

BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

IN RE: Georgia Power Company)
2015 RFP Process and Proxy Contracts) Docket No. 27488-U
)

**REQUEST OF ALBANY GREEN ENERGY LLC FOR APPROVAL
OF CHANGE OF CONTROL TRANSACTION AND
AMENDMENTS TO THE POWER PURCHASE AGREEMENT**

I. BACKGROUND

Albany Green Energy LLC (“AGE”) and Georgia Power Company (“Georgia Power”) are parties to that certain Contract For The Purchase of Firm Capacity And Energy From a Renewable Qualifying Facility Utilizing Proxy Methodology dated November 1, 2013 (the “Agreement”), as amended, pursuant to which AGE will sell to Georgia Power, and Georgia Power will purchase from AGE, electric energy and capacity associated with the approximately 42 MW (net) biomass cogeneration power plant that is currently being developed by AGE in Albany, Georgia (the “Facility”) consistent with the Georgia Public Service Commission (the “Commission”) Orders in Docket Nos. 4822 and 19279.

For more than eighteen months, AGE and its affiliates have been working closely with The Procter & Gamble Paper Products Company (“P&G”) to develop the Facility, using a team approach. The construction, operation and ownership of the Facility will provide long term jobs in Georgia and utilize a plentiful Georgia-based renewable fuel source, while helping establish and diversify Georgia’s renewable installed generation base, which is one of the key objectives of the Commission and Georgia Power. Moreover, the Facility will be co-located with, and provide a significant amount of renewable energy generated steam to, the paper manufacturing facility of P&G in Albany, Georgia (the “Albany Plant”), which is one of the largest industrial customers of Georgia Power and one of the largest employers in the Albany area. As such, the project has the potential to make the Albany Plant P&G’s single largest renewable energy site globally. In addition to the sustainability benefits, it will allow the utilities cost at the Albany Plant to remain more competitive with sister sites in other states that already have large scale combined heat and power cogeneration onsite.

During the course of our negotiations with P&G, AGE and P&G have worked diligently with numerous potential investors. On May 15, 2014, Sterling Planet Holdings, Inc., an affiliate of AGE (“Sterling Planet”), and Constellation NewEnergy, Inc. (“Constellation”), an independent power

producer with access to significant financial resources and technical expertise that desires to finance, construct, own and operate the Facility, entered into a letter of intent (“LOI”). Under the LOI, Sterling Planet and Constellation agreed to negotiate, among other documents, a purchase and sale agreement (“PSA”), pursuant to which Sterling Planet would cause the sale of AGE to Constellation or its designee, subject to the terms and conditions to be set forth in the PSA. The entire project is in the final stages of formal due diligence by P&G and Constellation. One of the closing conditions under the PSA will be the finalization and execution of the Steam Supply Agreement and Ground Lease between AGE and P&G. Constellation is working diligently with P&G and AGE to finalize these critical project agreements. As a result, AGE, P&G and Constellation anticipate that such condition will be satisfied on or about September 1, 2014, at which time the closing of the transactions contemplated under the PSA is anticipated to occur (the “Closing Date”). Prior to AGE’s selection of Constellation as a strategic investor, AGE, working with P&G, began initial construction activities in December 2013 and has continuously worked on such construction efforts since. As a result, AGE has incurred significant expenses and continues to do so in its efforts to facilitate a complex multi-party partnership with Constellation and P&G.

In connection with negotiating the PSA, Constellation has selected DCO Energy, LLC (“DCO”) as its preferred engineering, procurement and construction contractor to finalize construction of the Facility, subject to the execution of a binding engineering, procurement and construction contract, which is also under final negotiations. DCO has informed Constellation that, following the Closing Date, it will take thirty-three (33) months, commencing upon the anticipated construction notice to proceed date of September 1, 2014, to complete construction of the Facility and achieve commercial operation in accordance with Prudent Industry Practices (as defined under and required by the Agreement).

Because the project’s projected returns are extremely challenging for the overall partnership, it is critically important to the project that certain dates set forth in the Agreement be extended to eliminate liquidated damages that would result from constructing the Facility in accordance with Prudent Industry Practices over a 33-month schedule, and extend the term of the Agreement to allow Constellation to realize the economic benefits contemplated by the Agreement over a 20-year term.

Without significant extensions that reflect the particular factors associated with the project, the project is not expected to be economically viable and the benefits associated with the Facility, including with respect to P&G’s goals for its Albany Plant and more broadly as part of P&G’s corporate sustainability goals, are unlikely to be realized. If we are able to go forward, however, this is the type of project that will meet a portion of the need identified in Georgia Power’s Request for

Proposals (“2015 RFP”) - a significant and new biomass combined heat and power project that will provide important benefits to Georgia.

II. REQUEST FOR AMENDMENT AND CONSENT

1. Required Commercial Operation Date. Based upon the 33-month schedule provided by DCO and a contemplated construction notice to proceed date of September 1, 2014, Constellation contemplates achieving the Required Commercial Operation Date, or RCOD (as defined in the Agreement), on or about June 1, 2017. Accordingly, we request that the RCOD be changed from December 1, 2015, to June 1, 2017.

2. Termination Date. Based on such RCOD, we request that the termination date that is one year after the RCOD, as set forth in Section 2.7 of the Agreement, be changed from December 1, 2016 to June 1, 2018 (with corresponding changes to modifying the chart set forth therein as follows: (i) replace “January-May” with “June-October”, (ii) replace “June” with “November”, (iii) replace “July” with “December”, (iv) replace “August” with “January”, and (v) replace “September” with “February”).

3. Term. Based upon such RCOD of June 1, 2017, we request that the Term (as defined in the Agreement) be extended to May 31, 2037 so the Agreement remains a 20-year term, both so that Constellation is able to realize the economic benefits contemplated by the Agreement, and to match the term of the Agreement with the term of the Steam Supply Agreement, which is also important to the overall project. Because capacity payments in the Agreement do not begin to escalate until the Commencement of Service Date (as defined in the Agreement), moving these dates has the effect of lowering the capacity rates over the projected 20-year term, as such period begins and ends later, which is a benefit for Georgia Power’s rate payers.

4. Delivery of Milestone Schedule. We request that Section 2.5.2 of the Agreement be amended by deleting the phrase “After 250 days from the date of the Agreement” and replacing it with the phrase “On or before September 1, 2014”. This is the date by which Constellation has indicated it will be able to provide the milestone schedule described therein.

5. Maintenance. In addition to the changes in the dates described above, Constellation and DCO have had detailed discussions with potential engineering firms and original equipment manufacturers for the Facility and, based on such discussions and Prudent Industry Practices, understand that the Facility will require one major maintenance period of up to eight (8) weeks in duration every five-year period during the Term. Therefore, we request that the Agreement be amended to account for such periodic major maintenance of the Facility.

6. Other Changes. In addition to the above requested consent and amendments, based upon Constellation's concerns related to the uncertainty or assumptions associated with specific language in the Agreement, Constellation has requested additional minor changes, as further described below:

a. Limitation of Remedies, Liability and Damages. We request that the last sentence of Section 14.5 be amended by inserting the words "PLUS THE PRESENT VALUE OF THE ALL POWER EXPECTED TO BE DELIVERED HEREUNDER AT THE CONTRACT PRICE" after the words "FOLLOWING TERMINATION" and by adding "LESS THE PRESENT VALUE AT THE THEN MARKET PRICE OF ALL POWER EXPECTED TO BE DELIVERED HEREUNDER" at the end of such sentence.

b. Service Contract. We request a new Section 13.1.2.7 be added to the Agreement to provide that the Parties intend that this Agreement be treated as a "service contract" within the meaning of Section 7701(e)(3) of the Internal Revenue Code of 1986, as amended ("Code"), and shall not be treated as a lease for federal and other applicable income tax purposes."

c. Losses. We request a change to Section 14.3.2 to amend the definition of "Losses" as follows: "Losses" shall mean an amount equal to the economic loss determined on a mark to market basis (exclusive of Costs) and including the value of any lost investment tax credit pursuant to Section 48 of the Code or lost depreciation deductions pursuant to Section 168 of the Code, if any, to it resulting from the termination of its obligations with respect to this Agreement."

d. Confirmation of Satisfaction of Conditions Subsequent. We request a provision whereby Georgia Power confirms that all rights that the Parties had or have under the Agreement to terminate the Agreement as a result of the occurrence or non-occurrence of the Required Threshold Date under Section 2.6 of the Agreement or the conditions subsequent set forth in Sections 3.2.1 through 3.2.4 of the Agreement have ceased and terminated without either Party seeking to terminate the Agreement and the Agreement is and remains in full force and effect as of the date of the amendment.

e. Regulatory Matters. We request that Section 16.1 of the Agreement be amended by adding the following sentence to the end of such Section: "Notwithstanding anything to the contrary in this Agreement, neither Party shall seek to have GPSC deny such authorization on its own initiative for reasons solely related to changed economic circumstances or market conditions affecting this Agreement." This is identical to language provided in other renewable energy power purchase agreements approved by Georgia Power in connection with certain solar projects.

7. Additional Capacity. We request the opportunity to increase the size of the Facility, at our option, by up to eight (8) MWs, for a total of 50 MWs, should any additional megawatts that were allocated to biomass projects become available because the power purchase agreements associated with such biomass projects become terminated within the next six (6) months. This would allow the Facility to operate more efficiently by fully utilizing its design capabilities, thus helping Georgia Power and the Commission achieve a higher biomass generation base in Georgia.

8. Change of Control Transaction. In connection with the closing contemplated under the PSA, Constellation and DCO will be forming a new limited liability company (“NewCo”) to acquire and own AGE at the Closing Date. NewCo will be owned by Constellation and DCO, or affiliates thereof, in percentages yet to be determined during construction, and will be owned 90% by Constellation or an affiliate and 10% by DCO after the Facility is completed. The closing under the PSA will constitute a Change of Control Transaction (as defined in the Agreement), which requires the consent of Georgia Power under Section 22.1.3 of the Agreement. Accordingly, we request such consent provided that the closing contemplated in the PSA occurs and Constellation or its affiliate owns at least 50% of AGE following the Commencement of Service Date (as defined in the Agreement).

9. Eligible Collateral. Because of such contemplated Change of Control Transaction, Constellation is prepared to provide the Eligible Collateral (as defined in the Agreement) in form of a QF Guaranty issued by Exelon Generation Company, LLC, an investment grade rated affiliate of Constellation (“ExGen”) by August 1, 2014, and that such security remain in place after the Change of Control Transaction, as required under Section 22.1.4 of the Agreement, provided that Constellation and ExGen shall have the right to terminate the QF Guaranty without any further obligations if (i) the Closing does not occur on or prior to September 15, 2014 and (ii) Georgia Power and AGE execute a binding amendment, acceptable to the Commission, that reflects the requested changes described herein. Accordingly, we request that the Agreement, including the form of the QF Guaranty therein, be amended to allow for such changes and to allow for this posting by ExGen by August 1, 2014, as required by Georgia Power and the Commission.

We respectfully request that the Commission approve our requests described herein. We appreciate the continued leadership of the Commission to establish biomass renewable power as an important and growing industry in the state for decades to come. We also appreciate Georgia Power’s continued support of the QF proxy contract program.

III. CONCLUSION

WHEREFORE, Albany Green Energy LLC respectfully requests expedited approval of this request to amend the Agreement and to consent to the Change of Control Transaction described herein. If possible, we request that this item be placed on the Commission's July 10, 2014 Energy Committee agenda.

Respectfully submitted this 3rd day of July, 2014.

Therrell Murphy, Jr.
President
Albany Green Energy LLC