

IN THE MATTER OF :  
JEFFERSON SOLAR LLC, :  
PETITION FOR DECLARATORY RULING : April 1, 2021

Decision Not to Issue Declaratory Ruling

Pursuant to Conn. Gen. Stat. section 4-176(e) and R.C.S.A. section 22a-3a-4(c)(3), the Department of Energy and Environmental Protection (DEEP) issues this decision in response to a Petition for Declaratory Ruling (Petition) submitted by Jefferson Solar LLC (Petitioner).

**1) Background.**

Under the Shared Clean Energy Facilities (SCEF) program, authorized by Conn. Gen. Stat. §16-244z, the electric distribution companies (EDCs) are required to issue a request for proposal (RFP) each year for six years to annually procure up to 25 megawatts (MWs) from SCEFs,<sup>1</sup> as those facilities are defined by statute.<sup>2</sup> On July 1, 2019, the DEEP submitted proposed program requirements for the SCEF program to PURA for modification and approval as required pursuant to Conn. Gen. Stat. § 16-244z(a)(1)(C).<sup>3</sup> PURA modified DEEP’s proposed program requirements and approved the final version of the SCEF program requirements in a final decision issued on December 18, 2019 (Modified Program Requirements).<sup>4</sup>

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<sup>1</sup> The 25 MWs are apportioned to the EDCs based on each EDC’s percentage share of the EDCs’ total combined electric load in Connecticut at the time of the RFP. In the first year of the SCEF program, Eversource Energy was allocated 20 MWs, while the United Illuminating Company (UI) was allocated 5 MWs.

<sup>2</sup> A SCEF is a “a Class I renewable energy source, as defined in [Conn. Gen. Stat.] section 16-1, that (A) is served by an [EDC], as defined in [Conn. Gen. Stat.] section 16-1, (B) is within the same [EDC] service territory as the individual billing meters for subscriptions, (C) has a nameplate capacity rating of four [MWs] or less, and (D) has at least two subscribers.” Conn. Gen. Stat. §16-244x(a)(1).

<sup>3</sup> Conn. Gen. Stat. § 16-244z(a)(1)(C) provides in relevant part that: “On or before July 1, 2019, the department shall submit any such program requirements and tariff proposals to the authority for review and approval.”

<sup>4</sup> PURA Docket No. 19-07-01, *Review of Statewide Shared Clean Energy Facility Program Requirements*, Final Decision, Exhibit B - Modified Program Requirements (Dec. 18, 2019).

Pursuant to these Modified Program Requirements, the EDCs issued a joint RFP on April 30, 2020, seeking bids for eligible projects in their service territories in Connecticut. The bids at issue in the Petition were located in The United Illuminating Company's (UI) service territory. Bids for the first program year were due July 13, 2020.<sup>5</sup> On October 20, 2020, UI submitted the bid selections to DEEP for review and approval pursuant to section 3.4 of the Modified Program Requirements. On October 22, 2020, DEEP notified UI that it had reviewed and approved the bid selections. On November 5, 2020, UI submitted the final bid selections for approval to PURA.<sup>6</sup> PURA approved these final bid selections on January 22, 2021.<sup>7</sup>

## 2) **The Petition**

On February 1, 2021, Jefferson Solar LLC submitted the Petition to the Commissioner of DEEP. The Petition seeks a ruling that DEEP erred in concluding that a bid submitted by SCEF1 Fuel Cell LLC, a subsidiary of FuelCell Energy, Inc. (FuelCell Energy), in the first year of the SCEF program satisfied the site control requirements of the SCEF program.<sup>8</sup>

Petitioner states that FuelCell Energy's bid for a 2.8 MW fuel cell located in Derby was improperly selected as one of the winning bids.<sup>9</sup> Petitioner's 4 MW bid was also selected, but due to the SCEF program's capacity limitations (the rest of the capacity for the first year's selection in UI's service territory was filled by projects that offered lower bids), only 700 kilowatts of the Petitioner's facility was selected.<sup>10</sup> Petitioner asserts that FuelCell Energy's bid

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<sup>5</sup> This bid deadline was extended by PURA by two weeks for those projects who could demonstrate delays attributable to the COVID-19 pandemic.

<sup>6</sup> UI Motion No. 46, PURA Docket No. 19-07-01, *Review of Statewide Shared Clean Energy Facility Program Requirements* (Nov. 5, 2020).

<sup>7</sup> PURA Ruling to Motion No. 46, PURA Docket No. 19-07-01, *Review of Statewide Shared Clean Energy Facility Program Requirements* (Jan. 22, 2021).

<sup>8</sup> Petition at pp. 1, 10.

<sup>9</sup> *See id.* at pp. 3-7.

<sup>10</sup> *Id.* at p. 2.

included an option to lease to demonstrate site control for the project site.<sup>11</sup> Petitioner alleges that this option to lease “provides no unconditional rights to” FuelCell Energy, as discussed in more detail below, and therefore, that FuelCell Energy’s bid failed to demonstrate site control.<sup>12</sup> The Petition further argues that because of FuelCell Energy’s alleged lack of site control, DEEP was “required to reject the [FuelCell Energy] bid and remove it from the rankings.”<sup>13</sup>

Petitioner claims that FuelCell Energy’s option to lease, signed by the City of Derby, was unlawful and not binding for four reasons. The Petitioner alleges that: (1) section 22 of the Derby City Charter was not complied with;<sup>14</sup> (2) the Derby City Charter does not authorize options to lease;<sup>15</sup> (3) the City of Derby failed to abide by Conn. Gen. Stat. § 7-163e in approving the option to lease;<sup>16</sup> and (4) the option to lease is unenforceable under Connecticut’s statute of frauds.<sup>17</sup> Given these alleged deficiencies in FuelCell Energy’s option to lease, Petitioner argues that DEEP’s failure to remove FuelCell Energy’s bid from the rankings was erroneous, arbitrary and capricious.<sup>18</sup> Petitioner states if FuelCell Energy’s bid is found to be erroneously approved, and that the bid is removed from the selection rankings, that all 2.8MWs of capacity awarded to FuelCell Energy would go to Petitioner, in accordance with the Modified Program Requirements.<sup>19</sup>

On February 4, 2021, FuelCell Energy submitted an objection to the Petition requesting that DEEP deny the Petition.

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<sup>11</sup> *Id.* at p. 3.

<sup>12</sup> *Id.* at p. 7.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at pp. 3-5.

<sup>15</sup> *Id.* at p. 5.

<sup>16</sup> *Id.* at pp. 5-6.

<sup>17</sup> *Id.* at pp. 6-7.

<sup>18</sup> *Id.* at p. 10.

<sup>19</sup> *Id.* at p. 2.

### 3) **The Decision Not to Issue a Declaratory Ruling**

Conn. Gen. Stat. §4-176(e) requires that “[w]ithin sixty days after receipt of a petition for a declaratory ruling” an agency must take one of five specified options.<sup>20</sup> The last option under section 4-176(e), and the one the agency is applying here, is to decide not to issue a declaratory ruling and state the reasons for the action. In short, when DEEP issues a declaratory ruling under Conn. Gen. Stat. §4-176(e), the declaratory ruling must relate to “the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances . . . .”<sup>21</sup> These circumstances are not present here because there is no statutory provision, DEEP regulation, or DEEP final decision for which DEEP can provide a declaratory ruling.

The basis for the Petition is DEEP’s role and responsibilities under the SCEF Modified Program Requirements. As discussed above, DEEP submitted proposed program requirements for the SCEF program on July 1, 2019 to PURA for modification and approval. Subsequently, PURA modified DEEP’s proposed program requirements, and then PURA approved these modified program requirements in a final decision issued on December 18, 2019 (i.e., the Modified Program Requirements).

At issue in the Petition are three requirements laid out in PURA’s Modified Program Requirements:

- (1) Section 3.4 requires DEEP to review and approve the EDCs’ final selections to ensure consistency with the Modified Program Requirements, prior to the EDCs

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<sup>20</sup> Conn. Gen. Stat. § 4-176(e) provides that:

Within sixty days after receipt of a petition for a declaratory ruling, an agency in writing shall: (1) Issue a ruling declaring the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances, (2) order the matter set for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under section 4-168, on the subject, or (5) decide not to issue a declaratory ruling, stating the reasons for its action.

The Department’s Rules of Practice also require compliance with §4-176(e). *See* R.C.S.A. § 22a-3a-4(c)(3).

<sup>21</sup> Conn. Gen. Stat. § 4-176(e).

submitting the selections to PURA.<sup>22</sup>

- (2) Section 3.4 also requires DEEP to direct the EDCs to remove any bid from the ranking that fails to comply with the requirements established in Appendix B of the Modified Program Requirements.<sup>23</sup>
- (3) Section 4.5 requires a bidder to “demonstrate that it has site control of the generation site, or an unconditional right, granted by the property owner, to acquire such control.”<sup>24</sup>

The Petitioner argues that FuelCell Energy failed to demonstrate that it had site control or an unconditional right to acquire such control (*see* Section 4.5 of the Modified Program Requirements above).<sup>25</sup> By failing to instruct the EDCs to remove the FuelCell Energy bid from the bid rankings when DEEP conducted its review and approval of the EDCs’ selection (*see* Section 3.4 of the Modified Program Requirements above), the Petitioner claims that DEEP acted arbitrarily and capriciously and that DEEP’s decision in doing so was “clearly erroneous.”

It is not necessary to reach the merits of whether FuelCell Energy demonstrated site control under the Modified Program Requirements because the agency concludes it does not have the authority to grant the declaratory ruling requested by the Petitioner. The Petition is based on the premise that DEEP failed to fulfill its obligation to review and approve the EDCs’ selections because it approved a selection that Petitioner alleges had failed to demonstrate the requisite site control. As discussed above, DEEP’s obligation to review and approve the EDCs’ selections arises under the Modified Program Requirements. These Modified Program Requirements were adopted pursuant to a PURA final decision, not a DEEP final decision.

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<sup>22</sup> PURA Docket No. 19-07-01, *Review of Statewide Shared Clean Energy Facility Program Requirements*, Final Decision, Exhibit B - Modified Program Requirements, Sec. 3.4 Evaluation and Selection Process, at pp. 6-7.

<sup>23</sup> *Id.*

<sup>24</sup> PURA Docket No. 19-07-01, *Review of Statewide Shared Clean Energy Facility Program Requirements*, Final Decision, Exhibit B - Modified Program Requirements, Sec. 4.5 Generation Site, at pp. 10-11.

<sup>25</sup> Petition at pp. 7-10.

The Petitioner points to no statutory provision, DEEP regulation, or DEEP final decision to serve as the base for a declaratory ruling. As stated previously, a declaratory ruling must relate to the “the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances . . . .”<sup>26</sup> In reviewing and approving the selections of the EDCs, DEEP is executing the program requirements embodied in a PURA final decision, not a statute, a DEEP regulation, or a DEEP final decision. Accordingly, the agency finds that it lacks the authority to issue a declaratory ruling based on the specified circumstances laid out in the Petition.

**4) Conclusion**

For the reasons noted above, the declaratory ruling requested by the Petitioner will not be issued.



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Katherine S. Dykes  
Commissioner of Energy and Environmental  
Protection

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<sup>26</sup> Conn. Gen. Stat. § 4-176(e).