

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF NorthWestern Energy’s) REGULATORY DIVISION
Application for Interim and Final Approval of)
Revised Tariff No. QF-1, Qualifying Facility) DOCKET NO. D2016.5.39
Power Purchase) ORDER NO. 7500

**ORDER ON NORTHWESTERN ENERGY’S MOTION FOR EMERGENCY
SUSPENSION OF TARIFF SCHEDULE QF-1**

BACKGROUND

1. In 1978, Congress enacted a National Energy Act to conserve domestic oil and natural gas resources, increase the efficiency and reduce the cost of electric generating facilities, and reduce the nation’s dependence on foreign energy sources. The National Energy Act consisted of five energy-related laws, including the Public Utility Regulatory Policies Act (PURPA). Section 210 of PURPA encourages cogeneration and small power production by requiring electric utilities to buy energy and capacity from qualifying small power production facilities¹ (QFs) at prices reflecting “the incremental cost to the electric utility of alternative electric energy.” 16 U.S.C. § 824a-3 (2015).

2. In 1980, the Federal Energy Regulatory Commission (FERC) adopted rules implementing PURPA. 18 C.F.R. §§ 292.301 *et seq.* (2015). These rules generally require state regulatory authorities to set “standard rates for purchases from [QFs] with a design capacity of 100 kilowatts or less.” *Id.* § 292.304(c). State regulatory authorities have discretion to set standard rates for purchases from QFs with a design capacity larger than 100 kilowatts. *Id.*

3. In 1981, the Montana Legislature enacted “mini-PURPA,” which also entitles QFs to sell electricity to electric utilities regulated by the Montana Public Service Commission (“Commission”).² Mont. Code Ann. §§ 69-3-603–604 (2015) (authorizing adoption of rules).

¹ A “QF” is a facility no larger than 80 megawatts, owned by a person not otherwise engaged in the generation or sale of electricity, that produces both electricity and useful forms of thermal energy, or electricity from any combination of renewable resources. Mont. Code Ann. § 69-3-601(3); *see also* 18 C.F.R. § 292.101(b)(1).

² In 2003, the Montana legislature repealed these statutes, effective upon PURPA’s repeal. Mont. Code Ann. §§ 69-3-601 *et seq.*; *see* Mont. H. 417, 58th Legis., 1st Reg. Sess. (Jan. 23, 2003).

The Commission's rules adopt FERC's rules by reference, and provide that long-term contracts between a utility and a QF no larger than three megawatts "may be accomplished according to standard tariffed rates." Mont. Admin. R. 38.5.1902(1), 38.5.1902(5) (2016).

4. The Commission first approved a standard "QF-1 rate" as the Montana Power Company was "preparing to sell its generation" in response to the Electric Utility Industry Restructuring and Customer Choice Act of 1997. Order 6124, Dkt. D98.8.183, ¶¶ 2, 11 (Dec. 8, 1998); *see also* Order 6459a, Dkt. D2002.6.63, ¶ 11 (Dec. 2, 2003). After considering certain policy issues, the Commission first approved two standard QF-1 rate options for NorthWestern Corporation, doing business as NorthWestern Energy ("NorthWestern"), in 2006. Order 6501f, Dkt. D2003.7.86, ¶¶ 182-193 (Dec. 12, 2006). Option 1 was initially set at \$49.90 per megawatt-hour (MWh) based on NorthWestern's 2005 Electricity Supply Resource Procurement Plan and a seven-year power purchase agreement (PPA) recently entered into with PPL Montana, LLC. Order 6501f ¶ 184. The Commission required the resources underlying Option 1 to be "refreshed periodically" based on biennial electricity supply resource procurement plans. *Id.* ¶ 192. Option 2 offers indexed rates calculated at the time of delivery. Order 6973d, Dkt. D2008.12.146, ¶ 139 (Apr. 13, 2010). Option 2 rates are not at issue here.

5. In 2010, the Commission approved NorthWestern's proposal to base Option 1 rates on a projection of Colstrip Unit 4 (CU4) revenue requirements as "a proxy for the cost of [base load] power that NorthWestern could avoid with future QF power purchases." Order 6973d ¶ 133; *see also* Order 6925f, Dkt. D2008.6.69 (Nov. 13, 2008) (approving CU4). The Commission also approved NorthWestern's proposal to classify the nominal, levelized avoided cost rate "into energy and capacity elements." *Id.* ¶ 134. This method resulted in Option 1(a) rates of \$51.15 (off-peak) and \$99.41 (on-peak) per MWh. *Id.*

6. In 2011, the Commission substituted a combined cycle combustion turbine (CCCT) for CU4 as the avoidable base load resource based on a preferred portfolio in NorthWestern's 2009 Electricity Supply Resource Procurement Plan: "This approach blend[ed] NorthWestern's forecast of wholesale electricity market prices in the early years with the expected cost of owning and operating a combined cycle gas plant" beginning in 2015. Order 7108e, Dkt. D2010.7.77, ¶¶ 65-70, (Oct. 19, 2011). This method resulted in Option 1(a) rates of \$54.44 (off-peak) and \$90.87 (on peak). Sched. QF-1, Sheet 74.2 (4th Rev. Oct. 19, 2011).

7. Because NorthWestern's 2011 Electricity Supply Resource Procurement Plan also

“described natural gas-fired resources as a focal point of its resource planning activities,” the Commission applied the same method in 2012, “with some adjustments.” Order 7199d, Dkt. D2012.1.3, ¶¶ 18, 35, 45 (Dec. 7, 2012) (expecting a gas plant in 2018). This method initially resulted in Option 1(a) rates of \$46.97 (off-peak) and \$86.56 (on-peak). Sched. QF-1, Sheet 74.2 (5th Rev. Jan. 10, 2013). The Commission ordered NorthWestern to apply the same method “to update the avoided cost rates” about eight months later, resulting in the current Option 1(a) rates of \$53.14 (off-peak) and \$92.37 (on-peak). Order 7199d ¶¶ 86, 107; Sched. QF-1, Sheet 74.2 (6th Rev. Aug. 26, 2013).

8. In 2014, NorthWestern filed an application to update its standard QF-1 tariff rates. Order 7338b, Dkt. D2014.1.5 (May 4, 2015). The Commission ultimately determined that NorthWestern’s assumptions regarding the use and timing of a combined cycle plant in the blended market-CCCT avoided cost calculation method were not supported by a comprehensive, long-term resource planning analysis. *Id.* ¶ 20. The Commission considered the avoided cost data NorthWestern and other interested persons submitted, but determined that due to NorthWestern’s failure to provide adequate avoided cost information, NorthWestern did not meet its burden of proof. *Id.* ¶ 36. Because the Commission was unable to find, as would be required under PURPA, that NorthWestern’s proposed QF rates were just and reasonable, in the public interest, and not discriminatory, the Commission denied NorthWestern’s application. *Id.* The Commission noted that it had set standard QF-1 tariff rates a year and a half prior to its decision, based on underlying market data NorthWestern used in its 2013 Electricity Supply Resource Procurement Plan. The Commission also noted that record evidence at the time showed limited activity with respect to QF-1 tariff-eligible QF projects.

PROCEDURAL HISTORY

9. On May 3, 2016, NorthWestern filed an *Application for Approval of Avoided Cost Tariff Schedule QF-1* (“Application”) with the Commission. NorthWestern requests that the Commission approve NorthWestern’s new QF-1 tariff on both an interim and final basis. The proposed avoided cost rates would apply to QFs with a nameplate capacity of three megawatts or less on May 3, 2016.

10. On May 13, 2016, the Commission issued a *Notice of Application and Intervention Deadline*, setting an intervention deadline of June 10, 2016. On May 17, 2016,

NorthWestern filed a *Motion for Emergency Suspension of the QF-1 Tariff for New Solar Qualifying Facilities with Nameplate Capacities Greater than 100 kW* (“Motion”), as well as the supporting affidavit of John B. Bushnell. On May 24, 2016, the Commission determined that expedited consideration of NorthWestern’s Motion was necessary; it issued a *Notice of Emergency Motion and Opportunity to Comment and Request Hearing* setting a June 6 deadline for interested persons “to submit data, views, or arguments” related to NorthWestern’s Motion.

11. On June 6, 2016, the Commission received written comments on NorthWestern’s Motion from the Montana Consumer Counsel (MCC), FLS Energy (FLS), Vote Solar and Montana Environmental Information Center (MEIC)³, Cypress Creek Renewables (“Cypress”), and Pacific Northwest Solar (PNW). On June 8, 2016, the Commission received written comments from the Montana Department of Environmental Quality (DEQ).

12. On June 9, 2016, the Commission conducted a public hearing and heard oral arguments on NorthWestern’s Motion. The Commission admitted into evidence the pre-filed direct testimony of NorthWestern witnesses Autumn Mueller (Ex. NWE-1 and NWE-2), John Bushnell (Ex. NWE-3 and NWE-4), and Luke Hansen (Ex. NWE-6). The Commission also admitted into evidence the affidavit of John Bushnell that NorthWestern filed concurrent with and in support of its Motion (Ex. NWE-5). NorthWestern, the MCC, and Vote Solar/MEIC also made oral arguments regarding NorthWestern’s Motion.

13. On June 16, 2016, the Commission suspended NorthWestern’s obligations under QF-1 option 1(a) standard rates for solar projects greater than 100 kW. Notice of Commn. Action, Dkt. D2016.5.39 (June 16, 2016). The Commission authorized NorthWestern to enter contracts with solar QFs greater than 100 kW, but no larger than 3 MW, at the standard tariff rate, if prior to the date of the notice, the QF had submitted a signed power purchase agreement and executed an interconnection agreement. *Id.* The suspension will automatically expire on the service date of the issuance of the Commission's final order in this docket. The Commission stated that a Commission Order would follow its *Notice of Commission Action*. This Order fulfills that commitment.

³ Vote Solar and the MEIC are two separate entities which filed a joint petition for intervention and are being represented by one attorney in this proceeding.

FINDINGS OF FACT

14. Nothing in Montana law requires the Commission to establish standard rates for sales of energy and capacity to electric utilities. FERC rules implementing PURPA require the Commission to establish standard rates for QFs with design capacities of 100 kW or less. The Commission previously has chosen to require utilities to offer standard rates to QFs with nameplate capacities of up to 3 MW.

15. NorthWestern's QF-1 tariff rates are standard offer rates that allow eligible QFs to enter long-term contracts (up to 25 years) at fixed prices based on estimates of NorthWestern's avoided costs. NorthWestern's current QF-1 tariff rates were set in August 2013 based on a blended market-CCCT method of estimating long-term avoided costs approved in December 2012. Order 7199d ¶¶ 18, 107. The Commission has used the blended market-CCCT avoided cost calculation method to estimate NorthWestern's avoided costs and set QF-1 tariff rates since 2010. Order 7338b ¶ 18.

16. NorthWestern's current QF-1 tariff rates, set in August 2013, reflect Mid-Columbia wholesale electricity market forward prices and AECO wholesale natural gas market forward prices as of June 7, 2013. *Compliance Filing for Schedules QF-1 and WI-1 Updated Using June 2013 Price Forecasts for Natural Gas and Electricity*, Dkt. D2012.1.3 (July 29, 2013). Natural gas prices after 2016 were escalated based on the annual rate of change in the Energy Information Administration 2013 Annual Energy Outlook Henry Hub nominal natural gas price forecast. Order 7199d ¶¶ 27-28.

17. NorthWestern states that current QF-1 rates exceed current avoided costs and are not just and reasonable. Mot. at 2. It claims electricity and natural gas prices have declined since the QF-1 rates were set in August 2013. Ex. NWE-3, p. 7. Using the blended market-CCCT avoided cost calculation method, NorthWestern estimated that current electricity and natural gas prices produce 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. *Id.* at (JBB-1) p. 2.

18. NorthWestern states that it "is facing immediate execution of solar QF-1 PPAs for 75 MW" and it "anticipates that soon it will confront additional requests for immediate execution of solar QF-1 PPAs." Mot. at 7. NorthWestern asserts that contracting with these QFs at current QF-1 tariff rates will harm its customers by imposing extra costs on them. *Id.* at 8. It contends that the likelihood of harm to its customers justifies a narrow, temporary suspension of the QF-1

tariff rates for solar QFs larger than 100 kW. *Id.* at 11.

19. The MCC supports NorthWestern's Motion. It states that it has been several years since the Commission updated NorthWestern's standard rates and that NorthWestern's portfolio and regional markets have since evolved. Comments of the MCC 2 (June 6, 2016). The MCC states that the risk to customers of many solar QFs contracting at long-term rates, that may significantly exceed avoided costs, justifies granting NorthWestern's Motion. *Id.*

20. Vote Solar and the MEIC oppose NorthWestern's Motion. They contend that suspending QF-1 tariff rates would be inconsistent with PURPA, Montana law, and Commission rules and procedures. Comments of Vote Solar and MEIC 5 (June 6, 2016). Vote Solar and the MEIC state that PURPA and Commission rules require the Commission to base a determination of standard rates on contested case procedures and a complete evidentiary record. *Id.* at 6. They assert that only NorthWestern has had an opportunity to submit evidence in this docket and that its rate proposals reflect several changed assumptions other than electricity and natural gas price forecasts. *Id.* at 7. They contend it would be premature to adopt NorthWestern's rate changes until these assumptions are scrutinized during this proceeding. *Id.*

21. Vote Solar and the MEIC state that FERC rules obligate NorthWestern to purchase power from QFs and that NorthWestern cannot circumvent its obligations by declaring an emergency. In addition, they assert that Mont. Code Ann. § 69-3-603(3)(a) obligates NorthWestern to enter into agreements with QFs based on current standard rates until the Commission changes those rates on a going forward basis. *Id.* at 9.

22. Vote Solar and the MEIC state that NorthWestern has not demonstrated that immediate changes to the QF-1 tariff are needed to protect customers. They assert granting NorthWestern's Motion would require accepting "at face value [NorthWestern's] new calculation of avoided costs, which is based not only on electricity price forecasts, but on a host of additional assumptions and methodological changes" that "have not been scrutinized and affirmed." *Id.* In addition, they assert NorthWestern failed to show that a flood of new solar QF projects is imminent.

23. FLS does not oppose NorthWestern's request for relief with respect to projects not yet in the interconnection process or not specifically identified to NorthWestern's supply department prior to the Commission's ruling on NorthWestern's Motion. FLS states it reached agreement with NorthWestern on PPA terms during the week of May 30, 2016. According to

FLS, NorthWestern agreed to execute PPAs with FLS for 14 projects (and other similarly situated projects under development by other parties) based on the current QF-1 tariff (NorthWestern disputes that there was any agreement with regard to similarly situated projects. Hr'g Tr. 53:19-23 (June 9, 2016)).

24. FLS states that in 2015 it decided to develop and build approximately 253 MW solar facilities in Montana over the next several years. FLS opposes any attempt by NorthWestern to be excused from its obligation to enter into PPAs with FLS for the 14 advanced projects, as it would preclude the development of the projects and cause FLS to lose the approximately \$750,000 it has invested to date in the development of its Montana portfolio.

25. FLS asserts its negotiated resolution with NorthWestern is a reasonable outcome that, consistent with PURPA, strikes an appropriate balance between QF development and ratepayer considerations, protects FLS's investment-backed expectations, and signals that Montana and the Commission value a fair and predictable regulatory environment with respect to energy development.

26. Cypress asserted that it has a number of solar projects at various stages of development in Montana, some of which could be adversely affected if the Commission grants NorthWestern's Motion. Cypress states that it agrees with comments filed by FLS. Cypress opposes NorthWestern's Motion to the extent it would impair projects that were in the interconnection process and for which PPAs had been requested prior to a Commission decision. Cypress expressed concern over the impact granting NorthWestern's Motion could have on its ability to complete several of its projects and recover its Montana investment.

27. PNW opposes NorthWestern's Motion. It states NorthWestern has not shown a need for emergency relief. According to PNW, NorthWestern overstates the number of solar projects that may develop by combining projects in the interconnection queue with projects that requested PPAs, which likely double-counted some projects. PNW asserts that only a fraction of potential QF projects are actually completed. It states that NorthWestern's own Motion indicates that about 60 percent of projects in the interconnection queue are withdrawn.

28. PNW states that, to the extent current QF-1 tariff rates exceed the final rates ultimately set in this case, NorthWestern overestimated the customer impact because the Commission is unlikely to fully accept NorthWestern's proposed rates. PNW adds that QFs have relied on lawfully-established, current QF-1 rates when moving forward with development

work in Montana and it would be unfair to undermine those efforts. PNW states it has been negotiating 21 PPAs with NorthWestern for a six month period and the Commission should exclude those projects from any relief it grants.

29. DEQ did not explicitly support or oppose NorthWestern's Motion. DEQ states that granting NorthWestern's Motion without modification would risk terminating all utility-scale solar development in Montana. However, it also states that significant solar QF resource acquisition without a systematic review of costs and benefits would pose risks to NorthWestern's customers. DEQ notes that solar resource development would diversify Montana's energy resources, help achieve renewable energy goals, provide sustainable, pollution free electricity, and help attract technology companies that prefer to receive service from clean and renewable supply portfolios. DEQ recommended that the Commission resolve the matter in a way that addresses customer risks without completely blocking near-term development of some solar QFs.

30. As explained further in subsequent findings, while the Commission disagrees with the precise approach NorthWestern applied to estimate its current avoided costs using the blended market-CCCT method, NorthWestern has 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 is good cause to implement a narrow, temporary suspension of Tariff Schedule QF-1 for solar QFs with nameplate capacities larger than 100 kW in order to prevent irreparable harm to NorthWestern's ratepayers. *Infra* ¶ 38. To the extent necessary, a waiver of Mont. Admin. R. 38.5.1902(5) is thus being granted in connection with the suspension.

31. The Commission has previously entertained a request for an emergency motion in the context of a Commission QF avoided cost compliance proceeding. In Order 6501g, Colstrip Energy Limited Partnership filed an emergency motion requesting reconsideration of the Commission's decision in that docket. Order 6501g, Dkt. D2003.7.86, D2004.6.96, and D2005.6.103 (June 7, 2007). The Commission reviewed the emergency motion and subsequently issued an order on the emergency motion. *Id.*

32. Additionally, the judicial system is no stranger to expedited consideration of requests for relief, including, for example, writs of supervisory control (Mont. R. of App. Proc. 14) and writs of mandate (Mont. Code Ann § 27-26-101, *et. seq.*). Supervisory control is "an extraordinary remedy, reserved for extraordinary circumstances." *San Diego Gas & Elec. Co. v. Ninth Judicial Dist. Court*, 2014 MT 191, ¶ 6, 375 Mont. 517, 329 P.3d 1264. Encouraging

“judicial economy and avoiding procedural entanglements are adequate grounds for [a court] to issue a writ of supervisory control.” *Id.* ¶ 7. Similar to supervisory control, a temporary suspension of a standard QF tariff should be considered an extraordinary remedy. A writ of mandate may be issued by a court to compel the performance of an act that the law specifically enjoins. The writ must be issued in all cases in which there is not a plain, speedy, and adequate remedy in the ordinary course of law. Mont. Code Ann § 27-26-102. Similar to a District Court writ of mandate, the suspension of a QF tariff is warranted when standard administrative procedures for achieving PURPA’s requirements are inadequate and there is not a plain, speedy, and adequate remedy in the ordinary course of law.

33. NorthWestern contends that current QF-1 rates exceed current avoided costs and, therefore, are not just and reasonable to its customers and in the public interest. Mot. at 2; Ex. NWE-3 pp. 6-8. NorthWestern estimates current avoided costs for the period 2013 through 2036 based on a blended market-CCCT avoided cost calculation method, a method the Commission has applied multiple times in prior standard avoided cost rate proceedings. *Supra* ¶¶ 6-7. However, NorthWestern’s calculation uses historic market prices for the period 2013-2015. Ex. NWE-3 (JBB-1). The use of historic prices is problematic because FERC’s rules implementing PURPA define avoided costs in terms of a utility’s incremental costs. 18 C.F.R. § 292.101(b)(6). A forward-looking calculation for the period 2017 through 2040 would be more reasonable. In addition, while NorthWestern assumed a combined cycle plant is acquired in 2018, that assumption is unrealistic today, despite the fact that this assumption underlies the avoided cost calculation upon which current QF-1 tariff rates are based. For example, NorthWestern’s 2015 Electricity Supply Resource Procurement Plan calls for the acquisition of a combined cycle plant in 2025. Hr’g Tr. 26:3-7.

34. An application of the blended market-CCCT method that hews closely to the calculation method applied in Order 7199d (the basis for current rates), and one that is more realistic in light of NorthWestern’s 2015 resource plan, would assume the combined cycle plant is added in 2022.⁴ This approach produces an annual avoided cost stream comprising five years of market electricity prices and 19 years of CCCT costs, consistent with the approach used in Order 7199d. The approach yields a slightly higher avoided cost than an approach that assumes

⁴ The only substantive difference between this avoided cost calculation and the calculation underlying current QF-1 rates is the forward shift of the calculation period and CCCT online date.

the combined cycle plant is added in 2025 and results in a conservative comparison between the avoided costs used to set existing QF-1 tariff rates and current avoided costs based on the Order 7199d blended market-CCCT method.⁵

35. Adjusting NorthWestern's avoided cost estimate based on these findings produces a 24-year nominal levelized avoided cost of \$0.04403 per kWh, compared to NorthWestern's estimate of \$0.04040 per kWh. This estimate is 29 percent less than the \$0.06235 per kWh avoided cost estimate used to set existing standard QF-1 rates. Thus, a Commission-approved and consistently-applied method of estimating NorthWestern's avoided costs shows that NorthWestern's current QF-1 tariff rates are based on avoided cost estimates that are higher than current, comparable avoided cost data.

36. None of the commenters that oppose NorthWestern's Motion addressed NorthWestern's estimate of its current avoided cost. Instead these commenters focused on NorthWestern's *proposed* rates, which are based on a new and different method of estimating avoided costs. Ex. NWE-3, p. 9; Ex. NWE-6, pp. 4-6. Because a Commission-approved and consistently-applied avoided cost calculation method exists, and because NorthWestern relied on it to justify its Motion, it is reasonable to consider it when assessing the merits of the Motion.

37. Since October 2015 NorthWestern has executed five contracts, totaling 14 MW, with solar QFs at the current standard QF-1 tariff rates. Mot. at 5; Ex. NWE-5, p. 3. Other QFs are pursuing contracts and are at various points along the continuum from project scoping to contract execution. NorthWestern's generator interconnection queue shows forty 3 MW or smaller solar projects, totaling 116 MW, actively pursuing interconnection agreements. Ex. NWE-2. Approximately 130 MW (14 + 116) of new solar generating capacity would represent a significant resource acquisition. Furthermore, due to NorthWestern's failure to provide adequate avoided cost data in Docket D2014.1.5 the Commission was unable to properly evaluate whether QF-1 tariff rates were just and reasonable, in the public interest, and not discriminatory on the schedule required in the Commission's rules. Order 7338b ¶ 36; Mont. Admin. R. 38.5.1905(1). Using NorthWestern's estimate of its current avoided cost, as adjusted by the Commission, 130

⁵ For purposes of adjusting NorthWestern's estimate of its current avoided costs, the Commission assumes that changing the calculation time period and CCCT acquisition date impacts such things as the annual capital cost for the combined cycle plant, based on the source data underlying the calculation method. See *Compliance Filing for Schedules QF-1 and WI-1 Updated Using June 2013 Price Forecasts for Natural Gas and Electricity*, Dkt. D2012.1.3, Attach. p. 11 (July 29, 2013).

MW of new solar generating capacity priced at the current QF-1 tariff rates could impose approximately \$60 million of extra costs on customers, on a net present value basis over 25 years.⁶ Based on these facts, NorthWestern's customers are exposed to a material risk of long-term QF payment obligations that exceed current avoided costs which, if not addressed, would result in irreparable harm.

38. NorthWestern has made a *prima facie* case that the current QF-1 tariff rates exceed NorthWestern's current avoided costs. None of the parties opposing NorthWestern's motion contest the use of the blended market-CCCT avoided cost calculation method as a reasonable indicator of NorthWestern's current avoided costs, pending a final Commission decision. QF-1 tariff rates that exceed NorthWestern's avoided cost are not just and reasonable and in the public interest and, therefore, NorthWestern will not be compelled by this Commission to enter into contracts that reflect such rates with solar QFs over 100 kW.

39. NorthWestern requested a "narrow, temporary Emergency Suspension." Mot. at 11. Specifically, NorthWestern requested that the Commission "issue an order suspending NorthWestern's obligations pursuant to Schedule QF-1 for solar QFs that exceed 100 kW until the earlier of the Commission's grant of interim rates or the issuance of a final order" in which the Commission will presumably set new, final QF-1 rates. *Id.* There is persuasive evidence that the current QF-1 rate exceeds NorthWestern's avoided costs. However, that fact in and of itself does not rise to the level of an emergency. Rather, it is the large number of solar developers requesting contracts and interconnection agreements, and the associated total generating capacity, that is cause for concern, considering the fact that this will directly impact ratepayers. Comments of the MCC at 2. As a result, NorthWestern narrowly tailored its request for relief.

40. After receiving NorthWestern's Motion, the Commission issued a *Notice of Emergency Motion and Opportunity to Comment and Request Hearing* on May 24, 2016, alerting interested parties to the fact that NorthWestern sought an emergency suspension of the QF-1 tariff, specifically for new solar QFs with nameplate capacities greater than 100 kW. The Commission received comments from interested parties and ultimately chose to hold a hearing on June 9, 2016. The record that was developed through the comments and the hearing was

⁶ NorthWestern estimated customers' exposure to costs exceeding avoided cost of approximately \$81 million on a 25-year net present value basis, assuming about 100 MW of new solar QF capacity and its proposed QF-1 tariff rates. Ex. NWE-3 (JBB-2) p. 9.

focused specifically on a possible suspension of the QF-1 rate for solar QFs with nameplate capacities that exceed 100 kW.

41. A Montana district court or the Montana Supreme Court may “reverse an agency’s findings of fact if they are ‘clearly erroneous in view of the reliable, probative and substantial evidence in the whole record.’” *Core-Mark Int’l, Inc. v. Mont. Bd. of Livestock*, 2014 MT 197, ¶ 19, 376 Mont. 25, 329 P.3d 1278 (quoting *St. Personnel Div. v. Child Support Investigators*, 2002 MT 46, ¶ 18, 208 Mont. 365, 43 P.3d 305). This agency is required to rely on the evidence in the record when promulgating findings. In this case, the evidence on the record was applicable only to solar QFs with nameplate capacities that exceed 100 kW. Furthermore, concerns about discrimination were discussed at the hearing, and the record before the Commission reflects that both NorthWestern and the consumer advocate, the MCC, felt that the circumstances of the situation warranted action on the part of the Commission, and outweighed any concerns regarding discrimination.

42. The Commission is also required to provide procedural due process. “Due process is flexible and calls for such procedural protections as the particular situations demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). The Commission finds that in order to suspend a tariff, impacted parties ought to be provided notice and opportunity to be heard, as was provided to solar QFs in this docket. *See* Notice of Emergency Motion and Opportunity to Comment and Request Hearing (May 24, 2016). Before the Commission could reasonably suspend QF-1 rates for other types of QFs, the Commission should provide similar notice and opportunity to be heard as was provided to solar QFs. Because the request for relief was narrowly tailored to solar QFs, for the reasons articulated above, other QFs did not participate in the process. It would be unreasonable for the Commission to suspend the QF-1 rates for all QFs based upon the record before it and the process that was available.

43. NorthWestern has reasonably demonstrated that extraordinary relief is appropriate in this unique situation, and the Commission finds that there exists good cause to narrowly and temporarily suspend the availability of NorthWestern’s Schedule QF-1 for solar QFs with nameplate capacities larger than 100 kW while the Commission further investigates NorthWestern’s avoided costs.

44. Solar QFs with nameplate capacities larger than 100 kW remain free to contract with NorthWestern at negotiated rates, terms, and conditions. In addition, the Commission will

adjudicate petitions by either NorthWestern or a solar QF with a nameplate capacity larger than 100 kW to set contract rates and conditions pursuant to Mont. Code Ann. § 69-3-603 if NorthWestern and the solar QF are unable to mutually agree to contract rates or conditions. Accordingly, solar QFs larger than 100 kW will continue to have two ways to obtain long-term contracts with NorthWestern during the period standard rates are suspended: amicable contract formation through good faith negotiation, and case-by-case Commission avoided cost rate determination through a petition pursuant to Mont. Code Ann. § 69-3-603. Furthermore, the Commission has not yet ruled on NorthWestern's interim rate request. The Commission will weigh the legal and policy implications of interim rates in the context of PURPA standard avoided cost rates and may, in the course of this proceeding, replace the suspension of Schedule QF-1 rates for solar projects larger than 100 kW with interim rates that would be applicable to all QFs, among other relief. The Commission will set a final rate at the conclusion of this docket, which the Commission will endeavor to conduct expeditiously.

45. NorthWestern's Motion does not address the question of whether some solar QFs eligible for QF-1 tariff rates have made sufficient commitments to deliver energy and capacity to warrant excluding them from the effect of the suspension, despite not having fully executed contracts with NorthWestern, on the grounds that they have a legally enforceable obligation. At the hearing, NorthWestern proposed the following standard: "...if the parties have negotiated a complete PPA, which...is ready for execution, it is not affected by the [suspension]." Hr'g Tr. 33:25-34:3. Under NorthWestern's proposed standard, 44 solar QF projects comprising 135 MW could contract at existing QF-1 rates despite the suspension.

46. NorthWestern's proposed standard is incompatible with the notion that extraordinary action is required to prevent "irreparable harm" (Mot. at 1) to customers from QF payments based on rates that exceed avoided cost. In addition, given *prima facie* evidence that the current QF-1 tariff rates exceed NorthWestern's current avoided costs, the Commission must mitigate the impact of this situation as much as possible while reasonably acknowledging commitments already made by QFs and in particular those who meet the Commission standard for having obtained a legally enforceable obligation prior to the effective date of the suspension.

47. The Commission finds that its requirements for establishing a legally enforceable obligation, established in Order 6444e, are a reasonable standard. Order 6444e, Dkt. D2002.8.100, ¶ 47 (June 4, 2010). That standard, which has withstood challenges in state district

court and at FERC, requires a QF to “tender an executed power purchase agreement to the utility... with specified beginning and ending dates... and an executed interconnection agreement.” *Id.*; *Whitehall Wind LLC v. Mont. Pub. Serv. Comm.*, 2010 MT 2, 355 Mont. 15, 223 P.3d 907; *Whitehall Wind LLC v. Mont. Pub. Serv. Comm.*, 2015 MT 119, 379 Mont. 119, 347 P.3d 1273; *Hydrodynamics Inc.*, 146 FERC ¶ 61,193 (2014). This standard demonstrates an unequivocal commitment by a QF to deliver energy or capacity, or both, to a utility. Thus, it is reasonable to exempt from the suspension of Tariff Schedule QF-1 those solar QFs larger than 100 kW that had signed and submitted to NorthWestern a power purchase agreement and an executed interconnection agreement on or before June 16, 2016, the date of the Commission’s action. The Commission will investigate whether irregularities in NorthWestern’s generator interconnection process may have unreasonably prevented QFs from achieving this standard and may exempt additional QFs from the suspension in a future order. The Commission will also entertain, and will process separately, complaints filed by QFs regarding irregularities in NorthWestern’s generator interconnection process.

CONCLUSIONS OF LAW

48. The Commission has full power of supervision, regulation, and control of public utilities in Montana. Mont. Code Ann. § 69-3-102. NorthWestern is a public utility subject to the jurisdiction of the Commission. *Id.* § 69-3-101.

49. PURPA requires electric utilities offer to purchase electricity from QFs; the rates for such purchases “shall be just and reasonable to the electric customers of the electric utility and in the public interest, and shall not discriminate against [QFs].” 16 U.S.C. § 824a-3(b). Nothing in PURPA “requires any electric utility to pay more than the avoided costs for purchases.” 18 C.F.R. § 292.304(a).

50. “Avoided costs” are “the incremental costs as determined by the [C]ommission to an electric utility of electric energy or capacity or both which, but for the purchase from the [QF] or [QFs], such utility would generate itself or purchase from another source.” Mont. Admin. R. 38.5.1901(2); *see also* 18 C.F.R. § 292.101(b)(6). State regulatory authorities such as the Commission “play the primary role in calculating avoided cost rates.” *Indep. Energy Producers Assoc., Inc. v. Cal. Pub. Utils. Commn.*, 36 F.3d 848, 856 (9th Cir. 1994). FERC has “recognized that avoided costs could change over time,” and “that the supply characteristics of a

particular facility may vary in value from the average rates set forth in the utility's standard rate." *In re JD Wind 1*, 130 F.E.R.C. 61127, 61631 (Feb. 19, 2010); 45 Fed. Reg. 12214, 12223.

51. FERC "afford[s] the state regulatory authorities . . . great latitude in determining the manner of implementation of [its] rules, provided that the manner chosen is reasonably designed to implement the [rules' requirements pertaining to purchases and sales of power between utilities and QFs]." *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 (1980), *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part and vacated in part*, *Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part*, *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983) (hereinafter "Order No. 69"), 12230. "[I]mplementation may be accomplished by the issuance of regulations, on a case-by-case basis, or by any other means reasonably designed to give effect to [FERC's] rules." *Id.* at 12216.

52. "Standard rates" are "based on avoided costs to the utility, are computed annually by the utility and made available to the public, are reviewed by the [C]ommission, and are applicable to all contracts with [QFs] which do not choose to negotiate a different rate." Mont. Admin. R. 38.5.1901(2)(j).

53. Standard rates must be made available to "[QFs] with a design capacity of 100 kilowatts or less." 18 C.F.R. § 292.304(c). QFs "having a nameplate capacity no larger than three megawatts are eligible for standard offer rates." Mont. Admin. R. 38.5.1902(5). NorthWestern's standard rate QF-1 Option 1 offers fixed and levelized rates "calculated at the time the obligation is incurred," and its standard rate QF-1 Option 2 offers indexed rates "calculated at the time of delivery." 18 C.F.R. § 292.304(d).

54. "As good cause appears and as justice may require, the commission... may waive the application of any rule, except where precluded by statute." Mont. Admin. R. 38.2.305(1). The Commission is not precluded by any statute or regulation from waiving Mont. Admin. R. 38.5.1902(5) as to QFs over 100 kW. *See* 18 C.F.R. § 292.304(c) (FERC regulation does not require standard offer rate for QFs larger than 100 kW).

55. "[N]ot less often than every two years," NorthWestern must provide the Commission with specific "data from which avoided costs can be derived," including its "plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and

for capacity retirements for each year during the succeeding 10 years.” 18 C.F.R. § 292.302(b). NorthWestern is required to submit such data “for use by the Commission in determining avoided costs and standard rates” within thirty days of filing a resource procurement plan. Mont. Admin. R. 38.5.1905(1).

56. The Montana Supreme Court has determined that a standard rate does not remain just and reasonable or reflective of avoided cost simply because the Commission has left it unchanged. “Thus, under both state and federal law, rates for purchases from qualifying facilities must be reasonable and based on current avoided least cost resource data.” *Whitehall Wind, LLC v. Mont. Pub. Serv. Com.*, 2010 MT 2 ¶ 21, 355 Mont. 15, 223 P.3d 907. The Court found that “[t]he PSC observed correctly that a utility must re-compute the long and short-term standard avoided cost rates after it submits an updated least cost plan filing.” *Id.* ¶ 26. “The PSC further noted in its order that the rate for sales may not exceed the utility’s avoided costs.” *Id.* A standard rate may become unjust and unreasonable if it does not reflect current avoided cost data. The Court ultimately found that “[t]he PSC based the avoided cost tariff on out-of-date data in violation of Admin. R. Mont. 38.5.1905.” *Id.* ¶ 28. The Commission is required to set rates based on current avoided cost data and rates that exceed the utility’s avoided cost are not just and reasonable or consistent with Montana law.

57. In a contested case under the Montana Administrative Procedure Act, the Commission is generally “bound by common law and statutory rules of evidence.” Mont. Code Ann. § 2-4-612(2). Under the statutory rules of evidence, “a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense the party is asserting.” *Id.* at § 26-1-402; *Mont. Env'tl. Info. Ctr. v. Mont. Dept. of Evntl. Quality*, 2005 MT 96, ¶ 14, 326 Mont. 502 (“the party asserting a claim for relief bears the burden of producing evidence in support of that claim.”); *see also* Mont. Admin. R. 38.5.182 (“A utility filing for an increase in rates and charges shall be prepared to . . . sustain the burden of proof of establishing that its proposed charges are just and reasonable”); Mont. Admin. R.38.5.8213 (requiring modeling and analysis to meet the “burden of proof in prudence and cost recovery filings”); Mont. Admin. R. 38.5.8220 (discussing how a utility may “satisfy its burden of proof.”).

58. “*Prima facie*” is defined as “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.” *Prima facie*, *Black’s Law Dictionary* (10th ed. 2014). A “*prima*

facie case” is “[a] party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.” *Prima facie case*, *Black’s Law Dictionary* (10th ed. 2014). Good cause is defined as a “legally sufficient reason,” and is “often the burden placed on a litigant... to show why a request should be granted...” *Good cause*, *Black’s Law Dictionary* (10th ed. 2014).

59. The Commission’s “experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.” Mont. Code Ann. § 2-4-612. The Commission has recognized that “[a]lthough [Mont. Admin. R.] 38.5.1902(5) directs utilities to re-compute avoided cost rates based on the results of their most recent resource plans, it does not obligate the Commission to automatically approve those rates.” Order 7108e ¶ 56. Instead, standard rates are “calculated on the basis of avoided costs to the utility which is determined by the [C]ommission to be appropriate for the particular utility after consideration, to the extent practicable, of the avoided cost data submitted to the [C]ommission by the utility and other interested persons.” Mont. Admin. R. 38.5.1905(4).

ORDER

60. The Commission temporarily waives Mont. Admin. R. 38.5.1902(5) with respect to the eligibility of solar QFs larger than 100 kW for standard rates.

61. NorthWestern’s Motion to temporarily suspend the availability of Schedule QF-1 for solar QFs larger than 100 kW is GRANTED.

62. NorthWestern and QFs may petition the Commission pursuant to Mont. Code Ann. § 69-3-603 to set contract rates and conditions governing the purchase and sale of electric power from solar QFs larger than 100 kW. NorthWestern’s existing Motion to set a new standard offer rate for QFs eligible for such rates and to adopt such rates on an interim basis remains pending before the Commission and will be acted upon at a later date.

63. This Order does not apply to any QF that had submitted a signed (by the QF) PPA and had signed a final Small Generator Interconnection Agreement on or before June 16, 2016.

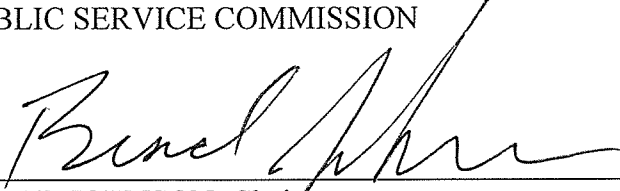
64. The terms of this Order will expire as of the service date of a Final Order in this proceeding unless prior to the service date of a Final Order the Commission decides to vacate this Order.

65. NorthWestern must file compliance tariffs that implement the terms of this Order


within ten (10) days of the service date of this Order.

DONE AND DATED this 16th day of June, 2016 by a vote of 3 to 2. Commissioners Kavulla and Bushman dissenting.


BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION



BRAD JOHNSON, Chairman



TRAVIS KAVULLA, Vice Chairman (dissenting)



KIRK BUSHMAN, Commissioner (dissenting)

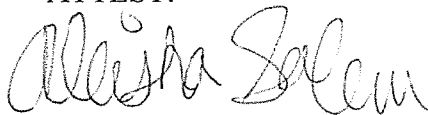


ROGER KOOPMAN, Commissioner



BOB LAKE, Commissioner

ATTEST:



Aleisha Solem
Commission Secretary

(SEAL)



Service Date: July 25, 2016

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF NorthWestern Energy’s) REGULATORY DIVISION
Application for Interim and Final Approval of)
Revised Tariff No. QF-1, Qualifying Facility) DOCKET NO. D2016.5.39
Power Purchase) ORDER NO. 7500

DISSENTING OPINION OF COMMISSIONER TRAVIS KAVULLA

I sympathize with the desire to protect consumers from out-of-market costs, but I disagree that the approach the Commission takes in the Order will actually protect them.

Simply put, this proceeding has not followed the process that would be necessary to permit the Commission “to temporarily suspend the availability of Schedule QF-1.” Order 7500, Dkt. D2016.5.39, ¶ 61 (July 25, 2016). The rate available to these small power production facilities (QFs) was established after a contested case proceeding held pursuant to the Montana Administrative Procedure Act (MAPA). *Notice of Public Hearing*, Dkt. D2012.1.3, (Aug. 22, 2012). After another contested case proceeding which concluded last year, the Commission determined that the rate should not be modified. Order 7338b, Dkt. D2014.1.5, (May 4, 2015). Both of those ratemaking orders were the subject of litigation in Montana District Court after NorthWestern appealed them. The District Court affirmed the Commission’s decision in the latter instance, and dismissed NorthWestern’s petition in the former after the utility did not actively prosecute and ultimately abandoned its appeal. *See NorthWestern Corp. v. Mont. Pub. Serv. Comm’n*, ADV-2015-459, Order on Pet. for Judicial Review (Mont. 1st Jud. Dist. Ct. Mar. 3, 2016); *NorthWestern Corp. v. Mont. Pub. Serv. Comm’n*, CDV-2013-37, Order Dismissing Pet. (Mont. 1st Jud. Dist. Ct. Dec. 17, 2015).

Meanwhile, the process the Commission has followed that led to the present Order is not a product of a proceeding where all parties were afforded their right to respond to NorthWestern’s submissions and present evidence, as is required by MAPA. Mont. Code Ann. § 2-4-612(1) (2015). Indeed, the intervention deadline to the proceeding occurred *only after* a hearing on NorthWestern’s motion was held. Certain parties—or rather, quasi-parties, since the

intervention deadline had not arrived—participated in that hearing, but the developers of the projects that would be compensated under the rate schedule did not. The hearing commenced with the purpose of taking “argument” on NorthWestern’s motion. Hr’g. Tr. 4:16-17, (June 9, 2016). Then, as a surprise to those in attendance, counsel for NorthWestern alerted the Commission that it also wished to offer evidence. Hr’g. Tr. 6:12-20 (June 9, 2016). No other quasi-party presented evidence at this hearing. Subsequently, one party (since granted intervention) has disagreed about the nature and the meaning of the evidence, and argued that the nature of the hearing precluded it from presenting evidence to inform the Commission’s judgment. Appl. of FLS Energy for Rehearing 8-11 (July 1, 2016). There were no post-hearing briefs, and the party was not represented by counsel at the hearing, and so it was effectively excluded altogether from responding to NorthWestern’s evidentiary submission.

Nowhere does the Order, in its conclusions of law, cite to a statute which empowers it to suspend a tariff without a full evidentiary hearing. Nowhere does the Order cite a precedent where, in the more than a century since Title 69 and its predecessor statutes have been Montana law, the Commission has done so. The Commission’s only cited precedent relies on an order which is, in fact, an order on reconsideration, issued as the final act of a docket that had a sprawling evidentiary record and which consumed years. Order 7500, ¶ 31. Although the present Order itself is vague on this count, it appears to stand for the proposition that only *prima facie* evidence or good cause needs to be shown to justify the suspension of the Schedule QF-1 rate. Order 7500, ¶¶ 38, 43, 54, 58. I cannot understand how this reasoning enables the Commission to escape the process required by MAPA. The Commission compares itself to a court exercising its power to issue a writ or supervisory control or a writ of mandate, and cites to the enabling statutes and rules that permit this conduct. Order 7500, ¶ 32. Putting aside the inaptness of analogizing ratemaking to these writs, the difference is plain: There is no law that permits the Commission to do the same.

The parties and quasi-parties commenting in favor of NorthWestern’s motion offer only limited precedents. NorthWestern’s turn mostly on foreign jurisdictions, which may or may not have an analogue to MAPA and Montana’s ratemaking statutes. Where NorthWestern cites to Montana cases, they are, at their core, decisions that continue to offer published rates to the QFs they affected. NorthWestern Energy’s Mot. for Emergency Suspension (May 17, 2016), citing to Order 6124 (Dec. 17, 1998) and Order 6459a (Dec. 9, 2003). As I explain below, in this

circumstance, I believe the adoption of temporary rates would be appropriate, but that is not what the Order does. Meanwhile, the Montana Consumer Counsel's comments, as if in quiet acknowledgement of the unlawfulness of the proposition, are bereft of a single citation to legal authority in support of NorthWestern's position, with which it agrees. *Comments of the Montana Consumer Counsel* (June 6, 2016).

The Order suspending the Schedule QF-1 tariff, at its core, is substituting an unpublished rate subject to bilateral negotiation for the Schedule QF-1 rate approved by the Commission. Order 7500, ¶ 44. The Commission itself has been clear in even the most recent QF-1 proceeding that it has never granted NorthWestern's requests to change or suspend Schedule QF-1 before rendering a final decision. Order 7338a, (Oct. 8, 2014), ¶ 8, citing to Dkts. D2012.1.3, D2010.7.77, and D2008.12.146. In that order, the Commission again denied NorthWestern's request to change the rates at the outset of the QF-1 proceeding, citing MAPA and reasoning, "The parties to this Docket have not yet had a full opportunity to respond to NorthWestern's proposal []." *Id.* ¶ 17. The present Order is an unexplained departure from the Commission's previous legal reasoning.

Instead, the Order implies that the 25-year forecast which is the Schedule QF-1 rate became unlawful by failing to accurately reflect projected avoided costs sometime between when the Commission affirmed the rate after a full proceeding in Order 7338b (May 4, 2015) and a little more than a year later in this action. Order 7500 ¶ 56. This is erroneous. It is well-established that a rate approved by a regulatory commission and on file with it is *ipso facto* lawful; a regulated utility may not charge or pay anything other than that rate. Mont. Code Ann. § 69-3-305. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578, 101 S. Ct. 2925, 2931. 69 L.Ed.2d (1981) (interpreting a similar provision of the Federal Power Act). A rate may ultimately be invalidated or changed through a Commission proceeding, but even PURPA's black-letter command that payments to QFs should be no more or less than avoided cost is qualified by a "recogni[tion] that avoided costs could change over time" and "that the supply characteristics of a particular facility may vary from the value from the average rates set forth in the utility's standard rate." *In re JD Wine I*, 130 F.E.R.C. 61127, 61631 (Feb. 19, 2010); 45 Fed. Reg. 12214, 12223. As the Commission previously concluded in the face of much the same NorthWestern arguments raised in this docket, "To maintain the existing standard rates pending a final decision in this Docket is not a violation of PURPA." Order 7338a, Dkt. D2014.1.5 ¶ 15

(October 8, 2014). The present Order departs without reason from the rationale the Commission expressed no more than two years ago. It cannot be the case that certain on-file rates are unlawful depending on the theretofore unrevealed wisdom of the Commission. PURPA most certainly does not necessitate this legal impossibility, and I think the Order cannot possibly mean what it says.

So how, then, to rectify a situation where the Commission or an applicant thinks the tariffed rate is out-of-line with the rate as it should be? A very recent case from the Commission offers guidance. On Jan. 11, 2016, the upstream owners of Mountain Water Company (MWC), Montana's largest regulated water utility, sold the utility to another firm without the Commission's approval, even as a Commission review of that proposed sale was well underway. Order 7392q, Dkt. D2014.12.99, ¶ 2 (Feb. 5, 2016). Proposals in that docket included a modification of the rates MWC charges customers, in order to account for changes in the firm's cost of capital, which is one of the largest expenses that is factored into consumer rates because of the capital-intensive nature of the industry. *Id.* ¶ 15. The Commission did not, at that time, suspend the tariff immediately—a tacit recognition that such an action was a ratemaking action that required the MAPA process to be followed, no matter the extraordinary nature of the situation. (Nothing like the unauthorized sale of this utility had ever occurred in this jurisdiction.) Instead, the Commission properly instituted a ratemaking proceeding which included rounds of testimony from all parties, an evidentiary hearing that lasted multiple days, and post-hearing briefs. The proceeding spanned from the Commission's Notice of Investigation of Feb. 3, 2016 to the issuance of a final order on June 22, 2016, which found that the cost of capital had indeed changed significantly, making the approved MWC rates unjust and unreasonable, and ordered an adjustment in rates. Order 7475i, Dkt. D2016.2.15 (June 22, 2016). This was an emergency situation, but nonetheless the Commission followed MAPA. Such an approach would have been appropriate in this matter also.

Alternatively, the Commission sometimes establishes interim rates during the pendency of a proceeding, which are statutorily subject to a refund or surcharge after a final order makes a determination on rates. Mont. Code Ann. § 69-3-304. The Commission has never done so in a QF-1 order, but that is because a true-up would render meaningless the seeming statutory imperative to encourage “long-term contracts” that “enhance the economic feasibility” of QFs. Mont. Code Ann. § 69-3-604(2). (Whether this is a good or bad law I leave for another day.)

NorthWestern initially moved for interim rates “subject to adjustment back to the rate effective date, with interest” when the Commission issued a final order. *Notice of Appl. for Interim Rate Adjustment*, 2 (May 3, 2016). Then at hearing, during argument, NorthWestern contended, “No one is suggesting, to my knowledge, that we would have interim rates where the rates that would actually be paid under the contract would be revised later.” Hr’g. Tr. 50:7-10, *see also* 75:17-18 (counsel for NorthWestern conceding under questioning, “that is not what I believe [the motion] should have said”). The QF-1 Schedule is a tariff designed to state a price which is then built into a long-term contract; the resulting standard contract itself is not subject to adjustment. I believe this approach would have been a reasonable one.

Certain quasi-parties disagreed that the interim rate statute is applicable to QF proceedings, but I do not read into the statute the same limitation. *Comments of Vote Solar and Montana Environmental Information Center*, 7-8 (June 6, 2016). The Commission, in my view, could have done what it has done in the past, which is to take a methodology which has previously been approved in a contested case conducted pursuant to MAPA and updated the essential variables on which the valuation methodology hinges in order to arrive at a rate which is less an act of discretion and more a formulaic update. *See* Order 7199d, Dkt. D2012.1.3, ¶ 107 (July 29, 2013). (Indeed, at a recent Commission roundtable on PURPA implementation, there was wide agreement that once a methodology had been approved, its input variables should be subject to routine updates to prevent the rate from becoming stale.⁷) A rate calculated in that manner would have reflected the market fundamentals which have changed, especially due to the falling price of natural gas, but would have left the more significant methodological changes that NorthWestern proposes to be resolved through this proceeding. The rates I believe reflect such an update are included as Appendix A to this opinion.

Finally, the Order is careful not to purport that it is suspending the mandatory purchase obligation of PURPA altogether. That action, even more clearly than this one, would be contrary to law. Convolutedly, the Order both suspends the Schedule QF-1 tariff—the subject of my discussion above—and it also waives the administrative rule that requires any solar QFs under three megawatts in size to contract only through a standard rate, a waiver permitted by another of the Commission’s administrative rules. Mont. Admin. R. 38.5.1902(5) (2016) (standard rate

⁷ Docket No. N2015.7.94, (June 1, 2016), a recording of which is available online at: http://psc.mt.gov/Docs/WorkSessions/WorkSessionVideo/20160601_1612_Work_Session.f4v

eligibility); Mont. Admin. R. 38.2.305(1) (waiver provision); Order 7500 ¶ 51 (ordering a waiver of the first rule). The practical effect of this is to make it so that a statutory prohibition on small QFs' contracting outside the standard-rate no longer applies. Mont. Code Ann. § 69-3-603(3)(a) (“authoriz[ing] a rate or term different from that in the rate schedule” is prohibited “if a qualifying small power production facility is eligible to sell electricity to a utility pursuant to a rate schedule approved by the commission”).

After this rigmarole, the Order is able to declare that the market is, after all, still open to these QFs. They may pursue “amicable contract formation through good faith negotiation.” Order 7500 ¶ 44. I believe this promise is illusory. NorthWestern is proposing rates in the present docket which, if and when approved by the Commission, will instantly supplant the negotiation process. *Id.* ¶ 64 (“The terms of this Order will expire as of the service date of a Final Order in this proceeding”). Were NorthWestern to agree to a contract price for a solar QF higher than the one it proposes in its advocacy to the Commission, it would be contradicting itself, and would expose itself to litigation risk in the present docket or to future disallowance claims in other rate cases. One imagines a very simple and pointless negotiation indeed, given these circumstances, one in which the monopsony buyer simply offers the price it has advocated in this proceeding and is unwilling to budge from it. While I generally agree that genuine negotiations are a better price-discovery tool than administrative proceedings that inquire as to the future “market” price of something, this is a negotiation process that can only fail. In effect, the Order allows NorthWestern to adopt as a *de facto* rate for the purpose of negotiating with small solar QFs, a rate which is not approved by the Commission, and which the Commission itself opines to likely be unreasonably low. *Id.* ¶ 30 (“The Commission disagrees with the precise approach NorthWestern applied to estimate its current avoided costs”), ¶ 35 (showing “an avoided cost estimate” substantially higher than the one NorthWestern proposes in its application).

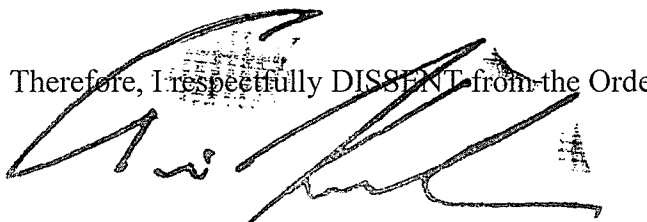
The Order also offers that, if a QF is unsatisfied with this, it can petition the Commission to set a rate at the actual avoided cost. *Id.* ¶ 44. Yet at this point, we are right back to where we started: a contested case proceeding to determine the appropriate avoided cost for small solar QFs.

Finally, the Commission argues that nothing in law prevents it from waiving the Mont. Admin. R. 38.5.1902(5) and depriving 3 MW solar QFs of the ability to obtain a standard-offer

rate. *Id.* ¶¶ 14, 54. This ignores some salient history. The issue of which QFs should be eligible for standard rates has been a topic of heated political debate for years. Most recently, in 2013, the Commission proposed to change the administrative rule to reduce the standard-offer threshold from 10 megawatts [MW] to 0.1 megawatts (100 kilowatts), responding to concerns that there would be a rush of QFs eager to take advantage of standard rates that could potentially grow stale too quickly for the Commission to change them⁸. (At that time, as I have related above, the Commission accepted the premise that there could be no “emergency” suspension of the standard rate, so changing the eligibility size was the only remedy to this concern, if accepted as valid.) The Commission’s legislative overseers, the Energy and Telecommunications Interim Committee, disagreed with the Commission’s rulemaking proposal, and unanimously objected to it, “because the proposed amendments to [Mont. Admin. R. 38-5-1902] did not consider a 3 MW cap.” *See* Exhibit B. The Commission, upon further consideration, agreed with the legislative committee, and modified the rule to set a 3 MW threshold⁹. By waiving the rule, rather than merely changing the rate, the Commission countermands the legislative directive, to which it conceded just a few short years ago. Unlike my view of other aspects of the process that resulted in the present Order, I do not think that this waiver actually violates the law, but it does disregard a recent, significant act of legislative oversight on the very matter of which size of QFs should be able to obtain a standard rate.

Again, I appreciate the concern that the standard rate does not reflect avoided cost. However, I would have pursued other means to remedy this issue.

Therefore, I respectfully DISSENT from the Order,



Travis Kavulla, Commissioner (dissenting)

⁸ MAR Notice 38-5-218 proposed amendment: <http://www.mtrules.org/gateway/ShowNoticeFile.asp?TID=4813>

⁹ MAR Notice 38-5-218 notice of amendment: <http://www.mtrules.org/gateway/ShowNoticeFile.asp?TID=5212>

Dissenting opinion of Travis Kavulla, Appendix A

Order 7199d Blended Market-Combined Cycle Plant Approach										
Year	Annual Capital	Fixed O&M 0.025	Total fixed	Variable O&M 0.025	Natural Gas Cost Forecast	Fuel Cost 6.843	Market Price	Total Cost	CO2 Cost	Total Cost w CO2
	(\$/Kw-yr)	(\$/kW-yr)	(\$/kW-yr)	(\$/kWh)	(\$/MMBtu)	(\$/kWh)	(\$/kWh)	(\$/kWh)	(\$/kWh)	(\$/kWh)
2016										
2017							0.01991	0.01991	0.00000	0.01991
2018							0.02175	0.02175	0.00000	0.02175
2019							0.02314	0.02314	0.00000	0.02314
2020							0.02468	0.02468	0.00000	0.02468
2021							0.02583	0.02583	0.01352	0.03935
2022							0.02703	0.03903	0.01419	0.04122
2023							0.02827	0.04077	0.01490	0.04317
2024							0.02958	0.04259	0.01565	0.04523
2025	178.45	14.76	193.20	0.0052	3.72	0.02546		0.05521	0.00907	0.06428
2026	178.45	15.12	193.57	0.0054	3.86	0.02641		0.05634	0.00952	0.06587
2027	178.45	15.50	193.95	0.0055	4.00	0.02737		0.05748	0.01000	0.06748
2028	178.45	15.89	194.34	0.0056	4.14	0.02833		0.05863	0.01050	0.06913
2029	178.45	16.29	194.73	0.0058	4.29	0.02936		0.05985	0.01102	0.07087
2030	178.45	16.69	195.14	0.0059	4.45	0.03045		0.06114	0.01157	0.07271
2031	178.45	17.11	195.56	0.0061	4.61	0.03155		0.06244	0.01215	0.07459
2032	178.45	17.54	195.99	0.0062	4.78	0.03271		0.06380	0.01276	0.07657
2033	178.45	17.98	196.43	0.0064	4.95	0.03387		0.06518	0.01340	0.07858
2034	178.45	18.43	196.87	0.0066	5.14	0.03517		0.06670	0.01407	0.08076
2035	178.45	18.89	197.34	0.0067	5.33	0.03647		0.06822	0.01477	0.08299
2036	178.45	19.36	197.81	0.0069	5.53	0.03782		0.06980	0.01551	0.08531
2037	178.45	19.84	198.29	0.0071	5.73	0.03922		0.07143	0.01628	0.08771
2038	178.45	20.34	198.79	0.0072	5.94	0.04067		0.07312	0.01710	0.09022
2039	178.45	20.85	199.30	0.0074	6.16	0.04218		0.07487	0.01795	0.09282
2040	178.45	21.37	199.82	0.0076	6.39	0.04374		0.07668	0.01885	0.09553
2013-2015 - 3-year levelized cost:								0.02152		0.01991
2013-2036 24-year levelized cost:								0.04405		0.05098

All-in pricing for 3 MWac Solar Project						
	Current Tariff w/o CO2	Or. 7199d Method w/ CO2	Pct. Chg.	NWE Proposed w/ CO2	Pct. Chg.	
Off-peak price	0.05314	0.04177	-18%	0.04366	-18%	
On-peak price	0.09273	0.08136	-10%	0.04366	-53%	
Off-peak MWh	4,798,515	4,798,515	0	4,798,515	0	
On-peak MWh	2,332,951	2,332,951	0	2,332,951	0	
Total MWh	7,131,466	7,131,466	0	7,131,466	0	
Off-peak revenue	\$ 254,993	\$ 200,434	-18%	\$ 209,503	-18%	
On-peak revenue	\$ 216,335	\$ 189,803	-10%	\$ 101,857	-53%	
Total Revenue	\$ 471,328	\$ 390,237	-14%	\$ 311,360	-34%	
Effective unit price	0.06609	0.05472	-17%	0.04366	-34%	

Projected 25-year levelized cost of Hydros = \$55.86 (DR PSC-343)



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Energy and Telecommunications Interim Committee
63rd Montana Legislature

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TODD EVERTS, Staff Attorney
DAWN FIELD, Secretary

September 17, 2013

Chairman Bill Gallagher
Montana Public Service Commission
1701 Prospect Ave
P.O. Box 202601
Helena, MT 59620-2601

Dear Chairman Gallagher:

Pursuant to section 5-5-230, MCA, the Energy and Telecommunications Interim Committee (ETIC) reviewed MAR Notice No. 38-5-218 to amend ARM 38.5.1902 pertaining to qualifying facilities. After careful consideration, the ETIC, on a unanimous vote, notified the ETIC's presiding officer on September 13, 2013, that they objected to the notice of proposed rulemaking. The ETIC objected to the notice of proposed rulemaking because the proposed amendments to ARM 38.5.1902 did not consider a 3 MW cap. This letter constitutes notice to the Department of Public Service Regulation that the ETIC objected to MAR Notice No. 38-5-218 pursuant to section 2-4-305(9), MCA, of the Montana Administrative Procedure Act. A copy of this notification is included in the ETIC's records.

The effect of the ETIC's objection is that following the receipt of this notice by the Department, the proposed rule may not be adopted until publication of the last issue of the Register that is published before expiration of the 6-month period during which the adoption notice must be published unless, prior to that time, the ETIC meets and does not make the same objection.

Please do not hesitate to contact me for additional information regarding this matter.

Sincerely,

Todd M. Everts
Chief Legal Counsel
Montana State Legislature

cc: ETIC Committee Members
Sonja Nowakowski, ETIC Lead Staff
Justin Kraske, Chief Legal Counsel, Montana Public Service Commission

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