UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Otter Creek Solar LLC	)	Docket Nos. EL17-16-000
Allco Finance Limited	)	QF11-193-002
PLH LLC	)	QF11-194-002
Otter Creek Solar LLC	)	QF13-402-006
Otter Creek Solar LLC	)	QF16-353-001
Otter Creek Solar LLC	)	QF16-354-001
Otter Creek Solar LLC	)	QF16-355-001
Otter Creek Solar LLC	)	QF11-356-001

NOTICE OF INTERVENTION AND PROTEST OF THE
VERMONT PUBLIC SERVICE BOARD

Pursuant to Rules 211 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. § 385.211, 385.214, the Commission's November 7, 2016 "Notice of Petition for Enforcement," and the Commission's November 18, 2016 "Notice of Extension of Time," the Vermont Public Service Board ("VPSB" or "the Board") files this Notice of Intervention and Protest of the Petition for Enforcement Under the Public Utility Regulatory Policies Act of 1978 ("PURPA") submitted by Otter Creek Solar LLC ("Otter Creek"), Allco Finance Limited, and PLH LLC (collectively, "Petitioners") on November 4, 2016, in the above-captioned dockets against the VPSB ("Petition"). The Petition, submitted pursuant to section 210(h)(2)(B) of PURPA, 16 U.S.C. § 824a-3(h)(2)(B), asks the Commission to initiate an enforcement action against the VPSB to remedy what the Petition characterizes as the State of Vermont's improper implementation of PURPA. *See* Petition at 1. For the reasons discussed in this Protest, the Petition does not raise any legitimate basis for an enforcement action against the VPSB. The VPSB requests that the Commission not

initiate an enforcement action against the VPSB and instead issue a notice of intent not to act in this proceeding.

I. NOTICE OF INTERVENTION AND SERVICE

Pursuant to Rule 214(a)(2), 18 C.F.R. § 385.214(a)(2), the VPSB gives notice of its intervention in the above-captioned proceeding and designates the following persons for service:

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II. BACKGROUND

A. Vermont's PURPA Program: Rule 4.100

The VPSB is the Vermont state regulatory authority responsible for implementing PURPA. Among other things, the VPSB has jurisdiction over the following:

> The sale to electric companies of electricity generated by facilities: (A) which produce electric energy solely by the use of biomass, waste, renewable resources, cogeneration, or any combination thereof; and (B) which are owned by a person not primarily engaged in the generation or sale of electric power derived from facilities described in subdivision (a)(8)(A) of this section; and (C) which have a power production capacity which, together with any other facilities located at the same site, is not greater than 80 megawatts.

30 V.S.A. § 209(a)(8).

To effectuate the requirements of PURPA and section 209(a)(8), the Board promulgated General Order 65 in June 1981, establishing a rate for energy sales to utilities.[1] In April 1983, the Board replaced General Order 65 with Rule 4.100 – Small Power Production and Cogeneration, a more comprehensive approach to developing avoided cost rates and the process for entering into contracts with qualifying facilities ("QFs").[2] The Board's prior version of Rule 4.100 was found by the Commission to be consistent with PURPA. *See Otter Creek Solar LLC*, 143 FERC ¶ 61,282, P 4 (2013) ("*Otter Creek*"), *reconsideration denied*, 146 FERC ¶ 61,192 (2014) ("*Otter Creek* Reconsideration Order") (citing *Vt. Elec. Coop., Inc. v. Vt. Pub. Serv. Bd. and Vt. Dep't of Pub. Serv.*, 25 FERC ¶ 61,273 (1983); *Barnet Hydro Co. v. Cent. Vt. Pub. Serv. Corp.*, 95 FERC ¶ 61,257 (2001); *N. Hartland, LLC v. Cent. Vt. Pub. Serv. Corp.*, 105 FERC ¶ 61,037 (2003)).[3]

In an August 22, 2014 order in Docket No. 8010, the Board directed its staff to conduct a workshop outside of that proceeding to investigate whether there was a more efficient procedural mechanism to implement PURPA than the procedures contained in Rule 4.104(E). Board staff conducted the workshop on February 19, 2015. Following that workshop, there was an opportunity for all interested stakeholders to submit comments on whether and how the Board should amend its PURPA rules and to provide specific language. The Board held a hearing on its proposed rule on February 29, 2016, and following the submission of comments and reply

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1 *See* Biennial Report of the Public Service Department, July 1, 1980 – June 30, 1982 at 5.

2 *See* Biennial Report of the Department of Public Service, July 1, 1982 – June 30, 1984 at 5.

3 The VPSB does not agree with the Petition's characterization of this finding as "a myth." *See* Petition at 18-19.

comments, the Final Proposed Rule was filed with the Vermont Secretary of State on July 14, 2016. New Rule 4.100 became effective September 15, 2016.

Pursuant to New Rule 4.104(B), a QF may now elect to sell its output to an Interconnecting Utility through one of the following arrangements:

1. A standard power purchase contract not to exceed seven years based on as-delivered rates (an "as-delivered contract"). *See* VPSB Rule 4.104(B)(1).

    a. The as-delivered energy rate is either the hourly real-time locational marginal price ("LMP") at the ISO New England ("ISO-NE") delivery node or, at its option, the hourly day-ahead LMP at the ISO-NE delivery node adjusted to reflect any real-time Energy Market settlement for deviation from the generation that cleared in the day-ahead Energy Market. *See* VPSB Rule 4.104(E)(1)(a).

    b. The as-delivered monthly capacity rate is based on payments received from the QF's participation in ISO-NE's Forward Capacity Market, adjusted for any performance penalties or incentives assessed or paid by ISO-NE. *See* VPSB Rule 4.104(F)(1)(a).

2. A standard-power purchase contract for a term of seven years based on time-of-obligation Rates (a "time-of-obligation contract"). *See* VPSB Rule 4.104(B)(2).

    a. Under a time-of-obligation contract, the QF has the option of choosing energy rates that are:

        i. Standard rates, which are based on the Interconnecting Utility's avoided costs for energy, as provided pursuant to Rule 4.109 and after consideration of the factors set forth in 18 C.F.R § 292.304(e). Standard rates shall be determined at the start of the contract period and remain unchanged over the term of the time-of-obligation contract. *See* VPSB Rule 4.104(E)(2)(a).

        ii. Index rates, to be updated monthly over the term of the time-of-obligation contract, which shall be calculated using on-peak and off-peak monthly forward prices on the ISO-NE system that are available on the New York Mercantile Exchange (or other accepted published commodity exchange for ISO-NE forward prices). *See* VPSB Rule 4.104(E)(2)(b).

    b. Monthly rates for capacity are based on the capacity supply obligation for the month multiplied by the contractual rate specified in the contract, as

adjusted for any performance penalties or incentives assessed or paid by ISO-NE. Capacity rates shall be determined at the start of the contract period and remain unchanged over the term of the time-of-obligation contract. *See* VPSB Rule 4.104(F)(2)(a).

3. A negotiated power purchase contract executed between the QF and the Interconnecting Utility (with no limit on the contract's length). *See* VPSB Rule 4.104(B)(3).

Other changes were made to Rule 4.100, but the changes above were the most significant and are the most relevant to this proceeding.

B. Vermont's Standard-Offer Program

In addition to its implementation of PURPA through the VPSB's Rule 4.100 program, Vermont has additional state programs aimed at increasing the use of renewable resources in the state. Vermont's renewable goals are reflected in 30 V.S.A. § 8001, enacted by the Vermont General Assembly in 2003. Among these goals, in their current iteration, are:

(1) Balancing the benefits, lifetime costs, and rates of the State's overall energy portfolio to ensure that to the greatest extent possible the economic benefits of renewable energy in the State flow to the Vermont economy in general, and to the rate-paying citizens of the State in particular.

(2) Supporting development of renewable energy that uses natural resources efficiently and related planned energy industries in Vermont, and the jobs and economic benefits associated with such development, while retaining and supporting existing renewable energy infrastructure.

* * *

(8) Promoting the inclusion, in Vermont's electric supply portfolio, of renewable energy plants that are diverse in plant capacity and type of renewable energy technology.

30 V.S.A. § 8001(a)(1), (2), (8).

In 2005, the Vermont General Assembly established the Sustainably Priced Energy Enterprise Development Program ("SPEED"), which was designed to encourage the

development of renewable energy resources in Vermont, as well as the purchase of renewable power by the state's electric distribution utilities, by requiring that the State's utilities enter into long-term, stably priced contracts for power from resources utilizing renewable technologies.[4] The Vermont Energy Act of 2009, enacted in May 2009, modified the SPEED program to include a state-wide standard-offer program. The standard-offer program was open to SPEED projects with a nameplate capacity of 2.2 MW or less, and provided for a program cap (with certain exceptions) of 50 MW.[5]

In May 2012, the Vermont General Assembly passed Public Law 170,[6] which mandated significant changes to the SPEED standard-offer program, pursuant to 30 V.S.A. §§ 8005a and 8006a. As the Board explained, among those changes were:

> (1) annually increasing the cumulative plant capacity of the standard-offer program until the 127.5 MW capacity of the program is reached, pursuant to a predetermined schedule;
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> (2) reserving a portion of each annual increase in capacity for Vermont retail electricity providers;
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> (3) adjusting the annual increase in capacity to account for [greenhouse gas] reduction credits;
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> * * *
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> (5) excluding from the cumulative plant capacity plants using methane derived from agricultural operations and new standard-offer plants that the Board determines will provide sufficient benefits to the operation and management of the electric grid;

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4 *See* 30 V.S.A., Chapter 89, Renewable Energy.

5 Public Act 45 (2009, Vt., Adj. Sess). The text of Act 45 is available at http://www.leg.state.vt.us/docs/2010/Acts/ACT045.pdf.

6 Public Act 170 (2012, Vt., Adj. Sess.). The text of Act 170 is available at http://www.leg.state.vt.us/DOCS/2012/ACTS/ACT170.PDF.

(6) setting standard-offer prices for each renewable energy category at avoided cost, with the requirement that the Board employ a market-based mechanism, if certain enumerated conditions are met.

* * *

Programmatic Changes to the Standard-Offer Program, Order Re Establishment of Standard-Offer Prices and Programmatic Changes to the Standard-Offer Program at 5, VPSB Docket 7873 (March 1, 2013). In this order, the Board took several actions, including determining the avoided costs which would serve as the limit on the standard-offer prices, adopting guidelines to provide standard-offer plant developers with adequate information regarding constrained areas of the electric grid in which generation having particular characteristics is reasonably likely to provide sufficient benefit to the operation and management of the grid, and remanding the Docket to Board staff to conduct additional proceedings on various issues. *See id*. at 64-66.

On May 1, 2013, Otter Creek petitioned the Commission to initiate an enforcement action against the VPSB to remedy the Board's issuance of orders related to the implementation of the SPEED program, or in the alternative, requesting that the Commission find the SPEED program inconsistent with the requirements of PURPA and the Commission's regulations implementing PURPA. *See Otter Creek Solar LLC*, Petition for Enforcement Under the Public Utility Regulatory Policies Act of 1978 at 1-3, Docket Nos. EL13-60-000, QF13-402-001 (May 1, 2013) ("Otter Creek 2013 Petition"). On June 27, 2013, the Commission issued a Notice of Intent Not To Act, explaining that "[t]he standard offer SPEED program is an optional program available to certain small renewable QFs[,]" *Otter Creek* at P 4 , and that QFs may participate in the Board's Rule 4.100 program which "has been found by the Commission to be consistent with PURPA." *Id*. (citations omitted). In response to Otter Creek's request for reconsideration, the

Commission explained that Vermont's "SPEED program is simply an option offered by Vermont to QFs like Otter Creek in addition to, but not as a replacement for, the Rule 4.100 program." *Otter Creek* Reconsideration Order at P 8.

Since then, the standard-offer program has been amended to reflect the fact that the SPEED program itself has been repealed, with the standard-offer program left intact. In 2015, the General Assembly enacted Act No. 56, an act relating to establishing a renewable energy standard. Act No. 56 repealed the SPEED program and established a mandatory Renewable Energy Standard for the State.[7] Pursuant to the Renewable Energy Standard, the total renewable energy required is to be 55 percent of each retail electricity provider's annual retail electric sales during the year beginning on January 1, 2017, increasing by an additional four percent each third year, until reaching 75 percent on and after January 1, 2032. *See* 30 V.S.A. § 8005(a)(1)(B). While the Renewable Energy Standard requirements replaced the SPEED program's goals, the structure of the standard-offer program remained intact.

III. PROTEST

Commission action is not warranted for several reasons. First, with respect to the objections to the standard-offer program, the Petition, filed pursuant to PURPA section 210(h)(2)(B), identifies no violation of PURPA section 210(f), which directs states to establish rules consistent with the Commission's PURPA program. Rather, the Petition complains about the VPSB's implementation of the state's standard-offer program which the Commission has

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[7] Public Act 56 (2015, Vt., Adj. Sess.). The text of Act 56 is available at http://legislature.vermont.gov/assets/Documents/2016/Docs/ACTS/ACT056/ACT056%20As%20Enacted.pdf .

previously recognized as a program that is optional and supplemental to the Board's Rule 4.100 PURPA program. *See infra* Section III.A.

Second, the Petition's objections to New Rule 4.100 mischaracterize the provisions of that rule. Specifically, Rule 4.100 as revised provides QFs several different avenues to seek to sell the output of their facilities, including an option to negotiate with the distribution utilities for contracts longer than seven years and an option to enter into up to a seven-year contract with avoided costs calculated at the time of the obligation. Additionally, the Petition's contentions that PURPA and/or the Commission's regulations prohibit the State regulatory authority from imposing limits on the length of the legally enforceable obligation are mistaken. *See infra* Section III.B.

Third, the Petition's arguments that New Rule 4.100 and the standard-offer program discriminate against QFs misconstrue PURPA. *See infra* Section III.C.

Fourth, the Petition's claims that the VPSB is engaging in impermissible wholesale rate regulation are mistaken. *See infra* Section III.D.

Fifth, the Petition's claim that the standard-offer program discriminates against QFs misconstrues siting orders of VPSB that are not for the approval of 25-year fixed rate contracts. *See infra* Section III.E.

Finally, the Petition makes several arguments that are unsupported, irrelevant or seek Commission action beyond the scope of the Commission's authority pursuant to PURPA section 210(h)(2)(B). *See infra* Section III.F.

Accordingly, the VPSB requests that the Commission issue a notice of intent not to act.

A. Vermont's Standard-Offer Program Is Supplemental to Its Rule 4.100 PURPA Program and, as the Commission Has Previously Found, Does Not Violate PURPA.

PURPA section 210(f)(1) directs a State regulatory authority, such as the VPSB, to timely implement, after notice and opportunity for public hearing, rules for jurisdictional distribution utilities as prescribed by the Commission. *See* 16 U.S.C. § 824a-3(f)(1). The VPSB has done so with its Rule 4.100 Program. PURPA, however, does not prohibit state renewable programs that are different than, or supplemental to, a state-PURPA program. To the contrary, the Commission has long-recognized that a state may encourage the development of renewable generation in a variety of ways independently of PURPA:

> The Commission believes that states have *numerous ways outside of PURPA* to encourage renewable resources. As a general matter, states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. States may, for example, order utilities to build renewable generators themselves, or deny certification of other types of facilities if state law so permits. They also, assuming state law permits, *may order utilities to purchase renewable generation*.

So. Cal. Edison Co., 71 FERC ¶ 61,269, 62,080 (1995) (denying reconsideration) (emphasis added).

Here, the Vermont standard-offer program is a means for a renewable resource to sell the output of its facility. It is not a program implemented by the VPSB pursuant to PURPA. In fact, the standard-offer program is only available to qualifying small power production facilities (as defined by 16 U.S.C. § 796(17)(C) and 18 C.F.R. pt. 292) that are commissioned on or after September 30, 2009, and that have a plant capacity of 2.2 MW or less. *See* 30 V.S.A. § 8005a(b). The Board's Rule 4.100 PURPA program is open to QFs of any size. *See* VPSB Rule

4.103(A)20. There is no requirement for any QF to participate in the Vermont standard-offer program, and it is supplemental to the Board's Rule 4.100 PURPA program.

The Commission has rejected challenges to state programs brought under PURPA section 210(h)(2) where the challenged state programs were *supplemental* to the state's PURPA programs. In fact, three and a half years ago, the Commission rejected allegations by Otter Creek that Vermont's standard-offer SPEED program—an earlier version of the standard-offer program at issue in this proceeding—violated PURPA and the Federal Power Act ("FPA"). *See Otter Creek*, *Otter Creek* Reconsideration Order. The Commission declined to take enforcement action, explaining:

> In Vermont, QFs [] still have the option to participate in a program that has been found consistent with PURPA. Those Vermont QFs that choose to participate in the SPEED program are agreeing to the rates that result from that program. Nothing in the Commission's regulations limits the authority of either an electric utility or a QF to agree to rates for any purchases or terms or conditions relating to any purchases which differ from the rates or terms or conditions which would otherwise be required by the Commission's regulations.

Otter Creek at P 4 (footnotes omitted). Similarly, the Commission found that California's feed-in tariff program is an alternative to California's standard PURPA program and that as long as QFs have access to the benefits of the state's PURPA program, the "state may also have alternative programs that QFs and electric utilities may agree to participate in." *Winding Creek Solar LLC*, 151 FERC ¶ 61,103, P 6 (2015), *reconsideration denied*, 153 FERC ¶ 61,027 (2015).

The Petition raises several objections to the standard-offer program, arguing that each aspect of the program, in turn, violates both PURPA and the FPA. For the reason discussed immediately above, none of these demonstrate a violation of section 210(f), 16 U.S.C. § 824a-

3(h)(2)(A) ("[n]o enforcement action may be brought by the Commission under this section other than (i) an action by the State regulatory authority . . . for failure to comply with the requirements of subsection (f)"). The objections that the Petition raises—the bidding "requirement" (Petition at 27-28), the "cap" on contracts (*id*. at 28-29), the associated exemption from the cap (*id*. at 29-30), and the reservation of the power block to Vermont utilities (*id*. at 31)—are not part of the Board's Rule 4.100 PURPA program. For example, the Petition argues that "[t]he requirement to participate in a bidding contest to obtain a long-term 25-year wholesale electricity bundled contract" violates both the FPA and PURPA. Petition at 1, 27-28. This argument rests on the mistaken assumption that QFs must participate in a bidding process to obtain a long-term contract in Vermont. As explained above, the standard-offer program is an optional program for those QFs that are eligible to participate. The statute imposes an obligation on the Board to issue standard offers for renewable energy plants that meet the program's eligibility requirements, 30 V.S.A. § 8005a(a), but there is no obligation on the QFs to participate. Likewise, there is no prohibition on QFs eligible for the standard-offer program to participate in the Board's Rule 4.100 PURPA program. As discussed below in Section III.B, QFs have the ability to seek either a seven-year contract or a longer-term contract pursuant to Rule 4.100. And Rule 4.100 does not impose any requirement to participate in a competitive bidding process to participate in the PURPA program in Vermont.

The Petition's characterization of Commission precedent as having "already declared the requirement of a request for proposal process to obtain a contract at a long-term forecasted avoided cost rate as unlawful and contrary to PURPA" (Petition at 27) is inaccurate. The Petition cites two cases for this proposition: *Hydrodynamics Inc.*, 146 FERC ¶ 61,193, P 32

(2014) ("*Hydrodynamics*") and *Windham Solar LLC*, 156 FERC ¶ 61,042, P 5 (2016) ("*Windham Solar*"). In *Windham Solar*, the Commission explained that it has found a state regulation to be inconsistent with PURPA "to the extent that it offers the competitive solicitation process as *the only means* by which a QF . . . can obtain long-term avoided cost rates." *Id.* (quoting *Hydrodynamics* at P 33 (2014)) (emphasis added). In *Hydrodynamics*, the question before the Commission was whether the rule that the Montana Public Service Commission ("Montana Commission") adopted to implement PURPA was in violation of PURPA. Specifically, in 1992, the Montana rule adopted a competitive solicitation approach for QFs with a threshold size greater than 3 MW of nameplate capacity, later amended to 10 MW of nameplate capacity. *See Hydrodynamics* at P 5. The Commission issued a declaratory order finding that the Montana rule is inconsistent with PURPA, and the Commission's regulations implementing PURPA to the extent that it offers the competitive solicitation process as the *only* means by which a QF greater than 10 MW can obtain QF rates. The Commission explained that the Montana rule:

> creates, as well, a practical disincentive to amicable contract formation because a utility may refuse to negotiate with a QF at all, and yet the Montana Rule precludes any eventual contract formation where no competitive solicitation is held. Such obstacles to the formation of a legally enforceable obligation were found unreasonable by the Commission in *Grouse Creek*, and are equally unreasonable here and contrary to the express goal of PURPA to "encourage" QF development.

Hydrodynamics at P 33 (citing *Grouse Creek Wind Park*, LLC, 142 FERC ¶ 61,187 (2013)).

Similarly, the Petition cites *Hydrodynamics* as supporting its argument that the standard-offer program violates the mandatory purchase obligation set forth in the Commission's regulations by "plac[ing] stringent limits on the amount of capacity that Vermont's utilities are

required to purchase from QFs." Petition at 29. As noted above, the Commission's finding that the cap on the utility's purchase obligation was "inconsistent with PURPA and the Commission's regulations" (*Hydrodynamics* at P 34) was premised on the fact that the Montana Commission's order requiring the cap was issued within the confines of that state's PURPA program (*see id.* at PP 7, 14).

The Petition does not explain how the reservation of a certain quantity of contracts to Vermont's utilities violates the FPA or PURPA. *See* Petition at 31. Similar arguments were raised by Otter Creek in its prior unsuccessful petition for enforcement. *See* Otter Creek 2013 Petition at 14-15 (arguing that the Commission should find in violation of the FPA and PURPA the Vermont standard-offer programs provisions that "set aside a certain amount of new capacity for utility-owned projects, thus eliminating the ability of QFs to specifically displace that new capacity"). As was pointed out by the Vermont Department of Public Service in that docket, the VPSB has explained in an order the basis for and implementation of the block "set aside" for Vermont utilities. *See Otter Creek Solar LLC*, Vermont Department of Public Service Protest and Motion to Dismiss at 19-21, Docket Nos. EL13-60-000, QF13-402-001 (citing the VPSB Standard-Offer Order at 32-38). The Commission, therefore, has already reviewed these same arguments and determined that they provided no basis for an enforcement action. *See Otter Creek, Otter Creek* Reconsideration Order. Nothing has changed in this regard, and there is likewise no need for the Commission to take enforcement action now.

There is nothing unlawful about the Vermont standard-offer program. To the contrary, the Commission's regulations preserve the "authority of a State commission in accordance with State and Federal law to establish . . . [c]ompetitive procedures for the acquisition of electric

energy . . . purchased at wholesale." 18 C.F.R. § 35.27(b)(1). *See also Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082, PP 18, 36-39 (2004) (emphasizing that a utility's solicitation was based on an RFP developed in a state commission proceeding and subject to commission and commission-selected consultant supervision). As the Commission has explained:

> While section 292.304 of the Commission's regulations sets forth the requirements for *rates for purchases* of electric energy by utilities from QFs, and while nothing in the regulation requires any electric utility to *pay* more than the 'avoided costs for purchases,' it is the *states* that have the authority to dictate a utility's actual purchase decisions. . . . Thus, the guidance provided by the Commission in this proceeding simply reflects the reality that states have the authority to dictate the generation resources from which utilities may procure electric energy.

Cal. Pub. Util. Comm'n, 134 FERC ¶ 61,044, P 30 (2011) (citation omitted; emphasis in original). *See also N. Little Rock Cogen., L.P. and Power Sys., Ltd. v. Entergy Servs, Inc.*, 72 FERC ¶ 61,263, 62,174 (1995) (the Commission is "wary of becoming entangled unnecessarily in the specifics of administering or reviewing state or local competitive power procurements (absent any facial or patent defect") (citation omitted)).

Petitioners have not shown a violation of any other section of PURPA or the Commission's PURPA regulations. Without such a violation, PURPA provides no grounds for the Commission to take any enforcement action.

B. The Petition Does Not Demonstrate New Rule 4.100 To Be in Violation of PURPA.

The Petition's criticism of Rule 4.100 rests on a flawed interpretation of that rule. In particular, the Petition's assertion that "New Rule 4.100 limits contracts to a 7-year term" (Petition at 16) is mistaken. Rule 4.104(B)(3) gives a QF the option to sell its output to an Interconnecting Utility pursuant to a negotiated power purchase contract executed between the

QF and the Interconnecting Utility. In this case, there is no seven-year limit on the contract; rather, the term will be that negotiated between the QF and the utility.

Even if the New Rule 4.100 did not provide QFs the option to elect a negotiated power purchase contract without a specified maximum term, the Board has the discretion to impose such a limit on the standard power purchase contract term. The Board's rationale for adopting the seven-year option (Board Rule 4.100 – Response to Comments Document at 9) included that it is consistent with the seven-year term provided to new resources in the ISO-NE Forward Capacity Market.[8] Nothing in PURPA or the Commission's PURPA regulations specifies a minimum length. The Commission recently noted that it "has not required any particular minimum contract length or other minimum contract provisions in PURPA-purchase contracts." *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Notice Inviting Post-Technical Conference Comments: Post-Technical Conference Questions for Comment at 2, Docket No. AD16-16-000 (Sept. 6, 2016). Indeed, some states have imposed limitations more stringent than the Board's seven-year option. *See, e.g., In re Idaho Power Co.'s Petition To Modify Terms and Conditions of PURPA Purchase Agreements*, *et al.*, Order No. 33419 at 19-20, Idaho Public Utilities Commission Case No. IPC-E-15-01 (Nov. 5, 2015) (approving change from twenty-year term to two-year limit).

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[8] The Board explained further that "the 7-year term represents a period over which a distribution utility can reasonably forecast future avoided costs. The 7-year term balances the interests of QFs and ratepayers by providing certainty and stability, while at the same time avoiding lengthy contracts that because of their length can result in out-of-market rates (as is the case with terms as long as 30 years authorized by the existing rule)." *Id.*, *available at* http://psb.vermont.gov/sites/psb/files/rules/proposed/Rule4100/FinalProposed/BoardRule%204100-ResponseToComments.pdf.

In addressing this issue, the Petition includes a lengthy discussion of how limited state discretion is, arguing, among other things, that states have latitude only when taking action to respond to a utility seeking to overturn state action encouraging QF generation. *See* Petition at 13-14. The Petition similarly discusses at length unconstitutional delegation to the nonregulated utilities and states. *Id.* at 21-25. There is no foundation for these arguments. "As the Commission has previously explained, 'states are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA, as long as such plans are consistent with our regulations.'" *Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059, P 24 (2010) (citing *Am. REF-FUEL Co. of Hempstead*, 47 FERC ¶ 61,161, 61,533 (1989) additional authorities omitted)). "It is up to the States, not [the Commission], to determine the specific parameters of individual QF power purchase agreements. . . ." *W. Penn Power Co.*, 71 FERC ¶ 61,153, 61,495 (1995) (citation omitted). The Fifth Circuit Court of Appeals explained that "*West Penn* and its Progeny *Jersey Central Light Co.*, 73 FERC ¶ 61,092, 61,297 (1995) and *Metropolitan Edison Co.*, 73 FERC ¶ 61,015, 61,050 (1995) support the proposition that the FERC regulations grant the states discretion in setting specific parameters for [legally enforceable obligations]." *Power Res. Group, Inc. v. Pub. Util. Comm'n of Tx.*, 422 F.3d 231, 238 (5th Cir. 2005).[9] *See also Indep. Energy Producers v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 856 (9th Cir. 1994) ("the state's authority to implement [16 U.S.C. § 824a-3] 210 is admittedly broad").

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[9] The VPSB recognizes that the Petitioners believe that the *Power Resource* case was wrongly decided (Petition at 25-27); nonetheless, the Court's decision has not been overturned.

In any event, there is no improper delegation in Rule 4.100. The Board retains the ultimate authority over avoided cost determinations. *See* 30 V.S.A. § 209(a)(8) (the Board has jurisdiction over the sale to electric companies of electricity generated by facilities). The Board's rules require each Interconnecting Utility to file a schedule with the Board and with the Vermont Department of Public Service of its avoided costs every 24 months. *See* VPSB Rule 4.109(B). If, within 90 days of a QF submitting an offer to an Interconnecting Utility, there is failure to agree to terms—which include the avoided costs—the QF may petition the Board for resolution of the issue. *See* VPSB Rule 4.104(C).

C. The Petition Has Not Shown Discrimination under PURPA.

The Petition includes allegations of discrimination that, even if credited, do not state a legitimate claim under PURPA. Specifically, the Petition complains of the "discriminatory treatment of certain QFs by exempting only certain generators from the cap and bidding requirements," the "discriminatory treatment against solar QFs by providing a fixed 25-year bundled rate under the standard offer program, but only a 7-year nonbundled contract under Rule 4.100," and the "discrimination against solar QFs as compared to Vermont's monopoly utility . . . by approving 25-year bundled wholesale electricity contracts between GMP and its non-regulated affiliate when similarly-situated QFs are not provided the same treatment." Petition at 1.

PURPA section 210(b) provides that in the rules that the Commission issues pursuant to subsection (a), such rules "shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase . . . shall not discriminate against qualifying cogenerators or

qualifying small power producers." 16 U.S.C. § 824a-3(b)(2). The Commission's PURPA regulations do just that. *See* 18 C.F.R. § 292.304(a)(1)(ii) ("Rates for purchases shall . . . [n]ot discriminate against qualifying cogeneration and small power production facilities."). In adopting its QF regulations in the first instance, the Commission determined that the way to ensure rates were not discriminatory was to require that all rates for QF purchases be set at no higher than avoided cost. *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214, 12,222 (Feb. 25, 1980) (finding that the rates for purchases meet the statutory requirement that such rates not discriminate against QFs if they equal avoided costs). The Board's Rule 4.100 PURPA program properly implements these principles.

As discussed above (*see* Section III.A), the standard-offer program is an optional program available to QFs under 2.2 MW that is supplemental to the Board's Rule 4.100 PURPA program; therefore, the fact that the terms and conditions of the contracts that arise from the solicitation under the standard-offer program may differ from the Rule 4.100 PURPA program does not constitute discrimination. Regarding the GMP "contracts," as explained below (*see* Section III.E), the Board did not approve any bundled wholesale electricity contracts between GMP and its non-regulated affiliate; therefore, the Petition's argument of discrimination rests on a faulty premise.

The Petition has not shown any way in which the Board's Rule 4.100 PURPA program violates either PURPA or the Commission's implementing regulations prohibiting discrimination. Nor has the Petition shown any way in which the VPSB's specific application of

its Rule 4.100 PURPA program is discriminatory.[10] *See Compare Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215, PP 37-39 (2013) (finding that a proposed curtailment provision that provides a curtailment priority to existing generation resources as compared to QFs violates the non-discrimination protections for QFs included in PURPA and the Commission's PURPA regulations).

D. The Petition Has Not Shown Any Way in Which the VPSB Has Engaged in Wholesale Rate Regulation in Violation of the Federal Power Act.

The Petition includes a number of unsupported statements that the VPSB's actions, in connection with the standard-offer program or Rule 4.100, constitute a regulation of wholesale electricity sales. *See* Petition at 3 ("Both the Rule 4.100 and the standard-offer rules constitute the regulation of wholesale sales of electricity in interstate commerce"); *id*. at 27 ("Vermont's rules and practices with respect to interstate wholesale power contracts under Rule 4.100 and the standard offer program plainly constitutes [sic] regulation in the field of wholesale energy sales"). The Petition also asserts, without explanation, that the bidding process contained in the standard-offer program is "pre-empted because it regulates wholesale sales of electricity but does not foster QF generation" (*id*. at 28), and that the seven-year term limit "is state regulation of wholesale sales that does not foster QF generation" (*id.* at 31). Even if the VPSB's Rule 4.100 did include a bidding requirement—which it does not—this would not constitute impermissible

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[10] To the extent the Petition had done so, this would be the type of "as applied" challenges over which state courts have exclusive jurisdiction. *See Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 388 (5th Cir. 2014) ("PURPA provides for two types of review of a state utility regulatory authority's actions: implementation and as-applied challenges. . . . Federal courts have exclusive jurisdiction over implementation challenges, while state courts have exclusive jurisdiction over as-applied challenges. An implementation claim involves a contention that the state agency . . . has failed to implement a lawful implementation plan under § 824a-3(f) of PURPA, whereas an 'as applied' claim involves a contention that the state agency's . . . implementation plan is unlawful, as it applies to or affects an individual petitioner."). *Power Res. Group, Inc. v. PUC,* 422 F.3d 231, 234-235 (2005).

wholesale rate regulation. And even if the allegation about the seven-year limit were correct—which, as discussed in Section III.B, above, it is not—again, this would not constitute impermissible wholesale rate regulation. There is no question that the Commission's authority under the FPA to regulate rates, terms and conditions of wholesale sales of energy in interstate commerce is exclusive, *see* 16 U.S.C. § 824(b). At the same time, however, "resource planning and resource decisions are the prerogative of state commissions." *So. Cal. Edison Co.*, 70 FERC ¶ 61,215, 61,676 (1995) ("states may wish to diversify their generation mix to meet environmental goals in a variety of ways"). Here, the VPSB has engaged in resource planning, and has not set wholesale rates or otherwise intruded on the Commission's FPA authority.

E. The Petition Is Mistaken That the VPSB Approved Wholesale Contracts Between GMP and Its Affiliates.

Among the issues raised in the Petition are objections to what it refers to as the calculation of avoided costs in "wholesale contracts the VPSB approved for the monopoly utility from its unregulated affiliate." Petition at 18 (citing *Petition of GMPSolar-Hartford LLC*, VPSB Docket 8580 (June 30, 2016); *Petition of GMPSolar-Panton LLC*, VPSB Docket 8637 (July 8, 2016); and *Petition of GMPSolar-Williamstown LLC*, VPSB Docket 8682 (August 24, 2016)). The Petition describes each of these orders as approving GMP's 25-year wholesale power bundled contract at a fixed rate, of 12.8 cents/kWh, 12.2 cents/kWh, and 12.3 cents, respectively. *Id*.

The orders cited by the Petition are not for the approval of any contracts between GMP and its affiliates or of any rates in such contracts. Rather, they are siting orders approving petitions for Certificates of Public Good and authorizing the installation and operation of solar

electric generation facilities.[11] By way of background, using the first listed case as an example, on August 17, 2015, GMPSolar - Hartford, LLC ("GMPSolar Hartford") filed a petition with the Board pursuant to 30 V.S.A. § 248, requesting that the Board issue a Certificate of Public Good ("CPG") for the installation and operation of a 4.99 MW AC solar electric generating facility. In the June 30, 2016 Proposal for Decision, the Hearing Examiner recommended that the Board, subject to conditions, approve the GMP Solar Hartford Project and issue a CPG authorizing construction and operation of the Project, having addressed the various statutory criteria under 30 V.S.A. § 248(b) to ensure that the project would be consistent with the statutory requirements. In discussing the economic benefit to the state, 30 V.S.A. §248(b)(4), the Hearing Examiner found that the total cost of the Project would be approximately $12.9 million, that the levelized cost of the Project over 25 years would be approximately $0.128 per kWh, and that under a power purchase agreement, GMP would purchase the energy, capacity, and renewable energy credits at the same price of $0.128/kWh. June 30 Proposal for Decision at 8 (P 35). The Board adopted the findings, conclusions, and recommendations of the Hearing Officer, finding that the installation and operation of the 4.99 MW GMPSolar Hartford project will promote the general good of the State of Vermont in accordance with 30 V.S.A. § 248, and issuing a Certificate of Public Good to that effect. However, neither the power purchase agreement nor the $0.128/kWh rate was before the Board, and the Board's order made no finding about them.

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[11] The June 30, 2016 Order in Docket 8580 is available at http://psb.vermont.gov/sites/psb/files/orders/2016/June/8580%20Final%20Order.pdf. The July 8, 2016 Order in Docket 8637 is available at http://psb.vermont.gov/sites/psb/files/orders/2016/July/8637%20Final%20Order.pdf. The August 24, 2016 Order in Docket 8682 is available at http://psb.vermont.gov/sites/psb/files/orders/2016/September/8682%20Final%20Order.pdf.

In a similar case involving a different solar project's request for a Certificate of Public Good, the Board made a finding that "[t]he total constructed cost of the Project will be about $12 million, and the levelized cost of the Project over 25 years will be about $0.122 per kWh." *Petition of GMPSolar – Williston, LLC For a Certificate of Public Good*, Order Re. Hearing at Montpelier Vermont at 10, VPSB Docket 8562 (Mar. 4, 2016).[12] The Board noted that GMP was not seeking a determination regarding rate recovery in that proceeding with respect to any aspect of the project, and "[a]ccordingly, "nothing in this order should be construed as a determination of GMP's ability to recover Project costs from ratepayers." *Id.* at 10 n.5. The posture of this case is identical to all of those the Petition cites.

In short, the orders cited in the Petition (at 18) are siting orders approving requests to obtain Certificates of Public Good in order to construct solar electric generating facilities. Requests to approve the purchase power agreements and the rates therein were not considered by the Board in those dockets, and the Board has not approved any rates in those dockets.

F. None of the Petitions' Other Arguments State a Claim Under PURPA.

The Petition includes arguments that are outside the scope of what constitutes a PURPA claim:

- The Petition argues that Old Rule 4.100 violated FPA and PURPA by transferring the utility's obligation to purchase to VEPPI (Petition at 35). This same argument was raised by Otter Creek in the 2013 Otter Creek Petition, and in response, the Commission determined that "[Old] Rule 4.100 has been found by the

[12] The March 4, 2016 Order is available at http://psb.vermont.gov/sites/psb/files/orders/2016/March/8562%20Final%20Order.pdf.

Commission to be consistent with PURPA." *Otter Creek* at P 4 (*see* Section II.B., above). The other argument the Petition advances—that Otter Creek never agreed, consistent with PURPA Rule 303(d), 18 C.F.R. § 292.303(d), to the "transmission-among utility arrangement embodied by Old Rule 4.100" (Petition at 35)—misunderstands Old Rule 4.100 and ignores this finding. Moreover, Old Rule 4.100 has been replaced by the New Rule 4.100, and the Petition fails to explain the relevance of these arguments.

- The Petition includes references to GMP refusing to buy power from Petitioners' facilities (*e.g.*, *id.* at 19-20). These claims are outside the scope of the Commission's authority under PURPA section 210(h)(2)(B), which gives the Commission authority to initiate an enforcement action against the state regulatory authority for improperly implementing PURPA rules.
- The Petition states that in the case of most renewable energy facilities greater than 30 MWs, neither States nor regulated utilities have any role in determining avoided costs. However, the largest of Petitioners' facilities is 5.4 MW, and this statement is irrelevant to the VPSB's implementation of its PURPA program.

These arguments should be readily dismissed.

IV. CONCLUSION

WHEREFORE, for the reasons discussed herein, the VPSB respectfully requests that the Commission not initiate an enforcement action and instead, issue a notice of intent not to act.

Respectfully submitted,

VERMONT PUBLIC SERVICE BOARD

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CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document upon the parties identified on the Commission's official service lists in these proceedings by electronic means.

Dated at Washington, D.C. this 30th day of November, 2016.

By: */s/ Phyllis G. Kimmel*

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