Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-109

OCTOBER TERM, 2017

In re Petition of Pequot Energy Development LLC	}	APPEALED FROM:
	}	
	}	Public Service Board
	}	
	}	DOCKET NO. 8809

In the above-entitled cause, the Clerk will enter:

Appellant Pequot Energy Development, LLC appeals a decision of the Public Service Board[1] dismissing its petition for approval of a contract containing long-term rates because the Board concluded that the petition was substantially insufficient. We affirm.

This appeal concerns Vermont's implementation of the federal Public Utility Regulatory Policies Act of 1978 (PURPA), which is a federal statute aimed at "encourag[ing] the development of cogeneration and small power production facilities" and reducing the demand for fossil fuels. Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp., 461 U.S. 402, 404 (1983). Congress directed the Federal Energy Regulatory Commission (FERC) to develop rules regarding the purchase and sale of electricity from these facilities. Id. at 404-05; see 16 U.S.C. § 824a-3(a) (directing FERC to set rules, after consultation with federal and state utility regulatory agencies, requiring electric utilities to sell and purchase energy from cogeneration and small power production facilities). Federal regulations require utilities to purchase energy from qualifying facilities. 18 C.F.R. § 292.303(a). The rules must ensure that the rates are "just and reasonable to the electric consumers" and do "not discriminate against qualifying cogenerators or qualifying small power producers." 16 U.S.C. § 824a-3(b). Implementation of PURPA is given to the states. In re E. Ga. Cogeneration Ltd. P'ship, 158 Vt. 525, 534 (1992).

The Board enacted Rule 4.100 to implement the federal requirements. See 30 V.S.A. § 209(a)(8) (granting Board jurisdiction over regulation of "sale to electric companies of electricity generated by facilities"). As it existed at the time the petition at issue in this case was filed, Board Rule 4.100 required Vermont utilities to purchase output from qualifying facilities through a designated purchasing agent, who was required to purchase all of the output of the qualifying facilities with approved contracts under the rule and sell that power to the Vermont utilities based on pro rata basis. The rule allowed short-term contracts and long-term contracts for up to thirty years. Pursuant to the prior version of Rule 4.100, long-term rates are available only to qualifying

[1] When the decision on appeal was issued, the administrative agency was called the Public Service Board. The name has since been changed to the Public Utility Commission. 2017, No. 53, § 9.

facilities that have been found by the Board, after hearing, to satisfy the substantive criteria of 30 V.S.A. § 248(b). See In re E. Ga. Cogeneration Ltd. P'ship, 158 Vt. at 535.

Rule 4.100 was amended effective September 15, 2016. Under the new rule, contracts are formed, not with the purchasing agent, but with the interconnecting utility and are limited to seven years unless a longer term is negotiated between the qualifying facility and the interconnecting facility. The new rule states that it applies to contracts and obligations "formed subsequent to the effective date" of the rule and that nothing would change with "contracts and obligations in existence prior to the effective date."

In August 2016, Pequot filed a petition seeking approval for a thirty-year contract with established long-term rates. In November 2016, Green Mountain Power moved to dismiss the petition, arguing that the new rule applied to the petition because no contract or obligation had been formed prior to the effective date of the new rule and the proposal did not meet the requirements of the new rule. Green Mountain Power further asserted that Pequot did not have a vested right to have the petition analyzed under the old rule. Green Mountain Power reasoned that the application was incomplete because any contract required Board approval under the § 248 certificate of public good criteria, which Pequot's proposal did not have. In response, Pequot argued that it was entitled to the benefit of the old rule because it had already formed a contract with the purchasing agent. Pequot further claimed that it had a vested right to use the old rule and should be granted an opportunity to cure any insufficiencies in its filing, namely by giving it time to obtain a § 248 permit.

The Board concluded that Pequot's petition was substantially insufficient pursuant to Board Rule 2.208 because it failed to provide any information addressing whether Pequot's proposed facility will meet the § 248 criteria. The Board rejected Pequot's argument that it had formed a contract with the purchasing agent, explaining that there could not have been a contract because the purchasing agent was not empowered to enter into a contract without prior approval of the Board. The Board further found that Pequot failed to make a prima facie showing that it was legally possible for Pequot to obtain Board approval insofar as the application did not address the criteria of § 248(b). Therefore, the Board concluded that dismissal was the most appropriate disposition and dismissed the petition for a thirty-year Rule 4.100 power purchase agreement without prejudice to Pequot asserting rights under the newly amended rule.

On appeal, Pequot argues that the Board erred in dismissing its petition. Pequot cannot assert that it had a completed contract prior to the effective date of the new rule. Indeed, as the Board found, Pequot could not have a contract because contract formation requires Board approval and no approval had been granted. Instead, Pequot asserts that it had a reasonable expectation of completing the process to obtain Board approval and the Board erred in denying it an opportunity to cure the petition and to form a contract under the former version of the rule. This Court applies a deferential standard of review to Board orders, which "enjoy a strong presumption of validity." In re Green Mountain Power Corp., 162 Vt. 378, 380 (1994). We defer to the Board's expertise and affirm the Board's findings and conclusions unless they are "clearly erroneous." Id.

Pequot argues that the Board erred in dismissing its petition because Pequot had a vested interest in application of the prior version of Rule 4.100 in connection with its application. It responds to the Board's reasoning by emphasizing that it had a reasonable expectation of obtaining

a § 248 permit.[2] The Board's rules allow it to reject "[s]ubstantially defective or insufficient filings." Board Rule 2.208. The Board concluded that Pequot's petition was substantially incomplete because it did not contain facts to support the granting of a § 248 petition. Contracts for long-term rates require the Board's approval and the Board must first find that the proposed contract satisfies the substantive criteria of § 248. Pequot does not challenge the fact that the initial petition did not contain the necessary facts, but argues that it should have been given an opportunity to complete the § 248 process instead of having the petition dismissed. The Board's decision indicates that Pequot estimated at the time that it could cure its petition by July 2017. Given the length of time and the fact that this date would be past the time when the current rule would be effective, the Board dismissed the petition.

The Board acted within its discretion. Board Rule 2.208 is a general procedural rule for the Board, which states that "[s]ubstantially defective or insufficient filings may be rejected by the Commission, provided, that if it will not unreasonably delay any proceeding nor unreasonably adversely affect the rights of any party, the Commission shall allow a reasonable opportunity to a party to cure any defect or insufficiency." Pequot asserts that it could have obtained the § 248 permit within a reasonable period of time, and asserts several facts in support, including that it had given a 45-day advance notice in February 2017 and was prepared to make an initial § 248 filing in March 2017. Our review is based on the facts that were part of the record below; we do not consider additional facts on appeal. See V.R.A.P. 10(a) (defining scope of record on appeal). Here, the facts before the Board were that the petition lacked the required information about the § 248 criteria and Pequot itself estimated that the § 248 process would not be completed until July 2017. Under these facts, the Board's action in dismissing the petition was reasonable.

Pequot also argues that it made a prima facie showing that this project would meet the § 248 criteria because it was substantially the same as a prior petition. In its petition, Pequot did not rely on the prior project to demonstrate how the § 248 criteria were met. In response to the motion to dismiss, Pequot alleged that this project was similar to the prior project, but did not argue that therefore the § 248 criteria were met. Pequot stated that, based on this prior project, it anticipated completing the § 248 process by the end of July 2017. As explained above, given that this date was far beyond the effective date of the new rule, the Board did not err in declining to give Pequot time to cure the deficiency in its filing.

We do not reach Pequot's argument that the new rule violates PURPA. This argument was not raised below and is not preserved for appeal. See In re Twenty-Four Vt. Utils., 159 Vt. 339, 352 (1992) ("We require errors to be raised first to the Board before they are raised on appeal."). Pequot's assertion that it was not required to raise this before the Board because it did not know its request would be denied is without merit. Pequot had an opportunity to respond to GMP's motion to dismiss and should have presented the Board with any reason it had that dismissal would not be appropriate.

Pequot also argues that it has been denied due process under the Fourteenth Amendment. Due process requires adequate notice and an opportunity to be heard. Rich v. Montpelier

[2] Pequot makes allegations that there was a coordinated effort between GMP, the Department, and the Board to deny Pequot the opportunity to apply for a petition under the old rule. There is no evidence in the record to support such an assertion.

Supervisory Dist., 167 Vt. 415, 420 (1998). Pequot fails to show how it was denied either adequate notice or an opportunity to be heard in the proceedings before the Board.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Beth Robinson, Associate Justice

_____
Karen R. Carroll, Associate Justice