Docket No. [not assigned]

# COMPLAINT OF VOTE SOLAR AND MONTANA ENVIRONMENTAL INFORMATION CENTER FOR VIOLATIONS OF THE PUBLIC UTILITIES REGULATORY POLICIES ACT OF 1978

*Filed on Behalf of Vote Solar and Montana Environmental Information Center*

Filed September 19, 2016

**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

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| Vote Solar and Montana Environmental Information Center, | ) | |
| Complainants, | ) | |
| | ) | Docket No. _____ |
| v. | ) | |
| Montana Public Service Commission | ) | |
| 1701 Prospect Ave<br>P.O. Box 202601<br>Helena, MT 59620 | ) | |
| Respondent. | ) | |

**COMPLAINT OF VOTE SOLAR AND MONTANA ENVIRONMENTAL INFORMATION CENTER FOR VIOLATIONS OF THE PUBLIC UTILITIES REGULATORY POLICIES ACT OF 1978**

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## STATE STATUTES AND LEGISLATIVE MATERIALS



## REGULATIONS AND ADMINISTRATIVE MATERIALS

**STATE REGULATIONS AND ADMINISTRATIVE MATERIALS**

Pursuant to Rule 206 of the Rules of Practice and Procedure, 18 C.F.R. § 385.206, Vote Solar and Montana Environmental Information Center (collectively, "Vote Solar") file this Complaint against the Public Service Commission of the State of Montana ("Montana Commission") for violating Section 210 of the Public Utilities Regulatory Policies Act of 1978 ("PURPA" or "the Act"), 16 U.S.C. § 824a-3. On June 16, 2016, the Montana Commission suspended the obligation of NorthWestern Energy ("NorthWestern")[1]—Montana's largest public utility—to adhere to the standard power purchase rates for solar qualifying facilities ("QFs") larger than 100 kilowatts ("kW"), effectively stalling current and future small solar projects in Montana. See Order on NorthWestern Energy's Motion for Emergency Suspension of Tariff Schedule QF-1 ¶ 13 (Order No. 7500), In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. Qf-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n July 25, 2016) [hereinafter Order No. 7500] (attached as Exhibit 2).[2] The Montana Commission unjustly deprived solar developers of the benefit of their significant investments in Montana and both extinguished legally enforceable obligations to which these solar developers are entitled under PURPA and denied them opportunities to create future obligations. In doing so, the Montana Commission also applied an overly restrictive interpretation of legally enforceable obligations ("LEOs") that this Commission has previously rejected as a violation of PURPA. The Montana

[1] NorthWestern Corporation does business as NorthWestern Energy in Montana, South Dakota and Nebraska as a public utility. NorthWestern's Application for Interim & Final QF-1 Tariff Change at 1, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n May 3, 2016) (attached as Exhibit 1).

[2] Among the consequences, the Montana Commission ruling had an immediate impact on approximately 135 megawatts ("MW") of advanced-stage projects. See Order No. 7500 ¶ 45 (Ex. 2).

Commission's blatant violations of PURPA will have devastating consequences for clean energy in Montana.

In the name of an illusory emergency, the Montana Commission has undercut significant solar development in Montana and discouraged future solar projects—in direct opposition to PURPA's "basic purpose" of "increase[ing] the utilization of … small power production facilities" and "reduc[ing] reliance on fossil fuels." Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp., 461 U.S. 402, 417 (1983) (citing FERC v. Mississippi, 456 U.S. 742, 750 (1982)). This Commission should take immediate action to enforce PURPA against the Montana Commission and invalidate the suspension of the standard rate for solar developers.

## BACKGROUND

## I. COMMUNICATIONS

Communications regarding this Complaint should be directed to the following individuals:

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## II. PARTIES

### A. Vote Solar

Complainant Vote Solar is a non-profit grassroots organization working to foster economic opportunity, promote energy independence, and fight climate change by making solar a mainstream energy resource across the United States. Declaration of Edward Smeloff ¶ 2. Vote Solar engages at the state, local, and federal levels to remove regulatory barriers and implement the key policies needed to bring solar to scale. Id. Established in 2002, Vote Solar has more that 70,000 members throughout the United States, including members and supporters in NorthWestern's Montana service territory. Id. Vote Solar's offices are located at 360 22nd Street, Suite 730, Oakland, CA 94612. Id.

### B. Montana Environmental Information Center

Complainant Montana Environmental Information Center ("MEIC") is a non-profit environmental advocacy organization founded in 1973 by Montanans concerned with protecting and restoring Montana's natural environment. Declaration of Brian Fadie ¶ 1. MEIC plays an active role in promoting Montana clean energy projects and policies, including advocating for the expansion of responsible, renewable energy and energy efficiency and supporting policies that insulate energy consumers from fuel price risk. Id. At the state level, MEIC leads the effort to pass policies that help expand clean, affordable, reliable, and efficient energy solutions for Montana. MEIC has approximately 5,000 members and supporters, many of whom are in NorthWestern's Montana service territory. Id. MEIC's offices are at 107 W. Lawrence St. No.N-6, Helena, MT 59601. MEIC's mailing address is P.O. Box 1184, Helena, MT 59624. Id.

### C. Montana Public Service Commission

The Montana Public Service Commission was created in 1913 to supervise and regulate aspects of the operations of public utilities, common carriers, railroads, and other regulated industries. Mont. Admin. R. § 38.1.101(1) & (4). Five elected members from different state districts comprise the Montana Commission. Id. The principal office of the Montana Commission is located at 1701 Prospect Avenue, Helena, Montana 59620. Id.

## III. STATUTORY FRAMEWORK

### A. PURPA

Congress enacted PURPA in 1978 as part of the National Energy Act and in response to a nationwide energy crisis. FERC v. Mississippi, 456 U.S. at 745 & n.2, 750 n.12. In passing PURPA, Congress sought to encourage the diversification of energy sources by creating purchase requirements for alternative energy sources from "[s]mall power production facilities" that "use biomass, waste, or renewable resources, including wind, solar, and water …." 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, 12,215 (Feb. 25, 1980) [hereinafter Order No. 69];[3] see also S. Rep. No. 95-442, at 10 (1977) ("[I]n recognition of the potential contribution of … small power production facilities to the achievement of the purposes of this act, the committee adopted language to encourage the development and use of these

[3] Also found at Final Rule Regarding the Implementation of Section 210 of [PURPA], Order No. 69, FERC Stats. & Regs. ¶ 30,128, order on reh'g, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), aff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC, 675 F.2d 1226 (D.C. Cir. 1982), rev'd in part sub nom. Am. Paper Inst., 461 U.S. 402.

power sources"). Section 210 of PURPA embodies this goal of advancing renewable energy from small power producers by requiring utilities to purchase electric energy from cogeneration and small power production facilities at rates that are just and reasonable to consumers, in the public interest, and reflect "the incremental cost to the electric utility of alternative electric energy," 16 U.S.C. § 824a-3(a), (b), & (d), otherwise known as "avoided costs," 18 C.F.R. § 292.101(b)(6). As an essential component of the statutory scheme for achieving that goal, states must adopt a standard rate of purchase for small power producers, with an upper capacity threshold no greater than 80 MW, to eliminate the need for burdensome negotiations between small power producers and statewide utilities that could otherwise discourage small power production. See 16 U.S.C. § 824a-3(a),(b), & (f); 18 C.F.R. § 292.304(c).

**B. PURPA's Implementation in Montana**

The Montana Commission's rules implementing PURPA provide that long-term contracts between utilities and QFs with "a nameplate capacity not greater than 3 MW are eligible for standard offer rates." Mont. Admin. R. § 38.5.1902(5). Prior to 2013, the eligibility cap for standard rates was higher, allowing QFs with ten MW or less in capacity to avail themselves of the standard rate. See Notice 38-5-218 No. 10, Mont. Admin. Reg. at 1 (May 23, 2013) (attached as Exhibit 3).[4] In 2013, the Montana Commission initially proposed to lower the eligibility cap from ten MW to 100 kW in capacity, but ultimately determined during the rulemaking process that a three-megawatt

[4] Regulations governing PURPA's implementation in Montana have changed several times. For a detailed history of these regulatory changes see Mont. Comm'n, Econ. Impacts of Proposed Amendments to the Mont. Dep't of Public Serv. Regulation's Qualifying Facility Rules (Mont. Admin. R. § 38.5.1902) at 6-11 (Aug. 22, 2013) (attached as Exhibit 5).

threshold was appropriate because, absent a standard rate, QFs of three MW and smaller may be discouraged from the market by "high transactions costs relative to total revenue potential." Notice 38-5-218 No. 21, Mont. Admin. Reg. at 3, Response 3 (Nov. 14, 2013) (attached as Exhibit 4).[5]

Also in 2013, the Montana Commission approved modified standard rates for NorthWestern as just and reasonable, in the public interest, and not discriminatory. Final Order ¶ 87 (Order No. 7199d), In the Matter of NorthWestern's Application for Approval of Avoided Cost Tariff for New Qualifying Facilities, Dkt. No. D2012.1.3 (Mont. Comm'n Dec. 7, 2012) (attached as Exhibit 6). These standard rates were based on NorthWestern's estimated avoided costs as determined "by blending projected near-term market prices and the expected cost of owning and operating a natural gas [combined cycle combustion turbine ("CCCT")]." Order ¶ 18 (Order No. 7338b), In the Matter of NorthWestern's Application for Qualifying Facility Tariff Adjustment, Dkt. No. D2014.1.5 (Mont. Comm'n May 4, 2015) (attached as Exhibit 7) (describing previous two QF-1 proceedings).

In January 2014, NorthWestern sought to alter the standard rates approved by the Commission in 2013. Id. ¶ 11. After a full contested case proceeding, the Montana Commission rejected NorthWestern's request based on the utility's failure to support its avoided-cost assumptions "with a comprehensive, long-term resource planning analysis,"

[5] Although these high transaction costs related in part to the competitive bidding process that was then required for QFs above the eligibility cap (which this Commission later found inconsistent with PURPA, see In re Hydrodynamics, et al., 146 FERC ¶ 61,193, at ¶¶ 32-34 (2014)), the high costs of litigation in relation to total revenue potential for small QFs were also a concern, see Notice 38-5-218 No. 21, Mont. Admin. Reg. at 3, Response 3 (Nov. 14, 2013) (Ex. 4); Mont. Comm'n, Econ. Impacts of Proposed Amendments to the Mont. Dep't of Pub. Serv. Regulation's Qualifying Facility Rules (Mont. Admin. R. § 38.5.1902) at 27, 30-31 (Aug. 22, 2013) (Ex. 5).

and its use of a potentially flawed methodology for calculating avoided costs. See id. ¶¶ 11-17, 19-21. Accordingly, the Commission determined it lacked a sufficient basis to change the standard rates approved in 2013. Id. ¶¶ 20, 23, 36.

## IV. THE MONTANA COMMISSION'S SUSPENSION OF THE STANDARD RATE

### A. NorthWestern's Motion for Emergency Suspension of the Standard Rate

On May 3, 2016, NorthWestern filed an application for interim and final approval of a revised rate schedule for QFs with a nameplate capacity of three MW or less ("Rate Application") that would drastically reduce QF-1 tariff rates ("standard rates"). See Schwartzenberger Cover Letter at 1, NorthWestern's Application for Interim & Final QF-1 Tariff Change, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n May 3, 2016) (Ex. 1). Specifically, the Rate Application proposed to significantly lower the standard rates for non-wind, wind, and solar, claiming that the standard rates previously approved by the Montana Commission were higher than NorthWestern's current estimated avoided costs. See id. at 1-3; see also id. at Ex. JBB-1 to Prefiled Direct Testimony of John B. Bushnell on behalf of NorthWestern's Application for Interim & Final QF-1 Tariff Change; Order No. 7500 ¶ 17 (Ex. 2) (explaining that "NorthWestern estimated that current electricity and natural gas prices produced a 24-year levelized avoided cost of $0.04040 per kWh, 35 percent less than the $0.06235 per kWh avoided cost used to set current QF-1 rates").

On May 17, 2016, NorthWestern filed a motion for an "emergency" suspension of the standard rate for new solar QFs with nameplate capacities over 100 kW "until the earlier of the Commission's grant of interim rates or the issuance of a final order in this

docket." NorthWestern's Motion for Emergency Suspension of the QF-1 Tariff for New Solar Qualifying Facilities with Nameplate Capacities Greater than 100 kW at 12, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n May 17, 2016) [hereinafter "Emergency Motion"] (attached as Exhibit 8). NorthWestern claimed that emergency relief was warranted because the utility believed it was facing the immediate execution of a high volume of power purchase agreements for solar QFs that would create long-term obligations at the current standard rates, which NorthWestern calculated as higher than its current avoided costs. Id. at 1-2, 7-8, 11-12. Specifically, NorthWestern claimed that it was "facing the immediate execution of solar QF-1 [power purchase agreements] for 75 MW" with an additional "80 MW of projects in the interconnection queue" and that it expected additional projects during the pendency of its rate application, all of which would impose unnecessarily high costs to NorthWestern and ultimately to ratepayers. Id. at 7-8.

Vote Solar and several solar energy development companies filed comments expressing concern about NorthWestern's Emergency Motion.[6] Vote Solar explained that NorthWestern's request would undermine both PURPA and Montana law by allowing NorthWestern to avoid paying rates to QFs that the Montana Commission had already deemed just, reasonable, and in the public interest and by chilling new investment in solar power generation in Montana. See Comments of Vote Solar and MEIC on NorthWestern's Emergency Motion at 1, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 6, 2016) (attached as Exhibit 12). Moreover, Vote Solar argued that suspending the standard rate based on the one-sided evidentiary record provided by NorthWestern would violate state and federal law and impermissibly exempt NorthWestern from its obligation to purchase power from QFs. Id. at 6-9.

[6] The Montana Consumer Counsel submitted the only comments supporting NorthWestern's Emergency Motion. See Comments of the Montana Consumer Counsel In Support of NorthWestern's Motion for Emergency Suspension of the QF-1 Tariff for New Solar Qualifying Facilities, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 6, 2016) (attached as Exhibit 9). The Montana Business Assistance Connection submitted general comments explaining the importance of energy diversity to attracting new industry to Montana. Montana Business Assistance Connection Comments, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 6, 2016) (attached as Exhibit 10). Montana's Department of Environmental Quality ("DEQ") submitted comments recognizing the importance of controlling costs to Montana's electricity customers, but stating that "it may be equally undesirable to raise regulatory barriers so high as to completely block the entry of a new energy industry into Montana." DEQ Comments on Emergency Motion, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Docket No. D2016.5.39 (Mont. Comm'n June 8, 2016) (attached as Exhibit 11).

Solar development companies with advanced-stage solar projects in Montana expressed concern that NorthWestern's emergency motion would undermine projects in which the companies already had heavily invested. See, e.g., Comments of FLS Energy, Inc. in Response to NorthWestern's Emergency Motion at 6, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 6, 2016) (attached as Exhibit 13) ("If the Commission were to release NorthWestern from its legal obligation to enter into pending contracts with FLS at Commission-approved rates, FLS will be forced to abandon all of its solar projects and planned investment in Montana."); Comments of Cypress Creek Renewables in Response to NorthWestern's Emergency Motion at 2, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 6, 2016) (attached as Exhibit 14) (stating that granting NorthWestern's Emergency Motion "could render several of Cypress Creek's projects financially non-viable and devalue Cypress Creek's substantial investment in Montana"); Pacific Northwest Solar's Supplemental Comments on NorthWestern's Emergency Motion at 3, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 17, 2016) (attached as Exhibit 15) ("[I]f the Commission were to adopt the revised pricing, none of the projects currently under development would be viable any longer."). Montana Wind and Solar, a small solar developer based in Montana, explained that an emergency suspension of the standard rate would "pull[] the rug out from independent power project developers by changing the

rules midstream after our team has spent hundreds of thousands of dollar[s] in good faith" and would negatively impact solar energy development, and its economic benefits, in Montana. Comments of Montana Wind & Solar, LLC on NorthWestern's Rate Application, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 9, 2016) (attached as Exhibit 16). Pacific Northwest Solar further challenged NorthWestern's claim of emergency given the likelihood that the majority of the proposed projects that NorthWestern argued presented an emergency situation would not move forward, as shown by the fact that historically 60 percent of projects within NorthWestern's interconnection queue were withdrawn. See Pacific Northwest Solar, LLC's Comments in Response to NorthWestern's Emergency Motion at 2-3, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 9, 2016) (attached as Exhibit 17).

### B. The Montana Commission's Emergency Suspension of the Standard Rates for Solar QFs Between 100 KW and Three MW

On June 7, 2016, the Montana Commission issued a notice setting a hearing on NorthWestern's Emergency Motion for just two days later, June 9—before the deadline to intervene in the matter. See Notice of Staff Action Setting Hearing at 1-2, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 7, 2016) (attached as Exhibit 18); see also Order No. 7500, Kavulla Dissent at 1-2 (Ex. 2). On the morning of the hearing, NorthWestern informed Vote Solar and other intervenors that it intended to present witnesses at the hearing. Order No.

7500, Kavulla Dissent at 2 (Ex. 2). Although Vote Solar, as an intervening party, presented oral argument and cross-examined NorthWestern's witnesses, the short notice of the hearing and even shorter notice of NorthWestern's plan to present oral testimony precluded any meaningful opportunity for Vote Solar and other intervenors to obtain or present witnesses or other evidence at the hearing. See id. ¶ 12 & Kavulla Dissent at 1-2. Furthermore, based on representations from NorthWestern that it would modify its Emergency Motion to exclude certain advanced project from the suspension, the solar developers that had submitted written comments on NorthWestern's motion elected not to participate in the hearing at all. See, e.g., Application of FLS Energy, Inc. for Rehearing on Emergency Motion at 3-4, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n July 1, 2016) (attached as Exhibit 19).

One week after the hearing, the Montana Commission granted NorthWestern's motion and suspended NorthWestern's obligations to pay the standard rate for solar projects greater than 100 kW pending the issuance of a final order on NorthWestern's Rate Application. See Order No. 7500 ¶ 13 (Ex. 2).[7] The Montana Commission provided a narrow exemption for solar QFs with a nameplate capacity between 100 kW and three MW, if prior to June 16, 2016, the QF had tendered a signed power purchase agreement to the utility and obtained an executed an interconnection agreement. See Notice of Comm'n Action, In the Matter of NorthWestern Energy's Application for

[7] In fact, the duration of the suspension adopted by the Montana Commission went beyond NorthWestern's request, which was to suspend the standard rate only until interim rates could be established. See Order No. 7500 ¶ 45 (Ex. 2).

Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 16, 2016) (attached as Exhibit 20). Notably, this exemption was narrower than that advocated by NorthWestern at the hearing, which proposed an exemption for solar QFs that had "negotiated a complete PPA, which … is ready for execution." Order No. 7500 ¶ 45 (Ex. 2).

FLS Energy Inc. ("FLS"), a solar developer with several advanced projects in Montana, applied for rehearing on July 1, 2016, seeking the opportunity to present evidence on the interconnection status of FLS projects and on the terms of the power purchase agreements negotiated by FLS and NorthWestern. Application of FLS Energy, Inc. for Rehearing on Emergency Motion at 1-3, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n July 1, 2016) (Ex. 19). Specifically, FLS sought to show that FLS had tendered 13 signed power purchase agreements to NorthWestern that constituted a firm and unconditional commitment to sell output to NorthWestern and to show that, for seven of these projects, FLS would have had a signed interconnection agreement in place before June 16 if NorthWestern had met its legal obligation to provide the agreements within five business days of FLS's request. See id. at 5-7 (citing Small Generator Interconnection Procedures, Order No. 792, 145 FERC ¶ 61,159, at § 3.5.7 (Nov. 22, 2013)). FLS also explained that based on the Montana Commission's June 16 decision, NorthWestern has refused to tender any interconnection agreements for solar QF projects, interpreting the Montana Commission's decision as restricting it from "execut[ing] a new Interconnection Agreement for any solar QF project between 100 kW and 3 MW in size seeking a

contract at the standard long term rate." See id. at Affidavit of Casey James May ¶ 22, Ex. C (email correspondence from NorthWestern to FLS). Despite noting its "concern[]" about FLS's claim that NorthWestern failed to meet its legal obligation to provide interconnection agreements in a timely fashion, the Commission denied FLS's rehearing request. Notice of Comm'n Action at 2, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n July 13, 2016) (attached as Exhibit 21).

Subsequently, on July 25, 2016, the Commission issued an Order explaining its June 16 decision to suspend the standard rate. Order No. 7500 (Ex. 2). Although the Montana Commission "disagree[d] with the precise approach NorthWestern applied to estimate its current avoided costs" and estimated that proposed projects would provide approximately 130 MW of new solar generating capacity instead of the 155 MW estimated by NorthWestern, id. ¶¶ 30, 37; Emergency Motion at 8 (Ex. 8), the Montana Commission found that NorthWestern "made a prima facie case that the current QF-1 tariff rates applicable to solar projects exceed Northwestern's current avoided costs" and that there was "good cause" to impose a "temporary suspension of the standard rate for QFs with nameplate capacities above 100 kW" to "prevent irreparable harm to NorthWestern's ratepayers," Order No. 7500 ¶ 30 (Ex. 2); see also id. ¶¶ 33-39. Relying on its previously adopted legally enforceable obligation standard, the Montana Commission exempted from the suspension only those projects that on or before June 16, 2016 had tendered a purchase power agreement signed by the QF to the utility and had an "executed interconnection agreement." Id. ¶¶ 47, 63.

Commissioners Kavulla and Bushman dissented. Id. at 18. In his written dissent, Commissioner Kavulla argued that the Montana Commission's decision improperly suspended the standard rate without a full evidentiary hearing and stated that this rate suspension would not "actually protect" consumers from out-of-market costs. Id. Kavulla Dissent at 1-2. He explained that the Order "at its core, is substituting an unpublished rate subject to bilateral negotiation for the Schedule QF-1 rate approved by the Commission." Id. at 3. Vote Solar, FLS, and Cypress Creek Renewables timely moved for reconsideration. See Vote Solar Motion for Reconsideration of Order No. 7500, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n Aug 4, 2016) (attached as Exhibit 22); Joint Motion of FLS Energy, Inc. & Cypress Creek Renewables, LLC for Reconsideration, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n Aug 4, 2016) (attached as Exhibit 23). Because the Montana Commission did not act on these motions for reconsideration within ten days of their filing, the motions were deemed denied. See Notice of Staff Action at 2, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n Aug. 25, 2016) (attached as Exhibit 24); see also Mont. Admin. R. § 38.2.4806(5).[8]

[8] The de facto denial of these motions for reconsideration is consistent with the opinion of Montana Commission Chair Brad Johnson as published in the Billings Gazette on August 4, 2016—the same day the motions for reconsideration were filed. In his opinion piece, Commissioner Johnson championed the Montana Commission's approval of NorthWestern's Emergency Motion as a benefit to consumers and dismissed the contrary

## COMMISSION JURISDICTION

Section 210(h) of PURPA gives the Commission jurisdiction to enforce PURPA against any State regulatory authority. 16 U.S.C. § 824a-3(h); see also Order No. 69, 45 Fed Reg. at 12,231 ("Section 210(h)(2)(A) of PURPA states that the Commission may enforce the implementation of regulations under section 210(f)."). By granting this jurisdiction, "[t]he Congress has provided not only for private causes of action in State courts to obtain judicial review and enforcement of the implementation of the Commission's rules under section 210, but also provided that the Commission may serve as a forum for review and enforcement of the implementation of this program." Order No. 69, 45 Fed. Reg. at 12,231 (citing 16 U.S.C. § 824a-3(h)(2)(A)). Accordingly, this Commission has jurisdiction to review this Complaint and impose the requested relief of enforcing PURPA against the Montana Commission.

## COMPLAINT

The Montana Commission's order violates PURPA because it illegally suspends the standard rate for small solar QFs with a capacity between 100 kW and 3 MW and applies an overly restrictive legally enforceable obligation standard that nullifies significant investments by small solar developers, thus bringing solar development in Montana to a standstill. By taking this extraordinary action, the Montana Commission moves Montana a significant step in the wrong direction by pushing the state farther away from fulfilling PURPA's mandate of encouraging small power producers and

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views of "out-of-state renewable energy developers and environmental activists operating in Montana." See Brad Johnson, Guest Opinion: Montana PSC Sides with Consumers on Solar Pricing, Billings Gazette, Aug. 4, 2016 (attached as Exhibit 25).

reducing reliance on fossil fuels. As explained below, the Montana Commission has illegally suspended the standard rate.

## I. THE MONTANA COMMISSION'S UNLAWFUL ORDER VIOLATES PURPA AND UNDERMINES SOLAR ENERGY DEVELOPMENT IN MONTANA

The Montana Commission's decision violates PURPA's basic mandate of encouraging small power production and reducing reliance on fossil fuels. See 16 U.S.C. § 824a-3(a); FERC v. Mississippi, 456 U.S. at 750. Far from advancing PURPA's mandate, the Montana Commission's decision pulls the rug out from small solar energy producers with advanced projects in Montana and stalls future solar development in the state. Not only does the Montana Commission's decision violate PURPA by effectively eliminating market access for small solar energy producers with a nameplate capacity between 100 kW and three MW, but it also exceeds the Montana Commission's authority to suspend PURPA's application in certain extraordinary situations, none of which are present here.

### A. Suspension of the Standard Rate Discourages Small Solar Energy Production in Violation of PURPA

The Montana Commission's decision violates PURPA by failing to maintain a standard rate for facilities up to three MW in capacity. The Montana Commission, in unrebutted findings, has deemed the QF standard rate necessary to implement PURPA's mandate to ensure that small power producers have market access. Thus, as explained below, the Montana Commission's unsupported decision to eliminate the standard rate violates PURPA.

To facilitate PURPA's purpose of encouraging the development of cogeneration and small power production facilities, Section 210 of PURPA and its implementing

regulations authorize states to adopt standard rates for the purchase of electric energy from QFs with a capacity of 80 MW or less. 16 U.S.C. § 824a-3(a), (b), &(f); 18 C.F.R. § 292.304(c). State regulatory authorities also are authorized under PURPA to determine the size of facilities above 100 kW in capacity that are eligible for standard rates, the so-called "eligibility cap," that is appropriate to support the development of small power production facilities. See 16 U.S.C. § 824a-3(f) (requiring states to implement PURPA regulations and to provide "notice and an opportunity for public hearing"); 18 C.F.R. § 292.304(c) (authorizing states to establish an eligibility cap for QFs with a capacity of more than 100 kW). PURPA's mandate to encourage small power production remains a key limitation on the discretion granted state regulatory authorities in implementing PURPA. See Connecticut Light & Power Co., 70 FERC ¶ 61,012, 61,023 (Jan. 11, 1995) ("Rates may be established by the state but only pursuant to and consistent with this Commission's regulations under PURPA."); Order No. 69, 45 Fed. Reg. at 12,221 ("State laws or regulations which would provide rates lower than the federal standards would fail to provide the requisite encouragement of these technologies, and must yield to federal law.").

The Montana Commission's decision to suspend the standard rate undermines PURPA's mandate of encouraging small power production because the suspension is contrary to the Montana Commission's own findings that all QFs up to three MW in capacity must be eligible for a standard rate to encourage small power production. In 2013, the Montana Commission specifically found that failure to adopt standard rates for facilities up to three MW in capacity would discourage development of these facilities. Notice 38-5-218 No. 21, Mont. Admin. Reg. at 3, Response 3 (Nov. 14, 2013) (Ex. 4).

At that time, the Montana Commission had proposed—through the state rulemaking process—to lower the eligibility cap to the regulatory minimum of 100 kW of nameplate capacity. See Notice 35-5-218 No. 10, Mont. Admin. Reg. at 1 (May 23, 2013) (Ex. 3). However, in response to state legislative pressure, see Order No. 7500, Kavulla Dissent 6-7 & Appx. B (Ex. 2), and other evidence presented during the rulemaking process, the Montana Commission ultimately concluded that a three-MW threshold was necessary to avoid discouraging market participation of small power producers between 100 kW and three MW in nameplate capacity "due to high transactions costs relative to total revenue potential," see Notice 38-5-218 No. 21, Mont. Admin. Reg. at 3, Response 3 (Nov. 14, 2013) (Ex. 4).

In suspending the standard rate for these same small power producers just three years later, the Commission indefinitely lowered the eligibility cap to 100 kW. See Order No. 7500 ¶¶ 60, 64 (Ex. 2).[9] This action was based solely on purported changes in avoided costs and NorthWestern's claims that a purported influx of solar developers requesting contracts and interconnection agreements will directly impact ratepayers. Id. at ¶¶ 36, 38-39. However, the Montana Commission failed to show that NorthWestern's allegations regarding its avoided costs or potential rate-payer impacts were factually accurate or that such a suspension will not discourage market participation of small solar

[9] The Montana Commission purported to "temporarily" waive the standard rate, but provided no specific end date to the suspension. See Order No. 7500 ¶¶ 60, 64 (Ex. 2). Indeed, at the time it issued Order No. 7500, the Commission had not even issued a procedural schedule in this matter. That schedule was subsequently issued on September 2, 2016, and indicates no date by which the Commission will resolve NorthWestern's application for final approval of a revised standard rate. See Procedural Order (Order No. 7500a), In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. Qf-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n Sept. 2, 2016) (attached as Exhibit 26).

power producers. See id. ¶¶ 38, 39 (determining based only on evidence presented by NorthWestern that the utility had made a "prima facie" case that current standard rates exceeded avoided costs).[10] Indeed, the Montana Commission's own prior conclusions indicate that the suspension will discourage such market participation in direct violation of PURPA. See Notice 38-5-218 No. 21, Mont. Admin. Reg. at 3, Response 3 (Nov. 14, 2013) (Ex. 4).

The Montana Commission attempts to brush away concerns about market participation of small power producers between 100 kW and three MW in nameplate capacity by assuring those producers that they may still obtain long-term contracts with NorthWestern through "good faith negotiation" with the utility for a contract rate. See Order No. 7500 ¶ 44 (Ex. 2); see also id. Kavulla Dissent at 6 (Ex. 2). As Commissioner Kavulla explains, however, such negotiation would be "simple and pointless" because NorthWestern would be foolish to negotiate a contract rate above what it proposed in its rate application. Kavulla Dissent at 6. Thus, the purported "good faith negotiation" relied on by the Montana Commission would in fact be "one in which the monopsony buyer simply offers the price it has advocated in this proceeding and is unwilling to budge from it." Id. Accordingly, requiring small power producers to rely on the resource-intensive negotiation process to proceed with small power projects in Montana will only further deter market participation because such negotiations would be fruitless

[10] Although the Montana Commission cites comments from the Montana Consumer Counsel to support its conclusion about ratepayer impacts, see Order No. 7500 ¶ 39 (Ex. 2), those comments are "[b]ased on the circumstances described by NorthWestern," see Comments of the Montana Consumer Counsel In Support of NorthWestern's Motion for Emergency Suspension of the QF-1 Tariff for New Solar Qualifying Facilities at 1-2, In the Matter of NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 6, 2016) (Ex. 9).

and would lead to contract rates that the Montana Commission itself already estimates to be below avoided costs. See Order No. 7500 ¶ 35 (estimating NorthWestern's avoided costs to be higher than those proposed by the utility).

### B. Suspension of the Standard Rate Creates an Unlawful De Facto Rate

Even if it were lawful to suspend the standard rate for QFs larger than 100 kW—and it is not—the Montana Commission's action further violates PURPA by effectively authorizing NorthWestern to replace the Montana Commission approved standard rate with NorthWestern's unreviewed proposed rate—a rate that the Montana Commission has not found "just and reasonable," nondiscriminatory, or an accurate calculation of avoided costs as required under PURPA. See 18 C.F.R. § 292.304(a), (c), & (e); see also Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Utils. Comm'n, 36 F.3d 848, 857 (9th Cir. 1994) (explaining that avoided costs must be "based on enumerated data regarding the utility's operational costs and characteristics … and on the availability, usefulness, type, and reliability of the energy or capacity that is purchased." (citing 18 C.F.R. § 292.304(e)).

To the contrary, the Montana Commission indicated that NorthWestern's proposed rate is likely too low to accurately reflect the utility's avoided costs. See Order No. 7500 ¶¶ 34-35 (Ex. 2). By allowing NorthWestern to effectively rely on this admittedly too-low rate for an indefinite period of time, the Montana Commission's decision unlawfully denies QFs their statutory right to sell electric energy at the utility's full avoided cost. See 18 C.F.R. § 292.304(d); Indep. Energy Producers Ass'n, Inc., 36 F.3d at 858 ("[T]he Commission's regulations provide that QFs are entitled to sell electric energy to utilities at a rate that is the utility's full avoided costs.").

Further, although PURPA regulations allow for a utility to pay a rate for purchase less than avoided costs if it is just and reasonable, nondiscriminatory, and "sufficient to encourage cogeneration and small power production," see 18 C.F.R. § 292.304(b)(3), there is no evidence in the record to support such a conclusion. To the contrary, small solar energy producers in Montana indicate that the standard-rate suspension will lead to the opposite result—a chilling of small solar power production in Montana. See, e.g., Comments of FLS Energy, Inc. in Response to NorthWestern's Emergency Motion at 6, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 6, 2016) (Ex. 13) ("If the Commission were to release NorthWestern from its legal obligation to enter into pending contracts with FLS at Commission-approved rates, FLS will be forced to abandon all of its solar projects and planned investment in Montana."); Pacific Northwest Solar's Supplemental Comments on NorthWestern's Emergency Motion at 3, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 17, 2016) (Ex. 15) ("[I]f the Commission were to adopt the revised pricing, none of the projects currently under development would be viable any longer"). In short, by allowing NorthWestern to effectively set the standard rate until the Montana Commission enters a final order on NorthWestern's Rate Application, the Montana Commission violates PURPA and places small solar power developers in an untenable position.

### C. The Montana Commission Lacks Authority to Suspend the Standard Rate

While the Montana Commission based its "extraordinary action" on NorthWestern's claim of an emergency, Order No. 7500 ¶¶ 39, 46 (Ex. 2), neither PURPA nor its implementing regulations authorize waiving the standard rate under the circumstances present here.

The Montana Commission found that NorthWestern had made a "prima facie" showing that its avoided costs are below the current QF standard rate, see id. ¶ 39, but such fluctuations in energy prices do not constitute an emergency. Indeed, they were contemplated by this Commission as an inevitable part of long-term avoided-cost agreements:

> [FERC] does not believe that the reference in the statute to the incremental cost of alternative energy was intended to require a minute-by-minute evaluation of costs which would be checked against rates established in long term contracts between qualifying facilities and electric utilities. Many commenters have stressed the need for certainty with regard to return on investment in new technologies. The commission agrees … and believes that, in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out.

Order No. 69, 45 Fed. Reg. at 12,224. Long-term contracts serve the purpose of ensuring "that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances." Id. Thus, even if it were true that the current standard rate is higher than NorthWestern's avoided costs, a question that will be resolved during the lengthy proceedings on NorthWestern's Rate Application, this fact would not justify emergency suspension of the standard rate.

Rather than suspending the standard rate, the proper response to an outdated avoided-cost estimate is to follow the Montana Commission's procedures for the utility to formally request and support changes to the standard rates it pays to QFs. See Mont. Admin. R. § 38.5.1905. Between these formal proceedings, the standard rates that the Montana Commission previously deemed appropriate continue to apply because "[t]o maintain existing standard rates pending a final decision [regarding an application for rate adjustments] is not a violation of PURPA." Order ¶ 15 (Order No. 7338a), In the Matter of NorthWestern's Application for Qualifying Facility Tariff Adjustment, Docket No. D2014.1.5 (Mont. Comm'n Oct. 8 2014) (attached as Exhibit 27). Rates established by the Montana Commission using this procedure are ipso facto lawful, and state and federal law prohibit a regulated utility from charging or paying anything other than that rate. See Order No. 7500, Kavulla Dissent at 3 (Ex. 2) (citing Mont. Code Ann. § 69-3-305 and Ark. La. Gas Co. v. Hall, 453 U.S. 571, 578 (1981)).

There are only three "limited" circumstances in which a utility may be relieved of its PURPA obligations to purchase energy from a QF that has otherwise met PURPA's requirements to deliver such energy. See In re Exelon Wind 1, 140 FERC ¶ 61,152, at ¶¶ 47-48 (Aug. 28, 2012), reconsideration denied in 155 FERC ¶ 61,066 (Apr. 21, 2016) (identifying section 210(m) of PURPA as well as suspensions under 18 C.F.R. § 292.304(f) and 18 C.F.R. § 292.307(b) as providing limited exceptions to the statutory quality facility purchase obligation). None of these circumstances are present here.

First, PURPA regulations exempt utilities from purchasing unscheduled QF energy when such a purchase obligation would "result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an

equivalent amount of energy itself." See id. at ¶ 48 (quoting 18 C.F.R. § 292.304(f)). This provision ensures that utilities do not need to purchase energy or capacity from QFs that are already connected to its system when the purchase would result in net increased operating costs, as may occur during light loading periods. 18 C.F.R. § 292.304(f); see also Order No. 69, 45 Fed. Reg. at 12,227-28 (describing the purpose of 18 C.F.R. § 292.304(f)). This Commission, however, has made clear this provision does not apply to a situation, as here, where the utility has not yet completed a purchase. See Order No. 69, 45 Fed. Reg. at 12,227 (explaining that, this provision was specifically designed to minimize the possibility that "electric utilities would abuse [section 304(f)] to circumvent their obligation to purchase from qualifying facilities"); id. at 12,228 (explaining that this provision was not intended to exempt utilities from legally enforceable obligations because in those arrangements "the established rate is based on the recognition that the value of the purchase will vary with the changes in the utility's operating costs"); see also See In re Exelon Wind 1, 140 FERC ¶ 61,152, at ¶ 48 (noting that this is a limited exception). In other words, this section of PURPA does not provide NorthWestern an opportunity to avoid entering into new agreements. As such, this provision cannot authorize the Montana Commission's actions here.

Second, PURPA regulations authorize utilities to discontinue purchasing power from QFs in the event of a system emergency, 18 C.F.R. § 292.307(b), which is "a condition on an electric utility's system … likely to result in imminent significant disruption of service to customers, or is imminently likely to endanger life or property," id. § 292.101(4). NorthWestern presented no evidence of a system emergency, see generally, Emergency Motion (Ex. 8), and the Montana Commission made no findings

that would support relying on this provision to authorize its emergency suspension, see generally, Order No. 7500 (Ex. 2).

Third, Section 210(m) of PURPA provides a procedure in which a utility will be relieved of its purchase obligation if this Commission finds, after proper notice and opportunity for comment, that the QF has nondiscriminatory access to the market. See 16 U.S.C. § 824a-3(m)(1) & (3). Notably, the authority to lift the purchase obligation lies with this Commission and not with state regulatory authorities. See id. Far from supporting the Montana Commission's actions, this provision demonstrates Congress's clear intent that only this Commission can authorize exemptions from the statutory mandate that utilities purchase electric energy from small power producers.

In sum, the Montana Commission's suspension of the standard rate and with it NorthWestern's obligations under Section 210 lacks any legal basis.

## II. THE MONTANA COMMISSION'S ORDER APPLIED AN UNLAWFUL STANDARD FOR LEGALLY ENFORCEABLE OBLIGATIONS

Although the Montana Commission's decision purports to exempt legally enforceable obligations from its suspension of the standard rate, it instead imposes an illegally high bar to creating a legally enforceable obligation by requiring QFs to both tender a power purchase agreement signed by the QF and have an executed interconnection agreement before a legally enforceable obligation is formed. See Order No. 7500 ¶¶ 47, 63 (Ex. 2) (citing Order on Remand ¶ 47 (Order No. 6444e), In the Matter of the Petition of Whitehall Wind, LLC, for QF Rate Determination, Dkt. No. D2002.8.100 (Mont. Comm'n June 4, 2010) (adopting a bright-line legally enforceable obligation standard)). Notably, in applying this overly restrictive legally enforceable obligation standard, the Montana Commission rejected the less-restrictive exemption

proposed by NorthWestern, which would have exempted parties that had "negotiated a complete [power purchase agreement], which … is ready for execution." Id. ¶ 45. The Montana Commission's application of its overly restrictive legally enforceable obligation standard violates PURPA by extinguishing legally enforceable obligations to which QFs are entitled and discouraging future solar development in Montana.

### A. The Montana Commission Applied an Untenable Legally Enforceable Obligation Standard

The Montana Commission's decision applied an illegal definition of legally enforceable obligations. Although the Montana Commission has authority to determine when a legally enforceable obligation occurs, this determination is bound by PURPA and this Commission's regulations. See Cedar Creek Wind, LLC, 137 FERC ¶ 61,006, at ¶ 35 (2011) ("While West Penn stands for the notion that the Commission gives deference to the states to determine the date on which a legally enforceable obligation is incurred, such deference is subject to the terms of the Commission's regulations."). By conditioning legally enforceable obligations on the existence of a fully executed interconnection agreement, the Montana Commission's decision violates PURPA and its implementing regulations, which clearly delineate legally enforceable obligations from contracts to protect QFs.

Small facilities are entitled to a standard purchase rate as of the time a legally enforceable obligation "is incurred." 18 C.F.R. § 292.304(d)(2)(ii). That is, a legally enforceable obligation is created when the QF "has agreed to obligate itself to deliver at a future date energy and capacity to the electric utility." Order No. 69, 45 Fed. Reg. at 12,224; see also 18 C.F.R. § 292.304(b)(5)). The use of the phrase "legally enforceable obligation" as opposed to "contractual obligation" was intentional; it ensures that QFs

can avail themselves of the purchase requirement regardless of utilities' willingness to sign agreements. See Order No. 69, 45 Fed. Reg. at 12,224 (explaining that the term "legally enforceable obligation" is "intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible QF merely by refusing to enter into a contract with the qualifying facility."). Importantly, a utility's refusal to enter into a contract with the QF does not foreclose creation of a legally enforceable obligation. See id.; see also Grouse Creek Wind Park, LLC, 142 FERC ¶ 61,187, at ¶ 40 (Mar. 15, 2013) ("In order to protect the rights of a QF, once a QF makes itself available to sell to a utility, a legally enforceable obligation may exist prior to the formation of a contract."). Contradicting this basic principle, the Montana Commission's decision unlawfully requires QFs greater than 100 kW to both tender a signed contract to the utility and obtain an executed interconnection agreement before incurring a legally enforceable obligation.

This Commission has repeatedly rejected such attempts to limit legally enforceable obligations to formal contractual terms. For example, in Grouse Creek, this Commission emphasized that a "fully-executed contract" may not be a condition to forming a legally enforceable obligation. Id. ¶ 36. In that case, the Idaho Public Utilities Commission issued an order that reduced the size of QFs eligible for a standard rate and applied the new eligibility cap retroactively. Id. ¶¶ 2-6. In a subsequent, but related order the Idaho Commission relied on a bright-line legally enforceable obligation rule to deny a standard rate to a QF because the QF did not have a fully executed power purchase agreement, i.e. one signed by both parties, before the effective date of the reduced eligibility cap. Id. Grouse Creek was the fourth of a line of cases challenging the Idaho Commission's decision, and each time this Commission made clear that

requiring a fully-executed contract as a condition precedent to a legally enforceable obligation "is inconsistent with PURPA and [the Commission's] regulations implementing PURPA." Id. ¶ 36; see also Murphy Flat Power, LLC, 141 FERC ¶ 61,145, at ¶¶ 24-25 (Nov. 20, 2012); Rainbow Ranch Wind, LLC, 139 FERC ¶ 61,077, at ¶¶ 23-24 (Apr. 30, 2012); Cedar Creek Wind, LLC, 137 FERC ¶ 61,006, at ¶¶ 35-36 (Oct. 4, 2011). This Commission's determination was based on the fact that:

> the phrase legally enforceable obligation is broader than simply a contract between an electric utility and a QF and that the phrase is used to prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract, or as here, delaying the signing of a contract, so that a later and lower avoided cost is applicable.

Grouse Creek Wind Park, LLC, 142 FERC ¶ 61,187, at ¶ 36.

Thus, this Commission found that the Idaho Commission illegally modified its definition of a legally enforceable obligation by attempting to apply its order retroactively to QFs without executed power purchase agreements. This Commission should reach a similar conclusion in this instance and find that the Montana Commission has impermissibly modified its definition of legally enforceable obligations by only recognizing agreements with QFs that "had submitted a signed power purchase agreement and executed an interconnection agreement" prior to June 16. Notice of Comm'n Action at 2, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 16, 2016) (Ex. 20); Order No. 7500 at ¶¶ 13, 47, 63 (Ex. 2). In fact, the Montana Commission's action is even more egregious than the situation that arose in Grouse Creek because the Montana Commission decision effectively terminates legally enforceable obligations for QFs that have already obtained

fully executed power purchase agreements. See Order No. 7500 at ¶ 47.[11] Accordingly, the Montana Commission's decision violates PURPA.[12]

### B. The Montana Commission's Standard Creates Impermissible Barriers to The Formation of Legally Enforceable Obligations

Even if requiring an executed interconnection agreement were not contrary to PURPA—and as described above, it is—the effect of these requirements and the elimination of the standard rate for projects between 100 kW and three MW creates impermissible barriers to the formation of legally enforceable obligations.

In implementing PURPA provisions that encourage the development of renewable energy projects, this Commission has rejected attempts to establish hurdles for QFs, including state-imposed barriers to the formation of legally enforceable obligations. For

[11] For example, as described in FLS's motion for rehearing, the company had signed power purchase agreements for 13 projects before the Commission's June 16 work session, through which FLS "made a firm and unconditional commitment to sell the output of these projects to NorthWestern." Application of FLS Energy, Inc. for Rehearing on Emergency Motion at 2, In the Matter of NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n July 1, 2016) (Ex. 19). Indeed, for seven of these projects, FLS had requested interconnection agreements, while still others were in advanced stages of the interconnection process. Id. However, these projects do not satisfy the Commission's bright-line standard because they lack executed interconnection agreements. To preclude standard rates for QFs between 100 kWh and three MW that already have created legally enforceable obligations under PURPA's standards effectively ignores their legally enforceable rights in violation of PURPA.

[12] In an effort to support its legally enforceable standard, the Montana Commission wrongly claims that this standard has "withstood challenges in state district court and FERC." Order No. 7500 ¶ 47 (Ex. 2). But neither the state court nor this Commission directly reviewed the legality of the legally enforceable standard adopted by the Montana Commission. See Whitehall Wind, LLC v. Montana Pub. Serv. Comm'n, 223 P.3d 907, 908 (Mont. 2010) (identifying issues reviewed on appeal); Whitehall Wind, LLC v. Montana Pub. Serv. Comm'n, 347 P.3d 1273, 1277-78 (Mont. 2015) ("Because it is not implicated in this appeal, we decline to opine whether the Commission's bright-line prospective test, announced in its order, complies with PURPA."); see generally, Hydrodynamics Inc., 146 FERC ¶ 61,193 (2014) (reviewing the Montana Commission's competitive bidding approach for certain QFs, not its bright-line legally enforceable obligation standard).

example, in Hydrodynamics, Inc., this Commission found that the Montana Commission's rule requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract violated PURPA where such competitive solicitations were not regularly held. 146 FERC ¶ 61,193, at ¶¶ 32-33 (2014) (explaining that "[s]uch 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"). In doing so, this Commission made clear that even de facto obstacles preventing QFs from incurring legally enforceable obligations violate PURPA. See id.; see also JD Wind 1, 129 FERC ¶ 61,148, at ¶ 29 (2009) (rejecting the Texas Commission's condition that a producer provide "firm" energy to incur a legally enforceable obligation as contrary to the purpose of the legally enforceable obligation clause and of PURPA to encourage investment in small power producers by providing investors with security in their returns).

Similarly, by setting an overly restrictive standard for obtaining a legally enforceable obligation, the Montana Commission's decision undermines the purpose of PURPA. The Montana Commission's decision creates an impermissible burden that threatens to prevent the formation of most, if not all, new legally enforceable obligations. Indeed, under the Montana Commission's decision NorthWestern maintains that it "cannot execute a new Interconnection Agreement for any solar QF project between 100 kW and 3 MW in size seeking a contract at the standard long term rate." See Application of FLS Energy, Inc. for Rehearing on Emergency Motion 6, In the Matter of NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n July 1,

2016) (Ex. 19); see also id. Affidavit of Casey James May ¶ 22, Ex. C. This is particularly alarming given the absence of evidence that any of the advanced solar projects in Montana qualify under the Montana Commission's legally enforceable obligation standard. See Joint Motion of FLS Energy, Inc. & Cypress Creek Renewables, LLC for Reconsideration at 9 & n.3, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n Aug 4, 2016) (Ex. 23) (stating that none of FLS or Cypress Creek Renewables projects meet the Montana Commission's legally enforceable obligation standard and that it does not know of any projects that do qualify). As a result, these projects, in which developers have already heavily invested, have been brought to a standstill.

At the same time the Montana Commission extinguished existing legally enforceable obligations for advanced projects, the Commission eliminated the standard rate altogether for QFs still making their way through the development process. The result is that, in order to obtain a legally enforceable obligation during the indefinite period of the standard rate suspension, a small QF of more than 100 kW must attempt to negotiate a contract and seek a project-specific avoided-cost rate determination from this Commission if negotiations fail. See Order No. 7500 ¶ 44 (Ex. 2). Both processes add substantial transaction costs, as well as uncertainty that may undermine project financing. See Pacific Northwest Solar's Supplemental Comments on NorthWestern's Emergency Motion, In the Matter of NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 17, 2016) (Ex. 15) (explaining that "standard contracts

represent a much lower cost to complete negotiations and finalization of a [power purchase agreement] when compared to non-standard negotiated contracts. … A non-standard contracting process often kills projects due to the prolonged nature of the proceeding, which removes certainty from the development process"). It is exactly this type of situation that PURPA intended to avoid when it set out to overcome impediments to the development of nontraditional generating facilities. See FERC v. Mississippi, 456 U.S. at 751 (explaining that two problems impeded the development of nontraditional energy sources: (1) reluctance by traditional electrical utilities to purchase power from nontraditional facilities; and (2) state and federal regulations that imposed financial burdens on nontraditional facilities, discouraging their development). Accordingly, the Montana Commission's restrictive legally enforceable obligation standard is inconsistent with PURPA and its implementing regulations.

## REQUESTED ACTION AND RELIEF

For the reasons stated above, Vote Solar respectfully requests that this Commission exercise its authority under Section 210(h)(2)(A) and enforce PURPA's provisions against the Montana Commission. Specifically, Vote Solar requests that this Commission:

(a) invalidate the Montana Commission's June 16 decision and July 25 order suspending the standard rate as a violation of PURPA;

(b) reinstate the standard rate approved by the Montana Commission in 2013 and reapproved in 2015;

(c) rule that the Montana Commission's legally enforceable obligation standard violates PURPA;

(d) recognize the legally enforceable obligations existing at the time of the Montana Commission's June 16 decision, and their entitlement to the pre-existing standard rate;

and

(e) grant any other relief which this Commission deems appropriate.

## RULE 206 COMPLAINT REQUIREMENTS

In accordance with Rule 206(b), Vote Solar provides the following:

### A. The Montana Commission's June 16 Decision and July 25 Order Violate PURPA (Rules 206(b)(1) & (b)(2))

As explained in detail above, see supra Complaint Parts I and II, the Montana Commission's waiver of the standard rate for solar QFs between 100 kW and three MW, see generally Order No. 7500 (Ex. 2), violates PURPA and its mandate of encouraging small power production, see 16 U.S.C. § 824a-3, by discouraging small solar power producers from participating in the market, imposing a de facto standard rate that has not been shown to be just, reasonable, and nondiscriminatory, and applying an overly-restrictive legally enforceable obligation standard.

### B. The Montana Commission's Suspension of the Standard Rate Stalls Solar Development in Montana and Threatens to Prevent Future Development (Rule 206(b)(3))

By suspending the standard rate and applying an unlawful legally enforceable obligation standard, the Montana Commission has brought solar development in Montana to a standstill. See supra Background Part IV; Complaint Part II.B. Over 44 advanced solar projects in Montana comprising 135 MW in capacity are unable to move forward because of the Montana Commission's Order, which extinguished the legally enforceable obligations of these projects and suspended the standard rates on which the projects had

relied. See Order No. 7500 ¶ 45 (noting that under NorthWestern's proposed legally enforceable obligation standard "44 solar QF projects comprising 135 MW could contract at existing QF-1 rates despite the suspension"). The viability of these projects is now in question. See supra Background Part IV; Complaint Part II.B. In addition, countless other less-advanced projects are stalled pending the Montana Commission's final decision on NorthWestern's rate application. See supra Background Part IV.

### C. The Montana Commission's Suspension of the Standard Rate Threatens the Commercial Viability of Small Solar Production in Montana (Rule 206(b)(4))

Although difficult to quantify given the limited record before the Montana Commission at the time of its decision, the financial impact of the Montana Commission's decision is significant. FLS estimates that suspension of the standard rate will cause the company to lose approximately $750,000 in investments in developing its Montana portfolio. Comments of FLS Energy, Inc. in Response to NorthWestern's Emergency Motion at 2-3, In the Matter of NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 6, 2016) (Ex. 13). Similarly, Cypress Creek has invested approximately $770,000 in developing projects in Montana that it stands to lose as a result of the rate suspension. Comments of Cypress Creek Renewables in Response to NorthWestern's Emergency Motion at 2-3, In the Matter of NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 6, 2016) (Ex. 14). In addition, the loss of these and other renewable energy projects threatens to decrease revenue for local companies and associated county taxes. See Comments of Montana Wind & Solar, LLC on NorthWestern's Rate Application, In the

Matter of NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 9, 2016) (Ex. 16).

Moreover, as the Montana Business Assistance Connection warned, the standard rate suspension threatens to make Montana less appealing to large industry operations looking to locate their firms in states with access to renewable energy sources. See Montana Business Assistance Connection Comments, In the Matter of NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 6, 2016) (Ex. 10). If those industries are dissuaded from bringing their business to Montana, the economic impacts—including the loss of an opportunity to bring much-needed jobs to Montana—will be significant. See id.

### D. The Montana Commission's Actions Will Have Lasting Impacts on Montana's Renewable Energy Production (Rule 206(b)(5))

As explained above, see supra Background Part IV; Complaint Part II.B; Rule 206 Part C, the Montana Commission's decision has brought small solar power production in Montana to a halt. The decision threatens the viability of advanced projects in which solar development companies have heavily invested. See, e.g., Pacific Northwest Solar's Supplemental Comments on NorthWestern's Emergency Motion at 3, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n June 17, 2016) (Ex. 15) ("[I]f the Commission were to adopt the revised pricing, none of the projects currently under development would be viable any longer"). In short, the future

of solar power production in Montana and its economic benefits to the people of Montana are threatened by the Montana Commission's decision.

**E. Other Proceedings (Rule 206(b)(6))**

None of the issues presented in this Complaint are pending in an existing proceeding before this Commission or in any other forum in which Vote Solar is a party.

**F. Relief Requested (Rule 206(b)(7))**

As detailed above, see supra Requested Action and Relief, Vote Solar requests that this Commission exercise its authority under Section 210(h)(2)(A) to enforce PURPA against the Montana Commission.

**G. Supporting Documents (Rule 206(b)(8))**

Vote Solar has included all documents supporting the facts in this Complaint as exhibits to the declaration of Aurora R. Janke, counsel for Complainants.

**H. Alternative Dispute Resolution (Rule 206(b)(9))**

As described above, see supra Background Part IV.B, Vote Solar filed a motion for reconsideration on August 4 asking the Montana Commission to reconsider its order on the grounds discussed above. See Vote Solar Motion for Reconsideration of Order No. 7500, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n Aug 4, 2016) (Ex. 22). The Montana Commission denied this motion for reconsideration pursuant to its rules that motions for reconsideration are deemed denied if not ruled on within ten days. See Notice of Staff Action, In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n Aug. 25, 2016) (Ex. 24). Given the Montana Commission's denial, and its decision not

to issue any subsequent order explaining its reasoning, Vote Solar does not believe that alternative dispute resolution under this Commission's supervision will successfully resolve this Complaint. This is especially true given the position of the Commission Chair, Brad Johnson, as articulated in his opinion piece published in the Billings Gazette. See Brad Johnson, Guest Opinion: Montana PSC Sides with Consumers on Solar Pricing, Billings Gazette, Aug. 4, 2016 (Ex. 25).

In addition, any direct communication with the Montana Commission on the issues raised in this Complaint would likely be improper ex parte communication because NorthWestern's original Rate Application remains pending before the Montana Commission and Vote Solar is a party to this action. See Procedural Order (Order No. 7500a), In the Matter of NorthWestern Energy's Application for Interim & Final Approval of Revised Tariff No. Qf-1, Qualifying Facility Power Purchase, Dkt. No. D2016.5.39 (Mont. Comm'n Sept. 2, 2016) (Ex. 26).

As a result, Vote Solar has not pursued the use of the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms or any other informal dispute resolution procedures other than its motion for reconsideration. Vote Solar and the Montana Commission have not agreed on any process for resolving this Complaint, and Vote Solar seeks to move forward with procedures outlined in Rule 206(f) and (g).

## CONCLUSION

For the reasons stated above, Vote Solar respectfully requests that this Commission enforce Section 210 against the Montana Commission.

Respectfully submitted on this 19th day of September, 2016.

/s/ Jenny K. Harbine

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*On behalf of Complainants Vote Solar and Montana Environmental Information Center*

**UNITED STATES OF AMERICA**
**FEDERAL ENERGY REGULATORY COMMISSION**

Vote Solar and Montana Environmental
Information Center,

Complainants

v. Docket No.

Montana Public Service Commission,
Respondents

**NOTICE OF COMPLAINT**

( )

Take notice that on September 19, 2016, Vote Solar and Montana Environmental Information Center (collectively, "Vote Solar") filed a formal complaint against the Montana Public Service Commission pursuant to 18 C.F.R. § 385.206, alleging that the Montana Commission violated Section 210 of PURPA, 16 U.S.C. § 824a-3, by suspending the standard rate for solar qualifying facilities with a nameplate capacity between 100 kW and 3 MW and applying an unlawfully narrow definition of legally enforceable obligations.

Vote Solar certifies that copies of the complaint were served on contacts for the Montana Public Service Commission, on contacts for NorthWestern Energy as listed on the Commission's list of Corporate Officials, and on other persons who may be affected by the complaint.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at http://www.ferc.gov. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

This filing is accessible on-line at http://www.ferc.gov, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington,

DC. There is an "eSubscription" link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 pm Eastern Time on (insert date).

Kimberly D. Bose,
Secretary.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document and its attachments upon each person designated on the official service list compiled by the Secretary in this proceeding. I further certify that I have served the foregoing document and its attachments on the respondent and others who may be affected by this complaint in accordance with Rule 206(c). Accordingly, I certify that the following parties have been served:

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Dated at Washington, DC this 19th day of September, 2016.

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