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PUBLIC SERVICE COMMISSION

November 22, 2011

To Whom It may Concern:

Re: Case no. 9214 Request for Proposals – Evaluation of a Request for Proposal for
Generating Capacity Resources Under Long-Term Contract
ADDITIONAL QUESTIONS AND ANSWERS

As a preface to this lengthy list of questions, the Commission would like to remind all bidders of several key principles of this RFP. First, the model agreement is a pay-for-performance contract (not a cost-plus offer) that is designed to place several risks on the supplier, not on the ratepayers. Second, bidders are allowed to suggest modifications to the agreement, but the evaluation gives preference to bidders who do not propose modifications. Third, in places where the contract calls for PSC approval, this is not meant to invite substantial litigation.

Q1. Please provide the following clarifications regarding Section 2.1 of the Agreement:

(i) Under Section 2.1(b) of the Agreement, Supplier is not permitted to make changes to the Facility that “change the economic balance of this Agreement, as defined by the anticipated payments relative to the anticipated benefits under this Agreement for each party.” Would there be an exception to this requirement for changes to the Facility that are required by new legal requirements (e.g., new environmental laws)?

A. No. However, please see Section 12.12 of the Agreement for further details regarding Environmental Changes in Law.

(ii) Under Section 2.1(c), it appears that all “immaterial” changes to the Facility will require an amendment to the Agreement and must be filed with the MDPSC, even if such changes do not have an adverse impact on Supplier’s ability to perform. Would the MDPSC be required to formally approve such an amendment and/or “immaterial” changes, and would such amendment and/or immaterial changes be subject to public comment?

A. Yes, for the amendment to be enforceable it would be subject to MDPSC approval as outlined in Section 12.7(b).

(iii) Under Section 2.1(d), it appears that “material changes” to the Facility must be submitted to the MDPSC for approval, even if such changes will not adversely affect the Supplier’s ability to perform. What is the rationale for requiring MDPSC approval if such changes will not adversely affect the Supplier’s ability to perform? What is the process for such approval? Also, would there be an exception to this requirement for changes to the Facility that are required by new legal requirements (e.g., new environmental laws)?

A. At Seller’s suggestion, Buyer may propose amendments to the Agreement in accordance with Section 2.1(d), subject to MDPSC approval as outlined in Section 12.7(b). Under Section 12.7(b), all amendments must be approved by the Commission to be enforceable. Please see Section 12.12 for details regarding Environmental Changes in Law under this Agreement.

Q2. Under Section 2.4, Supplier is responsible for all costs and expenses to interconnect the Facility. However, under the short timeline for completing the RFP process, the applicable interconnecting utility may not notify the Supplier of actual interconnection costs until after the Agreement is executed. Will the Supplier have the ability to adjust its price under the Agreement in order to take into account actual interconnection costs once they are known?

A. No. The Supplier is responsible for estimating interconnection costs. The Supplier assumes the risk that actual costs may be different than estimated costs.

Q3. Under Section 2.5(d)(3), if the Facility’s UCAP is less than the Original Contract Quantity and such deficiency is not cured within 30 days, the “Confirmed Contract Quantity” will be set equal to the demonstrated UCAP. In such event, would Supplier have any subsequent opportunity to re-test the Facility in order to re-establish the Confirmed Contract Quantity at a higher value (i.e., up to the “Original Contract Quantity”)?

A. The Supplier would have an opportunity to re-establish the higher contract quantity amount as part of the testing procedures under Section 3.1(i)

Q4. Under Section 2.6(e), in order to achieve COD, the Supplier must meet PJM’s Procedures for Establishing Deliverability of Generation Capacity Resources (Schedule 10 to the Reliability Assurance Agreement). The term “Deliverability” is defined to mean that the Facility is interconnected to the PJM System and that the output of the Facility is anticipated to flow to the benefit of Maryland load during transmission network peak loading conditions.

(i) It is understood that Supplier will be required to interconnect the Facility to the PJM system. However, prior to the Supplier incurring material costs to develop the Facility, what assurances will be provided to Supplier that the output of the Facility will be “Deliverable” beyond the point of interconnection?

A. The Supplier would receive documentation from PJM and is responsible for assessing deliverability of the Facility’s output under the processes laid out by PJM.

(ii) If the Facility is completed and interconnected to the PJM system but, through no fault of Supplier, the output of the Facility is not “Deliverable” to Maryland load, will Supplier nevertheless be able to declare COD and receive payment under the Agreement?

A. No. However, under Section 3.1(d) this event may qualify as a force majeure event. If so, the supplier would not receive payments, but would not be penalized as well.

Q5. Under Section 3.1(e), the Supplier must not undertake any actions, or neglect to perform any reasonably required actions, with respect to the Facility such that Energy from any portion of its capacity is not “Deliverable” in the state of Maryland over the term of the Agreement.

i. Please discuss the intent of this provision – i.e., what are some actions that Supplier could undertake, or neglect to perform, that would make capacity from the Facility “not Deliverable” in the state of Maryland.

A. The purpose of this provision is to clarify that the Supplier is responsible for taking all necessary actions to operate the Facility such that the output of the Facility is deliverable to the state of Maryland. Such actions would include any action within a Supplier’s control that would impact Deliverability of any portion of the Facility’s UCAP, represented in Exhibit A, to the state of Maryland.

ii. Please confirm that if the capacity from the Facility becomes “not Deliverable” beyond the point where the Facility interconnects to the transmission system, through no fault of Supplier, the Supplier will not be penalized and would still receive payments under the Agreement.

A. Please see the Answer to Question 4(ii).

Q6. The Agreement requires the Supplier to participate in PJM markets in accordance with the PJM Agreements, as such agreements may be amended from time to time (see Section 2.6(d)). Under the definition of “PJM Markets”, such markets would include not only current markets, but also “any additional markets that may be developed by PJM in the future.”

(i) If future amendments to the PJM Agreements (including “future markets”) cause the Supplier to incur additional costs or expenses in performing under the Agreement, will Supplier be able to recover such additional costs or expenses?

A. No.

(ii) If the Supplier is not able to participate in certain PJM Markets because of future PJM rule changes outside Supplier’s control, will Supplier continue to receive payments under the Agreement?

A. No, however, this may be a Force Majeure event.

Q7. Under Section 3.2(a), the Supplier must participate in PJM Markets “pursuant to guidelines established by the MDPSC”.

(i) If the MDPSC establishes new guidelines that increase the Supplier’s costs, will the Supplier be able to recover such costs under the Agreement?

A. No

(ii) Does the MDPSC agree that any such MDPSC guidelines with respect to Supplier must be consistent with the operating capabilities of the Facility, to be set forth in the Agreement?

A. The Commission does not foresee establishing or changing any “guidelines” for participating in the PJM markets in such a way as to prohibit payment under an executed Contract for Differences.

Q8. Section 3.1(c) suggests that the Supplier may recover amounts incurred by the Supplier that result from the Supplier’s failure to meet PJM Tariff performance requirements, if caused by Force Majeure. What is the mechanism for such recovery?

A. Force Majeure is intended to excuse non-performance and prevent the supplier from incurring damages for non-performance. It does not allow for cost recovery. The Commission always has the right to approve cost recovery if such recovery is warranted.

Q9. Please clarify the following aspects of the availability provisions in Section 3.1(f):

(i) Please provide an example of how derates of the Facility (i.e., partial unavailability of Facility capacity) would be treated in the availability calculation.

A. Derates will be reflected in the Facility's Actual Availability based on GADS data.

(ii) Are events of Force Majeure that impact Facility availability to be excluded from the availability calculation (i.e., will the Supplier be penalized for unavailability that results from Force Majeure)?

A. The calculation will exclude hours where performance was prevented due to Force Majeure. Please see Section 3.1(f)(3) of the Agreement.

(iii) In the liquidated damages calculation under Section 3.1(f)(4)(ii), it appears that the energy price under the Agreement should be *subtracted* from the weighted average of the annual average on-peak day-ahead price and the annual average off-peak price. This would be necessary to prevent over-recovery of damages by Buyer, and would also be consistent with the way damages are calculated in Section 3.1(i)(2) (where the price of capacity under the Agreement is subtracted from the replacement price of capacity).

A. The liquidated damages calculation under Section 3.1(f)(4)(ii) will remain as is. This is meant to be a penalty for failing to meet availability goals, it is not a replacement cost calculation.

Q10. Please provide an example of how the payment adjustments under Section 6.2(b) and (c) would work.

A. The Supplier is responsible for reviewing the contract to determine how payment adjustments work.

Q11. Under Section 3.2(d), is Supplier entitled to retain all revenues from the sale of Ancillary Services, both before and after COD?

A. Yes.

Q12. Under Section 3.2(b), Supplier is required to submit only cost-based offers into the Day-Ahead Energy Market and Ancillary Services Market.

(i) Under Section 3.2(b), would Supplier be allowed to include in its offer the amount of any and all taxes that Supplier is required to bear under the Agreement (e.g., emissions taxes, sales taxes, etc.) and other variable environmental costs (e.g., costs of emissions allowances)?

A. Supplier is responsible for managing offers in accordance with PJM Market rules and regulations and would be responsible for demonstrating that their offers were cost-based if asked to do so under this contract.

(ii) In order for Supplier to be made whole for taxes and variable environmental costs, will Supplier be entitled to retain the amounts of such taxes and variable environmental costs it receives from PJM markets?

A. Supplier is responsible for managing offers in accordance with PJM Market rules and regulations and would be responsible for demonstrating that their offers were cost-based if asked to do so under this contract. Please see Section 12.4 regarding treatment of Taxes. Please see Section 13.7 Exhibit F for treatment of variable environmental costs.

Q13. Please provide further clarification regarding Section 3.3(f):

i. Supplier must give Buyer and the MDPSC 30 days notice before it would receive additional state-approved or federal approved ratepayer funding. What is the intent of this provision, and what are some examples of such funding? Would this include any type of tax abatement or tax incentives with respect to the Facility?

A. This Section prevents the Project from recovering more than the amount pledged in the Agreement, so that ratepayers are not paying twice for supply – once through the markets and then through government funding.

ii. Section 3.3(f)(2) states that the MDPSC can reduce compensation to Supplier “such that total ratepayer funding for the Facility does not exceed the total amount payable to the Supplier anticipated under this Agreement.” Please explain the intent of this provision and provide some examples of how Supplier’s compensation could be reduced after the Agreement is executed by the parties.

A. Please see Answer to Question 13(i). Compensation would be reduced such that ratepayers would not pay twice for supply.

Q14. Under Section 4.2, the Agreement is not effective until the MDPSC approves the Agreement.

(i) In order to take into account other required government approvals and permits (including applicable certificates of convenience and necessity), can the Agreement be modified so that it is not effective until all material permits and approvals have been obtained in final non-appealable form?

A. No

(ii) Please clarify whether the termination rights in Section 4.2 apply after the expiration of 180 or 365 days after the “Execution Date”.

A. The Buyer agrees to release the Supplier from the Agreement after 180 days past the Execution Date. If the Supplier chooses to continue to wait for MDPSC approval after the initial 180 days, the Buyer agrees to release the Supplier from the Agreement after 360 days from the Execution Date.

Q15. The payment calculations of Article 6 appear to be unclear, particularly the referenced Exhibit G and the methodology for determining the amounts that Buyer and Supplier would pay to each another to financially settle against PJM revenues received by Supplier. Please provide contract language that sets forth a clear methodology, as well as some example calculations.

A. Please note that Exhibit G has been updated to Exhibit F. The Supplier is responsible for reviewing the Agreement for details regarding financial settlement. The supplier will be compensated for its offered capacity price, fixed O&M, variable O&M (including emissions costs) and fuel costs at a given heat rate.

Q16. Section 6.1 states that the Supplier will not be paid for any year in which it does not clear the PJM Base Residual Auction. It appears that the new PJM Minimum Offer Price Rule (“MOPR”) (FERC Docket No. ER11-2875) creates a material risk that a new generation resource will not be able to clear the auction and, therefore, receive payment. If a Supplier enters into the Agreement with a Maryland utility pursuant to the RFP, but then cannot clear the BRA auction due to the PJM MOPR, how will the Supplier be assured that it can fully recover its costs associated with constructing the Facility?

A. The Supplier assumes full risk that it may not clear the BRA due to PJM MOPR mitigation.

Q17. Please provide further clarification of the following events of default of Supplier under Section 8.1:

(i) Under Section 8.1(a)(1), after a cure period, Supplier could potentially be in default if it cannot participate in any PJM Market. Would this provision apply if Supplier’s inability to participate is due to rule changes in PJM Markets or a change in law?

A. Yes, however such an event may be a force majeure event.

(ii) Section 8.1(a)(2) provides that Supplier could be in default, after a cure period, if “[t]he Facility cannot deliver benefits to the state of Maryland in accordance with Section 2.2 due to an action of the Supplier or lack of reasonable action in instances where action was warranted and the Supplier had the ability to provide such action”. Please clarify the intent of this provision, as well as provide some examples of what such an “action of the Supplier or lack of reasonable action” might include.

A. The Supplier is responsible for taking all necessary actions to operate the Facility such that the output of the Facility is deliverable to the state of Maryland. Such actions would include any action within a Supplier’s control that would impact Deliverability of any portion of the Facility’s UCAP, represented in Exhibit A, to the State of Maryland.

(iii) Under 8.1(c)(3), can the failure of the Supplier to clear any auction in PJM Markets (including the BRA) result in an event of default, even if Supplier offered the Facility’s capacity and energy into the PJM Markets?

A. Supplier must offer into all PJM Markets in accordance with Section 3.2, but will not be in default if the offer does not clear, provided the offer was made in Accordance with PJM rules and regulations. Please see Section 3.2 for details regarding offers into PJM Markets.

Q18. Please provide clarification that Section 8.4 is not intended to allow the MDPSC to approve a merger of Buyer into another entity whereby the surviving entity would not assume Buyer’s performance obligations under the Agreement.

A. The MDPSC does not foresee approving a merger of Buyer into another entity whereby no surviving entity would assume Buyer’s performance obligations under the Agreement.

Q19. Please provide the following clarifications regarding Article 9 (Force Majeure):

(i) What would be the process for the MDPSC to determine that a party is prevented from performing due to Force Majeure, and would such process be a public process?

A. The MDPSC will process events as described in Article 9.2.

(ii) Would the MDPSC consider a modification to Article 9 so that a neutral third party would determine whether a party is prevented from performing due to force majeure, instead of the MDPSC?

A. No. The Maryland Commission would retain responsibility to make the final decision. The Commission is free to use third-parties to assess incidents and offer recommendations.

Q20. The second sentence of Section 12.1(a) requires the Supplier to “submit to the jurisdiction of the MDPSC for purposes of Title 6 of the PUA and to comply with the provisions of that article”. Title 6 subjects public utilities in Maryland to broad regulatory oversight, including requirements pertaining to the assumption of indebtedness; the issuance of stocks, bonds and indebtedness; record keeping requirements; and reporting requirements.

(i) The heading of Section 12.1 is entitled “Change of Control, Sale of Facility or Assignment”. Is the intent of Section 12.1(a) to subject Supplier *only* those requirements of Title 6 that pertain to changes in control over the Supplier, or is the intent to subject the Supplier to *all* Title 6 requirements?

A. It is the intent to subject the Supplier to only those requirements of Title 6 that pertain to Changes of Control, Sale of Facility, or Assignment.

(ii) What is the rationale for subjecting a wholesale Supplier to such broad MDPSC jurisdictional requirements when, typically, wholesale providers are mainly subject to jurisdiction of the Federal Energy Regulatory Commission?

A. As noted in the previous answer, there is no intent to subject the supplier to the boarder provisions of Title 6.

Q21. Under Section 12.1(b) and (c), if the Agreement were assigned by a party to another party, does the MDPSC agree that non-assigning party’s consent would be required before the assigning party could be released from its obligations under the Agreement?

A. Obviously, the MDPSC would expect that both parties would have agreed upon a transfer prior to going to the Commission for approval.

Q22. Under Sections 12.5 and 12.9, with limited exception, the MDPSC will resolve disputes under the Agreement. Typically, dispute resolution is performed by a neutral third party arbitrator(s). Would the MDPSC consider modifying these provisions to provide for a neutral third party arbitrator(s)?

A. Please see Answer to Question 19(ii).

Q23. Please provide the list of “MDPSC’s decisions and orders” that Section 12.7(a) is intended to include.

A. Please see materials in MDPSC Case No. 9214 and Case No. 9117.

Q24. Please confirm that any extension of the term of this Agreement under Section 12.11 is subject to the parties reaching mutual agreement on the terms and pricing for the extended term, as determined in each party’s sole discretion.

A. Yes, the Supplier will submit terms and pricing for extension at the request of MDPSC and gain approval in accordance with section 12.11(d) of the Agreement.

Q25. Is Section 12.12 intended to provide Supplier the right to recover costs and expenses incurred in performing under the Agreement that result from complying with new or changed environmental laws? If so, please explain the process by which Supplier would be able to recover such costs and/or expenses.

A. No, this section presents only an opportunity for suppliers to recover costs, not a right. To be clear about the process described in Section 12.12, for changes to the market price of emissions (e.g. Co2, Nox) that are below the ten and twenty percent thresholds in that section, the buyer will recover those costs as a part their monthly energy payment as shown in Section 13.7 exhibit (f). If environmental changes in law necessitate additional capital spending and the Supplier desires to raise their bid price by less than the thresholds, that would necessitate an amendment to the contract and such amendment must be approved by the Commission. If the cost changes (resulting from either emissions costs or capital costs increases) are above the thresholds in Section 12.12 the Buyer has the right to terminate the contract, but the Supplier may either (a) waive their recovery of these additional costs or (b) request that the Buyer seek approval of these additional costs at the Commission.

Q26. Under what process would the Supplier be allowed to test (or re-test) the Facility to establish the Confirmed Contract Quantity from time to time.

A. Please see answer to Question 3.

The following questions refer to Section 7 of the RFP.

Question 1

On November 17, 2011, the Federal Energy Regulatory Commission (“FERC”) largely denied the MSPC’s Request for Rehearing of FERC’s order dated April 12, 2011, which accepted modifications to PJM’s Minimum Offer Price Rule (“MOPR”) (FERC Docket No. ER11-2875). On page 11 of its Request for Rehearing, the MPSC stated as follows:

Any state that considers developing new capacity resources to achieve legitimate policy objectives must now take into account the probability that the capacity these resources provide cannot be used to satisfy its load-serving entities RPM capacity obligations. For example, if the [MPSC] determines, after an evidentiary rehearing, to proceed with an RFP process and requires utilities to enter into long-term contracts for new generation facilities to meet identified reliability and environmental needs, *those resources would almost certainly have their offers mitigated to a level that cannot clear the [PJM Base Residual Auction].*¹

In light of FERC’s November 17 Order, please provide the following clarifications with respect to the model Agreement attached as Attachment 8 to the RFP:

- (i) Section 6.1(a) of the model Agreement provides that the Seller will not receive a Monthly Payment for any period it does not clear the PJM Base Residual Auction. In light of the November 17 FERC Order and the MPSC’s statement that a Seller “would almost certainly” not be able to clear the Base Residual Auction under the new MOPR, will the MPSC reconsider this provision and allow a Seller to be paid even if it does not clear the Base Residual Auction?

A. No.

- (ii) If the MPSC will not allow the Seller to be paid if it does not clear the Base Residual Auction, will there be other arrangements to ensure that the Seller can recover the costs of its investment in a new generation facility? If so, what would such arrangements include?

A. No.

¹ See also page 20 of the MPSC’s Request for Rehearing, which states that “The minimum offer fixed for these resources will likely exceed the offers of resources utilizing traditional technologies, so these resources are unlikely to clear the RPM.”

(iii) In light of FERC's November 17 Order, will the MPSC consider modifications to the RFP process or the model Agreement in order to address the MPSC's previous concern that the new MOPR will cause "merchant generation [to be] unlikely to invest in efforts to develop new technology under the RPM market design" (see page 20 of MPSC Request for Rehearing in FERC Docket No. ER11-2875).

A. No.

(iv) Does the MPSC plan to take any action as a result of the November 17 FERC Order, including a modification of the RFP process or the Agreement?

A. The RFP or the Agreement will not be modified regarding clearing the BRA.

Question 2

On February 9, 2011 a lawsuit was filed in the U.S. District Court for the District of New Jersey (Case No. 3:11-cv-00745-PGS-DEA). In that case, Plaintiffs seek to have the New Jersey Long-Term Capacity Agreement Pilot Program ("LCAPP") law declared unconstitutional and its enforcement enjoined. Under LCAPP, certain generators were awarded a "Contract for Differences" that is similar in structure to the model Agreement set forth in the MPSC's own RFP.

(i) Does the MPSC anticipate that similar litigation might be initiated with respect to the RFP and the model Agreement?

A. Unknown

(ii) If such litigation is possible, will the model Agreement be modified so that the parties' obligations under the agreement are contingent on full resolution of all claims asserted in such litigation?

A. The contract cannot be made contingent on: a) the existence of unknown litigation, and; b) the outcome of unknown litigation.