STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion, to promulgate rules governing electric interconnection and distributed generation, and rescind legacy interconnection and net metering rules.	)))))	Case No. U-20890

At the May 12, 2022 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair
Hon. Tremaine L. Phillips, Commissioner
Hon. Katherine L. Peretick, Commissioner

ORDER ON REHEARING

Procedural History

Section 173(1) of Public Act 295 of 2008 (Act 295), MCL 460.1173(1), authorized the Commission to promulgate administrative rules governing net metering. In the May 26, 2009 order in Case No. U-15787, the Commission formally adopted the Electric Interconnection and Net Metering Standards (legacy net metering rules). *See*, Mich Admin Code, R 460.601a *et seq*. The legacy net metering rules focused primarily on small electric generators. In the December 20, 2012 order in Case No. U-15919 the Commission adopted procedures for interconnection of smaller projects. The Commission has not adopted procedures governing the interconnection of larger projects and has now determined that the legacy net metering rules are outdated.

Section 173(1) of Act 295 was revised by Public Acts 341 and 342 of 2016 to authorize the Commission to promulgate rules governing distributed generation. MCL 460.1173(1); MCL 460.1173(6). In the November 8, 2018 order in Case No. U-20344, the Commission commenced an effort to consider rescinding the legacy net metering rules and promulgating new rules that would address interconnection (IX) and distributed generation (DG), and directed the Commission Staff (Staff) to initiate a stakeholder process in the Case No. U-20344 docket. The Staff thereafter undertook an extensive, multi-year stakeholder process to arrive at a draft set of rules titled Interconnection and Distributed Generation Standards (also known as the MIXDG rules). The instant docket was opened to address both the MIXDG rulemaking and the rescission of the legacy net metering rules.[1]

On September 8, 2020, the Commission submitted a request for rulemaking (RFR) to the Michigan Office of Administrative Hearings and Rules (MOAHR) to rescind the legacy net metering rules. MOAHR approved the RFR on September 29, 2020, MOAHR #2020-95. On September 29, 2020, the Commission submitted the draft rules to MOAHR and the Legislative Service Bureau (LSB) for their approvals, which were granted on October 13, 2020. The regulatory impact statement (RIS) was submitted on April 28, 2021, and approved on July 21, 2021. The Notice of Public Hearing (NOPH) was submitted on July 27, 2021, and approved on July 29, 2021. The rules appeared in the Michigan Register on October 1, 2021.

On September 8, 2020, the Commission submitted an RFR to MOAHR to promulgate the Interconnection and Distributed Generation Standards (the MIXDG rules). MOAHR approved the RFR on September 25, 2020, MOAHR #2020-96. On October 28, 2020, the Commission

[1] The legacy net metering rules will not be rescinded until the MIXDG rules become effective.

submitted the draft rules to MOAHR and LSB for their approvals, which were granted on July 9, 2021. The RIS was submitted on April 28, 2021, and approved on July 21, 2021. The NOPH was submitted on July 27, 2021, and approved on July 29, 2021. The rules appeared in the Michigan Register on October 1, 2021.

On September 9, 2021, the Commission issued an order approving dates for a public hearing and for the submission of written comments on both rule sets, which are progressing through the Administrative Rulemaking System (ARS) in tandem. The public hearing was held on October 20, 2021. No one provided comments at the public hearing. Written comments were due no later than 5:00 p.m. (Eastern time) on November 1, 2021. The Commission received timely comments on the MIXDG rules from 11 commenters, some of whom also submitted a redlined version of the draft MIXDG rules. Sunrun Inc. (Sunrun) submitted timely written comments and a redlined version of the draft rules. However, the ruleset submitted by Sunrun on November 1, 2021, contained no redlining (that is, no revisions). The Staff informed Sunrun that the submitted rules contained no redlining. Sunrun submitted a redlined version of the draft MIXDG rules on December 7, 2021.

On March 17, 2022, the Commission issued an order responding to the comments and approving a revised version of the MIXDG rules for final adoption (March 17 order).[2]

On April 14, 2022, Consumers Energy Company (Consumers) and DTE Electric Company (DTE Electric) (together, petitioners) filed a joint petition for rehearing of the March 17 order (joint petition) pursuant to Mich Admin Code, R 792.10437 (Rule 437).

[2] No comments were received regarding the legacy net metering rules, and the Commission also approved the final version of the rescinded Electric Interconnection and Net Metering Standards. March 17 order, Exhibit C.

On May 4, 2022, Indiana Michigan Power Company (I&M), Michigan Electric and Gas Association (MEGA), and Michigan Electric Cooperative Association (MECA) filed answers to the joint petition for rehearing. On May 5, 2022, the Environmental Law and Policy Center, Ecology Center, and Vote Solar (together, the Clean Energy Organizations or CEOs) filed an answer to the joint petition.

Joint Petition for Rehearing

Petitioners seek rehearing on the basis of three arguments: (1) the March 17 order violates petitioners' due process rights; (2) the MIXDG rules should be revised due to safety and reliability issues; and (3) the MIXDG rules should be revised to ensure cost recovery.

To begin, petitioners complain about the Commission's chosen procedure, and invoke their rights to due process under the Fourteenth Amendment to the U.S. Constitution, and under Michigan Const 1963, art I, sec 17, which provides:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Petitioners assert that the stakeholder process carried out by the Commission during this rulemaking effort is not provided for in the Michigan Administrative Procedures Act (APA), MCL 24.201 *et seq.*, and that no consensus developed from that stakeholder process. They note that Sunrun is headquartered in San Francisco, California, and did not participate in the stakeholder process. Petitioners describe Sunrun's November 1, 2021 comments as "vague," and note that Sunrun's redlined version of the draft rules was not submitted until December 7, 2021, well past the deadline for comments set in the September 9 order. Joint petition, p. 2. Petitioners argue that this document contained changes that were proposed for the first time, and that were

ultimately adopted by the Commission. Petitioners complain that they were not given the opportunity to respond to Sunrun's untimely comments. They contend that the comments should not have been considered, or "other interested parties should have been afforded a formal opportunity to comment on Sunrun's suggested changes." *Id.*, p. 3. Petitioners assert that consideration of the untimely comments violated the September 9 order and deprived the other commenters of their due process rights. Petitioners contend that the "best remedy for the procedural Due Process issue is to remove all of Sunrun's late-filed comments from the MIXDG rules." *Id.*, p. 5.

Petitioners assert a second due process concern regarding the substance of the MIXDG rules rather than the procedure. They argue that the dispute resolution process provided for in R 460.904, 460.906, and 460.908 is overly complex, and relies on the Staff to play multiple roles, including as potential mediator, assistant to the decisionmaker, and party to the complaint proceeding.

Petitioners then turn to the safety and reliability concerns which they claim arise from the MIXDG rules. Citing the references to reliability and safety in MCL 460.1173 (regarding DG) and MCL 460.10e(3) (regarding merchant plants), they argue that "Michigan law reserves to electric utilities the right to test and approve all proposed interconnections to the electrical systems." *Id.*, p. 7. Stating their concerns with R 460.980 (Capacity of the DER [distributed energy resource]) (Rule 980) and R 460.920 (Electric utility interconnection procedures) (Rule 920), they continue:

> One example of such a concern involves a project pushed through the rapid evaluation process contemplated by the proposed rules because it is export limited. At the export-limited amount of generation associated with the project it might be argued under the proposed rules that no electric utility distribution system upgrades are required because, even though maximum site load and/or the maximum potential nameplate capability of the generation would dangerously

> overload (or affect the voltage of) the electric utility distribution system and cause damage to electric utility and customer equipment, the export has been limited to some amount of generation less than the nameplate capability. However, this ignores the reality that, at any point the site generation or load is turned off (for economics, repair, intentionally, or inadvertently), 100% of the maximum load or generation will instantaneously hit the electric utility distribution system. Note that the Commission's proposed fast track process in R 460.946, does include a provision to perform a facilities study, however it is not clear how the scope of the facilities study would be determined or funded. Because the proposed rules prohibit proper study and evaluation of such an export limited project under both the fast and non-export tracks, the electric utility cannot consider the impacts of this scenario and require proper electrical precautions. The proposed rules effectively allow 32 seconds of dangerous operation until the project needs to come back into compliance. This short amount of time can cause a transformer to fail catastrophically (potentially including a fire) and seriously impact power quality to adjacent customers (potentially including appliance failures).

Id., p. 8. Petitioners argue that the Commission has not been granted clear and unmistakable statutory authority to promulgate rules that could have this result. They assert that allowing input from third parties in the proceeding wherein the Commission approves interconnection procedures under Rule 920 raises due process concerns.

Petitioners express several concerns with definitions added to the MIXDG rules, stating that:

> the MIXDG rules have newly-added definitions of "Export capacity" (R 460.901a(bb)), "Generating capacity" (R 460.901a(gg)), "Inadvertent export" (R 460.901a(pp), "Limited export" (R 460.901b(k)), "Ongoing operating capacity" (R 960.901b(x)), and "Power control system" (R 460.901b(BB)); and changed the definition of "Material modification," including replacing "nameplate rating" with "generating capacity," and adding that: "Replacing a component with another component that has near-identical characteristics does not constitute a material modification." R 460.901b(n). This presents [petitioners] with a virtually infinite number of illegal, unsafe, and unreliable configurations with no apparent recourse.

Id., p. 13. Finally, they express safety related concerns with the maximum fast track eligibility set in R 460.944 (Fast track applicability).

Turning to the issue of cost recovery, petitioners seek rehearing and revision of the MIXDG rules because, they contend, the rules as currently written usurp petitioners' property rights and

management authority. They express particular concern with R 460.936 as well as certain definitions in R 460.901a concerning DERs, which, they contend, eliminate petitioners' property rights in utility equipment. Petitioners assert that their private property is being taken for public use without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. They express concern with the rules governing fees, which, they argue, do not provide the utility with sufficient compensation and they contend that allowing the utility to seek a waiver is an inadequate and piecemeal solution.

Responses to the Joint Petition

MECA states that it shares petitioners' concern regarding the "timing and process" that resulted in the March 17 order. MECA's answer, p. 1. MECA indicates that it developed its collective proposed interconnection procedures and forms in reliance on the draft rules attached to the September 9 order. Like petitioners, MECA states that mere certification of certain devices does not provide sufficient assurance of safety and reliability for the utilities and cooperatives and expresses concern about the review process. MECA requests that the Commission reopen the rulemaking process for further input.

I&M's response is substantially similar to MECA's. Regarding an export limited project that passes through the fast track process, both I&M and MECA state that:

> [t]he reality is that, at any point this generation or load is turned off (for economics, repair, intentionally, or inadvertently), 100% of the maximum load or generation will instantaneously hit the electric utility distribution system. As described in the Petition, a utility's opportunity to manage the safety concerns are handicapped under the current proposed ruleset because the proposed rules prohibit proper study and evaluation of such an export limited project under both the fast and non-export tracks.

I&M's answer, p. 2; MECA's answer, p. 2. I&M also expresses concern that R 460.911 requires a utility to allow any DER to interconnect, and R 460.988 obligates the utility to obtain easements. I&M requests that the Commission reopen the rulemaking process for further input.

MEGA states that it supports the joint petition and agrees with petitioners' claims of error. MEGA's answer, p. 2.

The CEOs state that the appropriate remedy for petitioners' complaint is to reopen the comment period and not to change the rules as petitioners suggest. The CEOs argue that they proposed the identical definition for "limited export" in their November 1, 2021 comments as was proposed by Sunrun in its untimely redlined version. CEOs' answer, p. 3. The CEOs note that in their comments they proposed that the Commission include "specific standards for the utilities to follow as detailed in the 2019 Model Interconnection Rules from IREC [Interstate Renewable Energy Council]," and they note that these model rules contain the same definitions as appear in the approved rule version. CEOs' answer, p. 3, quoting CEOs' comments[3] and citing the March 17 order, p. 7. Thus, they argue:

> the Commission adopted in the MIXDG rule the IREC definitions suggested by the CEO in its timely-filed comments. To remove this definition because Sunrun filed those same comments past deadline – albeit as specific redlines rather than general comments – would violate the CEO's due process rights.

CEOs' answer, p. 3. The CEOs state that the IREC model rules have been adopted by 10 states and are in the process of adoption in four others. They note that use of the IREC model rules was also suggested by the Michigan Energy Innovation Business Council (MEIBC). *See,* March 17 order, p. 29. For these reasons, the CEOs posit that it is unlikely that petitioners were prejudiced by the March 17 order; however, they do not object to reopening the comment period.

[3] The CEOs' comments are unpaginated, but the quote appears on natural p. 2.

Discussion

Rule 437 provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

The Commission observes that, with respect to the changes made to Rule 980 regarding limited export and non-exporting generating facilities, MEIBC made the same comment as Sunrun and presented the same language in its associated redlined draft rule version (both timely filed) but suggested that it be placed between R 460.920 and R 460.922 rather than in Rule 980. *See*, filing #U-20890-0009, pp. 14-15; March 17 order, pp. 4-5. While MEIBC did not include the associated definitions that appear in R 460.901a and R 460.901b in its redlined rule version, both MEIBC and the CEOs advocated use of the 2019 Model Interconnection Procedures published by IREC (a publicly available document), which contains these same definitions. March 17 order, pp. 7-8; CEOs' comments, p. 2; MEIBC's comments, p. 3. Additionally, Sunrun made timely comments seeking this same change but without a redlined version of the rules. March 17 order, p. 8.

Nevertheless, the Commission finds that petitioners' request for rehearing should be granted. The Commission recognizes that when changes are made to rule language in response to public comments, those changes need not be based on actual suggested rule language; they are most often based on agreement with the objective of the comment itself. Redlined versions of the

draft rules are not required from commenters. However, the Commission acknowledges that Sunrun's redlined rule version was untimely and thus finds that consideration of that filing was in error. On that basis, the Commission grants rehearing and will provide members of the public with a second opportunity to comment on the proposed MIXDG rules.[4]

In order to provide a second public hearing, the Commission must seek approval of a second NOPH from MOAHR and LSB. This requires that the history of MOAHR #2020-96 in the ARS be cleared. The Commission is informed by MOAHR that this cannot occur earlier than May 11, 2022, and thus a new NOPH could not be submitted for approval before that date, too late to allow for its approval by the other agencies and issuance with this order. Thus, assuming that a new NOPH is approved by MOAHR and LSB no later than May 25, 2022, the Commission intends to issue an order on May 26, 2022, providing information on how to participate in a second public hearing and provide written comments. Having granted rehearing on the basis of petitioners' due process arguments, the Commission does not reach petitioners' remaining arguments, which would be appropriate for inclusion in future comments.

THEREFORE, IT IS ORDERED that the petition for rehearing filed by Consumers Energy Company and DTE Electric Company is granted and a second opportunity for public comment on the proposed Interconnection and Distributed Generation Standards will be provided.

The Commission reserves jurisdiction and may issue further orders as necessary.

[4] Petitioners suggest that the appropriate remedy is to revise the MIXDG rules. The Commission finds that further revisions should not be made in the absence of providing the public with another opportunity to submit comments.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Daniel C. Scripps, Chair

Tremaine L. Phillips, Commissioner

Katherine L. Peretick, Commissioner

By its action of May 12, 2022.

Lisa Felice, Executive Secretary

PROOF OF SERVICE

STATE OF MICHIGAN)

Case No. U-20890

County of Ingham)

Brianna Brown being duly sworn, deposes and says that on May 12, 2022 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).

Brianna Brown

Subscribed and sworn to before me
this 12th day of May 2022.

Angela P. Sanderson
Notary Public, Shiawassee County, Michigan
As acting in Eaton County
My Commission Expires: May 21, 2024

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