2020 VT 103

No. 2019-393

In re Investigation to Review the Avoided Costs that Serve as Prices for the Standard-Offer Program in 2019 (Allco Renewable Energy Limited & PLH LLC, Appellants)

Supreme Court

On Appeal from
Public Utility Commission

May Term, 2020

Anthony Z. Roisman, Chair

Thomas Melone, Allco Renewable Energy Limited, New York, New York, for Appellants.

Alexander W. Wing, Special Counsel, Montpelier, for Appellee Vermont Department of Public Service.

PRESENT: Reiber, C.J., Robinson, Eaton, Carroll and Cohen, JJ.

¶ 1. **COHEN, J.** Allco Renewable Energy Limited and PLH, LLC (collectively, Allco) challenge several decisions of the Public Utility Commission (PUC) in administering Vermont's standard-offer program and the request-for-proposals (RFP) mechanism the PUC has adopted to implement the program. Allco argues that, contrary to public policy, the PUC disregarded the mandatory requirements of the 2019 RFP and awarded contracts to bidders that failed to satisfy those requirements; that the PUC misinterpreted the program's statutory scheme in several respects; and that certain components of the program are unconstitutional. We affirm.

## I. The Standard-Offer Program and the RFP Mechanism

¶ 2. To promote the development of renewable energy in Vermont, the Legislature enacted the standard-offer program in 30 V.S.A. § 8005a, which authorizes the PUC to issue standard offers to developers for the construction of renewable energy plants across the state. The plants must meet certain eligibility requirements, such as having a Vermont location and a capacity of 2.2 megawatts (MW) or less. Id. § 8005a(b). Under the cumulative-capacity component of the program, the statute establishes a schedule that increases program capacity annually until a total of 127.5 MW is reached and directs the PUC to allocate the total capacity among different renewable-energy technologies like solar, wind, and hydroelectric power. Id. § 8005a(c)(1)(A), (c)(2). A portion of this annual increase is reserved for new plants proposed by Vermont retail electricity providers (the provider block) and the remainder is left for new plants proposed by others (the developer block). Id. § 8005a(c)(1)(B).

¶ 3. The Legislature entrusted the PUC to select new plant proposals with its choice of "a market-based mechanism, such as a reverse auction or other procurement tool," as long as it finds that the mechanism is consistent with "applicable federal law" and "the goal of timely development at the lowest feasible cost." Id. § 8005a(f)(1)(A)-(B). With the assistance of a standard-offer facilitator, see id. § 8005a(a), the PUC is directed to "administer the process of applying for and obtaining a standard offer contract in a manner that ensures that the resources and capacity of the Standard Offer Program are used for plants that are reasonably likely to achieve commissioning," id. § 8005a(h).

¶ 4. Pursuant to this statutory power, in 2013 the PUC adopted an RFP mechanism to choose new plants to fill the annual program capacity. Programmatic Changes to the Standard-Offer Program & Investigation into the Establishment of Standard-Offer Prices under the Sustainably Priced Energy Enter. Dev. (Speed) Program, Nos. 7873, 7874, 2013 WL 840116, at

*14-15 (Vt. Pub. Serv. Bd. Mar. 1, 2013) [hereinafter 2013 Order].[1] Under this mechanism, the standard-offer facilitator promulgates an annual RFP, developers submit responsive proposals (bids) to the facilitator, the facilitator selects proposals based on the lowest prices until the annual program cap is reached, the facilitator places some proposals in a reserve group in case selected projects are withdrawn, the results are submitted to the PUC for approval, and the PUC authorizes the facilitator to execute contracts for approved proposals. Id. at *17-20. To "encourage legitimate and realistic bidding and timely development of projects," the PUC requires that bidders demonstrate legal control over the project site and provide a forfeitable security deposit. Id. at *19.

¶ 5. Further to this scheme, the facilitator promulgated an RFP in 2019. The RFP listed several "mandatory requirements," which proposals had to satisfy "to be considered further in the evaluation process," and warned that "[p]roposals that fail to satisfy these mandatory requirements shall be rejected." One of the requirements compelled proponents to demonstrate site control in favor of the proponent company name in one of several ways, including, among others, providing evidence of fee-simple title to the property or an option to lease the land. Another mandatory requirement was to submit a project map with dimensions of twenty-four by thirty-six inches, which had to include specified information and "indicate the scale at a sufficient ratio . . . such that the location of all project facilities is easily discerned." The RFP also provided that proponents awarded standard-offer contracts would be required to submit a security deposit of fifteen dollars per kilowatt of installed capacity, to be refunded upon project commissioning or forfeited if the project withdrew prior to commissioning. Finally, with notice to the PUC, the facilitator could "disregard minor deficiencies in a proposal if such proposal complie[d] in all material respects with the requirements of [the] RFP."

[1] Before 2017, the PUC was called the Public Service Board. See 2017, No. 53, § 9.

¶ 6. The facilitator received thirty-eight proposals in response to the 2019 RFP. Allco submitted eight proposals, NextEra Energy Resources Development, LLC, (NextEra) submitted three—Vermont Solar DG, St. Albans Solar DG, and Vergennes Solar DG—and Pacific Northwest Solar, LLC, (PNW) submitted three, among them Silk Road Solar. To satisfy the site-control requirement, NextEra submitted written options to lease the properties for its proposals. Given the projects' costs, and the facilitator's determination that the proposals satisfied the RFP requirements, NextEra's three projects were selected for contract. The facilitator disqualified PNW's Silk Road Solar proposal because the project map was submitted on eight-by-eleven-inch paper and with an inadequate scale to easily discern project facilities. Allco's projects were not selected nor placed in the reserve group because they were among the projects with the highest prices.

¶ 7. The facilitator filed its recommendations with the PUC, and Allco submitted comments challenging several of the facilitator's conclusions. First, Allco argued that the St. Albans Solar proposal failed to meet the site-control requirement because, under an access agreement between the State and the landowner, use of the access road to the property was limited to agricultural purposes and could not be leased nor assigned to NextEra. Second, Allco maintained that the Vermont Solar proposal failed the site-control requirement because access to the property was controlled by an easement deed limiting access to transportation of farm equipment and products. Third, Allco contended that all three of NextEra's projects failed to demonstrate site control in favor of the proponent's legal company name because the site-control documents were in favor of Boulevard Associates, LLC, an affiliated company, instead of NextEra itself. Fourth, Allco argued that the PUC miscalculated the capacity of the developer block. Finally, Allco challenged the constitutionality of the provider-block and technology-allocation provisions of the standard-offer program.

¶ 8. In an order addressing Allco's arguments, the PUC first observed that it adopted the site-control requirement "to reduce speculative bidding and ensure that projects have a realistic chance of being commissioned." Investigation to Review the Avoided Costs that Serve as Prices for the Standard-Offer Program in 2019, No. 18-2820-INV, 2019 WL 3841570, at *14 (Vt. Pub. Util. Comm'n Aug. 9, 2019) [hereinafter 2019 Order]. The PUC then concluded that the St. Albans Solar and Vermont Solar proposals complied with the site-control requirement because, for each, NextEra provided one of the types of documents required by the RFP—a written option to lease the property. Id. The PUC determined that if there were legal restrictions on NextEra's access to the properties precluding project commissioning, NextEra risked forfeiting the security deposit if granted a standard-offer contract. Id. Additionally, the PUC concluded that it was not the appropriate forum to litigate property rights under the access easements because the landowners of the burdened and benefited parcels were not parties to those proceedings. Id.

¶ 9. Regarding the company name, the PUC concluded that listing Boulevard Associates in the site-control documents was a minor deficiency because Boulevard Associates was a wholly owned subsidiary of the project proponent. Id. at *13. The PUC also determined that the Silk Road Solar proposal's wrong-sized map was a waivable, minor defect because the map showed the information specified in the RFP with sufficient clarity and detail to permit review. Id. at *11. Rejecting Allco's constitutional and developer-block-capacity arguments, id. at *3-4, 6, 8, the PUC ordered the facilitator to execute standard-offer contracts for NextEra's three proposals and to place the Silk Road Solar project in the reserve group, leaving Allco without a contract in the 2019 RFP process, id. at *11, 14.

¶ 10. Allco filed a motion for reconsideration, renewing, among others, its argument concerning the use of the different company name in site-control documents. In response, the PUC recognized that it initially misapprehended NextEra's corporate structure—which we clarify

below—but concluded that the site-control requirement was nevertheless satisfied because one of the ways of satisfying the requirement was to provide a written option to lease the property "unconditionally exercisable by the proponent or its assignee," and the project proponent supplied an option unconditionally exercisable by its assignee. Investigation to Review the Avoided Costs that Serve as Prices for the Standard-Offer Program in 2019, No. 18-2820-INV, 2019 WL 5298115, at *3 (Vt. Pub. Util. Comm'n Oct. 10, 2019).

## II. Issues on Appeal

¶ 11. On appeal, Allco challenges the PUC's conclusions regarding access rights, the use of the different company name in site-control documents, and the waiver of the map-size requirement. Allco maintains that the PUC disregarded the mandatory requirements of the RFP and awarded contracts and a place in the reserve group to nonconforming bids. It asks us to disqualify NextEra's three projects and the Silk Road Solar proposal and order a reselection to fill that capacity. Allco also seeks rulings that the 2019 developer-block capacity was miscalculated and that the provider-block and technology-allocation provisions of the program are unconstitutional. We address all but the constitutional arguments, which are not properly before us.

¶ 12. We review PUC decisions with "great deference to the PUC's expertise and judgment, allowing for a strong presumption of validity to the PUC's orders." In re Constr. & Operation of a Meteorological Tower, 2019 VT 20, ¶ 9, 210 Vt. 27, 210 A.3d 1230 (quotations and alterations omitted). Such deference is warranted in this case given the PUC's broad grant of statutory authority to implement a statutory scheme over which it possesses relevant expertise. See Plum Creek Me. Timberlands, LLC v. Vt. Dep't of Forests, Parks & Recreation, 2016 VT 103, ¶ 29, 203 Vt. 197, 155 A.3d 694; see also Meteorological Tower, 2019 VT 20, ¶ 9 ("Absent a compelling indication of error, we will not disturb an agency's interpretation of statutes within its

particular area of expertise." (quotation omitted)); Travelers Indem. Co. v. Wallis, 2003 VT 103, ¶ 14, 176 Vt. 167, 845 A.2d 316 (explaining that when Legislature entrusts administration of statute to agency, agency necessarily develops expertise in its administration, and therefore we extend deference to agency's interpretation and implementation of statute). We affirm the PUC's findings and conclusions unless the opposing party shoulders the heavy burden of demonstrating clear error. In re UPC Vt. Wind, LLC, 2009 VT 19, ¶ 2, 185 Vt. 296, 969 A.2d 144.

A. Bidder and PUC Adherence to Mandatory RFP Requirements

¶ 13. We first consider as a general matter the extent to which a bidder and the PUC must adhere to the mandatory requirements of an RFP. Although we have not examined this issue before, we navigate charted waters. Remarking on the Federal Acquisition Regulations' requirement that nonconforming bids must be rejected, see 48 C.F.R. § 14.503-1(e)(2), the U.S. Court of Appeals for the D.C. Circuit observed:

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

Irvin Indus. Canada, Ltd. v. U.S. Air Force, 924 F.2d 1068, 1072-73 (D.C. Cir. 1990) (quotation omitted). Other courts have made similar observations while requiring contracting agencies to disqualify nonconforming bids. See, e.g., Meadowbrook Carting Co. v. Borough of Island Heights, 650 A.2d 748, 756-57 (N.J. 1994) ("Public bidders should regard the specifications as

requiring the submission of bids on the terms specified. Awarding the contract to one who fails to submit bids on all terms necessarily creates an inequality in the bidding and an opportunity for favoritism." (quotation and alterations omitted)); AAA Carting & Rubbish Removal, Inc. v. Town of Southeast, 951 N.E.2d 57, 61 (N.Y. 2011) (noting that deviation from criteria in bid request "gives rise to speculation that favoritism, improvidence, extravagance, fraud or corruption may have played a role in the [award] decision"). The public policies behind requiring adherence to RFP requirements are so compelling that "awards may be overturned even without evidence of actual impropriety," Acme Bus Corp. v. Orange Cty., 68 N.E.3d 671, 676 (N.Y. 2016), and "even where deviations would save the public entity money," Domar Elec., Inc. v. City of Los Angeles, 885 P.2d 934, 942 (Cal. 1994) (quotation and alterations omitted).[2]

¶ 14. However, cognizant of the potential for irrational results if some flexibility is not extended to the contracting agency, courts have recognized that immaterial defects or minor irregularities in a bid can be waived. The Supreme Court of New Jersey has noted that "this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications that by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding." Meadowbrook, 650 A.2d at 751. In contrast are bid specifications whose waiver can result in corruption, favoritism, or other improvidence, or those that are "likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of

[2] The PUC itself has applied these principles in administering the standard-offer program. See Investigation into Programmatic Adjustments to the Standard-Offer Program, No. 8817, 2017 WL 4841502, at *4, 8 (Vt. Pub. Util. Comm'n Oct. 20, 2017) (agreeing with commentators 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," expressing concern that "deviating from the announced rules of the RFP would prejudice participants who followed those rules," and disqualifying bid for failure to satisfy site-control requirement).

affecting the ability of the contracting unit to make bid comparisons." Id. at 751-52; see also Gariup Const. Co. v. Carras-Szany-Kuhn & Assocs., P.C., 945 N.E.2d 227, 235 (Ind. Ct. App. 2011) (observing that immaterial variance will not render bid invalid and defining material variance as one which "affords one bidder a substantial advantage not available to other bidders and which destroys the competitive character of the bidding process"); Sayer v. Minn. Dep't of Transp., 790 N.W.2d 151, 156 (Minn. 2010) (noting that material variations from bid specifications require disqualification and explaining that variance is material if "it gives a bidder a substantial advantage or benefit not enjoyed by other bidders" (quotation omitted)); Federal Acquisition Regulations, 48 C.F.R. § 14.405 (providing that variation is immaterial when it is "merely a matter of form and not of substance," when it can be corrected or waived without prejudice to other bidders, and "when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired").

¶ 15. As noted, the Legislature allowed the PUC to select new plant proposals under the standard-offer program with its choice of "a market-based mechanism, such as a reverse auction or other procurement tool," as long as the mechanism is consistent with "applicable federal law" and "the goal of timely development at the lowest feasible cost." 30 V.S.A. § 8005a(f)(1)(A)-(B). Thus, the PUC is under no obligation to proceed with an RFP mechanism as it has since 2013. But when, as here, the PUC chooses to promulgate an RFP with mandatory requirements, public policy dictates that it must disqualify bids that do not conform to those requirements. The PUC may, however, waive or allow a bidder to correct immaterial variations from mandatory RFP requirements. As explained, an immaterial variation is one that is merely a matter of form and not substance, one that can be waived or corrected without affording the deviating bidder a substantial

advantage over other bidders, and generally one whose correction or waiver does not undermine the fundamental fairness required in the bidding process.[3]

B. Access Rights under the Site-Control Requirement

¶ 16. With these principles in mind, we turn to Allco's arguments that the St. Albans Solar and Vermont Solar proposals failed to satisfy the site-control requirement because, as Allco reads the properties' land records, NextEra does not have the right to use the access roads to the sites. Reading the site-control requirement along with the RFP as a whole and with the statutory mandate, and extending due deference to the PUC's expertise and judgment under its broad authority to administer the standard-offer program, we find no error in the PUC's conclusion that the proposals satisfied the site-control requirement.

¶ 17. We begin with the statute, which is designed in anticipation that a plant awarded a contract may not ultimately, for countless unexpected reasons, achieve commissioning. For example, if the annual program capacity in a given year is not filled, the unfilled capacity is to be added to subsequent years. Id. § 8005a(c)(1)(B)(ii)-(iii). If a selected proposal "fails to meet the requirements of the Program in a timely manner," the contract terminates, and the plant's capacity is "reallocated to one or more eligible plants." Id. § 8005a(j). The PUC, moreover, is directed to "administer the process of applying for and obtaining a standard offer contract in a manner that ensures that the resources and capacity of the Standard Offer Program are used for plants that are reasonably likely to achieve commissioning." Id. § 8005a(h). Thus, the PUC does not have to

[3] The parties in this case do not contest that the RFP provisions at issue are mandatory requirements. After all, the PUC labeled them as "mandatory requirements" and warned that "[p]roposals that fail to satisfy these mandatory requirements shall be rejected." We do not consider whether RFP provisions may constitute mandatory requirements even though the RFP does not describe them as such, nor do we examine the extent to which a bidder or the PUC must adhere to nonmandatory provisions. We would face different considerations if the RFP provisions were written in permissive language like "may" or "should," and our decision here should not be misconstrued as restricting the language the PUC may use in drafting RFPs.

guarantee that a plant selected for contract will achieve commissioning—a potentially impossible task at the contracting stage; the statute requires the PUC to determine only that a plant is reasonably likely to achieve commissioning.

¶ 18. The PUC adopted RFP requirements to implement that statutory mandate, and, like the statute, these requirements contemplate that proposals awarded contracts may not reach commissioning for numerous reasons. The requirements include the site-control requirement itself, the reserve group, and the security deposit. See 2019 Order at *14 (explaining that site-control requirement was adopted "to reduce speculative bidding and ensure that projects have a realistic chance of being commissioned"); 2013 Order at *19 (noting that site-control and security-deposit requirements were included to "encourage legitimate and realistic bidding and timely development of projects").

¶ 19. It is in this context that we read the site-control requirement—as one of several RFP provisions designed to aid the PUC in identifying projects reasonably likely to achieve commissioning, and accordingly as a provision that does not require a bidder nor the PUC to eliminate the numerous contingencies that can preclude plant commissioning. This is, after all, how a bidder would read the site-control requirement—along with the rest of the RFP and the statute. The requirement reads as follows:

> The proponent must demonstrate project site control in favor of the proponent's legal company name by providing evidence of one of the following: (1) fee simple title to such real property; (2) valid written leasehold or easement interest for such real property; (3) a legally enforceable written option with all terms stipulated including "option price" and "option term," unconditionally exercisable by the proponent or its assignee, to purchase or lease such real property or hold an easement for such property including the underlying purchase, lease, or easement agreement; or (4) a duly executed contract for the purchase and sale of such real property. These are the only permissible forms of site control.
>
> Site control documents must contain the following: (1) proponent's legal company name; (2) parcel size; (3) 911 physical address;

> (4) legal description adequately identifying the property; (5) must be valid for the term of the standard-offer contract plus development time; and (6) must be signed by all parties. Each project proposed must have its own independent site control.

¶ 20. This provision is susceptible to at least two reasonable interpretations. Under the first, the provision is satisfied by providing one of the listed documents in the proponent's legal company name, with the specified requirements—parcel size, address, signatures, etc. Note the language used: "The proponent must demonstrate project site control in favor of the proponent's legal company name by providing evidence of one of the following . . . ." The provision in essence says, "You must demonstrate X by providing Y." It follows that if you provide Y, you have demonstrated X.

¶ 21. Allco suggests another reasonable reading: The proponent must demonstrate project site control in favor of the proponent's legal company name, which means not just supplying the requested documents, but proving the ability to build and operate the project on the site. In other words, having, at the time of bidding, the full bundle of property rights necessary to build and operate the plant.

¶ 22. The PUC gave the site-control requirement, which it drafted, the first interpretation. It determined that because NextEra provided the documents required by the RFP, there was no basis to reject the two bids at issue. 2019 Order at *14. We defer to that reading of the site-control requirement because the PUC's interpretation is reasonable and consistent with the language in the RFP, and because the Legislature entrusted the PUC—not us, and not Allco—to administer the standard-offer program. See In re Korrow Real Estate, LLC Act 250 Permit Amendment Application, 2018 VT 39, ¶ 20, 207 Vt. 274, 187 A.3d 1125 (explaining that courts owe "deference to agency interpretations of policy or terms when: (1) that agency is statutorily authorized to provide such guidance; (2) complex methodologies are applied; or (3) such decisions are within the agency's area of expertise" (quotation omitted)); Plum Creek, 2016 VT 103, ¶ 25 (explaining

that "agency determinations regarding the proper interpretation of policy or methodology within the agency's expertise are entitled to deference" and that "[d]ecisions made within the expertise of such agencies are presumed correct, valid and reasonable" (quotation omitted)).

¶ 23. Moreover, we find no unfairness to other bidders stemming from the PUC's interpretation of the site-control requirement. Reading the requirement along with the other provisions of the RFP and with the statute, a bidder would easily conclude that the requirement is satisfied by providing one of the listed documents, with its company name, and with the associated specifications. The provision is silent on access rights, as it is silent on numerous other potential obstacles to project commissioning, such as defects in the chain of title, unsettled ownership claims under intestate succession, and restrictive covenants, to name a few. Nothing in the site-control requirement nor in the rest of the RFP compels a bidder to search the land records of the proposed property, identify, and then resolve all potential obstacles to plant commissioning at that stage of the process. Other provisions of the RFP and the statute contemplating project withdrawal would confirm that view. These include the reserve group adopted in case selected projects withdraw, the requirement to submit a security deposit to be forfeited upon withdrawal, and the statute's capacity-reallocation provisions. See 30 V.S.A. § 8005a(c)(1)(B)(ii)-(iii), (j). NextEra did no less than a reasonable bidder would have done at that stage of the process—supply one of the listed documents with the understanding that it may have to resolve obstacles to commissioning if those obstacles arose, and that it may have to withdraw if those obstacles became insurmountable. The PUC's conclusion did not give NextEra an advantage over other bidders. Allco simply asks more of NextEra and the PUC than the site-control provision requires. We defer to the PUC's conclusion that NextEra complied with the site-control requirement by supplying exactly what the requirement demands—legally enforceable written options to lease the properties.

¶ 24. We also agree with the PUC that it did not have to disqualify all bidders facing potential property disputes at that incipient stage of the plant-selection process, nor resolve those disputes itself. Having received what it explicitly required, the PUC correctly determined that it did not have to take the extra step of ensuring that these two projects—and the twenty-four other proposals selected or placed in the reserve group—were not encumbered in a way that could ultimately prevent project commissioning. This would force the PUC to comb through the land records of dozens of properties to identify potential problems that could well present no actual barrier to construction or operation of a plant.

¶ 25. Resolving property disputes would lead to bigger problems. It would force the PUC to adjudicate property rights between landowners not present before it and under a statute completely silent on authority to do that, raising jurisdictional concerns. See, e.g., Westover v. Vill. of Barton Elec. Dep't, 149 Vt. 356, 358-59, 543 A.2d 698, 699 (1988) (discussing limited jurisdiction of PUC to legislatively authorized matters). Adjudicating property disputes would also likely embroil the PUC in protracted litigation in this and future cases, frustrating the implementation of the standard-offer program and the Legislature's goal of developing renewable energy in Vermont. See 30 V.S.A. §§ 8005a(a), 8001 (establishing legislative goals behind standard-offer program). The PUC acted consistently with the language of the RFP and the statute and did not err in concluding that NextEra's St. Albans Solar and Vermont Solar proposals satisfied the site-control requirement.

¶ 26. We acknowledge that Allco's interpretation of the requirement finds support in the sample contract that would be signed between the facilitator and a successful project proponent. That contract also contains a site-control requirement, but, unlike the RFP, it defines "site control" as "proof of dominion over real property to the extent necessary to construct the project." Allco appears to argue that it read the RFP and the sample contract together and concluded that to satisfy

the site-control requirement in the RFP, a bidder had to ensure that there were no obstacles to construction or operation of its projects.

¶ 27. Again, to the extent Allco did this, it did more than the RFP required. Even assuming the contract was promulgated along with the RFP, such that all bidders could examine the site-control requirement in the RFP and the site-control requirement in the sample contract, the RFP does not reference the contract and thus does not compel bidders to rely on the contract definition. Moreover, directly after the definition of site control, the contract provides that "[s]ite control may be established by" the same four options listed in the RFP. Thus, the contract could just as easily confirm the interpretation of the RFP requiring merely the provision of documents. Allco has failed to prove error.

C. Company Name in Site-Control Documents

¶ 28. We next consider Allco's argument that all three of NextEra's projects failed to demonstrate site control "in favor of the proponent's legal company name" because the site-control documents were executed in favor of Boulevard Associates, LLC. Three affiliated legal entities are involved: The proponent of the three projects is NextEra Energy Resources Development, LLC (NextEra). The site-control documents are in favor of Boulevard Associates, LLC. Both NextEra and Boulevard Associates are wholly owned subsidiaries of NextEra Energy Resources, LLC (the parent company).

¶ 29. As noted, the PUC concluded that the site-control requirement was satisfied because it allows a proponent to demonstrate site control in its company name by providing a written option "unconditionally exercisable by the proponent or its assignee," and NextEra had provided an option unconditionally exercisable by its assignee, Boulevard Associates.

¶ 30. We do not fully agree with the PUC's reliance on the assignee language of the RFP because there is no evidence in the record of an assignment between NextEra and Boulevard

Associates. Nevertheless, we find no error in the PUC's ultimate conclusion that NextEra's bids satisfied the site-control requirement because, again, reading the requirement in context, there is no meaningful distinction in this case between NextEra and Boulevard Associates. As many authorities in other contexts have recognized, a parent company has full control of its wholly owned subsidiaries. See, e.g., Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771-72 (1984) (observing in context of Sherman Act that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise" among other reasons because "the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests"); VFB LLC v. Campbell Soup Co., 482 F.3d 624, 635 (3d Cir. 2007) ("[A] wholly-owned subsidiary has only one shareholder: the parent. There is only one substantive interest to be protected, and hence no divided loyalty of the subsidiary's directors . . . ." (quotation omitted)); Cont'l Distilling Corp. v. Old Charter Distillery Co., 188 F.2d 614, 620 (D.C. Cir. 1950) ("A court of equity, in order to do justice, does not hesitate to disregard a corporate entity and to recognize that all the assets of a solvent wholly owned subsidiary are equitably owned by the parent corporation.").

¶ 31. NextEra submitted official documentation proving that it and Boulevard Associates are wholly owned subsidiaries of the parent company. As wholly owned subsidiaries of the parent company, NextEra and Boulevard Associates serve one master and will do as the parent company directs. They are like "a multiple team of horses drawing a vehicle under the control of a single driver." Copperweld, 467 U.S. at 771. Thus, demonstrating site control in favor of Boulevard Associates is demonstrating site control in favor of NextEra because both are completely controlled by the same parent company. We would face a different case if NextEra had executed the options using an unaffiliated company under contract. This could create potential obstacles to plant commissioning, such as a breakdown in the business relationship between NextEra and the

unaffiliated company. But there is no evidence that NextEra's corporate structure would present an obstacle to plant commissioning. Given the parent company's complete control of the subsidiaries, and reading the site-control requirement within the broader context of the RFP as a whole and the PUC's statutory mandate to ensure that plants are "reasonably likely to achieve commissioning," the PUC did not err in concluding that NextEra satisfied the site-control requirement.

D. Silk Road Solar Map

¶ 32. We next turn to Allco's argument that the PUC was required to disqualify PNW's Silk Road Solar proposal because PNW submitted the project map on eight-by-eleven-inch paper, instead of the twenty-four by thirty-six inches specified in the RFP. On the stated dimensions, maps had to include specified information and "indicate the scale at a sufficient ratio . . . such that the location of all project facilities is easily discerned." The PUC determined that the map's wrong size was a waivable, minor defect because the smaller map showed the information specified in the RFP with sufficient clarity and detail to permit review.

¶ 33. We agree with the PUC that this was a waivable defect. As noted, the PUC may waive or allow a bidder to correct immaterial variations from mandatory RFP requirements. An immaterial variation is one that is merely a matter of form and not substance, one that can be waived or corrected without affording the deviating bidder a substantial advantage over other bidders, and generally one whose correction or waiver does not undermine the fundamental fairness required in the bidding process. See supra, ¶¶ 14-15.

¶ 34. Here, the map's smaller size is a matter of form and not substance because the PUC determined that the map contained the information specified in the RFP and the scale permitted review of the proposal. The map served the purpose for which it was intended even though it was smaller than specified. Additionally, the advantage PNW received from the waiver is

insubstantial. Allco maintains that it and other complying bidders incurred a greater cost in supplying the larger map. They likely did. But viewed in the context of a project to build and operate a 2.2 MW solar powerplant—with the attendant costs of planification, securing site control, purchasing equipment, and paying labor—the marginal advantage PNW received from obtaining a map measuring eight by eleven inches instead of twenty-four by thirty-six inches is negligible. At any rate, the advantage was small enough that the waiver did not undermine the fundamental fairness required in the bidding process. All bidders had notice of the potential for waiver—the RFP warned bidders that the facilitator could "disregard minor deficiencies in a proposal if such proposal complie[d] in all material respects with the requirements of [the] RFP." The map complied with the RFP in all respects except size. There was no error.

E. Capacity of the Developer Block

¶ 35. Next, we consider Allco's argument that the PUC miscalculated the capacity of the developer block. As explained briefly above, under the cumulative-capacity component of the standard-offer program, the PUC is directed to issue standard offers to new plants "until a cumulative plant capacity amount of 127.5 MW is reached." 30 V.S.A. § 8005a(c). The statute then provides that "[a]nnually commencing April 1, 2013, the Commission shall increase the cumulative plant capacity of the Standard Offer Program (the annual increase) until the 127.5-MW cumulative plant capacity . . . is reached." Id. § 8005a(c)(1). Starting on April 1, 2019, the annual increase is set at 10 MW. Id. § 8005a(c)(1)(A). Also starting that year, twenty percent of the annual increase is reserved for new plants proposed by Vermont retail electricity providers (the provider block), and the remaining eighty percent is reserved for new plants proposed by others (the developer block). Id. § 8005a(c)(1)(B)(i).

¶ 36. The statute then establishes two relevant ways to allocate unsubscribed capacity in a given year and newly available capacity resulting from terminated contracts:

> If the provider block for a given year is not fully subscribed, any unsubscribed capacity within that block shall be added to the annual increase for each following year until that capacity is subscribed and shall be made available to new standard offer plants proposed by persons who are not providers.

Id. § 8005a(c)(1)(B)(ii).

> In the event a proposed plant accepting a standard offer fails to meet the requirements of the Program in a timely manner, the plant's standard offer contract shall terminate, and any capacity reserved for the plant within the Program shall be reallocated to one or more eligible plants.

Id. § 8005a(j).

¶ 37. In 2019, the PUC had 0.308 MW of unsubscribed capacity from the 2018 provider block and 2.56 MW of newly available capacity from terminated contracts. The PUC added the two sums to the 10 MW annual increase for 2019 and then allocated twenty percent of the total to the provider block and eighty percent to the developer block. Allco argued before the PUC, and now contends on appeal, that this was error because under subsections (c)(1)(B)(ii) and (j), the 0.308 and 2.56 MW had to be allocated exclusively to the 2019 developer block.

¶ 38. The PUC first interpreted subsection (c)(1)(B)(ii) in the 2013 order establishing the RFP mechanism. There, the PUC concluded that the subsection "makes clear that any unsubscribed capacity in the Provider Block from a given year will be added to the increase in capacity for the next year and is available to persons who are not providers." 2013 Order at *27. The PUC acknowledged, however, that the statute is unclear on whether the unsubscribed capacity is "exclusively available to persons who are not providers." Id. (emphasis added). Thus, the PUC adopted the practice of adding the unsubscribed capacity from the provider block to the annual

increase and then allocating the sum along the twenty-eighty-percent line prescribed in the statute. Id.

¶ 39. We defer to the PUC's reading of subsection (c)(1)(B)(ii) because it is a reasonable interpretation of the statutory language. There are two key parts to subsection (c)(1)(B)(ii): first, that unsubscribed capacity from the provider block "shall be added to the annual increase for each following year," and second, that it "shall be made available to new standard offer plants proposed by persons who are not providers." 30 V.S.A. § 8005a(c)(1)(B)(ii). The statute clearly states that unsubscribed capacity from the provider block "shall be added to the annual increase." Id. The "annual increase" is defined as the annual increase of the cumulative-plant capacity of the standard-offer program, which is 10 MW for 2019. Id. § 8005a(c)(1), (c)(1)(A). Thus, it was reasonable to add the 0.308 MW of unsubscribed capacity from the 2018 provider block to the 10 MW annual increase for 2019. It was also reasonable to then allocate the sum—in essence the new annual increase—along the twenty-eighty-percent line because subsection (c)(1)(B)(i) provides that twenty percent of the 2019 annual increase is reserved for the provider block. Moreover, the second part of subsection (c)(1)(B)(ii) makes unsubscribed capacity from the provider block just that—available to the developer block. "Available" means "present or ready for immediate use; accessible; obtainable." Available, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/available [https://perma.cc/36AF-ZYEW]. The Legislature's use of the word "available" does not mandate reallocation exclusively to the developer block. It is logical to conclude from the statutory scheme and the language used in subsection (c)(1)(B)(ii) that the PUC is to add the unsubscribed capacity to the annual increase and then allocate twenty percent of the sum to the provider block and eighty percent to the developer block. The PUC's allocation of unsubscribed capacity from the 2018 provider block is based on a

reasonable interpretation of the statute it is entrusted to administer, and we accordingly defer to the PUC.

¶ 40. The same result obtains under subsection (j), which is even more flexible and accordingly provides the PUC greater discretion. That provision says that if "a proposed plant" fails to meet the program requirements, the plant's contract terminates, and its capacity "shall be reallocated to one or more eligible plants." 30 V.S.A. § 8005a(j). The statute makes no distinction between the provider block and the developer block, nor is there any reason to think that "eligible plants" are only those in the developer block. It is reasonable to conclude that an eligible plant is one that satisfies subsection (b), which establishes basic plant eligibility requirements like having a Vermont location and a capacity of 2.2 MW or less. Id. § 8005a(b). Having interpreted the standard-offer statute to mandate the reallocation of unsubscribed capacity to the annual increase for the following year and then proceeding along the twenty-eighty-percent line—a practice the PUC has followed since 2013—it was reasonable for the PUC to adopt the same approach for the new capacity resulting from terminated contracts. This approach is permitted under the flexible language of subsection (j); suggested by other provisions in the statutory scheme, including subsections (b) and (c)(1)(B)(ii); and within the PUC's broad statutory authority to implement the standard-offer program. Allco's mere disagreement with the PUC's approach is not enough to prove error. Cf. Korrow, 2018 VT 39, ¶ 22 (noting that mere disagreement with agency's reading of statutory terms is insufficient to substitute different interpretation, "especially in light of the broad statutory authority given to the [agency] in applying those terms").

F. Constitutional Arguments

¶ 41. Finally, Allco raised two constitutional arguments before the PUC, which, though renewed on appeal, are not properly before us. First, Allco argued that the provider block set-aside violates the Common Benefits Clause of the Vermont Constitution because it favors Vermont

utilities without advancing a public interest. Second, Allco maintained that the technology-allocation provision, which directs the PUC to allocate program capacity among different renewable-energy technologies, is an unconstitutional delegation of legislative power because it does not provide any standards to execute its mandate. Before the PUC, Allco characterized these arguments as "as-applied" challenges. The PUC did not reach the merits of the arguments because it determined that despite Allco's characterization, they were really facial challenges to the constitutionality of statutes, and, under our case law, it lacked jurisdiction to adjudicate such claims.

¶ 42. On appeal, Allco describes the constitutional arguments as facial and as-applied. But merely characterizing constitutional challenges as facial or as-applied does not make them so. We have recently explained that "[i]n a facial challenge, a litigant argues that no set of circumstances exists under which a statute or regulation could be valid," while in an as-applied challenge, "a party claims that a statute or regulation is invalid as applied to the facts of a specific case." In re Mountain Top Inn & Resort, 2020 VT 57, ¶ 22, __ Vt. __, 238 A.3d 637 (quotation and alterations omitted). In Mountaintop we rejected a court's characterization of a legal conclusion as as-applied because the court did not rely on a specific set of facts; instead, the conclusion applied under every set of facts. Id. ¶ 23.

¶ 43. The same is true of Allco's arguments. The Common Benefits Clause argument is that the provider block set-aside favors Vermont utilities without advancing a public interest. Allco argues that "the law penalizes independent developers (and ratepayers) solely to give a benefit to Vermont utilities." See Vt. Const. ch. I., art. 7. Allco points to no set of facts in this case making the statute unconstitutional, nor to a set of facts under which the statute would be constitutional. Instead, Allco seeks to invalidate the provision outright. So, too, with the delegation argument: Allco seeks to invalidate the technology-allocation provision altogether

because it does not establish any standards to govern its execution. See Vermont Home Mortg. Credit Agency v. Montpelier Nat. Bank, 128 Vt. 272, 278, 262 A.2d 445, 449 (1970) (holding that to survive unconstitutional-delegation challenge, "the statute must establish reasonable standards to govern the achievement of its purpose and the execution of the power which it confers"). If Allco is right, no set of circumstances exists under which the statute could be valid. The PUC correctly determined that these are facial challenges to the constitutionality of statutes.

¶ 44. Because Allco's constitutional arguments are facial challenges, the PUC indeed lacked jurisdiction to adjudicate them. Compare Westover, 149 Vt. at 357, 543 A.2d at 698 (holding that PUC is without jurisdiction to rule upon constitutionality of statutes), with Travelers, 2003 VT 103, ¶ 18 (recognizing that administrative agencies may adjudicate as-applied challenges to statutes); see also Chase v. State, 2008 VT 107, ¶ 14, 184 Vt. 430, 966 A.2d 139 ("[F]acial challenges to statutes must be heard by courts, not administrative agencies . . . ."). Thus, we are asked to resolve these constitutional arguments in the first instance, without the input of other interested parties. As we have insisted in the past, Allco's remedy is to follow the appropriate procedures to seek a declaratory judgment in the superior court, where other interested persons have an opportunity to participate in the proceedings. See Westover, 149 Vt. at 359, 543 A.2d at 700 (directing party to Declaratory Judgment Act to resolve constitutional claims); 12 V.S.A. §§ 4711, 4721 (respectively, conferring superior court original jurisdiction to hear requests for declaratory judgment and allowing interested persons opportunity to participate in those proceedings).

Affirmed.

FOR THE COURT:

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Associate Justice