STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8817

Investigation into programmatic adjustments to the standard-offer program	

Order entered: 10/20/2017

ORDER RE: 2017 STANDARD-OFFER AWARD GROUP

I. INTRODUCTION

On May 24, 2017, the Standard-Offer Facilitator (the "Facilitator") received 32 proposals in response to the 2017 Request for Proposals ("RFP") under the standard-offer program. In this Order, the Vermont Public Utility Commission ("PUC" or "Commission")[1] directs the Facilitator to enter into standard-offer contracts with the eight proposals identified in this Order and to place two additional proposals in the reserve group.

II. PROCEDURAL HISTORY

On April 24, 2017, 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 in 2017 was approximately 7.33 MW for the Developer Block and approximately 1.295 MW for the Provider Block.[2] Pursuant to Section 8005a(c)(1)(D), a preferred location pilot program was established for the 2017 RFP. The Developer Block was allocated 1.222 MW for projects located on parking canopies and 1.222 MW for projects located on other types of preferred locations.[3] In addition, 1.343 MW of the Developer Block was set aside for small wind plants (wind power with a capacity less than or equal to 100 kW) and another 1.343 MW was set aside for food waste anaerobic digestion plants.[4] The remainder of the Developer Block was allocated to price-

[1] Pursuant to Section 9 of Act 53 of the 2017 legislative session, the Vermont Public Service Board's name was changed to the Vermont Public Utility Commission, effective July 1, 2017. For clarity, activities of the Vermont Public Service Board that occurred before the name change will be referred to in Commission documents as activities of the Commission unless that would be confusing in the specific context.

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

[3] The criteria for preferred locations are specified in 30 V.S.A § 8005a(c)(1)(D)(iv).

[4] *Order Re: Motions to Alter or Amend and Motion to Reconsider*, Docket 8817, Order of 3/29/17 at 12.

competitive projects. The Provider Block was allocated 0.216 MW for projects located on parking canopies and 0.216 MW for projects located on other types of preferred locations.

On May 24, 2017, 32 proposals were filed in response to the RFP. The proposals were opened on May 26, 2017, at the Commission's offices. The proposals are summarized in the following table.

PROJECT NAME	TECHNOLOGY	PRICE ($/kWh)	SIZE (kW)	CATEGORY TOTAL (kW)
Provider Block - Other				
Trombley Hill Solar	Solar	0.1290	855	
Blackberry Solar 1	Solar	0.1295	860	**1,715**
Preferred Location Block - Parking Canopy				
Eitri Foundry, LLC	Solar	0.1396	1,200	**1,200**
Preferred Location Block - Other				
VT Fresh Energy	Solar	0.0899	1,200	
Windsor Tech Park Solar 1	Solar	0.1089	1,222	
Hess Auto Solar	Solar	0.1120	1,200	
Battle Creek Solar 3	Solar	0.1189	1,000	
Richville Road Solar	Solar	0.1213	1,222	
Pig Pen Solar	Solar	0.1246	1,050	**6,894**
Technology Diversity Block - Food Waste				
Middlebury Resource Recovery	Food Waste	0.2050	1,014	
Brattleboro Organic Energy	Food Waste	0.2080	300	**1,314**
Technology Diversity Block - Small Wind				
Forgues Dairy	Small Wind	0.2520	50	
Addie Wind 1	Small Wind	0.2550	90	
Haydale Wind A	Small Wind	0.2550	90	
Middle Wind A	Small Wind	0.2550	90	
Addie Wind 2	Small Wind	0.2570	90	
Alburgh North Wind B	Small Wind	0.2570	90	
Alburgh North Wind C	Small Wind	0.2570	90	
Haydale Wind B	Small Wind	0.2570	90	
Missile Base Wind	Small Wind	0.2580	60	
Alburgh North Wind A	Small Wind	0.2580	90	
Haydale Wind C	Small Wind	0.2580	90	
Middle Wind B	Small Wind	0.2580	90	
Middle Wind C	Small Wind	0.2580	90	**1,100**

Price Competitive Block				
Golden Solar	Solar	0.0889	2,200	
Babcock Solar	Solar	0.0904	2,200	
Wallingford Solar	Solar	0.0946	2,200	
Otter Creek 2 Solar	Solar	0.1020	2,200	
Blackberry Solar 2	Solar	0.1037	2,150	
IP Solar	Solar	0.1038	2,000	
Sunderland Solar	Solar	0.1045	2,200	
Missisquoi Valley Solar	Solar	0.1117	2,200	**17,350**

On June 2, 2017, the Facilitator filed a report on the proposals and recommended that the Commission award contracts to 9 proposals. However, the Facilitator recommended that the Commission reject several proposals because the Facilitator concluded that they were not separate plants and, thus, they exceeded the 100 kW capacity limit for the small wind technology set-aside. Specifically, Fundamental Energy, LLC ("Fundamental") submitted 12 proposals for small wind facilities, all located in Alburgh, Vermont. Based on Fundamental's common ownership of the plants, contiguity in time of construction, and proximity of the projects, the Facilitator recommended that the Commission reject all of these proposals except for one, the Missile Base Wind project.

In addition to the Fundamental proposals, the Facilitator identified 4 other proposals that are located adjacent to an existing or proposed renewable energy facility: Blackberry Solar I, Blackberry Solar II,[5] Otter Creek 2 Solar, and Sunderland Solar. The Facilitator did not recommend that the Commission reject these facilities but stated that the Commission should determine whether such proposals qualify as separate plants under state law.

Finally, the Facilitator recommended that the Commission reject several proposals because they had failed to comply with the requirements of the RFP regarding site control. The Facilitator stated that the following proposals failed to adequately demonstrate site control: Eitri Foundry, LLC ("Eitri"), VT Fresh Energy, Middlebury Resource Recovery Center ("Middlebury Resource Recovery"), and all of the Fundamental proposals.

[5] This proposal was subsequently withdrawn. Therefore, we do not rule on the question of whether the two Blackberry Solar projects constitute a single plant.

On June 20, 2017, the Commission issued an order seeking comments on issues raised by the Facilitator's recommendations and on whether the Commission should adopt those recommendations.

On July 5, 2017, Eitry Foundry, LLC filed comments and revisions to its option agreement.

On July 7, 2017, the Vermont Department of Public Service ("Department") requested an extension of time to submit its comments.

On July 13, 2017, the Commission granted an extension of time to file comments until July 28, 2017.

On July 14, 2017, comments were filed by Conti Group ("Conti") and Allco Renewable Energy Limited ("Allco").

On July 19, 2017, SolarSense Land Dev LLC requested withdrawal of its bid for the Blackberry Solar II 2.15 MW Developer Block project and return of the $21,500 proposal security.

On July 28, 2017, SolarSense XXI, LLC requested that the Commission place its IP Solar 2 MW Developer Block project on the reserve list.

Also on July 28, 2017, comments were filed by the Department, Green Mountain Power Corporation ("GMP"), Vermont Public Power Supply Authority ("VPPSA"), Wallingford Solar LLC ("Wallingford"), Fundamental, the Vermont Natural Resources Council ("VNRC"), Allco, and Star Wind Turbines LLC ("Star Wind").

On July 29, 2017, Vermonters for a Clean Environment ("VCE") filed comments.

No other comments have been received.

III. DISCUSSION

Site Control

Section 3.3.2 of the RFP states that a bid proponent must demonstrate project site control by providing evidence of one of the following: (1) a fee simple title to such real property; (2) a valid written leasehold 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 (4) a duly executed contract for the purchase and sale of such real property.

The RFP further states that "[t]hese are the only permissible forms of site control. Site control documents must state the proponent's legal company name, must be valid for the term of the standard-offer contract plus development time, must fully describe the parcel's location with a 911 address, and must be fully executed." According to the RFP, each proposed project must have its own independent site control, and proponents may not propose multiple projects on the same parcel of land. In prior RFPs, the Commission has rejected proposals where they failed to include fully executed site control documents.[6]

The Facilitator recommended that the Commission determine that the following facilities lack adequate site control as required by Section 3.2.2 of the RFP: Eitri, VT Fresh Energy, Middlebury Resource Recovery, and the Fundamental proposals.

Eitri

The Facilitator recommends that the Commission reject Eitri's proposal on the grounds that Eitri has failed to meet the site control requirements of the RFP. Specifically, the Facilitator observes that the option agreement submitted by Eitri provides that the property "[o]wner may cancel this Agreement at any time for any reason or no reason, in Owner's sole discretion at any time upon written notice to Eitri."[7] Based on this language, the Facilitator concludes that Eitri's option agreement fails to meet the RFP's requirement that an option agreement be "unconditionally exercisable by the proponent or its assignee."[8]

Following the Commission's issuance of the June 20 Order, Eitri filed an amended option agreement that excises the language identified by the Facilitator. Based on this revised language, Eitri requests that the Commission award Eitri a contract. Eitri further argues that "as the only project to venture into the new territory of a parking canopy," the public good would be served by awarding Eitri a contract, as this category will otherwise go unfilled.[9] Eitri further notes that negotiating site control agreements for such projects is "inherently more cumbersome than

[6] *In Re: Programmatic Changes to the Standard-Offer Program*, Docket 7873, Order of 8/31/16.
[7] Eitri Option Agreement at 2.
[8] RFP at § 3.2.2.
[9] Eitri Comments at 3.

leasing a plot of farmland," and that, given these difficulties, the Commission should allow Eitri the opportunity to rely upon the revised option agreement.[10]

We concur with the Facilitator's recommendation that the option agreement initially submitted by Eitri fails to meet the requirements of the RFP. The language noted by the Facilitator clearly limits the option agreement in such a way that it is not unconditionally exercisable by Eitri.

We also find that it would not be appropriate to consider Eitri's revised option agreement. The Commission has previously stated that the purpose of the site control requirement is "to decrease speculative positioning in the queue" and to "encourage realistic bidding during the RFP process."[11] Section 3.2.2 of the RFP clearly states the nature of this requirement, and how a respondent may demonstrate site control in its proposal. As a result, all respondents to the RFP should have been aware that a clear demonstration of site control was a required component of a successful proposal, and project proponents presumably made bidding decisions based on that information. The Commission agrees with those commenters who, in addressing the site control requirements of the RFP, argue that the integrity and effectiveness of the standard-offer program relies on the clear standards established by the RFP process and that skirting these requirements undermines that integrity.[12]

Eitri argues that, because no other developers bid into the parking lot canopy category, no harm will result if the Commission allows Eitri to supplement its proposal and grants Eitri a contract. We disagree. Although no other developers submitted bids in this category, the Commission is unable to determine what developers might have submitted bids if they had known they could submit bids containing unexecuted leases or bids that could be amended after submission to cure any deficiency. Furthermore, altering the rules after the fact by allowing additional opportunities to amend proposals would undermine participants' confidence in the program, deleteriously affecting the overall RFP process. Finally, although Eitri is correct in

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[10] Eitri Comments at 2.

[11] Docket No. 7533, *Investigation re: Establishment of a Standard-Offer Program*, Order of 10/28/09 at 2; Docket Nos. 7873/7874, *Programmatic Changes to the Standard Offer Program*, Order of 3/1/13 at 25.

[12] *See, e.g.*, Comments of Wallingford Solar, LLC at 1 ("[t]he Standard Offer Program has been successful . . . because its market design, clear set of rules, and process integrity have allowed developers to invest with confidence"); Comments of the Conti Group at 1 ("awarding contracts to projects that did not meet the site control requirements would unfairly punish those developers who followed the rules").

observing that, if its proposal is rejected, the Commission will not be awarding a contract in the parking lot canopy category, this capacity will instead be made available to other categories in which participants submitted responsive proposals that met the RFP's requirements. While the Commission is sensitive to the impact this ruling may have on Eitri, we are concerned that deviating from the announced rules of the RFP would prejudice participants who followed those rules. In light of all these factors, we decline to consider Eitri's revised option agreement and, therefore, do not authorize the Facilitator to enter into a contract for Eitri's proposal.

Fundamental

With regard to the Fundamental proposals, the Facilitator observes that the option agreements submitted by Fundamental are signed by the landholder but have not been executed by Fundamental. The Facilitator therefore recommends that Fundamental not receive contracts because the documents provided by Fundamental do not meet the RFP's requirement that site control documents be fully executed.

The Commission solicited comments on the Facilitator's recommendation with respect to Fundamental, including "[w]hether the failure of Fundamental to file fully executed site control documents constitutes the type of 'minor deficiency' that the Facilitator may disregard pursuant to Section 4.3 of the 2017 RFP." Comments on Fundamental's site control documents were filed by the Department, Fundamental, GMP, VNRC, Wallingford Solar, Conti, and Allco.

GMP, Wallingford Solar, and Conti respond that the Commission should not treat Fundamental's failure to file fully executed site control documents as a minor deficiency. Each of these commenters stresses that the site control requirement is a clear requirement of the RFP and, as such, should not be disregarded. Both Wallingford Solar and Conti stress the importance of the site control requirement in the RFP process and the effort expended by proponents in securing site control. In these commenters' view, disregarding a failure to meet these requirements would undermine the fairness of the overall RFP process.

The Department agrees that the absence of a fully executed site control document should not be considered a minor deficiency.

Allco concurs with other commenters that the lack of fully executed site control documents for the Fundamental proposals should not be considered a minor deficiency. Allco

further argues that Fundamental fails to meet the site control requirements because its option agreements do not specify terms, but rather require the parties to negotiate terms and that, therefore, the agreements are not fully responsive to the RFP.

VNRC expresses support for the Fundamental projects and small wind facilities generally, observing that they will contribute to the State's policy goals and have limited adverse environmental effects.

Fundamental argues that its option agreements should not be considered deficient because they are "in full compliance, and meet all requirements [under the program]."[13] Fundamental argues that the option agreements are valid and legally enforceable, and that the failure of Fundamental to sign them simply reflects the fact that Fundamental has not yet been approved to build a project. Fundamental states that the submitted option agreements are consistent with the RFP's provisions allowing for a demonstration of site control using a "legally enforceable written option with all terms stipulated" and that the agreements demonstrate that Fundamental is legally entitled to build the projects at its discretion. Fundamental further argues that the imprecision observed by Allco should not be considered a deficiency of the agreements because the easement agreements are "detailed, specific, and comprehensive" and "specify all material terms."[14] Fundamental states that this flexibility is a necessary component to allow for the siting of small wind facilities in a manner consistent with the Commission's regulatory approval process.

However, the Facilitator recommends that the Commission reject the option agreements provided by Fundamental because they are not "fully executed" as required by the second part of Section 3.2.2. Fundamental responds that, regardless of whether Fundamental has signed the documents, they are still legally enforceable and unconditionally exercisable by Fundamental. Therefore, Fundamental argues, they meet the requirements of the RFP.

Section 3.2.2 of the RFP contains several distinct requirements as they relate to the demonstration of site control. First, the RFP states that project proponents must demonstrate site control using one of four listed document types. The third permissible type of document under

[13] Fundamental Comments at 1.

[14] Letter from Richard Saudek, Esq., to William Kaplan, Fundamental, dated July 28, 2017, at 2; Letter from Gerald Tarrant, Esq., to Judith Whitney, Clerk of the Commission, dated July 28, 2017 ("Tarrant Letter"), at 2.

the RFP is "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."[15] Second, the RFP states that "[s]ite control documents must state the proponent's legal company name, must be valid for the term of the standard-offer contract plus development time, must fully describe the parcel's location with a 911 address, and must be fully executed."[16]

Fundamental's response disregards the second paragraph of Section 3.2.2, which requires that site control documents be fully executed. This question is separate and apart from the requirement that all site-control documents be legally enforceable. Thus, Fundamental has still failed to fully execute the option agreement as required by the RFP. Fundamental suggests that it does not plan to sign the documents unless selected for a contract, implying that it has simply not yet exercised its option. However, pursuant to the terms of the agreement, Fundamental's option would be exercised not through signing the option agreement but by "providing written notice to the [landowner]."[17] Therefore, by not providing notice to the landowner, Fundamental has failed to execute the option, and the agreement is of no legal force at this time. Therefore, Fundamental has failed to obtain control of the project site because the landowner is not bound to the option agreement until Fundamental exercises its option.[18]

In addition, even if the options were executed, Fundamental's options do not meet other requirements of the second paragraph of Section 3.2.2. First, Fundamental's options are for an easement. In contrast, the RFP states that an option must be for the "purchase or lease" of "real property." The draft easements attached to options are subject to conditions that would limit Fundamental's control of the site in a manner inconsistent with a typical lease. For example, instead of having exclusive possession of the project site during the term of years, Fundamental would have "the benefit of access" to the project site only upon "reasonable notice to the [landowners]."[19]

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[15] RFP at 3.2.2.

[16] *Ibid.*

[17] Fundamental Option Agreement at 1.

[18] *Starr Farm Beach Campowners Ass'n, Inc. v. Boylan*, 174 Vt. 503, 505, 811 A.2d 155, 159 (2002) ("Just as a mere expression of willingness to contract does not amount to an offer neither does it amount to acceptance.").

[19] Fundamental Option Agreement at 1. "Together with the benefit of access to the Site and Permitted Areas 24 hours per day, 7 days per week during the term of this easement with reasonable advance notice to Grantor; except

Furthermore, the option agreements further state that the easements shall have terms "similar but mutually acceptable to those set forth" in the attached proposed easement.[20] Given these limitations, there is no guarantee that the final easements entered into by Fundamental for development of the proposed projects would be valid for the term of any standard-offer contract issued to Fundamental, nor that the specific project site contemplated by the easements will actually be the location in which Fundamental seeks to develop the projects. Rather, the options provide that Fundamental and the parcel owner "agree to meet in good faith, and negotiate and execute a mutually acceptable easement over [the proposed project sites]."[21] Given these limitations, the Commission concludes that the option agreements provided by Fundamental do not guarantee that the terms of the final easement will meet the requirements of the RFP. Finally, the option agreements provided by Fundamental do not specify the 911 address of the parcel to be leased, despite the clear requirement of Section 3.3.2.

Fundamental states that the fluidity in the terms of the easements is necessary in order to better accommodate small wind turbine-type projects that have a limited footprint and may need to be relocated as a result of the Section 248 review process for the projects. Rather than "encumbering an entire farm for the sake of demonstrating site control," Fundamental argues it is necessary to allow this flexibility in the terms of its agreement because "the precise locations of the easements cannot be guaranteed at the outset of the regulatory process."[22]

The site control requirement was implemented to "decrease speculative positioning in the queue by showing that the applicant has identified a particular location on which the project could be constructed . . . ."[23] Under the site control documents provided by Fundamental, there appears to be no guarantee that the projects could in fact be constructed at a particular location, or that Fundamenetal could operate the projects for the full term of a standard-offer contract. Given this absence of precision, as well as Fundamental's failure to fully execute the documents as required by the RFP, we conclude that Fundamental has failed to demonstrate adequate site control pursuant to Section 3.2.2 of the RFP. We also conclude that these missing elements

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that no advance notice must be given in the case of an emergency affecting Grantee's facilities or equipment or the health or safety of any person or property."

[20] *Id.*

[21] *Id.*

[22] Tarrant Letter at 2.

[23] *Second Order re Implementation Issues*, Docket 7533, Order of 10/8/09 at 2.

should not be disregarded as a minor deficiency because this would diminish the integrity of the RFP process. Accordingly, we do not authorize the Facilitator to enter into a contract with Fundamental for any of its proposals.

VT Fresh Energy

The Standard Offer Facilitator notes that the site control documents filed by VT Fresh Energy do not state the legal company name of the proponent. Instead, a quitclaim deed for an unidentified parcel in favor of a different company was provided. Thus, the Facilitator recommends that the Commission find that VT Fresh Energy's proposal is deficient due to the lack of site control documentation. No further comments were received on this recommendation.

We concur with the recommendation of the Facilitator and do not authorize a contract with VT Fresh Energy.

Middlebury Resource Recovery

The site control documents filed by Middlebury Resource Recovery were not executed by either party. Accordingly, the Facilitator recommends that this proposal be rejected. No further comments were received on this recommendation.

We concur with the recommendation of the Facilitator and do not authorize a contract with Middlebury Resource Recovery.

Independent Technical Facility

Several proposals are located in close proximity to existing or planned renewable energy facilities. Under these circumstances, the Commission must examine whether the facilities constitute a single plant because the capacity of such a plant could exceed the applicable standard-offer program capacity limits. Pursuant to 30 V.S.A. § 8002(18), a "plant" is defined as:

> an independent technical facility that generates electricity from renewable energy. A group of facilities, such as wind turbines, shall be considered one plant if the group is part of the same project and uses common equipment and infrastructure such as roads, control facilities, and connections to the electric grid. Common ownership, contiguity in time of construction, and proximity of facilities to each

> other shall be relevant to determining whether a group of facilities is part of the same project.

The participants in this proceeding dispute how this definition should be interpreted. Allco and Fundamental contend that this definition establishes a two-part test, the first prong being a determination of whether a group of facilities is "part of the same project," and the second prong being a determination of whether a group of facilities uses common infrastructure, control facilities, and grid connections. Allco and Fundamental contend that a group of facilities must be both "part of the same project" and use "common equipment and infrastructure" to be considered a single "plant" under Section 8002(18) because the statute uses the conjunction "and" to join these two phrases.

Allco and Fundamental further contend that the third sentence of Section 8002(18), which provides that "[c]ommon ownership, contiguity in time of construction, and proximity of facilities to each other shall be relevant to determining whether a group of facilities is part of the same project," describes the factors the Commission may consider only when determining whether a group of facilities are part of the same "project." Therefore, according to Allco and Fundamental, a positive finding under these factors would not provide an adequate foundation for the Commission to determine that a group of facilities constitutes a single *plant* unless the Commission also finds that such facilities use common equipment and infrastructure.

In contrast, the Department contends that the Legislature adopted specific changes to Section 8002(18) so that the Commission could consider the elements of common ownership, proximity, and contiguity of construction in determining whether a group of facilities constitutes a single plant. According to the Department, the Vermont Supreme Court's decision in *In re Programmatic Changes to the Standard-Offer Program* indicated that the Legislature could choose to make these factors relevant in cases like this.[24] Therefore, the Department maintains that the Legislature's subsequent amendment of Section 8002(18) "was designed to and does provide the Commission the authority to consider the[se] elements . . . in determining whether a group of facilities constitutes a single plant."[25]

[24] *In re Programmatic Changes to Standard-Offer Program*, 2014 VT 29 (2014).
[25] Department comments at 4-5.

One commenter, VCE, expressed frustration with what it characterizes as "gaming the rules." VCE states that the details of what constitutes a "plant" and a "project" and how contiguous projects should be reviewed have been a challenge for members of the public to understand.

When interpreting a statute, the Commission first must look to the plain language of the statute and, if clear on its face, apply its ordinary meaning.[26] Second, the Commission must assume that the Legislature chooses its words carefully and that "every word, clause, and sentence [must be] given effect if possible."[27] With this framework in mind, we turn to the words of Section 8002(18). The first sentence of the definition establishes that the primary characteristic of a "plant" is being an "independent technical facility." The second sentence of the statute plainly says that a group of facilities will be considered a single plant if it is part of the same "project" *and* "uses common equipment and infrastructure such as roads, control facilities, and connections to the electric grid." As stated by the Vermont Supreme Court, "the logical corollary of the second sentence is that facilities that are *not* part of the same project and do not share equipment and infrastructure should be considered separate plants."[28] In applying this standard, the Court found that two facilities were separate plants where they did "not share common roads, control facilities, or connections to the electric grid" and each facility had "separate interconnection facilities designed and owned by [the utility]."[29]

In Act 99 of 2014, the Legislature added the third sentence to the statute, which identifies the factors the Commission may consider when determining whether a group of facilities is part of the same "project": common ownership, contiguity in time of construction, and physical proximity. Contrary to the Department's position, this additional language does not provide a basis for the Commission to find that a group of facilities constitutes a single plant based solely on these criteria. The Department's argument requires the Commission to assume that the Legislature incorrectly used the word "project" at the end of the third sentence when it meant to use the word "plant." This argument is contrary to the rule that the Legislature is assumed to

[26] *In re Taylor*, 2016 VT 82, ¶ 9, 150 A.3d 625, 628 (Vt. 2016).
[27] *State v. Stevens*, 173 Vt. 473, 481 (1979). *See also, Petition of Omya Inc.*, Docket 7854, Order of 8/2/12 at 3 (citing *Committee to Save Bishop's House v. Medical Center Hospital*, 137 Vt. 142, 153 (1979).)
[28] 2014 VT 29, ¶ 10 (2014).
[29] *Id* at ¶ 12.

choose its words carefully. For these reasons, the Commission concludes that the Legislature intended that a group of facilities must be part of the same project *and* share common equipment and infrastructure to be considered a single plant under the plain language of Section 8002(18).

The Commission appreciates VCE's concern that the regulatory process adequately review contiguous energy projects. However, for the purposes of awarding standard-offer contracts, the Supreme Court of Vermont has held that the technical independence of facilities is sufficient to render such facilities separate plants and that the proposal of a certain number of contiguous plants is consistent with the State's renewable energy goal of locating plants of a moderate size in a distributed manner.[30] Accordingly, the Commission believes that concerns about review of contiguous plants are best addressed in the Section 248 process.

Fundamental Wind Proposals

Pursuant to State law and the terms of the RFP, small wind plants with a capacity of 100 kW or less are eligible for consideration in the RFP as a separate technology with a technology-specific price cap of $.258/kWh.[31] Fundamental submitted 12 proposals, all located in Alburgh, Vermont. Each proposal consists of 2 or 3 turbines,[32] with a cumulative capacity of 60 or 90 kW per proposal. Fundamental has entered these proposals in the small wind category, with bid prices ranging from $.255 to $.258/kWh. Together, the proposals total 35 individual turbines.

The turbines are located in four distinct clusters. Five proposals, Addie I and II and Alburgh North Wind A, B, and C, are located on two adjacent parcels of land on Route 2 North (15 turbines, collectively the "Addie/North Wind Project").[33] The Haydale A, B, and C proposals are located on parcel number 963 on Haydale Road (9 turbines, collectively the "Haydale Wind Project"). The Middle Wind A, B, and C proposals are located on parcel number 658 on Middle Road (9 turbines, collectively the "Middle Wind Project"). Finally, the Missile

[30] *Id*. at ¶ 14.

[31] *See* 30 V.S.A. § 8005a(c)(2) (establishing technology allocation for small wind plants); and RFP Section 3.3.4 (establishing price cap). For comparison, the price cap for wind plants larger than 100 kW is $.116/kWh.

[32] Each proposed turbine has a capacity of 30 kW.

[33] The proposal bid forms submitted by Fundamental state that the parcels have tax identification numbers 1721 and 1752. Addie Wind 1 and Alburgh North Wind A, B, and C, are located on parcel number 1721, while Addie Wind 2 is located on parcel number 1752.

Base Wind proposal is located on parcel number 1747 on Missile Base Road (2 turbines, collectively the "Missile Base Wind Project").

Fundamental concedes that each of these four groups of proposals is a "project" because of their physical proximity, common ownership, and the proposed contiguity in construction.[34] Therefore, the Commission must determine whether the facilities use common equipment and infrastructure such as roads, control facilities, and connections to the electric grid. Fundamental asserts that these four projects are comprised of 12 independent plants because each "has an independent transformer, meter, electrical equipment, infrastructure, access, control facilities, and cable connections to the electric grid."[35] No participant has disputed these facts. Therefore, the Commission concludes that the facilities do not share common equipment or infrastructure. Accordingly, the facilities are separate plants, within the meaning of the word used in Section 8002(18).

Otter Creek 2

Otter Creek submitted a proposal for a 2.2 MW solar facility in Rutland Town, Vermont (the "Otter Creek 2"). The facility is located on the same parcel as another potential 4.9 MW solar project, which is known as Otter Creek 1, but the 4.9 MW facility was not submitted as a proposal in the RFP process. Otter Creek filed petitions for certificates of public good pursuant to Section 248 for both facilities on August 23, 2016. These projects are being reviewed together in parallel proceedings, in Dockets 8797 and 8798.

As discussed above, to be considered a single plant, facilities must be part of the same project and use common equipment and infrastructure. Otter Creek represents that the facilities do not use common equipment and infrastructure because each facility will have separate equipment, access roads, and interconnection points. No participant has disputed these facts. Therefore, the Commission finds that the Otter Creek 2 project is a separate plant under Section 8002(18).

[34] Tarrant Letter at 5 (internal quotes omitted).
[35] *Id*.

Sunderland Solar

The Sunderland Solar facility ("Sunderland 1") is adjacent to two planned solar facilities ("Sunderland 2 and 3"); however, the additional potential facilities were not proposed in the RFP. Allco represents that Sunderland 1 is an independent technical facility and would not share common equipment or infrastructure such as roads, control facilities, or connections to the electric grid with Sunderland 2 and 3. Allco states that Sunderland 1 has a proposed point of interconnection and access way from Sunderland Hill Road, and that the Sunderland 2 and 3 projects will have separate access and points of interconnection on North Road.

No participant has disputed these representations. Based on Allco's representation that the Sunderland 1 facility will not share common infrastructure or equipment with the other facilities, we find that the Sunderland 1 facility is a separate plant.

Contracts Pursuant to Section 8005a(d)(2)

In addition to its comments concerning the eligibility of certain proposals under the RFP, which have been discussed above, Allco argues that the Commission must award standard-offer contracts to several additional proposals pursuant to Section 8005a(d)(2) because the proposed projects would offer "sufficient benefits to the operation and management of the electric grid or a provider's portion thereof because of their design, characteristics, location, or any other discernible benefit." The Commission declines to do so because this relief is outside the scope of this proceeding. The 2017 RFP was issued pursuant to Sections 8005a(c)(1)(B) and (D) for the purpose of implementing the required annual allocation of standard-offer program capacity.[36] The record in this proceeding is not adequate for the Commission to determine whether the proposals advanced by Allco would provide sufficient benefits such that they should receive contracts pursuant to Section 8005a(d)(2). In addition, there has not been an opportunity for interested persons to respond to Allco's assertions regarding potential benefits associated with its projects. If Allco wishes to pursue contracts pursuant to Section 8005a(d)(2), it should do so outside of the annual RFP process by filing a petition for a contract for a particular plant supported by appropriate proof and legal argument. Therefore, Allco's request is denied.

[36] 2017 RFP at § 1.

Is the Provider Block Preempted?

Allco also contends that VPPSA is neither a small power producer nor a Qualifying Facility ("QF") under the Public Utility Regulatory Policies Act ("PURPA"). According to Allco, the Provider Block results in "compelled wholesale sales" that are void and preempted by the Federal Power Act ("FPA"), citing the Second Circuit Court of Appeals' recent decision in *Allco Fin. Ltd. v. Klee*.[37] Allco maintains that a "provider block project can never pass muster under the Federal Power Act." Therefore, Allco requests that the Commission "eliminate the provider block entirely."

Pursuant to 30 V.S.A. § 8005a(b), a plant must be a QF "under 16 U.S.C. § 796(17)(C) and 18 C.F.R. part 292" to be eligible for a standard-offer contract. For this reason, all plants receiving a standard-offer contract must file a certification of QF status with the Federal Energy Regulatory Commission ("FERC") as a condition of executing such contract.[38] Allco asserts, without explanation, that a project owned by a provider can never be a QF. However, the Commission has reviewed the requirements of 16 U.S.C. § 796(17)(C) and 18 C.F.R. part 292 and finds no reason why VPPSA's proposed plants would not meet the criteria to be considered QFs because the proposed plants have a capacity of less than 80 MW and because they are photovoltaic systems, as required by those provisions.[39] Furthermore, Allco has made similar arguments regarding the Provider Block in proceedings before the FERC, and in response the FERC declined to initiate a PURPA enforcement action.[40] Nothing in the recent Second Circuit decision cited by Allco addresses the issue of what facilities are eligible to be QFs or would otherwise support Allco's contention that VPPSA's proposed facilities are not QFs. Therefore, the Commission does not accept Allco's argument that the VPPSA proposals are not QFs and the Commission denies Allco's request to eliminate the Provider Block.

[37] *Allco Fin. Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017).
[38] Standard Offer Contract ¶ 6 and Attachment D.
[39] 18 C.F.R. § 292.104.
[40] *Otter Creek Solar LLC*, 143 FERC ¶ 61282, 62969 (June 27, 2013).

IV. AWARD GROUP

Having resolved the issues identified in the Facilitator's report, the Commission hereby awards contracts to the following proposals. First, we start with the preferred-location category in the Provider Block. Because there were no proposals submitted in this category, the 432 kW of available capacity is rolled into the non-preferred-location category in the Provider Block. The Commission awards contracts to the two VPPSA proposals, the Trombley Hill Solar project and the Blackberry Solar 1 project, which total 1.715 MW of capacity.

Next, we turn to the preferred-location portion of the Developer Block. The Commission awards a contract to the Windsor Tech Park project. Having received no eligible proposals for projects located on parking canopies, 1.222 MW of unused preferred-location capacity rolls over to the price-competitive portion of the Developer Block.

The Commission awards a contract to the Fogues Dairy project in the small wind category. As the only eligible proposal in this category, 1.293 MW of unused capacity rolls over to the price-competitive portion of the Developer Block.

The Commission awards a contract to the Brattleboro Organic Energy project in the food waste category. As the only eligible proposal in this category, 1.043 MW of unused capacity rolls over to the price-competitive portion of the Developer Block.

As a result of the addition of the unused capacity described above, there is 5.758 MW of capacity available for price-competitive proposals. Accordingly, the Commission awards contracts to Golden Solar, Babcock Solar, and Wallingford Solar. The Commission further places Otter Creek Solar 2 and IP Solar in the Reserve Group.[41] These results are summarized in the following table.

[41] Normally, if a project withdraws from the award group prior to January 1st of the subsequent year, then a standard-offer contract will be offered to the proposal within the Reserve Group that has the lowest price and that does not exceed the annual capacity cap by more than 2.2 MW. However, because contracts were not awarded until later than usual this year, the Commission will award contracts to the lowest price project in the Reserve Group if a project withdraws from the award group prior to March 1, 2018. If a project withdraws from the award group on or after that date, then such capacity will be made available in the next annual RFP and the withdrawing project will be disqualified from bidding in the next RFP.

PROJECT NAME	TECHNOLOGY	PRICE ($/kWh)	SIZE (kW)	CATEGORY TOTAL (kW)
Provider Block - Other				
Trombley Hill Solar	Solar	0.1290	855	
Blackberry Solar 1	Solar	0.1295	860	**1,715**
Preferred Location - Other				
Windsor Tech Park Solar 1	Solar	0.1089	1,222	**1,222**
Technology Diversity Block - Food Waste				
Brattleboro Organic Energy	Food Waste	0.2080	300	**300**
Technology Diversity Block - Small Wind				
Fogues Dairy	Small Wind	0.2520	50	**50**
Price Competitive Block				
Golden Solar	Solar	0.0889	2,200	
Babcock Solar	Solar	0.0904	2,200	
Wallingford Solar	Solar	0.0946	2,200	**6,600**
Reserve Group				
Otter Creek 2 Solar	Solar	0.1020	2,200	
IP Solar	Solar	0.1038	2,000	**4,200**

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 Otter Creek 2 Solar and IP Solar projects in the Reserve Group. Notwithstanding prior Commission determinations to the contrary, the Commission will award contracts to the lowest price project in the Reserve Group if a project withdraws from the award group prior to March 1, 2018. If a project withdraws from the award group on or after that date, then such capacity will be made available in the next annual RFP and the withdrawing project will be disqualified from bidding in the next RFP.

3. Allco's request for contracts pursuant to 30 V.S.A. § 8005a(d)(2) is denied.

4. Allco's request to eliminate the Provider Block is denied.

Dated at Montpelier, Vermont, this 20th day of October, 2017.

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

OFFICE OF THE CLERK

Filed: October 20, 2017

Attest: _____
Deputy 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) or 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 thirty 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 ten days of the date of this decision and Order.

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