STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 18-2820-INV

Investigation to review the avoided costs that serve as prices for the standard-offer program in 2019	

Order entered: 08/09/2019

ORDER RE: 2019 STANDARD-OFFER AWARD GROUP

I. INTRODUCTION

On May 1, 2019, the Standard-Offer Facilitator ("Facilitator") received 38 proposals in response to the 2019 Request for Proposals ("RFP") under the standard-offer program. In this Order, the Vermont Public Utility Commission (the "Commission") directs the Facilitator to enter into standard-offer contracts with 23 of the proposals and to place three proposals in the reserve group. For the reasons described in this Order, the Commission does not accept Facilitator's recommendation to reject the Silk Road Solar Proposal. As a result, the Commission has placed Silk Road Solar in the Reserve Group, instead of the Windsor Solar proposal.

II. PROCEDURAL HISTORY

On April 2, 2019, the Facilitator issued an RFP to solicit standard-offer projects to meet the requirements of 30 V.S.A. § 8005a(c). The available annual capacity for 2019 was 2.235 MW for the Provider Block and 8.93 MW for the Developer Block.[1] The Developer Block included capacity set-asides of 1.17 MW each for biomass plants, small wind plants (wind power with a capacity less than or equal to 100 kW), large wind plants, food waste anaerobic digestion plants, and hydroelectric plants.

On May 1, 2019, the Facilitator received 38 proposals in response to the RFP. The proposals were opened on May 3, 2019, at the Commission's offices, and on May 24, 2019, the Facilitator filed a report on the proposals and recommended that the Commission award contracts to 23 projects, which are shaded blue in the following table. The Facilitator also recommended that the Commission place three projects in the reserve group; these projects are shaded green.

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

Projects that are not shaded were not recommended to receive a contract or to be placed in the Reserve Group.

Table 1. Proposals Received and the Facilitator's Recommendations

2019 Standard Offer Program RFP: Proposals Received				
Project Name	Technology	Price ($/kWh)	Capacity (MW)	Category Total (MW)
PROVIDER BLOCK				
Salvage Yard Solar	Solar	0.1200	2.100	
Center Road Solar	Solar	0.1240	2.100	4.200
DEVELOPER BLOCK				
Technology Diversity Block				
Purpose Energy-St. Albans	Food Waste	0.2038	1.014	
Franklin Foods VT Recovery Ctr.	Food Waste	0.2050	0.710	
Cabot Creamery	Food Waste	0.2080	0.250	
Rothblatt Wind	Small Wind	0.2520	0.025	
Shepard Wind	Small Wind	0.2520	0.025	
Cross Wind Project A	Small Wind	0.2580	0.050	
Cross Wind Project B	Small Wind	0.2580	0.050	
Cross Wind Project C	Small Wind	0.2580	0.050	
Cross Wind Project D	Small Wind	0.2580	0.050	
Tomlinson Wind 2	Small Wind	0.2580	0.050	
Howrigan Wind Farm	Small Wind	0.2580	0.100	
Way Out Wind Farm	Small Wind	0.2580	0.100	
Merck Forest Wind Farm	Small Wind	0.2580	0.100	
Hespos Wind Farm	Small Wind	0.2580	0.100	
Auger Heights Wind A	Small Wind	0.2580	0.100	
Auger Heights Wind B	Small Wind	0.2580	0.100	
Pennock Hill Wind	Small Wind	0.2580	0.100	2.974

2019 Standard Offer Program RFP: Proposals Received				
Project Name	Technology	Price ($/kWh)	Capacity (MW)	Category Total (MW)
Price Competitive Block				
Vermont Solar DG	Solar	0.0838	2.200	
St. Albans Solar DG	Solar	0.0849	2.200	
Post Road Solar 1	Solar	0.0861	2.200	
Post Road Solar 2	Solar	0.0861	2.200	
Sand Hill Solar	Solar	0.0910	2.200	
Vergennes Solar DG	Solar	0.0919	2.200	
ER The Narrows Solar	Solar	0.0930	2.200	
Silk Road Solar	Solar	0.0939	2.200	
Lemay Solar Park	Solar	0.0998	2.200	
Windsor Solar	Solar	0.1079	2.200	
Safford Solar	Solar	0.1182	2.200	
Galusha Solar	Solar	0.1184	2.200	
Cannon Green Solar	Solar	0.1186	2.200	
Willard Solar	Solar	0.1187	2.200	
Rose Solar	Solar	0.1188	2.200	
Brown Bridge Solar	Solar	0.1191	2.200	
Lemuel Solar	Solar	0.1196	2.200	
St. Andrews Solar	Solar	0.1199	2.200	
Sawyer Road Solar	Solar	0.9981	2.200	41.800
Total				**48.974**

The Facilitator did not recommend the Post Road Solar 1, Post Road Solar 2, or Silk Road Solar proposals for the Award or Reserve Group because the Facilitator found that the proposals do not satisfy the mandatory requirements of RFP Section 3.1.4. The proposals in the competitive block ranked below Windsor Solar were not selected for either the Award or Reserve Group. The proposals listed below the Windsor Solar proposal were not recommended on the basis of price.

On May 28, 2019, the Commission requested comments on the Facilitator's recommendations.

On June 11, 2019, the Vermont Department of Public Service ("Department"), Green Mountain Power Corporation ("GMP"), and Allco filed comments on the Facilitator's recommendations.[2] The Department and GMP supported the Facilitator's recommendations. Allco raised the following arguments: (1) the Facilitator had improperly calculated the amount of capacity that should be allocated to the Provider Block; (2) VPPSA's bid should be rejected because it violates the Sherman Antitrust Act; (3) the Provider Block statute is unconstitutional and a violation of the Sherman Antitrust Act; (4) the statute authorizing the standard-offer program is invalid because it lacks adequate standards to allocate capacity among technologies; (5) the food waste bids do not explain how they meet the rules of the Federal Energy Regulatory Commission ("FERC"); (6) the food waste bids are outside of the technology cap; (7) several wind bids exceed the 100 kW limit on small wind plants; (8) several proposals must be rejected because the proposals failed to demonstrate site control or provide information as required by the RFP.

On June 24, 2019, SB Energy Holdings, LLC responded to the Allco Comments.

On June 28, 2019, SB Energy Holdings LLC, Peter S. Ford, Purpose Energy-St. Albans LLC, Vermonters for a Clean Environment, Star Wind Turbines, Next Era Energy Resources Development LLC, Encore Redevelopment LLC, and VPPSA filed response comments.

Also on June 28, 2019, Allco replied to SB Holdings LLC's June 24 Comments and several of the other June 28 comments.[3]

No other comments have been received.

III. DISCUSSION

This RFP is being conducted pursuant to 30 V.S.A. §§ 8005a(c) and (f), which direct the Commission to use a market-based mechanism to award contracts to a certain amount of new small and medium-sized renewable energy plants each year. The goal of the RFP is to ensure the "timely development at the lowest feasible cost" of such plants.[4] Accordingly, the Commission included in the RFP requirements intended to ensure that bidders have proposed legitimate projects that are likely to achieve commissioning.[5] These requirements are intended to be clear and to allow for fair competition

[2] Allco's filing is hereinafter referred to as the "Allco Comments."
[3] This filing is hereinafter referred to as the "Allco Reply Comments."
[4] 30 V.S.A. § 8005a(f).
[5] *Investigation Re: Establishment of a Standard Offer Program*, Docket No. 7533, Order of 7/11/11 at 22 ("The standard-offer program was designed so that legitimate projects could enter the queue, not so developers could create a placeholder for a theoretical project.").

between bids on the basis of price.[6] At the same time, the Commission will not apply the requirements of the RFP in a rigid manner that causes ratepayers to pay for higher-cost bids for no substantive reason. Accordingly, the RFP permits the Facilitator, with notice to the Commission, to overlook minor defects in bids.[7] With these standards in mind, the Commission turns to the issues raised by the Facilitator and the participants about several of the bids received.

A. The Provider Block

VPPSA submitted two proposals for the Provider Block, and the Facilitator recommended that the Commission award both proposals a contract. Allco has raised a number of arguments against awarding contracts to the VPPSA proposals. We address each argument below.

Size of the Provider Block

Allco contends that the Facilitator incorrectly calculated the amount of capacity that should be allocated to the Provider Block. Section 8005a(c)(1)(A) dictates the amount of new capacity that should be made available in the RFP each year, which is 10 MW in 2019. In addition, the Commission must add any "unsubscribed capacity" from the previous year's RFP "to the annual increase."[8] That unsubscribed capacity is "added to the annual increase . . . and shall be made available to new standard-offer plants proposed by persons who are not providers."[9]

The statute states that "a portion of the annual increase shall be reserved for new standard-offer plants proposed by Vermont Retail electricity providers."[10] Finally, Section 8005a(j) states that in the event a standard-offer contract is terminated, that capacity "shall be reallocated to one or more eligible plants." The statute does not specify how that capacity should be reallocated.

The Commission decided how to implement these statutory directives in an Order dated March 1, 2013, explaining that it was ambiguous whether the Legislature intended for unsubscribed capacity from the Provider Block to be made exclusively available to the

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[6] *Investigation Into Programmatic Adjustments To The Standard-Offer Program*, Docket 8817, Order of 10/20/2017, at 7 ("the effectiveness of the standard-offer program relies on the clear standards established by the RFP process and . . . skirting these requirements undermines that integrity.")

[7] RFP Section 4.3.

[8] 30 V.S.A. § 8005a(c)(1)(B)(ii)-(iii).

[9] *Id*.

[10] 30 V.S.A § 8005a(c)(1)(B).

Developer Block or whether unsubscribed capacity should be added to the annual increase that is allocated between the Developer and Provider Blocks.[11] The Commission concluded that unused capacity is added to the "annual increase" and, therefore, should be made available to the Developer and Provider Blocks.[12]

In this year's RFP, the Facilitator added the .308 MW of unsubscribed capacity from last year's Provider Block to the 10 MW annual increase in program capacity. The Facilitator also added to the annual increase 2.560 MW of capacity available from terminated contracts. The Facilitator then allocated the capacity between the Provider Block and the Developer Block according to the percentages specified in Section 8005a(c)(1)(A)(i).

According to Allco, unsubscribed capacity from the previous year's RFP and the capacity from the terminated contracts should not be allocated to the Provider Block because such capacity is not part of the "annual increase" under 30 V.S.A. § 8005a(c)(1)(A). This argument is not persuasive for two reasons. First, the statute does not limit the "annual increase" to the amounts set forth in Section 8005a(c)(1)(A). Instead, "unsubscribed capacity . . . *shall be added to the annual increase* for each following year."[13] The Facilitator appropriately added unsubscribed capacity to the annual increase that is divided between the Provider and Developer Blocks.

With respect to capacity from terminated contracts, Section 8005a(j) does not prohibit the allocation of a portion of that capacity to the Provider Block. The statute simply states that the Commission must reallocate capacity from terminated contracts to "one or more eligible plants."[14] In the March 1, 2013, Order, the Commission found that it is simpler to add unused capacity to the annual increase and then allocate the sum between the Provider and Developer Blocks.[15] This rationale applies equally to capacity from terminated contracts, and Allco has not provided a persuasive reason to deviate from the procedure announced in 2013. In summary, we conclude that the Facilitator correctly calculated the amount of capacity available to the Provider Block.

Antitrust Issues

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[11] *Programmatic Changes to the Standard-Offer Program*, Docket No. 7873, Order of 03/01/2013 at 36.
[12] *Id*.
[13] 30 V.S.A. § 8005a(c)(1)(B)(ii)-(iii).
[14] 30 V.S.A § 8005a(j).
[15] *Programmatic Changes to the Standard-Offer Program*, Docket No. 7873 Order of 03/01/2013 at 36.

Allco argues that VPPSA's bids violate the Sherman Antitrust Act because federal law prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[16] Allco states that the VPPSA bids are illegal *per se* because they are "horizontal price-fixing agreements" between competitors that set the price of the Provider Block.[17]

Allco's argument is unpersuasive because it has presented no specific information demonstrating a contract, combination, or conspiracy in restraint in commerce. For example, Allco has not alleged that VPPSA's member utilities were prohibited from filing competitive bids or that members withheld competitive individual bids in favor of the VPPSA bid. Allco has not shown that VPPSA prevented any electric utility that is not a member of VPPSA from submitting a bid.

Federal courts have recognized that joint bids can in fact promote competition by allowing less wealthy bidders to compete against larger competitors.[18] This is the case here. VPPSA is a "public instrumentality exercising public and essential functions," [19] one of which is "[t]o sell electric power and energy and other products of projects to utilities within the state."[20] The members of VPPSA are small municipal companies that likely lack the resources to individually compete in the RFP. Under these circumstances, and without any specific allegations of anticompetitive behavior, the Commission cannot conclude that VPPSA's bid is a violation of the Sherman Antitrust Act.

Next we turn to Allco's argument that the Provider Block statute is "preempted facially" by the Sherman Antitrust Act because "it sanctions a per se violation of the Sherman Act—the collusion among the municipal members of VPPSA engaging in horizontal price fixing and market allocation."[21] Preemption claims are constitutional in nature, and the Commission cannot invalidate a statute that it is tasked with implementing.[22] Even if we had the power to adjudicate

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[16] 15 U.S.C. § 1.

[17] Allco Comments at 16 (*citing United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S. Ct. 811 (1940)).

[18] *See Love v. Basque Cartel*, 873 F. Supp. 563, 577 (D. Wyo. 1995), *aff'd sub nom. Dry Creek Cattle Co. v. Basque Cartel,* 95 F.3d 1161 (10th Cir. 1996*)* ("Bid rigging should not be confused with joint bidding, which allows bidders to pool their resources to place bids on property which they would otherwise be unable to afford."); *Pennsylvania Ave. Funds v. Borey*, 569 F. Supp. 2d 1126, 1133 (W.D. Wash. 2008) (holding that price agreements between competitors in a corporate control context are not *per se* illegal). *See also, Kearney v. Taylor*, 56 U.S. 494, 14 L.Ed. 787 (1854) (holding that joint bids are not necessarily anticompetitive).

[19] 30 V.S.A. § 5011(a).

[20] 30 V.S.A. § 5012(8).

[21] Allco Comments at 18.

[22] *Westover v. Village of Barton Elec. Dept.*, 149 Vt. 356, 357-59 (1988).

this claim, it fails because we conclude that the statute does not sanction anticompetitive behavior.

The Federal Power Act

For similar reasons, we cannot address Allco's argument that the statute discriminates against non-incumbent utilities and, therefore, violates Sections 205 and 206 of the Federal Power Act. Section 8005a(c)(1)(B) requires that "a portion of the annual increase *shall be reserved* for new standard-offer plants proposed by Vermont retail electricity providers." The Commission lacks the power to invalidate this statutory mandate. The Commission also observes that Allco has previously raised similar arguments before the FERC concerning the Provider Block, and the FERC declined to initiate an enforcement action.[23]

Common Benefits Clause

Allco also argues that "favoring . . . certain higher-cost renewable energy facilities without justification meeting the necessity standard is irreconcilable with the [Common Benefits Clause of the] Vermont Constitution."[24] Allco states that the Commission should hold that the Provider Block statute is unconstitutional as applied.

The Common Benefits Clause of the Vermont Constitution states, "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community."[25] Despite Allco's attempt to paint this issue as an "as applied" challenge, Allco has not described under what circumstances the Commission could implement the Provider Block without, in Allco's view, creating "an unlawful set aside violating the Common Benefits Clause."[26] Therefore, the Commission concludes that Allco's Common Benefits Clause attack is the type of facial challenge to the constitutionality of a statute that the Commission is unable to adjudicate.[27]

Conclusion

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[23] *Otter Creek Solar LLC Allco Fin. Ltd. Plh LLC*, 158 FERC ¶ 61001 (Jan. 3, 2017).
[24] Allco Comments at 21.
[25] Vt. Const., ch. I, art 7.
[26] Allco Comments at 21.
[27] *Westover v. Village of Barton Elec. Dept*., 149 Vt. 356, 357-59 (1988).

In conclusion, the Commission rejects Allco's arguments regarding the Provider Block and agrees with the Facilitator's recommendation to award contracts to the two proposals submitted by VPPSA.

B. The Technology Diversity Block

Food Waste Technology Allocation

Allco contends that the plain language of the statute excludes "biomass power using methane derived from an agricultural operation" from the renewable energy technologies that are eligible to receive a portion of the 127.5 MW available through the standard-offer program.[28] According to Allco, "[t]he Franklin Foods, Cabot [Creamery] and Purpose Energy proposals appear to be operations from an agricultural facility, and as such would not be entitled to a technology allocation, but should qualify for a standard-offer contract under 30 V.S.A. §8005a(d)(1) or (d)(2)."

This argument is incorrect. The proposed plants will primarily use food waste, not agricultural-biomass, to generate energy.[29] The statute defines renewable energy as "energy produced using a technology that relies on a resource that is being consumed at a harvest rate at or below its natural regeneration rate . . . anaerobic digestion of agricultural products, byproducts, or wastes, *or of food wastes* shall be considered renewable energy."[30] The Commission has distinguished between energy generated from "agricultural waste" and "food waste," and designated food-waste plants as a renewable energy technology that is distinct from agricultural biomass. The Commission found that plants using food waste as their primary energy source have a different avoided cost than agricultural biomass plants and may participate in the RFP.[31] Accordingly, we reject Allco's argument that the Franklin Foods, Cabot Creamery, and Purpose Energy proposals should be treated as agricultural biomass plants that are outside of the standard-offer program cap.

Standardless Discretion and Technology Allocations

Section § 8005a(c)(2) provides:

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[28] 30 V.S.A § 8005a(c)(2).
[29] Purpose Energy Comments of June 28, 2019.
[30] 30 V.S.A. § 8002(21).
[31] *Programmatic Changes to the Standard-Offer Program*, Docket No. 7873, Order of 03/20/2015 at 11-15.

> Technology allocations. The Commission shall allocate the 127.5-MW cumulative plant capacity of this subsection among different categories of renewable energy technologies. These categories shall include at least each of the following: methane derived from a landfill; solar power; wind power with a plant capacity of 100 kW or less; wind power with a plant capacity greater than 100 kW; hydroelectric power; and biomass power using a fuel other than methane derived from an agricultural operation or landfill.

Allco argues that this statutory provision is "an unconstrained delegation, without any standards at all"[32] and that "the set-aside for the food waste and wind projects in the 2019 RFP is unconstitutional as applied." Once again, Allco's challenge is actually a facial one because Allco has not explained how the Commission could comply with the statute's mandate that we "allocate the 127.5-MW cumulative plant capacity of this subsection among different categories of renewable energy technologies" without, in Allco's view, exercising standardless discretion. As noted earlier, the Commission cannot invalidate a statute that it is tasked with implementing.

The 75% Rule

State law requires standard-offer plants to be "a qualifying small power production facility under 16 U.S.C. § 796(17)(C)."[33] Allco contends that the FERC's regulations require that 75% of a qualifying facility's energy input must be from renewable resources. Allco contends that the Franklin Foods, Cabot Creamery, and Purpose Energy proposals should be rejected because the proposals do not provide sufficient information to determine whether or not FERC's 75% rule is met.

All parties executing a standard-offer contract must certify that they meet the requirements to be a qualifying facility and do not use fossil fuels.[34] There is no requirement in the RFP that information specifically addressing the FERC rule cited by Allco be included with a bid. Therefore, Allco has not presented a valid reason to reject these proposals.

Cross Wind Proposals

The Cross Wind projects contain a purchase and sale agreement with three purchasers—Peter Kowanko, Kimberly Kowanko, and Green Power Farms LLC. Allco contends that while Peter and Kimberly Kowanko signed the purchase and sale agreement, Green Power Farms,

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[32] Allco Comments at 22.
[33] 30 V.S.A. § 8005a(b).
[34] Standard-Offer Form of Contract at 4. A copy of a sample contract is available on the Facilitator's website at: http://static1.1.sqspcdn.com/static/f/424754/28065358/1548362494193/2019+Contract+Standard+Offer+Program+1-16-19.pdf?token=hJqLN7WC8JH1FOXzTa9ldbODFgk%3D.

LLC, did not. Therefore, according to Allco, the proposal did not satisfy the RFP's requirement that site control documents be executed.

This argument fails because Kimberly Kowanko is identified as the authorized representative of Green Power Farms, LLC.[35] Accordingly, the Commission finds that the site-control documents provided in the Cross Wind proposals comply with Section 3.1.3 of the RFP.

The Howrigan, Way Out, Merck Forest, Hespos, Auger Heights A, Auger Heights B, and Pennock Hill Wind Proposals

Allco argues that the above listed proposals should be rejected because each proposal consists of 4 wind turbines that have a nameplate capacity of 45 kW per turbine. Therefore, according to Allco, the capacity of the proposals exceeds the 100 kW size limit for the small-wind technology category. The materials submitted with each proposal state that the wind turbines have a capacity of 25 kW, but Allco alleges that the capacity of the turbines is in fact 45 kW based on information from the website of Star Wind Turbines, the model's manufacturer. Allco also contends that the proposals were not likely to achieve commissioning based on previous experience with Star Wind Turbine projects.[36]

Star Wind Turbines responded that the STAR72-6 turbine is modular and can be configured with varying capacities, including 25 kW. The "nameplate capacity" of a wind turbine is generally understood as "[t]he maximum rated output of a generator under specific conditions designated by the manufacturer. Generator nameplate capacity is usually indicated in units of kilovolt-amperes (kVA) and in kilowatts (kW) on a nameplate physically attached to the generator."[37] The Commission interprets Star Wind Turbines' response to mean that the STAR72-6 turbine can be built with a nameplate capacity of 25 kW. The Commission also notes that the RFP does not require a proponent to identify the model of turbine that will be used in its bid, only the nameplate capacity of the proposed plant.[38] Star Wind Turbines may use any turbine model, provided that the total nameplate capacity of each plant does not exceed 100 kW. For these reasons, Allco's arguments are rejected and the Commission accepts the Facilitator's recommendation to award contracts to these proposals.

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[35] Cross Wind Project A Bid at 3.

[36] This contention was also raised in comments from Vermonters for a Clean Environment. These comments are rejected because the RFP sets forth no criteria to deny a proposal based on a firm's alleged lack of success in developing projects.

[37] *Investigation Re: Establishment of A Standard Offer Program*, Docket No. 7533, Order of 10/16/2009 at 11 (citing the U.S. Energy Information Administration's glossary definition of generator nameplate capacity).

[38] 2019 Standard-Offer RFP Application Form, Section 1.

C. The Price Competitive Block

Post Road Solar 1, Post Road Solar 2, and Silk Road Solar Proposals

Pacific Northwest Solar, LLC ("PNW") submitted three proposals: the Post Road Solar 1, Post Road Solar 2, and Silk Road Solar. The Facilitator recommends that the Commission reject these proposals because they did meet the requirements of RFP Section 3.1.4. The RFP requires that:

> Proposals must include a detailed, high resolution project map that identifies the property for which the proponent has site control and includes all of the following clearly labeled: (1) property line boundaries; (2) location of the project site on the property; (3) any required rights-of-way; (4) total acreage of the project site; (5) anticipated interconnection point; (6) location of any existing projects or other proposed projects that would share common equipment and infrastructure with the proposed project (such as roads, control facilities, and connections to the electric grid); (7) local infrastructure, including power lines and roadways; and (8) lakes, rivers, and streams. The project map must be provided in 24" x 36" and indicate the scale at a sufficient ratio (i.e., 1 inch = 50 feet) such that the location of all project facilities is easily discerned.
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> The project map must include a detailed site layout plan that illustrates the location of all major equipment and facilities such as panel arrays, inverters, transformers, and any required structures on the project site. Proponents may consult the project map example available on the Standard Offer Facilitator's website.[39]

The Facilitator states that the Project maps submitted with all three proposals were submitted on 8" x 11" paper and used a scale that made it "difficult to discern the location of all project facilities with any level of detail."[40] According to the Facilitator, these defects in the project maps are fatal because "the purpose of the project map requirement is to promote preliminary project vetting."[41]

The Facilitator also contends that the proponent of the Post Road Solar 1 and Post Road Solar 2 bids failed to provide information required to demonstrate that the facilities are separate plants. Section 3.1.2 states that "if the proposed project is located at, adjacent to, or near an existing or proposed renewable energy facility, the proposal must also include Appendix C: Independent Technical Facility."[42] The Facilitator states that the Post Road Solar 1 and 2

[39] 2019 Request for Proposals at Section 3.1.4
[40] Facilitator Recommendation at 9.
[41] *Id*.
[42] RFP at 6.

proposals did not include a complete Appendix C because PNW did not provide the distance between the two facilities.[43] The Facilitator also points out that the Proponent indicated that the two facilities would be owned by separate entities but the "Applications list ownership of both projects to the same entity: Pacific Northwest Solar."[44]

The Facilitator also states that the bids did not follow the applicable procedures to request confidential treatment of certain information in the bids and notes a discrepancy in the Post Road Solar 1 and Post Road Solar 2 bids regarding the parcel ID number of the property that would host the facilities. However, the Facilitator did not identify the confidentiality issue or parcel ID number discrepancy as reasons to reject the proposals.

GMP and Allco supported the Facilitator's recommendation. PNW did not respond to the Facilitator's recommendation.

The Commission has reviewed the Facilitator's recommendation, the comments of the participants, and the bid materials and concludes that the Post Road Solar 1 and Post Road Solar 2 proposals did not satisfy the requirements of RFP Sections 3.1.2 and 3.1.4. The primary reason for our decision to reject the PNW bids is because PNW failed to provide information required by RFP Section 3.1.2 and because the bids contained contradictory claims about the ownership of the facilities.[45] Therefore, the Commission accepts the Facilitator's recommendation to reject these proposals.

Next, we turn to the Silk Road Solar proposal. The purpose of the map requirement is to ensure that proponents submit well vetted projects. The RFP requires that a map show eight pieces of information, which help demonstrate that the proponent has undertaken a site assessment to determine the feasibility of the project.[46] The Commission has reviewed the Silk Road Solar project map and finds that the map shows the required information. The only defect in the Silk Road Solar bid is that the project map was submitted on 8" x 11" paper, as opposed to 24" X 36" paper.

The Commission finds that this defect is minor because the map was sufficiently clear and detailed to allow the Commission to review it for compliance with the substantive requirements of the RFP. The Commission acknowledges that RFP clearly calls for a map that is 24" x 36" but the Commission concludes that rejecting a proposal solely because the project map

[43] *See* RFP Appendix C ("Please provide exact distance of all facilities to each other.").
[44] Facilitator Recommendation at 11.
[45] *See* RFP Section 4.3 (reserving right to reject proposals containing inaccurate or misleading information).
[46] RFP Section 3.1.4.

is on the wrong size paper would elevate form over substance at the expense of ratepayers. Accordingly, the Commission directs the Facilitator to overlook this technical defect and place the Silk Road Solar proposal in the Reserve Group.

Vermont Solar DG, St. Albans Solar DG, and Vergennes Solar DG Proposals

NextEra submitted three proposals: (1) Vermont Solar DG, (2) St. Albans Solar DG, and (3) Vergennes Solar DG. Allco argues that all three proposals failed to satisfy the clear, mandatory requirements of the RFP because the proposals' site control documents are in favor of Boulevard Associates, LLC ("Boulevard Associates") and not NextEra. Allco contends that NextEra "has no legal rights to the site of the project."[47] Allco states that the Commission has previously rejected bids where the site-control documentation was in a name different than the proponent's.

Allco also argues that the Vermont Solar DG and St. Albans Solar DG projects also failed to demonstrate site control because they do not have the legal right to use the access roads that would serve the facilities. According to Allco, the Field Drive that would serve the St. Albans Solar DG proposal is subject to a Use Agreement between the landowner and the Vermont Agency of Transportation. Allco alleges that the Use Agreement limits use of Field Drive to agricultural purposes. Therefore, Allco asserts that NextEra lacks legal rights sufficient to construct the St. Albans Solar DG project.

Allco asserts that the Vermont Solar DG proposal is similarly flawed because the easement that provides access to the site is limited to "transportation of farm equipment and products."[48]

NextEra responds that Boulevard Associates is a wholly owned subsidiary of NextEra and that the difference in name between the two companies is "a distinction without a difference."[49] NextEra states that it has demonstrated site control for each of the proposals using option agreements that legally inure to NextEra's "intracompany affiliates."[50] NextEra represents that it does have the right to access the parcels. NextEra states that the Field Drive Use Agreement was entered into before solar generation was a common source of energy.

[47] Allco Comments at 5.
[48] *Id*. at n.4 (citing page 35 of the Vermont Solar DG proposal).
[49] NextEra Public Comment dated June 28, 2019, at 2.
[50] *Id*.

According to NextEra, Vermont recognizes easements by necessity. NexEra also states that the easement that it provided shows that it has access to the Vermont Solar DG project site.

First, we turn to the issue of whether NextEra may demonstrate site control using a subsidiary company. The RFP states that a proponent "must demonstrate project site control in favor of the proponent's legal company name."[51] A proponent may demonstrate site control by providing evidence that it holds any one of the following: title, a leasehold, an easement, an option, or a contract for the purchase and sale of the property where the facility will be constructed.[52] Site-control documents must contain, among other requirements, the "proponent's legal company name."[53] Accordingly, Section IV of the 2019 Standard-Offer RFP Application Form states that "site control must be to Proponent Legal Company Name listed under Section II above."

The Commission finds that NextEra has demonstrated site control in favor of NextEra. NextEra has supplied options for leases of the land necessary to construct the proposed facilities. The lease options are between the landowner and Boulevard Associates. NextEra has provided documentation showing that Boulevard Associates is a wholly owned subsidiary of NextEra, and Allco has provided no basis to question this representation.

The use of a wholly owned subsidiary is consistent with the intent of the site-control requirements and complies with Section 3.1.3's requirement that a proponent "must demonstrate project site control in favor of the proponent's legal company name" because evidence of site control to the wholly owned subsidiary is evidence that the parent company has site control. The fact that Boulevard Associates is named in the easement option is technically inconsistent with Section 3.1.3's requirement that site-control documents must contain the "proponent's legal company name." However, this inconsistency is a minor deficiency because NextEra has documented that it controls the company identified in the lease options.

This case is distinguishable from our past decision to reject a bid from VT Fresh Energy that relied on a "a quitclaim deed for an unidentified parcel in favor of a different company."[54] The NextEra bids identify the relevant parcels and also provide sufficient information to demonstrate that NextEra has control over those parcels through its subsidiary company. Thus,

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[51] RFP Section 3.1.3.
[52] *Id*.
[53] *Id.*
[54] *Investigation Into Programmatic Adjustments To The Standard-Offer Program*, Docket 8817, Order of 10/20/2017 at 11.

contrary to Allco's contention, awarding contracts to the NextEra proposals will not undermine the integrity or effectiveness of the RFP process.

Next we turn to Allco's contention that the St. Albans Solar DG and Vermont Solar DG projects have failed the site-control requirements of the RFP because they do not have adequate access to the land to construct the proposed facilities. Allco argues that the interconnection of the St. Albans Solar DG Project requires the right to use an access road called Field Drive. Allco further contends that the use of Field Drive is governed by the Field Drive Use Agreement between the State of Vermont Agency of Transportation and the landowner dated January 13, 1999. Allco contends that the Field Drive Use Agreement prohibits use of Field Drive for reasons other than agricultural uses. Allco further argues that the Field Drive Use Agreement cannot be leased or assigned to NextEra because NextEra does not hold title to the land.

Similarly, Allco argues that NextEra does not have access to the parcel that would host the Vermont Solar DG Project. The land (known as "Lot C") is accessed by an easement across property owned by another landowner. Allco contends that the easement is limited to the "transportation of farm equipment and products."[55]

The Commission does not find that the provisions of the easements cited by Allco are a sufficient reason to reject the NextEra bids because they mischaracterize the requirements of the RFP. The Commission included the site-control requirements in RFP Section 3.1.3 to reduce speculative bidding and ensure that projects have a realistic chance of being commissioned. NextEra has provided the documents required by RFP 3.1.3. Therefore, there is no basis to reject the bids. If there are legal restrictions on NextEra's ability to access the sites, that is a risk that NextEra takes if it accepts a standard-offer contract. Generators that sign standard-offer contracts must submit a substantial non-refundable deposit. If the projects are not commissioned because NextEra has misunderstood or mischaracterized its rights to access the parcel, then those deposits would be forfeited.

Additionally, this proceeding is not the appropriate forum to litigate the applicability of the easements because the owners of the properties that are benefitted and burdened by those easements are not parties. Therefore, the issues raised by Allco are outside the scope of this proceeding, which is focused on determining which bids have satisfied the requirements of the RFP.

[55] Allco Comments at 5.

In conclusion, we accept the Facilitator's recommendation to award contracts to the Vermont Solar DG, St. Albans Solar DG, and Vergennes Solar DG Proposals.

Sand Hill Solar

The Sand Hill Solar bid includes two documents relevant to site control: (1) a lease option agreement between the landowner, the Robert and Barbara Levine Revocable Trust, and the proponent, Encore Redevelopment LLC ("Encore") and (2) a site lease agreement between Encore and Sand Hill, LLC. Encore explains that the trust will transfer the property to Sand Hill, LLC before executing the lease.

Allco contends that Encore failed to demonstrate site control because "[t]he option agreement is an option with a revocable trust which purports to grant an option to cause a lease agreement to be entered into with an entity that has zero legal interest in the site."[56]

The RFP states that a proponent may demonstrate site control by providing "a legally enforceable written option with all terms stipulated, including 'option price' and 'option term,' unconditionally exercisable by the proponent or its assignee, to purchase or lease such real property or hold an easement for such property including the underlying purchase, lease, or easement agreement."[57] The lease option agreement states that "[the Robert and Barbara Levine Revocable Trust] grants to Encore the right and option to lease from [the Robert and Barbara Levine Revocable Trust] the Proposed Leased Premises."[58] Therefore, Encore has met the RFP's requirement to demonstrate that it has an enforceable option to the lease the project site. The fact that the trust plans to transfer the property to Sand Hill, LLC before executing the underlying lease agreement does not make this option illusory.

In conclusion, the Commission accepts the Facilitator's recommendation to award a contract to Sand Hill Solar.

Lemay Solar

The Lemay Solar Project is proposed on a parcel of land on Babtist Street in Williamstown, Vermont. Lemay Solar holds a binding contract to purchase this parcel. The project map shows that the anticipated interconnection line would traverse an adjacent parcel that is owned by another person. Allco contents that Lemay Solar failed the clear, non-waivable

[56] Allco Comments at 6.
[57] 2019 RFP at Section 3.1.3.
[58] Encore Lease Option Agreement at 1.

requirement to establish site control because neither "the purchase and sale agreement nor the [project] map provides proof of dominion over real property to the extent necessary to construct the project."[59]

SB Energy Holdings LLC, on behalf of Lemay Solar, responds that "[t]he new utility lines shown are only the anticipated pathway based on the closest utility line location to the site. The utility will still determine the best pathway based on their infrastructure, easements, and such. There may be alternative pathways for the utility lines which the utility takes." [60] Lemay Solar states that "the parcel is bordered by two public access roads on either side, Adams Rd. and Baptist St. This provides us plenty of opportunity to work with the utility to determine an exact interconnection point."[61]

Allco's argument once again mischaracterizes the requirements of the RFP. Section 3.1.3 of the RFP requires project proponents to submit certain site-control documents. Section 3.1.3 does not mention or set any requirements to document utility right-of-ways.[62] The definition of "site control" cited by Allco is not referenced in the RFP and is not a reason for the Commission to reject Lemay's bid.[63] Lemay Solar submitted an option agreement that complies with RFP Section 3.1.3. Therefore, we accept the bid and the Facilitator's recommendation to place Lemay Solar in the Reserve.

Windsor Solar

Allco made several arguments regarding Windsor Solar's bid. For the reasons discussed above, the Commission has decided to place the Silk Road Solar proposal in the Reserve Group. As a result, the Windsor Road Solar proposal is eliminated from the Reserve Group on the basis of price and the Commission need not address Allco's arguments concerning the Windsor Solar proposal.

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[59] Allco Comments at 8.

[60] SB Holdings LLC Public Comments dated June 28, 2019.

[61] *Id*.

[62] RFP Section 3.1.4 directs proponents to indicate the anticipated point of interconnection on a project map, which Lemay has done.

[63] The standard-offer form of contract defines "site control" as "proof of dominion over real property to the extent necessary to construct the project in accordance with the description set forth on Attachment A." The Commission has reviewed past standard-offer contracts and observes that the descriptions in Attachment A are general and do not specify a specific point of interconnection or the route of interconnection lines.

IV. AWARD GROUP

The Commission awards standard-offer contracts to the following proposals. Proposals that were rejected for failure to meet the requirements of the RFP are showing in strikeout.

Table 2. Award Group and Reserve Group

2019 Standard Offer Program RFP: Award Group				
Project Name	Technology	Price ($/kWh)	Capacity (MW)	Category Total (MW)
PROVIDER BLOCK				
Salvage Yard Solar	Solar	0.1200	2.100	
Center Road Solar	Solar	0.1240	2.100	4.200
DEVELOPER BLOCK				
Technology Diversity Block				
Purpose Energy-St. Albans	Food Waste	0.2038	1.014	
Franklin Foods VT Recovery Ctr.	Food Waste	0.2050	0.710	
Cabot Creamery	Food Waste	0.2080	0.250	
Rothblatt Wind	Small Wind	0.2520	0.025	
Shepard Wind	Small Wind	0.2520	0.025	
Cross Wind Project A	Small Wind	0.2580	0.050	
Cross Wind Project B	Small Wind	0.2580	0.050	
Cross Wind Project C	Small Wind	0.2580	0.050	
Cross Wind Project D	Small Wind	0.2580	0.050	
Tomlinson Wind 2	Small Wind	0.2580	0.050	
Howrigan Wind Farm	Small Wind	0.2580	0.100	
Way Out Wind Farm	Small Wind	0.2580	0.100	
Merck Forest Wind Farm	Small Wind	0.2580	0.100	
Hespos Wind Farm	Small Wind	0.2580	0.100	
Auger Heights Wind A	Small Wind	0.2580	0.100	
Auger Heights Wind B	Small Wind	0.2580	0.100	
Pennock Hill Wind	Small Wind	0.2580	0.100	2.974

Price Competitive Block				
Vermont Solar DG	Solar	0.0838	2.200	
St. Albans Solar DG	Solar	0.0849	2.200	
~~Post Road Solar 1~~	~~Solar~~	~~0.0861~~	~~2.200~~	
~~Post Road Solar 2~~	~~Solar~~	~~0.0861~~	~~2.200~~	
Sand Hill Solar	Solar	0.0910	2.200	6.600
2019 Standard Offer Program RFP: Reserve Group				
Project Name	Technology	Price ($/kWh)	Capacity (MW)	Category Total (MW)
ER The Narrows Solar	Solar	0.0930	2.200	
Silk Road Solar	Solar	0.0939	2.200	
Lemay Solar	Solar	0.0998	2.200	6.200
Total				**13.774**

V. ORDER

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

1. The Standard Offer Facilitator is directed to make standard-offer contracts available to the proposals listed above.

2. The Standard Offer Facilitator is directed to place the projects listed above in the Reserve Group.

SO ORDERED.

Dated at Montpelier, Vermont, this 9th day of August, 2019.

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

OFFICE OF THE CLERK

Filed: August 9, 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. 18-2820-INV - SERVICE LIST

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