STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7533

Investigation Re: Establishment of a Standard Offer)
Program for Qualifying Sustainably Priced Energy)
Enterprise Development ("SPEED") Resources)

Order entered: 7/7/2011

ORDER RE REVISIONS TO STANDARD-OFFER CONTRACT

Introduction

In this Order, the Public Service Board ("Board") addresses revisions to the standard-offer contract (attached) for Qualifying Sustainably Priced Energy Enterprise Development ("SPEED") resources.

Background

On September 30, 2009, the Board issued an Order implementing the standard-offer program, and attached to the Order a standard-offer contract drafted by a working group of interested parties. The Order directed the SPEED Facilitator to offer the contract to qualifying SPEED resources that enter the standard-offer queue. Producers must sign the contract to participate in the standard-offer program.

On January 20, 2011, Triland Partners filed a letter requesting that the Board review and consider revising specific provisions of the contract.

On February 24, 2011, Board staff held a workshop to discuss Triland's proposed edits and any other improvements to the contract.

On April 15, 2011, Board staff developed a draft, revised contract based upon discussions at the February 24 workshop, and circulated the draft to interested parties.

Comments on the draft revised contract were filed by Triland, Andrew Raubvogel, Esq., and the SPEED Facilitator.

Discussion and Conclusions

During the review of the standard-offer contract, some typographical errors were identified. The attached revised contract fixes these errors and there is no need to review each such change in this Order. Additionally, the draft that Board staff circulated to interested parties included revisions to the contract that were not commented on by interested parties. We do not address those draft revisions that had minimal substantive impact on the contract and on which no interested party provided comment, but incorporate these changes into the revised contract issued with today's Order.

Below we address the significant changes to the standard-offer contract.

In addition, it is important to bear in mind that the contract is an instrument for providing above-market prices to producers through the standard-offer program. It is not simply a bilateral contract between two parties, but a contract signed by the Facilitator, as an instrumentality of the state,[1] and enabling the producer to receive the benefits and responsibilities of the standard-offer program. Producers must adhere to the requirements of the program in order to receive the benefits.

Section 1- Definition of "Delivered"

Section 1 of the contract currently includes the following definition: "Delivered, in the context of Electricity, means delivered to the interconnection point and successfully injected into the Distribution System, and Deliver has the corresponding meaning."

Triland recommends that the Board remove from the definition of "delivered" the phrase "and successfully injected into the Distribution System." Triland contends that the definition, as written, makes the producer responsible for any issues associated with the distribution system.

Interconnecting a generation unit requires more than simply connecting a line from the unit to the distribution system; any generation unit must put into place sufficient protections to ensure that the output of the project does not adversely impact system stability and reliability. Typically, this means that, at a minimum, the project will require the installation of some type of protective equipment such as breakers. Therefore, the producer is partially responsible for

1. 30 V.S.A. § 8005(b)(5).

ensuring that the electricity is successfully injected into the distribution system. Provided that the producer constructs the project and meets all of the necessary interconnection requirements, the producer will meet the requirement that the electricity is successfully injected into the distribution system. Accordingly, we do not modify this definition as requested by Triland.

Section 1- Definition of "Commissioned"

Triland, in its January 20 letter, stated that the contract's commissioning milestone does not define "commissioning." Given that the contract includes a milestone requiring projects to be commissioned within three years of executing the contract, it is important to clearly define the term. Board staff proposed the following definition in their April 15 draft revised contract sent to interested parties:

> "Commissioned" or "Commissioning" means that the facility must be synchronized to the utility grid, has been put into operation with fully functioning metering, and has been fully constructed at the nameplate capacity described in Attachment A to this Agreement.

In his April 29 letter, Mr. Raubvogel noted that the following statutory definition already exists:

> "Commissioned" or "commissioning" means the first time a plant is put into operation following initial construction or modernization if the costs of modernization are at least 50 percent of the costs that would be required to build a new plant including all buildings and structures technically required for the new plant's operation. However, these terms shall not include activities necessary to establish operation readiness of a plant.[2]

Given that there is an existing statutory definition, we do not include a new definition of "commissioned" in the contract. Instead we include a citation to the statutory definition under Section 5.

However, we note that the statutory definition does not provide much guidance with respect to a determination as to whether a project meets the commissioning milestone. The last sentence of the statutory definition appears to state that activities such as testing the generator

2. 30 V.S.A. § 8002(11).

prior to interconnection with the grid do not constitute commissioning. Accordingly, it is reasonable to conclude that a project has to be fully operational to be commissioned. Further, the project would not be "commissioned" until the plant is running at its full capacity, because an essential characteristic of the Project is its capacity, as described in Attachment A of the contract.

If there are disputes regarding whether a particular project has met the commissioning milestone, we will address the issue on a case-by-case basis at that time.[3]

Section 1- Definition of "Other Products"

Triland's January 20 letter raised the issue of whether tax credits could be considered to be commodities that would be transferred to utilities under the contract's definition of "other products." The definition states:

> Other Products Related to Electric Generation means any transferable commodity, in addition to Electricity, that is directly attributable to the generation of electricity from the plant. For purposes of this definition, Other Products Related to Electric Generation does not include (1) tradeable renewable energy credits, as defined in 30 V.S.A. § 8002(8), directly attributable to plants using methane from agricultural operations; and (2) ancillary heat associated with engine exhaust, combined heat and power systems, or biomass systems.

Given that tax credits can be transferable, and the value of such credits is accounted for in the development of the standard-offer price, we conclude that it is appropriate to revise the contract to explicitly state that the definition of "other products" does not include tax credits associated with power production.

Section 5 - Milestones

The SPEED Facilitator recommends that the Board include an additional milestone to minimize "queue sitting" — projects that take up room in the queue without moving forward with project development. The Facilitator recommends that the Board include in the revised contract a milestone requiring a Producer to file a petition for a Certificate of Public Good within

3. If a producer has any uncertainty regarding whether a project will be deemed commissioned, it should raise the issue sufficiently in advance of the milestone date, as the project will no longer be eligible for the standard-offer price if the Board determines that the project is not timely commissioned.

one year of the Effective Date of the Agreement. The Facilitator states that such a milestone will "ensure that projects move through the queue expeditiously" and will provide adequate time to adjudicate the petitions, "after which the Producer should have sufficient time to construct the project within the three year Commissioning Milestone."

Currently, Section 5 of the contract requires that producers meet the following milestones:

> a. Within six months of the date of this Agreement, Producer shall file with the Interconnecting Utility, and shall provide Facilitator a copy of, a complete application for interconnection under Board Rule 5.500.
> b. Within three years of the date of this Agreement, the Project shall achieve Commissioning.

There are two and one-half years between the time when a producer is required to meet the first and second milestones. Given the significance of not meeting the milestone — being removed from the queue — it is important that the milestones ensure that projects are moving appropriately through the queue.

The majority of the projects in the queue need to obtain a certificate of public good under 30 V.S.A. § 248, a process that can take varying amounts of time depending on the developer's ability to prepare necessary studies and other documentation in a timely fashion, the impacts associated with the project, and the time constraints of the Board, the Department of Public Service, and the Agency of Natural Resources.[4] If producers delay in submitting their Section 248 petitions, there may be insufficient time for adequate review of the projects, and producers may be removed from the queue as a result.

Accordingly, we are including a third milestone in the revised contract. Producers must submit completed Section 248 petitions within one year of executing the contract, unless the project is a hydroelectric facility that requires a license from the Federal Energy Regulatory Commission. This should provide sufficient time for review of the projects and, if a certificate of public good is issued, construction of the project. However, we also emphasize that the time for reviewing projects varies according to circumstances specific to each project. A project that has

4. The Department of Public Service and the Agency of Natural Resources are statutory parties to all Section 248 proceedings.

the potential for significant environmental impacts, for example, could take longer due to a need to conduct seasonal studies. A developer must therefore evaluate the characteristics of the project and its site and determine the appropriate time to begin the regulatory review process; the three-year commissioning deadline will not be waived due to a producer's failure to adequately plan for regulatory review.

Section 12 - Exclusivity

Section 12 of the contract states:

> During the Term of this Agreement, Producer shall not enter into any other agreement for the sale or other conveyance of any portion of the Electricity or any Other Product that is the subject of sale under this Agreement. Producer acknowledges that, by entering into this Agreement, Producer is waiving any and all rights to seek an alternative power sales arrangement, including but not limited to an arrangement through Board Rules 4.100, 4.300 and 5.100, at any time throughout the term set forth in this Agreement. Absent an order of the Board to the contrary, this waiver shall extend throughout the full term contemplated under this Agreement, even if this Agreement is terminated early for any reason by default, for cause or otherwise.

Triland recommends that the exclusivity provision not apply for the full term of the contract if the contract is terminated early due to a monetary default by the Facilitator.

The Board previously addressed this issue in this Docket:

> The intent of this provision is to prevent developers from withdrawing from the standard-offer program and pursuing more lucrative price terms that might develop over the term of the contract. Ratepayers are paying a significant premium to the renewable generators that take advantage of the standard offer. If more lucrative opportunities arise, it would be unfair to allow such a project owner to walk away from the contract after receiving substantial subsidies from ratepayers. Given that a developer may request that the Board allow it to enter into other power purchase agreements, we conclude that the provision provides sufficient protection for developers while also preventing inappropriate strategic behavior if higher price terms become available over the term of the standard contract.[5]

5. Docket 7533, Order of 9/30/09 at 32-33.

While the Board continues to be concerned that producers could engage in inappropriate strategic behavior to potentially obtain a higher price outside the standard-offer program, we recognize that Triland raises a valid concern regarding potential default by the Facilitator. Section 12 contains a clause that allows the Board to modify the exclusivity provision of the contract. We add the following language to the end of Section 12: "In the event of a default by Facilitator, the Board's review under this paragraph shall begin with the rebuttable presumption that Producer should be relieved of the waiver contained in this paragraph."

Section 17 - Events of Default

The contract does not currently indicate that producers are responsible for ensuring that the requirements of the standard-offer program are met. To remedy this, Board staff have proposed the following as an event of default that would result in termination of the contract: "Producer fails to receive and maintain certification as a Qualifying SPEED Resource, as defined in 30 V.S.A. § 8004 or fails to comply with applicable statutory requirements and Board Rules and Orders." No comments were filed regarding this proposal. We conclude that this addition to the contract is reasonable and adopt this language in the revised contract issued with today's Order.

Section 22 - Indemnification of Facilitator

In its January 20 letter, Triland provided the following comments on the indemnification provisions: "The indemnity is 'one way' indemnification of Facilitator by Producer, with no indemnification of Producer by Facilitator, even for events on Facilitator's side of the interconnection point or Facilitator's breach of the PPA."

It is important to recognize that the standard-offer program is a state-mandated program that is paying producers prices that are currently above market. Accordingly, this contract should not be viewed as simply a contract between two independent parties, but an agreement by the producer that it will participate in the standard-offer program, and be bound by its regulatory requirements, in exchange for receiving the above-market prices. In addition, producers have

the ability to request that the Board review decisions of the Facilitator (as the Indemnification section now makes clear).

Furthermore, the SPEED Facilitator cannot be liable to producers under Vermont law. On May 25, 2011, Public Act 47 was enacted. Section 8 of Act 47 alters 30 V.S.A. § 8005(b)(5) to state that both the Board and the SPEED Facilitator "constitute instrumentalities of the state." In addition, pursuant to Act 47, Section 8005(m) now states that

> The state and its instrumentalities shall not be liable to a plant owner or retail electricity provider with respect to any matter related to SPEED, including costs associated with a standard offer contract under this section or any damages arising from breach of such a contract, the flow of power between a plant and the electric grid, or the interconnection of a plant to that grid.

Accordingly, the only modification we make to Section 22 of the contract is to include the following language: "Producer may seek review by the Board of any decision made by Facilitator that materially impacts Producer."

Amendment of the Contract in the Public Interest

Section 28 of the contract states as follows:

> This contract may be amended, without the consent of the parties, by order of the Board, provided: (1) such amendment does not result in any reduction in the project's economic value to Producer; (2) such amendment will not adversely affect Producer's ability to meet the project's financial obligations; (3) such amendment will not impose additional operational or other economic costs on Producer without full compensation; and (4) the amendment results in a benefit to ratepayers.

Triland's January 20 letter expressed concern with the ability of the Board to unilaterally amend the contract. The Board had provided the following rationale for this provision in our September 30 Order:

> We recognize and agree with developers' concerns that an open-ended contract clause that allowed the contract to be amended without the contracting party's consent could significantly impact the ability to finance a project. However, the contract provides cost-based, long-term prices at ratepayer expense, and some limited ability to amend the contract to provide additional benefit to ratepayers is

> warranted, so long as it would not reduce or adversely affect the ability of the producer to meet the project's financial obligations. The terms for standard-offer contracts range from 15 years to 25 years. Over the course of this time period, it is likely that technologies and policies will change significantly; the ability to allow amendments to standard contracts to adapt to such changes has potential value to both ratepayers and producers. If additional value can be obtained without adverse consequences to the producer, it is reasonable that the ratepayers that subsidized the project should be able to benefit.[6]

The contract currently protects producers by stating that the contract may be amended without the consent of the parties only if the amendment "does not result in any reduction in the project's economic value to Producer" and "will not adversely affect Producer's ability to meet the project's financial obligations." Producers can further address any concerns in the Board proceeding that would arise prior to any amendment of the contract, and we include in Section 28 explicit language that the parties will be given notice and an opportunity to be heard by the Board on any such proposed amendments to the contract. For these reasons we do not remove the provision allowing the Board to amend the contract in the public interest without the consent of parties.

Section 35 - SPEED Certification and Compliance with Program Requirements

Board staff have recommended that the following language be added as a new Section 35 of the contract: "Producer shall file an application for SPEED certification from the Board within 30 days after signing this Agreement. The Facility shall comply with all applicable statutory requirements and Board Rules and Orders." No comments were filed on the proposed language. The proposed language makes clear that producers are responsible for regulatory requirements, and we find this addition to be reasonable.

Amendment of Attachments A and C

The Facilitator recommends that the contract be modified to allow the SPEED Facilitator to amend Attachments A and C of the contract when authorized by the Board. The Facilitator states that this language would negate the need for projects to withdraw and reapply to the

6. Docket 7533, Order of 9/30/09 at 27.

standard-offer program in order to accommodate engineering changes or modifications to projects that have already executed standard-offer contracts.

Attachment C constitutes the rate schedule and term of the contract. We do not accept the Facilitator's recommendation that this Attachment could be amended subsequent to execution of the contract. The producer is aware of the price at the time of contract execution and should have made a determination, prior to contract execution, as to whether the project could be economically built at the price included in the contract. Given that there is a waiting list to sign standard-offer contracts, it would be unfair to alter the price for a producer who has signed a contract agreeing to certain price terms when other producers would likely be able to build a project at the same price.

Additionally, Vermont law provides that

> Once the Board determines, under subdivision (2)(B) or (C) of this subsection, the generic cost and rate of return elements for a category of renewable energy, the price paid to a plant owner under a subsequently executed standard offer contract shall comply with that determination.[7]

For these reasons, we do not modify the contract to allow amendment to Attachment C.

Attachment A constitutes the project description, including the location, technology type, interconnecting utility, and capacity of the project. We have previously addressed the possibility of modifying Attachment A:

> The purpose of the requirement contained in Paragraph 9 is to decrease the possibility of gaming the queue. When entering the queue, the plant owner must have a legitimate project to be developed. Accordingly, the location, technology type, and interconnecting utility cannot be changed from the time that the project enters the queue. We recognize that the actual size of a project may be altered during the development of the project; for example, reducing the capacity of the project to address interconnection issues. In balancing the need to minimize the opportunity to game the queue with these real logistical concerns, we conclude that the capacity of projects as described in Attachment A of the standard contract may be altered by up to 5% or 5 kW, whichever is greater.[8]

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7. 30 V.S.A. § 8005(b)(2)(D).

8. Docket 7533, Order of 10/16/09 at 7 (footnote omitted).

The Board is aware that some projects have voluntarily withdrawn from the queue and re-entered because the project capacity has changed by more than 5%. In addition, the change in capacity size is more likely to occur with projects that utilize reciprocating engines, such as farm methane and biomass projects, because it is more difficult to fine-tune the size of such generation units compared to the ease in modifying other types of projects (for example, it is very easy to alter the number of solar panels and thereby alter the capacity of a solar project). This creates an administrative burden on the SPEED Facilitator and, given that the technology caps have now been removed, could create an additional burden on projects that utilize reciprocating engines and reduce overall technological diversity within the queue.

Accordingly, the Board will include a provision in the contract that allows the Facilitator to modify the capacity listed in Attachment A upon project-specific authorization from the Board. The producer must file a request to modify the capacity of the project by more than 5% of the capacity indicated in Attachment A with the Board, with a copy to the SPEED Facilitator. In order to be eligible to alter the capacity of the project by more than 5%, the producer must demonstrate that there are legitimate engineering reasons why the project cannot be built to the capacity indicated in Attachment A and that the capacity included in Attachment A was not simply a placeholder. The Board will determine whether to grant such requests on a case-by-case basis.

The Board will not allow modifications to the location, technology type, or interconnecting utility listed in Attachment A. 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.

Payment to Producer

Pursuant to 30 V.S.A. § 8005(h)(1), the costs of the standard-offer program must be shared between the utilities and the producers; however, the Board has not yet established the mechanism for collecting Facilitator fees from the producers. The SPEED Facilitator recommends that the Board include language that specifically provides the Facilitator with the

authority to charge fees so that producers are provided notice of these fees and that there is a mechanism for ensuring that the fees are collected.

With regard to notice to producers of the Facilitator fees, producers are aware that they are participating in the standard-offer program and should be fully cognizant of the features and requirements of the program, whether set out in statute, Board order, Board rule, or the contract. Accordingly, the contract is not intended to serve as a repository of every element of the standard-offer program, and it could not reasonably do so.

Regarding the collection of fees, the Board will be issuing an order addressing that topic shortly and it is expected that the order will address the ability of the Facilitator to collect fees.

Ability of Producers to Adopt the Revised Contract

Triland requests that the revised contract be available to producers with signed standard-offer contracts.

Given that the revised contract benefits the standard-offer program as well as producers, we conclude that the revised contract should be available to any producer that currently has a standard contract. However, producers should note that the revised contract includes an additional milestone, the requirement that a Section 248 petition be filed within one year of the execution of the contract, that must be met in order to stay in the standard-offer queue. The milestone deadlines reference the date that the standard contract was originally executed, and that date will remain as the milestone reference. In other words, if a revised contract is executed in July of 2011 and the original contract was executed in July of 2010, a Section 248 application must be filed within one year of the July 2010 original execution date and commissioning must still be achieved in July of 2013. The Board will not extend the milestone deadlines.

In addition, if a producer with an existing standard-offer contract elects to adopt the revised contract, the producer may not, at a later date, revert back to the earlier version of the contract.[9] Any producer that would like to adopt the revised contract must do so by August 31, 2011.

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9. Given that the change to the revised contract is permanent, producers that wish to adopt the revised contract may want to inform their lenders prior to making such a decision.

SO ORDERED.

Dated at Montpelier, Vermont, this 7th day of July, 2011.

s/James Volz	)
	) PUBLIC SERVICE
	)
s/David C. Coen	) BOARD
	)
	) OF VERMONT
s/John D. Burke	)

OFFICE OF THE CLERK

FILED: July 7, 2011

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

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

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