STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Ampersand Gilman Hydro, LP, for approval of a proposed power purchase agreement between Ampersand Gilman Hydro, LP, and the Rule 4.100 Purchasing Agent	)))))	Docket No. 8840

AMPERSAND GILMAN HYDRO, LP'S MOTION TO RECONSIDER ORDER GRANTING MOTION TO DISMISS

Ampersand Gilman Hydro, LP ("AGH"), through undersigned counsel, moves the Board pursuant to V.R.C.P. 59(e) to reconsider its April 21, 2017 Order Granting Motion to Dismiss. The Board overlooked controlling FERC case law cited in AGH's opposition to Green Mountain Power Corporation's ("GMP") Motion to Dismiss. Had the Board considered those cases, it would have reached the opposite result.

The procedural and factual background of this case is set forth in detail in AGH's December 14, 2016 *Consolidated Response to GMP, BED, and DPS Filings*. In brief, on July 14, 2016, AGH obtained a power purchase agreement ("PPA") from the Purchasing Agent under Rule 4.100 as it existed prior to September 15, 2016 ("Superseded Rule 4.100"). On September 2, 2016, AGH filed a petition for approval of the AGH PPA pursuant to Superseded Rule 4.104(A). On November 29, 2016, GMP moved to dismiss AGH's petition on the grounds that AGH did not obtain a legally enforceable obligation when it filed the petition. AGH opposed the motion in its *Consolidated Response to GMP, BED, and DPS Filings*. On April 21, 2017, the Board granted the motion to dismiss. AGH now moves the Board to reconsider its dismissal of the petition.

I. Standard of Review

Under V.R.C.P. 59, after entering a final order, the Board "may reconsider issues previously before it, and generally may examine the correctness of the judgment itself." *In re SP Land Company, LLC*, 2011 VT 104, ¶ 16, 190 Vt. 418. Reconsideration may properly be granted, in pertinent part,

"to correct manifest errors of law or fact upon which the judgment is based." *McCullough Crushing, Inc. A250 Expansion*, Nos. 3-1-10 Vtec, 179-10-10 Vtec, 2017 WL 818690 (Vt. Super. Ct. Envtl. Div. Feb. 16, 2017). A motion for reconsideration is appropriate "where a court overlooks controlling decisions or factual matters that were put before it on the underlying motion . . . and which, had they been considered, might have reasonably altered the result before the court." *Banco de Seguros Del Estado v. Mutual Marine Offices, Inc.*, 230 F.Supp.2d 427, 428 (S.D.N.Y. 2002) (quotation omitted).

With respect to ruling on a motion to dismiss, as the Board itself stated, it 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. *Order Granting Motion to Dismiss* at 5, citing *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).

II. Argument

In this case, the Board overlooked a series of FERC cases put before it by AGH: *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011); *JD Wind 1, LLC*, 129 FERC ¶ 61,148 (2009); *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (2012); *Rainbow Ranch, LLC*, 139 FERC ¶ 61,077 (2012); and *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (2013). Those cases establish that a state utilities commission may not require a QF to submit a written or executed PPA as a condition precedent to the creation of a legally enforceable obligation. The Board noted AGH's argument on this point, but dismissed it on the grounds that under the terms of the PPA and the Superseded Rule, "the

agreement is not effective until execution, which can only occur after Board approval." *Order Granting Motion to Dismiss* at 6.

But that is precisely the rule that FERC has invalidated. Under the cases cited above, "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." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P 30 (2011). The reason is that a legally enforceable obligation is not the same as a contract: indeed, FERC's regulations "expressly use the terms 'contract' and 'legally enforceable obligation' in the disjunctive." *Cedar Creek Wind, supra,* 137 FERC ¶ 61,006 at P 35. Thus, FERC determined that PPAs that "were not signed by any party" were legally enforceable obligations because a legally enforceable obligation "can pre-date the signing of the contract." *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 at P 40.

The Board's Order also fails to draw the necessary distinction between when a "legally enforceable obligation" arises, and when a contract becomes effective after Board approval. Rather, the Board assumes that merely because the Superseded 4.100 Rule required Board approval prior to the execution of a contract (after notice and hearing), then it must be the case that no legally enforceable obligation arose. *Order Granting Motion to Dismiss* at 6. Nowhere in the Superseded 4.100 Rule, however, is the term "legally enforceable obligation" defined or used, and the Board's reasoning to look to its rule without any further analysis or reference to federal case law is effectively a tautology. As AGH pointed out in its original briefing, a legally enforceable obligation can arise at the time a petition is filed, while at the same time preserving a utility commission's continued ability to review and approve a contract prior to its execution. See *Armco Advanced Materials Corp. v. Pennsylvania Pub. Util. Comm'n*, 579 A.2d 13371347 (Pa. Commonw. Ct. 1990), aff'd. per curiam, 634

A.2d 207 (1993), cert. denied sub nom., *West Penn Power Co. v. Pennsylvania Pub. Util. Comm'n*, 513 U.S. 925 (1994).[1] FERC declined to disturb these rulings in *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995). The Board's Order failed to discuss or distinguish these cases.

III. Conclusion

The Board's Order Granting Motion to Dismiss does not address the holdings discussed in AGH's briefing and outlined above, or explain how the Board's rule conditioning the formation of a legally enforceable obligation on review and approval (and ultimately execution) of the PPA could be consistent with FERC's decisions. For the reasons set forth in AGH's *Consolidated Response to GMP, BED, and DPS Filings*, a legally enforceable obligation arose during the time when the Superseded 4.100 Rule was in effect. As a result, the legal standard for granting a motion to dismiss has not been met, and AGH has the right to proceed with Board review of its Petition under the Superseded 4.100 Rule. AGH thus respectfully requests that the Board modify its decision and deny the Motion to Dismiss.

Dated at Burlington, Vermont, this 5th day of May, 2017.

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[1] *See also Pennsylvania Elec. Co. v. Pennsylvania Public Utility Comm'n*, 677 A.2d 831, 835 (Pa. 1996) ("Obviously, the mere filing of a petition with the PUC does not create a contract between a utility and a QF. However, the filing is deemed to create an obligation . . . .").