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On behalf of Intervenors Vote Solar and Montana Environmental Information Center

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

IN THE MATTER OF NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase	REGULATORY DIVISION Docket No. D2016.5.39

VOTE SOLAR AND MONTANA ENVIRONMENTAL INFORMATION CENTER'S MOTION FOR RECONSIDERATION OF ORDER NO. 7500

Vote Solar and Montana Environmental Information Center respectfully seek reconsideration of Commission Order No. 7500 ("Order") on NorthWestern Energy's Motion for Emergency Suspension of Tariff Schedule QF-1. Reconsideration is appropriate because the Order is "unlawful, unjust or unreasonable." Mont. Admin. R. 38.2.4806.

The Order purports to "waive" the applicability of Montana Administrative Rule 38.5.1902(5), which entitles qualifying facilities ("QFs") with capacity up to 3 MW to standard purchase rates, for all QFs except those below 100 kW and those with signed power purchase agreements and executed interconnection agreements. The Order is unjust and unreasonable because it undercuts significant developer investments based on claims of an "emergency" that are entirely illusory and not recognized by statute. The Order is unlawful because it violates

both the federal Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3, and Montana law.

I. RECONSIDERATION IS WARRANTED BECAUSE THE ORDER IS UNJUST AND UNREASONABLE

A. The Order Unjustly Devalues Significant Investments by Solar Developers in Montana and Deters Future Investments.

The Commission's Order has unjustly deprived solar developers of the benefit of their significant investments in Montana and has both extinguished legally enforceable obligations to which they are entitled under PURPA and denied them opportunities to create future obligations. As the record before the Commission demonstrated, solar developers have expended significant time and resources cultivating projects in Montana based on their expectation—reasonable on the face of Montana's laws and regulations—that they would be able to contract for the sale of electricity to NorthWestern at the standard rate approved by the Commission unless and until the rate is modified through a contested case hearing in which they could fully participate. *See, e.g.*, FLS Comments of FLS Energy, at 4-5 (June 6, 2016); Comments of Cypress Creek Renewables, at 2-3 (June 6, 2016); PNW's Comments in Opposition to NWE's Emergency Motion, at 4-5 (June 6, 2016). The value of these investments will be lost—and the projects will not be developed—under the Commission's Order. *See, e.g.*, FLS Comments of FLS Energy, at 6 ("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."); PNW's Supplemental Comments in Opposition to NWE's Emergency Motion, at 3 (June 17, 2016) ("if the Commission were to adopt the revised pricing, none of the projects currently under development would be viable any longer"); Comments of Montana Wind & Solar LLC (June 9, 2016) (suspending the rates "pulls 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"). The Commission should reconsider its Order to prevent these devastating consequences for businesses seeking to create good jobs and clean energy in Montana.

B. The Record Undermines NorthWestern's Claim of an Emergency.

Not only is suspending the QF-1 tariff unjust, it is also unreasonable and unwarranted. The Commission suspended the QF-1 tariff—an action the Commission acknowledges is "extraordinary," Order ¶ 32—based on NorthWestern's claims of an "emergency" in the form of approximately 130 MW of new solar projects in advanced stages of development, Order ¶ 37. According to NorthWestern, these projects threaten to impose approximately $60 million of extra costs on customers. However, the record evidence undermines NorthWestern's claimed emergency.

1. A Suspension of the Standard Rate is Not Compelled by Fluctuating Energy Prices.

Far from giving rise to an emergency, this Commission and FERC have acknowledged that fluctuations in energy prices are inevitable and were always going to be a part of long-term avoided cost agreements. In its implementing regulations, FERC stated that it

> 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.

Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 38 12,224 (Feb. 25, 1980)

("Order 69"). The purpose of this is to ensure "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.*

As the Commission has recognized, NWE's avoided costs necessarily change over time. *See* Docket No. D2014.1.5, Order 7338a, ¶ 15 (Sept. 14, 2014); Docket No. D2014.1.5, Order 7338b, ¶¶ 31, 33 (Apr. 14, 2014). However, the expected short-term fluctuations in avoided costs do not require the Commission to make constant and reactive changes to standard rates offered to QFs. Instead, the Commission has established procedures for the utility to formally request and support changes to the standard rates it pays to QFs. Mont. Admin. R. 38.5.1905. Between these formal proceedings, the standard rates that the Commission previously deemed appropriate continue to apply because "to maintain existing standard rates pending a final decision [regarding an application for rate adjustments] is not a violation of PURPA." Docket No. D2014.1.5, Order 7338a, ¶ 15.3. It is because of this procedure that whatever rates the Commission sets are *ipso facto* lawful and Montana law prohibits a regulated utility from charging or paying anything other than that rate. Kavulla Dissent at 3 (citing Mont. Code Ann, § 69-3-305 and *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)).

2. A Suspension of the Standard Rate is Not Compelled by Prospective Solar Development.

The record also fails to support any emergency warranting a temporary suspension of the QF-1 tariff based on "the large number of solar developers requesting contracts and interconnections agreements," Order ¶ 39, which NorthWestern estimated would "impose approximately $60 million of extra costs on customers," Order ¶ 37.

As an initial matter, NorthWestern undermined its own claims of emergency. In its application, NorthWestern demonstrated that advanced-stage projects by FLS Energy, Cypress

Creek Renewables, and Pacific Northwest Solar could add up to 130 MW of new solar generating capacity that NorthWestern would be required to purchase at standard rates under PURPA. Order ¶ 37; NorthWestern Energy's Motion for Emergency Suspension of the QF-1 Tariff for New Solar Qualifying Facilities with Nameplate Capacities Greater than 100 kW, at 4-7 (May 17, 2016). However, NorthWestern subsequently proposed to allow 44 solar QF projects, amounting to 135 MW—nearly the entire sum of projects NorthWestern cited in support of its "emergency"—to contract at existing standard rates. In other words, NorthWestern was prepared to sign contracts for the very projects that formed the proffered basis for the emergency.

In any event, Vote Solar agrees with NorthWestern that it was required to purchase energy from the advance-stage QFs cited in its application, regardless whether they had executed power purchase and interconnection agreements, because those projects had incurred a "legally enforceable obligation" under PURPA entitling them to contract based on then-existing standard rates. *See infra* § II.B. The Commission thus remedied the perceived emergency only by extinguishing those legal obligations, which violates PURPA. *See id.*

Other potential projects that may make it through the PPA and interconnection processes during the pendency also form insufficient basis for the Commission's emergency suspension. As Vote Solar and Montana Environmental Information Center commented before the hearing on this matter, even under the existing QF-1 Tariff, there is a lengthy and complicated process to bringing QFs online and very few have successfully completed that process. Pacific Northwest Solar documented that "the total number of projects (and attendant MWs) that are likely to come on line are but a fraction of those currently in process" and "NWE itself has indicated a failure rate of between approximately 60% and 90% for solar QF projects in its service territory."

PNW's Comments in Opposition to NWE's Emergency Motion, at 2 (June 6, 2016). Accordingly, even accepting at face value NorthWestern's claims that each MW of new solar capacity will cause ratepayers to pay excessive costs, the total capacity likely to be added to the system are relatively low and do not warrant the extraordinary action of suspending the QF-1 tariff.

3. Suspending the Standard Rate is Unwarranted and Unprecedented.

The unprecedented procedure followed by the Commission to drop the eligibility cap is also unreasonable, as it is unsupported by decisions from other jurisdictions and its own past practice. NWE pointed to two decisions of the Oregon commission that actually undermine NWE's position.[1] Regardless, as Commissioner Kavulla observed, such comparisons may be inapposite if these jurisdictions lack legislation substantially similar to the Montana Administrative Procedure Act ("MAPA"), Mont. Code Ann. §§ 2-4-101, *et seq.* Kavulla Dissent at 2.

Where this Commission has previously modified eligibility criteria for the standard rate for QFs, it has always immediately replaced the tariff in recognition that it lacks the authority to suspend the rate indefinitely for QFs under 3 MW as a long as PURPA remains good law. First, in 1998, the Commission granted Montana Power Company's request to temporarily replace the

[1] In 2012, the Oregon Public Utility Commission rejected Idaho Power's petition to immediately lower the wind eligibility from 10 MW to 100 kW. *In re Idaho Power Co.*, UE 244, Order No. 12-042 (Feb. 14, 2012). The Oregon commission did lower the eligibility cap after an evidentiary proceeding four years later, but to 3 MW based on a record that QFs in the 4 MW to 10 MW could successfully enter into negotiated contracts. *In re Idaho Power Co.*, UM 1725, Order No. 16-129 (Mar. 29, 2016). In contrast with these decisions in other jurisdictions, the Montana Commission failed to solicit or consider evidence about the appropriate standard-rate eligibility threshold to implement PURPA's goal of breaking down barriers to entry for small power producers. By failing to consider whether changed circumstances warrant reversal of its 2013 findings supporting a 3-MW eligibility cap and instead basing its decision solely on NWE's unilateral testimony regarding avoided costs, the Order unlawfully subverts the goal of PURPA.

tariff schedule for QFs 3 MW and below, limiting new contracts to an end date of 2002. Docket No. D98.8.183, Order No. 6124 ¶ 8 (Dec. 17, 1998). Montana Power Company had made the request due to powerful extenuating circumstances: its own restructuring and restructuring of the power industry broadly as a result of new state legislation and two FERC orders. *Id.* ¶ 2. The Commission incorrectly guessed that PURPA might be repealed by January 2002, but recognized that if it were not, NWE would have to file to extend the rate schedule. *Id.* ¶¶ 6-8. Of course, the Commission's prediction about the repeal of PUPRA did not come to fruition and the Commission approved a new rate schedule in 2003. Docket No. D2002.6.63, Order No. 6459a ¶ 11 (Dec. 9, 2003).

Both orders amending the tariff for QFs with capacity less than 3 MW reflect the Commission's recognition that it would be improper to "suspend" the tariff without immediately replacing it and allowing for purchasing at a fixed rate to continue pursuant to PURPA. Here, in contrast with the situation in 1998 as described in Order 6124, NWE requests an even more drastic measure, elimination of the rate, for a less urgent situation, a fluctuation in energy prices.[2] Yet, as this Commission has already recognized, PURPA remains the law of the land. If the Commission lacked the authority to eliminate the standard rate for QFs 3 MW and below in 1998 and in 2002, despite the passage of regulations and laws that could have been read to provide tacit support for such a move, it certainly still lacks that authority today. *See also* Kavulla Dissent at 4 (describing the Commission's decision not to suspend another tariff in 2016 as "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").

[2] Since the Commission agreed to initiate this proceeding energy prices have fluctuated upwards as natural gas prices have increased. No opportunity has yet been provided to the parties to question NWE's forecasts of future energy prices.

II. THE COMMISSION SHOULD RECONSIDER ITS ORDER BECAUSE IT IS UNLAWFUL UNDER PURPA AND STATE LAW

In addition to being unjust and unreasonable, the Commission's Order suspending the QF-1 Tariff for solar projects between 100 kW and 3 MW is unlawful under PURPA and state laws and regulations that implement it. First, far from being compelled by PURPA, as the Commission seems to suggests, the waiver is actually illegal under both PURPA and Montana law because it either violates the required maintenance of a standard rate for QFs of 3 MW or less, or it *de facto* sets the rate unlawfully low. Furthermore, by requiring QFs greater than 100 kW to undertake a lengthy and uncertain negotiation with a monopsony buyer (NWE) in order to obtain commitments by the utility to purchase energy that has no other way to be sold into the market, the Order erects impermissible barriers to forming such legally enforceable obligations in violation of federal law. Accordingly, on reconsideration, the Commission should deny NWE's request for an "emergency" suspension, or waiver, of the standard rate for QFs between 100 kW and 3 MW.

A. The Commission's Waiver of the Standard Rate is Unlawful.

PURPA was designed to "encourage the development of cogeneration and small power production" and thereby "reduce the demand for traditional fossil fuels." *FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982). As an essential component of the statutory scheme for achieving that goal, PURPA requires states to adopt a standard rate of purchase for small power producers, with an upper threshold no greater than 80 MW, to eliminate the need for burdensome negotiations between small producers and statewide utilities. *See* 18 C.F.R. § 292.304(c). In implementing these statutory mandates, the Commission specifically found in 2013—less than three years ago—that standard rates must be available for facilities up to 3 MW in capacity so they are not "discouraged from participating in competitive solicitations or challenging unfair

bidding practices due to high transactions costs relative to total revenue potential." Notice 38-5-218 Mont. Admin. Reg. No. 21, at 3 Response 3 (Nov. 14, 2013).

In reversing this position in response to a purported "emergency," the Commission violates both PURPA and MAPA, because it undermines PURPA's statutory provisions designed to remove barriers to entry for small QFs and circumvents the process for changing standard-rate eligibility criteria mandated by state law.

1. "Waiving" the QF-Tariff Violates PURPA.

Eliminating the standard rate for QFs between 100kW and 3MW capacity can only be understood as either moving the eligibility cap to 100 kW or substituting the QF-1 tariff for "an unpublished rate subject to bilateral negotiation." Kavulla Dissent at 3. Either way, the Order violates PURPA.

a. The Order impermissibly eliminates the standard rate.

PURPA was enacted to "(1) encourage energy conservation, (2) encourage the efficient use of utility facilities and resources, and (3) encourage equitable ratemaking." S. Rep. 95-442 at 10 (1978). In passing PURPA, Congress sought to encourage the diversification of energy sources by creating purchase requirements for alternative energy sources from "small producers" that "use biomass, waste, or renewable resources, including wind, solar and water…." Order 69, 45 Fed. Reg. at 12,215; *see also* S. Rep. No. 95-442 at 10 (1978) ("[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 power sources"); *id.* at 14 ("The committee also sought to encourage… the use of small power production facilities.…"). PURPA was specifically designed to overcome impediments to the development of small renewable generating facilities. *FERC v. Mississippi*, 456 U.S. at 751; *see*

also Order 69, 45 Fed. Reg. at 12,215 ("[PURPA] sections 201 and 210 are designed to remove these obstacles.").

Critically, Congress directed the states to encourage small power production by entitling some producers to a standard rate of purchase, thereby alleviating the burdens and power imbalance inherent in forcing a negotiation between small producers and statewide utilities. H.R. Conf. Rep. 95-1750, at 97-98 (1978) ("The conferees recognize that… small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities *vis a vis* the sale of power to the utility and whose risk in proceeding forward in the … small production enterprise is not guaranteed to be recoverable."). Congress set a range within which states should make a determination of the appropriate size of QFs entitled to the standard rate, the eligibility cap. To fulfill PURPA's promise, this decision should be based on a determination about the minimum size of small producers that have the ability to negotiate for contracts and enter the competitive marketplace without the assurance of a standard rate. In making that consideration, states can draw the line anywhere between the statutory maximum of 80 MW and the minimum of 100 KW. Setting this initial standard was part of the original implementation of PURPA as required by Section 210(f) of PURPA and FERC. Section 210 of PURPA provides that state authorities shall implement the cogenerator and small producer (QF) rules after "notice and opportunity for public hearing." (18 C.F.R. § 292.210(f)(1)-(2)). This requirement applies both to new rules and "revised rules." *Id.*

Montana implemented Section 210 of PURPA, codified at Mont. Code Ann. 69-3-102 (2015). The relevant section is also written into the Administrative Rules of Montana, which provides:

> Only qualifying facilities having a nameplate capacity not greater than *3 MW* are eligible for standard offer rates. All purchases and

> sales of electric power between a utility and a qualifying facility that is eligible for standard offer rates shall be accomplished according to the terms of a written contract between the parties or in accordance with the applicable standard tariff provisions as approved by the commission.

Mont. Admin. R. 38.5.1902(5).

This provision requires the Commission to maintain the standard rate for QFs below the eligibility cap of 3 MW and requires QFs under the cap to only contract at the standard rate. *Id.* The Commission suggests that it is invoking Mont. Admin. R. 38.2.305(1) to waive both these obligations. Order ¶¶ 14, 44, 54. Yet, as Commissioner Kavulla points out, waiving the QFs' obligations in favor of open market negotiations is an illusory promise, because it subjects QFs to a time-consuming and resource-intensive process in which NWE is, as a practical matter, would not be expected to negotiatie in good faith for any rate for energy purchases that varies from its previous assertion of avoided costs in this docket. Kavulla Dissent at 6-7

b. The waiver effectively replaces the standard rate with a rate that is unsupported and likely below avoided costs, in violation of PURPA.

Because the Commission's waiver of Mont. Admin. R. 38.5.1902(5) eliminates the standard rate to which QFs are entitled, it violates PURPA. In the alternative, the waiver effectively replaces the standard rate with a rate that is unsupported and likely below avoided costs—albeit only after a resource intensive negotiation. By eliminating the QF-1 tariff for QFs between 100 kW and 3 MW, the Commission effectively has set the standard rate at NWE's proposed rate, requiring QFs to negotiate rates with a party whose position is already hardened. *See* Kavulla Dissent at 6. This, too, is unlawful because this rate is unapproved, not supported by evidence in the record, and, above all, unreasonably low.

Under PURPA, states are required to set a standard rate of sale for small QFs based on the avoided cost rate of the utility producing that energy itself. 18 C.F.R. § 292.304(c). The rate must "(i) [b]e just and reasonable to the electric consumer of the electric utility and in the public interest; and (ii) Not discriminate against qualifying cogeneration and small power production facilities." *Id.* § 292.304(a)(1). The rate for purchase may only be less than the avoided cost if the state regulatory authority finds that a lower rate "is sufficient to encourage cogeneration and small power production." *Id.* § 292.304(b)(3).

NWE's proposed rate lacks the requisite evidentiary support. The Montana Administrative Rules require that:

> the standard rate for purchases from a qualifying facility shall be that rate calculated on the basis of avoided costs to the utility which is determined by the commission to be appropriate for the particular utility after consideration, to the extent practicable, of the avoided cost data submitted to the commission by the utility and other interested persons.

Mont. Admin. R. 38.5.1905(4).

There is no evidence in the record that NWE considered the appropriate factors that the Commission must take into account when calculating avoided cost under PURPA. *See* 18 C.F.R. § 292.304(e). Indeed, the Commission suggested that NWE's proposed rate may be too low. Order ¶¶ 34-35. Yet by eschewing a rate setting procedure that complies with MAPA, the Commission has by default made this unsubstantiated and uncorroborated rate the new QF-1 tariff for producers between 100kW and 3MW.

A too-low avoided cost rate will have the effect of chilling new contracts and therefore "discriminate[s] against [QF]s" in direct violation of PURPA. 18 C.F.R. § 292.304(a). The Commission's *de facto* rate "fail[s] to provide the requisite encouragement of [small and renewable] technologies, and must yield to federal law." Order 69, 45 Fed. Reg. at 12,221.

c. The present situation falls outside PURPA's definition of an "emergency."

The argument that the standard rate purchasing obligation for QFs between 100 kW and 3MW capacity may be avoided due to an "emergency" situation is inconsistent with FERC regulations, which identify only two sets of circumstances relieving utilities of their PURPA obligations from purchasing energy or capacity from a QF that has otherwise met PURPA's requirements to deliver such energy.

The first is a system emergency, which is defined as "a condition on an electric utility's system which is likely to result in imminent significant disruption of service to customers, or is imminently likely to endanger life or property." 18 C.F.R. § 292.101(4).

The other relevant section of the federal regulations describes the "periods during which purchases [are] not required." *Id.* § 292.304(f). Rather than providing NWE an opportunity to avoid entering into new agreements, however, this section of PURPA is designed to ensure that exactly the type of situation that NWE fears does not occur. Section 304(f) is set up to ensure that utilities do not need to purchase energy or capacity from QFs that are already connected to its system when it would result in net increased operating costs, as may occur during light loading periods. *Id.* § 292.304(f); *see also* Order 69, 45 Fed. Reg. at 12,227-28 (describing the purpose of 18 C.F.R. § 292.304(f)). It is not a provision that allows utilities to avoid forming new agreements or honoring existing contracts and LEOs with QFs. *See* Order 69, 45 Fed. Reg. at 12,228 ("The commission does not intend that this paragraph override contractual or other legally enforceable obligations incurred by the electric utility to purchase from a qualifying facility."). Furthermore, this section's language 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 12,227.

The situation described by NWE in its motion to suspend the QF-1 tariff does not meet either of these statutory circumstances that would allow it to avoid its obligations under Section 210.

2. The Order Modifies the Eligibility Cap Without Following MAPA's Rulemaking Procedures.

The Commission's "waiver" of the standard rate for QFs between 100 kW and 3 MW amounts to an indefinite amendment of Rule 38.5.1902(5), which makes all QFs up to 3 MW eligible for standard rates. As such, the "waiver" violates MAPA, which mandates a rulemaking process for "the adoption, amendment, or repeal of any rule." Mont. Code Ann. § 2-4-302(1).[3] This process must include, among other things, "20 days' notice of a hearing and at least 28 days from the day of the original notice to submit data, views, or arguments, orally or in writing." *Id.* § 2-4-302(4).

Accordingly, both times the Commission has adjusted the eligibility cap in the past; it did so through formal rulemaking processes that considered factual evidence regarding the appropriate threshold for encouraging alternative energy development from small producers. As early as 1992, the eligibility cap was set at 3 MW. Mont. Admin. R. 38.5.1905(5) (1992). Supporting this eligibility threshold in 2002, NWE conceded that "[QFs of 3 MW or smaller] still do not have the capacity to enter the competitive marketplace that larger QFs have." NWE Energy's Application for Determination of New Avoided Costs, D.2002-6-63 (June 7, 2002). In 2007, this Commission initiated a formal rulemaking, proposing an amendment to Montana Administrative Rule 38.5.1902 to increase the eligibility cap from 3MW to 10MW. Notice 38-2-

[3] Although the Commission's rules purport to grant it the ability to "waive the application of any rule," Mont. Admin. R. 38.2.305, this provision cannot be read to allow the wholesale amendment or suspension of substantive rules of the Commission, where doing so would violate MAPA.

198 Mont. Admin. Reg. Notice No. 14 (July 26, 2007); *see* Mont. Admin. R. 38.2 *et seq.* (procedural rules establishing formal process for rule changes). The Commission deemed this change necessary because "small QFs up to 10 MW need a simplified mechanism for obtaining long-term contracts to sell electricity" because they "do not have the resources needed to participate effectively in competitive solicitations." Notice 38-2-198 Mont. Admin. Reg. Notice No. 24, at Comment #6/ Response (Dec. 20, 2007). The Commission further declared "formal discussion in the rulemaking setting… to be the best forum for resolving those issues." Notice 38-2-198 Mont. Admin. Reg. Notice No. 14 at 4 (July 26, 2007). The rulemaking involved publishing notice in the Montana Administrative Register which explicitly notified the public of the potential change to the eligibility cap, an over one month long public comment period, a hearing, a six month deliberation period, and a notice of amendment that responded to the public comments in detail.[4]

In 2013, the Commission again initiated a formal rulemaking process to adjust the eligibility cap. The initial proposal would have dropped the eligibility cap to the federal statutory minimum of 100 kW. However, the Commission determined that the appropriate eligibility cap was 3 MW after input from its legislative oversight committee and public comments arguing that 100 kW would leave out many small QFs that lacked the ability to enter the competitive marketplace. *See* Kavulla Dissent Appx. B; Notice 38-5-218 Mont. Admin. Reg. No. 21, at 4 (Nov. 14, 2013). In its notice of amendment, the Commission stated that:

> [t]he commission agrees with comments that associate the appropriate standard rate eligibility threshold with the transactions costs of bidding and other burdens placed on smaller QFs. The commission adopts a 3 MW threshold rather than a 100kW threshold because QFs 3 MW and smaller may be discouraged

[4] During the public comment period, NWE filed comments in support of raising the eligibility cap. Notice 38-2-198 Mont. Admin. Reg. No. 24, at 3 Comment #1 (Dec. 20, 2007).

> from participating in competitive solicitations or challenging unfair bidding practices due to high transactions costs relative to total revenue potential. However, bid preparation costs and potential costs to litigate a complaint against a utility for unfair treatment in a bidding process should be small relative to total revenue potential for QFs larger than 3 MW.

Notice 38-5-218 Mont. Admin. Reg. No. 21, at Response 3 (Nov. 14, 2013).

The Order improperly circumvents the rule-making process and violates the 3-MW standard set by the Commission to implement PURPA's requirement to encourage alternative energy production. In dropping the eligibility cap, the Commission failed to solicit or evaluate proper evidence, considering only the avoided cost rate rather than the appropriate statutory consideration of what size QF can actually enter the competitive marketplace. The Commission offered less than two weeks for the public to comment on NWE's "emergency motion," Notice of Emergency Motion and Opportunity to Comment and Request Hearing (May 24, 2016), and approximately one week after receiving such comment, suspended the QF-1 tariff for QFs between 100kW and 3 MW in a one and a half page notice lacking any factual findings regarding the appropriate standard-rate eligibility threshold under PURPA. Notice of Commission Action, (June 16, 2016). The Commission's final order notwithstanding, it was this notice, issued on June 16, 2016, that effectively dropped the eligibility cap from 3 MW to 100 kW. *Id.*[5]

[5] In contrast, where other state commissions have reduced the eligibility cap, they have also done so based on evidence that producers of a certain size are able to enter the competitive marketplace and so no longer need the standard rate to encourage participation. When the Oregon commission reduced its cap from 10 MW to 3MW, it required evidence that QFs in the 4 MW to 10 MW could successfully enter into negotiated contracts. *In re Idaho Power Company*, Order No. 16-129 Ore. Pub. Utility Comm'n, UM 1725 (Mar. 29, 2016). When the Idaho Commission reduced its eligibility, it did so based on evidence that the producers seeking the standard rate for projects under the eligibility cap were actually large producers who had disaggregated their individual sites to be below the maximum eligibility. Ida. Util. Comm'n, Order No. 32131. Here, the record presents no such evidence.

Although MAPA identifies circumstances permitting "[e]mergency or temporary rules," Mont. Code Ann. § 2-4-303, the present circumstances do not qualify. MAPA allows a foreshortened notice period for the adoption of emergency rules where "an agency finds that an imminent peril to the public health, safety, or welfare." Mont. Code Ann. § 2-4-303(1)(a). The legislature explained, "[b]ecause the exercise of emergency rulemaking power precludes the people's constitutional right to prior notice and participation in the operations of their government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against abuse." *Id.* Accordingly, "[a]n emergency rule may be adopted only in circumstances that truly and clearly constitute an existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any other administrative act." *Id.* The Commission has failed to make such findings justifying its extraordinary Order granting an "emergency suspension" of Mont. Admin. R. 38.5.1902(5). Furthermore, even in cases where agencies make the requisite findings of an emergency, an emergency rule may be effective only for 120 days. Mont. Code Ann. § 2-4-303(1)(a). The Commission effected no such limitation on the period of its suspension.

B. The Order Creates an Impermissibly High Bar for Forming Legally Enforceable Obligations.

The Commission's Order is unlawful because it extinguishes LEOs to which QFs are entitled and discourages, rather than encourages, energy production from small QFs by creating obstacles to the creation of an obligation by the utility to purchase such energy. PURPA requires that a QF can sell and a utility must purchase power pursuant to a legally enforceable obligation ("LEO"). 18 C.F.R. § 292.304(d). The drafters of PURPA intentionally used the phrase "legally enforceable obligation" as opposed to "contractual obligation." Order 69, 45 Fed. Reg. at 12,224. As FERC explained in its implementation order, the term "legally enforceable

obligation" is "intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility." *Id.* Smaller facilities are entitled to a standard purchase rate as of the time a LEO is formed. 18 C.F.R. § 292.304(d)(2)(ii). In Montana, that includes all facilities up to 3 MW in capacity which, as the Commission found in 2013, may otherwise "be discouraged" from development due to "high transactions costs" associated with a negotiated rate. Notice 38-5-218 Mont. Admin. Reg. No. 21, at 3 Response 3 (Nov. 14, 2013).

Reversing this position, the Commission's Order eliminates the standard rate for QFs between 100 kW and 3 MW unless they had, as of the date of the Order, executed interconnection agreements and signed PPAs. No new facilities larger than 100 kW are entitled to the standard rate at all. As an initial matter, the Commission suggests that the LEO standard reflected in its Order matches the standard that has been in place since 2010, when the Commission established a prospective, bright-line rule in *Petition of Whitehall Wind, LLC, for QF Rate Determination*, D2002.8.100, Order 6444(e). Order at ¶ 47; *see* Order 6444e, D2002.8.100 (June 4, 2010). But the Commission wrongly claims that this standard has "withstood challenges in state district court and FERC." Order ¶ 47. The authorities the Commission cites do not support this proposition.[6] The Commission's legal theory seems to be

[6] The first was a decision issued in January 2010, six months prior to the Commission's Order 6444e. *Whitehall Wind, LLC v. Montana Pub. Serv. Comm'n*, 2010 MT 2, 355 Mont. 15, 223 P.3d 907. The second case, also regarding *Whitehall Wind* case, discussed in more detail below, deliberately and explicitly did not address the legality of the Commission's proposed bright-line rule, instead upholding a totality of the circumstances approach to the formation of a LEO. *Whitehall Wind, LLC v. Montana Pub. Serv. Comm'n*, 2015 MT 119, ¶ 18, 379 Mont. 119, 347 P.3d 1273 ("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."). Finally, the Commission cites to *Hydrodynamics*, discussed in more detail below, in which FERC determined that the Commission's requirement that QFs over 10 MW participate in competitive solicitations in order to obtain long-term avoided cost rates violated PURPA because

that as long as FERC and the Montana Supreme Court looked at other aspects of the LEO standard while their bright-line rule was purportedly in place and did not strike it down, then the standard has "survived challenges." *Id.* However, the LEO standard from *Whitehall Wind* was never the subject of any challenge and for the courts or FERC to have addressed in the cited cases would have been at best dicta and at worst an advisory opinion. Order ¶ 47. To infer that either FERC or the Montana Supreme Court has tacitly endorsed the Commission's standard in Order 6444e based on mere silence would be wholly unreasonable.

Furthermore, in endorsing the *Whitehall Wind* LEO standard in its Order, the Commission violates PURPA by refusing to recognize LEOs that meet FERC's standards. While the Order requires an *executed* interconnection agreement as a prerequisite to obtaining a LEO, FERC's decisions in *Cedar Creek,* etc., preclude any commission from making an executed contract a prerequisite to a LEO. *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (Oct. 4, 2011) at ¶ 35; *accord Murphy Flats*, 141 FERC ¶ 61,145 (Nov. 20, 2012); *Rainbow Ranch*, 139 FERC ¶ 61,077 (Apr. 30, 2012); *Grouse Creek*, 142 FERC ¶ 61,187 at 6 (Mar. 15, 2013). Additionally, the Order establishes conditions for obtaining LEOs that are impermissible barriers to their formation under PURPA. Further, setting aside the Commission's treatment of existing LEOs under the *Whitehall Wind* standard, the Order unlawfully prevents QFs between 100 kW and 3 MW from forming new LEOs based on the standard rates to which they are entitled.

1. The Commission's Standard Violates PURPA's LEO Standard.

While the Order purports to condition LEOs on an executed interconnection agreement, by definition, the creation of a LEO cannot be dependent on the existence of an executed

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it created an unreasonable obstacle to LEO formation. 146 FERC ¶ 61,193 (2014). It neither mentioned nor supported the Commission's purported standard of a signed PPA and executed interconnection agreement. *Id.*

agreement. PURPA requires recognition of LEOs to ensure that QFs can avail themselves of the purchase requirement regardless of utilities' willingness to sign agreements. *See* Order 69, 45 Fed. Reg. at 12,224. The LEO is incurred when the QF notifies the utility of its commitment to provide energy or capacity at which time it may select a pricing option of either the avoided costs calculated at the time of delivery or the avoided costs calculated at the time the obligation is incurred. 18 C.F.R. 292.304(d)(2). Unlike a contract, a LEO is incurred when the QF tenders a signed agreement, not when the utility signs and fully executes the agreement. Contradicting this statutory LEO standard, the Order requires QFs greater than 100 KW to first obtain an executed interconnection agreement (IA).

FERC has already rejected such approaches. In 2011, the Idaho Public Utilities Commission issued an order reducing the size of facilities eligible for a standard rate and applying the new eligibility cap retroactively, except to QFs that already had an executed PPA prior to effective date of the change. *Grouse Creek*, 142 FERC ¶ 61,187 145 at 6 (Mar. 15, 2013). Because the Idaho commission effectively invalidated LEOs for QFs without fully executed PPAs, FERC understood this order as modifying the state commission's definition of LEOs retroactively and going forward from the order. *Id.* at 36. Cedar Creek, Rainbow Ranch, Murphy Flats, and Grouse Creek were all QFs that had tendered Idaho Power signed PPAs on the day before the Idaho commission's order was to go into effect. *Id.* Idaho Power waited to sign, and thereby fully execute, the agreements until the day after the order went into effect. *Id.* All four QFs asked the Idaho Commission to recognize that they had incurred LEOs before the order reducing the cap went into effect, the Idaho Commission denied all four requests, and, at the request of each QF, FERC stepped in to reverse the Idaho Commission in all four cases. *Id*.

FERC made clear that a "fully-executed contract" may not be a condition to forming a LEO. *Grouse Creek*, 142 FERC ¶ 61,187 at 36. The move by the Idaho Commission was "inconsistent with PURPA and [FERC's] regulations implementing PURPA" and was therefore superseded by the federal definition of a LEO. *Id.* The commission explains that a unilateral offer is enough to incur a LEO: "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations." *Cedar Creek*, 137 FERC ¶ 61,006 at 32. In other words, "a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing." *Id.* at 36. This is because:

> 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.

Id.

In the same way that the Idaho commission modified its definition of a LEO by attempting to apply its order retroactively to QF's without executed PPAs, here, this Commission has impermissibly modified its definition of LEOs to only recognize agreements with QFs that "had submitted a signed power purchase agreement and executed an interconnection agreement" prior to the date of its notice. Notice of Commission Action (June 16, 2016); Order at ¶ 63. FERC's decisions in *Cedar Creek*, etc. preclude any state commission from making an executed contract a prerequisite to a LEO. *Cedar Creek Wind, LLC*, 137 FERC ¶ 61006 (Oct. 4, 2011) at ¶ 35; *accord Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (Nov. 20, 2012); *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (Apr. 30, 2012); *Grouse Creek*, 142 FERC ¶ 61,187 at 6 (Mar. 15, 2013). In fact, the Commission's action is even more egregious than the situation that arose

in *Cedar Creek* etc. because the Order effectively terminates LEOs even for QFs that have already obtained fully executed PPAs, but for which signed interconnection agreements are not in place. Order at ¶ 47.[7] Accordingly, the Order violates PURPA.

2. The Order Creates an Impermissible Barrier to the Formation of LEOs.

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 QF-1 tariff for projects between 100 kW and 3 MW creates impermissible barriers to the formation of LEOs.

In implementing PURPA provisions that encourage the development of renewable energy projects, FERC has rejected attempts to establish hurdles for QFs, including state-imposed barriers to the formation of LEOs. For example, in *Hydrodynamics*, FERC found that this 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. *In re Hydrodynamics, et al.*, 146 FERC ¶ 61,193 (2014). In doing so, FERC made clear that even *de facto* obstacles preventing QFs from incurring LEOs violate PURPA.

Similarly, FERC rejected the Texas Commission's attempt to require that a producer provide "firm" energy in order to incur a LEO under 18 C.F.R. § 292.304(d)(2) and avail itself of the avoided cost calculated at the time of the notice of the obligation. *JD Wind 1, et al.*, 129

[7] For example, as described in FLS's motion for rehearing, the company had signed PPAs for 14 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." FLS Mot. for Rehearing, at 2. Indeed, for seven of these projects, FLS had requested interconnection agreements, while still others were in advanced stages of the interconnection process. *Id.* However, they do not satisfy the Commission's bright-line standard established in the Order because the lack executed interconnection agreements. To preclude standard rates for QFs between 100 kW and 3 MW that already have created LEOs under PURPA's standards or may in the future effectively ignores their LEOs in violation of PURPA.

FERC ¶ 61,148 at 26 (Nov. 19, 2009). Beyond pointing out that the statute makes no such distinction between "firm" and "non-firm sources," FERC reasoned that the purpose of the LEO clause in PURPA is to encourage investment in small power producers by providing investors with security in their returns. *Id.* at 27. The addition of the "firm" requirement would make it more difficult for investors in renewables to gain that security, contrary to the purpose and text of PURPA. *Id.* at 24.

The Commission's Order is equally unlawful because it creates an impermissible barrier to the formation of LEOs that will have the effect of preventing the formation of most, if not all, new LEOs. At the same time the Commission extinguished LEOs for QFs lacking signed PPAs and interconnection agreements, the Commission eliminated the QF-1 Tariff altogether for QFs still making their way through the development process. The result is that, in order to obtain a LEO, a small QF has to attempt to negotiate a contract and seek a project-specific avoided cost rate determination from this Commission if negotiations fail. *See* Order ¶ 44 (identifying "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 avoid cost rate determination through a petition pursuant to Mont. Code Ann. § 69-3-603"). Both processes add substantial transaction costs, as well as uncertainty that may undermine project financing. As Pacific Northwest Solar, LLC explained in comments to the Commission, "standard contracts represent a much lower cost to complete negotiations and finalization of a PPA when compared to non-standard negotiated contracts (which, in PNW's experience takes years to complete with attendant high legal fees to shepherd the process along). A non-standard contracting process often kills projects due to the prolonged nature of the proceeding, which removes certainty from the development process." PNW's Supplemental

Comments in Opposition to NWE's Emergency Motion (June 17, 2016). As the Commission already recognized in setting the 3 MW eligibility cap in 2013, such a situation is economically untenable and few if any small QFs are large enough to have the capital to take on such a risk. *See* Notice 38-5-218 Mont. Admin. Reg. No. 21, at 3 Response 3 (Nov. 14, 2013). It is exactly the 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.

As in *JD Wind* and *Hydrodynamics*, this Commission's revised standard for the creation of a LEO for QFs larger than 100 kW would undermine the purpose of PURPA, which is to *remove* barriers for small facility energy production, not to create them. This is an impermissible bar to the creation of LEOs and, like the additional criteria in *JD Wind* and *Hydrodynamics*, violates PURPA.

CONCLUSION

For the foregoing reasons, Vote Solar and Montana Environmental Information Center respectfully request that their motion for reconsideration of Order No. 7500 be granted.

Respectfully submitted on this 4th day of August, 2016,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2016, I served the foregoing by first-class mail, postage prepaid, and electronic mail on the following:

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