

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7782

Investigation into the Establishment of a Standard-Offer)
Price for Baseload Renewable Power under the)
Sustainably Priced Energy Enterprise Development)
("SPEED") Program)

Order entered: 3/29/2013

I. INTRODUCTION

In 2011, Act 47¹ mandated the establishment of a standard-offer price for certain baseload renewable power.² In an Order dated October 29, 2012, the Public Service Board ("Board") established a standard-offer price schedule for baseload renewable power (Ryegate biomass facility) that is represented by a levelized price of \$0.10 per kWh and that included a fuel pass-through mechanism, by which the price will be adjusted to reflect changes in Ryegate's fuel costs.

Ryegate has proposed a power purchase agreement ("PPA") between itself and the Sustainably Priced Energy Enterprise Development ("SPEED") Facilitator. Other parties have recommended changes to Ryegate's proposal. In this Order, we approve, with modifications, the form of the PPA, which is contained in Attachment I to this Order.

II. STATUTORY AND PROCEDURAL HISTORY

In 2005, the Vermont General Assembly established the SPEED program to encourage the development of renewable energy resources in Vermont, as well as the purchase of renewable

1. Public Act No. 47 (2011 Vt., Bien. Sess.), codified in 30 V.S.A. § 8005.

2. Ryegate Associates ("Ryegate") is the owner of an existing 20.5 MW biomass generation facility in Ryegate, Vermont, that is defined as baseload renewable power under the Act. It is the only facility in Vermont that meets the criteria for baseload renewable power.

power by the State's electric distribution utilities.³ In response to the legislation, the Board promulgated Board Rule 4.300 to implement the SPEED program. Board Rule 4.300 also established a SPEED Facilitator to encourage the development of resources under the program.⁴

In 2011, Act 47 mandated the establishment of a standard-offer price for certain baseload renewable power by November 1, 2012. The statute sets forth the factors that are to be used by the Board in setting a price.

In an October 29, 2012, Order, the Board established a standard-offer price schedule for baseload renewable power (Ryegate biomass facility) that is represented by a levelized price of \$0.100 per kWh. The standard-offer price schedule included a fuel pass-through mechanism, by which the standard-offer price will be adjusted to reflect changes in Ryegate's fuel costs. The October 29, 2012, Order required that Ryegate and the SPEED Facilitator either jointly submit a standard-offer contract to the Board for its review and approval, or separately submit proposed standard-offer contracts if a joint agreement is not reached.

On November 30, 2012, Ryegate and the SPEED Facilitator jointly filed a proposed PPA. The filing indicated that Ryegate and the SPEED Facilitator had not reached agreement concerning the indemnification provision of the contract.

On December 14, 2012, the City of Burlington Electric Department ("BED"), Green Mountain Power Corporation ("GMP"), and Vermont Public Power Supply Authority ("VPPSA") filed comments on the proposed PPA. On December 18, 2012, the Department of Public Service ("Department") filed comments on the proposed PPA.

On December 24, 2012, Ryegate filed reply comments. On December 28, 2012, VEPP Inc. filed reply comments. On January 2, 2013, BED filed comments in response to Ryegate's December 24, 2012, reply comments.

On March 8, 2013, the Board staff held a workshop in this proceeding to discuss the comments filed by parties on the proposed PPA. Workshop participants included representatives

3. Those portions of Title 30 concerning renewable energy in general, and the SPEED program in particular, are set forth in 30 V.S.A. Chapter 89.

4. 30 V.S.A. § 8005(b)(1) requires the Board to "name one or more entities" as SPEED Facilitator. VEPP Inc. presently is the designated SPEED Facilitator and operates under a contract with the Board.

from Ryegate, the Department, BED, GMP, VPPSA, VEPP Inc. and Vermont Electric Cooperative, Inc.

On March 13, 2013, Ryegate filed a revised PPA based on input from the workshop. On March 14, 2013, GMP filed, in response to an issue raised in the workshop, a letter clarifying that the meter used to measure plant electrical output is the property of Ryegate, not GMP.

III. DISCUSSION

In this Order, we approve, with modifications, the PPA proposed by Ryegate and the SPEED Facilitator for the reasons set forth below. The PPA in an approved form is contained in Attachment I to this Order.

BED, GMP, and VPPSA raised significant concerns with regard to the proposed PPA, as well as recommending several editorial and administrative changes. The Department represented that it supported the comments filed by BED and GMP. The workshop, conducted by Board staff, resolved some of the issues raised in the comments.

We address the significant issues among the parties below.

Payments to Producer

The proposed PPA contained provisions with regard to circumstances under which a distribution utility failed to make a payment to the SPEED Facilitator. BED objected to the inclusion of these provisions in the PPA since the Vermont distribution utilities are not parties to the PPA. Ryegate agrees with the removal of the provisions and requests that any Board order approving the PPA include clarification with regard to utility payments to the SPEED Facilitator.

We agree that clarifying the process with regard to utility payments is useful and hereby provide the following for clarification.

Pursuant to Section 8009(b), commencing November 1, 2012, and ceasing on November 1, 2022, the electricity supplied by each Vermont retail electricity provider to its customers shall include the provider's pro-rata share of the baseload renewable power portfolio requirement. Pursuant to Section 8009(f)(1), the SPEED Facilitator is required to purchase the power produced from the Ryegate plant and allocate the electricity purchased and any associated

costs to the Vermont retail electricity providers based on their pro-rata share of total Vermont retail kWh sales for the previous calendar year. In addition, Vermont retail electricity providers are required to accept and pay these costs.

Under these provisions, Vermont retail electricity providers have an obligation to purchase and to pay for electricity from Ryegate allocated to them by the SPEED Facilitator. In the event that a Vermont retail electricity provider fails to make payment when due to the SPEED Facilitator, and such payment remains delinquent for more than three days, or the business day closest thereto, the SPEED Facilitator shall promptly notify the Board and Ryegate. The SPEED Facilitator or Ryegate may seek enforcement for failure to make payment with the Board pursuant to Section 8009. In the event of such enforcement, the SPEED Facilitator shall do all things reasonable to assist in such action.

In addition, the SPEED Facilitator shall have the right to collect interest on past-due amounts owed by a retail electricity provider or on other amounts on account of any delinquency in making any payment due.⁵ If payment is not made when due, one percent of the amount unpaid shall be added to any amount due as liquidated damages, and an additional one-and-one-half percent interest shall be added thereto every thirty days thereafter. For good cause the Board may waive all or part of such damages. The SPEED Facilitator shall diligently pursue collection of such interest and damages, and shall pay any interest collected to Ryegate upon receipt from the delinquent retail electricity provider, and shall retain any damages collected. The damages retained by the SPEED Facilitator shall be used to cover reasonable and necessary costs of performing the functions of the SPEED Facilitator.

Fuel Adjustment Mechanism

GMP, BED, and the Department recommend that the PPA include a provision calling for the creation of an operating committee to be made up of representatives of the utilities who are allocated project electricity, VEPP Inc., and the Department. This committee would provide

5. The payment of interest is drawn from identical language in Board Rule 4.104(c). Board Rule 4.100 addresses the purchase of electricity from small power production and cogeneration facilities.

input on fuel procurement policies and procedures and allow utilities to receive planning information on the future fuel costs under the PPA.

Ryegate is opposed to the creation of an operating committee. Ryegate contends that the fuel adjustment mechanism approved in the October 29, 2012, Order creates the proper incentives for cost-effective purchases of fuel. Ryegate asserts that the Ryegate facility is privately-held, and not owned by a Vermont-regulated utility, and thus should not be subject to such oversight. Ryegate further contends that it is inappropriate for GMP or BED to be involved in an operating committee, given that each is a part owner of the McNeil wood-fired generating facility, which in certain instances competes with Ryegate for fuel. Ryegate is willing to provide fuel purchasing information to the SPEED Facilitator and the Vermont distribution utilities to assist in anticipating future costs.

We agree with Ryegate that the fuel adjustment mechanism approved in the October 29, 2012, Order creates the proper incentives for cost-effective purchases of fuel and that the participation of the Vermont distribution utilities in Ryegate's fuel procurement may result in conflict of interests given their part ownership of the McNeil generating facility.

As agreed by Ryegate to assist in anticipating future costs, we require Ryegate to provide the following information to the SPEED Facilitator and the Vermont distribution utilities:

1. On an annual basis, Ryegate should provide its best estimate of the yearly (\$/MW) fuel cost to assist with budget setting requirements. This estimate will not bind Ryegate as to the fuel costs for the upcoming year.
2. On a quarterly basis, Ryegate should provide a Wood Purchase Costs report. The report should detail on a weekly basis the volume of wood procured and the cost to procure it, and contain a summary for each month as well as for the quarter. The report will provide the basis for the SPEED Facilitator to calculate the fuel adjustment under Attachment E.1 of the PPA.
3. On a monthly basis, Ryegate should provide a narrative that discusses general issues affecting the biomass green chip industry in Vermont.
4. On a monthly basis, Ryegate should provide an estimate of the next month's fuel price (to use as input for the dispatch savings provision, should Ryegate consider economic dispatching).

Economic Dispatch

In the October 29, 2012, Order, we encouraged parties in the proceeding to continue to pursue an economic dispatch⁶ formula in the PPA developed for the Ryegate plant and concluded that any formula for economic dispatch included in the PPA should benefit the ratepayers.

Ryegate proposes that the PPA include a provision for the facility to be economically dispatched. Under the proposed provision, Ryegate would agree to reduce its energy production during periods when the Vermont distribution utilities can purchase less expensive energy on the wholesale market. The provision is meant to keep Ryegate economically whole by providing the facility with a fixed rate to cover its expenses of maintaining the facility and meet its capital obligations while avoiding the expense of purchasing fuel to operate the facility. The provision also includes an incentive for Ryegate to reduce its energy production by allowing the facility to share in the savings that the distribution utilities receive from purchasing less expensive energy from the wholesale market.

Ryegate represents that further discussions concerning the dispatch savings provision have occurred between Ryegate, the distribution utilities (including VPPSA), and VEPP Inc. following the March 8, 2013, workshop. The parties agree that any economic savings resulting from reducing the energy production of the Ryegate facility should be shared on a 60-40 basis between the Vermont distribution utilities and Ryegate, with forty percent of the savings going to Ryegate.

We conclude that the proposed dispatch savings provision will benefit ratepayers. The parties agree that any economic savings resulting from reducing the energy production of the Ryegate facility should be shared on a 60-40 basis between the Vermont distribution utilities and Ryegate. The 60-40 split of savings should encourage Ryegate to reduce its energy production during periods when the aggregate replacement power cost is less than Ryegate's avoided fuel costs. The reduction of plant output under these conditions will reduce power purchasing costs

6. Generation units in New England, and thus the Ryegate plant, participate in the regional energy market overseen by ISO-New England. Economic dispatch is defined as the selection of generating resources to cover load as inexpensively as possible. Typically the generators with the lowest-price offers are dispatched first, and increasingly higher-priced generators are brought on line as demand increases.

of the distribution utilities required to buy the power output of the Ryegate plant, thus benefitting ratepayers who ultimately pay for the power.

Accordingly, we approve the proposed dispatch savings provision. The approved PPA provision is detailed in Attachment E.3 of the form of the PPA contained in Attachment I to this Order.

Indemnification of Facilitator

BED, GMP, the Department, and VEPP Inc. support the inclusion in the PPA of an indemnification clause, similar to one contained in the standard-offer contracts, to ensure that producers are liable for indemnifying the SPEED Facilitator and distribution utilities as a part of the purchase arrangement. GMP contends that because Vermont utilities are allocated the power purchased under the PPA, and because the cost for the power is ultimately paid by the retail utility consumers, the indemnification helps to contain the scope of the incentives available to the producer under the program. GMP further argues that the effect of the provision is to enable the parties in interest to stand in the place of the buyer with respect to the scope of indemnification thus helping the agreement to follow the form of a traditional power purchase and sale arrangement.

Ryegate does not support the inclusion of the indemnification provision. Ryegate maintains that the Vermont distribution utilities are not parties to the PPA. Ryegate contends that GMP's arguments rest on a faulty assumption: that requiring Ryegate to indemnify the utilities is essential to the "benefit of the bargain" it receives for being granted a contract with above-market rates. Ryegate further argues that there is nothing in 30 V.S.A. § 8009 which implicitly or explicitly supports this notion, or which supports tying together the two unrelated issues of the contract price and the scope of indemnification. Ryegate claims the statute requires the Board to set a price using specific factors, in order to achieve the policy objectives of the Legislature (job retention, in-state renewable energy generation, etc.). Thus, Ryegate contends it should not be required to incur additional risk, and to effectively pay a price, in order to avail itself of the option to enter the PPA.

Pursuant to Section 8009(f)(1), the SPEED Facilitator is required to purchase the power produced from the Ryegate plant and allocate the electricity purchased and any associated costs to the Vermont retail electricity providers. Accordingly, the PPA should not be viewed as simply a contract between two independent parties, but an agreement by Ryegate that it will participate in the SPEED program, and be bound by its regulatory requirements, in exchange for its power output being purchased by the SPEED Facilitator and ultimately by the retail electricity providers. As such the SPEED Facilitator should not be at risk of any liability under the PPA for any damages arising from any breach of this agreement.

Furthermore, the SPEED Facilitator cannot be liable to producers under Vermont law. Section 8005(g) 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.

Pursuant to 30 V.S.A. § 8005(a)(5), both the Board and the SPEED Facilitator "constitute instrumentalities of the state." Thus, under Vermont law, the SPEED Facilitator is not liable to Ryegate or the utilities with respect to any of the matters set out in Section 8005(g). The indemnification provision in the PPA implements this statutory directive.

We find value in the inclusion in the PPA of an indemnification clause that includes the SPEED Facilitator and the Vermont distribution utilities, similar to the one contained in the standard-offer contract. Accordingly, we approve the PPA with an indemnification provision similar to one contained in the standard-offer contract.

Termination Due to Extraordinary Circumstances

Ryegate proposes that the PPA include a provision to allow Ryegate to terminate, subject to prior Board approval, the PPA in the event that market conditions deteriorate or governmental regulations change such that Ryegate's costs to operate the plant are greater than its revenues.

BED raises concerns with the inclusion of the termination clause, including that it would lead to uncertainty with regard to planning future power-supply portfolios. Ryegate contends that this provision allows for the PPA to be terminated due to extraordinary circumstances related to

economic conditions. Ryegate further argues that, since the provision requires the Board to review and decide on any request from Ryegate, the distribution utilities will have plenty of advance notice to plan changes to their power-supply portfolios.

Pursuant to Section 8009(b), commencing November 1, 2012, and ceasing on November 1, 2022, Vermont retail electricity providers are required to purchase the provider's pro-rata share of the Ryegate power output. Thus, the term of the PPA is ten years. The price schedule established for the Ryegate plant is consistent with the requirement that the power be purchased over a ten-year period. In addition, the price schedule is compatible with the renewable energy goals set for the state under Section 8001(a), including providing "an incentive for the state's retail electricity providers to enter into affordable, long-term, stably priced renewable energy contracts that mitigate market price fluctuation for Vermonters." A ten-year contract term prevents Ryegate from withdrawing from the SPEED program and pursuing more lucrative price terms that might develop over the term of the contract. Ratepayers are paying above-market power prices under the PPA, and it would be unfair to allow Ryegate to walk away from the contract after receiving substantial subsidies from ratepayers.

Ryegate contends that the provision to terminate the PPA is not an attempt to preserve the flexibility to pursue more lucrative prices, but rather to protect against catastrophic circumstances (e.g., plant shutdown due to fire). We conclude that the Force Majeure provisions of the PPA provide an appropriate remedy for catastrophic or extraordinary circumstances. We see no need to include in the approved PPA form a provision to allow Ryegate to terminate the PPA due to economic circumstances.

VI. CONCLUSION

In conclusion, we approve, with the modifications discussed above, the PPA proposed by Ryegate and the SPEED Facilitator. The PPA in approved form is contained in Attachment I to this Order. Ryegate shall file a copy of any executed PPA with the Board within two weeks of this Order.

The intent of Section 8009 is to allow for Ryegate to be eligible for a standard-offer price as of November 1, 2012. As established in the October 29, 2012, Order, we therefore direct the

SPEED Facilitator to bill the distribution utilities and pay Ryegate in accordance with the terms of the executed PPA, retroactively for the period between the signing of a new PPA and the expiration of Ryegate's previous PPA that expired on October 31, 2012.

IV. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board ("Board") of the State of Vermont that:

1. Pursuant to 30 V.S.A. § 8009, the power purchase agreement in the form contained in Attachment I to this Order is approved. Ryegate Associates shall file a copy of any executed power purchase agreement with the Board within two weeks of this Order.

2. The SPEED Facilitator shall bill the distribution utilities and pay Ryegate Associates in accordance with the terms of the executed power purchase agreement, retroactively for the period between the signing of a new power purchase agreement and the expiration of Ryegate Associates' previous power purchase agreement that expired on October 31, 2012.

3. Vermont retail electricity providers are obligated to purchase and to pay for electricity from the Ryegate plant allocated to them by the SPEED Facilitator. In the event that a Vermont retail electricity provider fails to make payment when due to the SPEED Facilitator, and such payment remains delinquent for more than three days, or the business day closest thereto, the SPEED Facilitator shall promptly notify the Board and Ryegate Associates. The SPEED Facilitator or Ryegate Associates may seek enforcement for failure to make payment with the Board pursuant to 30 V.S.A. § 8009. In the event of such enforcement, the SPEED Facilitator shall do all things reasonable to assist in such action.

4. The SPEED Facilitator shall have the right to collect interest on past-due amounts owed by a retail electricity provider or on other amounts on account of any delinquency in making any payment due. If payment is not made when due, one percent of the amount unpaid shall be added to any amount due as liquidated damages, and an additional one-and-one-half percent interest shall be added thereto every thirty days thereafter. For good cause the Board may waive all or part of such damages. The SPEED Facilitator shall diligently pursue collection of such interest and damages, and shall pay any interest collected to Ryegate Associates upon

receipt from the delinquent retail electricity provider, and shall retain any damages collected. The damages retained by the SPEED Facilitator shall be used to cover reasonable and necessary costs of performing the functions of the SPEED Facilitator.

5. Ryegate Associates shall provide the following information to the SPEED Facilitator and the Vermont distribution utilities:

- a. On an annual basis, Ryegate Associates shall provide its best estimate of the yearly (\$ per MW) fuel cost to assist with budget setting requirements. This estimate will not bind Ryegate Associates as to the fuel costs for the upcoming year.
- b. On a quarterly basis, Ryegate Associates shall provide a Wood Purchase Costs report. The report shall detail on a weekly basis the volume of wood procured and the cost to procure it, and shall contain a summary for each month as well as for the quarter. The report shall provide the basis for the SPEED Facilitator to calculate the fuel adjustment under Attachment E.1 of the power purchase agreement.
- c. On a monthly basis, Ryegate Associates shall provide a narrative that discusses general issues affecting the biomass green chip industry in Vermont.
- d. On a monthly basis, Ryegate Associates shall provide an estimate of the next month's fuel price (to use as input for the dispatch savings provision, should Ryegate Associates consider economic dispatching).

Dated at Montpelier, Vermont, this 29th day of March, 2013.

<u>s/James Volz</u>)	
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<u>s/David C. Coen</u>)	
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<u>s/John D. Burke</u>)	

PUBLIC SERVICE
BOARD
OF VERMONT

OFFICE OF THE CLERK

FILED: March 29, 2013

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.