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

By this filing, Green Mountain Power ("GMP") replies to Ampersand Gilman Hydro's ("Ampersand") opposition to dismissal of its Rule 4.100 Petition. Ampersand's contention that it obtained a legally enforceable obligation on September 2, 2016 when it filed its Petition is contrary to both the facts and the law applicable in this case.

As a matter of law, no enforceable obligation of any kind arose under Superseded Board Rule 4.100 until a contract was approved by the Vermont Public Service Board ("Board").[1] The Vermont Supreme Court has rejected the argument that merely tendering a proposed contract creates a legally enforceable obligation prior to Board approval.[2] Furthermore, the cases Ampersand relies upon[3] do not apply in Vermont because those cases are limited to circumstances where "a state limits the methods through which a legally enforceable obligation may be created to only a fully-executed contract."[4] In these circumstances, FERC has held that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF."[5] This requirement is intended "to prevent a utility from circumventing the

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1 Superseded Board Rule 4.104(A) ("The purchasing agent shall not be empowered to enter into any agreement for purchases from a qualifying facility until such agreement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.").

2 *Pet. of E. Georgia Cogeneration Ltd. Partn.*, 158 Vt. 525, 533 (1992).

3 *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 at 16-17 (2013); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at 11-12, 16 (2011); *Snow Mountain Pine Co. v. Maudlin*, 734 P.2d 1366 (Or. Ct. App. 1987).

4 *Cedar Creek* at 13 and n. 50 (in part quoting Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880).

5 *Id.*

requirement . . . merely by refusing to enter into a contract with a qualifying utility."[6] Likewise, the *Snow Mountain* Court imposed a legally enforceable obligation in order to "prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility."[7]

The regulatory framework in Vermont that implemented PURPA under Superseded Rule 4.100 renders these cases inapplicable because PURPA was not implemented through negotiated contracts between utilities and qualified facilities ("QFs"). Instead, the obligations under PURPA were implemented through a set of regulatory requirements (Superseded Rule 4.100).[8] Under these regulatory requirements, utilities could not circumvent their PURPA obligations by refusing to sign a contract in the manner addressed in *Cedar Creek*, *Grouse Creek* and *Snow Mountain*. The legally enforceable obligation under Rule 4.100 was imposed as a matter of law, but only after the Board approved a proposed contract.[9]

Ampersand asks the Board to follow the example of other states by establishing a legally enforceable obligation on the date a QF petitions to compel a purchase.[10] Such a rule, however, would directly contradict the Board's authority to reject a proposed contract under the Superseded Rule. Nor is such a rule required by PURPA. Both FERC and the federal courts have explicitly held that each state regulatory authority has the discretion to determine the date upon

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6 *Id.* (quoting Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880).

7 *Snow Mountain*, 734 P.2d at 1371 (citing 18 C.F.R. § 292.304).

8 *Petition of Dep't of Pub. Serv., etc.*, Docket No. 5191, at 10 (Vt. Pub. Serv. Bd. Aug. 26, 1987) ("Enforceability is not justified on the basis of mutuality of undertaking; rather, enforceability must be based purely on regulatory commands (derived from both federal and state sources."); *Id.* at 19-20 ("Letters of intent are not founded on mutual voluntary undertakings . . . . As to utilities that are required to purchase power, their obligations are founded on the commands of federal and, as to certain particulars, state law. Contract law, therefore, is simply inapposite."). Although the general obligation to purchase at avoided cost arises under federal law, the legally enforceable obligation claimed by Coolidge relates to its proposed PPA, which arises under Rule 4.100.

9 Rule 4.100 makes clear that any negotiated PPA is not binding on GMP until it is approved by the Board and becomes subject to an agreement between GMP and VEPPI obligating GMP to purchase. Superseded Rule 4.104(A), (E).

10 Ampersand's Opposition to Motion to Dismiss at 7 (filed December 14, 2016) ("Opposition").

which a legally enforceable obligation arises in that state. [11] Ampersand's proposal is a solution looking for a problem that does not exist in Vermont—there is no need to prevent utilities from circumventing their PURPA obligations because Vermont's unique implementation of PURPA through a statewide purchasing agent and regulatory framework for approval of proposed contracts already prevents this.

As a matter of fact, Ampersand's proposal cannot be an effective legally enforceable obligation on September 2, 2016 because Ampersand is currently obligated under another contract. Its current one-year contract approved in Docket 8717 does not expire until April 1, 2018, and the 20-year contract proposed in this docket does not commence until April 1, 2018.[12] Accordingly, Ampersand's reliance on 18 C.F.R. § 292.304 is misplaced because that provision does not provide a QF with the right to establish a legally enforceable obligation months or years before the obligation is incurred. To the contrary, Section 292.304(d)(2) provides a QF with the option to provide energy or capacity pursuant to a legally enforceable obligation at the avoided costs calculated either (1) at the time of delivery or (2) at the time the obligation is incurred. Ampersand proposes rates allegedly determined under Superseded Rule 4.100 at the time the obligation was incurred, yet it does not propose to be obligated until April 2018. Even the cases cited by Ampersand acknowledge that, "the legally enforceable 'obligation' is the QF's obligation to provide energy, and the 'time the obligation is incurred' refers to the date on which a binding obligation to deliver energy exists."[13] Ampersand contends that "when a QF commits

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[11] *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*"); *W.Penn Power Co.*, 71 FERC ¶ 61153, 61495 (F.E.R.C. May 8, 1995)("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.").

[12] Opposition at 2.

[13] *Armco Adv. Materials Corp. v. Pa. Pub. Util. Comm'n.*, 135 Pa. Cmwlth. 15, 32, 579 A.2d 1337, 1346 (Pa. Cmmw. 1990) (citing *Snow Mountain*, 734 P.2d at 1371), *aff'd,* 535 Pa. 108, 634 A.2d 207 (1993).

to sell power to utilities, it commits the utilities to buy that power,"[14] but its claim to a September 2, 2016 legally enforceable obligation is simply inconsistent with its own commitment, under which it would not have an obligation to deliver energy or capacity until more than a year later. Therefore, even under Ampersand's own legal argument, it has not established a legally enforceable argument as a matter of fact.

The Board should also reject Ampersand's contention that Amended Rule 4.100 does not apply to QFs seeking to extend or renew existing obligations that expire after the effective date of the Rule.[15] Amended Rule 4.100 provides that, "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."[16] Because the obligation proposed by Ampersand is effective subsequent to the effective date of the Rule, the Amended Rule applies.

For the foregoing reasons, and those articulated in GMP's Motion to Dismiss, the Board should reject Ampersand's arguments in opposition and dismiss its Petition because long-term 20 year contracts through the purchasing agent are not available under Amended Rule 4.100.

Dated at Burlington, Vermont this 29th day of December 2016.

GREEN MOUNTAIN POWER

By: _____

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14 Opposition at 3.
15 Opposition at 9.
16 Board Rule 4.102(C) (emphasis added).