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STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Ampersand Gilman Hydro, LP for)
approval of a Rule 4.100 power purchase) Docket No. 8840
agreement)

GREEN MOUNTAIN POWER'S
MOTION TO DISMISS

By this filing, Green Mountain Power (“GMP”) moves to dismiss the above-captioned Rule 4.100 petition (the “Petition”) pursuant to Board Rule 2.208. As explained below, dismissal is required because Ampersand’s 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”), which applies to all contracts or obligations formed subsequent to September 15, 2016. Petitioner has no right to the application of the prior rule (“Superseded Rule 4.100”) because it has no currently-effective contract or obligation, and has no vested right to be considered under that Rule. As a result, Ampersand’s Petition must be dismissed as a matter of law.

Background

On July 14, 2016, the Board filed a final version of the proposed Amended Rule 4.100 with the Secretary of State. The proposed Amended Rule 4.100 was the product of a rulemaking workshop that commenced in February 2015, and resulted in significant changes to both the Superseded Rule 4.100 process and contracts available to Qualifying Facilities. In particular, the Amended Rule provides for long-term contracts of no more than a 7-year term at rates

determined at the time the obligation is incurred. Twenty-year contracts, such as the one proposed by Ampersand, are not available under the Amended Rule.

On September 2, 2016, less than two weeks before the effective date of the Amended Rule, Ampersand filed a proposed contract with the purchasing agent under the Superseded Rule 4.100 for a term of twenty years at rates established in Docket 8010.

Summary of Argument

The Petition must be dismissed for several reasons. First, the Petitions seek approval of a contract through the purchasing agent rather than the interconnecting utility and proposes a term of twenty years at Docket 8010 rates. These proposals are contrary to the provisions of the Amended Rule, which requires that contracts formed subsequent to the rule be formed with the interconnecting utility and be limited to a term of seven years. The Amended Rule applies to this Petition because Ampersand formed no contract or obligation prior to the effective date of the rule.

Second, Ampersand has no vested right to the procedures or rate options in existence at the time its Petition was filed. The Vermont Supreme Court has held the doctrine of vested rights is inapplicable to pending contract requests where the developer has failed to establish a legally enforceable obligation. Furthermore, even if the doctrine were applied to Rule 4.100 petitions, Ampersand's Petition has no vested rights under the pending ordinance doctrine because the petition was not filed until well after the rulemaking culminating in the Amended Rule was noticed.

1. The Requested Contract is Not Available to Ampersand Under the Applicable Provisions of Amended Rule 4.100.

The Amended Rule includes the following:

For contracts and obligations or extensions of prior contracts or obligations *formed subsequent to the effective date of this Rule*, the rules and procedures set forth herein shall apply. For contracts and obligations in existence prior to the effective date of this Rule, nothing herein shall cause them to be changed.¹

Petitioners did not form a contract or obligation before the effective date of the Amended Rule. In particular, Superseded Rule 4.100 requires Board approval of the proposed contract before either (a) the purchasing agent is empowered to enter the contract or (b) Vermont distribution utilities are bound by the terms of the proposed contract.² Since the Board has not approved the proposed contract, Ampersand has no factual basis upon which it can claim to have formed a contract or obligation prior to the effective date of the Amended Rule.

Additionally, Ampersand's proposed contract for long-term rates under Superseded Board Rule 4.104(H), is available only if the project is found to satisfy the substantive criteria of Section 248(b).³ Ampersand's Petition has not been found to satisfy the substantive criteria of 248(b). In fact, Ampersand's late filing did not permit the Board an adequate opportunity to review and approve the filing by September 15, 2016. Because the Board has not approved the proposal, no contract or obligation has been formed.

Since Petitioner has no contract or obligation that was in existence before September 15, the provisions of the Amended Rule apply because the contract or obligation would be formed

¹ Amended Rule 4.102(C) (emphasis added).

² 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.").

³ Rule 4.104(H) ("Notwithstanding any other provision herein, long-term rates and levelized rates shall be available only to qualifying facilities which have been found by the Board, after due hearing, to satisfy the substantive criteria of 30 V.S.A. § 248(b).").

“subsequent to the effective date” of the Amended Rule. Those provisions require a Qualified Facility to submit its offer to sell to the interconnecting utility and limit long-term contracts to a term of seven years.⁴ Petitioner’s proposed contract through the purchasing agent rather than the interconnecting utility, for a term of twenty years, must be dismissed because it is contrary to the plain terms of the Amended Rule.

2. Petitioner Has No “Vested Right” to the Provisions of the Superseded Rule 4.100

Petitioner has no “vested right” to the application of the Superseded Rule for several reasons. First, the Vermont Supreme Court has already settled this question: the vested rights doctrine does not apply to a QF that has no legally enforceable obligation. Second, even if the doctrine did apply to unapproved Rule 4.100 contracts, any alleged rights to consideration under Superseded Rule 4.100 failed to vest because Ampersand’s Petition—filed at the last minute before the effective date of the new rule—was not filed until long after notice of the final rule was issued and therefore it failed to vest under the “pending ordinance” doctrine.

The doctrine of vested rights was first developed by the Court in *Preseault v. Wheel*.⁵ There, the City of Burlington issued a building permit, but later refused to renew the permit under an amended ordinance after the project was delayed due to related litigation.⁶ The Court overturned the City’s decision under the vested rights doctrine, holding that “where a valid permit is issued for a specified period, and where actual construction is delayed by litigation, involving parties who have standing to oppose construction, past that time, a permittee otherwise

⁴ Amended Rule 4.104.

⁵ 132 Vt. 247, 253 (1974).

⁶ *Id.*

proceeding in good faith is entitled to reissuance of that permit, even where the zoning was meanwhile changed so that the project is nonconforming.”⁷

The Court explained more recently that, “a permit applicant gains a vested right in the governing laws and regulations in existence when a complete permit application is filed.”⁸ In *Petition of North Springfield Sustainable Energy Project*, the Board applied the vested rights doctrine to a Section 248 petition, holding that petitioner did have a vested right to existing regulations under Section 248 because the petitioner filed “supporting testimony and exhibits that addressed each of the required § 248 criteria and [the Petition] was therefore properly considered complete at the time it was filed.”⁹ Prior to the filing of a complete application, however, no rights vest.¹⁰ In *In re Ross*, the Court held that a developer who failed to address two criteria under 10 V.S.A. § 6086 had no vested right to existing regulations because the application was incomplete.¹¹

Ampersand cannot avail itself of the vested rights doctrine for several reasons. First, the Court has held that the vested rights doctrine does not apply to petitions under Rule 4.100 that have not obtained a legally enforceable obligation.¹² In *Department of Public Service*, the Court stated that its vested rights doctrine “should not be interpreted as an open-ended right to ‘freeze’ the applicable regulatory requirements by proposing a development with inadequate

⁷ *Id.*

⁸ *In re Times and Seasons, LLC*, 2011 VT 76, ¶ 12, 190 Vt. 163 (citing *Paynter 2–Lot Subdivision*, 2010 VT 28, ¶ 9, 187 Vt. 637).

⁹ *Petition of North Springfield Sustainable Energy Project*, Docket No. 7833, 2014 WL 580146, at *86 (Vt. Pub. Serv. Bd. Feb. 11, 2014).

¹⁰ See *In re Ross*, 151 Vt. 54, 57–58 (1989).

¹¹ *Id.*

¹² *Pet. of Dep’t. of Pub. Serv.*, 157 Vt. 120, 127 (1991).

specificity.”¹³ A project without a legally enforceable obligation lacks the necessary specificity because, in the Court’s terms, “a legally enforceable obligation can be viewed as a requirement for adequate ‘specificity.’”¹⁴ Thus, the petition in *Department of Public Service* was not a legally enforceable obligation, therefore the petitioner failed to obtain any vested rights with regard to its application. Here, Ampersand has no approved contract or legally enforceable obligation of any kind. Accordingly, it has no vested right to the Superseded regulation.

Second, even if Petitioners could obtain a vested right without a legally enforceable obligation, Ampersand’s Petition failed to vest because Ampersand’s circumstances are distinct from *Preseault* and similar cases where the developer’s building permit was approved by the City, thus vesting him with a right to the regulations in existence at the time. Here, Ampersand has no approval from the Board and has not relied on the regulation that was in effect at all. On the contrary, Ampersand’s last-minute filing did not provide adequate time for the Board to consider or approve the contract prior to the rule being superseded.

Finally, Ampersand’s late filing under the Superseded Rule failed to establish any vested right under the “pending ordinance” doctrine. In *In re Handy*, the Court explained 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.”¹⁵ The “pending ordinance” doctrine “generally provides that an application filed after official notice that an amendment is pending will be governed by the amended provision if it is enacted within a certain time after the date of

¹³ *Id.*

¹⁴ *Id.* at 127–28.

¹⁵ *In re Handy*, 171 Vt. 336, 350 (2000).

notice.”¹⁶ The doctrine is meant to “allow[] towns to amend and adopt local regulations without the threat of landowners trying to ‘beat the clock’ and circumvent the process.”¹⁷

If the vested rights doctrine applies at all here, so too does the related pending ordinance doctrine. Here, Ampersand’s Petition failed to vest any rights in the Superseded Rule because it did not make a filing meant to comply with Rule 4.104(H) until less than two weeks before the effective date of the Amended Rule—well after the Rule was officially noticed. The amendments to the rule had been pending for months when the Petition was filed, and multiple publications of the draft and final rule were issued well in advance. Therefore, Ampersand’s attempt to obtain vested rights by means of a “beat the clock” filing at the last minute fails under the pending ordinance doctrine.

Conclusion

For the above reasons, the Board should dismiss the above-captioned Petition because it seeks relief that is not available to Ampersand under the Amended Rule and it has no vested rights to be considered under the Superseded Rule.

¹⁶ *In re John A. Russell Corp.*, 2003 VT 93, ¶ 8 n. 2, 176 Vt. 520.

¹⁷ *Re: John A. Russell Corp. and Crushed Rock, Inc.*, No. 1R0489-6-EB (Remand)-EB, Findings of Fact, Conclusions of Law, and Order at 24 (Vt. Env’tl. Bd. Jan. 17, 2002).

DATED at Burlington, Vermont this 29th day of November, 2016.

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