STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 18-2820-INV

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

Order entered: 10/10/2019

## ORDER DENYING MOTION FOR RECONSIDERATION

## I. INTRODUCTION

Allco Renewable Energy Limited and PLH LLC (collectively "Allco") moved for reconsideration of the Order dated August 9, 2019, in which the Public Utility Commission ("Commission") awarded standard-offer contracts to proposals submitted in response to the 2019 Request for Proposals ("RFP"). In today's Order, the Commission denies Allco's motion.

## II. SUMMARY OF THE MOTION AND RESPONSES

Allco contends that the Commission has "tosse[d] aside clear, and non-waivable, requirements of the RFP, and amend[ed] the RFP retroactively so that a favored lower-priced bidder could receive three contracts."[1] Allco states that "[p]ublic 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."[2] According to Allco, the Commission has ignored its previous holding that "deviating from the announced rules of the RFP would prejudice participants who followed those rules."[3]

Allco states that the NextEra proposals must be rejected because they failed to demonstrate site control in favor of NextEra. Allco asserts that the Commission has confused the NextEra entities and that NextEra Energy Resources, LLC is not the project proponent. Allco

[1] Allco Motion at 1.

[2] Allco Motion at 2 (citing *Meadowbrook Carting Co. v. Island Heights Borough*, 138 N.J. 307, 324, 650 A.2d 748 (N.J. 1994) (quotations and alteration marks omitted)).

[3] Allco Motion at 3 (citing *Investigation Into Programmatic Adjustments To The Standard-Offer Program*, Case Docket 8817, Order of 10/20/2017 at 6.).

argues that two of NextEra's proposals, Vermont Solar DG and St. Albans DG, do not demonstrate site control to build the projects because of issues with each proposal's access road. Allco contends that the Commission has consistently maintained that "site control" means "proof of dominion over real property to the extent necessary to construct the Project"[4] and that the Commission cannot avoid this issue because site control is required under the RFP.

Allco argues that the Silk Road Solar proposal must be rejected because it failed to meet the mandatory project map requirements of RFP Section 3.1.4. Allco contends that the Commission *sua sponte* granted a waiver of the RFP's requirements in contradiction of the Standard-Offer Facilitator's recommendation. Allco also contends that the Silk Road Solar project will never be built as a 2.2 MW project because it is not located on a preferred site identified in the Bennington Town Plan. Allco asserts that if the proponent adds vegetative screening "the project is not a legitimate 2.2MW project, but something smaller."[5]

Allco states that the Commission should award contracts to all qualified bids because the standard-offer program's limit on capacity is void and violates federal law. In Allco's view, 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")." Allco argues that Commission Rule 4.100 also violates federal law because it places a cap on the amount of energy utilities must purchase from qualifying facilities.

Allco challenges the Commission's conclusion that Vermont's municipal utilities likely lack the resources to individually compete in the RFP. Allco cites the Integrated Resource Plans of the members of the Vermont Public Power Supply Authority ("VPPSA") as proof that the members individually have capacity to compete in the RFP.

NextEra responds that Allco's reiteration of previously rejected arguments fails to demonstrate any mistake or inadvertence by the Commission in the August 2019 Order. NextEra states that Allco has not presented any new factual information to support its request for reconsideration.

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[4] Allco Motion at 10.
[5] *Id*. at 4.

The Department states that it has reviewed Allco's request for reconsideration and does not find it persuasive.

## III. DISCUSSION

Allco's motion was filed pursuant to Rule 59, which provides parties with 28 days to ask the Commission to "grant a new trial" and "amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."[6] Reconsideration is appropriate only to avoid an unjust result "due to mistake or inadvertence of the Commission, as opposed to that of a party."[7] The disposition of a reconsideration motion rests with the discretion of the Commission. In addressing a Rule 59(e) motion, the Commission "may reconsider issues previously before it, and generally may examine the correctness of the judgment."[8] A hearing is not mandatory.[9]

Relief pursuant to Rule 59 is an extraordinary remedy that is to be used with great caution.[10] Rule 59(e) recognizes the Commission's broad power to alter or amend a judgment. However, Rule 59 does not permit parties to relitigate issues or correct previous tactical decisions.[11] A party's mere disagreement with the Commission's decision is not grounds for reconsideration.[12]

Allco's motion generally reiterates the same arguments that the Commission rejected in its August 9, 2019, Order. However, Allco correctly points out that the Commission's Order did not distinguish between the proponent of the NextEra proposals, NextEra Energy Resources Development, LLC, and its parent company, NextEra Energy Resources, LLC. However, this oversight does not affect the result in this case. Section 3.1.3 of the RFP states that a proponent may demonstrate site control in favor of the proponent's legal company name by providing "a

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[6] Rule 59(a) and (e).

[7] *Rubin v. Sterling Enterprises, Inc.*, 164 Vt. 582, 588, 674 A.2d 782 (1996) (citing *Osborn v. Osborn*, 147 Vt. 432, 433 (1986) and *In re Kostenblatt*, 161 Vt. 292, 302 (1994)).

[8] *Petition of Vermont Transco LLC , et al*., Case No. 17-3808-PET, Order of 5/9/18 at 3 (citing *Drumheller v. Drumheller*, 185 Vt. 417, 432 (2009)).

[9] *Rubin v. Sterling Enterprises*, 164 Vt. at 588.

[10] *Petition of Vermont Gas Systems, Inc. for authority to condemn easement rights in property interests of the Town of Hinesburg, Vermont, at Shelburne Falls Road, Hinesburg, Vermont, for the purpose of constructing the pipeline authorized in Docket 7970*, Docket 8643, Order of 11/3/16 at 1.

[11] *Id.* (citing *In re Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3).

[12] *Investigation to consider revising maximum and minimum water levels at Great Averill Pond, Little Averill Pond, and Norton Lake in the towns of Averill, Norton, and Warren's Gore, Vermont*, Docket No. 8429, Order of 12/21/17 at 6.

legally enforceable written option with all terms stipulated including 'option price' and 'option term,' unconditionally exercisable by the proponent *or its assignee*."[13] NextEra Energy Resources, LLC is the parent company that owns the two affiliated companies NextEra Energy Resources Development, LLC and Boulevard Associates, LLC. The project proponent, NextEra Energy Resources Development, LLC, provided an option that was unconditionally exercisable by its assignee, Boulevard Associates, LLC, an affiliated company. The Commission concludes that this arrangement meets the express requirements of RFP Section 3.1.3. Therefore, while our August 9, 2019, Order was based on parent ownership of Boulevard Associates, LLC, we nonetheless reject Allco's argument that the NextEra Energy Resources Development, LLC failed to demonstrate site control because the project proponent provided a lease that was unconditionally exercisable by the proponent's assignee.

With respect to the Silk Road Solar proposal, the procurement law cases cited by Allco recognize that "minor or inconsequential discrepancies and technical omissions can be the subject of waiver."[14] The Commission has reviewed the map provided with the Silk Road Solar proposal and finds that the map complied with all of the requirements of the RFP, except that it was printed on the wrong size paper. This technical omission did not frustrate the Commission's review of the map because the map's scale was sufficient to discern the location of all project features, and the Commission disagrees with the Standard Offer Facilitator's contrary opinion. The limited waiver of the RFP's requirement that the map be printed on 36" by 24" paper has not adversely affected the competitive bidding process or placed the Silk Road Solar proposal in a position of advantage over Allco's proposals.[15]

We also find unpersuasive Allco's argument that the Silk Road Solar proposal will never be built as a 2.2 MW facility because it is not on a preferred site identified in the Bennington Town Plan. In light of our determination that providing a project map on the wrong size paper is a technical defect that may be waived, the Commission finds that the Silk Road Solar proposal has otherwise met the substantive requirements of the RFP and, therefore, is eligible to be

[13] RFP Section 3.1.3 (emphasis added).

[14] *Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307, 314, 650 A.2d 748, 751 (1994).

[15] Allco alleges that it incurred extra costs to produce the required map for its projects. Allco Motion at 4. However, Allco did not quantify this extra cost and the Commission has no reason to believe that the incremental cost of printing the map on larger paper is material. The Silk Road Solar proposal map was prepared by an engineering firm and is of the same quality as Allco's maps, just printed on smaller paper.

awarded a contract. Allco's assertion that the project would be smaller than 2.2 MW if screening is added is speculative and it is premature for the Commission to determine what siting or screening requirements, if any, would be required by the Bennington Town Plan. Those issues will be addressed when an application for a certificate of public good is filed.[16]

Finally, we turn to Allco's assertion that the Commission incorrectly concluded that the members of VPPSA likely lack adequate resources to develop individual bids based on the information contained in the companies' Integrated Resource Plans ("IRPs"). We have reviewed the IRPs cited by Allco and they reinforce our conclusion. The IRPs were produced by VPPSA on behalf of each of its members. The individual municipal utilities do not have independent staff and resources to conduct their own power procurement or planning.[17] Accordingly, Allco's motion does not demonstrate that VPPSA's members have the resources to place separate bids.

The remainder of Allco's motion reiterates arguments that the Commission already addressed in the August 9, 2019, Order. Allco's motion for reconsideration is denied. The Standard Offer Facilitator is directed to award the contracts as described in the August 9, 2019, Order.

**SO ORDERED.**

[16] All projects accepting a standard-offer contract are required to file a complete petition for a certificate of public good within one year of executing the contract. All standard-offer contract holders must also submit a $15/W contract deposit that is not refundable if the project fails to meet certain milestones.

[17] Barton Integrated Resource Plan at 2 *available at*: https://vppsa.com/wp-content/uploads/2018/12/Barton-Integrated-Resource-Plan.pdf.

Dated at Montpelier, Vermont this 10th day of October, 2019.

Anthony Z. Roisman ) PUBLIC UTILITY

Margaret Cheney ) COMMISSION

Sarah Hofmann ) OF VERMONT

OFFICE OF THE CLERK

Filed: October 10, 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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