

**PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 19<sup>th</sup> day of May 2011.

GENERAL ORDER NO. 258.1

In the matter of a General Investigation to invite comments on a proposed rulemaking to correct the Commission Rules Governing Electric Utility Net Metering Arrangements and Interconnections, 150 C.S.R., Series 33.

**COMMISSION ORDER**

The Commission promulgates final rules amending its rules governing net metering arrangements and interconnections.

**BACKGROUND**

The Alternative and Renewable Energy Portfolio Act (Portfolio Act or Act), codified at West Virginia Code §24-2F-1 et seq., that was enacted by the West Virginia Legislature in 2009 and amended in 2010, required the Public Service Commission of West Virginia to promulgate rules governing net metering and interconnection standards pursuant to W.V.a. Code § 24-2F-8 within twelve months of the effective date of the Act of July 1, 2009, or by July 1, 2010.

On June 30, 2010, the Commission issued an Order, promulgating the Rules Governing Electric Utility Net Metering Arrangements and Interconnections, (Net Metering Rules), 150 C.S.R. 33, in General Order No. 258. The Net Metering Rules govern the net metering arrangements and interconnections between electric utilities and electric utility customers that are also generators of electricity using alternative and renewable energy resources. The rules also govern interconnection standards between electric utilities and small power producers, including net metering customers. The interconnection standards are included in the rules as Form No. 2. For a complete history, refer to the June 30, 2010 Order in General Order No. 258.

On September 29, 2010, on its own motion, the Commission initiated the general investigation proceeding in General Order No. 258.1 for the purpose of inviting comments on a proposed rulemaking to amend the Commission Net Metering Rules to correct a minor error identified by the Commission in the rules after the rules were issued. The Commission identified

an omission in one of the agreements included in the interconnection standards in Appendix F, the Interconnection Agreement (Level 2) (“the Agreement”), the standardized form agreement required of the utility and interconnection customers with Level 2 small generator facilities.

The Order advised that the Commission found an omission of the default provision referred to as “Article 6.6” in Article 3.3.2 of the Agreement. The Commission noted that the omission likely occurred with the adoption of the interconnection standards (and interconnection agreements) from a prior Commission proceeding in Case No. 06-0708-E-GI, General Investigation into Net metering, Smart Metering and Interconnection Standards set forth in the Federal Energy Policy Act of 2005 into the final Net Metering Rules, as the interconnection standards in Case No. 06-0708-E-GI contain an identical error and omission in its Appendix F—Interconnection Agreement (Level 2).

By the Order issued September 29, 2010, the Commission (i) initiated this general investigation proceeding, (ii) required the Commission Executive Secretary to provide notice and publication of the proposed rulemaking, (iii) required the Executive Secretary to serve a copy of the Order and Notice of Future Rulemaking upon all interested parties and entities that filed comments in General Order No. 258, and (iv) established a thirty-day comment period for interested parties to file preliminary comments regarding proposed revisions to correct the Agreement prior to the issuance of proposed rules. The Order required interested parties to file comments on or before 4:00 p.m., October 18, 2010.

On October 18, 2010, Commission Staff filed comments regarding the proposed rulemaking, including recommended language to amend the existing Agreement to correct the omission. Staff confirmed that the omission of the default provision in the Agreement originated with the adoption of the interconnection standards approved in Case No. 06-0708-E-GI into the final rules. Staff explained that the interconnection standards in Case No. 06-0708-E-GI were modeled after the Model Interconnection Procedures, written by the Interstate Renewable Energy Council (IREC). Staff stated that it referred to Article 6.6 in the initial draft of proposed interconnection standards in Case No. 06-0708-E-GI, but failed to include a default provision in the final interconnection standards approved in Case No. 06-0708-E-GI. Staff stated that this omission carried forward with the incorporation of the interconnection standards approved in Case No. 06-0708-E-GI in the final Net Metering Rules promulgated in General Order No. 258.

In the comments filed, Staff informed the Commission that the current 2009 Edition of the IREC Model Interconnection Procedures contains an Article 6.6 default provision in its model interconnection agreement. Staff recommended that the Commission issue proposed rules revising the Agreement based on the provisions in Article 6 of the model interconnection agreement in the current edition of the IREC Model Interconnection Procedures. In the Staff proposed language amending the Agreement to correct the omission, Staff included some, but not all, of the provisions contained in Article 6 of the IREC model interconnection agreement. Staff included the default and force majeure provisions from Article 6, but omitted reference to the limitation of liability, indemnity, and consequential damages provisions that are also included in Article 6 of the IREC Model Interconnection Procedures (2009 Edition).

After considering the preliminary comments, on December 27, 2010, the Commission issued an Order promulgating proposed legislative rules revising the Net Metering Rules. The Order advised that the Commission proposed to correct the Interconnection Agreement (Level 2) by incorporating the Article 6 provisions of the IREC model interconnection agreement *in toto* in the revised Agreement in the proposed rules. The Commission invited specific comments regarding the inclusion of the complete Article 6 provisions from the IREC model interconnection agreement in the proposed rules, in light of West Virginia law and the best policy practices for this jurisdiction.

The Order also advised that the Commission expanded the purpose of the rulemaking to amend the Net Metering Rules to make the rules consistent with the Rules Governing Alternative and Renewable Energy Portfolio Standard (Portfolio Standard Rules), 150 C.S.R. 34, promulgated in General Order No. 184.25, by Commission Order entered November 5, 2010. The Order noted that the Commission promulgated the two new rules series in 150 C.S.R. 33 and 150 C.S.R. 34 in response to Portfolio Act requirements; and, therefore, the rules contained common definitions for the eligible alternative and renewable energy resources included within the Act. The Commission noted that we revised the definition for the renewable energy resource, run of river hydropower, in the Portfolio Standard Rules based on comments filed in that rulemaking proceeding. The Commission advised that the proposed rules revised the definition for run of river hydropower in Rule 2.15.d of the Net Metering Rules to make it consistent with the definition for run of river hydropower, as revised by the Commission in the Portfolio Standard Rules

By its Order issued December 27, 2010, the Commission: (i) issued proposed rules amending the Net Metering Rules to revise the Appendix F---Interconnection Agreement (Level 2) and the Rule 2.15.d definition for run of river hydropower, (ii) required the Commission Executive Secretary to publish a Notice of Rulemaking, (iii) required the Executive Secretary to serve a copy of the Order and proposed rules upon all electric utilities operating in West Virginia, all parties that filed comments in General Order No. 258 and all parties that were previously served a Notice of Future Rulemaking by Order entered September 29, 2010, and (iv) established a comment period. The Order stated that interested parties should limit their comments to the proposed rule amendments and required interested parties to file comments on or before 4:00 p.m., January 26, 2011.

On January 26, 2011, Staff filed written comments in response to the proposed rules.

On January 26, 2011, IREC filed written comments in response to the proposed rules.

### **DISCUSSION**

After consideration of the comments filed in this rulemaking proceeding and after its own consideration of the proposed rules, the Commission issues final rules amending the existing Commission Net Metering Rules to make two minor necessary revisions to the rules. The final rules do not make any changes from the proposed rules. The Commission will discuss our response to the comments received and the two revisions made to the rules below.

## Revision of the Interconnection Agreement (Level 2)

In promulgating final rules revising the Interconnection Agreement (Level 2) to correct the omission of certain provisions in the Agreement, the Commission considered the comments filed by Staff and IREC.

### Staff Comments

Staff explained the basis for the language proposed by Staff to revise the Agreement presented in its preliminary comments filed in this proceeding. Staff stated that it proposed including the default and force majeure provisions in Article 6 of the IREC model interconnection agreement in the Interconnection Agreement (Level 2), because this would effectively address the omission of the default provision in the Agreement. Staff stated that it recommended that the Commission omit the other provisions in Article 6, the limitation of liability, indemnity and consequential damages provisions, based on its assertion that the inclusion of these provisions conflicts with case law establishing that the Commission lacks jurisdiction over the award of damages and the resolution of contractual matters.

Staff stated that the Commission lacks jurisdiction to award monetary damages, citing Carter v. Willis, 117 S.E. 2d 594 (W.Va. 1960) and W.Va. Code §24-4-7. Staff argued that the Supreme Court of Appeals of West Virginia has held that the authority to rule on the validity of a contract or to enforce a contract is reserved to the courts (not the Commission) and has recognized that the Commission's jurisdiction over utility contracts is limited to the exercise of its authority under W.Va. Code §24-2-12. Benwood-McMechen Water Company v. City of Wheeling 4 S.E. 2d 300 (W.Va. 1939); Preston County Light & Power Company v. Renick 113 S.E. 2d 378 (W.Va. 1960); City of South Charleston v. The West Virginia Public Service Commission et al., 514 S.E. 2d 622 (W.Va. 1999).

Staff asserted that cases may arise in which the Commission will be called upon to enforce the Agreement provisions related to consequential damages and its subsequent ruling will result in a determination of the amount of damages to be awarded. Staff argued that the limitation of liability and indemnity provisions in the Agreement in the proposed rules limit the award of attorney's fees, that constitutes a limitation by Commission on the amount of the damages awarded for breach of contract. Staff recommended omitting the limitation of liability, indemnity and consequential damages provisions from the amendment of the Agreement to avoid a possible conflict with recognized limitations on the Commission's jurisdiction over contractual matters and the award of damages.

### IREC Comments

IREC filed comments recommending that the Commission retain the model Article 6 from its publication, in its entirety, in the revised Agreement as provided in the proposed rules. IREC asserted that the Article 6 provisions comprehensively establish the rights and obligations of the parties upon default of the Agreement. IREC argued that a Level 2 Interconnection Agreement that

lacks limitation of liability, indemnification and consequential damages provisions will provide less certainty for the parties and will increase the risk of litigation to resolve the process. IREC stated that the model provisions in Article 6 are similar to standard provisions in Level 2 Agreements used by other states in the PJM regional transmission organization territory. IREC stated that the provisions are nearly identical to the provisions in Article 7 of the Federal Energy Regulatory Commission (FERC) *pro forma* Small Generator Interconnection Agreement that have been widely used and heavily vetted.

After considering the comments filed by Staff and IREC regarding the proposed rule revision of the Interconnection Agreement (Level 2), the Commission has decided to incorporate the complete provisions of Article 6 of the IREC *Model Interconnection Procedures* into the final rules. The Commission finds that the inclusion of the complete Article 6 provisions does not conflict with recognized limitations on the Commission's jurisdiction over matters involving the award of damages and other disputes that would be subject to the sole jurisdiction of a state court. Consistent with established law, the Commission recognizes limitations on its jurisdiction over matters involving the award of damages and contractual disputes. The Commission believes that it is acceptable to include the complete Article 6 provisions from the IREC model interconnection agreement in the revised Agreement, because a court of competent jurisdiction, and not the Commission, will ultimately resolve any issues arising from the Agreement related to the award of damages or the resolution of contractual matters that are within the jurisdiction of the court. The Commission is persuaded by the IREC comments indicating that the model provisions in Article 6 should be retained in the revised Agreement. Accordingly, the final rules retain amendments to the Agreement that include the complete provisions of Article 6 of the IREC *Model Interconnection Procedures* to correct omissions of key provisions in the existing Agreement.

#### Net Metering Rule 2.15.d

In its comments filed in this proceeding, Staff and IREC did not file comments or take a position with respect to the proposed revision of the definition for "run of river hydropower" in Net Metering Rule 2.15.d. to make it consistent with the definition in the Commission Portfolio Standard Rules.

The Commission finds that it is appropriate to revise the Net Metering Rules definition of run of river hydropower in Rule 2.15.d to make it consistent with definition adopted in the Commission Portfolio Standard Rules. Upon review of the rules, the Commission finds that "run of river hydropower" is the only definition for an alternative or renewable energy resource in the Net Metering Rules that needs to be amended in light of the recently issued Portfolio Standard Rules. The final rules reflect the changes to the definition for run of river hydropower made in General Order No. 184.25. There are no changes to the rule, as proposed.

## FINDINGS OF FACT

1. On June 30, 2010, the Commission issued an Order, promulgating the Commission Net Metering Rules in General Order No. 258 in response to the requirements of W.Va. Code §24-2F-1 et seq. The Net Metering Rules govern the net metering arrangements and interconnections between electric utilities and electric utility customers that are also generators of electricity using alternative and renewable energy resources. The rules also govern interconnection standards between electric utilities and small power producers, including net metering customers. The interconnection standards in Form No. 2 include standardized form agreements between the utility and interconnection customers, attached as Appendices.

2. Appendix F—Interconnection Agreement (Level 2) contains an obvious omission. The Agreement in Article 3.3.2 refers to a default provision identified as “Article 6.6” that does not exist in the Agreement.

3. On September 29, 2010, the Commission initiated a general investigation proceeding in General Order No. 258.1 for the purpose of inviting preliminary comments on a proposed rulemaking to amend the Commission Net Metering Rules to correct the omission of the provision(s) identified in the Appendix F--- Interconnection Agreement (Level 2).

4. On October 18, 2010, Staff filed preliminary comments in response to the September 29, 2010 Order. According to Staff, the omission of the provisions in the Interconnection Agreement (Level 2) originated with incorporation of the interconnection standard approved in Case No. 06-0708-E-GI, General Investigation into Net metering, Smart Metering and Interconnection Standards set forth in the Federal Energy Policy Act of 2005 into the final Net Metering Rules. Staff noted that the omitted provisions were based on the IREC Model Interconnection Procedures, and the current 2009 Edition of the IREC Model Interconnection Procedures contained a current version of the omitted provisions in Article 6. Staff recommended that the omission be corrected by including the default and force majeure provisions from Article 6, but not the limitation of liability, indemnity, and consequential damages provisions that also are included in Article 6 of the IREC Model Interconnection Procedures (2009 Edition).

5. On November 5, 2010, the Commission issued Rules Governing Alternative and Renewable Energy Portfolio Standard, 150 C.S.R. 34 in General Order No. 184.25. The rules, as proposed, in General Order No. 184.25 contained many of the same definitions as included in the Net Metering Rules for the alternative and renewable energy resources listed in W.Va. Code §24-2F-3, including the same definition for run of river hydropower. In response to comments filed in General Order No. 184.25, the Commission amended the definition for the renewable energy resource, “run of river hydropower.”

6. On December 27, 2010, the Commission issued an Order promulgating proposed rules amending the Commission Net Metering Rules to: (i) correct the omission identified in Form No. 2, Appendix F—Interconnection Agreement (Level 2), and (ii) revise the definition for run of river hydropower in Rule 2.15.d of the Net Metering Rules to be consistent with the revision of the

definition in the Portfolio Standard Rules. The Order provided notice of the proposed rules and a comment period for interested parties to file comments regarding the rules. The Order advised that the Commission proposed to include the complete Article 6 provisions in the IREC Model Interconnection Procedures (2009 Edition) in the revised Agreement to correct the identified omission in the existing rules.

7. On January 26, 2011, Staff filed comments to the proposed rules.
8. On January 26, 2011, IREC filed comments to the proposed rules.

### CONCLUSION OF LAW

1. The Commission lacks jurisdiction over the award of damages. Carter v. Willis, 117 S.E. 2d 594 (W.Va. 1960); W.Va. Code §24-4-7. The Commission defers to the courts in matters involving the resolution of contractual matters, except for the exercise of its authority related to contractual matters pursuant to W.Va. Code §24-2-12. Benwood-McMechen Water Company v. City of Wheeling 4 S.E. 2d 300 (W.Va. 1939); Preston County Light & Power Company v. Renick 113 S.E. 2d 378 (W.Va. 1960); City of South Charleston v. The West Virginia Public Service Commission et al., 514 S.E. 2d 622 (W.Va. 1999).

2. Because a court of competent jurisdiction will ultimately resolve issues involving the award of damages or a contractual dispute arising from the Agreement that is within the sole jurisdiction of the court, the inclusion of complete Article 6 provision from the IREC Model Interconnection Procedures is appropriate.

3. The Commission concludes that it is reasonable to promulgate final rules revising the Commission Net Metering Rules (i) to correct Form No. 2, Appendix F—Interconnection Agreement (Level 2) to include certain provisions that were omitted from the Agreement, based on the IREC Model Interconnection Procedures, 2009 Edition, and (ii) to amend the definition of run of river hydropower in Rule 2.15.d to be consistent with the definition in the Commission Portfolio Standard Rules, after considering the comments filed in this proceeding.

### ORDER

IT IS THEREFORE ORDERED that the Executive Secretary of the Commission shall submit the final Rules Governing Electric Utility Net Metering Arrangements and Interconnections, 150 C.S.R. 33, attached hereto as Attachment A, to the Secretary of State.

IT IS FURTHER ORDERED that the final Rules shall be effective July 18, 2011.

IT IS FURTHER ORDERED that Attachment B is a blackline version, showing changes to the Rules Governing Electric Utility Net Metering Arrangements and Interconnections comparing the currently effective Rules to the final Rules.

IT IS FURTHER ORDERED that the rules submitted to the Secretary of State shall be accompanied by the required Form No. 5, "Notice of Agency Adoption of a Procedural or Interpretive Rule or a Legislative Rule Exempt from Legislative Review."

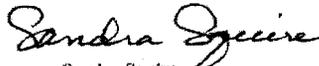
IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this order with attachment A and B on the parties that filed comments in this proceeding by United States First Class Mail and on Staff by hand delivery.

IT IS FURTHER ORDERED that the Executive Secretary provide copies of the final Rules to the interested parties who address inquiries to Sandra Squire, Executive Secretary, Public Service Commission of West Virginia, P.O. Box 812, Charleston, WV 25323.

IT IS FURTHER ORDERED that the Executive Secretary cause a true and accurate copy of the final Rules to be posted upon the Commission website.

IT IS FURTHER ORDERED that on entry of this Order this case shall be removed from the Commission docket of open cases.

A True Copy, Testa:

  
Sandra Squire  
Executive Secretary

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