



STATE OF MAINE
DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES
BUREAU OF GENERAL SERVICES
BURTON M. CROSS BUILDING
4TH FLOOR, 77 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0077

JOHN ELIAS BALDACCI
GOVERNOR

RYAN LOW
COMMISSIONER

M.F. CHIP GAVIN
DIRECTOR

March 5, 2010

Peter W. Drum, Esq.
Parson & Drum Attorneys LLC
P.O. Box 97
Damariscotta, ME 04543

Todd J. Griset, Esq.
Preti Flaherty Beliveau & Pachios LLP
45 Memorial Circle
Augusta, ME 04330

Benjamin J. Smith, Esq.
Attorney General
#6 State House Station
Augusta, ME 04333

Re: Appeal of Award by the Maine Public Utilities Commission, RFP #200909522
Competitive Grants for Large Energy Efficiency and Conservation Projects

Dear Attorneys Drum, Griset & Smith:

I am forwarding the Final Decision of the Appeal Panel in the above-referenced matter. The Panel validates the award for the reasons set forth in the attached decision.

This represents final agency action in this matter and as such may be eligible for judicial review. Any person aggrieved by this decision may appeal to Maine's Superior Court in the manner provided in 5 M.R.S.A. 1101, et seq, and M.R. Civ. P. 80C. A party must file a petition for review within thirty days after receipt of notice of the decision.

Sincerely,

M.F. Chip Gavin
Director, Bureau of General Services

cc: Richard Thompson, CIO, OIT
John Brautigam, Public Utilities Commission
Appeal Panelists

Attachment: Decision of the Appeal Panel

FINDINGS OF FACT

On September 25, 2009, the MPUC issued a competitive Request for Applications (“RFA”), the purpose of which was to obtain applications for large energy efficiency and conservation projects with the primary goals of reducing kilowatt (kWh) consumption, encouraging alternative and renewable energy, and decreasing greenhouse gas (ghg) emissions. The RFA indicated that approximately \$9 million was available for these projects, with \$6 million coming from the American Recovery and Reinvestment Act of 2009 (ARRA), and the remaining \$3 million from the Regional Greenhouse Gas Initiative (RGGI). Grant awards were expected to range from \$100,000 to \$1 million.

The RFA established the following three (3) weighted criteria for evaluating the applications: (1) Kilowatt Hour and Carbon Dioxide Reductions per Award Dollar Requested – 60 points; (2) Management and Resource Adequacy and Readiness – 20 points; and (3) Economic Impact – 20 points. Under criterion #1, the application reporting the greatest savings in either category (kWh or ghg reduction) would receive the full 60 points, with all other applications receiving proportionately fewer points. Applications reporting both kWh and ghg savings would be scored twice: once for kWh reductions and once for ghg reductions. The application would be given the higher of the two point totals it received. Under evaluation criterion #2, applicants were asked to provide a description of the applicant’s experience and ability to implement the project, project feasibility, costs and financing, project readiness and schedule, environmental permitting, and project management organization and qualifications. Under evaluation criterion #3, applicants were asked to provide detailed information on the overall impact

MAINE DEPARTMENT OF ADMINISTRATIVE
AND FINANCIAL SERVICES
BUREAU OF GENERAL SERVICES

In the Matter of)	
Mt. Abram LLC and Solar Center LLC)	
Appeal of Award by)	
Public Utilities Commission)	Decision of Appeal Panel
RFP No. 200909522)	
<i>“Competitive Grants for Large Energy</i>)	
<i>Efficiency and Conservation Projects”</i>)	

INTRODUCTION AND BACKGROUND

This is an appeal by Mt. Abram LLC and Solar Center LLC (collectively “Mt. Abram”) from a decision of the Maine Public Utilities Commission (MPUC) to award sixteen (16) grants pursuant to RFP 200909522 – *“Competitive Grants for Large Energy Efficiency and Conservation Projects.”* The appeal is brought pursuant to 5 M.R.S.A. § 1825-E and Chapter 120 of the Rules of the Bureau of General Services of the Department of Administrative and Financial Services (“Rules”). Industrial Energy Consumer Group (EICG), Lincoln Paper and Tissue, LLC (Lincoln), and Verso Paper Corporation (Verso) timely requested intervenor status. The Bureau granted intervenor status to Lincoln and Verso (collectively “Intervenors”), but not to EICG, a non-bidder. The Bureau granted Mt. Abram’s request for a hearing.

An Appeal Panel (“Panel”) was comprised of three members chosen from State service. An evidentiary hearing was held on February 18, 2010, at which testimony of witnesses and documentary evidence was presented. Written closing arguments were timely submitted by Mt. Abram, MPUC and Intervenors on February 25, 2010. After a review of all the arguments and evidence presented by the parties, the Panel makes the following findings of fact.

of the project on the State's economy, including specific job creation and/or retention information.

No Bidder's Conference was held, but the MPUC received and responded to questions from potential bidders regarding the RFA's provisions. Sixty-three (63) applications were received in response to the RFA, of which three (3) were determined to be ineligible. The remaining applications were reviewed by staff using the three criteria previously identified. In assigning the scores for the sixty point energy savings criterion, staff relied on the stated energy savings provided in the applications. The application reporting the greatest kWh savings or ghg reductions received the full 60 points, with the remaining applications receiving proportionately fewer points.

The eighteen (18) top-scoring applications were forwarded to Energy Resource Solutions (ERS), an independent technical consultant identified through a separate competitive process, for technical review. The purpose of the ERS review was to confirm that the projects would produce the claimed energy savings and that they would meet the RFP's resource adequacy and readiness requirements. ERS produced a comprehensive memo on each of the eighteen (18) applications it reviewed, reflecting on the suitability of the proposed technology, the validity of the calculated savings, the likelihood that the claimed savings would be achieved using the methods identified, whether there were unanswered questions that should be addressed, and whether the project's timetables were reasonable. ERS also produced a spreadsheet of all 18 applications, containing adjusted energy scores based on the technical analysis.

Following the technical review, the formal review team reviewed the applications, a spreadsheet from the staff review, and the memos from the technical consultant and assigned final scores for each application by consensus.

GOVERNING LAW AND STANDARD OF REVIEW

The issue in this case is whether Mt. Abrams has met its burden of proving by clear and convincing evidence that MPUC's award of the contract (1) was in violation of law, (2) contained irregularities that created a fundamental unfairness, or (3) was arbitrary or capricious. This standard is contained in the law at 5 M.R.S. §§ 1825-D and 1825-E and in the Bureau of General Services' Rule, Chapter 120 – Rules for Appeal of Contract and Grant Awards. The clear and convincing standard requires that the Panel be convinced that the truth of the assertions of the appeal are highly probable, as opposed to more probable than not. *Pine Tree Legal Assistance, Inc. v. Department of Human Services*, 655 A.2d 1260, 1264 (Me. 1995). The Panel may only decide whether to validate or invalidate the contract award decision under appeal. *See*, 5 M.R.S. § 1825-E(3) and Chapter 120(4)(1) of the rules.

In determining whether an award is arbitrary or capricious, the Panel must not substitute its judgment for that of the review team. *International Paper Co. v. Board of Environmental Protection*, 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054. There is a presumption that the agency's actions were not arbitrary or capricious. *Central Maine Power Co. v. Waterville Urban Renewal Authority*, 281 A.2d 233, 242 (Me. 1971).

DECISION

The Panel determines that Mt. Abram has not met its burden of proving that any of the statutory criteria have been met so as to invalidate the grants awarded. There is no

evidence of a violation of law in connection with MPUC's awards in this RFA; and the panel finds that no such violation of law occurred. Further, under the circumstances of this case, the panel does not find the existence of any irregularity creating a fundamental unfairness or that the contract awards by MPUC were arbitrary or capricious.

A. MPUC's Analysis of Economic Impacts Was Proper.

The agency's review process, including its analysis of the economic impacts of the proposed projects, complied with all applicable law. No evidence in the record supports the claim that its analysis of economic impacts created fundamental unfairness, or was arbitrary and capricious, or violated law.

Throughout the RFA process, the agency was clear that projects would be selected based on criteria including economic impact. The RFA describes what this means, and how the agency would evaluate it. Under the terms of the RFA, economic impacts under consideration include a broad range of information. In Section 7.3 of the RFA, the agency plainly stated the scope of economic impacts that it would consider, including the following:

- The number of new jobs directly created or retained within the first year of the project.
- The number of long-term jobs (i.e., lasting more than five years) created by the project.
- Demonstration of sustainable living wages for the jobs created or retained.
- Any additional information on the overall economic impact of the project.

MPUC testified that this fourth category of information specified in the RFA gave applicants the opportunity to provide (and the agency the opportunity to consider) economic impact information beyond the raw numbers of jobs created or retained.

The agency provided further guidance on the scope and methodology of its review of economic impacts in Section 8.4 of the RFA. Applicants were instructed to "[p]rovide

detailed information on the overall impact of the project on the State's economy". Applicants were also allowed to include "indirect or induced jobs" when providing a general description of the overall economic impact. The RFA thus clearly called for applicants to provide a broad assessment of how their projects will fulfill the Stimulus Act's goals.

At the hearing, MPUC testified as to how the review panel evaluated these applications for economic impact by reviewing all the material provided in the applications, including additional information on the overall economic impact of the project as required by the RFA.

Mt. Abram argued that MPUC should have based its evaluation of economic impact on a specific chart of jobs created and/or retained by the proposed projects, with little, if any consideration given to the broader economic impact information clearly solicited by the RFA and included in each of the successful applications. Mt. Abram's testimony and argument includes several cases in which the Appeal Panel believes that certain applications' assertions of economic impact have been mischaracterized. For example, Mt. Abram claims that Jackson Labs, a successful bidder, reported 0 new jobs, when in fact Jackson Laboratory's application includes up to 150 new on-site jobs within five years in addition to new jobs in the construction and forestry industries in Maine.

Similarly, Mt. Abram claims that Lincoln Paper and Tissue, a grant recipient, "didn't even report on this section." This is a serious misstatement of fact. In fact, the record demonstrates a significant economic impact from the project:

The project will positively impact not just LP&T, but the local, regional and State economies. Successful execution and commissioning of this preheated combustion air project will help preserve approximately 400 high-paying salaried

and hourly manufacturing jobs now existing at the mill and nearly 2,240 additional jobs in the surrounding communities that are directly impacted by the success of this facility.

Lincoln described itself as

one of the area's largest employers and contributors to the local and regional economy, ensuring long-term viability of the facility is crucial to the economic stability of this town and to the North-Central Maine region.

Lincoln further described how the project will

[p]reserve the 2,640 jobs currently directly supported by LP&T with a reduction in machine operating cost that will improve site viability by helping LP&T continue producing a high-quality, low cost tissue product and remain globally competitive in the world tissue manufacturing market.

Additionally, Lincoln included a separate section captioned "Economic Impact", which provided additional evidence of the positive economic impacts of Lincoln's project. This record supports MPUC's analysis and award to Lincoln.

The record shows that a number of the entities characterized by Mt. Abram as having limited economic impact in fact made strong economic impact showings, including significant retained jobs and extensive information on the economic impacts of the project on the size and health of their workforces and communities.

The Appeal Panel is not convinced that MPUC's analysis of economic impacts and assignment of scores violated the law, contained any irregularity creating a fundamental unfairness, or was arbitrary or capricious.

B. MPUC Did Not Award Grants to Non-RFA-Compliant Applications.

Mt. Abram asserts that the award to Prime Tanning violates the RFA in that it sought "to use funds at multiple locations". Because the Prime Tanning application involved "consolidation for two factories into one", Mt. Abram claimed "the funds will

be spent at two locations". Mt. Abram also argues that multiple buildings at Prime Tanning's single location should be treated as multiple locations – despite the plain language in the "Questions and Answers" stating, "A location may be a complex of buildings that operate in conjunction with each other within a reasonable distance of each other." The Appeal Panel notes that the RFA is not a rule, and that MPUC is free to interpret what they meant by "one location" in the RFA. The Appeal Panel is not convinced that Prime Tanning's application sought to use funds at multiple locations, or that MPUC's decision to score their proposal and award them a grant was in violation of law, contained an irregularity creating a fundamental unfairness, or was arbitrary or capricious.

Mt. Abram also argues that an award to Prime Tanning is inappropriate because it included in its budget a potential grant from Efficiency Maine's business program. While it is clear from the RFA and from MPUC testimony that no project can receive funding from both the Efficiency Maine business program and the subject RFA, there was no evidence presented that showed that such a business program award had been made, or that one would be considered. The Appeal Panel is not convinced that the award to Prime Tanning was inappropriate, provided that the applicant can identify funds from a source or sources other than the Efficiency Maine business program to complete the compressed air portion of their project. The Appeal Panel finds that MPUC acted within its appropriate discretion in deciding to score Prime Tanning's application and make an award. The Panel is not convinced that their action was in violation of law, contained an irregularity creating a fundamental unfairness, or was arbitrary or capricious.

C. MPUC's Analysis of Biomass Applications Was Proper.

Mt. Abram next argues that the awards should be invalidated because the agency's energy analysis embodied fundamental unfairness and was arbitrary and capricious. Specifically, Mt. Abram attacks the energy scores assigned to winning applicants' biomass projects, on the grounds that the agency improperly failed to account for

the transportation fuel required to deliver the 'project fuel' of various types of biomass facilities... Because all of the energy inputs were not taken into account in the granting of biomass and other centrally located fuel dependent projects, the process was fundamentally unfair and arbitrary and capricious.

Similarly, even though Mt. Abram concedes that biomass applicants properly complied with the Carbon Dioxide Emissions Factor Table contained as Appendix B to the RFA in reporting their energy merits, Mt. Abrams alleges "the methodology is flawed because there is a release of carbon dioxide into the atmosphere from the transportation of the fuel or biomass."

However, the record demonstrates that the agency issued its RFA pursuant to the enabling legislation, and that the agency performed its review of the applications pursuant to the RFA. Indeed, Mt. Abram concedes that the agency's analysis tracked the RFA; implicitly, then, Mt. Abram argues that any award pursuant to this RFA should be invalidated unless the award was based on an assessment of indirect energy costs. This argument is specious. Not only was the agency not required to consider indirect energy costs under the RFA, but it explicitly elected not to do so. As MPUC testified, accounting for emissions in the manner advocated by Mt. Abram would have been in violation of the RFA. The Appeal Panel is convinced that MPUC followed both the law

and the conditions of the RFA, and that the process did not include fundamental unfairness, arbitrary and capricious action, or a violation of law.

D. MPUC's Award to Verso Paper Corp. Was Proper.

Mt. Abram claims that the MPUC failed to adhere to its application requirements and erred in granting Verso Paper a grant that exceeded the "expected range". The Appeal Panel finds this claim to be without merit. Nothing in the RFA precluded the MPUC from awarding grants for any amounts, even those outside the "expected" range of \$100,000 to \$1 million. The plain meaning of the term "expected" in this context denotes that award amounts were likely to fall within that range, but were not legally limited to this range. Indeed, all applicants including Mt. Abram were on notice that the agency could issue grants outside this range. The MPUC clarified this point during the question and answer period, noting in response to two questions: "For exceptional projects, a request exceeding \$1 million dollars will be considered".

Verso submitted such an exceptional application, proposing a nearly \$46 million project (more than ten times the project size of the next largest project), which will achieve twice as much greenhouse gas reduction per grant dollar as the next best applicant, and approximately 14 times as much greenhouse gas reduction per grant dollar as Mt. Abram. As MPUC testified at the hearing, this was exactly the kind of "exceptional" application contemplated by the agency in its RFA. The Appeal Panel is convinced that MPUC complied with applicable law in issuing the award to Verso, that there was no irregularity creating a fundamental unfairness, and that the award to Verso was neither arbitrary nor capricious.

E. Any Error In Mt. Abram's Energy Score Was Favorable and Harmless.

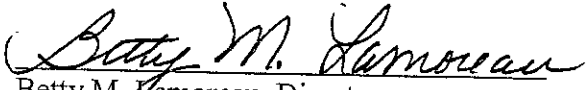
Although testimony introduced at the hearing suggests that the manner in which Mt. Abram presented the energy merits of its project was confusing, a correct calculation of the energy merits of Mt. Abram's application demonstrates that any errors in the agency's calculation actually overstated the savings of greenhouse gases and kWh per trust dollar. Mt. Abram's application requested \$809,928 in grant dollars for two subprojects with a combined savings of 782.1 tons of greenhouse gas emissions per year, or a savings of 406,785 kWh per year. This translates into 0.00097 tons of emissions saved per grant dollar requested, or 0.5022 kWh saved per grant dollar requested.

These numbers fall short of the numbers assigned to Mt. Abram by MPUC – 0.004203 tons per grant dollar, and 0.7551 kWh per grant dollar. This means that the energy scores assigned to Mt. Abram were, if anything, too high. Mt. Abram has thus failed to prove any fundamental unfairness in the RFP process. Mt. Abram's own witness conceded in his testimony that he could not find any errors in the calculations of the winning entities in the category of greenhouse gas energy scores, all of which were awarded funds under the RFP. Because the winning scores did not contain errors, and because any error in Mt. Abram's score actually overstated its energy merit, the Appeal Panel is convinced that any such errors were harmless with respect to the evaluation of Mt. Abram's proposal and did not create any fundamental unfairness, arbitrary and capricious action, or violation of law.

The Appeal Panel is clearly convinced that the selection process employed by MPUC was within the law, contained no irregularity creating a fundamental unfairness, and was neither arbitrary nor capricious. Accordingly, the Panel validates the grants awarded by MPUC.

APPEAL PANEL ON CONTRACT AWARD

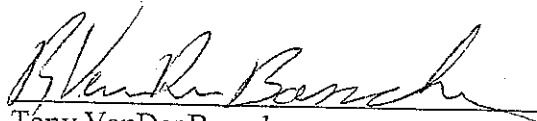
Dated: 3/5/10


Betty M. Lamoreau, Director
Division of Purchases

Dated: _____

Chad Lewis
Department of Health & Human Services

Dated: March 5, 2010


Tony VanDenBossche
State Planning Office

STATEMENT OF APPEAL RIGHTS

This decision constitutes a final agency action. Any aggrieved party may appeal this decision by filing a petition for review in Superior Court for the County where one or more of the parties reside or have their principal place of business, where the agency has its principal office, or where activity which is the subject of this proceeding is located.


Any such appeal must be filed within 30 days of the receipt of this decision.

APPEAL PANEL ON CONTRACT AWARD

Dated: _____

Betty M. Lanoreau, Director
Division of Purchases

Dated: 3/5/10


Chad Lewis
Department of Health & Human Services

Dated: _____

Tony VanDenBossche
State Planning Office

STATEMENT OF APPEAL RIGHTS

This decision constitutes a final agency action. Any aggrieved party may appeal this decision by filing a petition for review in Superior Court for the County where one or more of the parties reside or have their principal place of business, where the agency has its principal office, or where activity which is the subject of this proceeding is located. Any such appeal must be filed within 30 days of the receipt of this decision.

