STATE OF VERMONT
BEFORE THE
PUBLIC UTILITY COMMISSION

Investigation to review the avoided costs that serve as prices for the standard-offer program in 2019	**)** **)** **)**	**Case No. 18-2820-INV**

COMMENTS OF ALLCO RENEWABLE ENERGY LIMITED AND PLH LLC

"*What we've got here is failure to communicate*."

~Cool Hand Luke

Despite the straight-forward requirements of the 2019 standard-offer request for proposals, many of the bids simply miss the mark. Instead of complying with the specifications of the RFP, many bidders offer up their own work-arounds and deviations from the rules. In response to the Commission's order of May 28, 2019, Allco Renewable Energy Limited and PLH LLC (collectively, "Allco") submit the following comments.

"Public bidders should regard the specifications as requiring the submission of bids on the terms specified …Courts should not casually transform the mandatory requirement in [bid] specifications . . . into a polite request."[1] The Commission has agreed. *See, e.g., Order Re:2017 Standard-Offer Award Group*, Docket 8817, *Investigation Into Programmatic Adjustments To The Standard-Offer Program*, October 20, 2017, at 7 ("deviating from the announced rules of the RFP would prejudice participants who followed those rules"); *id*. at 6 ("the effectiveness of the standard-offer program relies on the clear standards established by the RFP process and [] skirting these requirements undermines that integrity.") The lowest responsible bidder *in compliance with*

[1] *Meadowbrook Carting Co. v. Island Heights Borough*, 138 N.J. 307, 324, 650 A.2d 748 (N.J. 1994) (citation omitted).

the bidding specifications and procedures has a legitimate expectation in being awarded the contract.[2]

Failure to comply with the *specifications and procedures* expressly *requires* rejection of the proposal under section 3.2 of the RFP, which states that: "Proposals must satisfy the mandatory requirements outlined in this section [i.e., section 3.2] to be considered further in the evaluation process. *Proposals that fail to satisfy these mandatory requirements shall be rejected*." (emphasis added.) The express provision of section 3.2 of the RFP requiring such rejection also excludes the failure to comply as potentially being a "minor deficiency" capable of waiver. Section 3.2 imposes a "nondiscretionary duty" on the Facilitator to reject such proposals. *Cf. Wool v. Menard*, 2018 VT 23, P7 (Vt. 2018).[3]

I. Vermont Solar DG, St. Albans Solar DG and Vergennes Solar DG All Fail The Clear, Non-Waivable Requirements To Establish Site Control.

The 2019 RFP states:

> 3.1 Mandatory Requirements
>
> Proposals must satisfy the mandatory requirements outlined in this section to be considered further in the evaluation process. *Proposals that fail to satisfy these mandatory requirements shall be rejected.*
>
> (emphasis added.)
> ***
> 3.1.3 Site Control
>
> The proponent must demonstrate project site control *in favor of the proponent's legal company name* by providing evidence of *one of the following*: (1) fee simple title to such real property; (2) valid written leasehold or easement interest for such real property; (3) a legally enforceable written option with all terms stipulated including "option price" and "option term," unconditionally exercisable by the

[2] *See, e.g., Schwandt Sanitation v. City of Paynesville*, 423 N.W.2d 59, 66 (Minn. App. 1988); *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 585 F. Supp. 120, 126 (E.D. Ark. 1984).

[3] Allco concurs with the Facilitator's rejection of the Post Road Solar 1, Post Road Solar 2 and Silk Road Solar projects.

> proponent or its assignee, to purchase or lease such real property or hold an easement for such property including the underlying purchase, lease, or easement agreement; or (4) a duly executed contract for the purchase and sale of such real property. *These are the only permissible forms of site control*.
>
> (emphasis added).

The bid forms also expressly call out that site control documentation *must be in the name of the project proponent*. Vermont Solar DG, St. Albans Solar DG and Vergennes Solar DG did not satisfy the site control requirements, thus failing the section 3.2 requirements and must be rejected. The failure of site control for all three is the same— the site control documents for those bids do not give site control *to the project proponent*—a clear and nonwaivable requirement of the RFP. Rather those bids seek to establish site control through an internal house of cards.

The following excerpts from the three bids plainly show those bids failed the mandatory site control requirement and must be rejected.

Vergennes Solar.

PROPONENT LEGAL COMPANY NAME
NextEra Energy Resources Development, LLC

LEGAL ENTITY POSSESSING SITE CONTROL
Site control must be to "Proponent Legal Company Name" listed under Section II above.
Boulevard Associates, LLC

Vermont Solar DG.

PROPONENT LEGAL COMPANY NAME
NextEra Energy Resources Development, LLC

LEGAL ENTITY POSSESSING SITE CONTROL
Site control must be to "Proponent Legal Company Name" listed under Section II above.
Boulevard Associates, LLC

St. Albans Solar.

PROPONENT LEGAL COMPANY NAME NextEra Energy Resources Development, LLC
LEGAL ENTITY POSSESSING SITE CONTROL *Site control must be to "Proponent Legal Company Name" listed under Section II above.* Boulevard Associates, LLC

The executive summary submitted with each bid acknowledges that each bid does not comply with the RFP's site control requirements. *See*, Executive Summary at 2 ("We have also included a secretary's certificate to explain the subsidiary's relationship to our parent corporation, NEER and the subsidiary that controls the project land, Boulevard Associates, LLC.") As the bid admits, that subsidiary, not the project proponent, has site control.

Site control for each of those bids is in a company called Boulevard Associates LLC. The proponent of each bid is a company called NextEra Energy Resources Development, LLC. Both of these separate corporate entities are allegedly indirectly wholly-owned by a third entity—NextEra Energy Resources LLC.

Those bids seek to improperly create a fifth category of qualifying site control—corporate relationship. The Vergennes, St. Albans and Vermont Solar DG not only disregard the mandatory requirements for the RFP, but ask the Facilitator to trace site control through a maze of what may be hundreds, if not thousands, of corporate entities.

The entire purpose of the four options allowed for site control in the RFP is to establish legally binding control of the site of the project *in the legal entity that is the project proponent*, not some other entity related or otherwise. Here, NextEra's corporate relationship gambit fails to meet

that requirement. The project proponent has *no legal rights to the site of the project*. The Commission has previously rejected bids where the site control documentation was in a name different than the proponent. *See, Order Re:2017 Standard-Offer Award Group*, Docket 8817, *Investigation Into Programmatic Adjustments To The Standard-Offer Program*, October 20, 2017, at 11 (rejecting a bid by VT Fresh Energy because the site control documents "do not state the legal company name of the proponent" but rather list "a different company.")

Furthermore, the Commission has consistently rejected bids that failed the express requirements to establish site control under the RFP, and it must do so here. *See, e.g., id.* at 6. ("The Commission agrees with those commenters who, in addressing the site control requirements of the RFP, argue that the integrity and effectiveness of the standard-offer program relies on the clear standards established by the RFP process and that skirting these requirements undermines that integrity.") Here, none of the Vergennes, St. Albans or Vermont Solar DG complied with the bidding specifications and procedures. The bidders which did comply have a legitimate expectation of being awarded a contract in price order.[4]

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[4] The St. Albans Solar project fails the site control for another reason. The Commission has made clear that "Site control means proof of dominion over real property to the extent necessary to construct the Project…"[4] The site control requirement ensures that the proponent has control over all necessary land rights in order to guarantee that the project can be constructed. The project interconnection requires the rights to use Field Drive under the Field Drive Use Agreement between the State of Vermont Agency of Transportation and the owner dated January 13, 1999. But that Use Agreement has two limitations that prohibit the use for the solar project. First, by its express terms the Use Agreement is limited to agricultural purposes. *See* paragraphs 1 and 6 of the Use Agreement. A standard-offer solar project is not an agricultural use. Second, the rights to the Field Drive Use Agreement cannot be leased and cannot be assigned *except to a successor in title*. *See* paragraph 8 of the Use Agreement. Thus the St. Albans Solar project cannot legally obtain the use of Field Drive because it would not hold title to the land. As a result, it does not possess the rights to build and operate the project.

Similarly, Vermont Solar DG fails the site control for that same additional reason. The easement that provides access to the site is limited to the "transportation of farm equipment and products" which excludes solar equipment necessary to build the project. *See*, Easement Deed (page 35 of the bid). As a result, it does not possess the rights to build and operate the project.

II. Sand Hill Solar Failed The Clear, Non-Waivable Requirements To Establish Site Control.

Like the NextEra bids, the Sand Hill Solar bid seeks to create a new category for site control—one that involves the project proponent having *no legal rights* to the site. Sand Hill Solar's bid admits there is an issue with site control, but tries to explain it away on the purported basis that complying with the RFP's site control requirements would have been inconvenient for Robert and Barbara Levine. The bid includes a letter from the project proponent explaining why it failed to meet one of the express site control requirements in the RFP. The letter is entitled "Relationship between Robert and Barbara Revocable Trust and Sand Hill Road, LLC"—which is a smaller scale variation of the NextEra maze of alleged corporate relationships.

The letter then goes on to explain how the proffered option agreement does not give *the proponent* an option over anything. The option agreement is an option with a revocable trust which purports to grant an option to cause a lease agreement to be entered into with an entity that has zero legal interest in the site. The option is therefore illusory. It does not provide *the project proponent* with a binding option over the proposed project site. It merely provides an option to enter a lease with an entity that has *no legal interest* in the project site.

The bid puts forth the following purported justification for the lack of site control:

> The Option is in the name of the Trust, however the underlying lease agreement is in the name of SHR. The reason for this difference is due to the desire of Encore to limit the financial burden to Mr. and Mrs. Levine, that would otherwise be incurred by transferring the land from the Trust to SHR, until the project has been awarded under the Standard Offer Program.

The proponent has put the cart before the horse. The project proponent seeks an award of a contract before it arranges proper site control. Moreover, the proponent's financial burden explanation does not pass muster. Encore knows how to deal with assignments of control for purposes of the RFP (without title transfers) because it has done so with respect to the provider

block projects bid into the 2019 RFP. No property transfer would have been required to the SHR LLC. But for some reason the Revocable Trust did not want to put the lease in its name. The reasons for that refusal are irrelevant to this RFP. The only thing relevant is that the express site control requirements have not been met.[5]

Here, Sand Hill Solar did not comply with the bidding specifications and procedures. The bidders which did comply have a legitimate expectation of being awarded a contract in price order.[6]

III. Lemay Solar Failed The Clear, Non-Waivable Requirements To Establish Site Control.

The Lemay Solar project submitted a map that identifies rights-of way needed for interconnection. It identifies an interconnection point on a separate parcel referred to as parcel 2, but the site control provided only relates to parcel 1—the site of solar array. The Lemay Solar project must be rejected for the same reasons the Power Factor Solar project was disqualified in 2018—failure to meet the site control requirements showing the proponent has control over all

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[5] Failure to meet the express site control requirements is not a minor deficiency. The 2019 RFP has relatively few requirements. The fundamental requirement is meeting *one of the four* specific site control requirements. The failure to provide one of the four ways to show site control is a material and non-waivable defect. *Thigpen Const. v. Parish of Jefferson*, 560 So. 2d 947 (La. App. 1990) (nonfulfillment of a formal bid requirement could not be waived even if the request for proposals reserved the right to waive technicalities and informalities.) *Accord, AAB Elec., Inc. v. Stevenson Pub. Sch. Dist.,* 5 Wash. App. 887, 889, 491 P.2d 684 (Wash. App. 1971) ("[A] substantial requirement" is not "a mere technicality which could be waived."); *Walsh/II in One Joint Venture III v. Metro. Water Reclamation Dist*., 389 Ill. App. 3d 138, 156 (Ill. App. 2009) ("a material variance … render[s] [the] bid nonresponsive [.] To hold otherwise could, with all due certainty, negatively affect the competitive bidding process by resulting in protracted litigation about issues such as good faith, intent and inadvertence.")

[6] Sand Hill Solar's purported site control fails for another reason. The option is signed only by one trustee of the revocable trust. For the transfer of real property rights by a revocable trust the granting instrument needs to be signed by both trustees and the settlors. The same is true for a binding contract. The Levines are fully aware of that requirement as the deed attached as **Exhibit 1** from public records show. In that deed the trustees and the settlors needed to execute the instrument. That was not done here. When property is held jointly by two persons whether as joint tenants or in tenants in common, both parties must execute a contract purporting to transfer an interest in real property. The same requirements apply with respect to a revocable trust.

necessary land rights in order to guarantee that the project can be constructed. The site control requirement is contained in RFP Section 3.2 Mandatory Requirements, which states: "Proposals must satisfy the mandatory requirements outlined in this section to be considered further in the evaluation process. Proposals that fail to satisfy these mandatory requirements shall be rejected." The Commission has made clear that "Site control means proof of dominion over real property to the extent necessary to construct the Project…"[7] The site control requirement ensures that the proponent has control over all necessary land rights in order to guarantee that the project can be constructed. Although Lemay Solar provided evidence of a purchase and sale agreement, neither the purchase and sale agreement nor the map provides proof of dominion over real property to the extent necessary to construct the project. Lemay Solar proposes a path of interconnection over land for which the proponent does not document site control. The interconnection path runs through a separate parcel, which according to land records is owned by Leon and Jean Adams.

[7] *Second Order Re: Implementation Issues*, Docket No. 7533, Order of 10/28/09 at 2.

The point of interconnection is located on private property for which the Lemay Solar project does not have site control or an easement. That parcel is located outside of the premises subject to the purchase and sale agreement. The purchase and sale agreement does not evidence site control through the parcel identified on the map as necessary for interconnection. Without demonstrating the requisite site control for all of the necessary land, there is no guarantee that the Lemay Solar project can be built as proposed. Therefore, the Lemay Solar documentation of site control does not satisfy section 3.2.2 of the RFP, and in accordance with Commission precedent, the Lemay Solar project must be rejected.

IV. Windsor Solar Failed The Map Requirements And The Clear, Non-Waivable Requirements To Establish Site Control.

The Windsor Solar project submitted an option to purchase agreement. The Windsor option agreement gives the optionee the right to buy a portion of the property, i.e., between 28 and 40 acres. *See*, Recital B. The property itself is one parcel of 53.91 acres. *See*, Recital A. When an option to purchase agreement is used as the basis of site control, section 3.1.3 requires the option to purchase constitute:

> a legally enforceable written option with all terms stipulated including "option price" and "option term," ***unconditionally exercisable*** by the proponent or its assignee, to purchase … such real property …including the underlying purchase … agreement
>
> (emphasis added).

The Windsor solar option to purchase is not "unconditionally exercisable by the proponent" because it is "conditioned" on the requirement of a subdivision. *See*, Windsor option at sec. 3.1(h). In other words, before the option can be exercised, there would need to be a separate proceeding to determine exactly what portion of the parcel the Windsor solar project had a right to. It is not until that later determination is made that the Windsor solar project knows that what, if any, portion

of the parcel it might have site control over. As of the time of the submission of its bid, the Windsor solar project's site control is both conditional and undefined as to the land covered. Making matters worse, the seller has no obligation to obtain a subdivision, or agree to any terms that might be imposed in connection with a subdivision approval. As a result, the seller holds an ongoing veto power, which also results in the project failing the "unconditionally exercisable" requirement. The seller could simply decline to agree to conditions that might be imposed in order to obtain the subdivision, making the option unenforceable and illusory.[8] In addition, section 3.1(h) of the option agreement states that "[t]he subdivision shall be generally as shown on Exhibit A" but there is no clearly shown subdivision on Exhibit A. That deficiency, in turn, causes the project to fail the map requirements of the RFP because it is impossible to tell where the project's purported site control exists.

The Windsor Solar project does not meet the site control for another reason. The option does not specify the exact portion of the land to be purchased. In order to be an enforceable contract when the contract is, as here, for *less* than an entire parcel, the boundaries must be clear and not approximate in order for the contract to be enforceable. *Evarts v. Forte*, 135 Vt. 306, 310, 376 A.2d 766, 769 (1977) ("where only a portion of a larger tract of land owned by the seller is to be conveyed … instruments which do not definitely separate the portion to be sold from the tract remaining are insufficient.… Here, the sales agreement was clearly deficient in this regard. It

[8] Section 1.1 of the Subdivision Regulations for the Town of Windsor, VT states: "No subdivision of land shall be made and no land in any proposed subdivision shall be sold, transferred or leased until a final plat prepared in accordance with these regulations has been approved by the Development Review Board and recorded in the Windsor Land Records." Section 2.1 of the Windsor regulations also prohibits "the issuance of any permit for any land development involving land to be subdivided" prior to the completion of the subdivision process and the recordation of the map.

[was] never clear where the boundaries would be. There were, at best, only approximate boundaries, and as such they did not suffice to identify one section of land to the exclusion of the remainder.") As a result, the Windsor option is not legally enforceable for that additional reason, thus failing the site control and map requirements on multiple grounds.

V. The Franklin Foods, Cabot and Purpose Energy Proposals Do Not Explain How They Meet The FERC's 75% Test.

30 V.S.A. § 8005a(b) provides that in order to be eligible for a standard offer contract, "a plant must constitute a qualifying small power production facility under 16 U.S.C. § 796(17)(C)." 16 U.S.C. § 796(17)(C) states: "'qualifying small power production facility' means a small power production facility that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe." The fuel use requirements are set forth in 18 C.F.R. §292.204(b):

> *(b) Fuel use.* (1)(i) The primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.[9]

The plant must meet the Federal Energy Regulatory Commission's 75% rule (based on energy input, not by volume) in order to be a qualifying facility. The Franklin Foods, Cabot and Purpose Energy proposals do not provide sufficient information to determine whether or not the 75% rule is met.

VI. The Franklin Foods, Cabot and Purpose Energy Proposals Do Not Explain How They Are Not *Biomass Power Using Methane Derived From An Agricultural Operation.*

30 V.S.A. §8005a(c)(2) includes a technology allocation for "biomass power using a fuel other than methane derived from an agricultural operation or landfill." Thus, the plain language

[9] Under 18 C.F.R. § 292.202, biomass means any organic material not derived from fossil fuels.

of the statute excludes *biomass power using methane derived from an agricultural operation.* But that is exactly what the Franklin Foods, Cabot and Purpose Energy Proposals appear they may be—biomass power using methane *derived from an agricultural operation.* There is no definition of an agricultural operation in 30 V.S.A. § 8005a. But 10 V.S.A. § 374b(1) defines an "Agricultural facility" as "land and rights in land, buildings, structures, machinery, and equipment that is used for, or will be used for producing, processing, preparing, packaging, storing, distributing, marketing, or transporting agricultural or forest products that have been primarily produced in this State." Operations of an agricultural facility logically is an agricultural operation. The Franklin Foods, Cabot and Purpose Energy proposals appear to be, *in whole or in part*, operations from an agricultural facility. At the very least, there is insufficient information in the bids to conclude that they are not biomass power using methane *derived from an agricultural operation.* They all involve processing agricultural products in an agricultural facility at least in part.[10] As such these projects have not shown that they fall within the technology allocation. Assuming they do not, they should qualify for a standard offer contract under 30 V.S.A. § 8005a(d)(1) or (d)(2).

VII. The Cross Wind Projects Do Not Meet The Site Control Requirements.

The Cross Wind projects contain a purchase and sale agreement with three purchasers—Peter Kowanko, Kimberly Kowanko and Green Power Farms LLC. The project proponent is Green Power Farms LLC. Green Power Farms LLC did not sign the purchase and sale agreement.

[10] The waste from processing of these products on a farm would without question be biomass power using methane derived from an agricultural operation. It would violate the Common Benefits Clause if a farmer was subject to a much lower price cap (and conversely a non-farmer given a higher price) based upon the happenstance that the operation is on a farm as opposed to across the street.

As a result, the project proponent does not have site control. *See*, *Order re: 2017 Standard-Offer Award Group*, Docket 8817, October 20, 2017, at 7-11 (disqualifying Fundamental Energy proposals for failure to submit fully executed site control documents.)

VIII. The Howrigan, Way Out, Merck Forest, Hespos, Auger Heights A, Auger Heights B and Pennock Hill Wind Projects Exceed The 100kW Project Size.

The Howrigan, Way Out, Merck Forest, Hespos, Auger Heights A, Auger Heights B and Pennock Hill wind projects all state that they consist of 4 Star Wind turbines, model STAR72-6. The maps accompanying all those bids state that each wind turbine is rated at 25kW nameplate. However, in connection with the 2018 Standard offer RFP, Star Wind Turbines LLC ("Star") represented that the STAR72-6 model was rated at 30kW each. In addition, the Star website states that the STAR72-6 model is 30kW. *See also,* **Exhibit 2.** http://www.starwindturbines.com/star726.html (last visited May 31, 2019). More recently, on May 23, 2019, Star filed an advance notice of a CPG application for a three turbine Tomlinson wind project using the STAR72-6 wind turbine. Star stated the nameplate was 30kW. *See*, **Exhibit 3.** The power curve for the STAR72-6 model shows that it has a rated power of 45kW. *See*, **Exhibit 4**. Rated power of a small wind turbine is how the nameplate of a small wind turbine is determined as provided by industry standards. Here, that would be 45kW. *See*, IRS Notice 2015-4, section 3.01(1), available at: https://www.irs.gov/pub/irs-drop/n-15-04.pdf, *and AWEA Small Wind Turbine Performance and Safety Standard*, section 1.5.2.1, available at: https://smallwindcertification.org/wp-content/uploads/2011/05/AWEA_2009-Small_Turbine_Standard.pdf.

Four wind turbines at 45kW each is 180kW in total, which puts each of the bids over the 100kW limit. As a result, each should be rejected. Moreover, the legitimacy of these projects is questionable. The Commission has previously determined that "[w]hen entering the queue, the

plant owner must have a legitimate project to be developed." *See*, *Request of Triland Partners LP to amend standard offer contract*, Docket No. 8801, Order of 8/29/16 at 2 (citing *Investigation Re: Establishment of a Standard Offer Program*, Docket No. 7533, Order of 10/1/09 at 7). *See also, Investigation Re: Establishment of a Standard Offer Program,* Docket No. 7533, Order of 7/11/11, 2011 Vt. PUC LEXIS 425 at 22 ("The standard-offer program was designed so that legitimate projects could enter the queue, not so developers could create a placeholder for a theoretical project.")

In dockets 8786 and 8787, Star applied for a CPG for the Tomlinson Wind A & B projects. The Commission issued an order stating that the applications were deficient. The order requested additional information to show that the turbines met the Commission's sound standards, and the order also rejected the project site plan. *In Re Application of Star Wind Turbines LLC*, dockets 8786 and 8787, *Order Re: Deficient Application* (August 5, 2016) at 2 (a site plan map "must be sufficiently clear to understand the potential impacts of a project.) Star filed a response on September 2, 2016, in response to which the Commission issued an order on September 29, 2016, stating that the applications were still deficient, again noting the absence of support that the projects met the sound requirements. Star did not respond. On February 1, 2018, the Commission dismissed the petitions.

IX. <u>The Amount Available to the Provider Block Is 2 MWs, Not 2.574MWs</u>.

The provider block has a hard limit of a specified percentage of the 10MW annual increase specified on 30 V.S.A. §8005a for 2019.[11] Unused amounts from prior year's provider blocks,

[11] *See*, 30 V.S.A. §8005a(c)(1)(B)(i) ("The portion of the annual increase reserved for the provider block shall be 10 percent for the three years commencing April 1, 2013, 15 percent for the three years commencing April 1, 2016, and 20 percent commencing April 1, 2019.")

such as the unused amount from the 2018 RFP, cannot (even in part) be allocated to the provider block under the plain language of the statute. *See,* 30 V.S.A. §8005a(c)(1)(B)(ii) ("If the provider block for a given year is not fully subscribed, any unsubscribed capacity within that block shall …be made available to new standard offer plants proposed by persons who are not providers.")

The same is true with respect to drop-outs from the developer group. 30 V.S.A. §8005a(j) states:

> Termination; reallocation. In the event a proposed plant accepting a standard offer fails to meet the requirements of the Program in a timely manner, the plant's standard offer contract shall terminate, and any capacity reserved for the plant within the Program shall be reallocated to one or more eligible plants.[12]

The misapplication of the language of the statute involving the term "annual increase" appears to be the culprit. The annual increase is defined in 8005a(c)(1): "Annually commencing April 1, 2013, the Commission shall increase the cumulative plant capacity of the Standard Offer Program (*the annual increase*) until the 127.5-MW cumulative plant capacity of this subsection is reached … The amount of the annual increase shall be … 10 MW commencing April 1, 2019." (emphasis added.)

Dropouts from prior allocated capacity and unused capacity from the provider block are not an increase in program capacity but a reallocation, in this case reallocations that statutorily must be to new standard offer plants proposed by persons who are not providers in the case of unused provider block amounts from prior years, and to one or more non-provider eligible plants in the case of drop-outs.

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[12] Even if drop-outs were considered an under-subscription (which they should not), 30 V.S.A. §8005a(c)(1)(B)(iii)(I) makes it clear that the "unsubscribed capacity within that block shall be … made available to new standard offer plants proposed by persons who are not providers."

The confusion appears to be that the Facilitator did more than just sum total those amounts plus the annual increase in order to determine the amount of capacity available in the RFP, but took the extra step of considering those amounts as part of the defined term "annual increase" as opposed to just an addition to the capacity available through the RFP. While that erroneous interpretation is easy to understand with respect to the unused provider block amount from prior years because of the reference to "annual increase" in section 8005a(c)(1)(B)(ii), there is no such reference in section 8005a(j).

The end result here is that the provider block was capped at 2.0MW, and each project bid exceeded the 2.0MW size. Thus, each project is ineligible. *See, Order, Investigation into programmatic adjustments to the standard-offer program for 2018*, Case No. 17-3935-INV (March 16, 2018) at 28 ("the annual capacity cap in the Provider Block serve[s] as the hard cap on the size of an eligible project, rather than the 2.2 MW standard-offer project cap.")

X. The VPPSA Bids Violate The Sherman Act And Are Therefore Void.

The VPPSA bids are submitted "on behalf of its Municipal Members." Rather than submitting a bid on its own behalf, each municipal member has joined together to eliminate competition, engaging in conduct that is a *per se* violation of the Sherman Act—horizontal price-fixing and market allocation.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Chief among such illegal arrangements are price-fixing agreements: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S. Ct. 811 (1940). "Price-fixing agreements between two

or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are per se unlawful." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5, 126 S. Ct. 1276 (2006); *see Knevelbaard Dairies v. Kraft Foods, Inc*., 232 F.3d 979, 986 (9th Cir. 2000) ("Foremost in the category of per se violations is horizontal price-fixing among competitors.") Put simply, "collusion" among competitors is "the supreme evil of antitrust." *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 408, 124 S. Ct. 872 (2004). Here, the municipal members of VPPSA, all of whom are independent economic actors, colluded to set the price for the provider block projects by joining together to support bids proposal by their agent, VPPSA, a *per se* antitrust violation.

XI. The Provider Block Violates The Sherman Act.

The principles of conflict preemption are applied to determine whether the Sherman Act preempts a state or local law pursuant to the Supremacy Clause of the United States Constitution. "As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state [or local] regulatory schemes." *Rice v. Norman Williams Co*., 458 U.S. 654, 659, 102 S. Ct. 3294 (1982). A state or local law, "when considered in the abstract, may be condemned under the antitrust laws," and thus preempted, "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *Id*. at 661. "Such condemnation will follow under [section] 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation." *Id*. However, "[i]f the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract." *Id*. Unlike the categorical analysis under the *per se* rule of illegality, "[a]nalysis under the rule of reason requires

an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws." *Id*. Here, the provider block is preempted facially by federal antitrust law because it authorizes a *per se* violation of section 1 of the Sherman Act—municipal electricity providers collaborating to fix prices, fix market allocation and avoid competition.

The provider block is also invalid under the rule of reason. The escape hatch from competition for the provider block is not "in the public interest. Neither … [is there] any benefit that such a right would … confer on consumers of electricity or on society as a whole under current conditions." *Miso Transmission Owners v. FERC*, 819 F.3d 329, 334 (7th Cir. 2016). The provider block is an anti-competitive right-of-first refusal. If the provider block is not subscribed then that capacity goes to the price competitive block.

As stated above, the provider block is facially invalid because it sanctions a *per se* violation of the Sherman Act—the collusion among the municipal members of VPPSA engaging in horizontal price fixing and market allocation. The provider block also fails the rule of reason because it has no redeeming feature—it is purely an escape from competition for incumbent utilities.

XII. The Provider Block and The PPAs Thereunder Violate Sections 205 and 206 Of The Federal Power Act.

The provider block and the PPAs thereunder violate sections 205 and 206 the Federal Power Act. The provider block's function is to "restrict the universe of competing projects," which in turn, may and does cause the rates to become higher than they otherwise would be absent the exemption from competition. That results in the rates being unjust and unreasonable or unduly discriminatory or preferential. *Order 1000*, 136 FERC ¶ 61,051 (2011), P283. The provider block is a "practice" affecting jurisdictional rates, bringing it within Section 206(a). This

practice "deprive[s] customers of the benefits of competition …and associated potential savings...." *Id*. at P284.

The provider block discriminates against non-incumbent utility developers. This discrimination is anticompetitive. The Federal Power Act's "public interest" phrase reflects "an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." *Id*. at P285 (quoting *Otter Tail Power Co. v. United States*, 410 U.S. 366 at 374 (1973)). The FERC under the Federal Power Act "has a responsibility to consider anticompetitive practices and to eliminate barriers to competition." *Id*. at P285 (citing *Gulf States Utils. Co*., 5 FERC P61,066 at 61,098 (1978)).

XIII. As-Applied Here, The Provider Block Set-Aside Is Unconstitutional.

The Common Benefits Clause of the Vermont Constitution, which guarantees equal protection of the laws, in pertinent part, reads,

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community. . .
>
> Vt. Const., ch. I, art 7.

"The concept of government exercising its authority inequitably and without a rational basis or for the emolument of a particular group [or against a particular person] was anathema to that end." *In re Town Highway No. 20*, 2012 VT 17, P34 (2012). Government action is judged under a "more stringent test" under the Common Benefits Clause than the United States Constitution's Equal Protection Clause's rational basis test. *Baker v. State*, 170 Vt. 194, 205 (2000). The Vermont Supreme Court has declared that Article 7 "only allows the statutory classifications . . . if a case of necessity can be established overriding the prohibition of Article 7 by reference to the "'common benefit, protection, and security of the people.'" *See, State v.*

Ludlow Supermarkets, Inc., 141 Vt. 261, 268, 448 A.2d 791, 795 (1982) ("*Ludlow*") (invalidating a Sunday closing law that discriminated among classes of commercial establishments on the basis of their size.)

The Common Benefits Clause of the Vermont Constitution differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development. While the federal amendment may thus supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties under the Vermont Constitution. *See State v. Badger*, 141 Vt. 430, at 449 (1982) (Court is free to "provide more generous protection to rights under the Vermont Constitution than afforded by the federal charter"). Although Vermont Supreme Court decisions over the last few decades have routinely invoked the rhetoric of suspect class favored by the federal courts, *see, e.g., Choquette*, 153 Vt. at 51, 569 A.2d at 458, there are notable exceptions.

The principal decision in this regard is *Ludlow*, where, Chief Justice Albert Barney, writing for the Court, invalidated a Sunday closing law that discriminated among classes of commercial establishments on the basis of their size. After noting that the Vermont Supreme Court, unlike its federal counterpart, was not constrained by considerations of federalism and the impact of its decision on fifty varying jurisdictions, the Court declared that Article 7 "only allows the statutory classifications . . . if a case of necessity can be established overriding the prohibition of Article 7 by reference to the "'common benefit, protection, and security of the people.'" *Id*. at 268, 448 A.2d at 795. The Court held that even though the preference for small business enterprises was premised on such enterprises being "essential and fundamental to the economy of the state," without more, "this objective of favoring one part of the community over another *is totally irreconcilable with the Vermont Constitution*". *Id*. at 269 (emphasis added).

The same holds true here, the favoring of certain higher-cost renewable energy facilities without justification meeting the necessity standard is irreconcilable with the Vermont Constitution. Applying the necessity test, the Court concluded that the State's justifications for the disparate treatment of large and small businesses failed to withstand constitutional scrutiny. *Id*. at 269-70, 448 A.2d at 796.

The provider block is an unlawful set-aside violating the Common Benefits Clause. This Commission has the authority to address as-applied constitutional challenges. *See Otter Creek Solar LLC v. State of Vermont*, Docket No. 299-4-18 (Vt. Sup. Ct. March 4, 2019) (slip op. at 4). Here, the set-aside is not justified by any necessity serving the common benefit, protection, and security of the people. Indeed, the bid prices for the provider block plainly show that the opposite is true. The bid prices for the provider block exceed all other similarly-situated bids. The Commission should therefore hold that it is unconstitutional as applied.

XIV. <u>As Applied Here, The Food Waste Set Aside Violates 30 V.S.A. §8005a(j).</u>

30 V.S.A. §8005a(j) provides: "(2) Technology allocations. The Commission shall allocate the 127.5-MW cumulative plant capacity of this subsection among different categories of renewable energy technologies. These categories shall include at least each of the following: methane derived from a landfill; solar power; wind power with a plant capacity of 100 kW or less; wind power with a plant capacity greater than 100 kW; hydroelectric power; and *biomass power using a fuel other than methane derived from an agricultural operation or landfill*." (emphasis added.) The plain language of the statute excludes *biomass power using methane derived from an agricultural operation.* But that is exactly what the Franklin Foods, Cabot and Purpose Energy Proposals appear to be—biomass power using methane *derived from an agricultural operation*, at least in part. There is no definition of an agricultural operation in 30 V.S.A. §8005a. But 10 V.S.A.

§ 374b(1) defines an "Agricultural facility" as "land and rights in land, buildings, structures, machinery, and equipment that is used for, or will be used for producing, processing, preparing, packaging, storing, distributing, marketing, or transporting agricultural or forest products that have been primarily produced in this State." Operations of an agricultural facility logically is an agricultural operation. The Franklin Foods, Cabot and Purpose Energy proposals appear to be operations from an agricultural facility, and as such would not be entitled to a technology allocation, but should qualify for a standard offer contract under 30 V.S.A. §8005a(d)(1) or (d)(2).

XV. <u>The Technology Allocation Is A Standard-less Unconstitutional Delegation As Applied</u>.

30 V.S.A. §8005a(j) provides: "(2) Technology allocations. The Commission shall allocate the 127.5-MW cumulative plant capacity of this subsection among different categories of renewable energy technologies. These categories shall include at least each of the following: methane derived from a landfill; solar power; wind power with a plant capacity of 100 kW or less; wind power with a plant capacity greater than 100 kW; hydroelectric power; and biomass power using a fuel other than methane derived from an agricultural operation or landfill."

But unlike other parts of the statute which provide standards, the technology allocation is an unconstrained delegation, without any standards at all. It is therefore an unconstitutional delegation of legislative authority. *See, Otter Creek Solar LLC v. State of Vermont*, Docket No. 299-4-18 (Vt. Sup. Ct. March 4, 2019) (slip op. at 10) ("'*Vermont Home Mortg. Credit Agency v. Montpelier Nat. Bank*, 128 Vt. 272, 278 (1970) ('To withstand the charge of unconstitutional delegation of legislative power, the statute must establish reasonable standards to govern the achievement of its purpose and the execution of the power which it confers.' … *Marta v. Sullivan*, 248 A.2d 608, 609 (Del. 1968) ('[T]o avoid an unlawful delegation of legislative power, a statute must establish adequate standards and guidelines for the administration of the declared legislative

policy and for the guidance and limitation of those in whom discretion has been vested'").

Here, the lack of standards is manifest. 30 V.S.A. §8005a(j) provides no standards and no guidance as to allocations—it simply leaves the allocations to the Commission's unbridled discretion without any standards. The delegation of legislative authority in 30 V.S.A. §8005a(j) simply goes too far. In doing so, it denies Allco contracts to which it otherwise would be entitled under the 2019 RFP. Therefore, the set-aside for the food waste and wind projects in the 2019 RFP is unconstitutional as applied.

XVI. Conclusion

For the reasons stated above, the award and reserve groups should be as follows:

Award Group	
ER Narrows Solar	2.2
Safford Solar	2.2
Galusha Solar	2.2
Cannon Green Solar	2.2
Willard Solar	2.2
Rose Solar	2.2
Reserve Group	
Brown Bridge Solar	2.2
Lemuel Solar	2.2
St. Andrews Solar	2.2

Respectfully submitted,

/s/Thomas Melone

Thomas Melone
Bar No. 5456
Allco Renewable Energy Limited
1740 Broadway, 15th Floor
New York, NY 10019
Phone: (212) 681-1120
Email: Thomas.Melone@AllcoUS.com

Dated: June 11, 2019

EXHIBIT 1

INSTR 4934612 OR 5000 PG 2686 RECORDED 1/15/2014 9:44 AM PAGES 4
DWIGHT E. BROCK, CLERK OF THE CIRCUIT COURT, COLLIER COUNTY FLORIDA
DOC@.70 $8,575.00 REC $35.50 INDX $1.00
CONS $1,225,000.00

Prepared by and return to:
Jayne M. Skindzier, Esq.
Cummings & Lockwood LLC
3001 Tamiami Trail North, Suite #400
Naples, FL 34103

Parcel Identification No. 66270600009

[Space Above This Line For Recording Data]

Trustee's Deed

This Indenture made this 8TH day of January, 2014 between **I. Robert Levine, individually and as Trustee of the Barbara Levine 2012 Trust dated December 21, 2012, joined by his spouse, Barbara Levine, and Daniel L. Daniels, as Trustee of the Barbara Levine 2012 Trust dated December 21, 2012,** whose post office address is 114 Moorings Park Drive #A212, Naples, FL 34105 (the "Grantors) and **Robert Matthews and Susan Matthews, husband and wife, as tenants by the entireties,** whose post office address is 10512 West 42nd Street, Overland Park, KS 66221 (the "Grantees").

Witnesseth that said Grantors, for and in consideration of the sum of TEN AND NO/100 DOLLARS ($10.00) and other good and valuable considerations to said Grantors in hand paid by said Grantees, the receipt whereof is hereby acknowledged, has granted, bargained, and sold to the said Grantees, and Grantees' heirs and assigns forever, the following described land, situate, lying and being in Collier County, Florida, to-wit:

Lot 8, TIERRA MAR:

A portion of Parcel C of Pelican Bay Unit One, according to the plat thereof as recorded in Plat Book 12, Pages 47 through 52, inclusive, of the Public Records of Collier County, Florida, more particularly described as follows:

Commence at the point of intersection of the centerline of West Boulevard with the centerline of Pelican Bay Boulevard as shown on said plat of Pelican Bay Unit One, being a point on the arc of a circular curve concave to the North, said point bearing South 19° 07' 14" East from the radius point of said curve, thence Westerly along the centerline of Pelican Bay Boulevard and the arc of said curve having for its elements a radius of 1010.00 feet and a central angle of 29° 33' 05" for 520.93 feet to an intersection with the centerline of Tierra Mar Lane; thence Southerly along said centerline for the following described three courses (1) South 11° 22' 53" West for 98.75 feet to the point of curvature of a circular curve concave to the East; (2) thence Southerly along the arc of said curve having for its elements a radius of 400.00 feet and a central angle of 16° 00' 00" for 111.70 feet to the point of tangency (3) thence 54° 32' '07" East for 80.67 feet; thence South 85° 10' 00" East for 266.19 feet; thence North 89° 20' 00" East for 42.00 feet to the Point of Beginning of the herein described parcel of land; thence North 64° 19' 54" East for 42.00 feet; thence South 25° 40' 00" East for

132.07 feet to an intersection with the arc of a circular curve concave to the Northwest, said point bearing South 38° 17' 10" East from the radius point of said curve, thence Southwesterly along the arc of said curve having for its elements a radius of 50.00 feet and a central angle of 34° 57' 10" for 30.50 feet to the point of tangency; thence South 86° 40' 00" West for 49.16 feet; thence North 8° 54' 01" West for 115.76 feet to the Point of Beginning.

Subject to (i) real property taxes for the year 2014 and subsequent years; (ii) zoning, building code and other use restrictions imposed by governmental authority; (iii) outstanding oil, gas and mineral interest of record, if any; and (iv) restrictions, reservations and easements common to the subdivision; provided, however that none of them shall prevent the use of the Property for residential purposes.

The subject property is the homestead of I. Robert Levine and Barbara Levine and therefore they are joining in this deed in their individual capacities. The subject property is not the homestead of Daniel L. Daniels who is signing in his capacity as an independent Trustee only.

And the Grantors hereby covenant with said Grantees that the Grantors are lawfully seized of said land in fee simple; that the Grantors have good right and lawful authority to sell and convey said land; that said Grantors do hereby fully warrant the title to said land, and will defend the same against lawful claims of all persons claiming by, through or under the Grantors, but none other.

[SIGNATURES APPEAR ON THE FOLLOWING PAGES]

In Witness Whereof, the Grantors have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in our presence:

Witness #1

Jayne M. Skindzier
Printed Name of Witness #1

Witness #2

Joan C. Saupp
Printed Name of Witness #2

I. Robert Levine, individually and as Trustee of the Barbara Levine 2012 Trust dated December 21, 2012

Witness #1

Jayne M. Skindzier
Printed Name of Witness #1

Witness #2

Joan C. Saupp
Printed Name of Witness #2

Barbara Levine

STATE OF FLORIDA
COUNTY OF COLLIER

The foregoing instrument was acknowledged before me this 8th day of January, 2014, by **I. Robert Levine, individually and as Trustee of the Barbara Levine 2012 Trust dated December 21, 2012, and Barbara Levine,** who are personally known to me or who produced _____ as identification.

My Commission Expires:

Notary Public

(SEAL)

JOAN C. SAUPP
MY COMMISSION # EE 197854
EXPIRES: June 24, 2016
Bonded Thru Notary Public Underwriters

Joan C. Saupp
Printed Name of Notary Public

Witness #1

Lisa G. Page
Printed Name of Witness #1

Witness #2

Betsy Hall
Printed Name of Witness #2

Daniel L. Daniels, as Trustee of the Barbara Levine 2012 Trust dated December 21, 2012

STATE OF ~~CONNECTICUT~~ NEW YORK
COUNTY OF ~~FAIRFIELD~~ NEW YORK

The foregoing instrument was acknowledged before me this 6 day of January, 2014, by **Daniel L. Daniels, as Trustee of the Barbara Levine 2012 Trust dated December 21, 2012,** who is personally known to me or who produced _____ as identification.

My Commission Expires: 10/31/14

(SEAL)

Notary Public

Betsy Hall
Printed Name of Notary Public

BETSY HALL
Notary Public, State of New York
No. 01HA4773809
Qualified in New York County
Commission Expires October 31, 2014

EXHIBIT 2

Home
Contact Us
STAR28
STAR36-6
STAR52-6
STAR72-6
STAR88-8
Hydraulic Towers
Links & Info
Home
Contact Us
STAR28
STAR36-6
STAR52-6
STAR72-6
STAR88-8
Hydraulic Towers
Links & Info

Star

Wind Turbines

LLC

Home | Contact Us | STAR28 | STAR36-6 | STAR52-6 | STAR72-6 | STAR88-8 | Hydraulic Towers | Links & Info

STAR72-6 Wind Turbine

30 kW @ 15mph

Operating range 4 mph to 35 mph

EXHIBIT 3

STAR WIND TURBINES LLC

95 Tesla Lane East Dorset, VT 05253
Tel: 802-779-8118 www.Starwindturbines.com

Judith C. Whitney, Clerk of the Commission
Vermont Public Utility Commission
112 State Street
Montpelier, VT 05620-2701
802-828-2358
Judith.whitney@vermont.gov

May 23, 2019

REF: Advance Notice for Tomlinson Wind Project, Standard Offer Program

Dear Ms. Whitney,

Pursuant to Vermont Public Utility Commission Rule 5.100, please accept this application for a 45 day advance submission prior to filing for a certificate of public good for an independent 90kW small wind turbine system in the Standard Offer Program. The system, known as Tomlinson Wind Project, will have the following **Mailing/911 Address: 1111 Tomlinson Rd, Wardsboro, Vermont,** and would be owned and operated by **Star Wind Turbines LLC**. The system has three STAR72-6 30kW turbines, with a total of 90kW in the small wind technology category. Installation of the small wind turbines is planned for the summer of 2020.

In order that the recipients of this advance submission can be informed of and evaluate the new proposal, I have enclosed analysis relevant to any potential impacts this proposal may have, i.e., sound, shadow, visual and wildlife. I will show that the sound, shadow, visual, and wildlife impacts are extremely small and the siting of these wind turbines will be well within acceptable guidelines. In addition, the contribution of these small wind turbines will help to avoid cost to the electrical grid, distribute needed electricity to nighttime peak hours, as well as contribute to the local economy and help address the global climate change crisis. I have attached a list of those neighbors, organizations, and agencies notified so that they can make comments and express concerns. I am open to make additional presentations or answer any questions.

Concerning the site location: Tomlinson Wind Project is located at the end of Tomlinson Rd. on top of the hill in Wardsboro, VT. The wind conditions are excellent for the proposed turbines to produce electricity efficiently. The property is 63 acres and the turbines are well within the setback requirements of Rule 5.100. The project has independent infrastructure, and a site map is provided showing the adjoining residences with distances of 860 ft., 1552 ft., 2123 ft., 2459 ft., and 3209 ft. The nearest property line

is well within the allowed setback distance (275 ft.) or 2 x the top of the blade per Rule 5.100. A 5.500 interconnection application has been filed with Green Mountain Power.

Concerning sound: I have attached a sound analysis of the three proposed turbines which shows that there will be zero sound impact at any of the surrounding residences. The STAR72-6 turbine is designed for low noise (less than 42 dBA max. @ 200ft.). The Vermont Sound Ordinance allows 42dBA 100ft. outside of a residence. In the sound analysis, the closest residences shows about 32 dBA, which will be effectively silent considering the background noise of 50-60 dBA caused by the trees in the area. The other adjoining houses are too far away to hear the turbines at all. Unlike large wind turbines, the STAR72-6 does not have any low frequency or infrasound that can travel long distances.

Concerning shadow: I have enclosed a shadow analysis of the proposed turbines which shows that shadow will not impact any neighboring residences. Because of the thin dimensions of the turbine blades, the shadow flicker will start to dissipate and make less than 30hrs/ yr. at about 750ft. The surrounding residences are too far away or not in the shadow area to cause any shadow flicker.

Concerning forest impact: I have previously made contact with the Agency of Natural Resources (ANR) and have performed the delineation and analysis of forest, wetland, RETP plants, and wildlife. The site has been inspected by ANR accordingly without concern. In addition, the site was inspected by the Department of Fish and Wildlife and there was no concern of any wildlife impact. The site is engineered for light roads with a drainage plan and will not cause any undue drainage or sediment problems. The installation of these small turbines does not require the use of large construction equipment such as cranes or bulldozers. Unlike a large wind turbine, the ground disturbance is tiny and does not produce toxic sediment that disperses into the hillside, watershed and tributaries. Each pad site is small, about 16' x 16' x 5' deep. Except for the need to bring a concrete truck to the pads, there would hardly be a need for a road at all. In general, the installation of these small wind turbines is much like a small logging operation. Transportation of materials and the erection of the towers are done with the aid of a "Bobcat" skid loader or back hoe. The towers lift themselves with their own hydraulics. No crane is used for erection or service and, because no one can ever climbs the tower, there is no requirement for a fence around each tower. The lack of ladders on the towers prevents unauthorized climbing, improves safety, and reduces insurance rates.

Concerning visual impact: It is difficult to find a point where the turbines would be visible. I have not been able to find a point on the surrounding roads that would be clear enough of the trees to take a photo. It may be possible to see the turbines from the distant ridges across the valley, but the visual signature would be tiny. I have attached a photo representation of a comparison of a large Vestas 3 MW turbine and a STAR72-6 small wind turbine. The STAR72-6 will make a small 72 ft. swept diameter just above the tree line, which is vastly different from the visual signature of other large turbines installed across Vermont. The turbines can be blended into the background using either a winter or forest theme camouflage.

In addition, the tower height is 100ft., and the top of the blade tip of these turbines is 138ft, therefore, there is no requirement for an FAA permit or the need for any flashing red light.

I have attached a copy of the "Quechee Test" for the guidelines for siting a wind turbine per the Public Utility Commission. See attached guidelines. If any of the adjoining residences can find a view point to Tomlinson Hill then I can take a photo and re-do the analysis.

The scoring I calculate shows a minimal impact.

1. What is the position of the turbines in the view?		0	
2. How far away are the turbines seen?		0	
3. How prominent are the turbines?		1	
4. Can the turbines be screened from view?		0	
5. Is the turbines seen from an important scenic or natural area?		0	
6. What is the duration of view?		0	
	Total	1	Minimal

The majority of the residences adjoining and living in Wardsboro will have zero visual impact from these turbines, and this project should be an example of how to employ wind turbine technology on the hillsides in Vermont. These turbines will blend into the hills of Vermont and will become no more apparent than a barn, silo, farm house or power pole. In most instances, they will have less visual impact than a typical line of power poles. Tomlinson Road is not well travelled, and the local roads cut deep into the valleys so the public will not be able to see the turbines. Because of the trees and the valleys the visual impact is minimal.

Concerning the value of small wind energy and the certificate of public good: A certificate of public good (CPG) is warranted for this project because it benefits and accomplishes the energy goals of the community and Vermont without undue adverse impact. This project will generate clean, distributive local wind energy that helps set a good example for other Vermont communities and, in particular, the landowners in Windham County. The project pays for itself, makes valuable energy credits, and does not pass on cost to any other rate payer. The clean energy produced by the small wind turbines helps reduce the carbon footprint of Vermont and reduces global warming. Because it is locally produced, this clean, wind energy will reduce the cost and fees related to importing electricity generated outside the state and help avoid the ongoing cost of building more and larger long distance transmission lines.

Also, because it is a distributive electrical generation being locally used, it stimulates the local economy and helps pave the way for Vermonters to learn how to become stronger energy independent communities. Finally, the peak usage hours of Vermont have been identified to be in the evening hours and not during the day, like sunny California and Arizona. Because there exists an abundance of solar PV development in Vermont and not enough clean energy being produced in the evenings and on cloudy winter days, small wind energy is a solution.

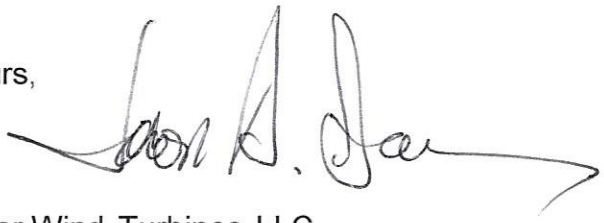
Because of the new Vermont sound ordinance, it is unlikely that a large wind turbine system will achieve a certificate of public good in areas like Wardsboro or anywhere in Vermont. By utilizing a small wind site with low sound and less visual impact, I hope these small wind turbines will become a solution that will be complementary overall and set an example of how to use Vermont land and possibly be the future for Vermont wind energy. A robust, diversified, clean energy grid system is what is desired in Vermont, and the proposed small wind turbines deserve a CPG because they will accomplish all of the above and not be an undue adverse impact on the surrounding residences and environment.

The purpose of this advance submission is to give the recipients reasonable notice of the nature of the project so as to provide them an opportunity to make inquiries or comments. I welcome interaction and suggestions. I plan to submit the final application after this 45 day advance submission and, at that time, the parties will have an opportunity to make additional comments. Relevant procedure is detailed in Rule 5.100 and is posted on the Public Utility Commission (PUC) web site at www.puc.vermont.gov. Also, any person can feel free to contact me at:

Jason Day, Star Wind Turbines LLC: jasonday@starwindturbines.com 802-779-8118

The STAR72-6 small wind turbine can be seen anytime at the Star Wind turbines facility, East Dorset, Vermont, by appointment.

Sincerely Yours,



Jason Day, Star Wind Turbines LLC

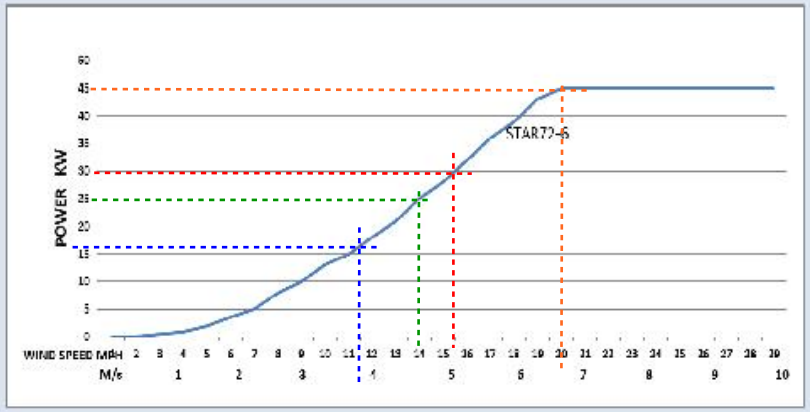
EXHIBIT 4

Star Wind Turbines LLC

Model:	STAR72
Rotor Diameter	72 ft./ 23 meters
Peak Power	25-45kW 15-19mph
Swept Area	379 sq. m
Rated Rotation	36-40RPM
Max Wind Speed	120 MPH
Sound	42 dBA Max @ 200ft.
Energy	100-140kWh/yr.

FEATURES:

-Automated blade pitch control
-Full feathering pitch for high wind protection
-Grid connect capability UL 1741 240VAC 60Hz single phase 480VAC 60Hz three phase
-Hydraulic lifting tower.

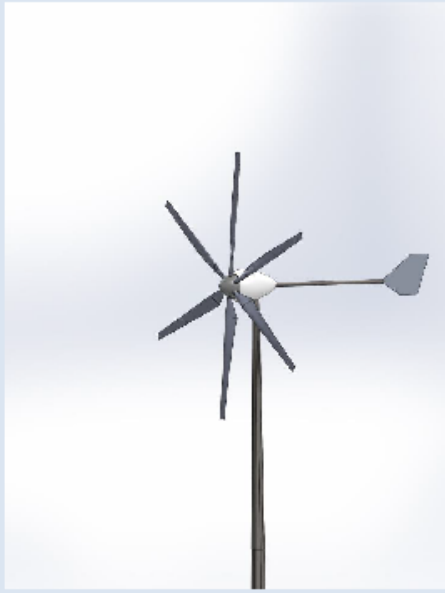


Star Wind Turbines LLC
95 Tesla La, East Dorset, VT 05253
Tel: 802-779-8118, Email: jasonday@starwindturbines.com
www.starwindturbines.com

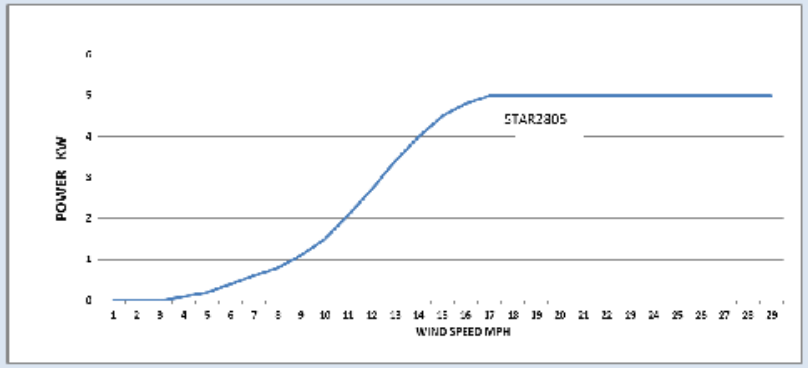
Star Wind Turbines LLC

PRELIMINARY DATA

Model:	STAR28-6
Rotor Diameter	28 ft (8.5 meters)
Swept Area	615 sq. ft. (56.7 sq. m)
Peak Power	3-5kW @ 15.4mph (7m/s)
KWh per Year	12-18,000 kWh/yr.



- FEATURES
- Automated blade pitch control
- Full feathering pitch for high wind protection
- Grid connect capability UL1741 240VAC 60Hz 1 or 3 phase
- Active Yaw
- Hydraulic lifting tower. 45ft. 60ft.



Star Wind Turbines LLC
PO Box 722, 95 Tesla La, East Dorset, VT 05253
Tel: 802-779-8118 Email: jasonday@starwindturbines.com
www.starwindturbines.com

68 Merchants Row
Rutland, VT 05701

Andrew Quint *Phone: (802) 747-6871*
Power and Markets Analyst
Andrew.Quint@greenmountainpower.com

June 11, 2019

Ms. Judith Whitney, Clerk
Vermont Public Utility Commission **filed via ePUC**
112 State Street
Montpelier, Vermont 05620-2601

Re: Case No. 18-2820-INV– 2019 Standard Offer Program RFP Recommendations

Dear Ms. Whitney:

Green Mountain Power appreciates the opportunity to comment on the Standard Offer Facilitator's ("Facilitator") recommendations for the 2019 Standard Offer Request for Proposal ("RFP") as requested in the Public Utility Commission's ("PUC") Order dated May 28, 2019.

Overview

The 2019 Standard Offer RFP attracted a total of thirty-eight bids, which was up from fourteen bids in 2018, for a total of almost 49 MW of nameplate capacity. The bids included proposals for twenty-one Solar PV projects, three food digester projects, and fourteen small wind projects. This compares to eleven Solar PV projects, one small wind project, one food digester project, and one hydro project proposed in 2018. These results indicate that there is positive progress being made in promoting technology diversity in the Standard Offer program, with almost 3 MW of non-Solar PV projects being proposed (and recommended for PPA awards).

While the volume of proposed projects showed significant developer interest in the RFP, we observe that the increased competition has not led to meaningful changes in prices, with all of the food digester and small wind projects featuring prices at or near the avoided cost caps. Additionally, in the Price Competitive Block there is a substantial spread of offered prices for Solar PV projects. Only four of the proposed Solar PV projects featured pricing below the lowest bids from the 2018 RFP, with an additional eight projects featuring prices above the highest offer price from the 2018 RFP.

Specific Issues

The Facilitator recommended accepting all seventeen proposals for the Technology Diversity Block, including 1.000 MW of small wind and 1.974 MW of food waste digesters. The Facilitator represents that the RFP submissions met the criteria set forth by the RFP; we therefore support the Facilitator's recommendation. We also concur that the omission of the Tomlinson Wind 2 project's nameplate capacity on page one of the application is a minor deficiency under Section 4.3 of the RFP.

We concur that the Post Road Solar 1, Post Road Solar 2, Silk Road Solar, and Sawyer Road Solar projects should not be included in the Award or Reserve Groups. According to the Facilitator:

1) Post Road Solar 1 had a number of defects associated with its proposal that are significant, including the lack of an appropriate high resolution map as detailed in Section 3.1.4; not adequately proving that the project is an independent technical facility per Section 3.1.5; the parcel identification is not consistent between the application and the site control documents; and finally, the application does not comply with the Section 2.3 confidentiality requirements. Each of these defects is material and when taken together show that the developer did not meet the requirements of the RFP.
2) Post Road Solar 2 had a number of defects associated with its proposal that are significant and the same as those detailed above for Post Road Solar 1. Each of the defects is material, and when taken together, show that the developer did not successfully meet the requirements of the RFP.
3) Silk Road Solar had a number of significant defects associated with its proposal. These include failing to submit an appropriate high resolution map as detailed in Section 3.1.4 and the fact that the application does not comply with the Section 2.3 confidentiality requirements. Both of these defects are material, and when taken together, show that the developer did not meet the requirements of the RFP.
4) The price indicated by Sawyer Road Solar is $0.9981/kWh, which appears to reflect that the bidder mistakenly proposed a project price in dollars per MWh while Section 3.1.6 clearly indicates that the price should be stated as dollars per kWh. This should be considered a material deficiency as it was for two projects in the 2018 RFP.

While it is unfortunate that some projects featuring nominally attractive prices will not move forward because they did not meet the RFP requirements, the proposal deficiencies appear to be clear and some of them appear to fall in areas that have been addressed directly in the RFP instructions or in Commission evaluation of Standard Offer RFP results in past years. We are not aware of a compelling reason to relax the RFP requirements to allow the affected bidders to revise their proposals or otherwise address the deficiencies now.

Based on the total capacity available in this RFP we concur with the Facilitator's recommendation that the four lowest priced Solar PV projects that met all RFP requirements be placed in the Award Group. We also agree that the next three lowest projects meeting all of the RFP requirements should be included in the Reserve Group. We note that the highest priced project in the proposed Reserve Group has a price that is $0.0241/kWh or almost 30% higher than the lowest priced bid, and 83% of the avoided cost cap for Solar PV. This seems to indicate that while the lowest priced projects remain competitive, the depth of the price completion is somewhat limited.

If you have any questions please feel free to contact me at (802) 747-6871 or at Andrew.Quint@GreenMountainPower.Com.

Sincerely,

Andrew Quint

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STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 18-2820-INV

Investigation to review the avoided costs that serve as prices for the standard-offer program in 2019	

DEPARTMENT OF PUBLIC SERVICE'S COMMENTS ON THE STANDARD OFFER FACILITATOR'S REPORT AND RECOMMENDATIONS

Pursuant to the Public Utility Commission's ("Commission") May 28, 2019 Procedural Order, the Department of Public Service ("Department") provides the following comments on the Standard Offer Facilitator's report and recommendation. The Department does not oppose the Standard Offer Facilitator's recommendations. However, the Department does request that the Commission require the following actions of the Standard Offer Facilitator.

First, for future RFP recommendations, the Department requests that the Commission direct the Standard Offer Facilitator to make the proposals received available online. This will improve transparency in the process and allow for independent review of the proposals.

Second, the Department requests that the Commission direct the Standard Offer Facilitator to remind the following developers of the following projects of the requirements related to standard offer projects in the Sheffield Highgate Export Interface ("SHEI") area: Cross Wind Projects A-D; Howrigan Wind Farm; and Auger Heights Wind A&B. The Commission's Order Re the 2019 Standard-Offer program, issued on January 16, 2019, requires that notice of the SHEI area and limitations be included in the RFP and that "any standard-offer projects proposed in the SHEI area will have to address the economic and transmission system

concerns during the certificate of public good process."[1] This requirement means that the 30 V.S.A. § 248 process normally available to projects with a nameplate capacity of less than 150 kW[2] would not be sufficient for the above-listed projects as the developer will be required to provide testimony from a qualified expert that addresses the concerns raised by new generation projects in the SHEI area.[3] While the Department recognizes that this Docket is independent of the § 248 process for standard offer projects, directing the Standard Offer Facilitator to remind project developers of this requirement will promote administrative efficiency in any subsequent § 248 review. To further promote administrative efficiency, the Department recommends that the Commission also rescind its conditional waivers of the SHEI criteria for these applications and require testimony and exhibits in kind prior to deeming any 2019 standard-offer petitions sited in the SHEI region administratively complete. Thank you for the opportunity to comment in this matter, please do not hesitate to contact me with any questions or concerns.

Dated in Montpelier, Vermont this 11th day of June, 2019.

By: /s/ Alex Wing

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cc: ePUC Service List

1 *Investigation to review the avoided costs that serve as prices for the standard-offer program in 2019*, Case No. 18-2820-INV, Order of 1/16/19 at 6-7.
2 *See*, 30 V.S.A. § 8007(a).
3 *See generally, Application of Derby GLC Solar, LLC*, Case No. 17-1247-PET, Order of 1/24/19.