STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7873

Programmatic Changes to the Standard-Offer Program)

and Docket No. 7874

Investigation into the Establishment of Standard-Offer)
Prices under the Sustainably Priced Energy Enterprise)
Development ("SPEED") Program)

Order entered: 6/28/2013

ORDER RE PETITION TO INTERVENE AND REQUEST FOR RECONSIDERATION

I. INTRODUCTION

On May 16, 2013, the Public Service Board ("Board") issued its *Order Re RFP Selection* ("May 16 Order"). In the May 16 Order, the Board determined that two projects offered in response to the 2013 Request for Proposals ("RFP"), the Bennington Solar Project and the Apple Hill Solar Project, constituted a single "plant" under 30 V.S.A. § 8002(14) because both projects were located on the same parcel of land. As a single plant, the projects exceeded the 2.2 MW statutory limit for plant capacity in the standard-offer program. Accordingly, the Board selected the least-cost project, the Bennington Solar Project, to receive a standard-offer contract and excluded the Apple Hill Project. On May 21, 2013, Ecos Energy, LLC ("Ecos"), the developer of both projects, filed a Petition to Intervene and Petition for Reconsideration and Modification of the Board's ex parte Order Issued on May 16, 2013.

On June 7, 2013, the Department of Public Service ("Department") filed a response to Ecos's filing. The Department also requested that the Board modify its May 16 Order to exclude both the Bennington Solar Project and the Apple Hill Solar Project.

In this Order, we deny both Ecos' and the Department's requests.

II. PROCEDURAL HISTORY

On April 1, 2013, the SPEED Facilitator, VEPP Inc., issued an RFP to solicit standard-offer projects to meet the requirements of 30 V.S.A. § 8005a(c).

On May 1, 2013, the SPEED Facilitator received proposals in response to the RFP. On May 10, 2013, the SPEED Facilitator filed with the Board a report detailing the RFP results. Thirty-four proposals, all solar projects, totaling 60.39 MW in plant capacity, were received in the RFP process. The following is a list of the 5 lowest-cost proposals ranked from lowest to highest price:

Developer	Project Name	Location	Size (MW)	Price ($/kWh)
Ecos Energy, LLC	Bennington Solar Project	Bennington	2.0	0.1340
Ecos Energy, LLC	Apple Hill Solar Project	Bennington	2.0	0.1390
Ecos Energy, LLC	Sudbury Solar	Sudbury	2.0	0.1440
Champlain Valley Solar Farm, LLC	Champlain Valley Solar Farm	Middlebury	2.2	0.1441
Otter Valley Solar Farm, LLC	Otter Valley Solar Farm	Pittsford	2.2	0.1491

VEPP Inc.'s report noted that the two lowest-cost proposals, the Bennington Solar Project and the Apple Hill Solar Project, are located on the same parcel of property and the generation components of the project are physically contiguous. VEPP Inc. requested that the Board make a determination as to whether these two projects constitute a single plant for purposes of 30 V.S.A. § 8002(14).[1]

On May 16, 2013, the Board issued the *Order Re RFP Selection*, excluding the Apple Hill Solar Project from the standard-offer program.

On May 21, 2013, Ecos filed its Petition to Intervene and Petition for Reconsideration and Modification of the Board's ex parte Order Issued on May 16, 2013.

1. Letter of John Spencer, on behalf of VEPP Inc., to Susan M. Hudson, Clerk of the Board, dated May 6, 2013.

On May 26, 2013, the Board issued a memorandum requesting comments on Ecos's filing. The memorandum also requested comments on what procedures the Board should follow in reviewing Ecos' filing.

On May 28, 2013, Green Peak Solar filed a response to the Board's memorandum stating that the Board should issue an order removing both the Bennington Solar and Apple Hill Solar Projects.

On May 31, 2013, Renewable Energy Vermont ("REV") filed a response to the Board's memorandum stating that the Board should issue an order removing both the Bennington Solar and Apple Hill Solar Projects.

On June 7, 2013, the Department filed a response to Ecos' filing, in which the Department requested that the Board modify its May 16, 2013, Order to exclude both the Bennington and Apple Hill Solar Projects.

On June 7, 0213, Ecos filed reply comments responding to the responses of REV, Green Peak Solar, and the Department.

III. SUMMARY OF ECOS' FILING AND THE DEPARTMENT'S REQUEST

Ecos raises two arguments in support of its request for reconsideration. First, Ecos alleges procedural defects prior to the May 16 Order. Second, Ecos challenges our determination that the Bennington and Apple Hill Solar Projects constitute a single plant under state law. Ecos alleges that VEPP Inc.'s May 1 letter was an improper *ex parte* communication between VEPP Inc. and the Board. Instead, Ecos contends, the Board should have followed "standard dispute resolution procedures" and afforded Ecos, at a minimum, "notice and an opportunity to respond" prior to making a decision. Ecos states that VEPP Inc.'s letter should have been treated as a Petition for Declaratory Ruling and that we should have followed the procedures attendant to such a petition under Board Rule 2.403.

On the second question, Ecos contends that the key issue in determining what constitutes a plant is "technical independence."[2] Ecos states that our consideration of the projects' location on a single parcel of land and use of "similar interconnection points" did not provide a sufficient

2. Ecos motion of May 21, 2013, at 10.

basis for concluding that the projects are not technically independent and thus comprise a single plant.[3]

In its June 7 filing, the Department requests that the Board reconsider or modify the May 16 Order to conform to the dissent issued by Board member Burke by removing both the Bennington and Apple Hill Solar Projects from the RFP award group. In support of its request, the Department cites the legislative goals of the standard-offer program to encourage the development of small and moderate sized plants and to distribute such plants across the state's electric grid. The Department contends that the 2.2 MW statutory limit on plant capacity for standard-offer projects is intended to effectuate these goals and that the Department is concerned that the May 16 Order may affect the integrity of the program. The Department states that under previous Board Orders, the Board has discretion to reject both projects from this year's RFP award group.

IV. DISCUSSION

Motion to Intervene

Ecos requests "full party" status under Board Rule 2.209. Because the proceedings in Dockets 7873 and 7874 are not a contested case under the Vermont Administrative Procedure Act ("APA"), we will not consider Ecos' request. Section 801(a)(2) of Title 3 of the Vermont Statutes Annotated defines a "contested case" as a proceeding "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." In this proceeding, the Legislature has made clear that the Board is not required to hold a contested case to implement a market-based mechanism.[4] Accordingly, participation in these Dockets is informal. Informality notwithstanding, Ecos' filings, including the request for reconsideration, have received our full consideration, as have the filings of all other participants in these Dockets.

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3. Ecos motion of May 21, 2013, at 7–10.

4. *See* 30 V.S.A. § 8005a(f) (Stating that the Board shall determine the price paid to standard-offer plants *via* a "market-based mechanism" and that such a determination is not required to be a contested case.).

Procedural Issues

Next we turn to Ecos' contention that the basis for our May 16 Order rests on an improper *ex parte* request for declaratory judgment by VEPP Inc. and as such, violated the Vermont Rules of Civil Procedure. This argument is without merit. Under the APA, only contested cases are subject to the prohibition against *ex parte* contacts.[5] As this case is not a contested case, no improper *ex parte* communication occurred prior to the Board's May 16 Order.

Ecos' contention that the question of whether the Bennington and Apple Hill Solar Projects constitute a single plant was a "dispute" that required "normal dispute resolution procedures" is also misplaced. As a non-contested case, the only specific procedures relevant to the administration of the RFP were those set forth in the RFP document itself. Section 4.4 of the RFP states that all disputes will be resolved by the Board but establishes no additional process for resolving such disputes. Further, no "dispute" occurred until the May 16 Order was issued and Ecos filed its request for reconsideration. Therefore, no "dispute resolution process" was necessary until after the issuance of the May 16 Order. There is a process for resolving disputes regarding Board Orders and Ecos has availed itself of it by filing a request for reconsideration.

Accordingly, Ecos' final argument—that Ecos has been "provided no process at all" and thus, has been denied its constitutional due process rights—must also fail. Setting aside the threshold issue of whether Ecos has a cognizable property interest in the outcome of the RFP selection process—which we doubt[6]—an individual who claims a violation of procedural due process in administrative proceedings has the burden of showing such a violation by balancing the various interests and risks involved.[7] Ecos' request fails to address these factors—nor does

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5. 3 V.S.A. § 813.

6. A protected property interest must be more than a "unilateral expectation." It must be a "legitimate claim of entitlement created by state law." *Ahern v. Mackey*, 2007 VT 27, ¶ 11 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (internal quotes omitted). The RFP selection process was a competitive process in which the Board retained the discretion to determine eligible participants. Therefore, it is not clear to us that any participant can have a legitimate claim of entitlement to the outcome of such a process.

7. The three factors that must be balanced are: (1) private interest affected by official action; (2) risk of erroneous deprivation of interest through procedures used, and probable value of additional procedures; and (3) government's interest, including function involved and fiscal and administrative burdens that additional procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Ecos persuasively justify any additional process because, as discussed below, even accepting all facts plead in Ecos' filings as true, we are not persuaded that the Bennington and Apple Hill Solar Projects are separate plants under state law.

For the foregoing reasons, we conclude that Ecos' procedural claims are without merit.

Definition of Plant under 30 V.S.A. § 8002(14)

Pursuant to 30 V.S.A. § 8005a(b) a project must have "a plant capacity of 2.2 MW or less" to be eligible for a standard-offer contract. In order to determine whether the Bennington Solar Project and the Apple Hill Solar Project constitute separate eligible plants or a single ineligible plant under Section 8005a(b), we must examine the statutory definition of the word "plant." Pursuant to Section 8002(14), a "plant" is:

> an independent technical facility that generates electricity from renewable energy. A group of newly constructed facilities, such as wind turbines, shall be considered one plant if the group is part of the same project and uses common equipment and infrastructure such as roads, control facilities, and connections to the electric grid.

Ecos states that the focus of the definition is "technical independence." In determining "technical independence," Ecos contends that we should look to the elements listed in the second sentence of Section 8002(14), including whether the facilities in question are "part of the same project" and use "common equipment and infrastructure." Ecos makes several representations concerning the projects to demonstrate their "technical independence": (1) the projects will interconnect with separate three phase lines; (2) there will be a fence in between the projects; (3) the projects will have separate access roads; (4) the Projects will have different financing parties; and (5) the projects will use separate inverters, transformers and other equipment.

Even accepting all of Ecos' representations, we do not conclude that the projects in question are separate plants. The Standard-Offer Program was created to support the Legislature's goal of "providing support and incentives to locate renewable energy plants of *small* and *moderate* size in a manner that is distributed across the state's electric grid."[8] The Legislature further defined energy plants of a "small or moderate size" by limiting the capacity of standard-offer projects to no more that 2.2 MW. While the projects may be operationally

8. 30 V.S.A. § 8001(7) (emphasis added).

independent, they are still being advanced by the same developer, located on the same parcel of land, and adjoining each other. Based on our review of the site plans provided by Ecos with its request for reconsideration, it is reasonable to infer that they are a single plant. Adopting Ecos' highly-technical interpretation of Section 8002(14) would thwart the Legislature's intent to encourage the development of small or moderate sized plants. Under Ecos' logic, any size facility could be constructed so long as it could be partitioned into "technically independent" 2.2 MW pieces by including redundant equipment and separating each piece by a mere fence. Such clustered development would also frustrate the Legislature's desire to distribute these small-to-moderate-sized facilities across the state's electric grid. Furthermore, the Legislature directed the Board to implement a streamlined review for such projects under Section 248 because of the reduced environmental impacts associated with small- and medium-sized plants.[9] The simplified procedures developed for standard-offer projects are not appropriate for larger plants and their more significant environmental impacts. We decline to adopt an interpretation of Section 8002(14) that would lead to a result that frustrates the Legislature's intent in this manner.[10]

Thus, for the reasons stated above, Ecos' request for reconsideration of our determination that the Bennington Solar and Apple Hill Solar Projects constitute a single plant is denied.

The Department's Request

The Department states that the disqualification of both projects is appropriate considering the plain language of our October 16, 2009, Order in Docket 7533, in which it stated that projects determined to be a single plant would be "removed from the queue." The Department contends that our policy of determining whether two projects constitute a single plant on a case-by-case basis preserves the Board's discretion to remove both of the projects at issue from the RFP and that the interests of maintaining the integrity of the Standard-Offer Program dictate that we exercise such discretion in this case.

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9. 30 V.S.A. 8007(b).

10. *Noble v. Delaware & Hudson Ry. Co.*, 142 Vt. 156, 160 (1982) ("This would clearly frustrate the legislative purpose of the statutory scheme and produce an irrational result.").

While we agree with the Department that the Board has the discretion to determine whether a project is eligible to receive a standard-offer contract, we do not think exercising our discretion in the manner suggested by the Department is warranted in this case. Nor do we think the operation of the specific procedure developed in Docket 7533 referenced by the Department should apply here. In Docket 7533, we developed procedures for filling Standard-Offer Program capacity by a lottery system, resulting in a queue of projects waiting to receive contracts with a standard price. Developers who entered ineligible projects into the lottery deprived eligible projects of a fair opportunity to participate in the selection process by decreasing the probability that eligible projects would be selected for a contract. Accordingly, it was necessary to discourage such behavior. In contrast, participants in the RFP process compete based on price. We agree in principle with Board Member Burke's Dissenting Opinion to our May 16 Order, that it would be appropriate to disqualify the Bennington Solar Project from the RFP if the Bennington Solar Project's price was artificially low because of economies of scale gained by its improper size. However, while this may be the case, we have no evidence of record demonstrating that the Bennington Project's price was actually skewed by the inclusion of the Apple Hill Solar Project—each project submitted a separate bid with a different price. Even in the event that such improper price skewing did occur, Ecos will not profit from it because we have offered a contract to Ecos for only the Bennington Solar Project. If the contract price is untenable, Ecos will not accept the contract. On the other hand, if Ecos can accept the contract price then Vermont ratepayers should receive the benefit of the low price.

By rejecting the Apple Hill Solar Project, we have made clear that proposed facilities must be sufficiently independent to constitute separate plants. The interests of maintaining the integrity of the Standard-Offer Program will not be materially advanced by also rejecting the Bennington Solar Project. If considered alone, the Bennington Solar Project meets the statutory definition of a plant and has submitted an otherwise qualifying bid. The Bennington Solar Project offers the lowest price available which will be a benefit to the ratepayers of Vermont. On balance, the limited benefit that would be realized by rejecting both Projects does not outweigh the benefit of selecting the lowest cost bid. Accordingly, the Department's request is denied.

SO ORDERED.

Dated at Montpelier, Vermont, this 28th day of June, 2013.

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

OFFICE OF THE CLERK

FILED: June 28, 2013

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.