

STATE OF VERMONT  
PUBLIC SERVICE BOARD

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

AMPERSAND GILMAN HYDRO, LP'S  
CONSOLIDATED RESPONSE TO GMP, BED, AND DPS FILINGS

Ampersand Gilman Hydro, LP (“AGH”), through undersigned counsel, respectfully submits the following response to filings by Green Mountain Power (“GMP”), Burlington Electric Department (“BED”), and the Department of Public Service (“DPS”) regarding AGH’s September 2, 2016 petition for approval of its Rule 4.100 power purchase agreement (“PPA”) with Vermont Electric Power Producers, Inc. (“VEPPI”), the Rule 4.100 Purchasing Agent (the “Petition”).

GMP, BED, and DPS all oppose AGH’s Petition and either seek its dismissal or request a hearing. Those parties base their requests on the mistaken ground that AGH’s PPA is not a legally enforceable obligation because it was not executed, and therefore AGH’s Petition is not governed by the prior version of PSB Rule 4.100 as it existed at the time the Petition was filed. As discussed below, FERC has expressly held that requiring an executed PPA—or indeed any written contract—as a condition precedent for the creation of a legally enforceable obligation violates the Public Utility Regulatory Policies Act. AGH’s PPA is a legally enforceable obligation, and AGH has a vested right to the Rule 4.100 and avoided cost rates in existence at the time it filed the Petition.

Factual and Procedural Background

The Gilman Hydro Project is an existing 4.9 megawatt hydroelectric generation facility located at the Gilman Dam in Gilman, Vermont, and owned by AGH. It is a self-certified qualifying facility (“QF”) under 16 U.S.C.A. § 796(17)(C) and 18 C.F.R. Part 292. The Public Service Board

(“PSB” or “Board”) previously approved a one-year Power Purchase Agreement between Gilman Hydro and the Purchasing Agent under Rule 4.100.<sup>1</sup> *Petition of Ampersand Gilman Hydro, LP*, Docket No. 8717 (Vt. Pub. Serv. Bd. June 21, 2016). The one-year PPA will expire on April 1, 2018.

On July 14, 2016, AGH obtained a second PPA from VEPPI, which will take effect on April 1, 2018 (“the AGH PPA”). It continues for a term of 20 years at the non-levelized rates established by the Board in *Investigation into Establishing Rates for Power*, Docket No. 8010 (Vt. Pub. Serv. Bd. Feb. 9, 2015).

On September 2, 2016, AGH filed the Petition for approval of the AGH PPA pursuant to Board Rule 4.104(A).

On September 15, 2016, an amended version of Rule 4.100 went into effect, applying to “contracts and obligations or extensions of prior contracts formed [from that date forward].” Board Rule 4.102(C) (2016).

On November 29, 2016, GMP filed a Motion to Dismiss AGH’s petition on the ground that the PPA is not a legally enforceable obligation, and therefore the amended Rule 4.100, which does not allow long-term rates or sale of power to a purchasing agent, applies. In the alternative, GMP requested a hearing on the Petition.

On the same day, BED filed a letter joining in GMP’s motion to dismiss and alternative request for a hearing.

Also on the same day, DPS filed a letter requesting a hearing on the ground that “Rule 4.100, as it currently exists, does not contemplate the type of contract sought by Ampersand.”

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<sup>1</sup> All citations to Rule 4.100 in this document refer to the rule as it existed prior to its amendment on September 15, 2016, unless otherwise noted.

Since GMP, BED, and DPS's filings raise identical issues, AGH responds to them here together.

### Discussion

The outcome of this motion rests on a single, key question: whether AGH's PPA is a legally enforceable obligation for purposes of the Public Utility Regulatory Policies Act ("PURPA"), 18 U.S.C. § 796, and the Federal Energy Regulatory Commission's ("FERC") implementing regulations, 18 C.F.R. Part 292. AGH has presented to the Board a PPA, committing it to sell power to Vermont's utilities through the Rule 4.100 Purchasing Agent. GMP argues that AGH has "no currently-effective contract or obligation." DPS similarly asserts that "Rule 4.100, as it currently exists, does not contemplate the type of contract sought by Ampersand," tacitly assuming that AGH lacks a legally enforceable obligation or a vested right to application of Board Rule 4.100 as it existed when this petition was filed.

In fact, FERC has established a clear rule 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. To the contrary: when a QF commits to sell power to utilities, it commits the utilities to buy that power, even if no written agreement exists. AGH obtained a legally enforceable obligation when it submitted the Petition on September 2, 2016. Because the amended Rule 4.100 applies only to "contracts and obligations . . . formed subsequent to the effective date" of the amendments, the Petition must be considered under Rule 4.100 as it existed prior to the 9/15/16 amended version. Moreover, under Vermont's common law of vested rights, AGH acquired a vested right to Rule 4.100 and the avoided cost rates in existence at that time.

**I. The AGH PPA is a legally enforceable obligation.**

The foundation of GMP's (and DPS's) argument is that the AGH PPA does not constitute a legally enforceable obligation under section 292.304(d)(2) of FERC's implementing regulations because the PPA was not executed at the time that AGH submitted it to the Board for approval. FERC has expressly rejected this identical argument, holding that "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). GMP and DPS conclude that because AGH and the Purchasing Agent did not enter into a contract, no legally enforceable obligation has been created. That conclusion violates FERC's unequivocal interpretation of its PURPA regulations, which preempt contrary state policies (as discussed further below).

By enacting PURPA, "Congress . . . required electric utilities to purchase electric energy from QFs," a requirement which FERC "interpreted as imposing on electric utilities an obligation to purchase all electric energy and capacity made available from QFs." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61006 at P 31 (2011). FERC required that QF's have the option to sell power either as available, or pursuant to a "legally enforceable obligation." 18 C.F.R. § 292.304. A legally enforceable obligation "includes, but is not limited to, a contract," a distinction that is used "to prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract" or "from delaying the signing of a contract" so that "a later and lower avoided cost is applicable." *Id.* at PP 35–36. *See also* 18 C.F.R. § 292.305 (distinguishing between a "contract or other legally enforceable obligation"). A legally enforceable obligation is a mechanism for providing market access and determining rates for QFs, whereas a contract serves the distinct function of "limit[ing] and/or defin[ing] bilaterally the specifics of the relationship between the QF and the utility." *Grouse*

*Creek Wind Park, LLC*, 142 FERC ¶ 61,187 at P 40 (2013). Rule 4.100 in its current form makes the same distinction between “contracts and obligations.” Board Rule 4.102(C) (2016). FERC has “consistently affirmed the right of QFs to long-term avoided cost contracts or other legally enforceable obligations with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred.” *JD Wind 1, LLC*, 130 FERC ¶ 61,127 at P 23 (2010).

While PURPA implementation is entrusted to the states, 16 U.S.C. § 824a-3(f), “a state may take action under PURPA only to the extent that that action is in accordance with the Commission’s regulations.” *Cedar Creek Wind, supra*, 137 FERC ¶ 61,006 at P 11. States may 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 Power Co.*, 71 FERC ¶ 61,153 at 61,495 (1995). However, states do not have “unlimited discretion to limit the ways a legally enforceable obligation is incurred.” *Cedar Creek Wind, LLC*, 137 FERC ¶ 61006 at P 35 (2011).

The Public Service Board is responsible for implementing PURPA in Vermont, 30 V.S.A. § 209(a)(8), and Rule 4.100 is its mechanism for doing so. As of the time that AGH filed the Petition, Rule 4.100 established a Purchasing Agent responsible for purchasing power on behalf of all Vermont utilities, an approach known as the “Vermont composite system.” See Board Rule 4.103(A)(8); *Petition of Randolph Center Solar, LLC*, Docket No. 8716 (Vt. Pub. Serv. Bd. June 30, 2016). It also required the Department of Public Service (“DPS”) to determine the avoided capacity and energy costs of Vermont’s utilities each year, which apply to PPAs executed by the Purchasing Agent until the conclusion of the Board’s next avoided cost investigation. See Board Rule 4.104(E, F). As of the time AGH filed the Petition, the applicable avoided cost rates were those adopted by the Board in Docket No. 8010 (Orders of Feb. 9, 2015 and Apr. 23, 2015).

**A. FERC has expressly held that requiring a fully executed PPA to create a legally enforceable obligation violates PURPA and FERC's regulations.**

In *Cedar Creek*, FERC considered an order from the Idaho Public Utilities Commission ("PUC") rejecting two PPAs from its statewide PURPA avoided cost program. The Idaho PUC's rationale was that the PPAs were not signed by both parties until after a rule amendment took effect that rendered the projects ineligible for statewide avoided cost rates. It adopted the very rule that GMP now urges the Board to adopt: that a PPA "must be executed, i.e., signed by both parties to the agreement, prior to the effective date of the change in eligibility criteria." *Id.* at P 3.

FERC unambiguously rejected the requirement that a PPA be fully executed prior to creation of a legally enforceable obligation as inconsistent with section 292.304(d)(2). It noted that FERC regulations "expressly use the terms 'contract' and 'legally enforceable obligation' in the disjunctive to demonstrate that a legally enforceable obligation includes, but is not limited to, a contract." *Id.* at P 35. By requiring PPAs to be fully executed, the Idaho PUC "ma[de] a fully-executed contract a condition precedent to the creation of a legally enforceable obligation," a limitation that was "inconsistent with PURPA, and [FERC's] regulations implementing PURPA." *Id.* It further "ignore[d] the fact that a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing." *Id.* at P 36. FERC explained that "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." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011) at 13-14; and *JD Wind 1, LLC*, 129 FERC ¶ 61,148 (2009) at 25. FERC reiterated the same rule in two companion cases, *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (2012); *Rainbow Ranch, LLC*, 139 FERC ¶ 61,077 (2012).

In *Grouse Creek Wind Park, LLC*, another challenge to the Idaho PUC, FERC clarified that requiring *any* party to execute a PPA as a precondition to the creation of a legally enforceable

obligation violates PURPA. 142 FERC ¶ 61,187 (2013). Unlike in the prior Idaho PUC cases, *Grouse Creek* concerned PPAs that “were not signed by any party” until after the Idaho PUC amended the eligibility criteria for statewide avoided cost rates. *Id.* at P 38. FERC held that because a legally enforceable obligation “can pre-date the signing of the contract,” the Idaho PUC should have treated the unexecuted PPAs as legally enforceable obligations. *Id.* at P 40.<sup>2</sup>

FERC’s Idaho cases leave no doubt that while the Board may regulate the terms of AGH’s relationship with the Purchasing Agent, it may not precondition a legally enforceable obligation on the formation of a contract with the Purchasing Agent. Board Rule 4.104(A) provides that 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.” The Board is entitled to restrict the Purchasing Agent’s ability to sign an agreement, and to regulate the terms of the bilateral relationship between the Purchasing Agent and QF. But the Board may not make the execution of a PPA a condition precedent to the creation of a legally enforceable obligation: that would collapse the distinction between a contract and a legally enforceable obligation, and would run afoul of FERC’s unambiguous holdings.

**B. Other states have implemented rules deeming partially executed PPAs to be legally enforceable obligations, and have gained FERC approval.**

AGH’s position—that a legally enforceable obligation arises when a PPA is submitted to the Board—is consistent with the approach taken in other states and approved by FERC.

In Pennsylvania, the rule is that

[w]here a QF has done everything within its power to create [a legally enforceable] obligation, . . . by petitioning the PUC to approve a contract or to compel a

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<sup>2</sup> When the Idaho PUC failed to rescind the order in which it established the full-execution condition precedent, FERC initiated an enforcement action in federal court arising from *Rainbow Ranch*, *Grouse Creek*, and *Murphy Flat*. See *Fed. Energy Regulatory Comm’n v. Idaho Pub. Util. Comm’n*, Docket No. 1:13-cv-00141-EJL-REB.

purchase, and only . . . an act of approval by the PUC remains to establish the existence of a “contract,” then the “legally enforceable obligation” contemplated by § 292.304(d)(2) has been created, and the QF is entitled to rates based on avoided costs calculated from the date of the QF’s action.

*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). *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 . . . .”). FERC declined to disturb this rule in *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995).

Similarly, “[t]he [New Hampshire Public Utility Commission]’s articulated policy is to treat the filing of a rate petition accompanied by an interconnection agreement *signed by the small power producer* as a legally enforceable obligation. This is consistent with subsection (ii) of 18 C.F.R. § 292.304(d)(2).” *Appeal of Public Service Co. of New Hampshire*, 539 A.2d 275, 279 (N.H. 1988) (emphasis added).

The Board should follow the examples set by Pennsylvania and New Hampshire and make clear that Rule 4.100 distinguishes between a contract and a legally enforceable obligation, as PURPA requires.

**II. AGH is entitled to application of Board Rule 4.100 and the avoided cost rates in existence at the time the Petition was filed.**

GMP’s and DPS’s requests for dismissal and a hearing are premised on the lack of a legally enforceable obligation. That premise is unsound, as FERC’s rulings demonstrate. AGH acquired a legally enforceable obligation on September 2, 2016, and is therefore entitled to the rules and rates in

effect at that time, under both the current version of Rule 4.100 and Vermont's vested rights doctrine.

DPS takes the position that AGH's Petition is defective because "Rule 4.100, as it currently exists, does not contemplate the type of contract sought by Ampersand." The answer to this argument is found on the face of the amended Rule 4.100. It states that it applies only to "contracts and obligations or extensions of prior contracts or obligations formed subsequent to the effective date of this Rule"—September 15, 2016. Board Rule 4.102(C) (2016). It does not apply to "contracts and obligations in existence prior to the effective date of this Rule." *Id.* To the contrary:

Any previous designation of a Purchasing Agent pursuant to prior versions of Rule 4.100, as well as the rules and obligations attendant thereto, shall remain in full force and effect unless and until specifically modified by the Board on a prospective basis with respect to contracts and obligations formed prior to the effective date of this Rule.

*Id.* Because AGH acquired a legally enforceable obligation prior to the effective date of the amendments to Rule 4.100, the rule itself requires the pre-amendment version to be applied.<sup>3</sup>

Even if this were not the case, AGH would be entitled to the September 2, 2016 rules and rates under Vermont's vested rights doctrine. As GMP tacitly acknowledges in its motion, the question whether AGH has a legally enforceable obligation under 18 C.F.R. § 292.304(d)(2) is dispositive of the question whether it has a vested right to Rule 4.100 and the avoided cost rates as they existed at the time the Petition was filed.

The Vermont Supreme Court has ruled that "a permit applicant gains a vested right in the governing laws and regulations in existence when a complete permit application is filed." *In re Times*

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<sup>3</sup> Indeed, the Board's November 10, 2016 notice of the Petition indicated that the utilities were "notified of the request for approval of the Agreement and provided with an opportunity for a hearing" pursuant to Board Rule 4.104(A), citing the pre-amendment rule.

*Seasons, LLC*, 2011 VT 76, ¶ 12, 190 Vt. 163. As GMP notes, the Board held in *Petition of North Springfield Sustainable Energy Project LLC* that a petition that addresses each of the criteria set forth under 30 V.S.A. § 248 is “properly considered complete at the time it was filed.” Docket No. 7833 (Vt. Pub. Serv. Bd. Feb. 11, 2014). AGH’s petition addressed all of the substantive criteria of section 248, as required by Board Rule 4.104(I), and was thus complete on September 2, 2016.

GMP points to the Supreme Court’s holding in *Petition of Department of Public Service* that an applicant who lacks a legally enforceable obligation does not gain vested rights under Board Rule 4.100. 157 Vt. 120, 127 (1991). But *Petition of Department of Public Service*, which was decided in 1991, provides no guidance whatsoever on how a legally enforceable obligation actually arises in 2016. Indeed, to the extent that *Petition of Department of Public Service* does speak to the question when a legally enforceable obligation arises, it is consistent with FERC’s recent case law, which came well after the Vermont Supreme Court’s 1991 decision. The Vermont Supreme Court stated that a legally enforceable obligation arises when a QF “ ‘tender[s] an agreement that obligates it to provide power.’ ” 157 Vt. at 126. It quoted an Oregon case holding that “the regulations and administrative rules contemplate that a qualifying facility’s self-imposed obligation to *deliver* energy triggers a utility’s obligation to *purchase* energy.” *Snow Mountain Pine Co. v. Maudlin*, 734 P.2d 1366, 1371 (Or. 1987) (emphasis in original). AGH has committed itself to sell power to the Purchasing Agent. Under both *Petition of Department of Public Service* and FERC case law, this created a legally enforceable obligation.

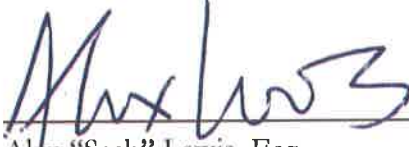
### III. Conclusion

GMP and DPS’s argument that AGH lacks a legally enforceable obligation ignores FERC’s unequivocal mandate that a state may not require a fully executed contract as a condition precedent

to a legally enforceable obligation. The AGH PPA committed AGH to sell power to Vermont's Purchasing Agent, thus committing the Purchasing Agent to purchase that power. AGH's September 2, 2016 Petition was administratively complete, thus vesting its right to the then-existing regulations and rates, both under Vermont Supreme Court case law and under the amended Rule 4.100. The Board should deny GMP's motion to dismiss and decline to hold a hearing on this matter. No party has raised any subject for a hearing other than the existence of a legally enforceable obligation. Because AGH has acquired a legally enforceable obligation as a matter of law, no hearing is required or necessary.

Dated at Burlington, Vermont, this 14th day of December, 2016.

AMPERSAND GILMAN HYDRO, LP

By:   
Alex "Sash" Lewis, Esq.  
Andrew N. Raubvogel, Esq.  
Dunkiel Saunders Elliott Raubvogel & Hand, PLLC  
91 College Street, Burlington, VT 05402-0545  
(802) 860-1003  
alewis@dunkielsaunders.com