Michael J. Uda
Uda Law Firm, P.C.
7 West 6th Avenue
Power Block West, Suite 4H
Helena, MT 59601
(406) 457-5311
michaeluda@udalaw.com

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

FLS Energy, Inc. and Cypress Creek Renewables, LLC
Reply in Support of Joint Motion for Relief from QF-1 Suspension

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In its Opposition to FLS and Cypress Creek's ("collectively, "Movants'") Joint Motion for Relief, NorthWestern Energy ("NorthWestern") does not challenge the fundamental premises on which the Joint Motion was based: (1) that Movants' Projects demonstrated an unequivocal commitment to sell the output of Movants' Projects to NorthWestern prior to the QF-1 suspension; and (2) that there is no longer any "emergency," such that allowing Movants' Projects to contract at QF-1 rates would be unfair to ratepayers. Instead, NorthWestern argues that the Commission should not allow Movants' Projects to contract at QF-1 rates because: (1) the Commission's conclusions regarding existing QF-1 rates in Order 7500 bars Movants' request for relief; (2) FERC's Declaratory Order has no legal significance; and (3) despite the Federal Energy Regulatory Commission's ("FERC") ruling that the Commission's *Whitehall Wind* LEO test is

inconsistent with PURPA, the Commission should continue to apply that test to support a finding that Movants' Projects had not established LEOs by June 16, 2016. Surprisingly, NorthWestern also appears critical of Movants' having sought relief before this Commission based on FERC's ruling, rather than proceeding directly to federal court to enforce their rights under PURPA. NorthWestern is wrong in every respect.

1. **The Montana Commission can and should resolve Movants' request for relief.**

As an initial matter, NorthWestern takes the curious position that Movants should not have sought relief from the Commission after FERC issued its Declaratory Order, but should instead have pursued a PURPA enforcement action "in the appropriate court" (*i.e.*, federal district court).[1] This is misguided, for several reasons. First, resolution of Movants' request by the Commission would be far more efficient. Movants' Motion raises only one issue for resolution by the Commission: how the "safe harbor" established under Order 7500 should be adjusted in light of FERC's conclusion that the *Whitehall Wind* LEO test violates PURPA. (As discussed below, Movants' request for relief does not require the Commission to revisit its conclusion as to the QF-1 rates or to establish a new LEO test of general applicability). By contrast, a PURPA enforcement action in federal district court would require the parties to re-litigate all of the major issues implicated in Movants' FERC petition, including the legality of the QF-1 rate suspension, whether the existing QF-1 rates are consistent with PURPA, the *Whitehall Wind* LEO test, and NorthWestern's abuses of the interconnection process. It would be a tremendous waste of time and resources for Movants and the Commission to litigate all those issues in federal court, when Movants' concerns can be resolved by this Commission.

[1] NorthWestern Energy's Opposition to the Joint Motion of FLS Energy, Inc. and Cypress Creek Renewables, LLC for Relief from QF-1 Suspension (Feb. 21, 2017) ("Opp.") at 2-3.

2. The Commission's prior conclusions regarding the QF-1 rates do not bar Movants' request for relief.

Movants' Joint Motion does not require the Commission to revisit its conclusions about whether existing QF-1 rates are just, reasonable, and in the public interest. Contrary to what NorthWestern argues, those conclusions do not foreclose Movants' request for relief. As acknowledged by the Commission, even if the QF-1 suspension was justified, the Commission has previously ruled that fairness dictates that it "reasonably acknowledge" the investment of QFs that had "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."[2] NorthWestern's own counsel also acknowledged that QFs that had made such commitments should be allowed to enter into QF-1 PPAs, and NorthWestern in fact committed to contracting with those QFs prior to the rate suspension, notwithstanding its position that the QF-1 rates were unjust and unreasonable.[3] As noted in FLS and Cypress Creek's Comments on the Emergency Motion, and then again in their motion for reconsideration, when the QF-1 rates were suspended the Movants had already made significant financial commitments to their Montana projects, in reliance on the availability of those rates. Movants had also done everything in their power to commit their Projects to selling to NorthWestern.

The Commission tried to acknowledge the expectations of QFs that had made such commitments by creating the safe harbor under Order 7500. The only question raised by Movants' Motion is how Commission should adjust its concept of the safe harbor now that the *Whitehall Wind* LEO test, on which the Commission based the safe harbor, has been found by FERC to be inconsistent with PURPA.

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[2] Order 7500 at PP 45-46.

[3] Transcript of June 9, 2016 Hearing ("June 9 Tr.") at 33:25-34:3.

3. The Declaratory Order is legally significant and would be entitled to deference in court.

Even if the Declaratory Order is not directly binding on the Montana Commission, it is persuasive authority that should guide the Commission's consideration of the Movants' request for relief. Movants agree with NorthWestern that the Declaratory Order did not automatically vacate Order 7500 or abolish the *Whitehall Wind* LEO standard. Movants also agree that PURPA gives states the authority to determine, *within the bounds of federal law*, when a LEO is established. However NorthWestern is entirely wrong in claiming that the Declaratory Order is of no legal significance, "provides no legal certainty regarding the issues" of interest in this matter, and probably would not be followed by a court.[4]

Contrary to NorthWestern's claim, the express statutory purpose of a FERC declaratory order is to "remove uncertainty" regarding a legal controversy—not just to "memorialize FERC's thought process" regarding a decision on enforcement action (which FERC can do without issuing a declaratory order).[5] FERC used that authority here to clarify its view that the *Whitehall Wind* LEO standard is inconsistent with PURPA and FERC regulations. FERC also rejected, in the Declaratory Order, the arguments about the legality of the *Whitehall Wind* standard that NorthWestern made in its FERC briefing and now rehashes in its Opposition to the Joint Motion.[6]

A federal district court hearing a PURPA enforcement action would grant substantial deference to this interpretation, as it would to any agency's interpretation of its own regulations.[7] This well-established doctrine of judicial deference has been applied specifically in the context of

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[4] Opp. at 5.
[5] 5 U.S.C. § 554(e) ("The agency . . . in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); 18 CFR § 385.207(a).
[6] Opp. at 5-6.
[7] *See Edwards v. The First American Corporation*, No. 13-55542 (9th Cir. Aug. 24, 2015) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)); *In re Farmers Insurance Exchange,* 481 F.3d 1119 (9th Cir. 2007).

FERC declaratory orders.[8] It is extraordinarily unlikely that a federal district court hearing a PURPA enforcement action would ignore this canon of administrative law and "agree with the Commission's analysis, rather than FERC's."[9] The Commission should accept the Declaratory Order as persuasive authority and recognize that the application of the *Whitehall Wind* LEO standard in this context violates PURPA.

4. The Commission can grant Movants' motion without creating a new LEO test of general applicability.

NorthWestern argues that even if the Commission accepts the illegality of the *Whitehall Wind* standard under PURPA, it should not establish a new LEO standard without "provid[ing] all parties an opportunity to present alternative options."[10] Although Movants agree that the Commission should not establish a new generally applicable, prospective LEO test without providing further opportunities for input from interested parties, such a step is unnecessary here. The only issue now before the Commission is whether to modify the Order 7500 safe harbor based on the FERC ruling and recognize the unconditional commitments made by Movants' Projects to NorthWestern.

Movants request and submit that their Projects should be included in the safe harbor because they had delivered fully negotiated, executed power purchase agreements to NorthWestern on or before the QF-1 rate suspension and thereby demonstrated their unequivocal commitment to sell their output to NorthWestern. Even if the Commission looked more broadly

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[8] *See Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1076 (D.C. Cir. 1987) (*en banc*).
[9] Opp. at 6. Similarly, a district court would likely defer to FERC's position, as stated in the Declaratory Order, that when a state commission believes that an existing standard rate is no longer accurately reflects 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." Declaratory Order at P. 20 n. 33.
[10] Opp. at 6.

at "the totality of the circumstances," as it did before establishing the now invalidated *Whitehall Wind* test, Movants Projects would still qualify for the safe harbor.[11] Despite its other protestations, NorthWestern does not (and cannot) argue that Movants' Projects have not made sufficient commitments to establish LEOs under that standard. The Commission may (and should) therefore find that Movants' Projects established LEOs prior to the QF-1 suspension, and are therefore entitled to contract at QF-1 rates.

5. Conclusion

FERC has stated its position that the *Whitehall Wind* LEO test (and by extension, a safe harbor based on that test) violates PURPA. A federal court would defer to FERC's interpretation of its own regulations in a PURPA enforcement action. But an enforcement action challenging Order 7500 as a whole would be an unnecessary waste of resources, where the Commission can grant Movants' request for relief on far narrower grounds. The Movants' Projects unequivocally committed to sell their output to NorthWestern by June 16, 2016, when the QF-1 rates were suspended. Consequently, they met the fundamental requirements for establishing a LEO under a PURPA-consistent LEO test, and this Commission should allow them to contract under the Order 7500 safe harbor.

[11] Joint Motion of FLS Energy, Inc. and Cypress Creek Renewables, LLC for Relief from QF-1 Suspension at 9 (quoting *Whitehall Wind* ¶ 49). NorthWestern's argument that a new LEO test should not be applied "retroactively" is disingenuous. If the Commission agrees with FERC and concludes that the *Whitehall Wind* LEO is inappropriate as applied in this situation, it was inappropriate as of June 16, 2016, and there is nothing "retroactive" about applying a different LEO test to the Movants' Projects.

RESPECTFULLY SUBMITTED THIS 2nd DAY OF MARCH, 2017

UDA LAW FIRM, PC

By: _____

Michael J. Uda

Attorney for Intervenors FLS Energy and Cypress Creek Renewables

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of March, 2016, I served the foregoing by first-class mail, postage prepaid mail on the following:

Kate Whitney, Administrator PSC 1701 Prospect Avenue Helena, Mt 59601	John Alke NorthWestern Energy 208 N Montana Ave Suite 205 Helena, Mt 59601
Al Brogan Northwestern Energy 208 N. Montana Ave Suite 205 Helena, Mt 59601	Tracy Killoy NorthWestern Energy 208 N. Montana Ave Suite 205 Helena, Mt 59601
Jason Brown Montana Consumer Counsel P.O. Box 201703 Helena, MT 59620	Tom Hopgood Luxan and Murfitt, PLLP P.O. Box 1144 Helena, MT 59624
Eric Christensen Caimcross Hempelmann 524 Second Avenue Suite 500 Seattle, WA 98104	Jeffrey Wagner Volkswind USA, Inc 205 SE Spokane Street Suite 306 Portland, OR 97202

By: _____
Jackie Haskins-Legal Assistant