

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8840

Petition of Ampersand Gilman Hydro, LP for approval)
of a long-term power purchase agreement pursuant to)
Board Rule 4.100)

Order entered: 4/21/2017

ORDER GRANTING MOTION TO DISMISS

I. BACKGROUND

On September 2, 2016, Ampersand Gilman Hydro, LP (“Ampersand” or “Petitioner”) filed with the Vermont Public Service Board (“Board”) a petition (“Petition”) seeking approval, pursuant to Board Rule 4.100, of a 20-year power purchase agreement (“PPA”) with Vermont Electric Power Producers, Inc. (“VEPP Inc.”). According to the Petition, the PPA would commence on April 1, 2018,¹ for the sale and purchase of electric energy and capacity from Ampersand’s 4.9 MW hydroelectric facility on the Connecticut River in Gilman, Vermont. On September 25, 2016, certain amendments of Rule 4.100 went into effect (“Amended Rule 4.100”).²

Green Mountain Power Corporation (“GMP”) filed a motion to dismiss the Petition (“Motion” or “Motion to Dismiss”) pursuant Board Rule 2.208.

In this Order we grant GMP’s Motion to Dismiss pursuant to V.C.R.P. 12(b)(6) and dismiss Ampersand’s Petition.

II. PROCEDURAL HISTORY

On September 2, 2016, Ampersand filed its Petition.

On November 29, 2016, the Vermont Department of Public Service (“Department”) filed a letter requesting a hearing on the Petition.

1. The proposed PPA “will commence at the time the existing one-year PPA expires, on April 1, 2018.” Petition at 2, para. 6. The existing PPA was approved by the Board on June 21, 2016, in Docket No. 8717.
2. The Board filed the Amended Rule 4.100 with the Secretary of State on August 31, 2016.

On November 29, 2016, GMP filed a Motion to Dismiss; in the alternative, GMP requested a hearing on the Petition.

On December 1, 2016, the City of Burlington Electric Department (“BED”) filed a letter in support of GMP’s filing.

On December 14, 2016, Ampersand filed a response to GMP’s Motion and to the letters filed by the Department and BED.

On December 29, 2016, GMP filed a reply to Ampersand’s response.

No other filings were submitted to the Board.

III. THE MOTION AND PARTY POSITIONS

GMP

GMP moves to dismiss Ampersand’s Petition pursuant to Board Rule 2.208, arguing that the Petition seeks approval of a “contract with terms (including contract duration) that are contrary to the provisions of Board Rule 4.100, as amended (the ‘Amended Rule [4.100]’), which applies to all contracts or obligations formed subsequent to September 15, 2016” and that the Petitioner has “no right to application of the prior rule (‘Superseded Rule 4.100’) because [it has] no currently effective contract or obligation, and has no vested right to be considered under that Rule.”³ GMP argues that the doctrine of vested rights is inapplicable to pending contract requests where the developer has failed to establish a legally enforceable obligation.⁴ GMP maintains that Ampersand has no vested rights under the pending ordinance doctrine because the Petition was filed after the rulemaking that culminated in Amended Rule 4.100 was noticed and because Ampersand does not yet have Board approval for its proposed PPA.⁵

GMP also argues that Ampersand’s proposal cannot be found to have established a legally enforceable obligation on the date of the Petition filing because Ampersand was obligated

3. GMP Motion to Dismiss at 1-2.

4. *GMP Motion to Dismiss* (11/29/16) at 5-6 (citing *Pet. of Dep’t. of Pub. Serv.*, 157 Vt. 120, 127 (1991), holding that a pending application for a Rule 4.100 contract does not constitute a legally enforceable obligation – the vested rights doctrine “should not be interpreted as an open-ended right to ‘freeze’ the applicable regulatory requirements by proposing a development with inadequate specificity.”).

5. *Id.* at 6-7 (citing *In re Handy*, 171 Vt. 336, 350 (2000), holding that “jurisdictions keying vested rights to the date of application generally have an exception for cases where a zoning change is pending on that date.”).

at that time under another contract, which does not expire until April 1, 2018. GMP contends that Ampersand's reliance on 18 C.F.R. § 292.304 is misplaced because that provision does not provide a qualifying facility ("QF")⁶ with the right to establish a legally enforceable obligation months or years before the obligation is incurred, and that Ampersand's obligation is incurred on the date on which a binding obligation to deliver energy exists.⁷

GMP argues that Ampersand has formed no obligation prior to the effective date of the Amended Rule and that it therefore has no vested right to the procedures or rate options that were in existence at the time its Petition was filed. GMP maintains that the Board should dismiss the Petition because it seeks relief that is not available to Ampersand under the Amended Rule and because Ampersand has no vested rights to be considered under the Superseded Rule.

Department

The Department states that "Rule 4.100, as it currently exists, does not contemplate the type of contract sought by Ampersand." The Department maintains that the Amended Rule 4.100 does not provide for agreements between QFs and a statewide purchasing agent or for access to the rate schedules established in Docket No. 8010. Accordingly, the Department argues, the basis for the Petition is unclear and a hearing is warranted.

BED

BED supports GMP's Motion to Dismiss and, in the alternative, GMP's request for a hearing.

Ampersand

Ampersand argues that the Federal Energy Regulatory Commission ("FERC") has expressly held that states may not require a QF to submit a written or executed PPA as a

6. "Qualifying Facility" means a co-generation facility or a small power production facility, which is a qualifying facility under 18 C.F.R. §§292.201-207. *See also* Rule 4.103(A)(9).

7. GMP Reply of 12/29/16 at 3.

condition precedent to the creation of a legally enforceable obligation.⁸ Ampersand maintains that it obtained a legally enforceable obligation “when it submitted its Petition to the Board for approval,”⁹ and that Amended Rule 4.100 applies only to “contracts and obligations or extensions of prior contracts or obligations formed subsequent to the effective date of [the Amended Rule]” – that is, September 15, 2016.¹⁰

Ampersand asserts that its Petition was administratively complete at the time of its filing, thus vesting Ampersand’s right to the then-existing regulations and rates, and that because Ampersand has acquired a legally enforceable obligation as a matter of law, dismissal is not warranted and no hearing is required or necessary.

IV. DISCUSSION AND CONCLUSION

Ampersand seeks the Board’s review and approval pursuant to Superseded Board Rule 4.100 of a 20-year PPA for the sale to VEPP Inc., as purchasing agent,¹¹ of electric energy and capacity from its existing hydroelectric facility in Gilman, Vermont. The proposed PPA incorporates non-levelized avoided-cost rates as established by the Board’s Order in Docket No. 8010 on February 9, 2015.

Ampersand filed its Petition on September 2, 2016, two days after certain amendments to Rule 4.100 had been adopted and 23 days before those amendments went into effect. The resulting Amended Rule 4.100 eliminated the role of the purchasing agent and provided that QFs such as Ampersand’s hydroelectric facility are to negotiate directly with their interconnecting electric utilities for the sale of their output.

GMP moves to dismiss the Petition pursuant to Board Rule 2.208, which states:

Substantially defective or insufficient filings may be rejected by the Board, provided, that if it will not unreasonably delay any proceeding nor unreasonably

8. *Ampersand Opposition to Motion* (12/14/16) at 5, citing *West Penn Power Co.*, 71 FERC ¶ 61,153 at 61,495 (1995) and *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P 35 (2011).

9. *Ampersand Response* (12/14/16) at 3.

10. *Id.* at 9.

11. VEPP Inc. is the designated purchasing agent under Superseded Rule 4.100 for PPAs approved pursuant to that rule.

adversely affect the rights of any party, the Board shall allow a reasonable opportunity to a party to cure any defect or insufficiency. . . . A filing is substantially insufficient if, inter alia, it fails to include all material information required by statute or rule.

GMP does not argue in its Motion, however, that Ampersand's Petition "fails to include all material information required by statute or rule." Rather, GMP argues that the PPA should be considered pursuant to Amended Rule 4.100, not pursuant to Superseded Rule 4.100, which went into effect on September 15, 2016. Accordingly, GMP asserts that the Petition should be dismissed as a matter of law because its terms are "contrary to the provisions of Board Rule 4.100, as amended."

Accordingly, we treat GMP's Motion as a motion pursuant to V.C.R.P. 12(b)(6) to dismiss the Petition for failure to state a claim upon which relief can be granted. A motion to dismiss tests the sufficiency of the allegations in the Petition, rather than the sufficiency of the proof.¹² In considering a Rule 12(b)(6) motion, the Board may consider matters set forth in the pleadings, including the filings that other parties have made in response to the Petition.¹³ The Board may not dismiss a petition unless it appears beyond doubt that there exist no circumstances or facts that the petitioner could prove about its claim that warrant relief.¹⁴

The PPA proposed here is for the full output of Ampersand's hydroelectric facility located in Gilman, Vermont. The PPA would effectively replace a 1-year PPA approved by the Board in Docket No. 8717 by Order of June 21, 2016. That PPA is set to expire on March 31,

12. *Powers v. Office of Child Support* (2002) 173 Vt. 390, 795 A.2d 1259 (the "purpose of a motion to dismiss is to test the law of the claim, not the facts which support it," citing *Levinsky v. Diamond*, 140 Vt. 595, 600, 442 A.2d 1277, 1280 (1982)). See also *Petition of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.*, Docket No. 6812, Order of 8/20/03, at 6.

13. *Ondovchik Family Limited Partnership v. Agency of Transportation*, 2010 Vt. 35, 187 Vt. 556, 561-562, 996 A.2d 1179, 1182 (parties must be afforded an opportunity to address the asserted grounds for dismissal because the court cannot know, without hearing the parties, whether the plaintiff may be able to amend the complaint sufficiently to state a claim entitled the plaintiff to relief).

14. *Ass'n of Haystack Property Owners, Inc. v. Sprague* (1985) 145 Vt. 443, 446, 494 A.2d 122, 124 (a court "should not dismiss a cause of action for failure to state a claim upon which relief may be granted 'unless it appears beyond doubt that there exist no circumstances or facts which the plaintiff could prove about the claim made in his complaint which would entitle him to relief,'" citing *Levinsky v. Diamond*, 140 Vt. 595, 600-1, 442 A.2d 1277, 1280-81 (1982)).

2018. Accordingly, the PPA proposed in this case would commence no earlier than April 1,

2018. In addition, the proposed PPA states that the purchase agreement:

shall become effective upon its execution by Purchasing Agent, and is of no force and effect whatsoever until that time. Both Producer and Purchasing Agent shall execute this Agreement within sixty (60) calendar days of the Board's Order approving this Agreement...¹⁵

Ampersand argues that the proposed PPA should be reviewed and approved pursuant to Rule 4.100 as it was in effect at the time that Ampersand filed the proposed PPA with the Board for approval. Ampersand maintains that it established a legally enforceable obligation when it filed its Petition, and that the FERC has held that “when a state limits the methods through which a legally enforceable obligation may be created to only a fully executed contract, the state’s limitation is inconsistent with PURPA and our regulations implementing PURPA.”¹⁶

The terms of the PPA itself, however, as well as the Superseded Rule, state that the agreement is not effective until execution, which can occur only after Board approval.¹⁷ Indeed, we have held that the mere proposal of a contract with the purchasing agent does not create a legally enforceable obligation.¹⁸ Instead, under the Superseded Rule, a legally enforceable obligation arose only after the Board approved the contract after notice and opportunity for hearing.¹⁹

Amended Rule 4.100 went into effect on September 15, 2016. The Petition was filed on September 2, 2016. Given the due process requirements for notice and opportunity for a hearing

15. PPP at 4, para. 2.

16. See, e.g., *Ampersand Response* (12/14/16) at 1, 3, 5, 7, 8, and 9, citing *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P 30 (2011).

17. *Petition* at Exhibit AGH-AJG-2 (Draft PPA) at 4, Section 2.

18. See *Petition of Swanton Wind, LLC*, Docket No. 8571, Order of 3/2/17 at 21 (in submitting a contract with the purchasing agent for review by the Board, the petitioner “obligated itself not to deliver power pursuant to the terms of that proposed contract, but to obtain the regulatory approvals necessary for it to become obligated to deliver such power”).

19. *Id.* at 19 (a legally enforceable obligation “would have arisen under the [Superseded] Rule only at the time the Board made affirmative findings under the substantive criteria of 30 V.S.A. Section 248(b)”). See also Superseded Rule 4.104(A) (“The purchasing agent shall not be empowered to enter into any agreement for purchases from a qualifying facility until such agreement shall have been approved by the Board. Such approval shall be granted only after notice to the purchasing agent, the qualifying facility and all Vermont retail electric utility companies and opportunity for a hearing.”)

under Superseded Rule 4.104, Board approval could not feasibly have been achieved prior to the Amended Rule going into effect 13 days after the Petition was filed. Thus, a legal obligation could not have been established under the Superseded Rule 4.100.

We also cannot consider Ampersand's request under the Amended Rule, which no longer allows for sales through a purchasing agent to the Vermont electric composite system or the rates that were established in Docket No. 8010, as proposed by Ampersand. Instead, Ampersand must pursue direct negotiations with its interconnecting electric utility. For these reasons, we conclude that the relief sought by Ampersand in this case is no longer available as a matter of law. Therefore, we grant GMP's motion to dismiss Ampersand's Petition. Ampersand may seek a contract with GMP pursuant to Amended Rule 4.100.

Accordingly, Ampersand's Petition is dismissed.

SO ORDERED.

Dated at Montpelier, Vermont, this 21st day of April, 2017.

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PUBLIC SERVICE
BOARD
OF VERMONT

OFFICE OF THE CLERK

FILED: April 21, 2017

ATTEST: Judith C. Whitney
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.

PSB Case No. 8840 - SERVICE LIST

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