STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 18-3996-PET

Petition of Dairy Air Wind, LLC for an amendment to its standard-offer contract	

Order entered: 07/11/2019

ORDER APPROVING STANDARD-OFFER CONTRACT AMENDMENTS

In today's Order, the Vermont Public Utility Commission approves amendments to the standard-offer contract held by Dairy Air Wind, LLC.

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[1] The Table of Contents has been removed from the Proposal for Decision and updated to reflect the addition of the Commission's Discussion and Conclusion and Order sections. References to Proposal for Decision page numbers reflect the pagination of this document, not the Hearing Officer's original.

PROPOSAL FOR DECISION

I. INTRODUCTION

This case concerns a request by Dairy Air Wind, LLC (the "Petitioner") to amend its standard-offer contract for a wind turbine located in Holland, Vermont. That contract enables the Petitioner to sell the power produced by the wind turbine to Vermont electric utilities at a set price for 20 years. The Petitioner requests that the Vermont Public Utility Commission ("Commission") approve (1) an extension of the commissioning milestone in the contract, and (2) a reduction in the capacity of the wind turbine from 2.2 MW to 1.5 MW. I recommend that the Commission approve the commissioning milestone extension and conclude, based on the information provided, that the capacity amendment request does not meet the Commission's previously articulated standard for such capacity amendments. However, in exercising its discretion, I recommend that the Commission find that there are public policy considerations that warrant granting the request.

Before the Petitioner may construct and operate the wind turbine and begin selling the power, the Commission must conclude that the project would be in the public good and grant the Petitioner a certificate of public good ("CPG") pursuant to 30 V.S.A. § 248. The Petitioner filed an application with the Commission for a CPG in December of 2016.[2] The Petitioner asserts that the request to amend its standard-offer contract is the result of the lengthy litigation schedule and regulatory review process under Section 248. The Petitioner represents that the 2.2 MW wind turbine model upon which its standard-offer bid and Section 248 petition were premised will no longer be available at the time the Petitioner would commence construction of the project if granted a CPG. The Petitioner therefore requests that the contract be amended to reflect the 1.5 MW capacity of the wind turbine that will be available.

The Commission has implemented the Standard Offer Program through orders and has established a general practice of granting amendments to the capacity of a standard-offer project only for "legitimate engineering reasons."[3] Here, the Petitioner concedes that its request is not

[2] Docket No. 8887, *Petition of Dairy Air Wind, LLC, for a certificate of public good, pursuant to 30 V.S.A. § 248, for the installation of a single turbine, 2.2 MW wind-powered electric generation facility in Holland, Vermont.*

[3] *Investigation re: Establishment of a Standard Offer Program*, Docket 7533, Order of 7/7/11 at 11.

premised on engineering reasons, but rather is necessitated by the passage of time and attendant risks to the project's viability.

Based on these circumstances, in this proposal for decision I recommend that the Commission grant the Petitioner's request for an extension of the commissioning milestone because its inability to meet the current commissioning milestone is the result of litigation in Docket 8887 regarding the Petitioner's Section 248 application. Additionally, I recommend that the Commission conclude that the Petitioner has not presented a legitimate engineering reason to amend the wind turbine capacity described in Attachment A to its standard-offer contract. However, in its discretion, the Commission may recognize other public policy reasons that warrant granting the Petitioner's request. I recommend that the Commission conclude that granting the Petitioner's request would advance the energy policy goals articulated in Vermont law.

I also recommend that the Commission deny the motions to intervene filed by the Northeastern Vermont Development Association, Town of Holland, Shawn Bickford, and Hollis and Angela Thresher (collectively referred to as the "Movants") because the Movants do not meet the Commission Rule 2.209 standards for intervention. However, I recommend that the Commission consider the Movants' comments, consistent with Commission precedent implementing the Standard Offer Program.

II. RELEVANT BACKGROUND AND LEGAL STANDARD

The Standard Offer Program was established in 2009 through the Vermont Energy Act of 2009.[4] Under the Program, developers of eligible new renewable energy plants are offered long-term stably priced contracts for the plants' electrical energy, capacity, and renewable energy certificates. These products are purchased by Vermont retail electric utilities.

The legislation that governs the Standard Offer Program authorizes the Commission to implement the standard offers for renewable energy plants "by rule, order, or contract."[5] The Commission has not adopted an administrative rule. Instead, the Commission has issued orders that govern administration of the program generally and contracts to individual projects. The

[4] Public Act No. 45 (2009 Vt. Bien. Sess.)
[5] 30 V.S.A. § 8005a(a).

Commission implemented the Program through a series of orders issued in Dockets 7523 and 7533.

On September 30, 2009, the Commission issued an order establishing the Standard Offer Program.[6] Importantly, that order established a standard contract that would be available to qualifying resources, and guidelines for determining which projects would be eligible for standard-offer contracts. In 2009 the Program had a capacity ceiling of 50 MW. The Commission determined that it was necessary to establish a queue for eligible projects, and to adopt mechanisms for managing the queue, to inform potential developers as to whether the standard offer was available to them at any given time. The Standard Offer Facilitator managed the queue.[7] When there was capacity remaining in the queue, the Standard Offer Facilitator would offer the standard contract to applicants. When there was no capacity remaining, applicants were placed on a waiting list and could become eligible for a standard-offer contract if a developer in the queue withdrew its project, if a project failed to meet required milestones, or for other reasons set forth in the standard contract. To encourage rapid development of standard-offer projects, the Commission included in the contract certain requirements intended to ensure that the queue did not become a placeholder for potential developers.

The standard contract adopted in September 2009 included a paragraph that allowed for amendments to a signed contract to be made when the Commission found it in the public interest. The Commission adopted the following language to protect the financial interests of developers while also providing flexibility to adapt to changing circumstances over the term of the contract in a manner that benefits ratepayers:

> This contract may be amended, without the consent of the parties, by order of the [Commission], provided: (1) such amendment does not result in any reduction in the project's economic value to Producer; (2) such amendment will not adversely affect Producer's ability to meet the project's financial obligations; (3) such amendment will not impose additional operational or other economic costs on Producer without full compensation; and (4) the amendment results in a benefit to ratepayers.[8]

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[6] *Investigation re: Establishment of a Standard-Offer Program for Qualifying Sustainably Priced Energy Enterprise Development ("SPEED") Resources*, Docket 7533, Order of 9/30/09.

[7] The Standard Offer Facilitator is appointed by the Commission to assist in the implementation of the Standard Offer Program. VEPP Inc is a Vermont non-profit corporation that serves as the Standard Offer Facilitator through a contract with the Commission. More information is available at http://www.vermontstandardoffer.com/

[8] Docket 7533, Order of 9/30/09 at 27.

This language is included in Paragraph 30 of the Petitioner's contract, with the additional provision that the contract parties "are given notice and an opportunity to be heard by the [Commission]."[9]

The Commission also concluded that is was appropriate to include limited milestones in the contract because the 50 MW ceiling limited the number of projects that could participate in the Standard Offer Program. The Commission reasoned that, due to the statutory directive to encourage rapid deployment of qualifying resources, a mechanism was necessary to prevent projects from holding space in the queue indefinitely, thereby depriving other resources of the opportunity to take the standard offer. The contract milestones require projects to move forward.

The standard contract requires a plant owner to provide a description of the project it intends to construct, including the project capacity, the fuel type, the location, and the name of the interconnecting utility. The contract requires the plant owner to construct its project at the location and in a manner substantially consistent with the specifications set forth in Attachment A to the contract. The purpose of this requirement was to "decrease the possibility of gaming the queue."[10] Paragraph 11 of the Petitioner's contract contains this requirement.

On October 16, 2009, the Commission issued an order that, among other things, clarified the extent to which a project could be modified after it has entered the queue. The Commission recognized that the actual size of a project may be altered during development and gave as an example a reduction of project capacity to address interconnection issues. To balance the need to minimize the opportunity to game the queue with "real logistical concerns," the Commission concluded that the capacity of a project could be altered by up to 5% or 5 kW, whichever is greater.[11]

On December 31, 2009, the Commission adopted procedures for reviewing changes to the capacity of standard-offer projects.[12] The Commission again recognized that there are legitimate reasons for a project's capacity to change as it proceeds through the permitting process. Further, the Commission stated that it did not want to discourage petitioners from

[9] Petitioner's *Vermont Standard Offer Purchase Power Agreement*, paragraph 30, filed as Petition Attachment 1.
[10] Docket 7533, Order of 10/16/09 at 7.
[11] Docket 7533, Order of 10/16/09 at 7.
[12] Docket 7533, Order of 12/31/09.

altering a project to address the concerns of the public and parties to that proceeding. The following procedures were adopted:

> 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 [Commission], the [Standard Offer] 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.
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> 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%, the reasons for the change in the capacity of the project, and must notify the [Standard Offer] Facilitator of the change in project capacity.
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> 3. Regardless of whether the plant owner notifies the [Commission] 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 [Commission] 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 [Commission] 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.[13]

On July 7, 2011, the Commission adopted revisions to the standard-offer contract.[14] The Commission noted that it is more difficult to fine-tune the size of certain generating units, such as those that use reciprocating engines, compared to the ease of modifying others, such as solar, where the number of panels may be easily altered. To ease administrative burdens and to avoid reductions in technological diversity, the Commission added a new paragraph to the standard contract that allows the Standard Offer Facilitator to modify the capacity listed in Attachment A upon project-specific authorization from the Commission.[15] The Commission stated that, to be eligible to alter the capacity of a standard-offer project by more than 5%, "the producer must demonstrate that there are legitimate engineering reasons why the project cannot be built to the

[13] Docket 7533, Order of 12/31/09 at 3-5.
[14] Docket 7533, Order of 7/7/11.
[15] This new provision is included in Paragraph 31 of the Petitioner's standard-offer contract.

capacity indicated in Attachment A and that the capacity included in Attachment A was not simply a placeholder."[16] The Commission stated that it would determine whether to grant such requests on a case-by-case basis.

The Standard Offer Program was expanded and amended in 2013 through implementation of the Vermont Energy Act of 2012.[17] Under the expanded and amended Program the cap was increased to 127.5 MW, with prescribed increments of capacity made available annually. The Program requires that this new capacity be awarded to new plants by use of a market-based mechanism, such as a reverse auction or other procurement tool. The Program also requires standard-offer projects to be commissioned within prescribed time periods unless the Commission grants an extension.[18] The Commission implemented these statutory changes to the Program through a series of orders issued in Dockets 7873 and 7874. Each year the Commission opens new dockets to consider any changes to the Program, such as avoided-cost prices, and to award annual capacity to new plants through a request for proposals.[19]

The Petitioner's standard-offer contract was awarded under this expanded and amended Standard Offer Program. While certain aspects of the Program have changed – there is no longer a queue, and contracts are now awarded annually based in part on a market-based mechanism – many of the relevant statutory considerations have not changed. For example, at any given time there is a limit in the available capacity under the Standard Offer Program, and there remains a goal of ensuring timely development at the lowest feasible cost. Accordingly, the standard contract contains the same paragraphs governing amendments, and the Commission has not issued new standards or procedures that supplant those standards and procedures previously issued.

Therefore, based on the decisions issued to date, the July 7, 2011 "legitimate engineering reasons" standard articulated in Docket 7533 is applicable to the Petitioner's request to modify the wind turbine project capacity as described in Attachment A to its standard-offer contract. The "legitimate engineering reasons" standard was issued later in time than the procedures

[16] Docket No. 7533, Order of 7/7/11 at 11.

[17] Public Act No. 170 (2012 Vt. Adj. Sess.)

[18] 30 V.S.A. § 8005a(j). The commissioning milestone is contained in Paragraph 7 of the Petitioner's standard-offer contract.

[19] Relevant Commission decisions on these topics are available at http://www.vermontstandardoffer.com/psb-board-orders/

issued on December 31, 2009, and applies specifically to amendments to Attachment A to the standard-offer contract under the new standard-offer contract paragraph adopted in the July 7 order.[20] The Petitioner agrees that its request is premised on this contract paragraph.[21]

III. PROCEDURAL HISTORY

On May 27, 2016, the Commission authorized the Standard Offer Facilitator to enter into a contract with the Petitioner for its 2.2 MW wind project.[22]

On July 26, 2016, the Petitioner executed a standard-offer contract for a 2.2 MW wind turbine located in Holland, Vermont (the "Project"). Paragraph 7 of the contract contains development milestones, including requirements that the Petitioner (1) file a complete Section 248 application by July 25, 2017, and (2) commission the wind project by no later than July 25, 2019.

On December 31, 2016, the Petitioner filed an application for a CPG pursuant to 30 V.S.A. § 248 to construct and operate its wind turbine project in Holland, Vermont. Between December 31, 2016, and now there has been much litigation, which is ongoing.[23]

On November 19, 2018, the Petitioner filed its request to amend the standard-offer contract. The Petitioner provided notice of its request to the Vermont Department of Public Service ("Department"), the Standard Offer Facilitator, the Vermont electric distribution utilities, and the Vermont Public Power Supply Authority.

On November 28, 2018, the Commission issued an order establishing a deadline for comments and for intervention requests of no later than December 10, 2018.

On December 7, 2018, the Northeastern Vermont Development Association and the Town of Holland filed intervention motions. The Petitioner filed a response to these motions on December 10, 2018. A reply was filed by the Northeastern Vermont Development Association and the Town of Holland on December 20, 2018.

On December 10, 2018, Shawn Bickford and Hollis and Angela Thresher filed intervention motions. The Petitioner filed a response to these motions on December 13, 2018.

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[20] Paragraph 31 of the Petitioner's standard-offer contract.

[21] Petitioner's response to motions and comments opposing amendments, 12/21/18 at 3-4.

[22] Dockets 7873/7874, *Order re 2016 Standard-Offer Award Group*, dated 5/27/16.

[23] Docket No. 8887, *Petition of Dairy Air Wind, LLC, for a certificate of public good, pursuant to 30 V.S.A. § 248, for the installation of a single turbine, 2.2 MW wind-powered electric generation facility in Holland, Vermont.*

On December 10, 2018, Holland and the Northeastern Vermont Development Association filed comments in opposition to the petition. In their intervention requests Mr. Bickford and the Threshers concurred with Holland's position.

On December 10, 2018, the Department and Green Mountain Power Corporation ("GMP") each filed comments stating that they did not object to the Petitioner's request to amend the contract.

Public comments opposing the petition were filed by Karen Jenne, Linda Wilkie, Michael Burnham, Lynda Hartley, Mitch Wonson, Earl Leigh, Joan Hickey, Suzanne Moulton, Gina Miller, John Wagner, Homer and Janet Selby, and Mr. Thresher.

On December 24, 2018, the Petitioner filed a response to the comments filed by Holland and the Northeastern Vermont Development Association.

On January 4, 2019, Holland and the Northeastern Vermont Development Association filed a response to the Petitioner's December 24 filing.

On February 8, 2019, the Petitioner filed a letter requesting that the Commission grant its requests.

On February 8, 2019, I issued an order requesting information from the Petitioner that included deadlines for the Petitioner to make a responsive filing and for any comments on that filing.

On February 21, 2019, the Petitioner requested a one-week extension to provide its response to my information request.

On February 22, 2019, I granted the Petitioner's request and granted a similar extension of time for any comments on the Petitioner's information filing.

On March 6, 2019, the Petitioner filed its response to my information request.

On March 22, 2019, comments were filed by the Department, Holland, Northeastern Vermont Development Association, Shawn Bickford, and Hollis Thresher, and affidavits were filed by David Snedeker for the Northeastern Vermont Development Association, Tim Sykes, Hollis Thresher, John Wagner, Janet Selby, Homer Selby, Shawn Bickford, Damian Deskins, Gary Leavens, Earl Leigh, Wendy Leigh, Paula Markwell, Cynthia Merril, Suzanne Moulton, Jacqueline Pomerleau, Lynda Therrien-Hartley, Linda Wilkie, and Bruce Wilkie.

Also on March 22, 2019, Vermonters for a Clean Environment filed a public comment.

There have been no further filings.

IV. INTERVENTION REQUESTS

Movants[24]

The Northeastern Vermont Development Association and the Town of Holland move to intervene as of right pursuant to Commission Rule 2.209(A)(3), and in the alternative seek permissive intervention under Rule 2.209(B). Mr. Bickford and the Threshers move for permissive intervention under Rule 2.209(B).

The Northeastern Vermont Development Association serves as the regional planning commission in the part of the state where the wind turbine project is proposed. The Northeastern Vermont Development Association states that energy planning and associated economic development interests are within its mission, authority, and expertise.

The Town of Holland is the host municipality for the proposed wind turbine project. The Town maintains that it has a fiscal responsibility to represent the interests of its taxpayers, who are also ratepayers of the interconnecting utility – Vermont Electric Cooperative, Inc.

Mr. Bickford and the Threshers are neighbors of the proposed wind turbine project and state that they have a direct line of sight and sound to the project.

The Movants note that they are all parties in the proceeding to review the Petitioner's request for a CPG pursuant to 30 V.S.A. § 248 and maintain that they have interests in aspects of the wind turbine project that are likely to be affected by the outcome of this case, including the size of the turbine, noise and aesthetic impacts, system stability and reliability impacts, and economic impacts. The Movants contend that any changes that may result from the petition to amend the standard-offer contract are of substantial interest to them, and in the case of the Northeastern Vermont Development Association, its constituent communities.

Petitioner

The Petitioner opposes the intervention motions. The Petitioner argues that the Movants do not meet the standards for intervention under Commission Rule 2.209 and that their interests

[24] "Movants" refers collectively to the Northeastern Vermont Development Association, Town of Holland, Shawn Bickford, and the Threshers.

in the potential impacts of the proposed wind turbine project are not within the scope of this proceeding, which the Petitioner alleges will only consider whether to allow two amendments to the standard-offer contract. The Petitioner maintains that the Town of Holland and the Northeastern Vermont Development Association do not qualify for intervention as of right because no statute confers an unconditional or a conditional right to intervene in this proceeding and because this is not the exclusive means by which they can protect their interests. The Petitioner contends that the Section 248 proceeding, in which all the Movants are parties, affords the Movants an alternative and adequate means to protect their interests. According to the Petitioner, any proposed changes to the wind turbine project will be addressed in the Section 248 case.

Discussion

Commission Rule 2.209 governs intervention in proceedings before the Commission. Rule 2.209(A) – intervention as of right – provides that upon timely application a person shall be entitled to intervene in a proceeding in three circumstances:

(1) when a statute confers an unconditional right to intervene;

(2) when a statute confers a conditional right to intervene and the condition or conditions are satisfied; or

(3) when the applicant demonstrates a substantial interest which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest, and where the applicant's interest is not adequately represented by existing parties.

In addition, Rule 2.209(B) – permissive intervention – reserves to the Commission the power to grant intervenor status on a permissive basis when an applicant "demonstrates a substantial interest which may be affected by the outcome of the proceeding." In exercising its discretionary authority under this provision, the Commission considers three factors:

(1) whether the applicant's interest will be adequately protected by other parties;

(2) whether alternative means exist by which the applicant's interest can be protected; and

(3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

I conclude that the Movants do not meet the standards for intervention under these rules.

Of the Movants, only the Town of Holland and the Northeastern Vermont Development Association have moved for intervention as of right. But they have not demonstrated that any statute confers upon them either an unconditional right to intervene or a conditional right to intervene. Additionally, the Town of Holland and the Northeastern Vermont Development Association have not demonstrated that this proceeding affords the exclusive means by which they can protect their interests in the proposed wind turbine, including its size, and any impacts related to sound, aesthetics, system stability and reliability, and economics. Those interests may be addressed through their intervention in the Section 248 case for the wind turbine project. Accordingly, the Northeastern Vermont Development Association and Town of Holland requests to intervene as of right are denied.

For the same reason, none of the Movants have demonstrated that they meet the standard for permissive intervention. The Movants' interests in the proposed wind turbine, including its size, and any impacts related to sound, aesthetics, system stability and reliability, and economics, are not at issue in this case and may be protected through their intervention in the Section 248 case for the wind turbine project. Accordingly, the Movants' requests for permissive intervention are denied.

It is important to note that this case will address only the Petitioner's requested amendments to its standard-offer contract. This case will not address the substantive merits of the Petitioner's Section 248 case, nor will it address whether approving the Petitioner's request to amend its standard-offer contract will have effects – either positive or negative – on the Petitioner's ability to meet the applicable Section 248 criteria. Instead, the question to be addressed by the Commission in this case is whether the requested amendment of the contract will advance the goals and requirements of the Standard Offer Program.

Commission precedent establishes that intervention under Rule 2.209 is not a necessary condition for a person or entity to file comments or responses to a request to amend a standard-offer contract.[25] When the Commission adjudicates a request to amend a standard-offer contract, not only is it considering the rights of the contract signatories,[26] it is also considering the public policy implications of such amendments as the administrative agency charged with implementation and administration of the Standard Offer Program.[27] Therefore, while I conclude that the Movants' intervention requests do not meet the Rule 2.209 standards, I recommend that the Commission fully consider the Movants' substantive comments on the merits of the amendment petition as they relate to the Commission's implementation of the Standard Offer Program. The Movants may also file friend-of-the-court briefs in response to my proposal for decision.

V. COMMISSIONING MILESTONE EXTENSION REQUEST

A. Parties' comments

Petitioner

The Petitioner requests that the standard-offer contract commissioning milestone be extended to 18 months following the later of (1) the lapse of the appeal period in the Section 248 proceeding if no timely appeals are filed, or (2) the final resolution of all appeals. The Petitioner expects that construction of the Project will take approximately 10 to 18 months, depending on weather conditions and the time of year that construction begins. The Petitioner states that commencement of construction depends on the date that the Commission grants a CPG for the Project and on when all appeals have been resolved.

The Petitioner maintains that since executing the standard-offer contract it has diligently pursued development of the Project, including by filing a complete Section 248 application within approximately five months of the contract execution date. The Petitioner contends that it

[25] *See, e.g., Petition of Otter Creek Solar*, Case No. 18-2013-PET, Order of 7/20/18; *Petition of Chelsea Solar*, Case No. 17-4695-PET, Order of 3/15/18.

[26] In this case, the standard-offer contract signatories are Dairy Air Wind, LLC and VEPP Inc. – the Standard Offer Facilitator.

[27] *Compare In re: Investigation into SolarCity Corporation*, 2019 VT 23, ¶ 14 ("Where a proceeding involves not only the interests of the parties, but also the interests of the public, the Commission may be responsible for independently evaluating what disposition of the matter is in the public interest.")

has timely responded to motions and discovery questions and that the Section 248 proceeding has been delayed for reasons beyond the Petitioner's control.

Department

The Department states that the Petitioner filed its CPG application well within the one-year filing deadline, and that the procedural history of Docket 8887 demonstrates that delays are the result of litigation, in which the Petitioner has actively engaged. Therefore, the Department finds that extending the commissioning milestone is appropriate.

B. Non-party comments

Green Mountain Power

GMP does not object to the Petitioner's request.

Movants[28]

The Movants recommend denial of the Petitioner's request for amendment of the commissioning milestone. The Movants contend that the Petitioner failed to adequately plan for regulatory review of its CPG application, asserting that the Petitioner was aware, prior to filing its CPG application, of local opposition to the project. The Movants argue that, as a "knowledgeable player in the distributed generation industry," the Petitioner was also aware of constraints on the transmission system. The Movants suggest that the Petitioner's expectation that the Section 248 proceeding would take approximately one year is unreasonable and unrealistic because no large wind project in Vermont has had its CPG petition adjudicated in one year or less, even when appeals periods are excluded. The Movants argue that granting the Petitioner's extension request, when delay is due to the Petitioner's failure to fully vet the site, community opposition, and Commission requirements, would not be in the public interest or consistent with the statutory goal of ensuring timely development of projects under the Standard Offer Program.

[28] In their December 10 filing, Holland and the Northeastern Vermont Development Association represent that Mr. Bickford and the Threshers join in their comments.

Public Comments

Most of the public commenters did not address the substantive merits of the Petitioner's extension request, and instead focused their comments more generally on opposition to the wind turbine. Several public commenters objected to the extension request and suggested that litigation of this project has lasted too long. One commenter recommended that the Petitioner refile a Section 248 application once the project design has been finalized.

C. Discussion

Paragraph 7 of the Petitioner's standard-offer contract requires that the Project be commissioned within 36 months of contract execution. This milestone is required by law.[29]

Section 8005a(j)(2) of Title 30 of the Vermont Statutes Annotated allows the Commission, upon the request of the plant owner, to extend the commissioning period for a standard-offer project "if it finds that the plant owner has proceeded diligently and in good faith and that commissioning of the plant has been delayed because of litigation or appeal."

I recommend that the Commission conclude that the Petitioner has proceeded diligently and in good faith and that the Petitioner's inability to meet the current commissioning milestone is the result of litigation and regulatory review in Docket 8887 regarding the Petitioner's Section 248 application. The Petitioner has presented credible information demonstrating that it has diligently pursued development of its project. The Petitioner filed an administratively complete Section 248 petition in December of 2016 and substantial litigation has followed. Therefore, I recommend that the Commission grant the extension.

VI. CAPACITY AMENDMENT REQUEST

A. Parties' comments

Petitioner

The Petitioner requests that the description of the wind turbine project in Attachment A to the standard-offer contract be amended to reflect a reduction in capacity from 2.2 MW to 1.5 MW. The Petitioner provides several bases for its request.

[29] 30 V.S.A. § 8005a(j)(1)(B).

The Petitioner maintains that its request to amend the contract capacity is not based on an engineering issue or a flaw in project design.[30] Instead, the Petitioner asserts that the circumstances are the result of an unpredictable regulatory process that does not align with the statutory commissioning milestone for large standard-offer wind projects. According to the Petitioner, the amendment request is necessitated by the passage of time and the Petitioner's desire to mitigate risk.[31] The Petitioner represents that it selected a lower-capacity turbine to "mitigate the uncertainty created by the changed circumstances in the Section 248 proceeding, and to address issues raised by some parties in the Section 248 proceeding about [the Petitioner's] proposal."[32]

The Petitioner states that the 30% federal tax credit that it had expected is now worth 18% due to the Commission's delays.[33] Further, the Petitioner states that the "price cap"[34] for the project does not work at a 12% federal tax credit, which is available to projects not safe harbored by the end of 2018.[35] The Petitioner states that the ability to take advantage of federal tax credits was an assumption in the standard-offer program pricing and in its specific project proposal. In order to meet the federal tax credit eligibility requirements, the Petitioner states that it was necessary for it to safe harbor a wind turbine by the end of 2018. The Petitioner argues that the 2.2 MW turbine that it had safe harbored in 2016 would not be available to complete construction by the end of 2020, and that the 1.5 MW turbine was its best option in late 2018.

The Petitioner states that it would have safe harbored a 2.2 MW wind turbine in late 2018 if a model was available that met the following criteria:

- Appropriate for the location on the host farm;
- Met the parameters of the Section 248 application;

[30] Petitioner's Information Response at 1.

[31] Petitioner's Information Response at 2.

[32] Petitioner's Memorandum of Law, dated November 19, 2018, at 2.

[33] A 30% federal tax credit was available to "large wind" projects that commenced construction or incurred 5% of project costs ("safe harbored") by December 31, 2016. The available tax credit is reduced to 24%, 18%, and 12% for eligible projects as of December 31, 2017, 2018, and 2019, respectively. https://www.energy.gov/savings/business-energy-investment-tax-credit-itc

[34] The Petitioner's use of the term "price cap" is understood to mean the compensation rate that the Petitioner is entitled to under the terms of its standard-offer contract, as detailed in Attachment C.

[35] A project is "safe harbored" upon demonstration that 5% or more of the total cost of the facility was paid or incurred. https://www.energy.gov/savings/renewable-electricity-production-tax-credit-ptc

- Could be operated in accordance with the Petitioner's settlement with Vermont Electrical Cooperative, Inc.;
- Could be delivered in 2019 for installation in 2019/2020; and
- Had a market-based price.[36]

The Petitioner states that the 1.5 MW wind turbine that it safe harbored in late 2018 met those criteria.

The Petitioner states that it has selected a Goldwind model wind turbine for the Project subject to the approval of this amendment request. According to the Petitioner, the 1.5 MW model selected has a lower sound power level than a 2.2 MW model, and that this lower sound power level will address concerns about sound impacts and electric transmission impacts raised in the Section 248 proceeding. However, according to the Petitioner, these lessened impacts were not the basis for the Petitioner's request to amend the contract.[37]

In addition, the Petitioner states that the 1.5 MW turbine model is readily available in the marketplace, whereas 2.2 MW wind turbines are less common.[38]

The Petitioner contends that the 2.2 MW project was not a "placeholder" for a theoretical project, and in fact all its development work in 2016 was for a 2.2 MW project. The Petitioner intended to select a wind turbine model after it had obtained a CPG for the project. The Petitioner represents that this strategy would protect its negotiation position with wind turbine manufacturers and would enable the project to benefit from innovations in the market. The Petitioner states that turbine supply agreements are typically not executed until after a CPG is issued and all permit conditions are known. The Petitioner argues that the Vermont General Assembly took this into consideration when it adopted Section 248(o).[39]

The Petitioner contends that its case is similar to the *Triland* case, in which a developer sought to modify the capacity of its standard-offer contract due to unforeseen interconnection

[36] Petitioner's Information Response at 13.
[37] Petitioner's Information Response at 13.
[38] Affidavit of David C. Blittersdorf, filed 11/19/18, at 2.
[39] Section 248(o) states, "The Commission shall not reject as incomplete a petition under this section for a wind generation facility on the grounds that the petition does not specify the exact make or dimensions of the turbines and rotors to be installed at the facility as long as the petition provides the maximum horizontal and vertical dimensions of those turbines and rotors and the maximum decibel level that the turbines and rotors will produce as measured at the nearest residential structure over a 12-hour period commencing at 7:00 p.m."

costs.[40] Like *Triland*, the Petitioner maintains that its project was based on reasonable assumptions that its 2.2 MW wind turbine could be permitted, procured, and constructed by the end of 2019, and thus be eligible to receive a 30% federal tax credit. The Petitioner asserts that the Commission's discretionary decisions in the Section 248 proceeding have delayed the case beyond reasonable expectations.

The Petitioner recommends that the Commission take administrative notice that the Petitioner's project is the first and only large wind standard-offer project to reach an advanced stage of development.

Department

The Department states that reducing the capacity of the wind turbine should not exacerbate any of the problems perceived by the Department that currently cause its opposition to the project. The Department contends that denying this capacity amendment request could "establish precedent that would prevent future petitioners from modifying projects to mitigate opponents' concerns" and that such precedent "could contravene public policy supporting parties negotiating peaceful resolutions."[41] The Department suggests that granting the Petitioner's requested amendment is consistent with Commission precedent. Therefore, the Department does not object to the request. However, the Department asserts that the Petitioner's response to my information request did not meet the standards for amendment cited in my information request.[42]

B. Non-party comments

Green Mountain Power

GMP does not object to the Petitioner's request.

Movants

[40] *Request of Triland Partners LP to amend standard offer contract*, Docket 8801, Order of 8/29/16.
[41] Department December 10 comments at 5.
[42] Department March 25 comments at 2.

The Movants recommend denial of the Petitioner's request to amend the standard-offer contract capacity to 1.5 MW. The Movants advance several arguments in support of their recommendation.

First, the Movants contend that a capacity reduction of this size effectively results in a new project. The Movants maintain that, because of the potential effects on multiple Section 248 criteria, the Petitioner's request is analogous to circumstances in which a developer requests a contract amendment to reflect a new project location. The Movants note several examples of the Commission denying such requests – where developers sought to change project locations in response to local opposition – reasoning that local opposition is a risk faced by all project developers that may be avoided or minimized by engaging with neighbors and municipalities early in the development of a standard-offer bid. The Movants argue that the Commission's reasoning is applicable here because the Petitioner did not investigate community support for the proposed capacity amendment.

Second, the Movants contend that a capacity reduction greater than 5% may only be granted for engineering purposes, citing to one of the Commission's Docket 7533 Standard Offer Program implementation orders. The Movants argue that this case is unlike *Triland*, in which the Commission authorized a reduction in the capacity of a 2.1 MW standard-offer project in order to address interconnection issues. The Movants argue that here, the Petitioner's capacity amendment request does not present legitimate engineering reasons for the amendment and thus the request should be denied.[43]

Third, the Movants suggest that the problems sought to be addressed through the capacity amendment are of the Petitioner's own making. The Movants note that the terms of the standard-offer contract require the Petitioner to take commercially reasonable efforts to fulfill its contractual obligations and to utilize good engineering and operating practices in the design, construction, and operation of its project. The Movants maintain that commercially reasonable efforts and good engineering and operating practices would have identified alleged shortcomings of the project earlier in the proceedings.

[43] The Movants note that in its response to my information request, the Petitioner conceded that the capacity amendment is not related to engineering or interconnection problems.

Finally, the Movants contend that the Petitioner has not demonstrated that the reduced project capacity would (1) remain financially viable or result in a benefit to ratepayers, or (2) be in the public interest, particularly if the CPG proceedings must be effectively re-set, thus requiring additional litigation. The Movants suggest that denying the requested amendment would be in the public interest.

The Movants contend that the Petitioner's economic model relies on federally funded tax credits that are available to developers of new renewable energy facilities. According to the Movants, a taxpayer may secure a favorable federal tax credit rate – establish "Safe Harbor" – by paying or incurring five percent or more of the total cost of the project or by beginning physical construction.

The Movants argue that the Petitioner knowingly took a financial risk by safe harboring a 2.2 MW turbine in 2016. Unlike in *Triland*, where the developer learned of significantly higher interconnection costs after filing a petition for a CPG, the Movants contend that the Petitioner would have known about the federal tax credit phase out that was enacted in 2015 at the time the petition for a CPG was filed in 2016. The Movants maintain that while the increased costs in *Triland* were related to engineering, the Petitioner's increased costs are attributable to the financial risk taken by the Petitioner within the known federal tax landscape. The Movants argue that there are no legitimate engineering issues that demonstrate that the Petitioner's project cannot be built at the original capacity.

With respect to addressing local opposition to a standard-offer project, the Movants state that they have communicated their opposition to the wind turbine project from the beginning, that the Petitioner has not contacted local community opponents to discuss the amendment request, and that they have no reason to believe that the reduced turbine capacity would address their concerns with the project.

Public Comments

The public commenters were universally opposed to the petition. Several commenters suggested the petition should be denied because the community – on both sides of the international border – does not want the turbine. One commenter suggested that reducing the

capacity of the wind turbine from 2.2 MW to 1.5 MW would not address community opposition to the project.

C. Discussion

The Commission may amend standard-offer contracts under two contract provisions. Paragraph 30 allows the Commission to make amendments without the consent of the contract parties if several conditions are met.[44] This case falls under Paragraph 31 of the standard-offer contract, which provides that when authorized by the Commission, the Standard Offer Facilitator may amend Attachment A of the contract.

To be eligible to alter the capacity of a standard-offer project by more than 5%, "the producer must demonstrate that there are legitimate engineering reasons why the project cannot be built to the capacity indicated in Attachment A and that the capacity included in Attachment A was not simply a placeholder." [45] The Commission will determine whether to grant such requests on a case-by-case basis.

The Petitioner has not met the first part of this standard – that there are legitimate engineering reasons why the project cannot be built to the capacity indicated in Attachment A. The Petitioner states that "[t]he circumstances Dairy Air Wind finds itself in now are not the result of an engineering issue or a project design flaw"[46] and that its request to amend the contract capacity "is not grounded on an engineering or interconnection problem."[47] Instead, the Petitioner contends that its request is due to the passage of time during litigation and regulatory review in Docket 8887 and the attendant consequences to the project's financial viability. While these circumstances constitute real reasons as to why the Petitioner may wish to amend the contract capacity, I conclude that they do not meet the Commission's articulated standard governing standard-offer contract capacity amendments. Accordingly, based on this standard

[44] Through the terms of the standard-offer contract, the Commission may make amendments to contracts when: (1) it does not result in any reduction in the Project's economic value to Producer; (2) it does not adversely affect Producer's ability to meet the Producer's financial obligations; (3) it does not impose additional operational or other economic costs on Producer without full compensation; (4) it results in a benefit to ratepayers; and (5) the parties are given notice and an opportunity to be heard by the Commission.

[45] Docket No. 7533, Order of 7/7/11 at 11.

[46] Petitioner's Information Response at 1.

[47] Petitioner's Information Response at 3.

and the information presented, it would be appropriate for the Commission to deny the Petitioner's request to amend the capacity of the wind turbine described in Attachment A to its standard-offer contract.

However, in its discretion, the Commission may consider other public policy reasons to grant a standard-offer contract amendment.

For example, in July of 2015 the Commission authorized an amendment to an existing standard-offer contract. The Commission determined to amend an existing contract for a landfill gas generation project to enable the project owner to use the existing generator set to combust biogas produced by anaerobically digested food waste. The Commission reasoned that the contract amendment would: (1) allow the public to realize the benefits of a return to operation of the existing landfill gas plant; (2) further the public interest through the productive use of food waste; and (3) further the state's renewable energy goals by promoting the inclusion of a diversity of renewable energy technologies in Vermont's electric supply portfolio.[48]

In its discretion, I recommend that the Commission conclude in this case that the Petitioner's requested capacity amendment would advance the third reason articulated above, concerning the state's renewable energy goals. Here are the pertinent points:

- Vermont law includes renewable energy goals that the General Assembly found to be in the interest of the people of the State;[49]
- Those goals seek to promote, among other things, renewable energy plants that are diverse in plant capacity and type of renewable energy technology;[50]
- The Standard Offer Program was established to achieve the goals of 30 V.S.A. § 8001;[51]
- The Commission is required to allocate the Standard Offer Program capacity among different categories of renewable energy technologies, including wind power with a plant capacity greater than 100 kW (the "large wind" category);[52]

[48] Docket No. 7873, Order of 7/16/15.
[49] 30 V.S.A. § 8001(a).
[50] 30 V.S.A. § 8001(a)(8).
[51] 30 V.S.A. § 8005a(a).
[52] 30 V.S.A. § 8005a(c)(2).

- New Standard Offer Program capacity allocations are scheduled to conclude in 2022;[53] and
- The Petitioner holds the only active standard-offer contract for wind power in the large wind category.

Thus, at this point in the trajectory of the Standard Offer Program, with no commissioned wind projects in the large wind category, the policy goals articulated in Vermont law that are intended to advance the public interest would be served by authorizing the requested amendment. Such an authorization could recognize the significant investment of time and resources that has been made by private citizens, State agencies, utilities, local towns, the regional planning commission, and the Petitioner, in the review of the Petitioner's Section 248 application, and would allow the Petitioner's project to succeed or fail on the merits of the Section 248 application, not on the technical application of the "legitimate engineering reason" standard adopted in July of 2011.

VII. CONCLUSION

Based on the foregoing, I recommend that the Commission authorize an amendment of the commissioning milestone in the Petitioner's standard-offer contract. The new commissioning milestone would be 18 months following the later of (1) the lapse of the appeal period in the Section 248 proceeding if no timely appeals are filed, or (2) the final resolution of all appeals.

As to the Petitioner's request to amend the wind turbine capacity described in Attachment A to its standard-offer contract, I conclude the Petitioner has not met the Commission's previously established standard because the Petitioner has not presented a legitimate engineering reason to amend the wind turbine capacity. However, in its discretion, I recommend that the Commission find that there are public policy considerations that warrant approving the request.

Finally, I recommend that the Commission deny the intervention requests of the Town of Holland, the Northeastern Vermont Development Association, Shawn Bickford, and Hollis and Angela Thresher, because they do not meet the intervention standards articulated in Rule 2.209. However, consistent with past practice, I recommend that the Commission consider their

[53] 30 V.S.A. § 8005a(c)(1)(A).

substantive comments, and consider any friend-of-the-court briefs filed in response to this proposal for decision.

This proposal for decision has been circulated to the parties pursuant to 3 V.S.A. § 811.

Thomas Knauer
Hearing Officer

VIII. COMMISSION DISCUSSION AND CONCLUSION

Comments on the Hearing Officer's proposal for decision were filed by the Petitioner, the Department, Hollis Thresher, jointly by Holland and the Northeastern Vermont Development Association, and Vermonters for a Clean Environment. Holland and the Northeastern Vermont Development Association requested oral argument.

On July 1, 2019, the Commission convened an oral argument hearing with arguments given by the Petitioner, the Department, and jointly by Holland and the Northeastern Vermont Development Association.

We address each of the questions identified by the parties' written and oral argument comments on the PFD, below.

Intervention

The Department supports intervention by Holland and the Northeastern Vermont Development Association. The Department does not state the legal basis for granting them intervention.

The Petitioner maintains that intervention should be denied because the intervention standards of Commission Rule 2.209 have not been met.

Holland and the Northeastern Vermont Development Association contend that they meet the intervention standard as of right specified in Commission Rule 2.209(A) because they have a substantial interest in this proceeding that cannot be effectively represented by another party. Holland and the Northeastern Vermont Development Association state that their interest in this case is in protecting the litigation investment they have already made in Docket 8887 – with public resources – and avoiding additional expert witness costs in Docket 8887 that may result from the contract capacity amendment from 2.2 MW to 1.5 MW.

Having carefully considered these positions, we agree with the Hearing Officer's reasoning that none of the intervention motions demonstrates that Commission Rule 2.209 intervention standards have been met. Holland and the Northeastern Vermont Development Association have an interest in whether the Petitioner's wind turbine development meets the Section 248 criteria, and they may rightfully advance that interest through their intervention in Docket 8887. However, the Section 248 criteria that will be addressed in that case are not at

issue here, nor are the litigation costs that have been or will be incurred. In addition, because the CPG hearing will provide a full opportunity for the proposed intervenors here to fully litigate the issues of concern to them, their request to intervene in this proceeding fails to meet the Rule 2.209(A) standard that "the proceeding affords the exclusive means by which the applicant can protect that interest" or the Rule 2.209(B) requirement that there are no "alternative means . . . by which the applicant's interest can be protected." Therefore, we deny the intervention motions. We agree with the Hearing Officer that formal intervention is not required in a case such as this where the Commission is making a determination about a standard-offer contract amendment as part of its implementation of a public policy program. As such, the Hearing Officer correctly considered the comments filed by all participants. We have done the same and given full consideration to the comments filed by all participants as they relate to the Petitioner's standard-offer contract amendment request. Further, we emphasize that the parties in Docket 8887 – including Holland, the Northeastern Vermont Development Association, the Threshers, and Mr. Bickford – will have the opportunity in that docket to address the substantive merits of the Petitioner's project under Section 248.

Contract Milestone Extension

Mr. Thresher disagrees that the standard-offer contract milestone will be missed as a result of litigation. Therefore, Mr. Thresher recommends that the Petitioner should not receive the contract milestone extension.

Holland and the Northeastern Vermont Development Association maintain that the Hearing Officer ignored their substantive points in opposition to extending the contract milestone. We disagree. The proposal for decision includes a summary of positions, including Holland and the Northeastern Vermont Development Association's argument against the requested relief. The proposal for decision then goes on to accurately state the legal standard and recommends approval of the extension because the Hearing Officer concluded that the Petitioner's inability to meet the milestone is the result of litigation, which meets the legal standard.

The record reflects that the Petitioner timely filed a Section 248 petition and that substantial litigation – including abundant motion practice from the parties – has followed. We

therefore adopt the Hearing Officer's recommendation and grant the standard-offer contract commissioning milestone extension.

Contract Capacity Amendment

Mr. Thresher argues that the Petitioner cannot prove that the requested capacity decrease is based on an engineering issue.

Vermonters for a Clean Environment disagrees with the Hearing Officer's recommendation to approve the capacity amendment.[54] VCE argues that the Commission has met its statutory obligation by allocating the standard-offer program's capacity among different renewable energy technologies and that the Commission has no obligation to ensure that projects that receive standard-offer contracts actually get built. VCE maintains that the requested contract amendment does not meet the Commission's "legitimate engineering reasons" standard. Rather than seek a contract amendment, VCE suggests that the Petitioner could seek a new standard-offer contract in an area that is not grid-constrained and where the public supports the project.

The Department recommends that the contract capacity amendment request be denied. The Department argues that the Petitioner has not met the "legitimate engineering reasons" standard of the Commission's July 2011 implementation order. The Department maintains that the Petitioner has the burden to demonstrate that it is entitled to the relief sought, and that no party – including the Petitioner – articulated the public policy grounds for a contract amendment advanced by the Hearing Officer.

The Petitioner does not claim any engineering reason for its amendment request. Instead, the Petitioner states that, as with *Triland*, the amendment request is based on the economics of the project. The Petitioner argues that the "legitimate engineering reason" standard is a proxy used to make sure that a standard-offer proposal is for a real project and is not simply a placeholder. The Petitioner maintains that its project was a real project when proposed. The Petitioner suggests that the Commission does not need to find a "hard and fast" engineering reason if the Commission finds that the Petitioner's project proposal was real and not a

[54] VCE did not seek to intervene in this case.

placeholder. The Petitioner requests that, if necessary, the Commission exercise its discretion and waive the "legitimate engineering reason" standard to allow amendment of the contract.

Holland and the Northeastern Vermont Development Association maintain that the Commission's orders implementing the standard-offer program "stand in the place of agency regulations and set the legal parameters within which Standard Offer contracts are administered, including the process for any amendment to such contracts."[55] Holland and the Northeastern Vermont Development Association argue that the Commission's September 30, 2009, implementation order is not the legal standard for amending a standard-offer contract, and instead addresses only amendments that result in benefits to ratepayers, not amendments that are in the public interest. We note that the Hearing Officer introduced the relevant language as follows:

> The Commission adopted the following language to protect the financial interests of developers while also providing flexibility to adapt to changing circumstances over the term of the contract in a manner that ***benefits ratepayers***. (emphasis added)

We see nothing in the proposal for decision to suggest that the Hearing Officer relied on this standard. Rather, the Hearing Officer clearly states that it is the July 7, 2011, "legitimate engineering reasons" standard articulated in Docket 7533 that is applicable to the Petitioner's request to modify the wind turbine project capacity, and we agree.

Holland and the Northeastern Vermont Development Association raise a procedural argument that the Petitioner's request should be denied because the Petitioner did not provide notice of the standard-offer contract amendment request to the parties in the Section 248 case, as detailed in the December 31, 2009, implementation order. Holland and the Northeastern Vermont Development Association argue that the July 7, 2011, implementation order refines the Commission's amendment procedures by establishing the "legitimate engineering reasons" standard but does not change the required process, including the Petitioner's need to file notice in the Section 248 case.

The Hearing Officer states in the proposal for decision that the July 7, 2011, amendment standard is applicable in the present case, and not the December 31, 2009, standard. The 2011

[55] Holland and the Northeastern Vermont Development Association comments on Proposal for Decision at 8.

implementation order is silent as to procedure, whereas the December 31, 2009, implementation order states:

> 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%, the reasons for the change in the capacity of the project, and must notify the SPEED Facilitator of the change in project capacity.[56]

To the extent that this procedure is applicable in the present case, we disagree that the Petitioner's failure to provide notice of the capacity amendment request in the Section 248 case constitutes grounds for denial. The parties in the Section 248 case were given notice of the Petitioner's amendment request when they were sent an informational copy of the Hearing Officer's procedural order requesting information in this case.

In addition, we do not read the notice requirement to be applicable until *after* the capacity amendment has been approved. That requirement begins with the statement "If the change to the project capacity occurs," which suggests that the change has occurred not that the change has been requested. All that has occurred here, until now, is the Petitioner has requested permission to amend the capacity and thus there is no obligation imposed by our prior orders to give notice in the 248 proceeding.

Holland and the Northeastern Vermont Development Association argue that the Hearing Officer is correct that the Petitioner has not met the Commission's standards and precedent for approval of a contract capacity amendment. However, Holland and the Northeastern Vermont Development Association maintain that the Hearing Officer is incorrect that public policy warrants granting the amendment.

Holland and the Northeastern Vermont Development Association disagree with the Hearing Officer's proposal that public policy warrants granting the capacity amendment request, which Holland and the Northeastern Vermont Development Association state would be a substantial deviation from the Commission's standards. Holland and the Northeastern Vermont Development Association note that the Hearing Officer cited to the Commission's July 16, 2015, decision to amend an existing standard-offer contract.[57] Holland and the Northeastern Vermont

[56] Docket 7533, Order of 12/31/09 at 4-5.
[57] Proposal for Decision at 22, citing Docket No. 7873, Order of 7/16/15.

Development Association argue that the case does not stand as precedent for altering the capacity of a project by more than 5% based on public policy considerations, and that the only amendment to that standard-offer contract was clerical: a name change. Holland and the Northeastern Vermont Development Association misunderstand the order cited. In that order the Commission authorized the amendment of a standard-offer contract to allow an existing landfill-gas-to-energy standard-offer project to incorporate renewable biogas produced by the anaerobic digestion of food waste to supplement and eventually replace the landfill gas. There was no precedent for this scenario, and none of the Commission's prior implementation orders considered such an amendment. Nonetheless, the Commission granted an amendment to the contract because it would advance multiple public policy goals.

Holland and the Northeastern Vermont Development Association argue that the policy goals on which the Hearing Officer bases his recommendation are broad and general. In contrast, Holland and the Northeastern Vermont Development Association argue that the Commission's standards governing standard-offer contract capacity amendments are specific and tailored to address the situation in this case. Holland and the Northeastern Vermont Development Association maintain that specific provisions that target a particular issue should apply instead of general provisions covering the same issue. Therefore, Holland and the Northeastern Vermont Development Association argue there is no legal basis for the Commission to look to a broad, general policy statement when the Commission has a specific, clearly stated regulation established to address the question at hand.

The Petitioner's capacity amendment request may be decided by considering the Commission's implementation orders, precedent, and the record in this case without considering public policy grounds for granting the amendment request.

Holland and the Northeastern Vermont Development Association assert that the Hearing Officer is incorrect in his statement that the "2.2 MW wind turbine model upon which its standard-offer *bid* and Section 248 petition were premised will no longer be available at the time the Petitioner would *commence* construction of the project if granted a CPG."[58] We agree that the record does not support the emphasized words. In fact, the Petitioner represented that "the

[58] Proposal for Decision at 2. (emphasis added)

2.2 MW wind turbine model that had been safe harbored in 2016, used as the basis for [Vermont Electric Cooperative's] [system impact study] … and that Dairy Air Wind was considering for a turbine supply agreement would no longer be available to *complete* construction by end of 2020."[59] The Petitioner filed an interconnection application on June 18, 2016, with Vermont Electric Cooperative for a 2.2 MW Goldwind GW121-2.2 model wind turbine.[60] This wind turbine model therefore represents one of the bases for the standard-offer contract,[61] and was the basis for at least some of the evidence filed with the Section 248 petition.[62] Thus, it would have been more accurate for the Hearing Officer to use the word "contract" where he used "bid," and "complete" where he used "commence." In any event, we conclude that this error was harmless because the result is the same: The wind turbine model considered by the Petitioner in the development of its standard-offer project will not be available to the Petitioner to construct.

Holland and the Northeastern Vermont Development Association contend that the Commission's procedures for standard-offer contract capacity amendments require the Commission to determine whether or not the project proposed at the time the contract was signed was a legitimate project and not simply a placeholder for a project that had not been fully formulated.[63] Holland and the Northeastern Vermont Development Association maintain that the Petitioner ignored the Hearing Officer's request for information as to the basis of the Petitioner's amendment request and that the Petitioner has advanced changing reasons, from marketplace availability to financial feasibility. Because the Petitioner ignored the Hearing Officer's information request and has not filed enough information on the basis for its project and the requested contract change, Holland and the Northeastern Vermont Development Association assert that the Commission cannot make the findings required by the December 31, 2009, implementation order. We agree that the Petitioner could have been much more helpful in responding to the Hearing Officer's information request, which aptly sought information to assist

[59] Petitioner's Information Response at 12. (emphasis added)

[60] Petitioner's Information Response, Exhibit 1.

[61] Under Vermont law, a standard-offer contract may not be executed unless and until a complete interconnection application is submitted to the utility. 30 V.S.A. § 8005a(i).

[62] *See* Docket 8887 exhibit DAW-DPE-3.

[63] Citing to Docket 7533, Order of 12/31/09, which states: "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."

the Commission in deciding the Petitioner's request. We disagree that the Petitioner has not filed enough information. As discussed below, the record information provided by the Petitioner is enough for us to determine that the Petitioner's 2.2 MW project was not a placeholder and is enough to determine the basis for the requested contract change.

In *Triland*, the Commission concluded that it was reasonable to amend the capacity of Triland's standard-offer contract when the developer determined that it was no longer financially feasible to construct the project due to unforeseen interconnection costs. *Triland* is an example of a capacity amendment request being granted when there was no finding of "legitimate engineering reasons" for the amendment but where the purpose behind the "legitimate engineering" standard had been fulfilled: The developer in that case demonstrated that the capacity indicated in its original application was not a placeholder, and that circumstances had changed during the development of the project, making the original proposal uneconomic. In *Triland*, despite the developer's initial communications with the interconnecting utility, additional interconnection costs were identified after the standard-offer contract was signed. These higher costs were not reasonably knowable in advance, and thus materially diminished the financial feasibility of the project. Here, the Petitioner represents that the financial feasibility of the 2.2 MW project has diminished with the passage of time and the ensuing reductions in the available federal incentives. In addition, the Petitioner has filed contemporaneous documentation from the wind turbine manufacturer that a 2.2 MW wind turbine was available at the time it signed the contract[64] and a memorandum, supported by a sworn affidavit, stating that the "2.2 MW wind turbine model that had been safe harbored in 2016, used as the basis for VEC's SIS (see Exhibits 1 and 2) and that Dairy Air Wind was considering for a turbine supply agreement would no longer be available to complete construction by end of 2020."[65] Based on this information, we find that the 2.2 MW capacity indicated in Petitioner's standard-offer contract was not a placeholder, and that the financial and technological circumstances of the project have changed during its development. These circumstances fulfill the purpose of the "legitimate engineering reasons" standard. Based on the foregoing, we conclude that it is

[64] Petitioner's Information Response, Exhibit 6.
[65] Petitioner's Information Response at 12.

reasonable to grant the Petitioner's request to amend the capacity described in Attachment A to the standard-offer contract from 2.2 MW to 1.5 MW.

IX. ORDER

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

1. The conclusions and recommendations of the Hearing Officer as to intervention and the contract milestone extension request are adopted. All conclusions and recommendations by parties and commenters that were not adopted in this Order were considered and not adopted.

2. The Petitioner's request to extend the commissioning milestone is approved. The new commissioning milestone shall be 18 months following the later of (1) the lapse of the appeal period in the Section 248 proceeding if no timely appeals are filed, or (2) the final resolution of all appeals.

3. The Petitioner's request to amend Attachment A to its standard-offer contract to reflect a reduction in wind turbine capacity from 2.2 MW to 1.5 MW is approved.

Dated at Montpelier, Vermont, this 11th day of July, 2019.

Anthony Z. Roisman)
) PUBLIC UTILITY
)
Margaret Cheney)
) COMMISSION
)
Sarah Hofmann)
) OF VERMONT

OFFICE OF THE CLERK

Filed: July 11, 2019

Attest: Judith C. Whitney
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.

PUC Case No. 18-3996-PET - SERVICE LIST

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