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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
Revised Tariff No. QF-1, Qualifying Facility
Power Purchase

Regulatory Division

Docket No. _D2016.5.39

**PACIFIC NORTHWEST SOLAR, LLC'S
MOTION FOR RELIEF FROM ORDER
NO. 7500**

Pacific Northwest Solar, LLC ("PNW") hereby moves the Montana Public Services Commission ("Commission") for relief from Commission Order No. 7500. In short, PNW asks the Commission to rule on two discrete issues:

- (1) That the Power Purchase Agreements ("PPAs") executed by both Northwestern Energy ("NWE") and PNW on or before the Commission's issuance of Order No. 7500 are not impacted by the Order (regardless of status of interconnection); and,

(2) That PNW established a legally enforceable obligation (“LEO”) with regard to all 21 of its projects which should not be impacted by Order No. 7500.

I. BACKGROUND

It is important to understand the specific timing of PNW’s projects as it relates to interactions with NWE on the subject PPAs.

PNW’s contracts should never have been the subject of the Order because the contracts should have been fully executed well before the Order was issued. It was only as a result of NWE’s actions that those contracts were not fully executed – and while PNW does not know the reasoning for NWE’s actions, the actions themselves demonstrate the less than fair approach taken by NWE. In short:

Date	Days	Event
1/8/16	0	PNW emails NWE with standard contract for 1 project, seeking to get agreement on the form of agreement before submitting other projects under PNW’s control.
2/11/16	35	PNW emails NWE with standard contracts for 3 additional projects, each being signature-ready.
2/17/16	41	PNW exchanges several emails with NWE concerning the Cottonwood project, with PNW providing requested information within minutes of request. PNW asked if anything else might be missing and was not given an answer (treated as a “no”).
2/23/16	47	PNW exchanges several emails with NWE concerning the project size and qualification under the QF-1 Tariff. PNW again responds within minutes to the erroneous argument concerning the size of the project (with PNW confirming, yet again, that the projects would not exceed 3 MW) – additionally, PNW spoke directly to NWE concerning the same issue. PNW then reiterated the analysis showing conforming projects and asked NWE to confirm the same.
2/25/16	49	PNW emailed NWE to follow up and ask if the explanation provided regarding qualification under the QF-1 Tariff was acceptable to NWE. PNW was told that the explanation was okay but that NWE was waiting on legal counsel to approve.
3/1/16	54	PNW emailed NWE to inquire as to status of PPAs pending the review of QF-1 Tariff qualification by NWE’s legal counsel – no response.

Date	Days	Event
3/4/16	57	PNW emailed NWE to inquire as to status of PPAs pending the review of QF-1 Tariff qualification by NWE's legal counsel – no immediate response.
3/7/16	60	NWE emailed PNW to advise that no response had come from legal counsel (re: PNW's 3/1 and 3/4 emails), and in response PNW advised that it was concerned about timing and that the agreements should have been executed already.
3/9/16	62	PNW emailed NWE again inquiring as to status of NWE's review of PPA qualification – no immediate response from NWE.
3/11/16	64	NWE emailed PNW advising that NWE believed PPAs not available for PNW's 3 MW projects, advised of legal department contact. Within a matter of hours, PNW responded with a further confirmation of project qualification under QF-1 and simultaneously reached out to NWE's counsel on the same issue.
3/15/16	68	PNW has extensive email exchange with NWE on issue of PPA qualification for PNW's 3 MW projects. PNW's responses are within minutes of receipt of emails from NWE.
3/17/16	70	PNW and NWE have email exchange and phone conversation regarding PPA qualification.
3/30/16	83	PNW submitted PPA requests to NWE for 8 PNW projects: Ulm, Choteau, Boulder, Stuckey, Stanford, Geraldine, Gage, and Dry Creek using "standard contract" form originally provided by NWE to PNW.
4/11/16	95	PNW provides "standard contract" originally provided by NWE to PNW to NWE's legal counsel, asking that any proposed comments be sent back quickly.
4/12/16	96	PNW has email exchange with NWE concerning status of PPA processing. At that time NWE reports: "I am hoping to forward all of your solar contracts to management today."
4/15/16	99	PNW emails NWE to inquire as to status of PPA changes to be made by NWE (not PNW).
4/22/16	104	PNW confirms with Montana PSC staff that NWE has been advised that the PNW project size qualified under QF-1. PNW attempts to follow up with NWE as to the same, asking for prompt resolution.
4/26/16	110	PNW receives revisions to "standard contract" from NWE. PNW responds substantively within hours to NWE.
4/27/16	111	PNW discusses changes to "standard contract" with NWE and NWE then sends new draft version for PNW's review. PNW responds within hours that the draft is approved. NWE advises of two issues to be resolved on its end.

Date	Days	Event
4/28/16	112	NWE emails PNW with further revised version of “standard contract” confirming the two prior issues to be resolved. The same day, PNW confirms its approval of the form (“We approve of this form.”) and advises NWE that PNW will provide individual PPAs following form in order to speed up the process.
4/29/16	113	PNW emails with NWE in regards to an NWE request for a QF matrix. PNW clarifies the request within minutes and then provides the matrix (although not a requirement of the PPA or the QF-1 Tariff). PNW is also asked to provide a corporate resolution concerning execution of the PPAs and provides the same that day. PNW further provides the approved form of the PPA as to all previously submitted projects.
5/4/16	118	PNW emails with NWE in regards to a typo in the Benton and Manta project PPAs. PNW corrects the typo within minutes and provides confirmation to NWE. PNW also provides updated FERC Form 556s as to several projects to account for variations in rounding in Lat/Lon (again, not required by the QF-1 Tariff nor the PPA, but provided as a courtesy).
5/6/16	120	NWE emails PNW with a yet further “standard contract” deemed “draft final.” Within 45 minutes, PNW responds and confirms.
5/9/16	123	PNW emails with NWE regarding final execution of PPAs, with NWE’s final issue being the “effective date.” NWE confirms date will be when fully executed. PNW discusses the issue at length, at which point PNW offers to again send individual PPAs for each project signed by PNW so that they simply need to be counter-signed by NWE. PNW is asked by NWE to send only the unsigned word versions, and does so within hours. Concurrently, PNW emails that: “I believe we are all set on information needed for these and I think we've addressed all pending questions of yours. . . . From our perspective these are complete and final - please let me know if you need anything else from me.”
5/10/16	124	PNW emails with NWE concerning review of the PPAs for approval for signature by management. Frank says “I will verify incoming email between when I last worked on your project and the last update you sent and I will review them one at a time. If I find anything out of order I will let you know. If they are ok from our review I will send an email to management to sign the PPA’s. As for timing, I would anticipate later today or tomorrow. ” (emphasis added).
5/11/16	125	PNW emails NWE to ask as to status of PPA review – no response.

Date	Days	Event
5/13/16	127	PNW emails NWE to again ask as to status of PPA review. NWE responds that it is working on the requests.
5/17/16	131	PNW emails NWE to again ask as to status of PPA review.
5/18/16	132	PNW emails NWE to ask about status of PPA execution. PNW confirms that previous submission of unsigned PPAs was at NWE's request, but that PNW is more than willing to send executed versions. PNW emails NWE but no response same day.
5/18/16	132	NWE files its Emergency Motion.
5/19/16	133	PNW emails with NWE as to typo in Benton project PPA. PNW provides corrected information within minutes and then notes "Just wanted to confirm nothing else needed from us."
5/23/16	137	PNW emails with NWE concerning status of PPA review and is advised several have been approved for signature. PNW asks which projects, but no response is provided.
5/24/16	138	PNW emails with NWE concerning the Manta project PPA – PNW confirms that prior submitted version was accurate, to which NWE agrees. PNW telephones NWE regarding timing for execution of all 21 PPAs submitted to date. NWE indicates internal process now being employed for PPAs that previously did not exist. PNW confirms expectancy to be at NWE's offices for counter-signing of PPAs on June 2, 2016.
5/26/16	140	PNW telephones with NWE regarding changing date of signing visit to June 8, 2016 in order to capture all 21 PPAs.
5/27/16	141	PNW emails with NWE concerning status. NWE indicates working through PPAs.
5/31/16	145	PNW emails with NWE confirming previously revised FERC Form 556s uploaded to FERC (again, not a Tariff requirement nor PPA requirement, but provided as a courtesy). PNW requests confirmation of receipt but does not receive response.
6/2/16	147	PNW emails with NWE confirming revised date for signature by PNW in NWE's offices of June 8, 2016. After asking if anything else was required of PNW, NWE responds "The final group will be those that I have not reviewed yet. . . I will let you know if I am missing anything further." Given prior discussions with NWE, PNW is lead to believe all 21 PPAs will therefore be ready by June 8, 2016.
6/7/16	152	PNW emails with NWE concerning the Geraldine project PPA, and confirms yet again the June 8, 2016 expected signing date for all 21 PPAs. At that point PNW is told that only 4 are actually ready for signature by PNW.
6/9/16	154	Before the Commission hearing, PNW meets with NWE at its offices to discuss PPA issues. For the first time, PNW is told that it need not have traveled to Montana and that it could just send digital signatures. PNW does so within a few hours.

Date	Days	Event
6/16/16	161	PNW is informed by NWE that: "I have NWE signature pages that I want to insert along with yours into our Execution Copy of PPAs. I have 4 this am and hope to have an additional 8 by this afternoon. The remainder should follow relatively soon." Hence, at this point no fewer than 4 PPAs and possible north of 12 PPAs were fully executed and effective prior to the Commission's Order.
6/29/16	174	Despite weeks of requests for the fully executed PPAs, NWE's legal counsel in this Docket informs PNW that none of the PPAs are fully executed because the "Effective Date" was not filled in by NWE. PNW provides the legal and factual rationale for disputing the same (referring back to NWE's own earlier admission that the "Effective Date" would be the date the last party signed the agreement), but to date no contracts have been forthcoming, despite being fully executed and effective prior to the Commission's ruling.

Pacific Northwest Solar LLC's and NorthWestern Energy's jointly agreed upon Amended Statement of Stipulated Facts (Mar. 23, 2017), filed in MT Fed. Dist. Ct. Case 6:16-cv-00114-SHE [ECF Doc. 35], attached and incorporated herein as **Exhibit A**.

As evidenced by the above, PNW's diligent efforts were met with routine and rampant hurdles by NWE. For some unknown reason, NWE was unable to execute what had been termed a "standard contract" for PNW's projects **for nearly 6 months**. Looking at other jurisdictions, the entire timeline from start to finish for a fully executed contract under a standard avoided-cost tariff can be as **few as 30 days** (and up to only 60 days if the developer exercises all of its own comment timelines). *See* Portland General Electric, Schedule 201; Idaho Power, Schedule 85; and Pacific Corp., Schedule 37 (all the equivalent to NWE's QF-1 Tariff).

To make matters worse, after inappropriately denying PNW its rightful contracts, NWE took the position that it would not execute any interconnection agreements with PNW for its projects already in the queue because PNW was seeking 3 MW Schedule QF-1 contracts (which is in itself a violation of FERC rules regarding sharing of information between contracting and

interconnection within a utility). Meyer Aff., ¶55-56. NWE insisted that PNW pay for and complete all studies but refused to execute an interconnection agreement. *Id.* In the face of such uncertainty, PNW demanded that NWE stay the entire queue while the issue is heard by the Commission, insisting that its position was untenable (and illogical). *Id.* at ¶¶ 57-59. PNW remains committed to its projects and asked to remain in the queue, but NWE has now unilaterally removed several of PNW's projects from the queue. *Id.* at ¶¶ 59-60. If NWE agrees that interconnection can move forward as required by FERC guidelines and embraced by this Commission, then PNW will tender the necessary study costs and agreements to obtain interconnection. *Id.* Until then, though, NWE's position in refusing to execute interconnection agreements but simultaneously demanding significant funds for would-be studies is improper and casts a pall over the process.

Regardless of NWE's bad faith efforts to destroy project development, PNW remains committed to its projects (as it always has) and is entitled to receive all PPAs it submitted to NWE (in executed form) before Order No. 7500 was issued.

II. PPAS EXECUTED ON OR BEFORE COMMISSION ORDER NO. 7500 WAS ISSUED ARE NOT IMPACTED BY THE ORDER.

It should be axiomatic that Order No. 7500 was purely prospective in nature and did not impact PPAs that had already been executed by both NWE and PNW. However, NWE currently takes the position that even those PPAs are stalled in light of Order No. 7500 and to date NWE has refused to honor those same PPAs. PNW simply asks the Commission to confirm that its Order did not impact those PPAs (since any ruling other than that requested would mean that all PPAs executed at any time before the Order – including those signed years ago – would be impacted, which obviously is neither permitted nor intended). Accordingly, PNW asks this

Commission to issue an Order confirming that those PPAs executed by both PNW and NWE on or before the Commission's issuance of Order No. 7500 are effective and not halted by the Order.

It is clear that Commission Order No. 7500 was intended to be prospective in nature only. Recall that NWE's Motion expressly requested that the Commission suspend "NorthWestern's obligations pursuant to Schedule QF-1." NWE's obligations under QF-1 Tariff are to [SCOPE]. Once the PPA is executed, both NWE and the developer have no further obligations under the QF-1 Tariff, and instead, their obligations and rights with regard to one another are governed by the terms of the respective PPA. Consistent with this line drawing, the Commission held "NorthWestern's Motion to temporarily suspend the availability of Schedule QF-1 for solar QFs larger than 100 kW is GRANTED." The Order further set out a safe harbor provision allowing for recognition of certain project PPAs based upon a LEO evaluation (treated separately herein).

The Order clearly distinguishes between projects based upon their status in contracting. Projects that had no PPA submitted (or otherwise no way to find a LEO present) had no opportunity to move forward with a PPA under QF-1. Those project developers that had submitted signed PPAs to NWE (but NWE had not yet signed those PPAs) and had a signed interconnection agreement were allowed safe harbor. The necessary consequence of those first two categories, is that the third category are those PPAs that were signed by both NWE and the developer – and in that case, the PPA would not be impacted in any way by the Order.

With regard to PNW's current Motion, there are at least four (4) PPAs that fall into the final category of non-impacted PPAs. NWE has admitted in email as well as an Answer in Federal Court, that four of PNW's PPAs were signed by both PNW and NWE before the Commission issued Order No. 7500 (and indeed, before the Notice of Commission Action was

issued). Those four projects were: **(1) Benton Solar; (2) Bootlegger Solar; (3) Choteau Solar; and (4) Manta Solar.**

There can be no dispute that a fully executed agreement (i.e., a PPA signed by both parties to the agreement) is effective and thus excepted entirely from Order No. 7500. Any other reading of the situation would put at risk all other PPAs executed by NWE and the developer at any time before the Commission Order (which, logically, would extend years into the past touching upon all PPAs issued under QF-1). Clearly that was not the intent of the Commission. While PNW believes that NWE has breached its obligations under those four (4) PPAs, it would seem that NWE would honor those agreements if this honorable Commission confirms that those four agreements are not impacted by Order No. 7500. Accordingly, PNW asks that the Commission issue an Order confirming the same and thus reaffirming very basic contract law and interpretation of Order No. 7500.

III. PNW IS FURTHER ENTITLED TO THOSE PPAS NOT YET SIGNED BY NWE AS A RESULT OF PNW'S ESTABLISHED LEO RIGHTS.

The Commission's Order incorrectly drew the line of where a legally enforceable obligation ("LEO") exists as applied to QF-1 Tariff contracts, relying entirely on *Whitehall Wind LLC v. Mont. Pub. Serv. Comm.*, 2015 MT 119, 379 Mont. 119, 347 P.3d 1273 ("*Whitehall Wind*"). The Federal Energy Regulatory Commission ("FERC") too has recognized that the line drawn in Order No. 7500 was inconsistent with PURPA and federal law. FERC 157 FERC ¶ 61,211 [page 9]. Developers like PNW must have some semblance of certainty in moving forward with development of renewable resources. Indeed, the same conclusion was found in a case cited by this Commission in its holding in the underpinning of *Whitehall Wind*. In *Appeal of Public Service Co. of New Hampshire*, 130 N.H. 285, 539 A.2d 275 (1988), that Court held

that: “In implementing PURPA’s policy of encouraging the development of new technologies, the FERC has recognized that investors must be able to estimate the expected return on their investment with reasonable certainty before the development of a qualifying facility.” 130 N.H. 293.

While *Whitehall Wind* is one measure of a LEO, it is not the only measure of a LEO and is not the appropriate test to be used in this case. Indeed, even that court recognized that the Commission’s LEO analysis as applied to Whitehall Wind LLC was fact specific. There, the court held that “[t]here is substantial evidence in the record to support the Commission’s finding that Whitehall had not committed itself to the project or established any obligation that could expose it to liability if Whitehall abandoned the proposed project. Although Whitehall conducted some wind tests in the area of the proposed project, it did not conduct avian studies, obtain required permits, or have actual site control over any of the proposed project areas.” 379 Mont. 125-126. Here, as applied to PNW, not only has PNW committed itself to its projects (by tendering executed PPAs that obligated PNW to tender nearly \$1 million in cash security), where entitlement permits were already underway or approved, where actual site control was established, and where interconnection was well under-way. **Ex. A.** Those are very different facts from those considered by the Commission in *Whitehall Wind*. Moreover, Whitehall Wind LLC was seeking a negotiated contract with negotiated rates, *Whitehall Wind*, 379 Mont. 120 – not, as is the case here, a standard contract using standard Commission-approved rates, Schedule QF-1 Tariff (2015).

FERC has further confirmed that the LEO test applied in Order No. 7500 is in violation of PURPA: “The Montana Commission’s requiring a signed interconnection agreement is no different than requiring a utility-signed contract, and equally impermissible [and a violation of

PURPA].” FERC 157 FERC ¶ 61,211 [page 10]. FERC’s concerns were that “[s]uch a requirement allows the utility to control whether and when a legally enforceable obligation exists – e.g., by delaying the facilities study or by delaying the tendering by the utility to the QF of an executable interconnection agreement.” *Id.* That is precisely what has happened here, as NWE has taken the interconnection and PPA process hostage in order to exact its control over timing of project developments to achieve a means by which to kill projects. The detailed background above clearly demonstrates that NWE has acted with the intent to hinder the development process and has specifically sought to delay in order to avoid entering into PPAs. That is the precise type of harm that FERC has found troubling (and indeed this Commission surely would not sanction) in allowing the utility to control the PPA process.

Instead of focusing on the utility, the Commission should look to the QF Developer’s commitments. As FERC recently reminded us, “[t]he Commission explained in *JD Wind 1, LLC* that the establishment of a **legally enforceable obligation turns on the QF’s commitment**, and not the utility’s actions: [A] QF has the option to commit itself to sell all or part of its electric output to an electric utility . . . Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.” FERC 157 FERC ¶ 61,211 [pages 9-10] (emphasis added).

Consistent with FERC guidance, the most appropriate line drawing for the LEO, and one that NWE conceded during the hearing on its Emergency Motion, is that espoused by the general rule: “an absolute, unconditional commitment to deliver energy, capacity, or energy and capacity.” *Whitehall Wind*, 379 Mont. 121. Beyond FERC guidance, this Commission cited

with favor the holding of *A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 828 P.2d 841 (1992). Therein, the Idaho Public Utility Commission set forth its standard for a LEO:

“The QF must be able to exhibit that it has laid a proper foundation entitling it to contract consideration and the current avoided cost rates. There must be an indication that the QF pursued a power contract with some diligence.... Indeed, this Commission has stated a CSPP is not entitled to contract rates until it is ready, willing and able to sign a contract. **It must show that but for the actions of the utility it was otherwise entitled to a contract.** In most cases this will entail making a comprehensive binding offer showing with reasonable specificity, design and size characteristics and indicating a willingness to rely on proposed contract terms and proceed thereunder.”

A.W. Brown, 121 Idaho 817 (emphasis added).

Considering the nature of the Schedule QF-1 Tariff, this Commission should adopt the bright line rule espoused in *A.W. Brown* to evaluate whether a LEO was established (and thus such contracts would be exempt from any ruling or Order of the Commission on NWE’s present Motion).

Taking PNW as an example, it is undisputed that PNW requested “standard contracts” from NWE for its projects starting in January 2016, and indicated its willingness to enter into those same contracts. **Ex. A.** At NWE’s insistence, certain terms of the “standard contract” were altered by NWE and again PNW agreed to be bound by the terms of the modified agreements, confirming its commitment to move forward with the projects. *Id.* at ¶¶ 24-30.¹

¹ The “standard contract” was modified despite the fact that the same “standard contract” had

Finally, PNW provided signed agreements to NWE, again evidencing its intent to be bound by the terms of the agreements and to provide energy as detailed therein (including full descriptions of the facilities and generation profiles).² *Id.* at ¶ 47. PNW arranged for nearly \$1 million in security deposits required by NWE – PNW was ready, willing and able to post the same once NWE provided PNW with fully executed contracts (which never happened). *Id.* at ¶ 51. Thus, PNW’s projects clearly meet the standard for a LEO, and but for the actions of NWE, PNW would have had fully executed contracts for all of its projects.

As this Commission has cited, with favor, on *Hydrodynamics, Inc.*, 146 F.E.R.C. ¶ 61,193 (2014), it is wise to review the same in the context of the pending dispute. Therein, FERC stated that a utility, like NWE, must purchase energy made available by a QF, and that a QF (like PNW’s projects) “has the unconditional right to choose whether to sell its power ‘as available’ or at a forecasted avoided cost rate pursuant to a legally enforceable obligation.” *Id.* FERC went on further to note that **“the term ‘legally enforceable obligation’ is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.”** *Id.* (emphasis added). Quoting its prior precedent, FERC stated therein that:

While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally

been used with at least one other developer for one or more sites where NWE had executed the agreement. There was therefore no reason to change the terms of the “standard contract” and yet NWE did so. **Ex. A.**

² Again, PNW’s execution of the form contracts was binding on it (if only NWE had signed), and thus PNW had a legally enforceable obligation pursuant to the obligation then incurred. *See* 18 CFR 292.304 (d)(2)(ii).

enforceable, obligation will be created pursuant to the state's implementation of PURPA. **Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.**

Id. (emphasis added).

Applying *Hydrodynamics* to the instant Order, it is clear that where a developer, like PNW, has committed itself to sell energy to an electric utility, that utility is committed to purchase the same – whether it has been reduced to a contract yet or not. Just such an example is PNW's projects in NWE's service territory, where PNW committed itself to sell power from 21 QF projects to NWE (before this Commission issued its Notice of Action and indeed before the Motion was filed), thereby committing NWE to purchase that same energy. **Ex. A.**

Given this, the Commission should grant relief to PNW from Commission Order No. 7500 and confirm that all 21 of its PPAs are entitled to move forward in the form provided by PNW (and executed by PNW before the Commission issued Order No. 7500).

IV. CONCLUSION

In light of the above, PNW asks this Commission to confirm that:

1. The PPAs executed by NWE and PNW on or before the PSC's issuance of Order No. 7500 are not impacted by that Order (regardless of status of interconnection);
2. That any other PPAs executed by PNW and NWE on or before Order No. 7500 are likewise not impacted by Order No. 7500; and

3. That PNW's 21 PPAs are entitled to relief from Order No. 7500 as PNW has LEO rights to those PPAs, and thus NWE should be directed to execute those additional PPAs not yet signed.

Respectfully submitted on March 31, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, postage pre-paid via first class U.S. mail on this 31st day of March, 2017 upon the following:

See attached service list

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Docket No. D2016.5.39

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EXHIBIT A

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION**

_____)
PACIFIC NORTHWEST SOLAR, LLC)	Case No.: CV-16-114-H-SEH
)	
Plaintiff,)	
)	
vs.)	AMENDED STATEMENT
)	OF STIPULATED
NORTH WESTERN CORPORATION,)	FACTS
A DELAWARE CORPORATION DBA)	
NORTHWESTERN ENERGY,)	
)	
Defendant.)	
)	
_____)

Pursuant to L.R. 16.2, the parties, filed a Stipulated Statement of Facts on March 17, 2017 [ECF Doc. #32]. After filing the Stipulated Statement of Facts, the parties identified a need to clarify the language in paragraph 6 and have agreed upon the following Amended Statement of Stipulated Facts:

1. PACIFIC NORTHWEST SOLAR, LLC (“PNW”) is an Oregon limited liability company which is registered to do business in the State of Montana, and has its principal place of business in Beaverton, Oregon.
2. NORTH WESTERN CORPORATION, A DELAWARE CORPORATION DBA NORTHWESTERN ENERGY (“NWE”) is a Delaware corporation which is registered to do business in the State of Montana, and has its principal place of business in Sioux Falls, South Dakota.
3. PNW is a distributive and utility-scale solar energy developer headquartered in Oregon. PNW develops projects throughout the United States, including in Montana.
4. NWE is an investor-owned utility pursuant to the Public Utility Regulatory Policies Act (“PURPA”) and its progeny.
5. In Montana, and under the auspices of shared jurisdiction with the Federal Energy Regulatory Commission, NWE is required to have its avoided cost rate schedule approved by the Montana Public Service

Commission (the “Commission”).

6. In 2015, the Commission approved NorthWestern’s Electric Tariff Schedule No. QF-1 (“Schedule ZF-1”), which reflects the standard rates available to developers of qualifying facilities (“QFs”) up to three (3) megawatts in size. A true and correct copy of the relevant Schedule QF-1 is attached to the Complaint as Exhibit A.
7. Under PURPA and the Commission’s rules, NorthWestern is required to purchase energy and capacity made available by a qualifying facility.
8. On January 8, 2016, PNW emailed Mr. Bennett, an employee of NWE, with a proposed PPA for a single project.
9. On February 11, 2016, PNW emailed Mr. Bennett an agreement for an additional three (3) projects (the Bootlegger, Manta, and Benton projects).
10. On February 17, 2016, PNW staff exchanged several emails with Mr. Bennett as to one (1) of PNW’s projects (the Cottonwood project) where Mr. Bennett requested information to support the PPA request, which PNW provided. PNW then asked if there was anything else that might be needed by NWE.
11. On February 23, 2016, PNW exchanged several emails with Mr. Bennett concerning the project size of its QF projects submitted for PPAs. Mr.

Bennett indicated that the projects exceeded the threshold size for PPAs available under Schedule QF-1. PNW responded regarding the project size, confirming its belief that the projects would not exceed three (3) megawatts and thus qualified under the Tariff. PNW asked that NWE confirm the same.

12. On February 25, 2016, PNW emailed Mr. Bennett to follow up and ask if the explanation provided by PNW earlier (regarding qualification under Schedule QF-1) resolved the concerns of NWE in issuing the PPAs requested. PNW was told that the explanation provided was okay, but that NWE was waiting on its own legal counsel to approve.

13. On March 1, 2016, PNW emailed Mr. Bennett stating that “I wanted to touch base with you quickly to see if Lead Counsel got back to you on our response” and that Mr. Bennett sought further clarification from the NWE legal department that same day.

14. On March 4, 2016, PNW emailed Mr. Bennett stating “I wanted to see if legal thought all looked good – any word back from them?” and that Mr. Bennett responded on March 7, 2016.

15. On March 7, 2016, Mr. Bennett sent PNW an email stating “I have not yet heard back on my latest email. I will send another reminder.” and that Mr. Meyer responded with an email stating “We submitted our

requests back in January and it's now mid-March and we're not yet off the ground (when it was my expectation to have signed PPAs at this point." PNWS' recitation of the email is incomplete as the email further states that "The interconnection work is progressing quickly and I really need to get the PPA situation worked out so we can get executed PPAs in place. Please let me know if there is anything I can do to streamline this process - I would be happy to call the legal department directly to discuss if that is helpful too, just let me know. Thanks."

16. On March 9, 2016, PNW emailed Mr. Bennett to inquire as to the status of NWE's legal counsel's review of the PPA qualification under Schedule QF-1.

17. On March 11, 2016, Mr. Bennett emailed PNW advising that NWE did not believe PNW's three (3) megawatt projects were qualified for PPAs under Schedule QF-1. PNW responded stating that it believed PNW's projects qualified under Schedule QF-1. PNW likewise called Al Brogan, counsel for NWE, to discuss the issue.

18. On March 15, 2016, PNW exchanged email with Mr. Brogan on the issue of PPA qualification for PNW's three (3) megawatt projects. PNW provided responses promptly.

19. On March 17, 2016, PNW had an email exchange and a phone

conversation with Mr. Brogan regarding the fact that PNW's three (3) megawatt projects qualified under Schedule QF-1.

20. On March 30, 2016, PNW submitted PPA requests to Mr. Bennett for an additional eight (8) projects (Ulm, Choteau, Boulder, Stuckey, Stanford, Geraldine, Gage, and Dry Creek). PNW submitted the same form previously used (and sent to PNW by NWE).

21. On April 11, 2016, PNW provided Jon Oostra, contract counsel for NWE, an email that stated "Wanted to see where we stood on the PPA proposed changes to the language concerning nameplate capacity. I'm attaching the last version Frank and I used in case you were unable to get it from him."

22. On April 12, 2016, PNW had several email exchanges with Mr. Bennett concerning the status of the PPA processing for PNW's projects.

23. On April 15, 2016, PNW sent Mr. Bennett an email in which he stated "Have you heard anything on this lately? I was trying to see if Jon Oostra was in the office - do you know if he's in today?" PNW also contacted Mr. Brogan and Mr. Oostra regarding the same issue.

24. On April 22, 2016, Mr. Meyer forwarded to Mr. Oostra an email dated April 20 purportedly written by Wil Rosquist that stated "Just this afternoon I left a voice message for Al Brogan explaining that the PSC

staff had discussed the issue and felt that, although the rule is not perfectly clear, it would be reasonable to use the AC output of a solar facility in determining its size for purposes of implementing NorthWestern's QF-1 tariff schedule."

25. On April 26, 2016, Mr. Oostra sent to PNW proposed revisions to the PPA and requested an opportunity to talk with Mr. Meyer about some outstanding issues.
26. On April 27, 2016, PNW had a phone conversation with Mr. Oostra regarding the changes to the proposed PPA. Mr. Oostra sent PNW a copy of a revised PPA.
27. On April 29, 2016, PNW emailed Mr. Bennett and Mr. Oostra multiple PPAs executed by PNW using a draft contract which had not been approved for execution.
28. On May 4, 2016, PNW exchanged emails with Mr. Bennett regarding conflicts in the latitude/longitude between the PPA and the FERC 556 form for two projects and that PNW forwarded revised FERC 556 forms.
29. On May 6, 2016, Mr. Oostra sent an e-mail to Mr. Meyer attaching a "draft power purchase agreement" and advising Mr. Meyer that he as "proceeding with my internal process requesting management approval of the form – and will let you know if any other issues come up. It is my

understanding that you are answering multiple inquiries from Frank [Bennett] with respect to individual project locations. Frank's questions will need to be resolved before NorthWestern executes any contracts."

PNW promptly responded to Mr. Oostra's email.

30. On May 9, 2016, PNW emailed Mr. Oostra regarding final execution of the PPAs. PNW thereafter had a phone conversation with Mr. Oostra. PNW was asked by NWE to send only the unsigned word versions, and PNW did so within hours. Concurrently with that conversation, PNW emailed to Mr. Bennett: "I believe we are all set on information needed for these and I think we've addressed all pending questions of yours. Please let me know if there are any other questions you have (note that we updated the coordinates to match the 556s on Dry Creek in addition to those noted before and have filed all FERC amendments where necessary). From our perspective these are complete and final - please let me know if you need anything else from me."

31. On May 10, 2016, PNW emailed Mr. Bennett concerning review of the PPAs for signature by NWE. Mr. Bennett advised via responsive email that: "I will verify incoming email between when I last worked on your project and the last update you sent and I will review them one at a time. If I find anything out of order I will let you know. If they are ok from

our review I will send an email to management to sign the PPA's. As for timing, I would anticipate later today or tomorrow."

32. On May 11, 2016, PNW emailed Mr. Bennett to ask as to the status of the PPAs, but PNW did not receive a response.

33. On May 13, 2016, PNW emailed Mr. Bennett to ask as to the status of the PPAs. Mr. Bennett responded via email that: "I am working through my backlog of emails. I hope to be caught up soon." PNW also emailed Mr. Oostra regarding status and asked for confirmation of timing of executed PPAs, but no response was received.

34. On May 17, 2016, PNW emailed Mr. Bennett to again ask as to status of the PPAs. PNW was told that progress was being made. PNW offered to supply any information or effort that may be needed to get the PPAs executed. PNW also emailed Mr. Oostra regarding the same issue.

35. On May 18, 2016, PNW sent Mr. Oostra the following email: "I am following up again on status of PPAs. At your request, I emailed the clean versions for our 21 projects on May 9, and it was my understanding you were seeking management approval. Can you advise of status?"

36. On May 18, 2016, NWE filed an Emergency Motion.

37. On May 19, 2016, PNW sent an email to Mr. Bennett stating "Just wanted to confirm nothing else needed from us. Can you let me know

how many of these you've made it through if you can - thanks!" and that Mr. Meyer and Mr. LaFave exchanged voice mails. .

38. On May 23, 2016, Mr. Bennet sent an email to PNW that said "I have been through a few so far. I have forwarded those for signature and will return to the list either this afternoon or tomorrow." and that PNW replied "Thanks Frank (which ones were sent up for signature?)."

39. On May 24, 2016, PNW had a phone conversation with Mr. LaFave concerning the 21 PPAs that PNW had submitted to date. Mr. LaFave indicated that there was a new internal process for review of PPAs. PNW indicated that PNW would fly to NWE's Montana offices to execute the PPAs.

40. On May 26, 2016, PNW and Mr. LaFave had a phone conversation in which they discussed Mr. Meyer's offer to travel to NWE's offices to execute the PPAs.

41. On May 27, 2016, PNW emailed Mr. Bennett concerning the status of the PPAs. PNW also exchanged emails with Mr. Bennett to correct/supply information requested by NWE on a project-specific basis.

42. On May 31, 2016, PNW sent a number of corrections to FERC filings to Mr. Bennett with a cover email that stated "Frank - wanted to confirm you received these updated versions (confirmation of filing attached)."

Mr. Bennett did not respond.

43. On June 2, 2016, PNW emailed Mr. Bennett stating "I wanted to make sure there wasn't anything you needed from us. I will be up to your offices on the afternoon of June 8th to execute the contracts and wanted to make sure there wasn't anything else needed." and that Mr. Bennett responded "I am processing them. I hope to go back over those that I returned to you with deficiencies today. I will need to coordinate with Jon on those we have signed so far. The final group will be those that I have not reviewed yet. Our filing is nearing its end and that will clear up a lot of my time. I will let you know if I am missing anything further. Have a good day."

44. On June 7, 2016, PNW emailed Mr. Bennett stating "I will be up there tomorrow to execute. I haven't heard back on preference from John Oostra - should I come to your office or the Helena office to counter sign? I expect to be there around 2 to 3 pm your time." and that Mr. Bennett advised "I have 4 signatures here now that I can coordinate with you in Butte. I am waiting to hear back on additional approvals/signatures. Jon is out of the office this week, from what I understand."

45. On June 9, 2016, PNW met with Mr. Bennett and Mr. LaFave prior to the

Commission's hearing on NWE's Emergency Motion in NWE's offices.

PNW was told that PNW did not have to travel to Montana. Later this same day, PNW submitted signatures for 21 PPAs.

46. On June 9, 2016, John Alke, legal counsel for NWE, told the

Commission ". . . as Mr. Bushnell described very ably, we are required to negotiate in good faith. And at this point in time, with respect to the FLS contracts in particular, the Cypress contract, Pacific Northwest was a little more awkward, but we're there I think with Pacific Northwest, too, once you agree – once the parties reach agreement on what the language of the PPA is, you guys, have set the rate, so we can't say no. So that's why we've asked for the emergency relief."

47. On June 16, 2016, Mr. Bennett emailed PNW that: "I have NWE

signature pages that I want to insert along with yours into our Execution Copy of PPAs. I have 4 this am and hope to have an additional 8 by this afternoon. The remainder should follow relatively soon."

48. On June 29, 2016, Mr. Alke emailed PNW that stated "I represent

NorthWestern Energy in the current QF-1 Docket in Montana. Your enquiry to Mr. Bennett on June 28, 2016, has been referred to me for response. As you are aware, on June 16, 2016, the Montana Public Service Commission issued a Notice of Commission Action staying

execution of standard long term rate contracts for solar QF facilities larger than 100 kw. Although your company has tendered a number of PPA agreements to NorthWestern, it has not proceeded very far down the path of securing the required interconnection agreements. The Commission's NCA indicates that NorthWestern is not supposed to execute additional PPAs at this time unless both signed PPAs and signed interconnection agreements had been tendered prior to the entry of the stay. As long as the stay is in place, NorthWestern will not be executing and returning standard rate PPAs from your company" and that Mr. Meyer responded "I appreciate the response and explanation, but I disagree with some of the analysis. I recognize that the PSC has issued a Notice of Commission Action, but I have yet to see a formal Order be issued, so it is not clear that NWE is yet free from its ongoing obligation to execute and process contracts. Moreover, prior to the PSC's decision, there were at least 4 and possibly 12 of our contracts that were executed in full (i.e., by both NWE and PNW) and thus not subject to any ruling by the PSC as those were valid and binding contracts once mutually executed - the PSC decision simply says that further contracts cannot be executed by NWE (a point we intend to address with the PSC and others). Therefore, I would ask that NWE provide all contracts that are

already executed - we know that number to be no fewer than 4 and possibly as high as 12 (per confirmed correspondence with NWE on June 16, 2016). I look forward to receiving those fully executed contracts - we can address the balance of the contracts with the PSC directly.”

49. Upon receipt of the 21 PPAs submitted to NWE, PNW will be obligated to put up nearly \$1 million in security pursuant to the terms of the PPAs.

50. On May 3, 2016, as required by the Commission, NWE filed an Application to reduce its QF-1 tariff rates based on lower avoided costs. In that application, NWE requested the Commission to issue an Interim Rate Adjustment.

51. On May 17, 2016, NWE filed an Emergency Application with the Commission asking to suspend fixed long-term rates for small solar QFs over 100 kW. MPSC Dkt. D2016.5.39 (May 17, 2016).

52. On June 9, 2016, the Commission held a public hearing on NWE’s Emergency Application.

53. In a work session on June 16, 2016, the Commission decided to grant relief to NWE.

54. On July 25, 2016, the Commission issued Order No. 7500.

Dated this 23rd day of March, 2017.

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 1.4, this document has been served on all parties via electronic service through the Court's Case Management/Electronic Case Filing (CM/ECF) system.