STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7873

Programmatic Changes to the Standard-Offer Program)
)

Docket No. 7874

Investigation into the Establishment of Standard-Offer Prices)
)

Order entered: 8/31/2016

ORDER DENYING REQUEST FOR RECONSIDERATION

I. INTRODUCTION

In this Order the Vermont Public Service Board ("Board") denies the motion for reconsideration filed by SolarSense LLC ("SolarSense").

II. PROCEDURAL HISTORY

On May 27, 2016, the Board issued an Order (the "Mary 27 Order) finding seven projects to be eligible to participate in the Developer Block of the standard-offer program and authorizing the Standard Offer Facilitator to enter into standard-offer contracts with those projects.[1] In addition, the Board directed the Standard-Offer Facilitator to place two projects on the reserve list. SolarSense submitted two bids for contracts that were not selected because they failed to meet the site-control requirements set forth in the request for proposals ("RFP") issued by the Board.

On June 9, 2016, SolarSense LLC ("SolarSense") filed a motion for reconsideration of the Board's order (the "SolarSense Motion").

1. The Developer Block is capacity reserved for proposals made by private developers while the Provider Block is capacity reserved for proposals made by Vermont retail electric utilities. *See* 30 V.S.A. § 8005a(c)(1)(B).

On July 11, 2016, the Vermont Department of Public Service (the "Department") and Allco Renewable Energy Limited and PLH, LLC (collectively "Allco PLH") filed responses to the SolarSense Motion.

III. LEGAL STANDARD

The Vermont Supreme Court has stated that Rule 59(e) codifies the trial court's inherent power to "open and correct, modify or vacate its judgments."[2] The purpose of the rule is to allow the court to avoid an unjust result arising from "the mistake or inadvertence of the court and not the fault or neglect of a party."[3]

Under Rule 59(e), the Board has "broad power to alter or amend a judgment."[4] In such a review, "the court may reconsider issues previously before it, and generally may examine the correctness of the judgment itself."[5] A hearing on such a motion is warranted "when the grounds relied upon are stated with particularity and the motion is neither frivolous nor totally lacking in merit"[6] and a showing of prejudice in the absence of a hearing is made.[7] Nonetheless, the Vermont Supreme Court has expressly stated that the rule does not demand a hearing[8] and that the power to grant a hearing "should be used with great caution."[9] It is not intended to permit

2. *Osborn v. Osborn*, 147 Vt. 432, 519 A.2d 1161 at 433 (1986). Board Rule 2.105 incorporates Rule 59(e) into the Board rules.

3. *Id., citing Haven v. Ward Estate*, 118 Vt. 499, 502, 114 A.2d 413, 415 (1955)(the court's power to vacate or modify judgments should be used with great caution and is addressed solely to the discretion of the court (citations omitted)).

4. *In re Robinson/Keir Partnership*, 154 Vt. 50, 54 (1990) (citations omitted).

5. *Id.* (citations omitted).

6. *Jensen v. Jensen*, 139 Vt. 551, 554, 433 A.2d 258, 260 (citations omitted).

7. *Gardner v. Town of Ludlow*, 135 Vt. 87, 92, 369 A.2d 1382, 1385 (1977) (not all error reaches proportions requiring reversal; prejudice must appear); *see also Petition of Rutland Renewable Energy, LLC*, Docket No. 8188 (Order of 5/6/15) (DPS must show that the Board's decision must be altered "to avoid an unjust result").

8. *Kalakowski v. Town of Clarendon*, 139 Vt. 519, 431 A.2d 478 (1981) (nothing new was presented in motion, the rule does not demand a hearing on the merits, plaintiffs failed to indicate how they were prejudiced or to show that court abused its discretionary power).

9. *Haven v. Ward's Estate*, 118 Vt. 499, 502 (1955).

parties to simply relitigate issues or revise their tactical approach[10] or to allow parties to advance arguments that could and should have been presented prior to the decision.[11]

IV. POSITIONS OF THE PARTIES

SolarSense requests that the Board: (1) award the SolarSense "Pit Site" project a standard-offer contract and (2) place the SolarSense "Cornfield Site" project on the reserve list. SolarSense states that if it had been provided an opportunity to cure its submissions, it would have done so. SolarSense asserts that the Standard Offer Facilitator provided such an opportunity to another developer but failed to treat SolarSense similarly. SolarSense represents that its projects are "vetted and have a high likelihood of being implemented, thus achieving the statutory goal of timely development."

Allco PLH contends "that the SolarSense motion should be denied for the simple reason that SolarSense did not comply with the site control requirements by the bid date." According to Allco PLH, "[t]he fact that the [Standard-Offer] facilitator asked another bidder (whose bid was rejected) whether it had an executed lease instead of the unexecuted lease submitted with its bid, does not cure SolarSense's failure to have site control by the bid date."

The Department states that "[a]ccepting SolarSense's summary of events as accurate, the Department finds SolarSense's request to be reasonable. While the Board has the ultimate discretion to determine how and when site control must be demonstrated for a Standard Offer application, the Department believes it is important from a due process perspective that all bidders should be treated equally in their application."

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10. *In re Cent. Vt. Pub. Serv. Corp.*, Dockets Nos. 6946 and 6988, Order of 5/25/05; *Amended Petition of UPC Vermont Wind, LLC*, Docket 7156, Order of 2/11/11 at 3.

11. *In re SP Land Co., LLC*, 190 Vt. 418, 435, 35 A.3d 1007, 1019 (2011) (it is well settled that Rule 59(e) "does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the court prior to the judgment" (citations omitted)).

V. DISCUSSION

The RFP describes the "Mandatory Requirements" that govern the submission of bids for standard-offer contracts. The Mandatory Requirements include the following provision concerning "Site Control":

> The proponent must demonstrate project site control to 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 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 proponent or its assignee, to purchase or lease such real property; or (4) a duly executed contract for the purchase or lease of such real property.[12]

The RFP further states that "[p]roposals 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." Accordingly, it is the responsibility of the bidder to submit a bid that conforms to the Mandatory Requirements set forth in the RFP.

SolarSense has not argued that its bid met the Mandatory Requirements contained in the RFP. Instead, SolarSense argues that the Standard-Offer Facilitator unfairly asked another developer whether that developer had an executed lease but did not similarly inquire of SolarSense. This argument is unavailing for two reasons. First, SolarSense's bid was deficient at the time it was filed because it was accompanied by a letter of intent, which did not satisfy the RFP's requirements for site control. Therefore, SolarSense's bid was properly rejected.

Second, the RFP reserves certain rights to the Standard-Offer Facilitator, including the right to, in its discretion:

> Verify with any proponent, or with a third party, any information set out in a proposal and . . . check references provided by any proponent as well as others.[13]

In this case, another developer filed a lease that was unexecuted. This document, if executed, would have been responsive to the requirements of the RFP. The Standard-Offer Facilitator did not abuse its discretion by inquiring with that developer whether the submission of an unexecuted lease was a mere oversight. In contrast, the Standard-Offer Facilitator had no obligation to inquire whether SolarSense could produce an executed lease because SolarSense

12. 2016 Standard-Offer RFP at § 3.2.2.
13. 2016 Standard-Offer RFP at § 4.3.

chose to file a letter of intent with its bid, which was non-responsive to the requirements of Section 3.2.2 of the RFP. In light of these facts, the Board finds the Standard-Offer Facilitator's actions were appropriate and did not prejudice SolarSense. Accordingly, we find no basis to grant the relief requested by SolarSense.

V. CONCLUSION

For the reasons stated in this Order, the motion for reconsideration filed by SolarSense is denied.

SO ORDERED.

Dated at Montpelier, Vermont, this 31st day of August, 2016.

s/James Volz)
)
) PUBLIC SERVICE
)
) BOARD
)
) OF VERMONT
s/Sarah Hofmann)

OFFICE OF THE CLERK

FILED: August 31, 2016

ATTEST: s/Judith C. Whitney
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@vermont.gov)