

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 19-4466-INV

Investigation to review the avoided costs that serve as prices for the standard-offer program in 2020	
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Order entered: 10/29/2020

ORDER DENYING MOTIONS FOR RECONSIDERATION

I. INTRODUCTION

In an Order dated September 17, 2020, the Vermont Public Utility Commission (“Commission”) awarded contracts as part of the 2020 standard-offer program request for proposals (“RFP”). In today’s Order, the Commission denies the motions for reconsideration filed by Norwich Solar Technologies (“NST”) and Allco Renewable Energy Limited (“Allco”).

II. LEGAL STANDARD

Reconsideration pursuant to Rule 59 of the Vermont Rules of Civil Procedure is appropriate only to avoid an unjust result “due to mistake or inadvertence of the Commission, as opposed to that of a party.”¹ The disposition of a reconsideration motion rests with the discretion of the Commission.² A hearing is not mandatory.³

Granting a motion for reconsideration is an extraordinary remedy that is to be used with great caution.⁴ Rule 59(e) does not permit parties to relitigate issues or correct previous tactical decisions.⁵ A party’s mere disagreement with the Commission’s decision is not grounds for reconsideration.⁶

¹ *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)).

² *Petition of Vermont Transco LLC, et al.*, Case No. 17-3808-PET, Order of 5/9/18 at 3 (citing *Alden v. Alden*, 187 Vt. 591, 592 (2010)).

³ *Rubin v. Sterling Enterprises*, 164 Vt. at 588

⁴ *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.

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

⁶ *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.

III. DISCUSSION AND CONCLUSION

Allco Motion

Allco argues that the bids of Green Mountain Power Corporation (“GMP”) are improper Provider Block bids because a third party, and not a provider, will own the plants. Allco cites legislative history for the proposition that it was understood that utilities would own plants participating in the Provider Block. Allco also reiterates its arguments that GMP’s bids did not address the accounting mechanism applicable to Provider projects and that the market-based mechanism is inconsistent with federal law.

The Department opposes Allco’s motion. The Department contends that Allco’s repeated arguments regarding the market-based mechanism’s consistency with federal law have been addressed previously and should be rejected. The Department states that Allco’s argument that Section 8005a(c)(1)(B) requires utility ownership is inconsistent with the text of the statute and with the Commission’s prior cases applying the statute. The Department states that the Commission’s order in Case 20-1481-INV, which set accounting standards that Provider Block prices may not exceed costs (so as to protect the ratepayers of other utilities) clearly indicated that it would “apply prospectively to any Provider Block standard-offer contract executed on or after July 10, 2020,” and, therefore, is not a valid basis for disqualifying GMP’s bids.

First, we address, Allco’s argument that Provider Block projects must be owned by utilities is supported by legislative history. There is no need to look at legislative history where legislative intent can be ascertained from the text of the statute.⁷ The statute stipulates that the Provider Block is for plants “proposed” by utilities.⁸ The legislature could have used the word “owned” if it wished to mandate utility ownership but it did not.⁹ Therefore, Allco’s extratextual argument is unconvincing. Also, as mentioned in our previous order, the GMP bids were among the least-cost bids submitted by either private developers or retail electricity providers and would have been selected if they were included in the Developer Block.

⁷ *In re Hinsdale Farm*, 2004 VT 72, ¶ 5, 177 Vt. 115, 117, 858 A.2d 249, 251 (2004) (citing *Derosia v. Book Press, Inc.*, 148 Vt. 217, 222, (1987) “Where legislative intent can be ascertained on its face, the statute must be enforced according to its terms without resort to statutory construction.”).

⁸ 30 V.S.A. § 8005a(c)(1)(B) (“a portion of the annual increase shall be reserved for new standard offer plants proposed by Vermont retail electricity providers (the provider block), and the remainder shall be reserved for new standard offer plants proposed by persons who are not providers (the independent developer block).”).

⁹ Vermont courts presume that legislative language is inserted advisedly. *Payea v. Howard Bank.*, 164 Vt. 106, 107 (1995).

The Commission has already addressed Allco's arguments regarding the accounting treatment for Provider Block projects and the consistency of the market-based mechanism and federal law. Allco's motion provides no new information or arguments related to these issues. Therefore, the motion is denied.

NST Motion

NST argues that the Commission should accept its late bids because new "evidence from FedEx Express proves that VEPP's physical office at Main Street in Manchester Center was not accessible to receive NST's FedEx bids."¹⁰ NST also asserts that the Standard Offer Facilitator took no action in response to door tags left by FedEx. NST asserts that "one of 'four basic grounds' for granting Rule 59(e) motion is when [a] moving party asks to present newly discovered or previously unavailable evidence."¹¹ NST states that the inaccessibility of VEPP's physical office to receive deliveries, and VEPP's failure to follow up made FedEx's delivery of the NST bid packages impracticable, and, therefore, excuses the late delivery of the NST bid proposals.

NST also argues that if its bids were late, this was a minor deficiency, citing a decision from the Southern District of New York affirming the acceptance of a late bid where submission was untimely due to the events of September 11, 2001.¹² NST contends that the intervening event of the COVID-19 pandemic similarly caused the Standard Offer Facilitator's office to be "not continuously accessible and equipped to accept the NST bids."¹³

Finally, according to NST, the Commission should not rely on State of Vermont Agency of Administration Bulletin No. 3.5 because its terms were not expressly included in the RFP and because the bulletin lacks the force of law.

The Department does not oppose NST's motion. The Department states that NST has presented precedent from other states outlining when late deliveries of bids may be accepted. The Department finds merit in NST's legal argument but also notes that many of its citations are not controlling and could be distinguished.

¹⁰ NST Motion at 6.

¹¹ NST Motion at 6 (quoting *In re B.K.*, 2017 VT 105, ¶ 13).

¹² *Hamlin Construction Co. v. Cty. of Ulster*, 753 N.Y.S.2d 602, 301.

¹³ NST Motion at 9.

MHG Solar, the bidder that would be displaced if the Commission accepted NST's bid, opposes NST's motion on the grounds that NST "reiterates the fact pattern that they set forth in their comments of July 28, 2020 in this matter." MHG Solar argues that NST "seeks to shift blame for late delivery onto the Facilitator . . . and asks the Commission to determine that the Facilitator intentionally (or negligently) opted to ignore repeated efforts at delivery from one, and only one, respondent to the RFP." MHG Solar asserts that if NST sent its proposals with "no signature required" as instructed on the Facilitator's website, then FedEx would have left the packages instead of door tags. MHG Solar asserts that "[w]hether it was FedEx policy that was not followed or RFP instructions that were not followed is irrelevant, the RFP instructions make clear that delivery risk lies with respondents."

MHG Solar contends that NST had the opportunity to track its packages, see delay issues, and call FedEx or the Facilitator but did not. MHG asserts that reviewing NST's arguments sets bad precedent:

The intent of the Standard Offer Program is to create repeatable efficiencies for the procurement and deployment of renewable energy projects. Accordingly, the bidding rules have repeatedly been simplified and pared down to a minimum set of requirements necessary to ensure transparent bidding that should lead to the rapid adoption of projects. Bright line rules stand at the heart of this approach because without them, the bid repeatedly finds itself dragged into conflict over bid compliance. During this current dispute more than fourteen (14) projects, representing more than 19,000 kW are waiting to receive PPAs. Many of these projects sit idled, clogging up interconnection queues and missing seasonal windows for important permitting requirements. The year over year uncertainty created by repeated battles around these clear-cut programmatic rules result in higher overall prices as developers cannot count on the procurement efficiencies that they should be able to rely on, thus they must carry higher pricing in their bids.

Finally, MHG Solar argues that even though NST did not have control of its bids once FedEx had them, NST could have gained an advantage in the bidding process because NST knew how its bids compared to the opened bids before they contacted FedEx and could have elected which bids they would have delivered, thus potentially saving NST significant bid deposit costs.

Vermonters for a Clean Environment commented that most of the bids selected in this year's RFP would be constructed in Rutland County and that NST's bid would be constructed in

Orange County. VCE recommends selecting NST's bid because it was the least-cost bid and would be more beneficial.

The original RFP, issued on March 4, 2020, stated that bids could be delivered to the Facilitator's office at 4927 Main Street in Manchester. However, the RFP was revised on April 8, 2020, and it specified that FedEx deliveries should be sent to 3452 Richville Road, Unit 1928 in Manchester Center. The revised RFP was published on the Facilitator's website, which also specifically noted the change in delivery address for FedEx deliveries and recommended "no signature required" service to prevent delays in delivery. The revised RFP did not list the Facilitator's Main Street office as a delivery location. While the Facilitator has maintained that its office remained a viable delivery location because its office was continually staffed, we conclude that the revised RFP required NST to deliver its bid to the Richville Road address because that is where the revised RFP directed FedEx deliveries. NST cannot claim that its failure to meet the submission deadline was caused by the pandemic or the Facilitator. NST should have followed the instructions in the amended RFP when it sent its bids via FedEx in late June.

We have reviewed the motion and find that NST has not demonstrated that the new information presented in its motion was previously unavailable and, thus, grounds for reconsideration under Rule 59(e). NST became aware that its bids were not delivered on July 7, 2020.¹⁴ NST made its initial request that the Commission accept the untimely bids on July 28, 2020, and the Commission provided until August 13, 2020, for participants to submit comments on the Standard-Offer Facilitator's report before contracts were awarded. Yet NST's motion states that it waited until after the September 7, 2020, Order to contact FedEx "to obtain more information" about why its bids were not delivered.¹⁵ NST has failed to explain why it was unable to obtain the information presented in its motion for reconsideration with its initial request or within the comment period provided before the Commission awarded contracts.

¹⁴ As discussed below, NST could have ascertained that its bids were not delivered sooner and addressed this issue before the submission deadline or at least before the bids were opened.

¹⁵ NST Motion at 6.

Therefore, NST has not demonstrated good cause for reconsideration of our September 17, 2020, order on the basis of “new evidence.”¹⁶

Furthermore, contrary to NST’s assertions, the new information presented in the motion does not prove that the Standard Offer Facilitator was at fault for NST’s untimely submission. The affidavit states that the FedEx courier knocked on the door of the Facilitator’s office and tried to open the door. The courier determined that the office was closed based on a “By Appointment Only” sign hanging on the door.¹⁷ The courier did not otherwise explain why the package could not be delivered. NST’s witness asserted that no signature was required for delivery.¹⁸ It is not clear why the bids could not have been placed at the entrance of the Facilitator’s office. Without these facts, we cannot conclude that delivery was impossible or impracticable due to any act or omission of the Facilitator or as a result of the COVID-19 pandemic.¹⁹

We are not persuaded that the untimely submission of the bids was a minor deficiency that should be overlooked. The case cited by NST reflects the extraordinary events of September 11, 2001, which shut down mail service in New York.²⁰ There are no similar circumstances that made delivery impossible in this case. Even considering the new information supplied by NST, all we can conclude is that delivery was not completed because the courier decided not to deliver the package based on his or her determination that the office was closed. The responsibility to ensure that its bids are delivered on time ultimately rests on NST. NST’s motion does not explain why the bids were not delivered without signature or why NST did not check FedEx’s tracking information sooner than July 7, 2020, well after the delivery deadline and after bids had

¹⁶ *In re SP Land Co., LLC*, 2011 VT 104, ¶ 33 (“Rule 59(e) . . . does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the [trial] court prior to the judgment.” (internal citations omitted)).

¹⁷ Affidavit of Christophe J. Keefe at 1.

¹⁸ Affidavit of Ken Davis at 1.

¹⁹ We also note that there is a conflict between the allegation of NST’s witness and the statements of the Facilitator regarding whether the Facilitator’s office was continuously staffed during the period of attempted deliveries. See Affidavit of Kevin Davis (alleging that a FedEx employee named “Sue” had heard from the courier that “a staff worker at VEPP had informed [the courier] that VEPP’s office was not continuously staffed during business hours, but instead was staffed on an irregular and intermittent basis.”); Standard Offer Facilitator Report, dated July 21, 2020, at 6 (“The office has been continuously staffed with no business interruption attributable to the COVID-19 pandemic.”). NST’s allegation is based on double-hearsay, and we observe that the courier did not attest to similar facts. Therefore, we do not give great weight to NST’s allegation.

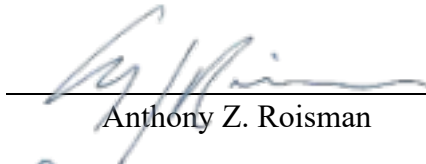
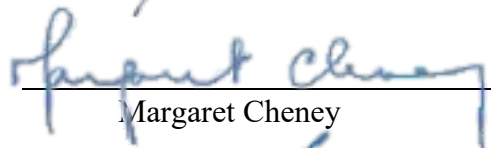
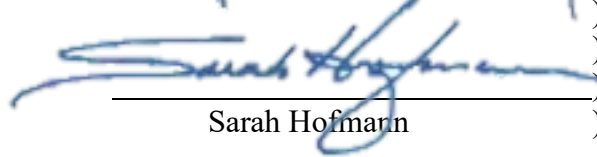
²⁰ *Hamlin Construction Co. v. Cty. of Ulster*, 753 N.Y.S.2d 602, 301.

been opened. If NST had been diligent, it could have discovered that FedEx did not complete delivery on the first or second attempts and could have taken steps to ensure the timely delivery of its bids before the June 30, 2020, submission deadline. Under these circumstances, we do not find good cause to waive the requirements of the RFP.

Finally, NST's motion mischaracterizes our reference to Bulletin 3.5. The Commission did not cite the bulletin as binding law but as "guidance."²¹ This guidance is informative as to how the Commission interprets the RFP's provision that the Commission may overlook minor deficiencies. As described in our September 17, 2020, order, the submission deadline is a hard deadline and the Commission declines to waive compliance with this RFP requirement. For these reasons, NST's motion for reconsideration is denied.

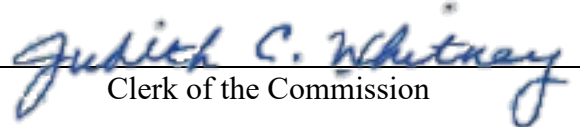
²¹ Order of 9/17/2020 at 8-9.

Dated at Montpelier, Vermont this 29th day of October, 2020.

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

OFFICE OF THE CLERK

Filed: October 29, 2020

Attest: 
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.

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