

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

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

Docket No. 8840

DEPARTMENT OF PUBLIC SERVICE RESPONSE TO
AMPERSAND GILMAN HYDRO, LP'S MOTION TO RECONSIDER

On April 21, 2017, the Public Service Board (Board) dismissed the petition of Ampersand Gilman Hydro, LP (Ampersand) seeking approval of a 20-year power purchase agreement (PPA) with Vermont Electric Power Producers, Inc. (VEPPI) pursuant to the now superseded version of Board Rule 4.100 (Superseded Rule). *Petition of Ampersand Gilman Hydro, LP*, Docket No. 8840, Order of 4/21/17 (April 21 Order). On May 5, 2017, Ampersand filed a motion to reconsider (Motion) the Board's April 21 Order pursuant to Vermont Rule of Civil Procedure 59(e). The Department of Public Service (Department) respectfully opposes Ampersand's Motion, as discussed more fully below.

BACKGROUND

Ampersand is a Qualifying Facility (QF) that is currently selling its output to VEPPI pursuant to a one-year PPA, approved under the Superseded Rule in Docket No. 8717. That contract was approved by the Board on June 21, 2016, and it will terminate on April 1, 2018. More than a year and a half in advance of that contract's termination, on September 2, 2016, Ampersand filed its request for a 20-year PPA under the Superseded Rule.

During 2016, the Board was engaged in a lengthy review of the Superseded Rule. On September 15, an amended version of Rule 4.100 took effect (Amended Rule).¹ The Amended

¹ In preparing this Response, the Department has noticed what appears to be clerical mistake on page 4 of the April 21 Order. The Board stated: "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." Because the Amended Rule took effect on September 15, 2016, the Department believes that the reference to "23 days before those amendments went into effect" should be changed to "13 days before those amendments went into effect."

Rule fundamentally restructured the manner in which the Public Utility Regulatory Policies Act of 1978 (PURPA) is implemented in Vermont. Under the Superseded Rule, VEPPI acted on behalf of the Distribution Utilities, and under the close supervision of the Board, in fulfilling PURPA's mandatory purchase obligation. Under the Amended Rule, the role of VEPPI is eliminated and replaced with a more traditional method of PURPA implementation, in which QFs and Distribution Utilities negotiate directly, with the Board acting in a manner to resolve disputes.

Ampersand's request for a PPA (beginning more than a year and a half hence) was filed after all steps in the rulemaking process had been completed, save for the expiration of the 15-day period between when the Amended Rule was adopted, and when it would become effective.

On November 29, 2016, Green Mountain Power Corporation (GMP) filed a motion to dismiss Ampersand's petition. Among other things, GMP argued that Ampersand's petition did not establish a legally enforceable obligation on the date of the petition because Ampersand was obligated under another contract through April 1, 2018. GMP also argued that because Ampersand had not created a legally enforceable obligation prior to the effectiveness of the Amended Rule, and because it had no vested right to the Superseded Rule, it is not entitled to a PPA under that rule.

In the April 21 Order, the Board granted GMP's motion to dismiss. The Board, relying on the rationale in a recently issued order, *Petition of Swanton Wind, LLC*, Docket No. 8571, Order of 3/2/17 (*Swanton Wind*), explained why Ampersand's September 2 petition did not create a legally enforceable obligation.

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. Indeed, we have held that the mere proposal of a contract with the purchasing agent does not create a legally enforceable obligation. Instead, under the Superseded Rule, a legally enforceable obligation arose only after the Board approved the contract after notice and opportunity for hearing.

April 21 Order at 6 (internal footnotes omitted). The Board further determined that in light of the timing of the filing (September 2, 2016) and the impending effectiveness of the Amended Rule (September 15, 2016), Board approval of the PPA could not feasibly have been achieved prior to the Amended Rule going into effect. In light of the due process requirements set forth under the Superseded Rule, the Board concluded that a legal obligation could not have been established under the Superseded Rule. *Id.* at 6-7.

AMPERSAND'S MOTION FOR RECONSIDERATION

On May 5, Ampersand filed its Motion. Ampersand argues that in granting GMP's motion to dismiss, the Board overlooked a series of orders by the Federal Energy Regulatory Commission (FERC), which Ampersand claims 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. Motion at 2 (referencing *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) (*Grouse Creek*)). Ampersand argues that the Board's determination, set forth in the block quote above, is contrary to this line of FERC precedent.

Ampersand further argues that the April 21 Order fails to draw the necessary distinction between when a legally enforceable obligation arises and when a contract becomes effective after Board approval under the Superseded Rule. *Id.* at 3. Ampersand contends that the Board improperly assumes that because the Superseded Rule requires Board approval prior to the execution of the contract, then it must be the case that no legally enforceable obligation arose. Ampersand claims that 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. *Id.* (citing *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)). Ampersand states that FERC declined to disturb these rulings in *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995).

DISCUSSION

The Department respectfully urges the Board to deny Ampersand's Motion. As described above, Ampersand's Motion is based on the contention that the Board overlooked relevant FERC precedent in granting GMP's motion to dismiss. Ampersand is incorrect. The cases cited by Ampersand are not germane to the instant proceeding because they do not pertain to the unique method of PURPA implementation reflected in the Superseded Rule—a method that FERC has repeatedly declined to challenge. Even assuming that the cases cited by Ampersand are relevant to the instant proceeding, Ampersand fails to distinguish key factual differences between the cited cases and the facts presented here. Specifically, the statewide manner in which the Superseded Rule implements PURPA is tightly regulated by the Board—a feature that distinguishes this case from those cited by Ampersand. Under this system, a QF that seeks a preferential long-term contract (as Ampersand has in this proceeding) must first demonstrate that it meets the requirements of 30 V.S.A. § 248(b). Ampersand has not yet made this demonstration, and therefore it has not yet secured a legally enforceable obligation. Accordingly, Ampersand's Motion should be denied.

1. Implementation of PURPA is delegated to the States

PURPA requires that electric utilities offer to purchase electricity from QFs at rates that are just and reasonable, non-discriminatory, and which do not exceed “the incremental cost to the electric utility of alternative electric energy.” 16 U.S.C. § 824a-3(b) (2006). The Federal Energy Regulatory Commission's (FERC) regulations codify this “purchase obligation,” and establish that “avoided cost” rates be paid to QFs that sell electric energy to utilities. 18 C.F.R. §§ 292.303(a), 292.304(a), (b), and 292.101(b)(6).

While federal law sets forth the basic structure for an avoided cost power purchase agreement, the details of these agreements are a matter of state law. Within the broad parameters set by PURPA and FERC's regulations, state regulatory authorities have broad discretion as to

how to implement the state's PURPA obligations. *Calif. Pub. Util. Comm'n*, 132 FERC ¶ 61,047, *order on clarification and reh'g*, 133 FERC ¶ 61,059, at P 24 (2010), *order denying reh'g*, 134 FERC ¶ 61,044 (2011) (*CPUC*). As FERC has recognized since the earliest days of PURPA,

[t]he requirement to implement [PURPA] may be fulfilled either (1) through the enactment of laws or regulations at the State level, (2) by application on a case-by-case basis by the State regulatory authority, or nonregulated utility, of the rules adopted by the Commission, or (3) by any other action reasonably designed to implement the Commission's rules. *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, 45 *Fed. Reg.* 12,214, 12,231 (Feb. 25, 1980), FERC Stats. & Regs. ¶ 30,128, *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part and vacated in part*, *Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part*, *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

Thus, matters such as how avoided cost is determined and whether and when a legally enforceable obligation to purchase electric energy from a QF is established are subjects committed to the states' discretion. *West Penn Power Co.*, 71 FERC ¶ 61,153, at 61,495 (1995) ("It is up to the States, not [FERC], to determine the specific parameters of individual QF power purchase agreements. . .").

In Vermont, the Board is the state regulatory authority that has the responsibility for implementing PURPA. 30 V.S.A. § 209(a)(8). The Board issued Superseded Rule to meet Vermont's responsibilities under PURPA and FERC regulations. *In Re East Georgia Cogeneration, L.P.*, Docket No. 5179, Order of 6/25/91, *aff'd*, *In re East Georgia Cogeneration Limited Partnership*, 158 Vt. 525, 528 (1992) (*East Georgia*). The Superseded Rule relies on a statewide purchasing agent, (VEPPI) that fulfills the purchase obligation on behalf of all Vermont electric utilities. This means that unlike other jurisdictions, contract negotiations do not occur between utilities and QFs. They instead occur within a tightly regulated system, in which the Board, with the assistance of a purchasing agent, closely monitors and is actively engaged in all contracts and obligations arising under Rule 4.100.

This approach to fulfilling the PURPA requirements has withstood multiple prior challenges before FERC. *See Otter Creek Solar LLC*, 143 FERC ¶ 61,282, at P 4 (2013), *reh'g denied*, 146 FERC ¶ 61,192 (2014) (“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)). Accordingly, the unique construct set forth in the Superseded Rule should be viewed as a well-established exercise of the Board’s discretion, squarely within the broad parameters established by PURPA, FERC rules, and subsequent precedent.

2. Ampersand Fails to Acknowledge Important Facts that Distinguish the Instant Matter from the *Grouse Creek* line of Cases

As noted above, Ampersand cites the *Grouse Creek* line of cases to argue that the Board’s April 21 Order improperly limits the manner in which a legally enforceable obligation can be created to a fully executed contract. The Department does not dispute the fact that as a general matter, a legally enforceable obligation can arise under PURPA without a fully executed contract. As FERC explained in *Grouse Creek*:

This option to sell via legally enforceable obligation was “specifically adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs.” Likewise, the Commission has also stated that

[A] QF has the option to commit itself to sell all or part of its electric output to an electric utility. While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state’s implementation of PURPA. Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in

non-contractual, but binding, legally enforceable obligations.

Grouse Creek, 142 FERC ¶ 61,187 at P 40. Importantly, it is clear from the April 21 Order that the Board does not challenge this basic tenet of PURPA. Instead, the April 21 Order recognizes that under the unique and tightly regulated PURPA implementation program reflected in the Superseded Rule, a legally enforceable obligation arises only after Board approval of the contract, after notice and opportunity for hearing. April 21 Order at 6 (citing *Swanton Wind* at 19). Such a requirement is perfectly reasonable in light of the Vermont composite system reflected in the Superseded Rule, as the Board, with the assistance of the purchasing agent, fulfills the mandatory purchase obligation on behalf of all utilities in the state.

In the *Grouse Creek* line of cases, which are set in Idaho, this critical fact is not present. In Idaho, as in most other jurisdictions and as is now the case in Vermont under the Amended Rule, the individual utilities have a direct mandatory purchase obligation. Thus, in *Grouse Creek*, the process begins with negotiations directly between the QF and the utility, and proceeds to points wherein the QF gives notification of an intent to obligate itself to the utility and the utility provides standard agreements to the QF. See *Grouse Creek* at P 14 (explaining the background of the dispute in that case). Where PURPA is implemented in this bilateral manner, FERC has recognized that there may be an incentive for utilities to seek to avoid that obligation by simply refusing to sign a contract. As noted in the quotation above, the option to sell via legally enforceable obligation was “specifically adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs.” *Grouse Creek*, 142 FERC ¶ 61,187 at P 40. FERC’s concern in *Grouse Creek* was ultimately with a requirement that the QF formally complain meritoriously to the Idaho Commission before it can obtain a legally enforceable obligation. *Id.* FERC determined that such a requirement (1) unreasonably interferes with a QF’s right to a legally enforceable obligation directly with the utility and (2) creates a practical disincentive to amicable contract formation. *Id.*

In Vermont under the Superseded Rule, the method of PURPA implementation is significantly different. There are no bilateral negotiations between the QF and a utility. Instead, the QF seeks approval of a PPA with the Board, through the Purchasing Agent, pursuant to Rule

4.104(A). Because the Purchasing Agent serves an exclusively administrative function, it cannot be thought of as a counterparty to the QF in contract negotiations in the same way that the utilities are counterparties to preliminary negotiations in Idaho's PURPA implementation scheme. That is, the Purchasing Agent, on its own, cannot be viewed as analogous to the role the utilities play in other jurisdictions because of its lack of discretionary decision-making authority and the fact that it does not answer directly to the utilities.

This is why the Superseded Rule requires formal approval of requests for PPAs by the Board. Under the Superseded Rule, Vermont implements PURPA in a manner that relies less on direct, bilateral interaction between the QF and the utility (with a regulatory commission serving as a backstop to referee disagreements) and instead relies on a formal Board process to ensure compliance with PURPA's objectives. Accordingly, the Superseded Rule sets forth certain rights (e.g., a menu of available contract types reflected in Rule 4.104(E)) along with certain obligations (e.g., the requirement to meet the requirements of section 248(b) for contracts with long-term and levelized rates reflected in Rule 4.104(H)). It also contains requirements for certain public process necessary for the Board to engage in reasoned decision-making (e.g., notice and hearing requirements reflected in Rule 4.104(E)).

Importantly, the structure set forth in the Superseded Rule also implicates when and how a legally enforceable obligation arises. The Board recently explained whether the filing of a proposed contract with the Purchasing Agent creates a legally enforceable obligation under the Superseded Rule in *Swanton Wind*.

In [presenting a proposed contract to the Purchasing Agent and submitting it for review to the Board], Swanton Wind 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, including affirmative Board findings under the criteria of 30 V.S.A. § 248(b). Swanton Wind would only have been obligated to deliver power in exchange for the preferential rates that it seeks after it demonstrated that the Project would "meet Vermont's rigorous economic, environmental and reliability criteria, as established by the Vermont legislature."

Swanton Wind at 21 (quoting *East Georgia*, 158 Vt. at 533). Thus, the mere filing of a proposed contract with the Purchasing Agent and the Board do not create a legally enforceable obligation because, unlike in *Grouse Creek*, the QF has not actually committed itself to anything other than beginning a process of regulatory approvals at that time. It makes sense that a legally enforceable obligation would not arise at such a preliminary stage in the process, and it is certainly within the states PURPA implementation authority to require as much. None of the concerns articulated by FERC would counsel in favor of creating a legally enforceable obligation at this early stage. For example, there is no disincentive to contract formation in this method of PURPA compliance. To the contrary, the Superseded Rule set forth a known path to contract formation, which the utility could not unilaterally block through failing to countersign a proposed contract, thereby effectuating the intent of PURPA.

Moreover, the two-step process reflected in the Superseded Rule—first setting the avoided costs of the Vermont composite electric system, and second determining whether individual requests for long-term and levelized rates meet the requirements of section 248(b)—provides additional support for why a legally enforceable obligation does not arise at the time a QF tenders a contract to the Purchasing Agent. The Vermont Supreme Court approved this two-step review in *East Georgia*, finding that the Board is not required to approve a proposed contract pursuant to the section 248(b) review conducted under Rule 4.104(H), even where that contract was based on previously approved generic rates adopted by the Board. *East Georgia* at 535-36. Implicit in this determination is that while the QF has the right to apply for previously approved avoided cost rates under the Superseded Rule, it does not have any entitlement to those rates until the Board approves the request, and it cannot do so until it has actually evaluated the request. With no entitlement to a particular set of avoided cost rates until Board approval, there can be no legally enforceable obligation until that time.

The unique structure of PURPA implementation, set forth under the Superseded Rule, is why the *Grouse Creek* line of cases relied upon by Ampersand is not germane to the instant case. In those cases, FERC was addressing a fundamentally different method of PURPA implementation wherein the regulatory commission did not have a primary role in the process. Here, the Board's close supervision of PURPA implementation renders *Grouse Creek*, and the

concerns articulated therein, distinct and not relevant to deciding the outcome of this case. This method of PURPA implementation has withstood challenges before the both FERC and the Vermont Supreme Court. The Board should therefore reject Ampersand's effort to apply the *Grouse Creek* line of cases to the factually dissimilar facts presented by the instant case.

3. Ampersand's claim that a Legally Enforceable Obligation Can Arise When a Petition is Filed While Still Preserving a Utility Commission's Ability to Review a Contract Prior to Execution is Irrelevant to the Instant Matter

Ampersand points to *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995) (*West Penn*), and argues that FERC, in that case, did not disturb a holding of the Pennsylvania Commission (and courts) holding that a legally enforceable obligation arises at the time a contract is filed. However, as discussed above, Vermont's implementation of PURPA through the Superseded Rule is different from Pennsylvania's implementation of PURPA. From the cases cited by Ampersand, Pennsylvania appears to implement PURPA in a bilateral fashion, more similar the method used in Idaho than in Vermont under the Superseded Rule. These differences are not only permissible, but fundamental to the manner in which PURPA is implemented, with FERC setting the broad requirements and the states implementing those requirements in a manner that suits their own unique circumstances and policies. As FERC explained in *West Penn*, "It is up to the States, not this Commission, 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." *West Penn*, 71 FERC at 61,495.

Ampersand seeks to leverage FERC's allowance of Pennsylvania's definition of a legally enforceable obligation to prohibit the longstanding definition used in Vermont and approved by Vermont Supreme Court. See *Petition of Department of Public Service*, 157 Vt. 120, 125 (1991) (holding that letter of intent tendered to the Purchasing Agent does not create a legally enforceable obligation but instead commits the QF only to going through a number of development and regulatory steps that may lead to an obligation to deliver energy, if all goes well). Ampersand's argument should be rejected because it fails to acknowledge the legitimate differences in state law on when a legally enforceable obligation is created. In this way,

Ampersand stands *West Penn* on its head by reading it to prohibit differences among the way PURPA is implemented in the states, rather than specifically allowing it.

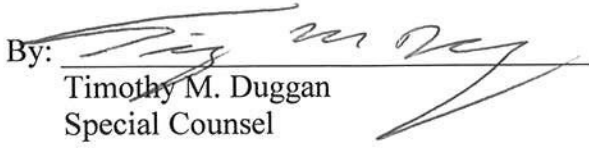
Moreover, FERC has more recently found that a North Carolina scheme that required a QF to obtain a certificate of public convenience and necessity as a necessary precursor to a QF creating a commitment to sell output to a utility at an established avoided cost rate is valid under PURPA. *Virginia Electric and Power Company*, 151 FERC ¶ 61,038, 61,294-61295 (2015). This demonstrates that states have wide discretion in determining when a legally enforceable obligation is created, and that Vermont, under the Superseded Rule, is within its authority to require the QF to demonstrate compliance with the section 248(b) requirements before a legally enforceable obligation arises.

CONCLUSION

The April 21 Order reflects a reasonable exercise of the Board's broad discretion in implementing PURPA and specifically in determining whether and when a legally enforceable obligation is created. The mere tendering of a proposed contract with VEPPi and the Board did not create such an obligation, a point consistent with longstanding Vermont precedent and within the broad discretion afforded states under PURPA. Accordingly, the Board should reject Ampersand's Motion and uphold the April 21 Order.

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

VERMONT PUBLIC SERVICE DEPARTMENT

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cc: Docket Nos. 8840 Service List