

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

**POST-HEARING BRIEF OF
VOTE SOLAR AND MONTANA ENVIRONMENTAL INFORMATION CENTER**

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This docket presents critical issues affecting the access of small renewable energy developers to the Montana market. NorthWestern Energy seeks to reduce dramatically the rates it pays to qualifying facilities (“QFs”) with a capacity of three megawatts (“MW”) or less, including a reduction of approximately 50 percent for solar QF generation. NorthWestern’s proposed reduction is unreasonable, discriminatory, and unsupported by the evidence. Moreover, NorthWestern’s flawed proposal would effectively block market access by solar QFs that would otherwise assist NorthWestern in meeting its substantial energy and capacity deficits.

NorthWestern’s post-hearing brief fundamentally fails to confront the substantial issues raised in pre-filed testimony and during the hearing in this matter. However, as the evidence before the Commission demonstrates, NorthWestern’s proposed methodologies and assumptions in calculating its avoided costs are deeply flawed, yielding proposed rates for solar QFs that fail to meet the requisite standards. Indeed, while NorthWestern proposes changes from its previous method and in most of the assumptions underlying its calculation of avoided costs, all of these changes conveniently (for NorthWestern) drive QF-1 standard rates in a single direction—down. Not only are these changes unjustified, they improperly treat QF resources in a fundamentally different manner than NorthWestern treats its own resources, thereby discriminating against QFs.

For the reasons set forth below, the Commission should reject NorthWestern’s approach and establish standard rates for QFs that are just, reasonable, in the public interest, and non-discriminatory. 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304(a)(1).

BACKGROUND

I. LEGAL FRAMEWORK

Congress enacted the Public Utilities Regulatory Policy Act of 1978 (“PURPA”) as part of the National Energy Act and in response to a nationwide energy crisis. FERC v. Mississippi, 456 U.S. 742, 745 & n.2 (1982). In passing PURPA, Congress sought to encourage the

diversification of energy sources by creating requirements that utilities must purchase electricity from alternative energy sources including “[s]mall power production facilities” that “use biomass, waste, or renewable resources, including wind, solar, and water . . .” Small Power Production & Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, Order No. 69, 45 Fed. Reg. 12,214, 12,215 (Feb. 25, 1980) [hereinafter Order No. 69];¹ see also S. Rep. No. 95-442, at 10 (1977), reprinted in 1978 U.S.C.C.A.N. 7903, 7907 (“[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”).

Section 210 of PURPA embodies this goal of advancing renewable energy from small power producers by requiring utilities to purchase electric energy from cogeneration and small power production facilities at rates that are just and reasonable to consumers, in the public interest, and non-discriminatory. 16 U.S.C. § 824a-3(a), (b); 18 C.F.R. § 292.304(a)(1). To achieve these standards, QF purchase rates must equal “the incremental cost to the electric utility of alternative electric energy,” 16 U.S.C. § 824a-3(b), (d), otherwise known as “avoided costs,” 18 C.F.R. § 292.101(b)(6); Mont. Admin. R. § 38.5.1901(2)(a). These criteria were designed to achieve rates that “make ratepayers indifferent as to whether the utility used more traditional sources of power or the newly encouraged alternatives” under PURPA. S. Cal. Edison, San Diego Gas & Elec., 71 FERC ¶ 61,269, at 62,080 (1995); see also Order No. 7505b ¶ 40, In the Matter of Crazy Mtn. Wind, Dkt. No. D2016.7.56 (Dec. 22, 2016) (“A just and reasonable rate is one that leaves customers economically indifferent to purchasing [QF] power compared to

¹ Also found at Final Rule Regarding the Implementation of Section 210 of [PURPA], Order No. 69, FERC Stats. & Regs. ¶ 30,128, order on reh’g, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), aff’d in part & vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC, 675 F.2d 1226 (D.C. Cir. 1982), rev’d in part sub nom. Am. Paper Inst., 461 U.S. 402 (1983).

NorthWestern’s least-cost alternative plan for purchasing energy and capacity or building new generating resources.”).

As an essential component of the statutory scheme for achieving that goal of advancing renewable development, states must adopt a standard rate of purchase for small power producers—i.e. those with an upper capacity threshold no greater than 80 MW—to eliminate the need for burdensome negotiations between small power producers and monopsony utilities that could otherwise discourage small power production. See 16 U.S.C. § 824a-3(a), (b), & (f); 18 C.F.R. § 292.304(c). The Commission’s rules implementing PURPA provide that long-term contracts between utilities and QFs with “a nameplate capacity not greater than 3 MW are eligible for standard offer rates.” Mont. Admin. R. § 38.5.1902(5).

II. THE QF-1 TARIFF

Standard rates applicable to NorthWestern’s purchase of power from QFs no larger than three MW are embodied in NorthWestern’s QF-1 Tariff. The Commission last approved modified standard rates in the QF-1 Tariff as just and reasonable, in the public interest, and not discriminatory in 2012. Order No. 7199d ¶ 87, In the Matter of NorthWestern’s Application for Approval of Avoided Cost Tariff for New Qualifying Facilities, Dkt. No. D2012.1.3 (Dec. 7, 2012). Consistent with previous standard rate adjustments, these rates were based on NorthWestern’s estimated avoided costs as determined “by blending projected near-term market prices and the expected cost of owning and operating a natural gas [combined cycle combustion turbine (“CCCT”)].” Order No. 7338b ¶ 18, In the Matter of NorthWestern’s Application for Qualifying Facility Tariff Adjustment, Dkt. No. D2014.1.5 (May 4, 2015) (describing previous two QF-1 proceedings).

In January 2014, NorthWestern sought to alter the standard rates approved by the Commission in 2013. Id. ¶ 11. After a full contested case proceeding, the Commission rejected NorthWestern’s request based on the utility’s failure to support its avoided-cost assumptions “with a comprehensive, long-term resource planning analysis,” and its use of a potentially flawed method for calculating avoided costs. See id. ¶¶ 11-17, 19-21. Accordingly, the Commission determined it lacked a sufficient basis to change the standard rates approved in 2013. Id. ¶¶ 20, 23, 36-37.

III. NORTHWESTERN’S APPLICATION FOR NEW QF-1 STANDARD RATES

On May 3, 2016, NorthWestern again filed an application for interim and final approval of a revised rate schedule for QFs with a nameplate capacity of three MW or less that would drastically reduce QF-1 tariff standard rates for non-wind, wind, and solar QFs. See NorthWestern Energy’s Application for Interim & Final Approval of Revised Tariff Schedule QF-1, (May 3, 2016) [hereinafter “Rate Application”]. Specifically, the Application proposed a standard rate for solar QFs that would be as little as roughly half the current rate—reducing it from an average price of roughly \$66/MWhr to \$34-44/MWhr. See id. at Appendix 1; id. at Notice of Application for Interim Rate Adjustment, at 2 (showing current solar average price and NorthWestern’s proposed prices, both without and with carbon adjustments); see also Ex. NWE-16 (Prefiled Rebuttal Testimony of John B. Bushnell), at 19 (slightly modifying NorthWestern’s proposed standard rate for solar QFs to roughly \$33-44/MWhr).

NorthWestern also requested that the Commission grant an emergency suspension of the standard rate for solar QFs greater than 100 kW based on NorthWestern’s belief that it was facing the immediate execution of a high volume of power purchase agreements for solar QFs that would create long-term obligations at the current standard rates, which NorthWestern argued

exceeded its current avoided costs. NorthWestern’s Motion for Emergency Suspension of the QF-1 Tariff, at 2, 12 (May 17, 2016). On June 16, 2016, the Commission granted NorthWestern’s emergency motion and suspended NorthWestern’s obligations to pay the standard rate for solar projects greater than 100 kW pending the issuance of a final order on NorthWestern’s Rate Application. See Order No. 7500 ¶ 13. The Commission provided a narrow exemption for solar QFs with a nameplate capacity between 100 kW and three MW if, prior to June 16, 2016, the QF had tendered a signed power purchase agreement to the utility and executed an interconnection agreement. See Notice of Comm’n Action (June 16, 2016); Order No. 7500 ¶¶ 47, 63. Among the consequences, the Commission’s June 16, 2016 decision had an immediate impact of halting approximately 135 megawatts (“MW”) of advanced-stage projects. See Order No. 7500 ¶ 45.

Following testimony by the parties on NorthWestern’s application and additional issues noticed by the Commission, the Commission held a hearing on January 18-19, 2017. Vote Solar now submits its post-hearing brief.

ARGUMENT

Vote Solar and Montana Environmental Information Center (collectively, “Vote Solar”) respectfully request that the Commission reject NorthWestern’s unreasonable and discriminatory avoided cost rates for solar QFs, and instead establish rates that are non-discriminatory and recognize NorthWestern’s full avoided costs.

At the outset, Vote Solar urges the Commission to reject NorthWestern’s proposal to change its method for calculating standard rates to a complex and opaque production cost modeling system that both depends heavily on NorthWestern’s judgment to identify appropriate

assumptions and removes any meaningful ability for the Commission, QFs, or the public to verify those assumptions.

Instead, the Commission should retain the existing “blended-market” method—the same method this Commission has consistently applied in establishing standard avoided cost rates. See Ex. VS-1 (Pre-filed Direct Testimony of R. Thomas Beach), at 11. As the testimony in this case demonstrates, under this method standard rates for solar QFs should be in the range of \$60 to \$70/MWhr. Id. at 15.

Even under NorthWestern’s new “peaker” method, however, solar QF standard rates should be significantly higher than those proposed by NorthWestern, and similar to current QF-1 Tariff rates. See id. at 27 (using peaker method and corrected assumptions to calculate avoided costs for solar QFs of \$62 to \$73/MWhr). In proposing dramatic reductions to the current rates, NorthWestern relied on unrepresentative natural gas price assumptions; unreasonable valuation of avoided energy costs under “long” conditions; and, in a change to NorthWestern’s original proposal, unjustified modifications to the carbon-price adjustment to energy costs. Further, NorthWestern significantly understates the capacity contribution of solar QF resources, including during NorthWestern’s high-load summer months. The Commission should reject NorthWestern’s unreasonable assumptions in calculating the avoided cost rate.

Regardless of the method applied, the Commission should refrain from modifying the 25-year contract length in the current QF-1 Tariff—a provision for which NorthWestern’s Rate Application sought no change. This issue is not properly before the Commission and is not supported by the record.

Finally, the Commission should afford deference to FERC’s declaratory order and grant relief to solar QFs that held a legally enforceable obligation at the time of the Commission’s emergency suspension of the QF-1 Tariff.

I. LEGAL STANDARD

The Commission has the “full power of supervision, regulation, and control” of public utilities, including NorthWestern. Mont. Code Ann. § 69-3-102. In implementing PURPA, the Commission “play[s] the primary role in calculating avoided cost rates and in overseeing the contractual relationship between QFs and utilities under the regulations promulgated by [FERC].” Indep. Energy Producing Ass’n v. Cal. Pub. Util. Comm’n, 36 F.3d 848, 856 (9th Cir. 1994) (citing 16 U.S.C. § 824a-3(a), (f)). The Commission owes no deference to utility avoided costs proposals or testimony. Instead, Montana utilities “shall purchase available power from any qualifying facility at either the standard rate determined by the commission” or a rate negotiated between the utility and the QF. Mont. Admin. R. § 38.5.1905(2) (emphasis added).

II. THE COMMISSION SHOULD RETAIN THE BLENDED-MARKET METHOD IN SETTING AVOIDED COSTS, WHICH LARGELY AFFIRMS CURRENT STANDARD RATES

The Commission should continue to rely on the blended-market method (or “proxy” method) for establishing QF power purchase rates because it is superior to NorthWestern’s proposed “peaker” method to establish QF power purchase rates. Specifically, the blended-market method is accurate, transparent, and more accessible to this Commission, QFs, and the public, see Ex. VS-1 (Beach Direct), at 11, 15, 18, and more closely tied to NorthWestern’s Resource Procurement Plan, which the Montana Supreme Court has affirmed forms the basis for calculating avoided costs, see Whitehall Wind, LLC v. Mont. Pub. Serv. Comm’n, 2010 MT 2, ¶ 21, 355 Mont. 15, 19, 223 P.3d 907, 910.

PURPA requires that QFs be compensated for both energy and capacity. See 18 C.F.R. § 292.303(a). Under the blended-market method, energy costs are assumed to be the variable costs of the utility’s next-planned generation unit in its resource procurement plan (the “proxy unit”), while capacity costs are set at the estimated fixed costs of that unit. See Ex. VS-7 (Edison Electric Institute, PURPA: Making the Sequel Better than the Original 9-10 (Dec. 2006)) [hereinafter “EEI”]. In Montana, the costs of short-term market purchases are used to establish avoided costs in the years before the proxy unit is expected to enter service. Ex. VS-1 (Beach Direct), at 11. This method, which this Commission has consistently applied in establishing the standard rate for small QFs, see Order No. 7500, ¶ 34 (discussing Order No. 7199d), assumes that the QF allows the utility to delay its next planned generating unit, and estimates avoided costs based on the projected capacity and energy costs of that next planned unit, Ex. VS-1 (Beach Direct), at 11. In lieu of this accepted and straight-forward method, NorthWestern proposes the “peaker” method that requires: (1) production cost modeling to establish the avoided energy costs; and (2) an “exceedence” methodology to establish the avoided capacity costs that gives QFs capacity credit only for the output that they can exceed in 85% of the top 10% of on-peak load hours. Id. at 17, 21-23; Ex. NWE-4 (Pre-filed Direct Testimony of John B. Bushnell), at 9-10.

Contrary to NorthWestern’s suggestion, the problem with NorthWestern’s peaker method is not that the intervenors do not understand it. See NorthWestern Energy’s Post-Hearing Initial Brief (“NWE Br.”), at 7 (stating that, “[i]n favoring a more simplistic approach, [Intervenors] admit that they have failed to learn to properly use PowerSimm”). While both the blended-market method and the peaker method are theoretically capable of deriving accurate avoided

costs, the peaker method is inappropriate for establishing NorthWestern’s QF purchase rates for two primary reasons.

First, the peaker method is based on an “assumption that the utility’s system is operating at an optimal point,” and does not have needs for both energy and capacity. Ex. VS-1 (Beach Direct), at 18; Ex. VS-7 (EEI), at 12. For these utilities that are operating optimally, incremental capacity needs can be met and overall system costs may be reduced by a low-cost peaker unit that only provides capacity, such as a simple cycle combustion turbine (“SCCT”). Ex. VS-1 (Beach Direct), at 18; see also Ex. VS-7 (EEI), at 10. Here, in contrast, it is undisputed that NorthWestern is not operating optimally and has significant capacity and energy deficiencies. See Ex. VS-1 (Beach Direct), at 18; NorthWestern, 2015 Electricity Supply Resource Procurement Plan (“NWE RPP”), at 1-11 (Mar. 31, 2016); Tr. Vol. 1, 34:9–40:18 (discussing administrative notice of NWE RPP). Accordingly, NorthWestern has proposed a resource plan that addresses its current resource inadequacy by adding Internal Combustion Engine (“ICE”) units and a combined cycle unit over a decade in order to reach resource adequacy, before adding an SCCT in 2028. Ex. VS-1 (Beach Direct), at 18; NWE RPP, at Table 1-2 (“EOP Resources”). NorthWestern nonetheless proposes to base its avoided costs today on its marginal energy costs plus the addition of an Aeroderivative SCCT unit, or “Aero”—the least cost resource identified to meet capacity needs in 2019. Ex. NWE-16 (Bushnell Rebuttal), at 17. But NWE does not plan to use the Aero unit to meet its resource needs for at least the next decade, see NWE RPP, at 1-4–1-5, and thus the Aero unit is not a reasonable basis for the utility’s avoided costs today.

Second, production cost modeling associated with NorthWestern’s peaker method—using the PowerSimm model—is a complex exercise under the exclusive control of

NorthWestern and its consultant. According to the Edison Electric Institute, because of this complexity, “[a]voided cost calculations [using the peaker method] become a ‘black box’ to regulators, QFs, consumer groups and other market participants without access to or knowledge of the necessary models.” Ex. VS-7 (EEI), at 12. These problems are compounded in this case by NorthWestern’s numerous decisions, as discussed below, to use questionable or inappropriate assumptions related to fuel costs and the value of QF energy during “long” conditions. See infra Part III.A.2. As FLS Energy witness Roger Schiffman testified, “[i]n its testimony and analysis, NorthWestern provides only a cursory description of its approach, including the PowerSimm modeling, so the inner workings of the model are not at all transparent.” Ex. FLS-2 (Schiffman Rebuttal), at 13. The Edison Electric Institute acknowledged that “[t]his lack of transparency and inability to verify the model’s inputs, structure and results could engender distrust of the utility’s estimates.” VS-7 (EEI), at 12. Where only NorthWestern and its consultants have access to the model, Intervenors and this Commission must rely on NorthWestern to explain its assumptions, test the model’s sensitivity to those assumptions, and execute appropriate modifications to generate new estimates of avoided energy costs. The problem of such heavy reliance on the self-interested regulated party can be resolved by the use of the blended-market method, which generates similar results to the peaker method when both are properly applied, while avoiding troublesome and opaque production cost modeling.² See Ex. VS-1 (Beach Direct), at 4, 17-18, 27-28.

NorthWestern critiques the blended-market method because it assumes—incorrectly, according to NorthWestern—that QF generation may delay or avoid the costs of NorthWestern’s

² The fact that the blended market method and the peaker method generate similar avoided cost estimates when properly applied to NorthWestern’s system suggests that the blended-market method, while more “simplistic,” NWE Br. at 7, is no less accurate.

next-planned resources. See Ex. NWE-16 (JBB Rebuttal), at 15. NorthWestern’s 2015 Resource Procurement Plan identifies as its next generation units several internal combustion engines, or “ICE” units, to come online in 2019. See id. at 16; Ex. NWE-4 (JBB Direct), at 9. According to NorthWestern, solar QFs “do not provide any significant capacity contribution during peak load hours,” and therefore cannot avoid such ICE units. Ex. NWE-16 (JBB Rebuttal), at 15. NorthWestern’s critique is misplaced because it focuses unreasonably on the utility’s capacity needs in just a few peak-load hours, even though Northwestern is significantly capacity deficient during a much larger set of hours, see VS-1 (Beach Direct) at 8-9, 18; NWE RPP at 1-2–1-4, and because it improperly discounts solar QFs’ capacity contribution during NorthWestern’s on-peak period despite that every other method for calculating solar value yields a much higher capacity contribution, see infra at Part III.B. Further, three MW solar projects offer significant advantages to NorthWestern’s capacity-deficient system, because they can be installed much more quickly than traditional utility capacity. Ex. VS-1 (Beach Direct), at 16. PURPA regulations explicitly require that avoided cost rates for QFs account for “the smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities.” 18 C.F.R. § 292.304(e)(2)(vii). For a utility such as NorthWestern that is capacity deficient, “QF development can match more closely the utility’s future load growth and future capacity needs, with fewer shortages or surpluses of capacity.” Ex. VS-1 (Beach Direct), at 16. Accordingly, NorthWestern’s critique of the blended-market method on grounds that solar QFs cannot actually delay NorthWestern’s capacity build-out ignores the capacity benefits of solar QFs and should be rejected.

The appropriateness of the blended-market method is further demonstrated by the fact that applying the blended-market method to NorthWestern’s system generates an avoided cost

estimate similar to NorthWestern's current avoided cost rates. See id. at 15. Mr. Beach calculated NorthWestern's avoided costs using the next-proposed resource additions from NorthWestern's 2015 Resource Procurement Plan (three gas-fired ICE units) as the proxy resource. Id. at 11-12. In addition, Mr. Beach's calculation updated natural gas price forecasts, adjusted avoided market prices in the initial years when solar QFs avoid market-purchased power, and assumed a conservative market value for environmental attributes in years prior to 2022. Id. at 12-13. The resulting average solar QF purchase prices are roughly \$61/MWhr when environmental attributes are not transferred to NorthWestern (an 8% decrease from current QF-1 Tariff rates), and \$70/MWhr when environmental attributes are transferred (a 7% increase from current rates). Id. at 15. Such rates based on the blended-market method previously used by this Commission reflect NorthWestern's full avoided costs and are just, reasonable, and non-discriminatory, and therefore should form the basis for the Commission's update to the QF-1 Tariff. See 16 U.S.C. § 824a-3(a), (b), & (d); 18 C.F.R. § 292.304(a)(1).

Because the blended-market method is appropriate and avoids unnecessary "black box" modeling, the Commission should continue to apply it to determine QF purchase rates.

III. APPROPRIATE APPLICATION OF THE "PEAKER" METHOD ALSO AFFIRMS CURRENT STANDARD RATES

While the Commission should set NorthWestern's avoided costs in this docket based on the blended-market method as described above, the peaker method, when properly applied, generates similar results. Using appropriate assumptions for future natural gas prices, avoided energy costs in NorthWestern's "long" conditions, and the capacity value of solar, the peaker method yields solar QF rates of \$62 to \$73/MWhr. Ex. VS-1 (Beach Direct), at 27-28. In proposing dramatically lower rates, NorthWestern unreasonably evaluated both energy and capacity costs.

A. NorthWestern Employed Unreasonable Assumptions in its Modeling of Avoided Energy Costs

The Commission should reject NorthWestern’s proposed avoided energy cost rate because it relies on unreasonable assumptions that are fundamental to the modeled output. In particular, NorthWestern selectively identified natural gas price forecasts that reflect low future gas prices, while other forecasts project higher prices. NorthWestern also assigned a value of zero to QF-generated energy in conditions when NorthWestern is long on resources, even while it acknowledged that it sells such energy at market prices in these conditions and recognizes such value for its own resources.

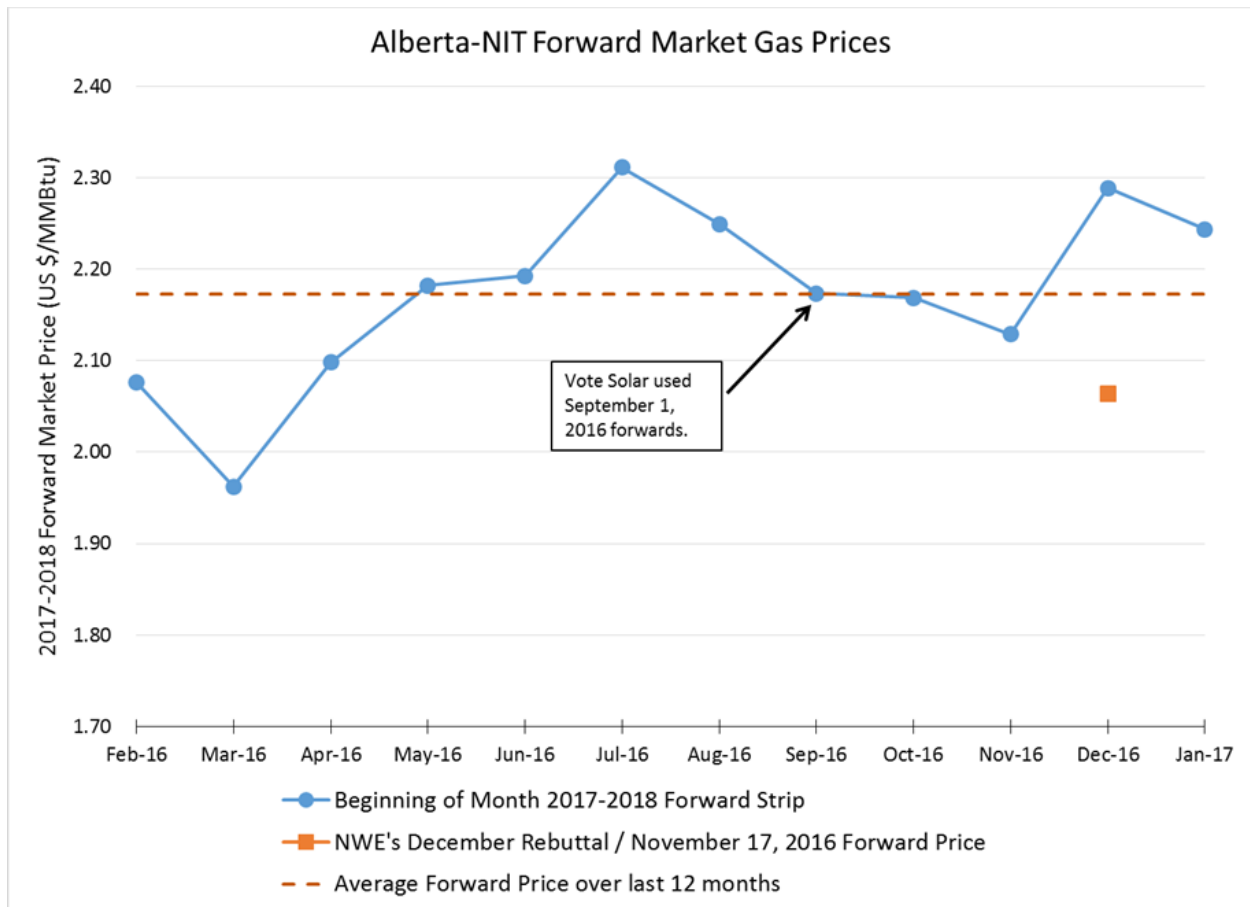
1. NorthWestern Selectively Relies on Unrepresentative Natural Gas Prices to Deflate Avoided Costs

While NorthWestern claims that “[n]atural gas and electricity price forecasts are the single largest determinants of avoided cost[.]” NWE Br. at 8, the evidence shows that NorthWestern cherry-picked natural gas forward prices for purposes of modeling avoided energy costs that are not representative of current forecasts, which are significantly higher. As a result, the avoided energy cost portion of NorthWestern’s proposed standard purchase rates are unacceptably low.

NorthWestern contends that the most appropriate natural gas price assumptions for purposes of calculating avoided energy costs should be based on the “most current” forecasts. See Tr. Vol. II 350:1-2; id. at 350:3-4 (NorthWestern witness Luke Hansen testifying that “it’s inappropriate to use anything other than the current information” for natural gas prices). Nevertheless, NorthWestern continues to suggest that natural gas forward prices as of November 17, 2016 should form the basis for the Commission’s avoided costs calculation. NWE Br. at 8. NorthWestern provides no support for its reliance on November 17 prices, which are neither the

“most current” information nor representative of natural gas prices. In fact, NorthWestern witness Luke Hansen could not justify his reliance on low-point prices from November 17, rather than more current prices on December 1, in preparing his December 12, 2016 rebuttal testimony. See Tr. Vol. II 349:13–350:22; see also Tr. Vol. II 348:4-14 (Mr. Hansen stating that it takes up to five days to run the PowerSimm model, and confirming that nearly a month elapsed between November 17, 2016 and the filing of Mr. Hansen’s rebuttal testimony). Indeed, Mr. Hansen checked forward market prices on December 9, 2016, three days before filing his testimony, but he testified that he could not recall whether they were higher or lower than the November 17 prices utilized in his testimony. Tr. Vol. II 348:22–349:6.

NorthWestern’s reliance on unrepresentative data for this key assumption is unsupported. As shown in Vote Solar Exhibit 5 (reproduced below), forward market prices on November 17, 2016, the prices used by NorthWestern, represent the lowest point in the natural gas forwards market at any time since NorthWestern commenced this docket.



Ex. VS-5 (blue circle data points depict first-of-the-month forward strip prices, averaged for 2017 and 2018; orange square depicts NorthWestern’s November 17, 2016 forward prices, averaged for 2017, 2018, and 2019).

In contrast, to calculate avoided energy costs, Vote Solar relied on forward market prices that reflect the 12-month average first-of-the-month forward market price. See Ex. VS-5; see also Vote Solar Response to Data Request PSC-028, “Updated MT Gas Forecast. xlsx”.

Accordingly, Vote Solar’s forward market prices are more representative and reliable than those used by NorthWestern.

NorthWestern attempts to dismiss Vote Solar’s calculations by accusing Vote Solar of “blatant manipulation” of natural gas forecasts because it calculated natural gas costs based on two years of forwards, rather than the three years of forwards selected by NorthWestern. NWE Br. at 9. Far from manipulating the data, Vote Solar presented its Exhibit 4 for the purpose of

demonstrating the sizable impact of NorthWestern’s decision to apply EIA’s escalation after three years, rather than two years, of forwards. See Ex. VS-4; Tr. Vol. II 346:13-20.

As shown, every decision NorthWestern made with respect to natural gas prices had the effect of driving its avoided energy costs—and thus its proposed QF-1 purchase rates—downward. The Commission should reject such selective use of the data, and instead utilize current and representative forecasts for this key assumption.

2. NorthWestern Proposes Unreasonable Avoided Energy Cost Rates During Periods When Its Generation Exceeds Retail Load

NorthWestern’s avoided energy cost estimates also fail to reflect the actual benefit to the company of QF generation during periods when NorthWestern generates energy in excess of its retail load. Both when NorthWestern’s variable cost of generation exceeds market energy prices (the “Long 2” condition) and when NorthWestern’s variable generation costs are less than market prices (the “Long 1” condition), the avoided energy costs should be equal to the value NorthWestern actually garners from selling QF-generated energy on the market. In setting NorthWestern’s avoided energy costs at less-than-market under such conditions, NorthWestern seeks to gain a windfall for itself while failing to compensate the QF for the value of the energy it generates. As this Commission has previously held, NorthWestern’s approach fails to appropriately compensate QFs and treats them in a discriminatory manner in violation of PURPA, 18 C.F.R. § 292.304(a)(1)(ii). See Order No. 7436d ¶ 38, In the Matter of Greycliff Wind Prime, Dkt. No. D2015.8.64 (Sept. 13, 2016) (rejecting NorthWestern’s position on long conditions); Order No. 7505b ¶¶ 73-75, In the Matter of Crazy Mtn. Wind, Dkt. No. D2016.7.56 (rejecting NorthWestern’s position on the Long-2 condition); but see id. ¶¶ 79, 84 (upholding NorthWestern’s position on the Long-1 position).

In response to a Commission data request, NorthWestern re-modeled avoided energy cost rates assuming market price for QF generation during all long conditions. See NWE Response to Data Request PSC-013. NorthWestern’s re-calculated avoided energy cost rates should form the starting point for the Commission’s avoided energy cost calculations.

a. Long-2 Condition

As the Commission properly held in both the Greycliff Wind and Crazy Mountain Wind proceedings, the value of QF generation in the Long-2 condition, when the market price is less than the operating cost of all of NorthWestern’s dispatchable units, is the value that NorthWestern actually derives from selling QF generation in the market. See Order No. 7436d ¶ 38, In the Matter of Greycliff Wind Prime, Dkt. No. D2015.8.64; Order No. 7505b ¶¶ 74, 84, In the Matter of Crazy Mtn. Wind, Dkt. No. D2016.7.56.

In setting the avoided energy costs in the Long-2 condition at zero, NorthWestern does not claim that it receives no value for QF generation when NorthWestern’s supply exceeds customer demand. To the contrary, NorthWestern concedes that, in these circumstances, it sells excess generation at the market price. See NWE Response to Data Request VS-028a (“NorthWestern does sell excess power in Long-2 situations.”).

Instead, NorthWestern’s sole justification for its proposal to retain the value of QF generation during these periods without compensating the QF is its erroneous interpretation of FERC Order No. 69. See id. (“Energy is valued at zero during Long-2 situations because of Order 69.”); NWE Br. at 13-14. Order No. 69 states, “while the utility is legally obligated to purchase any energy or capacity provided by a qualifying facility, the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load.” 45 Fed. Reg. at 12,219. The Commission has already rejected NorthWestern’s interpretation of

Order No. 69 in prior proceedings, and should do so again in this docket. As the Commission explained in Greycliff Wind:

NorthWestern's arguments are not persuasive. First, with respect to NorthWestern's citation to FERC's Order No. 69, the Commission is not convinced that the referenced language necessarily implies that avoided costs must be zero in long periods. The referenced language must be considered along with other statements in Order No. 69. For example, in discussing its adopted definition of "avoided cost" and the meaning of the term "incremental cost," FERC states: "At any given time, an economically dispatched utility can avoid operating its highest-cost units as a result of making a purchase from a qualifying facility." 45 Fed Reg. [12,214,] 12,216 (Feb. 25, 1980) (emphasis added). Thus, a more comprehensive reading of Order No. 69 suggests a non-zero avoided cost "at any given time" unless the utility's highest-cost economically-dispatched generating unit has a variable cost of zero or incremental energy from QFs causes the utility to shut down all of its own generating units.

Order No. 7436e, In the Matter of Greycliff Wind Prime, Dkt. No. D2015.8.64 (Oct. 21, 2016).

Here, as in Greycliff Wind, "NorthWestern did not provide evidence showing that these conditions would occur, in certain periods, with purchases of [QF] energy." Id.

As the Commission has found, NorthWestern's proposal to value QF generation at zero under Long-2 conditions treats QFs differently than NorthWestern treats its own resources.

Order No. 7505b ¶¶ 73-75, In the Matter of Crazy Mtn. Wind, Dkt. No. D2016.7.56.

Accordingly, NorthWestern's proposal is discriminatory and violates PURPA. Id. ¶¶ 73-75, 84.

In addition, such an approach is unlawful because it fails to compensate QFs for the value they provide to NorthWestern and its customers in the form of energy that NorthWestern sells at market prices. See 18 C.F.R. § 292.303(a) (requiring purchase of "any energy ... which is made available from a qualifying facility"). The Commission should therefore reject NorthWestern's proposal to set the value of QF production at zero during Long-2 conditions, and instead set the value as the market price for selling excess energy in such conditions.

b. Long-1 Condition

For similar reasons, the Commission should also reject NorthWestern's proposed adjustment to avoided energy costs in the Long-1 condition, when NorthWestern's variable generation costs are less than market prices.

NorthWestern's proposal to set avoided energy cost rates at the variable cost of the highest avoidable resource in Long-1 conditions is unsupported. See Ex. NWE-6 (Direct Testimony of Luke Hansen), at 6 (describing avoided cost energy rates paid in Long-1 condition). NorthWestern's position is based on the fiction that NorthWestern would reduce output from its highest avoidable resource when generation exceeds load even if such resources are economically dispatched. See id.; Ex. FLS-2 (Schiffman Rebuttal), at 15. This is nonsensical and it does not reflect the manner in which NorthWestern actually operates its system. When NorthWestern's supply exceeds demand and its generation is economically dispatched, NorthWestern sells excess power at market prices. See NWE Response to Data Request PSC-012a ("NorthWestern will sell excess power if the market price less transmission is above the variable cost of a generating resource."); see also NWE Response to Data Request VS-028a; Tr. Vol. II at 221:18–222:1. Accordingly, NorthWestern and its customers gain value from QF generation in this scenario that equals the market price at which QF energy is sold. Compensating QFs at the market price in these circumstances leaves other ratepayers indifferent, which is the goal of avoided cost pricing. See Tr. Vol. II 240:16–241:17. In contrast, NorthWestern's position would secure a windfall to the utility at the expense of QFs, see Ex. FLS-2 (Schiffman Rebuttal), at 14, unlawfully failing to properly compensate QFs for energy produced, see 18 C.F.R. § 292.303(a); 18 C.F.R. § 292.304(a).

The fact that NorthWestern valued projected energy output from its expansion of the Ryan Dam facility in the same manner does not make NorthWestern's Long-1 approach non-discriminatory. See Order No. 7505b ¶ 77, In the Matter of Crazy Mtn. Wind, Dkt. No. D2016.7.56. While NorthWestern's modeling of Ryan Dam may place that resource on similar footing to QFs with respect to theoretical procurement decisions, NorthWestern's resources (including Ryan Dam) are still treated fundamentally differently with respect to their net operating costs and economic benefits to NorthWestern and its customers. This is because NorthWestern does not suggest that it will curtail sales of excess generation from its own resources when market price exceeds its variable generating costs. See Tr. Vol. I 111:17-112:14. Indeed, doing so would violate principles of economic dispatch. See FLS-2 (Schiffman Rebuttal), at 15. Instead, NorthWestern will continue to gain value from energy sales from its own resources equal to the market sales price, while QFs will be paid a lesser amount under the same conditions. Such treatment violates PURPA because it discriminates against QFs and fails to "leave[] customers economically indifferent to purchasing [QF] power compared to NorthWestern's" own resources. Order No. 7505b ¶ 40, In the Matter of Crazy Mtn. Wind, Dkt. No. D2016.7.56. Accordingly, as with energy cost rates in the Long-2 condition, rates in the Long-1 condition should reflect the market price.

3. The Commission Should Maintain Avoided Energy Cost Adjustments that Reflect State and Federal Environmental Regulation

Consistent with NorthWestern's efforts to derive the lowest possible standard rate for QF purchases, NorthWestern has reversed its proposal to establish standard rates for the transfer of renewable energy credits ("RECs") from QFs to NorthWestern. See NWE Br. at 14. This Commission should approve NorthWestern's original proposal to establish standard rates that accommodate the transfer of RECs, while allowing QFs the option to retain them. See Ex.

NWE-4 (Bushnell Direct), at 4. Further, the record before the Commission supports a carbon-price adjustment to avoided energy costs beginning in 2022, consistent with NorthWestern's 2015 Resource Procurement Plan.

Adjustments to avoided energy costs when RECs are transferred should appropriately recognize the increasing value of those RECs based on current and future environmental regulation. One source of such increases is the regulation of power-plant carbon dioxide emissions under the federal Clean Power Plan ("CPP"). The CPP significantly restricts future carbon dioxide emissions, thus raising the value of RECs that may administratively offset those emissions. Although the CPP is currently on hold and may be replaced, the Commission has previously recognized that it may be difficult for federal regulators "to prevent carbon-dioxide from being regulable altogether." Order No. 7505b, ¶ 62, In the Matter of Crazy Mtn. Wind, Dkt. No. D2016.7.56.

Moreover, the CPP is just one factor contributing to the value of RECs. As Mr. Beach testified, the value of RECs is "also driven very substantially in the [W]est by state regulation and what states are doing with their [renewable portfolio standard ("RPS")] programs ... [W]e're seeing a second wave of RPS programs in the [W]est where states are increasing their requirements, most notably California is going to 50 percent renewables by 2030, Oregon also increased their RPS recently, Arizona is talking about increasing their RPS requirements because they have largely been met with solar in Arizona. So if there is another round of renewable development related to RPS programs in the [W]est, that's going to increase the value of RECs." Tr. Vol. I at 173:24–174:19. The value of RECs will also increase due to growing demand for green power from both major corporate customers and from the U.S. military. Ex. VS-1 (Beach Direct), at 13. The Commission's decision in Crazy Mountain Wind to delay the onset of a

carbon adjustment from 2022 from 2025 considered only the CPP’s influence on carbon pricing, while failing to acknowledge these state regulatory drivers. See Order No. 7505b ¶¶ 60-64, In the Matter of Crazy Mtn. Wind, Dkt. No. D2016.7.56. In this docket, the Commission should recognize the influence of near-term state regulatory drivers and corporate and military demand for clean energy in identifying the onset date of the carbon-price adjustment, and retain the 2022 onset date identified in NorthWestern’s Resource Procurement Plan.

Further, while NorthWestern now proposes to eliminate the option for QFs to transfer RECs at standard rates, NWE Br. at 14, the Commission previously recognized that doing so does not obviate the need to identify a price of energy reflecting appropriate carbon costs for purposes of establishing avoided costs, see Order No. 7505b ¶ 59, In the Matter of Crazy Mtn. Wind, Dkt. No. D2016.7.56 (“The conveyance of environmental attributes could be dealt with separately, and cumulatively, outside of this rate-setting process . . . , but that would not obviate the need to forecast, in a non-discriminatory way, the price for energy.”) (citing 18 C.F.R. § 292.304(a)(1)(ii), (d)(2)). In any event, NorthWestern’s recognition that it requires RECs to meet its own RPS requirements, Tr. Vol. II at 351:14-20, combined with its proposal to acquire a large carbon-emitting resource in 2025, Order No. 7505b ¶ 57, In the Matter of Crazy Mtn. Wind, Dkt. No. D2016.7.56, militate against NorthWestern’s new proposal to require QFs to retain RECs associated with their projects. The Commission should establish standard rates with and without the transfer of RECs and, in valuing both RECs and the price of energy generally, should retain the Resource Procurement Plan’s 2022 carbon-adjustment onset.

B. The Commission Should Reject NorthWestern’s Attempt to Drastically Undervalue Solar Capacity

NorthWestern’s proposed “peaker” method also dramatically underestimates the capacity value of solar QF generation, assigning value based on only 9.6% of the QF’s nameplate

capacity. See Ex. NWE-16 (Bushnell Rebuttal), at 18; NWE Br. at 11. NorthWestern’s method credits a solar QF only for the output that it exceeds 85% of the time during the hours with the top 10% of on-peak loads, Ex. NWE-4 (Bushnell Direct), at 10, even though NorthWestern can identify no other regulatory body that applies such a high exceedence threshold, see Tr. Vol. II at 311:6-17. NorthWestern’s proposal effectively values output from solar QFs only during the 15% of the top 10% of on-peak hours when solar output is the lowest, unreasonably assigning zero value to the substantially higher solar QF output at all other times, including many high-load, on-peak summer hours. Thus, even while NorthWestern concedes that QF resources with output during heavy load periods may “help NorthWestern achieve minimal resource adequacy by 2025 and could potentially provide a contribution to planning reserve margins by the end of the study period,” NWE Response to Data Request PSC-014a, NorthWestern unreasonably focuses on just a small set of on-peak hours in its proposed compensation for those resources.

NorthWestern first seeks to justify its proposed capacity contribution for solar resources based on its continued insistence that NorthWestern is “a winter peaking utility.” NWE Br. at 10. However, NorthWestern’s testimony makes clear that NorthWestern’s peak-hour loads have occurred during the summer months in six of the past 14 years. Ex. NWE-16 (Bushnell Rebuttal), at 5 (Table 1). Further, while NorthWestern focuses on the fact that its peak load hours have exceeded 1,200 MW only in the winter months over those years, id. at 4-5, NorthWestern concedes that peak load hours exceeding 1,200 MW account for just nine hours over ten years, NWE Response to Data Request VS-040b. In contrast with this absolute peak load that occurs during relatively few hours in the winter, since 2012, over 70% of the top 10% of on-peak hours have occurred during the summer. Ex. VS-1 (Beach Direct), at 25 (Fig. 3). In 2014 and 2015, approximately 70% of the top 10% of on-peak hours occurred in the summer

months. Id. Thus, while NorthWestern’s system experiences occasional, short-term spikes in demand in the winter months, the more sustained periods of high demand are experienced in the summer. See Tr. Vol. I 190:15–191:12. In addition, the trend in recent years has been toward an increasing percentage of high load hours in the summer. See Ex. VS-1 (Beach Direct), at 25 (Fig. 3). Further, NorthWestern’s 2015 Resource Procurement Plan projects greater average annual growth in summer peak demand than in winter peak demand, such that the absolute peak loads in summer and winter will be roughly equal by 2035. See NWE RPP, at 2-2. By focusing only on the output of solar QF resources that is exceeded 85% of the time in the top 10% of on-peak hours, NorthWestern unreasonably discredits the significant value of solar QF generation to NorthWestern’s system.

Moreover, NorthWestern bases its claimed capacity needs solely on its retail load. However, as Mr. Beach testified, peak-hour demand within NorthWestern’s balancing area is higher in the summer. Ex. VS-1 (Beach Direct), at 24. The Commission has already critiqued NorthWestern’s capacity planning for its focus on system-specific loads:

NorthWestern identified capacity shortages on a region-wide basis by 2021 as the problem, but a utility-specific measure of capacity need as the yardstick for the solution. This is incongruous. NorthWestern’s peak load is not coincident with the region’s peak load or the interconnection’s peak load. There will be times when resources owned by other utilities are not being used to serve other utilities’ peaks, at the time when NorthWestern’s retail load does peak. The same situation is true in reverse. NorthWestern’s resource adequacy should be measured by its retail load’s position relative to the region’s or interconnection’s peak demand, while taking into consideration import limitations. Measuring resource adequacy needs otherwise will systematically overstate the utility’s needs, and it could lead to a substantial overbuild if not corrected.

Mont. Public Service Commission Comments in Response to NorthWestern Energy’s 2015 Electricity Supply Procurement Plan, at ¶ 24, Dkt. No. N2015.11.91 (Feb. 2, 2017). For this

same reason, NorthWestern’s exclusive focus on system-specific winter peak demand to discount the capacity value of solar resources is unreasonable.

Although NorthWestern attempted to justify its proposed exceedence threshold because “it seemed like 85 percent exceedence was kind of the standard,” Tr. Vol. I 70:17-18, in fact, the one and only entity that used an 85% exceedence threshold to establish capacity values—the Southwest Power Pool (“SPP”)—recently abandoned it in favor of a more reasonable 60% threshold, see Order No. 7505b ¶ 97, In the Matter of Crazy Mtn. Wind, Dkt. No. D2016.7.56. In contrast with NorthWestern’s extreme proposal, “many control area operators assess the capacity contribution of solar resources based on their average capacity factor over a designated set of on-peak hours,” effectively applying a 50% exceedence threshold. Ex. VS-1 (Beach Direct), at 22. Applying this threshold to all hours in NorthWestern’s on-peak period yields a capacity contribution of 38%—effectively the capacity contribution under the current QF-1 Tariff. Id. at 21-22. Applying a 50% threshold to the top 10% of NorthWestern’s on-peak hours yields an even higher capacity contribution of 51%. Id.

Other reasonable exceedence methodologies affirm the significant capacity contribution of solar resources to NorthWestern’s system. For example, properly applying the SPP method in this case—i.e., applying the 60% exceedence threshold for output in the top 10% of on-peak hours—yields a solar capacity value of 39% of nameplate capacity. Id. at 23 (Table 6). NorthWestern calculated a different capacity value only by misapplying the SPP method to focus solely on the single annual peak-load hour. NorthWestern supports its calculation by relying on an inaccurate reading of the SPP Planning Criteria Workbook, Ex. NWE-16 (Bushnell Rebuttal), at 11 and Ex. JBB-5. See NWE Response to Data Request VS-034b; Tr. Vol. II 314:12-17. Those criteria state that the solar and wind capacity contributions “shall be determined on a

monthly basis.” Id. Ex. NWE-16, at Ex. JBB-5 ¶ 7. The method requires one to first “[s]elect the hourly net power output values occurring during the top 3% of load hours ... for each month of each year,” id. ¶ 7(b), and apply the 60% exceedance threshold to that data set, id. ¶ 7(c). Thus, “the capacity of the facility will be the MW value in the 65th data point.” Id. This is the calculation Mr. Beach performed for NorthWestern’s on-peak months of December, January, February, July, and August, resulting in the 39% capacity figure. Ex. VS-1 (Beach Direct), at 23-24. However, NorthWestern chose to proceed to the next, optional step of the criteria, which provides that “[a] seasonal or annual net capability may be determined by selecting the appropriate monthly MW values corresponding to the Load Serving Entity’s peak load month of the season of interest[.]” Ex. NWE-16 (JBB Rebuttal), Ex. JBB-5, ¶ 7(d) (emphasis added). NWE conceded that its decision to focus on QF output only in a single month was based solely on its interpretation of the word “may” to mean “must.” Tr. Vol. II 318:6-10. Accordingly, contradicting its own proposal to focus on the on-peak period in applying its recommended 85% exceedance threshold, NorthWestern would apply the SPP criteria to exclude any consideration of solar output in four out of its five peak-load months. Tr. Vol. II 319:10-16. NWE’s strained and self-serving interpretation of the SPP method should be rejected.³

Reinforcing these more reasonable estimates of solar resources’ capacity contribution is the Northwest Power and Conservation Council’s Seventh Northwest Conservation and Electric Power Plan (“Seventh Power Plan”). This Commission has previously relied on a weighted average of the Seventh Power Plan’s “Associated System Capacity Contribution” for regional wind resources. Order No. 7505b ¶ 100, In the Matter of Crazy Mtn. Wind, Dkt. No.

³ In Response to Data Request PSC-035, Mr. Beach provided additional support for 60% and 70% exceedance thresholds over a designated set of peak hours. Vote Solar Response to Data Request PSC-035.

D2016.7.56 (citing Ch. 11, pp. 23-25).⁴ The Seventh Power Plan assigns an annual average capacity value for Solar PV of 57.5%. Ex. VS-6 (Seventh Power Plan, Ch. 11), at 11-25, Table 11-8. The weighted average capacity value based on three winter months and two summer months—reflective of NorthWestern’s on-peak period—is 48%. See id.; see also infra fn.4. The Seventh Power Plan therefore recognizes a solar capacity value that is even higher than the values proposed by Vote Solar or derived through proper application of the SPP method.

NorthWestern’s proposal for a dramatically lower solar capacity value of 9.6% is additionally inappropriate because it assumes that the projects are developed in a vacuum. In fact, the evidence demonstrates significant synergies associated with combining Montana’s winter-peaking wind resource and summer-peaking solar resource. See Ex. VS-1 (Beach Direct), at 10 (Fig. 1). As Mr. Beach explained, “Montana already has significant wind resources, and they peak in the winter. The solar resources peak in the summer, and they’re real synergies. ... And combined the two resources are even more valuable than if you assess them individually.” Tr. Vol. I 182:13-20. By isolating its analyses of wind and solar resources and assigning capacity value only for a very small number of peak-load hours, NorthWestern under-compensates each type of resource even while it reaps the combined benefits of the two.

In sum, this Commission may reasonably assign a capacity value to solar QFs that reflects: (1) their average capacity factor over all on-peak hours (38%) or just the top 10% of hours over NorthWestern’s on-peak period (51%); (2) the SPP-derived capacity value over the on-peak period (39%); or (3) a weighted average of the Seventh Power Plan’s associated system capacity contribution for solar resources (48%). Whichever method the Commission employs, it

⁴ The Commission appears to have relied on an approximate weighted average of 0.03 for three winter months (Q1) and 0.11 for two summer months (Q3). See Order No. 7505b, ¶ 100, In the Matter of Crazy Mtn. Wind, Dkt. No. D2016.7.56.

should reject NorthWestern's proposed 9.6% capacity value based on an extreme and unjustified 85% exceedence threshold.⁵

IV. THE COMMISSION SHOULD NOT MODIFY QF CONTRACT LENGTHS IN THIS DOCKET

Consistent with the Montana Constitution and this Commission's procedural rules, this Commission should not address contract length in this proceeding. Although this Commission has broad authority with respect to "supervision, regulation, and control of ... public utilities," Mont. Code Ann. § 69-3-102, and may, upon proper notice and procedure, adopt rules or standards governing QF contracts, it would be improper for this Commission to address contract length in this proceeding when proper notice and procedure has not been provided on this issue.

The Montana Constitution protects the right of the public to be afforded a "reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision." Mont. Const. Art. II, § 8. Similarly, this Commission's procedural rules provide for intervention in proceedings before the Commission of "[a]ny person interested in and directly affected by the subject matter of any hearing or investigation pending before the commission." Mont. Admin. R. § 38.2.2401. Because NorthWestern's application for approval of a new Schedule QF-1 tariff and the Notice of Application and Intervention Deadline did not propose any reduction in contract lengths, see generally, Rate Application; see Notice of Application & Intervention Deadline (May 13, 2016), interested persons were not on notice that contract lengths would be an issue in this docket until the Commission requested additional issue testimony on this subject,

⁵ NorthWestern's suggestion that its "measure-and-pay" proposal somehow negates its undervaluation of solar capacity ignores the fact that the capacity value assigned to solar QF resources is a critical component of the contracted price for capacity, regardless of whether solar QFs are paid that price for their actual output. NWE Br. at 11. Furthermore, NorthWestern's "measure-and-pay" proposal is not novel. Under the existing QF-1 Tariff and Vote Solar's proposal, QFs would be paid based on their actual output. The issue in this proceeding is the amount of those payments.

see Notice of Additional Issues (Oct. 26, 2016). Indeed, the issue of contract length was not identified in this proceeding until more than four months after the deadline to intervene, see Notice of Application & Intervention Deadline, at 1 (May 13, 2016) (setting intervention deadline for June 10, 2016), at which time any persons seeking late intervention would be required to satisfy the higher bar to show good cause for late intervention, see Mont. Admin. R. § 38.2.2403. Given the lack of timely notice on the contract length issue, interested persons that could be affected by an order on this issue were effectively precluded from submitting testimony or otherwise participating in this proceeding in violation of both the Montana Constitution and the Commission’s procedural rules. Under these circumstances, the Commission should refrain from addressing contract length in this proceeding.

In addition, the Commission should not address contract length in this proceeding because the record provides an inadequate basis on which to determine a contract length that both conforms with PURPA’s efforts to “encourage ... small power production,” 16 U.S.C. § 824a-3(a), and with Montana law encouraging “long-term contracts ... to enhance the economic feasibility of qualifying small power production facilities,” Mont. Code. Ann. § 69-3-604(2). NorthWestern’s main support for a ten-year contract length is the testimony of Bleau LaFave emphasizing forecast error risks. See Ex. NWE-9 (Additional Issues Testimony of Bleau LaFave), at 4-5; see also NWE Br. at 9 (arguing that “shorter contract terms will reduce the risk of forecast error”). But NorthWestern’s reliance on the potential risks from forecast error is not an adequate basis on which to change QF contract length when the same risk applies to NorthWestern’s own generation resources. As Mr. Beach testified, NorthWestern’s argument that a QF contract cannot be modified once signed applies equally to the modification of the costs of utility-owned resources. See Ex. VS-1 (Beach Direct), at 31-32; see also Ex. VS-3

(Additional Issue Testimony of R. Thomas Beach), at 5 (“A utility would not build a new generating plant if it were only assured of cost recovery through rate base for a short period”); id. at 13-14 (discussing risks to ratepayers associated with the failure of utility-owned generation). Moreover, unlike QF resources, utility-owned resources have the added risk that their long-term capital costs could increase over time as additional capital expenditures may become necessary to continue to operate the units in compliance with changing laws and regulations. Ex. VS-1 (Beach Direct), at 31. Accordingly, “[i]f it is too uncertain and too risky to forecast avoided cost prices for 25 years, then by the same argument it would also be too risky to evaluate the merits of the alternatives to QF power ... or even to make decisions based on the long-term projections in an IRP.” Id. at 31-32. In addition, as Mr. Beach testified, long-term QF contracts do not present greater risk to ratepayers than shorter-term contracts. See Ex. VS-3 (Beach Additional Issue), at 10-14. To the contrary, long-term QF contracts can benefit ratepayers by providing a low and stable price that insulates ratepayers from the volatility of the market. Id. NorthWestern’s claims of forecast risk thus do not provide a sufficient basis for changing contract lengths in this proceeding.

Moreover, concerns over forecast error risks do not address the fundamental issue under PURPA and Montana law of whether a ten-year contract will help “to enhance the economic feasibility of qualifying small power production facilities.” Mont. Code. Ann. § 69-3-604(2). Other than Mr. LaFave’s speculation that “the landscape for project financing is changing” and his belief that QF developers do not have a “vested right to rely upon project finance,”⁶

⁶ Mr. LaFave’s contention is inconsistent with Order No. 69. See Order Setting Avoided Cost Input Parameters, at 19-20, N.C. Utils. Comm’n, Dkt. No. E-100 Sub-140 (Dec. 31, 2014) (“The FERC has made clear that its intention in Order No. 69 was to enable a QF to establish a fixed contract price for its energy and capacity at the outset of its obligation because fixed prices were necessary for an investor to be able to estimate with reasonable certainty the expected return on

NorthWestern does not provide any evidence on how a ten-year maximum contract will affect QF developers' access to project financing. See Ex. NWE-9 (LaFave Additional Issues), at 5-6; see also NWE Response to Data Request PSC-48b. Indeed, NorthWestern concedes that its survey of contract length in various states shows “no standardization” with respect to contract length. NWE Br. at 9 (citing Ex. NWE-10).⁷ Both Vote Solar and FLS Energy, however, submitted testimony showing the adverse effect of shorter contracts on QF financing and development. See Ex. VS-3 (Beach Additional Issue), at 3 (“Generally, the development of renewable QFs has only occurred when states have provided access to long-term contracts with terms of 15-30 years and fixed prices for all or a substantial portion of the contract terms, such that renewable QFs can secure long-term financing for the capital costs of their projects”); FLS-1 (Prefiled Additional Issues Testimony of Patrick McConnell), at 4 (explaining that contracts of “at least 15 years, and in most cases 20 years” are needed to secure financing).

Indeed, as Mr. Beach’s testimony shows, several states have recently declined to shorten their contract lengths based on concerns over QF access to project financing. See Ex. VS-3 (Beach Additional Issue), at 5-8 (surveying states). Of particular relevance here, North Carolina in 2014 declined to shorten its maximum contract length to ten years—the same length NorthWestern now proposes—based in large part on the importance of contract length to securing financing for QF projects. See Order Setting Avoided Cost Input Parameters, at 19-20,

potential investment, and therefore its financial feasibility, before beginning the construction of a facility.”); see also Order No. 69, 45 Fed. Reg. at 12,218.

⁷ NorthWestern also contends that Exhibit NWE-10 shows that “contract lengths of greater than 15 years often do not contain fixed price rates.” NWE Br. at 9. But even if it were true that contracts of more than 15 years “often” do not have fixed price rates (a claim that is debatable given that Exhibit NWE-10 appears to document a number of utilities with fixed price rates for contracts of 20 years or more, see Ex. NWE-10, at 1, 3, 6), this claim provides no support for the 10-year contract length advocated by NorthWestern and instead supports a fixed price rate for a minimum contract length of 15 years.

N.C. Utils. Comm'n, Dkt. No. E-100 Sub-140 (Dec. 31, 2014); see also Ex. VS-3 (Beach Additional Issues), at 6. Similarly, just last year, Wyoming declined to shorten its contract length from 20 to 3 years, recognizing the “chilling effect on QF development” that can take hold when contract lengths are too short. Memorandum Op., Findings of Fact, Decision & Order, In the Matter of the Application of Rocky Mtn. Power for Modification of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities, Dkt. No. 20000-481-EA-15 ¶¶ 25, 61, 2016 WL 3483204, at *4, 13 (June 23, 2016); see also Ex. VS-3 (Beach Additional Issue), at 4 (Fig. 1) (showing absence of QF contracts when Idaho had five-year contracts). This Commission should follow the lead of these other states and decline to change the current contract length when the record does not support NorthWestern’s arguments for a ten-year contract length.

V. THE COMMISSION SHOULD AFFORD DEFERENCE TO FERC’S DECLARATORY ORDER AND GRANT RELIEF TO QFS UNFAIRLY AFFECTED BY THE RATE SUSPENSION

Vote Solar supports FLS Energy and Cypress Creek Renewables’ motion for relief with respect to their legally enforceable obligations (“LEOs”) that were in effect at the time this Commission suspended the standard rate for QFs between 100 kW and three MW. See Joint Motion of FLS Energy Inc. & Cypress Creek Renewables, LLC for Relief from QF-1 Suspension (Feb. 10, 2017). Moreover, such relief should extend to any QF that held a legally enforceable obligation at the time of the rate suspension. In addition to the arguments raised by FLS Energy and Cypress Creek Renewables, Vote Solar offers the following arguments regarding the illegality of this Commission’s LEO standard and the importance of rectifying this issue in this proceeding.

As FERC recently found, the Commission’s LEO standard directly violates PURPA and its implementing regulations by requiring an executed interconnection agreement prior to the

creation of an LEO. See FLS Energy, Inc., 157 FERC ¶ 61,211, at ¶ 26 (Dec. 15, 2016) (“because the utility can, for example, delay the facilities study and the tendering to the QF of an executable interconnection agreement, the requirement of an executed interconnection agreement imposed by the Montana Commission is no different than requiring a utility-signed contract”) (emphasis added). PURPA regulations make clear that a LEO is separate and distinct from a contract. 18 C.F.R. § 292.304(e)(iii) (referencing “the terms of any contract or other legally enforceable obligation”); id. at (b)(5) (same). Congress has effectively ratified this distinction through its 2005 amendments to PURPA, which repeatedly employed the same “contract or obligation” language when discussing a utility’s obligation to sell or purchase energy under PURPA. See 16 U.S.C. § 824a-3(m)(1), (2), (5), & (6); cf. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 157 (2000) (holding that, after Food and Drug Administration had repeatedly stated that it lacked authority to regulate tobacco, Congress “effectively ratified” that interpretation by passing other tobacco legislation without giving the agency jurisdiction). As FERC has explained, this distinction is essential because it prevents a utility from controlling whether a LEO exists and thus “whether and when” a QF may avail itself of PURPA’s purchase requirement. FLS Energy, Inc., 157 FERC ¶ 61,211, ¶¶ 23-24; Order No. 69 (“Use of the term ‘legally enforceable obligation’ is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible facility merely by refusing to enter into a contract with the qualifying facility.”); see also FERC v. Mississippi, 456 U.S. at 750-51 (explaining that Congress intended PURPA to address the reluctance of utilities to purchase power from nontraditional facilities). Accordingly, LEO standards that give too much control to the utility, such as the requirement for an executed interconnection agreement, violate PURPA.

Nevertheless, NorthWestern contends that this Commission’s LEO standard is consistent with PURPA. See NWE’s Opposition to the Joint Motion of FLS Energy, Inc. & Cypress Creek Renewables, LLC for Relief from QF-1 Suspension, at 5 (Feb. 21, 2017). But, other than citing this Commission’s Whitehall Wind decision and a related state court decision that did not review the Commission’s current LEO standard, NorthWestern provides no support for this contention. See id. at 5-6 (citing Order No. 6444e ¶ 46, In the Matter of Whitehall Wind, Dkt. No. D2002.8.100 (May 18, 2010) and Whitehall Wind, LLC v. Mont. Pub. Serv. Comm’n, 2015 MT 119, ¶ 15, 379 Mont. 119, 124-25, 347 P.3d 1273, 1277); see also Whitehall Wind, 2015 MT 119, at ¶ 18 (declining “to opine whether the Commission’s bright-line prospective test, announced in its order, complies with PURPA”). As shown above and as recently found by FERC, the bright-line standard adopted in Whitehall Wind and applied in this proceeding cannot be reconciled with PURPA and its regulations. FLS Energy, Inc., 157 FERC ¶ 61,211, at ¶¶ 23, 27(B) (finding that this Commission’s “legally enforceable obligation standard is inconsistent with PURPA and the Commission’s PURPA regulations”). And it is PURPA and FERC’s regulations that control this Commission’s latitude in overseeing the relationship between QFs and utilities. See Indep. Energy Producing Ass’n, 36 F.3d at 856 (citing 16 U.S.C. § 824a-3(a), (f)) (In implementing PURPA, “states play the primary role in calculating avoided cost rates and in overseeing the contractual relationship between QFs and utilities under the regulations promulgated by [FERC]”) (emphasis added); see also Cedar Creek Wind, LLC, 137 FERC ¶ 61,006, at ¶ 35 (2011) (“While West Penn stands for the notion that the Commission gives deference to the states to determine the date on which a legally enforceable obligation is incurred, such deference is subject to the terms of the Commission’s regulations”).

NorthWestern erroneously attempts to dismiss FERC’s declaratory order as merely “memorializ[ing] FERC’s thought process” on Montana’s LEO standard. NWE Opp. to Joint Motion at 5. But, federal courts have held that FERC’s interpretation of its own regulation in a declaratory order is entitled to Auer deference and should thus be considered “controlling unless plainly erroneous or inconsistent with the regulation.” Swecker v. Midland Power Co-op., 807 F.3d 883, 888 (8th Cir. 2015) (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)), cert. denied, 136 S. Ct. 990 (2016); see also S. Cal. Edison Co. v. FERC, 195 F.3d 17, 28 (D.C. Cir. 1999) (applying Auer deference to review of FERC’s declaratory order interpreting its own regulation, but finding FERC’s interpretation inconsistent with the regulation); W. Mass. Elec. Co. v. FERC, 165 F.3d 922, 924, 926 (D.C. Cir. 1999) (applying Auer deference to review of FERC’s order and stating that “[i]n ‘a competition between possible meanings of a regulation, the agency’s choice receives substantial deference’ so long as it is ‘logically consistent with the language of the regulation’ and ‘serves a permissible regulatory purpose.’”) (quoting Rollins Envtl. Servs. (NJ), Inc. v. EPA, 937 F.2d 649, 652 (D.C. Cir. 1991)). NorthWestern’s reliance on Industrial Cogenerators v. FERC, 47 F.3d 1231, 1235 (D.C. Cir. 1995), see NWE Opp. to Joint Motion at 5, to dismiss the force of FERC’s declaratory order is misplaced when the D.C. Circuit twice applied Auer deference to FERC orders after the issuance of the Industrial Cogenerators decision. See W. Mass. Elec. Co., 165 F.3d at 924, 926; S. Cal. Edison Co., 195 F.3d at 28. Accordingly, FERC’s declaratory order is entitled to Auer deference.

NorthWestern has not shown—and cannot show—that FERC’s interpretation is plainly erroneous or inconsistent with PURPA regulations or does not serve a permissible regulatory purpose. As discussed above, FERC’s declaratory order aligns with the plain language of PURPA and its implementing regulations distinguishing LEOs from contracts, see supra, and it

is consistent with FERC’s prior decisions that requiring a QF to have a utility-executed contract as a condition precedent to an LEO “is inconsistent with PURPA and [FERC’s] regulations implementing PURPA,” Grouse Creek Wind Park, LLC, 142 FERC ¶ 61,187, at ¶ 36 (2013); see also Murphy Flat Power, LLC, 141 FERC ¶ 61,145, at ¶¶ 24-25 (2012); Rainbow Ranch Wind, LLC, 139 FERC ¶ 61,077, at ¶¶ 23-24 (2012); Cedar Creek Wind, LLC, 137 FERC ¶ 61,006, at ¶¶ 35-37 (2011).⁸ To conclude otherwise would read the term LEO out of the regulation altogether and would give utilities too much control over PURPA’s purchase requirement. Accordingly, NorthWestern’s attempt to dismiss FERC’s declaratory order should be rejected as inconsistent with federal law. Instead, this Commission should follow its prior practice and defer to FERC’s declaratory order on the proper implementation of PURPA with respect to its LEO standard. See Mont. Admin. Reg. Notice 38-5-232, Response to Comment 3 (Dec. 24, 2015) (finding “persuasive” FERC’s “legal opinion” in Hydrodynamics, Inc., 146 FERC ¶ 61,193 (2014)); Mont. Admin. Reg. Notice 38-5-232 (Sept. 24, 2015) (citing Hydrodynamics, Inc., 146 FERC ¶ 61,193). Doing so will both clarify the issue for QFs and for NorthWestern and reduce the prospect for federal litigation over Montana’s LEO standard. See FLS Energy, Inc. & Cypress Creek Renewables, LLC Reply in Support of Joint Motion for Relief from QF-1 Suspension (March 2, 2017) at 2-3.

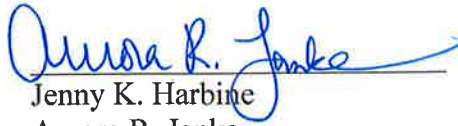
⁸ For this reason, Exelon Wind 1, LLC v. Nelson, is distinguishable because the Fifth Circuit found FERC’s interpretation of its own regulation to be unambiguously foreclosed by Fifth Circuit precedent and the regulatory text. 766 F.3d 380, 397-99 (5th Cir. 2014) (upholding Texas regulation restricting LEOs to QFs that provide firm power). The Fifth Circuit did not decide that Auer deference to a FERC declaratory order is never appropriate. Id. at 397. Exelon Wind is further distinguishable because it interpreted a different part of FERC’s regulations than at issue here. See id. 395 (identifying the FERC regulatory language at issue); id. at 403 (Prado, J., concurring in part and dissenting in part) (“The key phrase in dispute is ‘Each qualifying facility shall have the option ... [t]o provide energy ... pursuant to a legally enforceable obligation.’”).

CONCLUSION

Vote Solar and Montana Environmental Information Center respectfully request that this Commission adopt an avoided cost rate that is just, reasonable, nondiscriminatory, and in the public interest. As explained above, this Commission should use the established blended market method instead of NorthWestern's peaker method because the blended market method is accurate, simple, and transparent. In the alternative, if the Commission applies NorthWestern's peaker method, this Commission should reject NorthWestern's unreasonable modeling assumptions, including its assumptions related to natural gas forecasting, the long condition, and carbon pricing, and further reject NorthWestern's efforts to significantly undervalue solar capacity. To adopt NorthWestern's calculations would be to adopt an avoided cost rate that is not just, reasonable, nondiscriminatory, or in the public interest.

Regardless of the method applied, this Commission should decline to modify its contract length both because this is not the proper proceeding in which to determine this issue and because the record is inadequate to support a different contract length. Finally, this Commission should recognize FERC's authority to interpret its own PURPA regulations and grant relief to those QFs affected by the unlawful LEO standard in this proceeding.

Respectfully submitted on this 10th day of March, 2017,



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*On behalf of Intervenors Vote Solar and
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CERTIFICATE OF SERVICE

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

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