STATE OF VERMONT
BEFORE THE
PUBLIC UTILITY COMMISSION

Investigation to review the avoided costs that serve as prices for the standard-offer program in 2019	**)** **)** **)**	**Case No. 18-2820-INV**

MOTION FOR REHEARING AND RECONSIDERATION OF ALLCO RENEWABLE ENERGY LIMITED AND PLH LLC

In accordance with V.R.C.P. 59, Allco Renewable Energy Limited and PLH LLC (collectively, "Allco") move for a rehearing and reconsideration of the Order dated August 9, 2019, of the Public Utility Commission ("Commission"). The Commission's Order upends black-letter law on public procurements. It simply tosses aside clear, and non-waivable, requirements of the RFP, and amends the RFP retroactively so that a favored lower-priced bidder could receive three contracts. The Commission should vacate its Order and adhere to the terms of the RFP. Alternatively, the Commission should invalidate the statutory cap on the amount of capacity awarded as such a cap flatly violates federal law. *See, Winding Creek Solar LLC v. Peterman*, 932 F.3d 861 (9th Cir. July 29, 2019).

Although the Vermont Supreme Court has not yet had the opportunity to decide a case such as this, case law establishes certain basic principles of public procurements. "Public bidders should regard the specifications as requiring the submission of bids on the terms specified …Courts should not casually transform the mandatory requirement in [bid] specifications . . . into a polite request."[1]

Failure to comply with the *specifications and procedures* expressly *requires* rejection of

[1] *Meadowbrook Carting Co. v. Island Heights Borough*, 138 N.J. 307, 324, 650 A.2d 748 (N.J. 1994) (citation omitted).

the proposal under section 3.2 of the RFP, which states that: "Proposals must satisfy the mandatory requirements outlined in this section [i.e., section 3.2] to be considered further in the evaluation process. *Proposals that fail to satisfy these mandatory requirements shall be rejected*." (emphasis added.) The express provision of section 3.2 of the RFP requiring such rejection also excludes the failure to comply as potentially being a "minor deficiency" capable of waiver. Section 3.2 imposes a "nondiscretionary duty" on the Facilitator to reject such proposals. *Cf. Wool v. Menard*, 2018 VT 23, P7 (Vt. 2018).

The Commission cannot now retroactively permit the waiver of a requirement that both the RFP and prior Commission precedent states is non-waivable. If the Commission wants to change the rules for future RFPs, it may do so to permit such waivers, but it cannot do so mid-stream and retroactively.

The Commission's justification for all the waivers it proposes to grant to nonconforming bids is "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." Order at 5. But the Commission's characterization misses the point of public procurements, and especially the law regarding public procurements. No one ever contests higher price nonconforming bids. It is always the lower-priced non-conforming bids that are the subject of litigation. The law is well-settled that nonconforming bids must be rejected, especially where, as here, the RFP *expressly* states that bids that do not conform will be rejected.

The fundamental legal substantive principle requiring rejection here of non-conforming bids was explained by the D.C. Circuit Court of Appeals in *Irvin Industries Canada, Ltd. v. United States Air Force*, 924 F.2d 1068, 1072-3 (D.C. Cir. 1990):

> The principles demanding rejection of nonconforming proposals rest upon and effectuate important public policies. Rejection of irresponsive bids is necessary

> if the purposes of formal advertising are to be attained, that is, to give everyone an equal right to compete for Government business, to secure fair prices and to prevent fraud. The requirement that a bid be responsive is designed to avoid unfairness to other contractors who submitted a sealed bid on the understanding that they must comply with all of the specifications and conditions in the invitation for bids, and who could have made a better proposal if they imposed conditions upon or variances from the contractual terms the government has specified. The rule also avoids placing the contracting officer in the difficult position of having to balance the more favorable offer of the deviating bidder against the disadvantages to the government from the qualifications and conditions the bidder has added.

(internal citations and quotations omitted.)

Prior to its order of August 9, 2019, the Commission consistently has agreed. *See, e.g., Order Re:2017 Standard-Offer Award Group*, Docket 8817, *Investigation Into Programmatic Adjustments To The Standard-Offer Program*, October 20, 2017, at 7 ("deviating from the announced rules of the RFP would prejudice participants who followed those rules"); *id*. at 6 ("the effectiveness of the standard-offer program relies on the clear standards established by the RFP process and [] skirting these requirements undermines that integrity.") The lowest responsible bidder *in compliance with the bidding specifications and procedures* has a legitimate expectation in being awarded the contract.[2]

I. Silk Road Solar Is Required To Be Rejected.

VEPP Inc. (the "Facilitator") recommended that all three submissions from Pacific Northwest Solar, LLC ("PNW") be rejected because they did meet the requirements of RFP Section 3.1.4. It is undisputed that all three failed project map requirement, which states that "[t]he project map ***must*** be provided in 24" x 36" and indicate the scale at a sufficient ratio (i.e., 1 inch =

[2] *See, e.g., Schwandt Sanitation v. City of Paynesville*, 423 N.W.2d 59, 66 (Minn. App. 1988); *L & H Sanitation, Inc. v. Lake City Sanitation, Inc*., 585 F. Supp. 120, 126 (E.D. Ark. 1984).

50 feet) such that the location of all project facilities is easily discerned." Order at 12 (emphasis added.) Instead of adhering to the RFP requirements, "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.'" *Id*. Two of the PNW submissions—Post Road Solar 1 and Post Road Solar 2—also failed to provide information required to demonstrate that the facilities would be separate plants as required by section 3.1.2 of the RFP. *Id.* PNW did not challenge the Facilitator's recommendation. *Id*. at 13.

The Commission concluded that submitting the wrong size map, which was submitted at roughly 11% of the size of the required map, was a "technical defect," that should be waived, despite the fact that even the proponent did not request a waiver. The Commission's decision simply turns the project map requirement into a suggestion. All bidders that did comply incurred extra costs to produce the required map. The Commission's retroactively eliminating that as a necessary requirement harmed the process and those bidders that *did* comply. The Commission's decision is equivalent to a litigant submitting briefing to the Vermont Supreme Court in size 6 font instead of at least 12. Surely size 6 font could be read by the Court on a computer screen so that the words could be discerned.

Silk Road Solar has another fatal issue for its bid. The site in Bennington is not a preferred map site under Bennington's Act 174 energy plan. For the site to be a non-mapped preferred site it must have significant screening, but the site is mostly an open field. If PNW adds screening that would be required then the project is not a legitimate 2.2MW project, but something smaller. Given the Commission's familiarity with the Bennington Town Plan, it is more than surprising that the Commission would *sua sponte* waive a clear RFP requirement, contradict the Facilitator, and do so without the proponent requesting the Commission to do so, just to revive a possible

project that has zero chance of being a 2.2MW project in light of the substantial deference requirement under section 248(b)(1)(C).

In addition to the project map requirement not being met, the bid certification is also inaccurate. Section V of the bid form requires that it be signed by an authorized representative. The signature attests to the following: "I certify that all information provided herein is accurate." Appendix B contains the project map requirements in check-the-box form, one of which is that the proponent is certifying that the size submitted is a 24" x 36" size map. PNW checked that box, yet it did not submit the required map, thus causing its certification to be inaccurate.

The Commission must rejected the Silk Road Solar bid as the Facilitator recommended.

II. The NextEra Bids Failed The Site Control Requirements And Are Required To Be Rejected.

The RFP requires that a proponent "must demonstrate project site control in favor of the proponent's *legal company name*." (emphasis added.) The RFP *does not* that say that the proponent can simply demonstrate that some member in an affiliated group of corporations has site control. None of the NextEra bids demonstrated site control in *favor of the proponent's legal company name*. Nor did any of the NextEra bids demonstrate site control in *favor of the proponent's legal company*.

Failure to comply with that requirement expressly *requires* rejection of the proposal under section 3.2 of the RFP, which states that: "Proposals must satisfy the mandatory requirements outlined in this section [i.e., section 3.2] to be considered further in the evaluation process. *Proposals that fail to satisfy these mandatory requirements shall be rejected*." (emphasis added.) Those provisions of the RFP are binding contractual requirements on the Facilitator and the Commission.

The RFP expresses allows site control to be satisfied *solely by one of four* options:

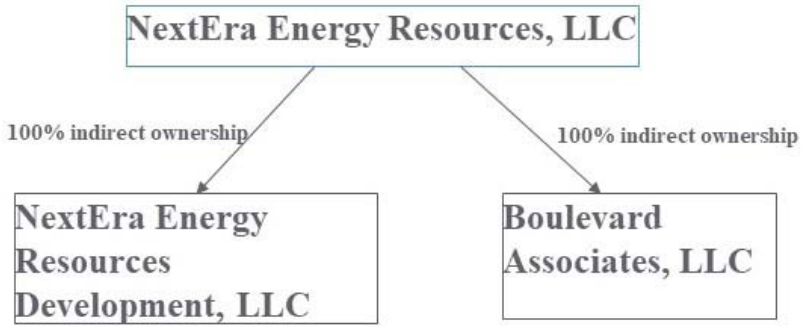
> The proponent must demonstrate project site control *in favor of the proponent's legal company name* by providing evidence of *one of the following*: (1) fee simple title to such real property; (2) valid written leasehold or easement interest for such real property; (3) a legally enforceable written option with all terms stipulated including "option price" and "option term," unconditionally exercisable by the proponent or its assignee, to purchase or lease such real property or hold an easement for such property including the underlying purchase, lease, or easement agreement; or (4) a duly executed contract for the purchase and sale of such real property. *These are the only permissible forms of site control*.
>
> (emphasis added).

The RFP expressly states that the bid "must" provide one of those four *in favor of the proponent's legal company name*. It also reinforces that requirement by emphasizing that "*These are the only permissible forms of site control*." Site-control documents must contain the "proponent's legal company name." 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."

There can be dispute that the facts establish NextEra did not satisfy the express requirements of the RFP. Site control documents are not *in favor of the proponent's legal company name*. They are not ***to Proponent Legal Company Name listed under Section II.*** The site control documents are in the name of "Boulevard Associates LLC." The project proponent is "NextEra Energy Resources Development, LLC." Those two corporate entities are owned indirectly by a third company called NextEra Energy Resources, LLC. NextEra claims that the option agreements in favor of Boulevard Associates LLC "legally inure to NextEra's 'intracompany affiliates.'" Order at 15.

The Commission simply tosses aside the express requirements of site control and retroactively has created a fifth category—corporate or business relationship. *Id*. ("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 Commission's conclusion is manifestly erroneous. *First*, the Commission itself appears confused by all the NextEra entities. It imputes the control by Boulevard Associates LLC as control by that entity's indirect parent—NextEra Energy Resources, LLC. *But that entity is not the proponent either*. Rather another indirect subsidiary of NextEra Energy Resources, LLC, is the project proponent.



Thus even under the Commission's erroneous legal conclusion, the NextEra bids must be rejected. The project proponent, which is NextEra Energy Resources Development, LLC, has not "documented that it controls the company identified in the lease options." *Second*, the Commission cannot retroactively amend the RFP to add a fifth category of site control. The Commission's statement that the newly-created fifth category satisfies the intent of the site-control requirements is a direct admission that the fifth category is new. *Third*, the Vermont Secretary of State would probably welcome the Commission's position that the option agreements in favor of Boulevard Associates LLC "legally inure to NextEra's 'intracompany affiliates,'" assuming it is ultimately sustained. It would mean that every "intracompany affiliate" of NextEra Energy, Inc., and Florida Power & Light Company are doing business in Vermont and need to pay the annual

corporate fee.

But even if NextEra's assertion and the Commission's proposition overturning the basics of corporate law were sustained, the newly-created fifth category is still a category that was specifically excluded from the RFP. To say that fifth category is a mere technical inconsistency ignores not only the express terms of the RFP but other Commission rules. For example, Commission Rule 5.504(B)(1)(c) includes this same fifth category as permissible site control for an interconnection application. The Commission has proposed to eliminate that category in its amendments to Rule 5.500. Furthermore, the Commission's decision here would be inconsistent with its decision in Docket 8775 regarding site control being established through a business relationship. In docket 8775, the Commission held that such a relationship must me in writing, such as a written assignment, because "all contracts involving the alienation of real property - like those contracts listed in Commission Rule 5.504(B)(2) - must be in writing and signed in order to be enforceable." Docket 8775, *Petition of Otter Creek Solar, LLC pursuant to Commission Rule 5.508 seeking dispute resolution over an interconnection request with Green Mountain Power Corporation*, Order March 26, 2018 at 10.

NextEra has admitted that it failed the non-waivable site control requirements. Affiliation is not one of the four express ways to satisfy site control under the RFP and NextEra's attempt to add a fifth way must be rejected. Tellingly, NextEra also conceded that site control in *the project proponent* would only be achieved at a future date and only if "the Commission approves the recommended selection of the NEER Development Projects." NextEra comments at 2. Site control *in favor of the proponent's legal company name* is required to happen first. That clearly did not happen, and that failure is neither a minor deficiency nor waivable.

The Additional Lack of Site Control to Build Two Projects

As Allco previously pointed out, the Vermont Solar DG and the St. Albans DG do not have site control to build the projects for an additional reason. The Commission's willingness to waive these requirements is expressly contrary to the RFP and Commission precedent.

A purpose of the project map is to be able to see what site control there is (which includes easements that are required). A site must have at least one access to a road. Here none exists because the only access is foreclosed to this type of use. As to both the Vermont Solar DG and the St. Albans Solar DG projects, NextEra has confirmed that the underlying property rights do not provide it the ability *as of the time of its bid* to build and operate the projects. That is dispositive. They do not have site control and must be rejected.

NextEra states it is relying on its ability to argue that it is entitled to an easement by necessity based upon the notion that "[w]hat constitutes 'necessity' evolves over time." That argument misapprehends the law in Vermont. In *Traders, Inc. v. Bartholomew*, 142 Vt. 486, 491 (1983), the Vermont Supreme Court explained the principal of easement by necessity:

> A way of necessity rests on public policy often thwarting the intent of the original grantor or grantee, and arises "to meet a special emergency . . . in order that no land be left inaccessible for the purposes of cultivation." *Howley v. Chaffee*, 88 Vt. 468, 473, 93 A. 120, 122 (1915). "Its philosophy is that the demands of our society prevent any man-made efforts to hold land in perpetual idleness as would result if it were cut off from all access by being completely surrounded by lands privately owned." 2 Thompson on Real Property § 362, at 382 (1980).

NextEra has no basis upon which to claim easement by necessity. There is no special emergency and the land is already in productive use with the easements that the property does have. Moreover, NextEra's claim of purported necessity is completely barred by the Vermont Marketable Record Title Act as the Vermont Supreme Court recently explained in *Gray v. Treder*, 2018 VT 137.

The Commission cannot avoid the issue by claiming that "the issues raised by Allco are outside the scope of this proceeding." The Commission made site control squarely an issue under the RFP. Moreover, the Commission has also (until now) consistently applied the site control requirement as including "proof of dominion over real property to the extent necessary to construct the Project…"[1] That requirement is contained in the express site control requirements of the RFP, including Appendix B ("Rights-of-way labeled, if necessary to establish site control.") It is required by the standard-offer form of contract which defines "site control" as "proof of dominion over real property to the extent necessary to construct the project." NextEra has no access to any road for the project.

The St. Albans solar project interconnection requires the rights to use Field Drive under the Field Drive Use Agreement between the State of Vermont Agency of Transportation and the owner dated January 13, 1999. But that Use Agreement has two limitations that prohibit the use for the solar project. First, by its express terms the Use Agreement is limited to agricultural purposes. *See* paragraphs 1 and 6 of the Use Agreement. A standard-offer solar project is not an agricultural use. Second, the rights to the Field Drive Use Agreement cannot be leased and cannot be assigned *except to a successor in title*. *See* paragraph 8 of the Use Agreement. Thus the St. Albans Solar project cannot legally obtain the use of Field Drive because it would not hold title to the land. Similarly, Vermont Solar DG fails the site control for that same additional reason. The easement that provides access to the site is limited to the "transportation of farm equipment and products" which excludes solar equipment necessary to build the project. *See*, Easement Deed (page 35 of the bid).

The issue of whether site control exists is squarely presented by the RFP. The Commission cannot avoid the issue now. Here, none of the Vergennes, St. Albans or Vermont Solar DG

complied with the bidding specifications and procedures. The bidders which did comply have a legitimate expectation of being awarded a contract in price order.

III. The Commission Should Award Contracts to All Qualified Bids Because The Cap Is Void and Violates Federal Law.

The standard-offer is the only program in Vermont for a qualifying facility ("QF"), such as Allco's, to obtain the long-term rate to which a QF is entitled under 18 C.F.R. §292.304(d)(2)(ii). But the standard-offer program suffers from the identical illegalities declared unlawful in the California Re-MAT program by the Ninth Circuit Court of Appeals in *Winding Creek Solar LLC v. Peterman*, 932 F.3d 861 (9th Cir. July 29, 2019) ("*Winding Creek*"). Like California's Re-MAT, the Vermont standard-offer program establishes caps, both aggregate and periodic, on the obligation of the utilities to provide a QF a long-term rate under 18 C.F.R. §292.304(d)(2)(ii). Just like California's Re-MAT, the standard-offer denies a QF a contract at the rate determined by the state commission as representing avoided costs by requiring QFs to bid against each other.

The annual cap is flatly unlawful under *Winding Creek.* Notably, California received the same short favorable statement from the Federal Energy Regulatory Commission ("FERC") that Vermont has received with respect its program.[3] In fact, the FERC's statement was based solely on its Vermont notice. The Ninth Circuit characterized the FERC notice not to act as "unreasoned," entitling it to no deference, citing the United States Supreme Court's recent decision in *Kisor v. Wilkie*, —U.S. —, No. 18-15, slip op. at 13, 17 (June 26, 2019) (holding that *Auer* deference is only appropriate if the regulation being interpreted is "genuinely ambiguous"

[3] *See, Otter Creek Solar LLC*, 143 FERC ¶ 61,282 (2013). *Winding Creek Solar LLC,* 151 FERC ¶ 61,103 (2015).

and the agency's interpretation "reflect[s] fair and considered judgment" (internal quotation marks omitted)).

Nor can, just like in *Winding Creek*, Vermont's other PURPA tariff, Rule 4.100 hope to save the cap on standard-offer contracts. The Rule 4.100 program violates PURPA in two ways. *First*, it caps the amount of energy at seven years that must be purchased. But a "cap on the amount of energy utilities must purchase from QFs is impermissible under PURPA's must-take provision." *Winding Creek* (slip op. at 9). The cap means a "utility could purchase less energy than a QF makes available, an outcome forbidden by PURPA." *Id*. *Second*, the price paid is discriminatory because it is not consistent with the avoided cost calculation used for the standard offer program. Vermont cannot place a *de facto* cap on contracts by using inconsistent and discriminatory methods for calculating avoided costs. But in any case, the Rule 4.100 tariff is plainly unlawful and pre-empted because of the seven-year term cap as it too means a "utility could purchase less energy than a QF makes available, an outcome forbidden by PURPA." *Id*.[4]

The cap on the developer block is also unlawful for another reason. The cap results in a discriminatory preference for QFs of similarly-situated solar facilities based solely on the sponsor of the bid. As is plainly shown here, two monopoly-utility sponsored QFs, Salvage Yard Solar and Center Road Solar, would be awarded contracts at prices higher than every other solar project

[4] From a practical perspective, the Commission is well aware that a seven-year term is simply unworkable for a new qualifying facility. For that reason, not a single renewal energy project has been built under Rule 4.100's seven-year term cap regime.

submitted. That result is particularly offensive under PURPA as well as the Vermont and United States Constitutions.

The Commission can remedy those unlawful aspects in the context of this procurement by awarding contracts to all qualified bids because the annual cap on the developer block is void and violates federal law.

IV. Antitrust Issues

The Commission rejected Allco's anti-trust argument based upon the assertion that "members of VPPSA are small municipalities that likely lack the resources to individually compete in the RFP." Order at 7. But that is demonstrably not so. Attached are the resource or annual reports for each of VPPSA's members, which are publicly available, administrative notice of which is requested.

Individual members have the resources to compete individually as is shown by their respective financials and by the contracts that they have. For example, the Barton Integrated Resource Plan[5] at 5 lists contracts entered into by the utility. Barton also operates its own run-of-river hydroelectric facility on the Clyde River in West Charleston, Vermont. Barton owns the facility and utilizes all of its output producing roughly 4,000 MWh annually, more than a single 2.2 MW solar project. Barton's Integrated Resource Plan also states that engages in the ISO-NE market and enters into bi-lateral transactions for part of its load. ("Market Purchases … Barton meets the remainder of its load obligations through ISO-NE's day-ahead and real-time energy markets, physical bilateral transactions, and financial transactions.") *Id*. at 10. Any utility that participates in ISO-NE's day-head and real-time energy markets certainly has the resources to

[5] https://vppsa.com/wp-content/uploads/2018/12/Barton-Integrated-Resource-Plan.pdf.

sponsor a bid for a standard-offer solar project. As the bids submitted by VPPSA demonstrate, the actual work for the projects is done by Encore.

The same situation exists for other VPPSA members, such as Ensoburg (which also operates a hydro plant and participates in ISO-NE markets and enters bilateral contracts)[6], Hardwick[7] (same in addition in 2013 Hardwick's system Real-Time Load Obligation (RTLO) totaled 38,235,182 kWh … Hardwick had a system peak RTLO in 2013 of 6,980 kW, certainly having enough resources to submit an independent bid under the standard-offer.) The same resource sufficiency clearly exists for each other member individually, Hyde Park,[8] Jacksonville,[9] *see also*, https://vppsa.com/wp-content/uploads/2018/12/Jacksonville-Resource-Report-2017.pdf, Johnson,[10] Ludlow,[11] Lyndonville,[12] Morrisville,[13] Northfield, [14] Orleans,[15] and Swanton.[16] Each member of VPPSA can clearly afford and has the resource to place a separate bid.

Furthermore, the cases cited by the Commission are simply inapposite. Here there is no competition in the provider block. VPPSA and each member jointly agree to work together and not submit separate bids in order to avoid competition and maximize the price.

Respectfully submitted,

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[6] https://vppsa.com/wp-content/uploads/2018/12/Enosburg-Integrated-Resource-Plan-1.pdf.
[7] https://vppsa.com/wp-content/uploads/2018/12/Hardwick-Integrated-Resource-Plan-2017.pdf
[8] https://vppsa.com/wp-content/uploads/2018/12/Hyde-Park-Integrated-Resource-Plan.pdf
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