

STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Ampersand Gilman Hydro, LP for)
approval of a Rule 4.100 power purchase)
agreement)

Docket No. 8840

**GREEN MOUNTAIN POWER'S RESPONSE TO
AMPERSAND GILMAN HYDRO'S MOTION TO RECONSIDER**

By this filing, Green Mountain Power (“GMP”) responds to Ampersand Gilman Hydro’s (“Ampersand” or “AGH”) May 5, 2017 Motion to Reconsider the Board’s April 21, 2017 Order Granting GMP’s Motion to Dismiss (“Order”). For the reasons set forth herein, as well as those set forth in GMP’s Motion to Dismiss and its December 29, 2016 Reply Brief in this matter, the Vermont Public Service Board (“Board”) should deny Ampersand’s Motion to Reconsider.

First, Ampersand’s contention that the Board “overlooked a series of FERC cases put before it by AGH” is not accurate.¹ The Board considered and rejected Ampersand’s arguments regarding these FERC decisions on page 6 of its Order. There, the Board acknowledged Ampersand’s contention that it had a legally enforceable obligation as well as its assertion that a state cannot, under the Public Utility Regulatory Policies Act (“PURPA”), limit the method through which a legally enforceable obligation may be created by requiring a fully executed contract. The Board rejected this contention because (1) under the terms of the proposed PPA

¹ Ampersand Gilman Hydro, LP’s Motion to Reconsider Order Granting Motion to Dismiss at 2 (filed May 5, 2017)(“Motion to Reconsider”)(citing *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P 30 (2011); *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 at P 40 (2013); *JD Wind I, LLC*, 130 FERC ¶ 61,127 at P 23 (2010); *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (2012); *Rainbow Ranch, LLC*, 139 FERC ¶ 61,077 (2012)).

itself, it is not effective until after Board approval, and (2) a legally enforceable obligation arises under Superseded Board Rule 4.100 only after the Board approves the proposed contract.²

Second, Ampersand’s contention that the Board’s Order runs afoul of the purported rule that a state cannot require an executed contract as a condition precedent to a legally enforceable obligation is misplaced.³ The Board did not hold that an executed contract is a condition precedent to a legally enforceable obligation. To the contrary, the Board relied on its holding in *Swanton Wind* for the proposition that a legally enforceable obligation does not arise until the Board approves the contract.⁴ Accordingly, regulatory approval by the Board is the applicable condition precedent—not an executed contract.

The Board’s conclusion on this point is consistent with the plain language of Superseded Board Rule 4.104(A), which provided that “[t]he 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.” The Board’s conclusion is also compelled by binding Vermont Supreme Court precedent holding that neither PURPA nor FERC regulations entitle Vermont Qualified Facilities (“QFs”) to a legally enforceable avoided cost contract prior to the QF demonstrating compliance with the substantive criteria of 30 V.S.A. § 248 under Superseded Board Rule 4.104(H). This was precisely the Board’s holding in *Swanton Wind*—no legally enforceable obligation arises until the Board makes affirmative findings under Section 248 pursuant Superseded Rule 4.104(H).⁵

² *Petition of Ampersand Gilman*, Docket 8840, Order of 4/21/2017 at 6 (“Order”)(citing *Petition of Swanton Wind, LLC*, Docket No. 8571, Order of 3/2/17 at 21).

³ Motion to Reconsider at 6.

⁴ See Order at 6 (citing *Petition of Swanton Wind, LLC*, Docket No. 8571, Order of 3/2/17 at 21).

⁵ *Petition of Swanton Wind, LLC*, Docket No. 8571, Order of 3/2/17 at 21.

The Board also correctly rejected Ampersand’s contention that FERC decisions in *Cedar Creek Wind*, *Grouse Creek Wind Park*, and others have “invalidated”⁶ the Board’s holding that an obligation under Superseded Rule 4.100 requires Board approval. These FERC decisions are inapposite in Vermont because they only apply where a state implements PURPA through bilateral contracts. In such cases, FERC has concluded that a legally enforceable obligation can arise prior to contract formation in order to “prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs.”⁷ Such a rule cannot apply in Vermont because PURPA is implemented through a regulatory approval process that vests the Board with the authority to review and approve proposed PPAs under PURPA. Unlike the case of *Grouse Creek* or *Cedar Creek*, Vermont utilities cannot circumvent PURPA regulations merely by refusing to enter contracts, and therefore the rule designed to prevent this circumnavigation is simply inapplicable.

Furthermore, at least one of the cases cited by Ampersand specifically does not support its contention that filing a petition for a PPA gives rise to a legally enforceable obligation. Ampersand cites *West Penn Power* for the proposition that the mere filing of a petition before a state PUC creates an obligation,⁸ but in fact, *West Penn Power* stands for the proposition that, “It is up to the States, not [FERC], to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law.”⁹ Far from invalidating Vermont’s rule, FERC has explicitly left this question to

⁶ See Motion to Reconsider at 3.

⁷ *Grouse Creek Wind Park, LLC Grouse Creek Wind Park II, LLC*, 142 FERC ¶ 61187, 61893, 2013 WL 1114898, at *10 (F.E.R.C. Mar. 15, 2013).

⁸ See Ampersand’s Response to GMP Motion to Dismiss (filed Dec. 4, 2016) at 8; Motion to Reconsider at 4.

⁹ *W. Penn Power Co.*, 71 FERC ¶ 61153, 61495 (F.E.R.C. May 8, 1995); see also *Power Resource Group, Inc. v. Pub. Util. Commn. of Texas*, 422 F.3d 231, 239 (5th Cir. 2005) (holding “FERC has given each state the authority to decide when a LEO arises in that state” and therefore “the regulations of other states regarding LEOs have no bearing on the case *sub judice*”).

the states, and in the case of Vermont, found Superseded Rule 4.100 to be consistent with PURPA on multiple occasions.¹⁰ Furthermore, it is hard to square Ampersand’s contention that the *Grouse Creek* line of cases “invalidated” Superseded Rule 4.100 (as construed by the Board and the Vermont Supreme Court), when Ampersand seeks—at the same time—to reap the benefits of a long-term contract under the same regulation.

Finally, Ampersand falsely claims that the Board failed to appreciate the distinction between a legally enforceable obligation and an effective contract, stating that the Board’s reliance on the language of the rule without reference to federal case law is “effectively a tautology.”¹¹ To the contrary, the Board has considered and rejected the contention that under federal case law Superseded Rule 4.100 created an unreasonable obstacle to the formation of a legally enforceable obligation. In *Swanton Wind*, the Board concluded that a legally enforceable obligation only arises after the Board has “made affirmative findings under the substantive criteria of 30 V.S.A. Section 248(b)”¹² pursuant to Superseded Rule 4.104(H). In reaching this conclusion, the Board expressly considered federal case law regarding this issue, holding that the requirement under Superseded Rule 4.100 did not impose an unreasonable obstacle.¹³ Rather, the Board found the rule “specifically established a process” for QFs to pursue an obligation and does “nothing to categorically exclude” any QFs.¹⁴

¹⁰ *Otter Creek Solar LLC*, 143 FERC ¶ 61282, 62969 (F.E.R.C. June 27, 2013) (“The Vermont Commission’s Rule 4.100 program is the Vermont Commission’s implementation of PURPA and Rule 4.100 has been found by the Commission to be consistent with PURPA.”) (citing *Vermont Electric Coop., Inc. v. State of Vermont Pub. Service Board and Vermont Dep’t of Pub. Service*, 25 FERC ¶ 61,273 (1983); *Barnet Hydro Co. v. Central Vermont Pub. Service Corp.*, 95 FERC ¶ 61,257 (2001); *North Hartland, LLC v. Central Vermont Pub. Service Corp.*, 105 FERC ¶ 61,037 (2003)).

¹¹ Motion to Reconsider at 3.

¹² *Swanton Wind* Order at 20.

¹³ *Id.* at 22.

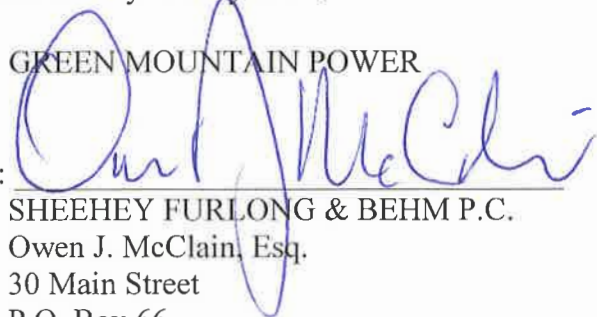
¹⁴ *Id.* at 11.

For the foregoing reasons, as well as the reasons set forth in GMP's Motion to Dismiss and GMP's Reply, the Board appropriately dismissed Ampersand's Rule 4.100 Petition and should deny its Motion for Reconsideration.

Dated at Burlington, Vermont this 22nd day of May 2017.

GREEN MOUNTAIN POWER

By:



SHEEHEY FURLONG & BEHM P.C.

Owen J. McClain, Esq.

30 Main Street

P.O. Box 66

Burlington, VT 05402

(802) 864-9891

omclain@sheeheyvt.com