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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) REGULATORY DIVISION
Revised Tariff No. QF-1,) DOCKET NO. D2016.5.39
Qualifying Facility Power Purchase)

**Joint Motion of FLS Energy, Inc. and Cypress Creek Renewables, LLC
for Relief From QF-1 Suspension**

I. INTRODUCTION

FLS Energy, Inc. (“FLS”) and Cypress Creek Renewables LLC (“Cypress Creek”) (collectively, “Movants”) respectfully request that the Montana Public Service Commission (the “Commission”) issue an Order finding that certain of Movants’ solar project companies¹ are eligible to enter into PPAs with NorthWestern Energy (“NorthWestern”) at NorthWestern’s QF-1, Option 1(a) avoided cost rates in effect prior to June 16, 2016 (the “QF-1 Rates”),

¹ The following project companies and their respective solar projects (collectively, the “Projects”) are the subject of this motion. For FLS: Martin Solar, LLC; Glass Solar, LLC; Canyon Creek Solar, LLC; River Solar, LLC; Sypes Canyon Solar, LLC; Middle Solar, LLC; Bear Gulch Solar, LLC; Valley View Solar, LLC; Malt Solar, LLC; Fox Farm Solar, LLC; Couch Solar, LLC; Ulm Solar, LLC; and Sage Creek Solar, LLC; and for Cypress Creek: Chester Solar, LLC.

notwithstanding the Commission's Order suspending the availability of those rates ("Order 7500").²

As the Commission is aware, Order 7500 included a "safe harbor" allowing qualifying facilities ("QFs") that had tendered to NorthWestern both a fully negotiated, executed PPA and an executed Interconnection Agreement ("IA") by June 16, 2016, to contract with NorthWestern at the QF-1 Rates. This safe harbor test was based on the Commission's previously established test for the creation of a legally enforceable obligation ("LEO") on the part of a QF to sell, and an electric utility to purchase, energy and capacity under the federal Public Utility Regulatory Policies Act, 16 U.S.C. §§ 2601, *et seq.* ("PURPA").³ As the Commission is also aware, on December 16, 2016, the Federal Energy Regulatory Commission ("FERC") issued an Order declaring that this LEO test violates PURPA and FERC's implementing regulations, insofar as it requires a QF to tender an executed IA to the utility (a milestone that FERC found was not within the control of the QF).⁴

In light of this ruling from FERC about the requirements of federal law, and the fact that Movants had tendered fully negotiated, executed PPAs for the Projects to NorthWestern prior to the suspension of the QF-1 Rates, Movants request that the Commission issue an order: (1) finding that Movants' Projects are eligible to contract at the QF-1 Rates that were effective prior to the June 16, 2016 suspension; and (2) directing NorthWestern to promptly enter into PPAs with each of Movants' Projects at the those same rates.

² See Order No. 7500, Dkt. D2016.5.39 (Mt. Pub. Serv. Comm'n served July 25, 2016) ("Order 7500").

³ See Order 7500 at ¶ 47 (citing *In the Matter of the Petition of Whitehall Wind, LLC, for QF Rate Determination*, Order No. 6444e, Dkt. D2002.8.100 (May 10, 2010) ("*Whitehall Wind*") at ¶ 47, *aff'd Whitehall Wind, LLC v. Montana Public Service Comm'n*, 379 Mont. 119 (2015)).

⁴ *FLS Energy Inc.*, Docket No. EL17-5-000, 157 FERC ¶ 61,211 (Dec. 15, 2016).

II. BACKGROUND

On May 3, 2016, NorthWestern opened this docket with the filing of an Application for Approval of Avoided Cost Tariff Schedule QF-1, requesting approval of new interim and final avoided cost rates. On May 17, 2016, NorthWestern filed an Emergency Motion requesting a complete suspension of fixed long-term rates for small solar QFs over 100 kW under the QF-1 tariff (the “Emergency Motion”).⁵ In the Emergency Motion, NorthWestern argued that its avoided costs had declined since the approval of the current QF-1 Tariff in 2013, and that the continued availability of fixed long-term rates under QF-1 would result in a “flood” of requests for new PPAs, obligating NorthWestern to contract for hundreds of megawatts of solar capacity at rates far above its current actual avoided cost.⁶

At the time the Emergency Motion was filed, Movants and NorthWestern were on the verge of entering into PPAs for a number of Projects at the QF-1 Rates. Cypress Creek tendered two fully negotiated, executed PPAs to NorthWestern on June 4, 2016; and FLS tendered 14 such PPAs to NorthWestern on June 15 and 16, 2016. NorthWestern represented to Movants prior to the hearing on the motion that the utility would execute the PPAs that had been tendered.

The Commission convened a hearing on the Emergency Motion on June 9, 2016. At the hearing, NorthWestern, consistent with its commitment to Movants, modified its request for relief to exclude from its request – or provide a safe harbor for – certain solar projects. As stated by NorthWestern’s counsel, “...if the parties have negotiated a complete PPA, which...is ready for execution, it is not affected by the [suspension].”⁷ Under NorthWestern’s proposed standard, additional solar QF projects comprising 108.5 MW of capacity would have been able to contract

⁵ NorthWestern Energy’s Motion for Emergency Suspension of the QF-1 Tariff for New Solar Qualifying Facilities with Nameplate Capacities Greater than 100 kW, Dkt. D2016.5.39 (May 17, 2016).

⁶ *Id.* at 6, 8.

⁷ Transcript of June 9, 2016 Hearing (“June 9 Tr.”) at 33:25-34:3.

at existing QF-1 Rates despite the suspension.⁸ NorthWestern also acknowledged that it was legally obligated to enter into PPAs on which agreement had been reached on all terms.⁹

In a work session held on June 16, 2016, the Commission voted to grant NorthWestern's requested relief, but with substantial modifications. As discussed, NorthWestern had modified its Emergency Motion to exclude from the QF-1 Rates suspension PPAs on which substantial agreement had been reached as to terms. As an alternative to that approach, Commission staff suggested that the Commission establish a 54-megawatt cap on the total capacity of additional projects that would be allowed to contract under the QF-1 Rates. Although a motion was made to adopt the staff 54-megawatt proposal, a substitute motion was tendered and the Commission did not adopt either of the foregoing alternatives. Instead, it suspended the QF-1 Rates but modified NorthWestern's proposed safe harbor to include only those QFs that had both submitted a signed power purchase agreement and executed an interconnection agreement by June 16, 2016.¹⁰ In its Final Order granting the Emergency Motion, the Commission explained that its limited exemption from the QF-1 Rates suspension was based on its previously established *Whitehall Wind* LEO test.¹¹ Satisfaction of that test, said the Commission, "demonstrates an unequivocal commitment by a QF to deliver energy or capacity, or both, to a utility," such that it would be reasonable to exempt from the QF-1 Rates suspension QFs which satisfied that test prior to the suspension.¹²

⁸ *Id.* at 34:24-35:2, 57:13-58:5. At the June 9 hearing, Mr. Alke said that NorthWestern had either executed or fully negotiated the terms of QF-1 PPAs representing 135 MW of solar capacity. That figure included nine Cypress Creek projects, totaling approximately 26.5 MW, that already had fully-executed PPAs and were unaffected by the QF-1 Rate suspension. Had the Commission granted NorthWestern's request for relief as modified at the hearing, up to 108.5 MW of additional projects would have been eligible to contract at the QF-1 Rates.

⁹ *Id.* at 48:13-16.

¹⁰ Dkt. D2016.5.39, Notice of Commission Action (June 16, 2016) ("June 16 NOCA") at 2 (citing *Whitehall Wind*, Order No. 6444e, Dkt. D2002.8.100, 2010 WL 10129008 ¶ 47 (May 10, 2010)).

¹¹ Order 7500 at ¶ 47.

¹² *Id.* at ¶¶ 47, 60-63.

FLS filed an application for rehearing, which the Commission denied on July 7, 2016. On August 8, 2016, FLS filed a motion for reconsideration of Order 7500. Among the grounds asserted was that the Commission's use of the *Whitehall Wind* LEO test to define the safe harbor was contrary to PURPA, because it effectively gave the utility (instead of the QF) control over when a commitment to sell was established. The Commission did not take action on the motion for reconsideration, and the motion was deemed denied on August 18, 2016.¹³

FLS then filed a Complaint and Petition for Enforcement with FERC, asserting that the Commission had failed to implement PURPA in a manner consistent with PURPA and FERC regulations. In its Complaint, FLS contended (among other things) that the Commission's suspension of the QF-1 Rates was unauthorized by and inconsistent with PURPA, and that the *Whitehall Wind* LEO test was likewise inconsistent with PURPA.

The Commission filed a Protest and Answer and Motion to Dismiss FLS's Complaint on November 10, 2016.¹⁴ NorthWestern also filed a Motion to Intervene and Protest the same day.¹⁵ In its Answer, the Commission clarified that under Order 7500, qualifying facilities between 100 kW and 3 MW that had established a LEO by June 16, 2016, would be entitled to contract at existing QF-1 rates.¹⁶ The Commission went on to argue that the *Whitehall Wind* LEO standard was compliant with PURPA, because the requirement of a partially executed interconnection agreement "is a very preliminary step [in development of a QF project] and presents a readily met hurdle[.]" According to the Commission, the purpose of the IA requirement was "to ensure that the QF is willing to move forward regardless of the interconnection cost, which it would bear in

¹³ Notice of Staff Action, Dkt. D2016.5.39 (Aug. 25, 2016) (citing A.R.M. § 38.2.4806(5)).

¹⁴ Protest and Answer to Petition and Motion to Dismiss Complaint of the Montana Public Service Commission (Nov. 10, 2016) ("MPSC Answer").

¹⁵ Motion to Intervene and Protest and, as Necessary, Answer of Northwestern Corporation (Nov. 10, 2016).

¹⁶ MPSC Answer at 8-9.

accordance with FERC regulations.”¹⁷ The Commission also argued in its Answer that it, not FERC, was the proper body to decide the question of whether the Movants’ Projects had established LEOs before the suspension date.¹⁸

On December 15, FERC issued a Notice of Intent Not to Act and Declaratory Order (the “Declaratory Order”).¹⁹ Although it declined to take enforcement action, FERC declared the *Whitehall Wind* LEO test to be inconsistent with PURPA because requiring a QF to execute an interconnection agreement as a prerequisite to obtaining a LEO “allows the utility to control whether and when a legally enforceable obligation exists.”²⁰ FERC explained that under the federal requirements of PURPA, the establishment of a LEO must “turn on the QF’s commitment, and not the utility’s actions.”²¹

In addition, although the Declaratory Order did not otherwise draw any firm conclusions about the legality of the QF-1 Rates suspension, FERC noted that:

When a state commission believes that a previously-determined avoided cost rate is no longer an accurate measure of a utility’s avoided costs, the appropriate response is not to establish a standard for a legally enforceable obligation that is inconsistent with PURPA and the Commission’s regulations under PURPA, but instead to determine a new avoided cost rate that better reflects the utility’s avoided costs consistent with the requirements and procedures identified in the Commission’s regulations under PURPA.²²

Now that FERC has declared the *Whitehall Wind* test to be invalid insofar as it requires a QF to execute an interconnection agreement as a prerequisite to obtaining a LEO, Movants believe, for the reasons discussed below, that their Projects should qualify for the safe harbor and be eligible for the QF-1 Rates. Movants further believe that the potential impact of modifying the safe harbor

¹⁷ *Id.*

¹⁸ *Id.* at 15.

¹⁹ 157 FERC ¶ 61,211.

²⁰ *Id.* at P. 23.

²¹ *Id.* at P. 24 (quoting *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P 25 (2009)).

²² *Id.* at P. 20 n. 33.

to be consistent with federal law has been substantially reduced. Since the suspension of the QF-1 tariff, two of Movants' Projects have been cancelled, leaving 13 FLS Projects and one Cypress Creek Project that tendered PPAs to NorthWestern by June 16, 2016 still in development. Moreover, Movants believe that there are no other QFs eligible for the safe harbor, as proposed herein. That means that, if Movants' motion were granted, only about 40.2 MW of total generating capacity would qualify for the QF-1 Rates – far less than the hundreds of megawatts that NorthWestern cited as giving rise to an “emergency” situation, and less even (by 25%) than the cap considered by the Commission on June 16.

III. ARGUMENT

a. **The Projects Demonstrated an Unequivocal Commitment to Sell to NorthWestern by June 16, 2016 and Should Therefore be Exempted from the QF-1 Rates Suspension.**

In the Declaratory Order, FERC ruled that the interconnection prong of the *Whitehall Wind* LEO test relied on by the Commission in establishing its Order 7500 safe harbor test was inconsistent with PURPA. When that additional requirement is removed, Movants submit that all of the Projects should qualify for a safe harbor from the QF-1 Rates suspension because on or before June 16, 2016, they tendered to NorthWestern a fully-negotiated, executed PPA with a price term consistent with the utility's avoided costs, with specified beginning and ending dates, and with sufficient guarantees to ensure performance during the term of the contract.²³ Tendering such an agreement to the utility demonstrated the Projects' “unconditional commitment to deliver energy, capacity, or energy and capacity” that is necessary to establish an LEO.²⁴ Moreover, this is the safe harbor test proposed by NorthWestern at the June 16, 2016 hearing.

²³ See Dkt. D2002.8.100, Order No. 6444e ¶ 47.

²⁴ *Id.* at ¶¶ 45, 47.

As noted above, Movants met this test and tendered such a contract, which included terms for avoided cost pricing, specified beginning and ending dates, and performance guarantees to NorthWestern on or before June 16, 2016. As discussed in Movants' Motion for Reconsideration, each of the Movants' Projects clearly had made an unequivocal commitment to deliver energy and capacity to NorthWestern by June 16, 2016, as evidenced by the terms of the PPAs they negotiated with NorthWestern.²⁵ Those PPAs included substantial penalties if the Projects failed to fulfill their obligation to deliver. For example, if a Project does not achieve commercial operation by the date specified in the PPA, the PPA seller must pay NorthWestern "delay damages" for each day commercial operation is delayed and must provide a refundable cash deposit or a letter of credit to guarantee payment of these damages. If a Project fails to achieve commercial operation within 90 days after the deadline, NorthWestern may terminate the PPA and the seller must pay NorthWestern total damages of \$33,750. In addition, if NorthWestern's cost for obtaining replacement energy on the market exceeds the contract price, the seller must compensate NorthWestern for the additional cost of obtaining replacement energy. Furthermore, with respect to the FLS PPAs, "interconnection obstacles" do not excuse the QF from its commitment to sell, as those PPAs exclude from the definition of *force majeure* "the inability or failure of Seller to arrange for, acquire or procure transmission services." These contract provisions mean that after tendering an executed PPA for a particular project, Movants' Projects would be obligated to deliver to NorthWestern the energy, capacity, and environmental attributes generated by the project on time, regardless of any expense or difficulty incurred in achieving interconnection. And as discussed in their Motion for Reconsideration, Movants made this commitment with a good

²⁵ See Dkt. D2016.5.39, Joint Motion of FLS Energy, Inc. and Cypress Creek Renewables, LLC for Reconsideration on of Commission Order No. 7500 Granting NorthWestern Energy's Motion for Emergency Suspension of the QF-1 Tariff for New Solar Qualifying Facilities with Nameplate Capacities Greater than 100 kW (Aug. 4, 2016) at 23, 30-32.

understanding of the likely interconnection costs associated with the Projects – costs that Movants were unquestionably willing to pay.²⁶

Since all of the Projects demonstrated an unequivocal commitment to sell to NorthWestern on or before June 16, 2016, and since FERC has ruled that imposing the additional requirement of an executed IA as a condition of LEO establishment is inconsistent with PURPA, all the Projects should be permitted to contract at the QF-1 Rates.

Granting Movants' request for relief would not result in a huge influx of new solar capacity onto NorthWestern's system – the purported "emergency" that led to Order 7500. To the extent that there ever was the threat of an "flood" of solar projects in Montana, Order 7500 effectively prevented that from occurring. The only remaining questions pertain to those projects that were under development at the time of the Commission's June 16, 2016 decision. And even that limited universe of projects has been substantially reduced in size. At the June 9, 2016 hearing on its Emergency Motion, NorthWestern indicated that it already had 26.5 MW of QF-1 projects under contract and was prepared to enter into PPAs with 108.5 MW of additional QF-1 projects.²⁷ Movants believe that the total capacity of projects now potentially eligible for the safe harbor has been reduced to 40.2 MW.

In the Emergency Motion, now filed more than nine months ago, NorthWestern asserted that it faced "the immediate execution of solar QF-1 PPAs for 75 MW," that it would soon "confront additional requests" for PPAs amounting to at least 80 MW, and that it expected additional requests for QF-1 PPAs in the near future.²⁸ At the June 9 hearing, NorthWestern stated that it had committed to enter into contracts with FLS, Cypress Creek, and another solar developer

²⁶ *Id.* at 9-10.

²⁷ June 9 Tr. at 57:13-58:5.

²⁸ Emergency Motion at 7-8.

that would total about 135 MW of capacity.²⁹ In its emergency motion, as modified in open court, NorthWestern requested only that the Commission provide relief “from any more than the 135 megawatts of solar we are already committed to contract under the old standard rates.”³⁰ And at the June 16, 2016 work session on the Emergency Motion, the Commission gave serious consideration to the staff’s proposal to allow up to 54 megawatts of additional projects to contract at QF-1 rates.

The total capacity of the Projects for which FLS and Cypress Creek still seek to contract at the QF-1 Rates is only 40.2 megawatts – 25% less than the 54 MW cap considered by the Commission, less than half of the capacity NorthWestern was prepared to contract for, and far less than the hundreds of megawatts in new solar capacity NorthWestern invoked to justify the Emergency Motion.

IV. CONCLUSION

As discussed above, Movants did everything in their power prior to June 16, 2016, to commit their Projects to selling their output to NorthWestern. In light of that fact and FERC’s declaratory ruling, Movants and the Projects are entitled to enter into PPAs with NorthWestern at the QF-1 Rates. That outcome is consistent with the requirements of PURPA and “properly balance[es] the interests of QFs in furthering their projects while protecting ratepayers,”³¹

In addition, the Commission suspended the QF-1 Rates in response to an alleged “emergency” arising from the unprecedented number of QFs that NorthWestern claimed were seeking PPAs under those rates. Seven months have passed since the suspension of the QF-1 Rates, and the emergency, if there ever was one, has surely passed. The Commission is well on

²⁹ June 9 Tr. at 34:24-35:2, 57:13-58:5. As discussed, this figure included 26.5 MW of projects already under contract and 108.5 MW of projects for which PPAs had been negotiated but not yet executed.

³⁰ *Id.* at 51:14-18.

³¹ *Whitehall Wind*, Order No. 6444e, at ¶¶ 46, 51.

its way to deciding new avoided cost rates for NorthWestern, and only a limited number of QFs still seek to contract under the QF-1 Rates.

Accordingly, Movants respectfully move that the Commission issue an Order: (1) finding that the Movants' Projects are eligible to contract at the QF-1 Rates effective prior to June 16, 2016; and (2) directing NorthWestern Energy to enter into PPAs with those QFs, on terms substantially identically to those in the PPAs previously tendered to NorthWestern by Movants.³²

RESPECTFULLY SUBMITTED THIS 10th DAY OF FEBRUARY, 2017

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By: 

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Creek Renewables

³² The only terms that need to be modified in those PPAs are the beginning and ending dates. Although the Movants and NorthWestern had agreed on those terms prior to June 16, 2016 (as required by *Whitehall Wind*), the delays occasioned by the QF-1 Rates suspension and NorthWestern's refusal to allow the projects to move forward in the interconnection process necessitate an adjustment to the Projects' development schedules.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, 2017, I served the foregoing by first-class mail, postage prepaid mail on the following:

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