because they have not attempted to file tariffs that comply with both state and federal regulations. Where it is clearly possible to do so, intervention by the Commission is unnecessary and the Petitioners' request inappropriately circumvents the state process. The Commission regularly dismisses petitions and complaints as unripe or

---

[8] Participation in the CSEGS program is voluntary for electric cooperatives, including the Petitioners. MD. CODE REGS. §20.62.01.03.

[9] Petitioners also complain that the CSEGS regulations fail to require that generators enrolled in the CSEGS program meet PURPA standards for a qualifying facility (QF). However, because the requirements to qualify as a CSEGS are narrower than PURPA's definition of a QF, all generators eligible for the CSEGS program will necessarily be QFs. Compare MD. CODE REGS. §20.62.02.01-02 to 18 C.F.R. §§ 292.203-204. Petitioners neither contest this nor explain why an explicit requirement is necessary.

premature where the issues described could be resolved without Commission action.[10]

The Petitioners concede that, even assuming that the transactions described are subject to PURPA, an electric company could file a tariff implementing the program that is consistent with both the Maryland regulations and PURPA. The Petitioners take issue with the italicized language from this provision of Maryland's regulation: "An electric company shall pay a subscriber a dollar amount of excess generation as reasonably adjusted to exclude the distribution, transmission, and non-commodity portion of the customer's bill *unless the electric company records subscriber credits as kilowatt hours.*"[11] The first part of the provision, which appears to be intended as the primary method for compensating subscribers, simply describes a method of calculating avoided cost.[12] By disputing only the

---

10 See e.g., NextEra Energy Resources, LLC v. ISO New England Inc., 156 FERC ¶61,150 (August 31, 2016); CSOLAR IV South, LLC v. Cal. Indep. Sys. Operator Corp., 142 FERC ¶61,250 (March 29, 2013); La. PSC v. Entergy Corp. Entergy Servs., 132 FERC ¶61,104 (August 4, 2010).

11 MD. CODE REGS. 20.62.02.07 (emphasis added).

12 Compare MD. CODE REGS. 20.62.02.07 to 18 C.F.R. § 292.101(b)(6). While the language in the CSEGS regulation does not mirror the federal definition, it permits the electric company pay avoided cost by allowing the subtraction of all non-avoided costs. This is consistent with the "wide degree of latitude" states enjoy in making avoided costs determinations. California Public Utilities Commission, 133 FERC ¶ 61,059 (October 21, 2010) (quoting

italicized portion, the Petitioners effectively concede as much. So long as an electric company does not "record subscriber credits as kilowatt hours," it is instructed to employ that avoided cost calculation.[13] The Petitioners fail to identify any reason that the concerns they describe could not be avoided by filing a compliance plan and tariffs that contemplate recording subscriber credits as dollar amounts, rather than kilowatt hours.

Furthermore, even in the case where an electric company does record credits as kilowatt hours, the CSEGS regulations do not require the electric company to pay an amount higher than avoided cost.[14] The Petitioners' claim that the regulations require that subscribers be compensated for excess generation "at the full retail rate, with the exception that any annual excess generation above annual kilowatt-hour consumption shall be purchased at the full standard offer service [] rate" lacks a citation and finds no support in the CSEGS regulations. Rather, the regulations do not state how subscribers should be compensated in that situation.[15] For that reason, even if an

---

American REF-FUEL Company of Hempstead, 47 FERC ¶ 61,161 (1989)).

13 MD. CODE REGS. 20.62.02.07.

14 Id.

15 Id.

electric company does choose to record subscriber credits as kilowatt hours, it could file a compliance plan and tariff compensating excess credits based on avoided cost rates while remaining in full compliance with the CSEGS regulations.

Because, even based on the Petitioners' interpretation of the applicable laws and regulations, the Petitioners and other Maryland electric companies could file CSEGS compliance plans and tariffs consistent with both the state regulations and federal laws and regulations, the Commission should dismiss the Petition as premature and unripe. The Petitioners' complaints would become ripe only if such tariffs were rejected by MDPSC.

CONCLUSION

The NYPSC respectfully urges the Commission to dismiss the Petition for the reasons discussed herein.

Respectfully submitted,

Paul Agresta, Esq.
General Counsel
Public Service Commission
of the State of New York
By: Theodore F. Kelly, Esq.
Assistant Counsel
New York State Department
of Public Service
Three Empire State Plaza
Albany, New York 12223-1350
theodore.kelly@dps.ny.gov

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: October 6, 2016
Albany, New York

Theodore F. Kelly
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-4953