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August 11, 2010

Mrs. Susan Hudson, Clerk
Vermont Public Service Board
112 State Street, Drawer 20
Montpelier, VT 05620-2701

Re: Docket Nos. 7523 and 7533

Dear Mrs. Hudson:

We are writing on behalf of Renewable Energy Vermont (REV) in response to the Board's memorandum of August 5, 2010 concerning the recent Federal Energy Regulatory Commission (FERC) decision, *California Public Utilities Commission and Southern California Edison Co., Pacific Gas and Electric Co., San Diego Gas & Electric Co.*, Docket Nos. EL10-64-000 and EL10-66-000, 132 FERC ¶ 61,047 (July 15, 2010) (FERC Order). The FERC Order was issued in response to the California Public Utilities Commission's (CPUC) petition, and several retail utilities' joint petition, for a declaratory order as to whether California's feed-in-tariff program for certain types of combined heat and power facilities was preempted by federal law—specifically, sections 205 and 206 of the Federal Power Act (FPA) and section 210 of the Public Utilities Regulatory Policies Act of 1978 (PURPA).

Given the facts and law outlined below, REV respectfully submits that the FERC Order has no legal implications for the Vermont SPEED Standard Offer program at this time. Consequently, the Board should not take any action with respect to: (i) the dockets implementing the Standard Offer program (Docket Nos. 7523 and 7533); and (ii) the dockets involving petitions for section 248 certificates of public good filed by Standard Offer producers; or (iii) the fully executed contracts for the SPEED Standard Offer between the SPEED Facilitator and the producers. There are four main reasons that REV believes it would be imprudent and inappropriate for the Board to take any action with respect to the Standard Offer program at this time. We outline each in turn.

First and foremost, the Board does not have jurisdiction to determine whether Vermont's SPEED law is valid or invalid on federal preemption grounds or on other constitutional bases. It is well-settled that "administrative agencies have no power to determine the constitutional validity of statutes." *Westover v. Village of Barton Elec. Dept.*, 149 Vt. 356, 357, 543 A.2d 698, 699 (1988). As the Vermont Supreme Court observed, "To make the system of administrative agencies function the agencies must assume the law to be valid until judicial determination to the contrary has been made." *Id.*, 149 Vt. at 358, 543 A.2d at 699 (quotation omitted). The SPEED program is a state-created, legislatively-mandated program and as a result, the Board can only take steps in conformance with the law as enacted and in particular, must follow the statutory directive to ensure the "rapid development and commissioning of [SPEED] plants." 30 V.S.A. § 8005.

Second, FERC declaratory orders such as the FERC Order in the California case, which merely interpret PURPA, are of very limited legal significance. FERC-issued declaratory orders that simply interpret PURPA or FERC's implementing regulations are not reviewable by the federal courts. *Xcel Energy Servs Inc. v. F.E.R.C.*, 407 F.3d 1242, 124 (D.C. Cir. 2005) (citing *Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000); *Niagara Mohawk Power Corp. v. F.E.R.C.*, 117 F.3d 1485, 1488 (D.C. Cir. 1997); and *Industrial Cogenerators v. FERC*, 47 F.3d 1231, 1234 (D.C. Cir. 1995)). Judicial review of FERC's PURPA interpretations takes place "only after someone—a utility, a QF, or the Commission—brings an enforcement action in the district court." *Id.* (citing *Industrial Cogenerators*, 47 F.3d at 1234). Thus, the FERC Order in the California case "merely advised the parties of the Commission's position," it has no "effect outside the context of an enforcement action," and it does not "fix[] the rights of any party or, indeed, [do] anything more than state how the FERC interprets its own regulations." *Industrial Cogenerators*, 47 F.3d at 1235. Consequently, the FERC Order is not binding on the CPUC or any of the parties who challenged the California feed-in-tariff program, let alone on the Vermont Public Service Board or any person interested in the Vermont Standard Offer program. And to date no party has challenged or raised any issue regarding the validity of the Vermont program or the fully executed Standard Offer contracts.

In addition to the FERC Order's limited precedential effect, FERC in that order did not in fact hold that the California feed-in tariff program is preempted by federal law. Rather, FERC determined that the program is not preempted as long as it satisfies certain conditions. FERC Order, ¶¶ 2, 67-68. The FERC Order did not investigate, let alone invalidate any rates in the California feed-in-tariff program or the methodology that the CPUC used to establish rates. *Id.* ¶ 68. Additionally, the FERC Order is not yet final, as the parties have the opportunity to move for a rehearing, and it is our understanding that some parties are considering such a motion.

Third, the Vermont Standard Offer program is different from the California feed-in-tariff program in several substantive respects. We do not believe it is necessary to describe the distinctions in this letter given the Board's familiarity with the Standard Offer program, but suffice it to say that the FERC Order in the California feed-in-tariff program cannot be read as a dispositive guide to how the FERC might rule if similar questions were raised about the Vermont Standard Offer program. The programs are different enough that the FERC Order is not useful in determining how FERC might analyze Vermont's Standard Offer legislation and its implementation.¹ Indeed, a court has ruled that New York can pass laws that require setting prices above the avoided cost rate:

In sum, as none of the criteria for preemption are present, the PSC has the authority to require utilities to offer to purchase power from Federal qualifying facilities (including those which qualify under both PURPA and the Public Service Law). The PSC may also require a

¹ For example, the role of the SPEED facilitator in the Vermont program, the inclusion of the capacity and other attributes associated with electricity generation in the Standard Offer contracts, the range of facilities covered by the Standard Offer program, the cap on the amount of electrical generation allowed under the Standard Offer program, and the ability of utilities to opt out of the Standard Offer program are all aspects of Vermont's program that would impact any analysis of the federal preemption questions that were addressed in the California FERC order.

utility to offer to purchase power from Federal qualifying facilities at a minimum rate of 6 cents per kilowatt hour in accordance with section 66-c of the Public Service Law.

Consolidated Edison Company of New York, Inc. v. Public Service Commission of State of New York, 472 N.E.2d 981 (N.Y. Ct. App. 1984), *appeal dismissed*, 470 U.S. 1075 (1985); see also *Armco Advanced Materials Corp. v. Pennsylvania Public Utility Com'n.*, 579 A.2d 1337, 1346 (1990) (“*Consolidated Edison* is clearly distinguishable from the present case. Pennsylvania has no statute authorizing rates in excess of [avoided cost]”). It should be noted that the U.S. Supreme Court left the *Consolidated Edison* decision undisturbed, concluding that the case raised no federal question.

The fourth reason that it would be imprudent and premature for the Board to take any action at this point is perhaps the most important reason. Aside from the fact that there are no present challenges to the Standard Offer program and that the FERC Order has no binding legal effect even on the California program, FERC precedent in other cases challenging state-set rates for QF power demonstrates that FERC will not void contracts that were not challenged during the rate-setting process or prior to execution of the contracts. This rule has been followed consistently by the FERC for at least the past fifteen years. Further, several federal courts have recognized and affirmed FERC’s practice in this area. E.g., *Greenwood ex rel. Estate of Greenwood v. New Hampshire Public Utilities Comm’n*, 527 F.3d 8, 15 (1st Cir. 2008) (recognizing FERC’s general approach to enforcement actions and FERC precedent stating, “the appropriate time to challenge a state-imposed rate is up to or at the time the contract is signed”); *New York State Elect. & Gas Corp. v. Saranac Power Partners, L.P.*, 267 F.3d 128, 131-32 (2d Cir. 2001) (discussing a utility’s Administrative Procedures Act challenge to FERC’s practice of refusing to invalidate contracts that were not timely challenged).

FERC has stated its basic rule with respect to QF contracts as follows:

While we are not inclined to upset the expectations of the parties (and lenders) to QF power purchase contracts after the date of contract execution, we are willing to intercede, if appropriate, prior to the date of contract execution. It is in the interest of all parties to resolve this dispute before these contracts are executed.

Midwest Power Systems, Inc., Order on Complaint and Petition for Declaratory Order and on Petition for Enforcement, 78 FERC ¶ 61,067, ¶ 61,248 (Jan. 29, 1997). Consistent with this rule, FERC has repeatedly stated that it is “unwilling to disrupt existing contracts, and to upset the settled expectations of parties and lenders to those contracts” in circumstances where the “contracts were not challenged at the time they were signed and are not now the subject of an ongoing challenge to the State’s avoided cost determination.” *Metro. Edison Co. and Penn. Elec. Co.*, Order Denying Petition for Enforcement and Declaratory Order, 72 FERC ¶ 61,015 (July 6, 1995) (citing cases). This is true even where FERC determines that the rates in such contracts are beyond the state’s regulatory authority or were set in violation of PURPA or FERC’s PURPA-implementing regulations. See, e.g., *Midwest Power Systems*, 72 FERC ¶ 61,067, ¶¶ 61,245, 61,248.

As noted above, there have been no challenges to the Vermont Standard Offer program or any of the now fully-executed Standard Offer contracts. Many of the Vermont retail electric utilities, the DPS, and a number of other parties participated in the dockets that set rates for standard offer

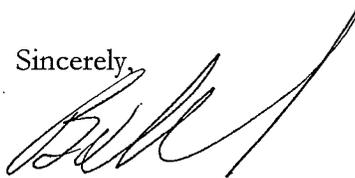
facilities and addressed implementation issues for the Standard Offer program. No party objected that the Board's action in these dockets is preempted by PURPA or the FPA. Similarly, no party raised any such objections prior to the execution of the Standard Offer contracts. The producers who are parties to the executed Standard Offer contracts have proceeded in reliance on those contracts, many expending significant resources (some hundreds of thousands of dollars) to fulfill their contractual obligations on time, as required under the executed contracts.

Regardless of any action the Board might consider taking with respect to the Standard Offer program in light of the recent FERC Order, REV urges the Board to proceed without interruption in evaluating the section 248 petitions that have been, and continue to be, filed by the producers that are seeking to develop renewable energy generation projects under Standard Offer contracts. The federal preemption issues raised in the California feed-in-tariff case should not have any bearing on whether these proposed generation projects satisfy section 248, as these projects have and can produce independent evidence to meet all of the statutory criteria. In addition, the Standard Offer contracts need not be evaluated or approved under section 248. Any questions as to the constitutional validity of the Vermont Standard Offer program are separate from, and unrelated to, the section 248 criteria.

In sum, in light of the relevant precedent, there is no basis to suggest that the FERC Order might directly impact the existing executed Standard Offer contracts. We have found no FERC orders or federal court decisions in recent history that nullify or modify existing QF contracts based on any PURPA preemption issues, and at least one court decision that was left undisturbed by the U.S. Supreme Court explicitly rejects this argument. Unless and until there is a final judicial ruling addressing the specific design of the Vermont Standard Offer program, it would be premature and imprudent for the Board to initiate any additional proceedings at this time to address the hypothetical impact of an advisory FERC decision that is specifically focused on a separate and unique California program. Moreover, it is incumbent for the Board to do what it can to resolve the question raised by its August 5th memorandum in a timely manner, consistent with its obligations to encourage the "rapid development and commissioning of [SPEED] plants," to help address any perceived uncertainty. In the event the Board elects to further address the issue of federal preemption for any future Standard Offer contracts or the Standard Offer program *sua sponte*, it is imperative that it do so in an expedited manner.

Thank you for considering REV's comments on these important issues related to the Standard Offer program, and please let us know if you have any questions.

Sincerely,



Brian S. Dunkiel

Andrew N. Raubvogel

SHEMS DUNKIEL RAUBVOGEL & SAUNDERS PLLC

cc: Service List (Via Email)