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: 12/31/2009

THIRD ORDER RE IMPLEMENTATION ISSUES

I. INTRODUCTION

On September 30, 2009, the Public Service Board ("Board") issued an Order establishing a standard-offer program for qualifying sustainably priced energy enterprise development ("SPEED") resources pursuant to the Vermont Energy Act of 2009 ("Act 45")[1]. On October 16 and 28, 2009, the Board issued orders addressing certain implementation issues.

In this Order, we provide further clarity regarding the requirement that the capacity of standard-offer projects not deviate from the capacity described in Attachment A of the standard contract by more than 5% or 5 kW, whichever is greater. In addition, we address the applicability of the milestones contained in the standard contract to hydroelectric facilities.

II. IMPLEMENTATION ISSUES

Construction of a Project in Accordance with Attachment A

The standard contract requires a plant owner to provide a description of the project it intends to construct; the plant description is included as Attachment A of the standard contract. In addition, Paragraph 9 of the standard contract states: "Producer shall construct the Project at the location and in a manner substantially consistent with the description set forth in Attachment A."

1. Public Act No. 45 (2009 Vt., Bien. Sess.).

In our October 16 Order re Implementation Issues we addressed the extent to which a project could be modified after it has entered the queue:

> When entering the queue, the plant owner must have a legitimate project to be developed. Accordingly, the location,[2] 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.[3]

On October 23, 2009, Redstone Commercial Group, LLC ("Redstone") filed a motion that the Board clarify this aspect of the October 16 Order.

Redstone's Motion

Redstone requests that the Board "clarify the remedy or process that occurs in the event a project deviates from the capacity provided for in Attachment A of the Standard Offer contract by more than 5% or 5 kW, whichever is greater.'" Redstone contends that deviating from the 5% limitation should not automatically result in a default in the standard contract. Instead, Redstone states that the Board should establish a process that: (1) allows projects to be improved in response to concerns raised by parties during the permitting process; (2) recognizes that only minimal engineering will have occurred prior to filing an application to be in the queue; and (3) provides for a determination as to whether a project in the queue was a "legitimate project to be developed" at the time of the application.

Redstone proposes that the issue be addressed during the Section 248 permitting process and provides the following proposed benchmarks for the Board to consider in such a process:

> 1. An applicant filing for a CPG for a project that was not within 5 percent of the capacity provided for in its Attachment A would have the burden to demonstrate

2. The location of the project, as used here, refers to the location of the parcel of land on which the project is situated, not the location of the project on the parcel of land.

3. Docket 7533, Order of 10/16/09 at 7 (footnote included).

that the capacity of the project applied for and included in the Attachment A was a "legitimate project."

2. A project applying for a CPG that is within the 5 percent limitation, but altered during the CPG process to not satisfy the 5 percent limitation, would be automatically deemed a "legitimate project" and eligible for the Standard Offer contract.

3. In the event a developer determines that a project will not satisfy the 5 percent limitation through completion of the interconnection procedures, it should be incumbent upon the developer to immediately notify the SPEED Facilitator and to seek to alter Attachment A to the Standard Offer contract with evidence that the capacity of the project applied for and included in the Attachment A was a "legitimate project." A developer should have the right to seek Board review of the SPEED Facilitator determination.

Comments of Participants

The only comment on the Redstone motion was filed by Falling Waters Hydropower, Inc. ("Falling Waters"). Falling Waters states that the need to allow a variance from the 5% or 5 kW rule is particularly acute for hydroelectric projects, as such projects may not know the restrictions associated with the Federal Energy Regulatory Commission ("FERC") permitting process, and therefore the potential capacity of the Project, until the FERC permit has been issued. Falling Waters contends that "a 5% tolerance of generator nameplate rating . . . would likely have a negative impact on project design optimization." Falling Waters recommends that hydroelectric projects be allowed to submit the FERC preliminary permit application or any subsequent documents such as a "Notice of Intent" or a "Preliminary Application Document" as Attachment A to the standard contract.

Discussion and Conclusions

The limitation on changing the capacity of the project from the time that a plant owner applied for a standard offer to the time the plant owner commissioned the project was developed in an attempt to encourage only legitimate projects to enter the queue. Given the 50 MW ceiling on participation in the standard-offer program, we determined that certain actions were necessary

"to ensure that the queue does not simply become a placeholder for potential developers "[4] and to meet Act 45's directive regarding rapid deployment of standard-offer projects.[5]

The Board recognizes that there are legitimate reasons for the capacity of a project to change as it proceeds through the permitting process, and does not want to discourage petitioners in the Section 248 (or other) process from altering a project to address concerns of the public and parties to that proceeding. Additionally, we recognize that changes to a project's capacity may be needed to address the engineering concerns of the interconnecting utility. However, this need for flexibility conflicts with the 50 MW ceiling on participation in the standard-offer program,[6] the purpose of which "is to contain the overall costs of the standard-offer program and address concerns that the program may adversely impact ratepayers."[7] To the extent that individual projects increase in capacity, there is the potential to significantly increase the aggregate capacity of the program beyond the 50 MW ceiling imposed by Act 45.

We conclude that Redstone's proposed mechanism for reviewing changes to the capacity of a project that is greater than 5% is, in general, a reasonable approach to resolving this issue, except that for changes in capacity that occur during a Section 248 proceeding, the Board's determination with respect to the standard contract will be made outside of the Section 248 Docket. Accordingly, we adopt the following procedures:

> 1. A plant owner who determines that changes to the capacity of the project will exceed the 5%, prior to filing for a certificate of public good under Section 248 (or FERC approval for a FERC-jurisdictional hydroelectric project), must notify the Board, the SPEED Facilitator, and the Department of Public Service as soon as practicable. The notification must include a detailed description of the reason for the change in project capacity.
>
> 2. If the change to the project capacity occurs during a Section 248 (or FERC) proceeding, the plant owner must highlight during the proceedings the fact that the project has accepted the standard offer, that the change in capacity exceeds 5%,

---

4. Docket 7533, Order of 9/30/09 at 9.

5. *See* Section 8005(b)(2)(B)(i)(II).

6. Section 8005(b)(2). *See also,* Docket 7533, Order of 9/30/09 at 9-10.

7. Docket 7533, Order of 9/30/09 at 10.

the reasons for the change in the capacity of the project, and must notify the SPEED Facilitator of the change in project capacity.[8]

3. Regardless of whether the plant owner notifies the Board and interested parties of the proposed change to the capacity of the project during the Section 248 process or prior to that process, the plant owner will have the burden of demonstrating that the project applied for in the standard-offer application was a legitimate project and that the scope and character of the project was described in Attachment A of the standard contract in good faith and was not simply a placeholder for a project that had not yet been fully formulated. If the Board determines that the project described in the standard-offer application was not a legitimate project, it will be considered to be in default of the standard contract and removed from the queue. The Board will make these determinations on a case-by-case basis after considering the facts and representations of the plant owner and any comments on the request.

Finally, we do not accept Falling Waters recommendation that hydroelectric projects be allowed to submit FERC documents as Attachment A. We expect all plant owners to make a reasonable estimate as to the eventual capacity of the project, and the process set forth above provides a mechanism for adjusting the capacity of a legitimate project

Commissioning Milestones for Hydroelectric Projects

On October 15, 2009, Falling Waters filed a motion to clarify or amend the standard contract with respect to the commissioning date for hydroelectric facilities. Falling Waters contends that the commissioning milestones set forth in the standard contract are not appropriate for hydroelectric projects because such projects must undergo the FERC permitting process. Falling Waters states that the time required to obtain a FERC license can vary considerably from as little as six months for a simple exemption to as many as seven years for a complex project. Falling Waters suggests that "the commissioning milestone for hydropower projects should be amended to allow 3 years from FERC license or license exemption issuance."

No participant filed comments regarding Falling Waters' motion.

8. Any significant changes to a project that has received a CPG under Section 248 must receive approval from the Board. This will include any changes to the capacity of a standard-offer project.

Discussion and Conclusions

The purpose of the milestones contained in the standard contract is to ensure the rapid deployment of standard-offer projects, as required by Act 45.[9] The Board recognizes that, for hydroelectric projects, there is a permitting process, independent of the Board, that can take significantly longer than the Section 248 permitting process. The milestones were developed based upon experience with the Section 248 permitting process.

However, to simply replace the milestones in the standard contract with a requirement that commissioning occur within some time period after receipt of the FERC license could result in some projects not being commissioned for seven to ten years. Such a time frame appears to be inconsistent with the statutory requirement for rapid deployment of standard-offer projects. Accordingly, we will allow owners of hydroelectric plants to request waivers of the milestones in the standard contract, provided that the plant owners can demonstrate good-faith compliance with FERC requirements, and can demonstrate that they have made all reasonable efforts to obtain FERC approval as quickly as possible.[10] We caution plant owners that the need to comply with the requirement in Act 45 for rapid deployment of standard-offer projects means that there will be a limit to the length of time for which the milestones could be waived.

SO ORDERED.

9. *See* Docket 7533, Order of 9/30/09 at 9.

10. In addition to the FERC license requirements, the appeal of a certificate of public good ("CPG") issued under Section 248 is also outside of the Board's control. Accordingly, we will also allow plant owners the opportunity to request a waiver of the commissioning milestone if the plant owner can demonstrate that the appeal of the CPG is the cause for failure to meet the commissioning milestone.

Dated at Montpelier, Vermont, this 31st day of December, 2009.

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

OFFICE OF THE CLERK

FILED: December 31, 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)

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.