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VIA HAND DELIVERY
September 25, 2015

Mrs. Susan Hudson, Clerk
VERMONT PUBLIC SERVICE BOARD
Peoples United Bank Building, 4th Floor
112 State Street
Montpelier, VT 05620-2701

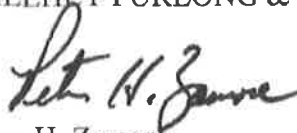
Re: Docket No. 8571
Petition of Swanton Wind, LLC for approval of a Rule 4.100 power purchase agreement concerning purchase of electric energy from a proposed up to 20 MW wind power project in Swanton, Vermont

Dear Ms. Hudson:

On behalf of Green Mountain Power ("GMP"), and pursuant to the Public Service Board's September 4, 2015 Procedural Order, I submit the enclosed Response to the Department of Public Service's ("Department") Motion to Dismiss the above referenced matter. I am also authorized to represent that Vermont Public Power Supply Authority and the Burlington Electric Department also support GMP's enclosed support for the Department's Motion to Dismiss.

Very truly yours,

SHEEHEY FURLONG & BEHM P.C.


Peter H. Zamore

PHZ/cah
Enclosure

cc: Attached Docket No. 8571 Service List

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Petition of North Hartland, LLC for approval of a Rule 4.100 power purchase agreement))	Docket No. 8569
Petition of Great Bay Hydro Corporation for approval of a Rule 4.100 power purchase agreement)))	Docket No. 8570
Petition of Swanton Wind, LLC for approval of a Rule 4.100 power purchase agreement))	Docket No. 8571

**GREEN MOUNTAIN POWER’S RESPONSE TO DEPARTMENT
OF PUBLIC SERVICE MOTION TO DISMISS**

Green Mountain Power (“GMP”) supports the Motion to Dismiss filed by the Department of Public Service (“Department”) on September 4, 2015 in the above-captioned matters. In particular, GMP supports the Department’s position that:

1. The Qualifying Facility (“QF”) requests for approval of Power Purchase Agreements (“PPAs”) are deficient because they lack sufficient information to demonstrate compliance with the substantive criteria of 30 V.S.A. § 248(b) as required for levelized rates under Public Service Board (“Board”) Rule 4.104(H);¹
2. The QF requests are deficient because they fail to demonstrate that levelized rates are needed for financing;² and
3. The request of Swanton Wind, LLC (“Swanton”) is missing critical information relating to the size of the facility and duration of the proposed PPA.

¹ See, e.g., *Pet. of Winooski One Partnership*, Docket No. 5167 (Vt. Pub. Serv. Bd. Dec. 22, 1988) at 56 – 67 (explaining Board rules require that a project must satisfy Section 248’s substantive criteria in order to be eligible for long-term levelized rates because the rates involve a form of loan from the ratepayers to the developer).

² The Board has set a presumption that, for projects exceeding 1 MW, a levelized capacity component is presumed required for financing but fully levelized rates are presumed not to be required. *In re: Small power Production*, Docket No. 4804 Proposal for Decision at 30 – 31; affirmed by *Board Order*, Docket No. 4804 (Vt. Pub. Serv. Bd. March 2, 1984).

Additional Reasons for Dismissal

In addition to supporting the Department's compelling reasons in support of dismissal, GMP submits that the requests should be dismissed because (A) the proposed PPAs do not constitute legally-enforceable obligations required under 18 C.F.R. §292.304(d)(2)(ii); (B) the proposed PPAs fail to include critical provisions protecting Vermont ratepayers; and (C) review of these deficient filings as presently constructed is an inefficient use of resources which should be discouraged.

A. The proposed PPAs do not constitute legally-enforceable obligations required under 18 C.F.R. §292.304(d)(2)(ii).

In order to sell at rates based on "avoided costs calculated at the time the obligation is incurred," PPAs for a specified term must be legally-enforceable obligations under 18 C.F.R. § 292.304(d)(2)(ii). None of the proposed PPAs constitute legally-enforceable obligations because, in the event of a QF breach, remedies available to the Purchasing Agent are limited to termination of the PPA, rather than damages, specific enforcement, or other typically-available contract remedies. *E.g.* Swanton PPA ¶ 19(a).³ In essence, the proposed PPA provides a QF with an option to terminate the PPA at any time over the multi-year term by choosing not to perform its obligations, thereby precluding enforcement of its obligations under the PPA. As a result, the utilities must arrange their power supply portfolios to accommodate the QF power over the full PPA term, without contractual certainty that the power will actually be delivered.

The Swanton PPA is also not a legally-enforceable obligation as it fails to specify the project size or the duration of the obligation, which are essential terms for the formation of a contract. *Quenneville v. Buttolph*, 2003 VT 82, ¶ 16, 175 Vt. 444, 452 ("[W]hile a binding

³ By contrast, the standard form of contract approved by the Board in Docket 4804 permitted PPA termination upon QF breach, but did not limit the availability of other remedies. *In re: Small power Production*, Docket No. 4804 (Vt. Pub. Serv. Bd. May 29, 1984) attached form of PPA at 16. *Compare Walsh v. Chuba*, 117 A.3d 798, 813 (Vt. 2015)(noting that it takes more than contract provisions establishing overlapping duties to effect a waiver or limitation of remedies available for a party's negligence).

agreement need not contain each and every contractual term, it must contain all of the material and essential terms.”).

B. The proposed PPAs fail to include critical provisions protecting Vermont ratepayers.

In addition to not being legally enforceable, the QF requests should be dismissed because the PPAs do not include critical protections for Vermont ratepayers required by the Board. In particular, they fail to include the required arrangements to secure repayment of the cumulative net present value difference between levelized and unlevelized rates. The Board-approved contract, for instance, required a pledge of this amount supported by a security interest.⁴

C. Review of these deficient filings as presently constructed is an inefficient use of resources which should be discouraged.

Rather than granting a stay for a certain time to allow for correction of these deficiencies, the requests should be dismissed for a number of reasons. First, GMP was unaware that new contract forms were being developed by Vermont Electric Power Producers, Inc. (“VEPPI”). Had GMP participated in the contract process, it would have had an opportunity to discuss these issues with the QFs and VEPPI. Instead, GMP’s first opportunity to raise these issues has been before the Board. Dismissal would send a clear signal that it is far more efficient when issues relating to a proposed contract are addressed through discussions and negotiations involving representatives of QFs and utilities rather than solely through litigation before the Board. Second, dismissal will discourage premature filings designed to obtain advantages over later filings or preclude the utilities from exercising rights granted to them under PURPA.⁵

⁴ *Id.* at 12.

⁵ These might include priority over subsequent filings as to eligibility for a specific rate schedule, to the extent that there are deadlines for filing requests or caps on the amount of output to which the rate schedule applies. *Cf. Petition of Department of Public Service for relief in regard to small power production under PSB Rule 4.100*, Docket No. 5191 (Vt. Pub. Serv. Bd. March 11, 1988 (entitlement to preferable rate schedules based on earlier-obtained letters of intent). They might also include a claim that a QF request for PPA approval, however deficient, provides protection against a subsequent utility request to the Federal Energy Regulatory Commission (“FERC”) for

Because these filings represent the first significant PURPA activity for many years and occur on an *ad hoc* basis rather than after Board approval of a standard PPA in a generic proceeding (as in the Docket 4804), failure to dismiss will likely increase the level of uncertainty and consequently, the level of litigation.

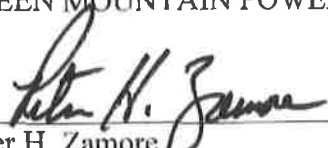
For the above reasons, GMP submits that the Department's Motion should be granted and that the QF petitions should be dismissed.

Dated: September 25, 2015

RESPECTFULLY SUBMITTED,

GREEN MOUNTAIN POWER

By:



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exemption from the purchase obligation. *Cf. Pub. Serv. Co. of New Hampshire*, 131 FERC ¶ 61027, 61185 (F.E.R.C. Apr. 15, 2010) (QF that has initiated request for approval of legally-enforceable obligation protected against subsequent utility request for exemption from purchase obligation); *but see* 18 C.F.R. § 292.314 (limiting the applicable savings clause to contracts or obligations in effect or pending approval "on or before August 8, 2005").