STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket Nos. 7523 and 7533

Implementation of Standard Offer Prices for Sustainably)
Priced Energy Enterprise Development ("SPEED"))
resources)

Order entered: 8/18/2009

ORDER RE THRESHOLD LEGAL ISSUES

I. INTRODUCTION

These dockets address the Public Service Board's ("Board") obligation to develop a standard offer program, review statutory standard offer prices, and develop standard offer prices. In this Order, the Board resolves certain legal issues related to: (1) the appropriate process for Docket 7533, (2) the use of an auction to establish standard-offer prices, and (3) the eligibility of certain categories of projects for the standard offer prices.

II. BACKGROUND

On May 27, 2009, the Vermont Energy Act of 2009 ("Act 45") became law. The Act requires that the Board establish a standard offer program for renewable generation facilities by September 30, 2009, and includes the requirement that the Board open and complete, by September 15, 2009, a "noncontested case docket" to determine whether the prices established by the Act "constitute a reasonable approximation of the price that would be paid applying the criteria" established by the Act. In addition, the Act requires that the Board "set the price to be paid to a plant owner under a standard offer" from the SPEED Facilitator, applying the criteria established by the legislation.

On June 3, 2009, the Board issued an Order opening an investigation into the development of standard offer prices for qualifying renewable generation under the Sustainably Priced Energy Enterprise Development ("SPEED") program. The June 3 Order stated that Docket 7523 would address:

> the review of the Act's standard offer prices and, if the prices are not a reasonable approximation, set interim prices by September 15, 2009. In addition, the Board will consider non-price terms and conditions for standard offer contracts in this Docket.

On June 29, 2009, the Board issued an Order opening Docket 7533, "to build upon the record developed in Docket 7523, resolve all necessary implementation issues not addressed in that docket, and reevaluate the prices for SPEED projects set out in the statute."[1] The June 29 Order further stated:

> We open this investigation as a distinct proceeding primarily because the Act requires that the Board not only open the non-contested case docket that is Docket No. 7523, but also complete it by September 15, 2009. To meet this mandate, we intend to close that docket following completion of the tasks set out in Section 8005(b)(2)(B)(ii). To ensure that we can deal with any implementation issues that are not fully resolved and to avoid having to duplicate the gathering and evaluation of information that occurs in that docket, we intend to incorporate the record from that docket as it now exists plus any additional material subsequently generated therein.[2]

On July 10, 2009, Board staff conducted a workshop in these Dockets to, among other things, identify issues that require early determination, and to discuss the process for resolving these issues. Following the workshop, on July 15, 2009, Board staff issued a memorandum outlining the following issues for consideration:

> (1) Nature of Docket 7533. In response to concerns raised by a participant, the July 15 memorandum requested comments on whether: (a) the process established in the June 29 Order should be altered; (b) Docket 7533 must be a contested case as a matter of law; and (c) even if Docket 7533 does not need to be a contested case, certain procedures associated with contested cases, such as hearings or ex parte rules, must apply to Docket 7533.
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> (2) Legal authority to conduct an auction to assist in the determination of standard offer prices. The July 15 memorandum stated that any participant that believed that an auction is consistent with the statute must file such an analysis, along with sufficient detail of the auction to allow meaningful comment.
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> (3) Project eligibility. The July 15 memorandum requested comments on what event should determine whether a particular project is eligible for standard

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1. Docket 7533, Order of 6/29/09 at 2.

2. *Id*. (footnote omitted).

> offer prices; in particular, are standard-offer prices available to: existing generation facilities; facilities that have been constructed but have not yet begun selling power; and facilities that have not been constructed but have received approval under 30 V.S.A. § 248 or 219a? In addition, the July 15 memorandum asked whether the Board can limit the participation of small-scale facilities and whether there are any statutory barriers to establishing a queue for resources.

Initial comments on these issues were filed on July 21, 2009, with reply comments filed on July 27, 2009.

III. Nature of Docket 7533

Positions of Participants

The Group of Municipal Electric Utilities ("GMEU")[3] contends that Docket 7533 must be conducted as a contested case. GMEU cites Act 45, which requires the Board to open and complete a "noncontested case docket" by September 15, 2009, to review the statutory standard offer prices and set interim prices if the statutory prices are not a reasonable approximation of the price that would be paid applying the statutory criteria. GMEU contends that "the legislature did not extend the 'nonconectested case docket' exercise to the January 2010 rate setting, the establishment of contract structure, the organization of a queue, or anything else." Further, GMEU contends that Docket 7523 must be completed by September 15, as required by statute, and to import Docket 7523 into Docket 7533 is contrary to Act 45 and increases the likelihood that a party could successfully appeal the outcome of Docket 7533.

GMEU contends that Docket 7533 must be a contested case because there is no other alternative; the noncontested case docket does not apply to anything beyond the September 15 deadline, and there is insufficient time to conduct a rulemaking. GMEU contends that the only alternative to a rulemaking is a contested case. GMEU further states that participants can utilize an informal process, such as that used in Docket 7081, to resolve issues in the Docket and bring

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3. GMEU consists of Barton Village, Inc. Electric Department, Village of Enosburg Falls Water & Light Department, Town of Hardwick Electric Department, Village of Hyde Park Electric Department, Village of Jacksonville Electric Company, Village of Johnson Water & Light Department, Village of Ludlow Electric Light Department, Village of Lyndonville Electric Department, Village of Morrisville Water & Light Department, Village of Northfield Electric Department, Village of Orleans, Inc. Electric Department, Town of Readsboro Electric Light Department, and Swanton Village, Inc. Electric Department.

these issues to the Board for approval. Finally, GMEU contends that Board Rule 2.201(E)(1), prohibiting ex parte communications between Board members and staff and parties, would be in effect in Docket 7533, because the docket must be a contested case. However, GMEU recommends that the Board waive the ex parte rule, pursuant to Board Rule 2.107, to allow certain staff to continue to work on this docket, while making clear that these staff would not be involved in the decision-making process relative to disputed issues.

Green Mountain Power Corporation ("GMP") contends that Docket 7533 must be conducted as a contested-case proceeding, and an evidentiary hearing should be conducted to inform the Board's decision in the docket. GMP contends that a hearing is required because Act 45 mandates a noncontested case proceeding for the Board's review of the statutory prices while it is silent on the process the Board must utilize in setting the standard offer prices for January 2010. Finally, GMP states that ratemaking is explicitly referenced in 3 V.S.A. § 801's definition of a contested case.

Central Vermont Public Service Corporation ("CVPS") generally supports GMEU's comments on this issue.

The Department of Public Service ("Department") does not advocate that Docket 7533 must be treated as a contested case as a matter of law, but recommends that the docket be treated as a contested case for other reasons. The Department states that conducting Docket 7533 as a contested case would remove this issue from the possibility of an appeal. Further, the Department states that ex parte communications could become an issue for projects seeking standard offer prices that are proposed under Section 248 and become the subject of a dispute at a later time.

Renewable Energy Vermont ("REV") agrees with the Department that Docket 7533 is not required to be conducted as a contested-case proceeding, but contested-case proceedings should be utilized to foreclose the possibility of an appeal on procedural grounds.

Discussion

Act 45 requires several actions by the Board. Under Section 8005(b)(2), the Board must, "no later than September 30, 2009, put into effect, on behalf of all Vermont retail electricity

providers, standard offers for qualifying SPEED resources with a plant capacity of 2.2 MW or less." Under Section 8005(b)(2)(B)(ii):

> No later than September 15, 2009, the board shall open and complete a noncontested case docket to accomplish each of the following tasks:
>
> > (I) Determine whether there is a substantial likelihood that one or more of the prices stated in subdivision (2)(A) of this subsection do not constitute a reasonable approximation of the price that would be paid applying the criteria of subdivision (2)(B)(I).
> >
> > (II) If the board determines that one or more of the prices stated in subdivision (2)(A) of this subsection do not constitute such an approximation, set interim prices that constitute a reasonable approximation of the price that would be paid applying the criteria of subdivision (2)(B)(I). Once the board sets such an interim price, the interim price shall be used in subsequent standard offers until the board sets prices under subdivision (B)(iii) of this subdivision (2).

Finally, under Section 8005(b)(2)(B)(iii): "Regardless of its determination under subdivision (2)(B)(ii) of this subsection, the board shall proceed to set, no later than January 15, 2010, the price to be paid to a plant owner under a standard offer applying the criteria of subdivision (2)(B)(I) of this subsection."

The Board's Order opening Docket 7523 stated: "This Docket will address the review of the Act's standard offer prices and, if the prices are not a reasonable approximation, set interim prices by September 15, 2009. In addition, the Board will consider non-price terms and conditions for standard offer contracts in this Docket."

The Board's Order opening Docket 7533 stated:

> The Act does not prescribe the manner in which the Board must proceed to meet the January 15, 2010, deadline, but merely requires the Board to "set" the price. The Act does not require a hearing or an opportunity for hearing. Thus, it is not a contested case as defined by 3 V.S.A. § 801(b)(3). It is our intention that this docket will proceed in the same manner as Docket 7523, without following all normal procedures for a contested case. For the most part, the issues before the Board in these two proceedings are policy issues rather akin to those that would be addressed in rulemaking. If it becomes apparent that evidentiary hearings are necessary or appropriate on particular issues, we will adjust the procedures and impose any necessary limits on ex parte contacts.

A contested case is defined in 3 V.S.A. § 801(b)(3) as "a proceeding, including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing."

As we noted in our June 29, 2009, Order opening Docket 7533, Act 45 does not specify that the Board require an opportunity for a hearing.[4] In addition, the proceeding does not affect the legal rights, duties, or privileges to the specific parties to the case.[5]

Furthermore, the development of a standard offer program, including the review and establishment of standard offer prices, are "policy determination[s], involving general facts, and having prospective application. These are characteristic of the legislative function."[6] As the Vermont Supreme Court has previously found, "the requirements of due process apply only to agency decisions that are adjudicative, not legislative."[7] In addition, the Vermont Supreme Court has expressly found that "a contested case may only address the legal rights, duties, or privileges of a party to a contested case . . . ."[8] The standard offer program and its prices are available to any party that qualifies, not just the participants to Dockets 7523 and 7533.

For these reasons, we conclude that a contested case proceeding is not required in this instance.

GMEU and other participants contend that, with the exception of the noncontested case docket that establishes interim standard offer prices, a Board proceeding must involve either a contested case or a rulemaking. However, these participants point to no statement or precedent to support this assertion. To the contrary, the Board has frequently conducted proceedings that are neither rulemakings nor contested cases; for example, the establishment of the Energy Efficiency Utility budget was not conducted as a rulemaking and did not follow all the

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4. "Because no hearing is required by law, the appellant's grievance is not a 'contested case' within the provisions of 3 V.S.A. § 801(2)." *Reed v. Department of Public Safety*, 137 Vt. 9, 10-11 (1979).

5. *See*, *Beaupre v. Green Mountain Power Corporation,* 172 Vt. 583, 587 (2001).

6. *Parker v. Town of Milton*, 169 Vt. 74, 80 (1998).

7. *Id.*

8. *Beaupre v. Green Mountain Power Corp.,* 172 Vt. 583, 587 (2001).

procedures of a contested case.[9] Similarly, for the issuance of accounting orders pursuant to 30 V.S.A. § 221 and special contract reviews pursuant to 30 V.S.A. § 229, neither of those statutory provisions require notice and opportunity for hearing, and accordingly, the Board generally does not employ contested-case proceedings for these matters.

In addition, the Board has wide discretion in determining the process by which we structure our cases.[10] Act 45 requires that the Board review statutory prices, including the establishment of interim prices if necessary, by September 15, establish a standard offer program by September 30, and establish more permanent prices by January 15, 2010. Given the short time frame to conduct these activities while also conducting our other responsibilities, the Board must utilize the most efficient process available. Given the specific requirements contained in Act 45, we have determined that the processes set forth in our Orders of June 3 and June 29, 2009, are the most efficient means of carrying out our statutory requirements.

GMEU and others raised the issue of finality in Docket 7533, stating: "an order resulting from a contested case proceeding has advantages of finality, since once the thirty day appeal period has passed, later attacks on the Board's order become difficult." However, 30 V.S.A. § 12 states that a "party to a cause who feels himself or herself aggrieved by the final order, judgment or decree of the board may appeal to the supreme court." There is no difference in the finality of a Board Order, whether it is issued in a contested-case proceeding or not.

In recommending that the Board conduct a contested-case proceeding, GMEU and other participants propose that we waive the prohibition on ex parte communications. However, we cannot do this, because 3 V.S.A. § 813 states:

> Unless required for the disposition of ex parte matters authorized by law, members or employees of any agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or

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9. *See*, *Order Re: Energy Efficiency Utility Budget for Calendar Years 2006, 2007, and 2008,* order issued August 2, 2006. *See also, In Re: Procedures governing the placement of wireless facilities on electric generation and transmission facilities pursuant to 30 V.S.A. § 248(n),* order issued September 5, 2007; *Order re Implementation of the Regional Greenhouse Gas Initiative auction procedures and disbursement of auction proceeds,* order issued July 18, 2008.

10. *In re Petition of Green Mountain Power,* 147 Vt. 509, 516-519 (1986).

> party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

Accordingly, we cannot waive ex parte prohibitions in a contested-case docket. The Department argues that ex parte communications could become an issue for projects proposed under Section 248 that seek standard offer prices. However, the proceeding currently before the Board does not involve any specific projects that would seek approval under Section 248, and Board staff are accustomed to ex parte restrictions and avoiding inappropriate discussions involving potential future dockets.

For these reasons, we conclude that the process established by the Board for Docket 7533 is consistent with the law, with Board precedent, and with the sound and efficient management of these proceedings.

IV. Use of an Auction to Establish Standard Offer Prices

Positions of Participants

The Department does not concede that an auction is inconsistent with statute; however, it contends that "the practical realities of structuring and conducting an auction that would satisfy the statutory requirements under the extreme time pressure imposed upon this process seem to be impractical." Consequently, the Department is not advocating that an auction be used at this time.

GMP contends that an appropriately designed auction could be an efficient means of setting the standard offer prices and could prevent inefficient or inflated prices.

The Agency of Agriculture, Food and Markets ("AAFM") contends that an auction would be an added burden for farmers who would need to bid-in their projects.

Northern Power Systems contends that there is no legal provision within Act 45 that allows for the use of an auction to set standard offer prices.

Discussion

The July 15 memorandum stated that any participant that believed that the use of an auction was consistent with statute should file "an analysis of why an auction is consistent with statute, what specific features an auction would need to contain to make it consistent with

Section 8005(b)(2), and sufficient detail to allow meaningful comment." No participant provided such a filing, and consequently, we do not need to address this issue further.

V. Project Eligibility

Positions of Participants

GMEU contends that standard offer prices should be available only for projects that have filed for regulatory approval after the effective date of the statute. GMEU states: "It is reasonable to conclude that any developer who filed for regulatory approval prior to that date had made a decision to proceed based on the status of economics and regulation existing at that time, and not in reliance upon a standard offer program that did not yet exist."

With respect to a size limitation for the standard offer program, GMEU states that the legislation does not contain any limits on the participation of small-scale facilities but instead mandates standard offers "for qualifying SPEED resources with a plant capacity of 2.2 MW of less."[11]

GMEU also states that the Board has the authority to establish a queue. GMEU cites to the establishment of a queue in implementing Board Rule 4.100, notwithstanding the fact that the underlying statute did not provide explicit authorization. Additionally, GMEU asserts that the Board may subdivide the queue by technology type, because "it is clear that the legislature envisioned development of multiple technologies under differentiated rates, and that it left the Board considerable discretion in the implementation of the Act."

GMP contends that standard offer prices are available only for projects that are commissioned after September 30, 2009, the date established by statute for enactment of the standard offer. GMP further asserts that net metering projects are not eligible for standard offer prices, and customers "will have a choice to participate in the standard offer or net metering depending on their individual circumstances."

GMP contends that the Board could set limits on participation of small-scale facilities because the Board may be overburdened by reviewing proposals of many small projects, thereby limiting the rapid deployment of renewable energy as mandated by the statute. GMP states that a

11. Section 8005(B)(2).

lower project-size threshold could be set to allow more efficient projects into the queue first, and if rapid development of renewable resources is being achieved, the lower threshold can be modified. Finally, GMP asserts that there are no statutory barriers to establishing a queue process.

REV contends that eligibility for standard offer prices should be limited to projects that did not apply for regulatory approval of any kind prior to the effective date of the Act. REV asserts that such a standard is consistent with the purpose of the Act, "which is to incentivize and promote new development and deployment of renewable generation." However, REV further states that a developer of a project "for which regulatory approval is sought after the effective date of the Act should not be required to make an irrevocable choice between net metering and standard offer." REV asserts that if a project is initially net metered, the owner of the project should be allowed to withdraw the project from the net metering program and submit an application for a standard offer contract.

REV further states that the plain language of the statute does not allow the Board to exclude projects below a minimum size from the program. Finally, REV contends that the establishment of a queue process is consistent with the statutory direction that the Board "[t]ake such other measures as the board finds necessary or appropriate to implement SPEED."

CPVS contends that the date on which regulatory approval is sought for a utility-owned project does not matter with respect to whether such a project counts toward the 50 MW ceiling on the program. CVPS cites to Section 8005(b)(2), which states that "a plant owned and operated by a Vermont retail electricity provider shall count toward this 50 MW ceiling if the plant has a capacity of 2.2 MW or less and is commissioned on or after September 30, 2009."

The Department recommends that no project be eligible for the standard offer unless regulatory approval was sought after the law came into effect. The Department further states that participation of small-scale projects cannot be limited. Finally, the Department contends that there is no statutory barrier to establishing a queue process.

AAFM contends that any project commissioned after the effective date of the statute should be eligible for standard offer prices. AAFM asserts that the intent of the Act is to allow

projects commissioned after the enactment of the statute to be eligible for the program, and the date that projects file for regulatory approval is irrelevant.

Discussion

We find the arguments set forth by REV and GMEU to be persuasive on the question of what projects are eligible for standard offer prices. Act 45 directs the Board to ensure that the standard offer program "provides sufficient incentive for rapid deployment and commissioning of plants."[12] Any facility that sought regulatory approval prior to the passage of Act 45 did so based upon the incentives and policies in effect at that time. A developer could not have reasonably assumed that standard offer prices would be available for a project proposed prior to the enactment of the statute, and accordingly would have made a decision to pursue the project based upon other, then-existing information regarding the economics of the project. If a developer sought regulatory approval prior to the effective date of the statute, the standard offer prices could not have been the incentive to develop the project. Accordingly, we conclude that any project that sought regulatory approval prior to May 27, 2009, the effective date of Act 45, is not eligible to participate in the standard offer program.

We do not accept REV's argument that a developer may propose a project under the net metering statute and then withdraw from the net metering program and apply under the standard offer program. The statute governing net metered projects allows the Board to establish "standards and procedures governing application for, and issuance or revocation of a certificate of public good for net metering systems under the provisions of section 248 . . . ." Act 45 does not alter Section 219a to authorize the review of non-net metered projects under the streamlined process allowed under that statute. Consequently, a project on which site preparation or construction had begun, under the net metering process, would not be eligible for standard offer prices.[13] Act 45 also does not authorize a more streamlined process for generation projects

12. Section 8005(b)(2)(B)(i)(III).

13. A developer of a project that sought approval under the net metering statute after May 27, 2009, and had not begun site preparation or construction on the project, could request that the certificate of public good issued under that statute be revoked (or request that its petition be withdrawn if a petition was filed and a certificate of public good was not yet issued) and then file a petition for a certificate of public good under Section 248 and request the

outside of the net metering program. The only permitting process available for non-net-metered generation facilities in Vermont is the standard Section 248 process, including Section 248(j) for projects of limited size and scope.

With respect to the question of whether small-scale projects can be excluded from the standard offer program, we conclude that no participant has identified a sufficient statutory basis for such exclusion, and the plain language of the statute instead appears to allow such participation.

Finally, we conclude that there are no statutory barriers to the general concept of a queue; however, there is no specific queue process that has been proposed at this time. The Board will carefully examine any queue process that is developed in these proceedings to ensure that it is consistent with Act 45.

SO ORDERED.

Dated at Montpelier, Vermont, this 18th day of August, 2009.

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

OFFICE OF THE CLERK

FILED: August 18, 2009

ATTEST: s/ Susan M. Hudson
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)

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standard offer prices.