

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Case No. 8840

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Petition of Ampersand Gilman Hydro, LP for approval of a twenty-year power purchase agreement between Ampersand and the Rule 4.100 Purchasing Agent	
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Order entered: 01/04/2018

**ORDER DENYING MOTION FOR RECONSIDERATION**

**I. INTRODUCTION**

On April 21, 2017, the Vermont Public Utility Commission (“Commission”)<sup>1</sup> granted a motion filed by Green Mountain Power Corporation (“GMP”) to dismiss a petition (“Petition”) filed by Ampersand Gilman Hydro, LP (“Ampersand”) for approval of a 20-year power purchase agreement (“PPA”) with Vermont Electric Power Producers, Inc. (“VEPP Inc.”). The PPA was filed under Commission Rule 4.100 as it was in effect on September 2, 2016 (“Superseded Rule 4.100”).<sup>2</sup>

On May 5, 2017, Ampersand filed a motion to reconsider the dismissal of its Petition (“Motion for Reconsideration”).

In this Order, we deny the Motion for Reconsideration.

**II. PROCEDURAL HISTORY**

On September 2, 2016, Ampersand filed its Petition pursuant to Superseded Rule 4.100.

On November 29, 2016, GMP filed its motion to dismiss the Petition (“Motion to Dismiss”) pursuant Commission Rule 2.208; in the alternative, GMP requested a hearing on the Petition.

On April 21, 2017, GMP’s Motion was granted and the Petition was dismissed.

On May 5, 2017, Ampersand filed its Motion for Reconsideration.

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<sup>1</sup> Pursuant to Section 9 of Act 53 of the 2017 legislative session, the Vermont Public Service Board’s name was changed to the Vermont Public Utility Commission, effective July 1, 2017. For clarity, activities of the Vermont Public Service Board that occurred before the name change will be referred to in Commission documents as activities of the Commission unless that would be confusing in the specific context.

<sup>2</sup> On September 25, 2016, certain amendments to Rule 4.100 went into effect. The Commission filed the amended rule with the Secretary of State on August 31, 2016.

### III. POSITIONS OF THE PARTIES

#### Ampersand's Motion for Reconsideration

Ampersand seeks reconsideration of the dismissal of its Petition pursuant to V.R.C.P. 59(e). According to Ampersand, the Commission overlooked controlling Federal Energy Regulatory Commission (“FERC”) case law in its decision and, had the Commission considered those cases, it would have reached the opposite result. Ampersand argues that the Commission erred when it granted GMP’s Motion to Dismiss on the grounds that Ampersand did not obtain a legally enforceable obligation when it filed its Petition.

Ampersand contends that federal case law establishes that a state public utility commission may not require a qualifying facility (“QF”) to submit a written or executed PPA as a condition precedent to the creation of a legally enforceable obligation. Ampersand further contends that a legally enforceable obligation “can pre-date the signing of the contract.”<sup>3</sup>

Ampersand reiterates the argument it made in its original motion 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,” and that to find otherwise creates an unreasonable obstacle for QFs under PURPA.

#### Department Response

The Department opposes Ampersand’s Motion and maintains that Ampersand fails to distinguish the statewide manner in which the Superseded Rule implements PURPA in Vermont and further fails to demonstrate that its PPA meets the requirements of 30 V.S.A. § 248(b). The Department states that the applicable rule in Vermont relies on a statewide purchasing agent, VEPPi, to fulfill the purchase obligation on behalf of all Vermont electric utilities, and that, as a result, contract negotiations do not occur between utilities and QFs. The Department adds that there is no disincentive to contract formation under the Vermont system because a utility cannot unilaterally block the contract through failing to countersign a PPA.

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<sup>3</sup> Citing *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at 30, 35 (2011) (“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 [FERC] regulations implementing PURPA”) and *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 at 40 (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”).

The Department contends that Ampersand's claim that a legally enforceable obligation can arise when a petition is filed is irrelevant in the instant matter because the filing of a proposed PPA in Vermont commits the QF only to going through a number of development and regulatory steps that may lead to an obligation to deliver energy. The Department argues that the Commission's approach to fulfilling PURPA requirements has withstood multiple challenges before FERC and should be viewed as a well-established exercise of the Commission's discretion, squarely within the broad parameters established by PURPA, FERC rules, and subsequent precedent.

#### GMP Response

GMP opposes Ampersand's Motion and urges the Commission to deny it. GMP argues that Ampersand's contention that the Commission "overlooked a series of FERC cases put before it by [Ampersand]" is not accurate because the Commission did consider the FERC decisions but held that a legally enforceable obligation arises only after Commission approval of a PPA under Superseded Rule 4.100. GMP further argues that Ampersand's contention that a state cannot require an executed contract as a condition precedent to a legally enforceable obligation is misplaced because regulatory approval of the proposed contract by the Commission is the applicable condition precedent under Superseded Rule 4.100, not an executed contract. GMP states that because PURPA is implemented in Vermont through a regulatory approval process, Vermont utilities cannot circumvent PURPA regulations merely by refusing to enter contracts and that, as a result, the FERC holdings cited by Ampersand are inapplicable. Finally, GMP maintains that the Commission expressly considered federal case law and rejected Ampersand's contention that Superseded Rule 4.100 created an unreasonable obstacle to the formation of a legally enforceable obligation.

#### **IV. DISCUSSION AND CONCLUSION**

A motion filed pursuant to V.R.C.P. 59(e) to alter or amend a judgment is left to the discretion of the court.<sup>4</sup> The Vermont Supreme Court has determined that Rule 59(e) is intended to allow a trial court to avoid an unjust result arising from "the mistake or inadvertence of the

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<sup>4</sup> *Gardner v. Ludlow*, 135 Vt. 621 (1973). Rule 59(e) is applicable to Commission proceedings pursuant to PUC Rule 2.105.

court and not the fault or neglect of a party,” and may be invoked “to support reconsideration of matters properly encompassed on the merits.”<sup>5</sup> Thus, in our review of a decision, we “may reconsider issues previously before [us], and generally may examine the correctness of the [decision] itself.”<sup>6</sup> However, Rule 59(e) is not intended to permit parties to simply relitigate issues<sup>7</sup> and a party’s mere disagreement with the Commission’s decision is not grounds for reconsideration.<sup>8</sup>

Upon review of the filings in this proceeding, we find that the Motion for Reconsideration does not demonstrate any mistake or inadvertence by the Commission in its ruling, nor does it present any new legal arguments or factual information that could not have been presented previously. In its Motion, Ampersand argues that the Commission overlooked the FERC decisions cited by Ampersand, failed to discuss or distinguish those cases, and therefore failed to “draw the necessary distinction between when a ‘legally enforceable obligation’ arises, and when a contract becomes effective after [Commission] approval.”

In our underlying Order, we analyzed GMP’s Motion to Dismiss pursuant to Rule 12(b) as a request to dismiss the Petition for failure to state a claim upon which relief could be granted. Ampersand argued then, as it does now, that the proposed PPA should be considered a legally enforceable obligation upon its filing with the Commission. We rejected that argument, noting that the language of the PPA itself dictates that the PPA is not effective until execution, which can occur only upon Commission approval. We further cited prior holdings that the mere proposal of a PURPA contract with the Purchasing Agent does not create a legally enforceable obligation.<sup>9</sup>

Based upon our review of the underlying Order in this case and Ampersand’s Motion for Reconsideration, we find that Ampersand’s Motion seeks to relitigate issues previously decided and thus is not within the scope of a proper motion to alter or amend under Rule 59(e). Ampersand has not raised any new facts or legal arguments to warrant reconsideration of our

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<sup>5</sup> In this case, for example, such matters may include the substantive criteria of Section 248(b), as well as the applicability of Superseded Rule 4.100.

<sup>6</sup> *In re Robinson/Keir Partnership*, 154 Vt. 50, 54; 573 A.2d 1188, 1192 (1990) (citations omitted).

<sup>7</sup> *In re Cent. Vt. Pub. Serv. Corp.*, Docket Nos. 6946/6988, Order of 5/25/05 at 3.

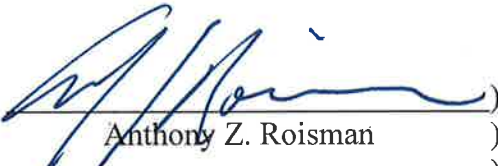
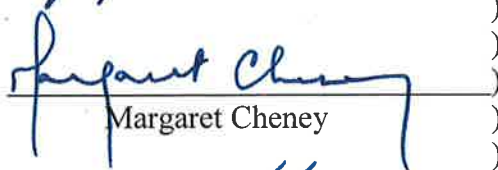
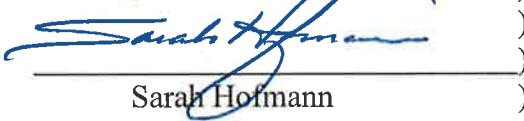
<sup>8</sup> *In re Bowen Conditional Use Application*, 2011 WL 495668; *see also Application of Emerson Fall Hydro, Inc.*, CPG #NMP-6757, Order of 3/4/16 (motion for reconsideration denied because no new arguments presented).

<sup>9</sup> *Petition of Ampersand Gilman Hydro, LP*, Docket No. 8840, Order of 4/21/17 at 6 (*citing Petition of Swanton Wind, LLC*, Docket No. 8571, Order of 3/2/17 at 21).

decision. Our implementation of Superseded Rule 4.100 in this docket was consistent with federal requirements under PURPA and our dismissal of Ampersand's Petition was warranted under Rule 12(b)(6). The FERC decisions cited by Ampersand in its opposition to GMP's Motion to Dismiss and again in its Motion for Reconsideration here do not alter our conclusion. We decline to address them here, as well, because they are not on point or persuasive, given Vermont's implementation of PURPA under the Superseded Rule. For these reasons, we deny the Motion for Reconsideration.

**SO ORDERED.**

Dated at Montpelier, Vermont this 4th day of January, 2018.

	)	
Anthony Z. Roisman	)	PUBLIC UTILITY
	)	
	)	
Margaret Cheney	)	COMMISSION
	)	
	)	
Sarah Hofmann	)	OF VERMONT

OFFICE OF THE CLERK

Filed: January 4, 2018

Attest:   
Clerk of the Commission

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

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

PSB Case No. 8840 - SERVICE LIST

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