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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
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**APPLICATION FOR GENERAL INTERVENTION OF
WINDATA, LLC**

WINData, LLC applies for general intervention in this docket. WINData shows:

1. Statement of Interest, Relationship to the Issues and Relief Sought

In light of the recently revealed animus and purposeful refusal to follow the law of the Montana Public Service Commission, and specifically, Commissioner Lake, toward development of renewable energy in Montana, WINData seeks general intervention pursuant to Administrative Rules of Montana 38.2.2401 *et. seq.* and 38.2.1202.

WINData has developed qualifying facility ("QF") projects across Montana that are entitled under the Public Utility Regulatory Policies Act ("PURPA") and related state law to sell output to NorthWestern Energy under a long-term contract at NorthWestern's full avoided costs. WINData has a direct interest in ensuring the

Commission follows the legal framework of PURPA and its Montana counterpart in adopting a rate methodology for QFs at NorthWestern's avoided cost, rather than elevating above the law its own abhorrence toward renewable energy.¹ WINData's interest is demonstrated through its involvement in and development of multiple commercial wind projects across the region over the past two decades, which include Blackfeet 1, Prospect Wind, Fairfield Wind, Greenfield Wind, Front Range Wind, Hopley Creek Wind, Hay Creek Wind, Coyote Wind, Crazy Mountain Wind and WD Wind projects in Montana.² WINData personnel initiated commercial energy development on the Blackfeet/Cut Bank, in the Judith Gap area and in Big Timber in central Montana.

WINData specifically requests the Commission:

1. Order NorthWestern to file a rate case for all its electricity assets by August 31, 2017 for purposes of ensuring application of a rate methodology consistent with that used for QFs³; and either
2. Reopen Commission Docket No. D2013.12.85 [the Hydros docket] to:
 - a. apply a DCF model using a five year forecast with some terminal value at the end of that five year period which may not be included in rates; and

¹ State and federal authority governing PURPA contracts can be found at 16 U.S.C. § 824a; 18 C.F.R. § 292.304(b); *FERC v. Mississippi*, 456 U.S. 742, 751, 102 S.Ct. 2126, 2133 (1982). M.C.A § 69-3-604; ARM 38.5.1905; and *Whitehall Wind, LLC v. Montana Pub. Serv. Comm'n.*, 355 Mont. 15, 16-17, 223 P.3d 907, 908-09 (2010).

² The Commission issued Final Orders with respect to Greenfield (PSC Docket No. D2014.4.43, Order No. 7347a, issued April 14, 2015 and available at http://www.psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/D2014-4-43_7347a.pdf; Greycliff Wind Prime, LLC, in Docket No. D2015.8.64, Order No. 7436e, issued November 4, 2016, available at <http://www.psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/D2015864Or7436e.pdf>; and Crazy Mountain Wind, LLC, in Docket No. D2016.7.56, Order No. 7505c, issued April 18, 2017 available at <http://www.psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/D2016756Order7505c.pdf>. All referenced documents and exhibits throughout this Application are incorporated herein by reference.

³ See Sec. 69-3-101, MCA, ARM 38.5.101 et seq, and also *Qwest v. Dept. of Public Service Reg., PSC*, 174 P.3d 496, 2007 MT 350, 340 Mont. 309 (Mont. 2007).

- b. set the rate for the Hydros based only on generation costs and not the purchase price of the asset; and
 - c. Immediately reduce all rates for NorthWestern by the “Long 1” adjustment and delay the carbon onset adder until 2025 as applied to QFs; or
3. Apply the same methodology to QFs as applied to NorthWestern’s most recently acquired asset, the Hydros, using long-term contracts, immediate carbon onset adders, and no Long 1 adjustment.

The Commission and individual Commissioners’ refusal to apply federal and state law to protect QFs creates a *de facto* caste system that will, as Commissioner Lake stated, kill off QF development and prevent anyone from getting into it. As a matter of law the Commission must apply the same rate methodology to NorthWestern, the monopoly utility, that it applies to QFs. Either NorthWestern’s rates must be adjusted today, not in some distant rate proceeding, to reflect the methodology the Commission is applying to QFs, or the Commission must apply the methodology it used in pre-approving the acquisition of NorthWestern’s Hydro purchase to QFs. Any other approach, including a promise that at some distant day in the unknowable future NorthWestern may be accountable to the same standard being applied to QFs today, is a violation of federal and state law and the Commission’s own rules.

PURPA’s non-discrimination protections of QFs are neither suggestions nor ancillary amendments, they are mandatory legal obligations this Commission must abide. QFs are inherently disadvantaged vis-à-vis the monopoly utility and this Commission

must encourage QFs because “cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis-a-vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable.”⁴

Good cause for allowing WINData’s general intervention is demonstrated by the new information revealed at the June 22, 2017 work session evidencing Commissioner Lake and the Commission’s hostility toward QF projects and renewable energy in Montana, desire to kill QF development, and refusal to apply and follow the law. The expressed intentional discrimination and purposeful refusal to follow the law defeats a defense of immunity and exposes the Commission and individual Commissioners to liability.

2. Legal name and post office address

Notice of all matters relating to this proceeding and copies of all documents and other communications may be served upon:

Martin Wilde
WINData, LLC
1943 Hwy 408
Fairfield, MT 59436
marty.wilde@windata-inc.com
(406) 590-5700

and on

⁴ *Amer. Paper Institute, Inc. v. Amer. Elect. Power Serv. Corp.*, 461 U.S. 402, 414 (1983), see also *Env’t Action, Inc. v. FERC*, 939 F.2d 1057, 1061-62 (D.C. Cir. 1991); see also 16 U.S.C. § 824a-3(b)(2) (“rates for such purchase . . . shall not *discriminate against qualifying facilities*”) (emphasis added).

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3. Statement of Facts and other relevant data

NorthWestern filed its Application for Approval of Avoided Cost Tariff Schedule QF-1 with the Commission. NorthWestern's proposed avoided cost rates would apply to QFs with a nameplate capacity of three megawatts or less. The Commission suggested the methodology it adopted and applied in this docket will be consistent with that in other dockets.⁵ WINData learned by watching the June 22, 2017 work session that the Commission is developing and applying its rate methodology for QFs with the specific intent of killing renewable energy and qualifying facilities in Montana.

The intervenors in this docket are the Montana Consumer Counsel (MCC), New Colony Wind, LLC (New Colony), Vote Solar and the Montana Environmental Information Center (MEIC), FLS Energy, Inc. (FLS), and Cypress Creek Renewables, LLC (Cypress Creek).⁶ Pacific NorthWest Solar LLC submitted a Notice of Intent to Participate. FLS Energy and Cypress Creek, Vote Solar and MEIC, and the MCC submitted prefiled testimony.

Commission Staff issued an "additional issues" memorandum identifying four issues that had not been raised by the parties to the docket: 1) contract length; 2) annual

⁵ See e.g., footnote 2, *supra*.

⁶ Notice of Staff Action, June 17, 2016.

updates of QF1-rates; 3) performance standards; and 4) levelization.⁷ Staff suggested limiting additional issues to contract length and performance standards, and recommended the Commission request prefiled testimony on contract length. The Commission adopted Staff's recommendation and issued its Notice of Additional Issues on October 26, 2016, setting out four issues related to contract length and one issue on performance standards, inviting parties to submit prefiled testimony "they wish to offer regarding these issues."⁸ FLS Energy and Cypress Creek, Vote Solar and MEIC, NorthWestern and the MCC submitted prefiled testimony in response to the additional issues Notice.

After holding a public hearing and taking post hearing briefs, the Commission held its work session on June 22, 2017 to reach a final decision. Staff circulated a memo prior to the work session setting out recommendations on issues the Commission would address.⁹ During a break, Commissioner Lake held a colloquy with staff recorded on video and microphone.¹⁰

Commissioner Lake:¹¹ Well, you can't put too many ingredients into your...[memo]

⁷ Exhibit 1, staff memorandum to the Commission, October 21, 2016, attached and incorporated herein.

⁸ See Notice of Additional Issues, October 26, 2016, available at <http://www.psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/D2016539NAI.pdf>.

⁹ Commission Staff Memorandum dated June 16, 2017, attached as Exhibit 2, and incorporated by reference.

¹⁰ See <https://www.youtube.com/watch?v=Q1YO2sXa8wU> Commission video. Montana press reported the conversation at <http://www.montanabar.org/news/352197/Hot-mic-records-PSC-commissioners-troubling-conversation-on-solar-regs.htm>; http://billingsgazette.com/news/government-and-politics/hot-mic-records-troubling-conversation-about-solar-regulations/article_8499a49d-e281-5dd7-aae7-aeccca0394e.html; and <http://ypradio.org/post/hot-mic-throws-shade-montana-solar-interview-billings-gazette-reporter-tom-lutey#stream/0>.

¹¹ Commissioner Lake is Montana Public Service Commissioner for District 4. <http://www.psc.mt.gov>. On the video Commissioner Lake is facing the camera.

Staff: The thing is it, you know, the staff memo kind of covers, I'm not saying you need to take the staff memo ... it kind of covers what the salient issues are. And then everyone is kind of familiar with that. And then if a commissioner raises something that is kind of brand new, and no one really, things get complicated very fast and no one even really, you know, staff, we were having trouble following exactly what the, you know, the motion was. Right now it's essentially a five year rate. I mean in the first instance ...

Commissioner Lake: Well it's a five year contract.

Staff: I mean in the first instance its calculated on a ten year period but in five years the rate will be the new QF1 rate so it will be essentially as if, the contract, they, which they can already do as a PURPA... I mean they can always come back and reuse whatever the existing QF1 tariff is, so yeah...

Commissioner Lake: So all the other terms in it, if all you're going to do is, how much, how much of the contract can be rewritten?

Staff: Well, I mean, just the rate will be updated, but it's essentially a five year rate...

Commissioner Lake: Are you sure?

Staff: Its essentially a five year rate but yeah which is, yeah, I mean, it's going to probably kill QF development, like Idaho...

Commissioner Lake: Well, the ten year might do it if the price doesn't. And honestly at this low price um I can't imagine anyone gonna get into it.

Staff: No, no one...

Commissioner Lake: So it becomes a totally moot point because just dropping the rate that much probably took care of the whole thing.

Staff: Well it did except for one issue. Which is the other, the ancillary amendment which is holding NorthWestern to the same standard, so that would mean in the case, say, if we were to go back to the hydros, they would have to come in and they would have to, their, their DCF model would be a five year model with some terminal value at the end of that, but they wouldn't be able to include the terminal value in rates, they would have to essentially include in rates only the five year forecast which is...

Commissioner Lake: We're.. we're still live.

Staff: Yeah but our, I think our mics are off so we're ok.

Staff: But anyway they're not going to be able to hear.

Commissioner Lake: Well...

Staff: Anyway, that's enough of that. We'll hear it from NorthWestern, we'll hear from....

Commissioner Lake: Well if you look at NorthWestern, let's take the, well, do Colstrip, if you take the price of the facility out that was paid and only run on the generation costs, they're cheap.

Staff: Right.

Commissioner Lake: It's seventeen dollars and sixty cents [\$17.60] or something like that. Same thing with the hydros, if you get it down to where you take the purchase price out, and have it as a separate part of it, and you move it over here, the cost of generation

is, I mean its minimal for what you're getting out of it, and so somewhere along the line somebody's got to test that in court as to whether or not the purchase price actually is calculated into the generation costs. Let's take the hydros, Colstrip not so much, but let's take the hydros, the fact that you have an asset, that's going to grow in value only because of the asset, so it, it, it stands alone, the generation cost over here is what the ratepayers are looking at. The biggest part of it is the repayment of the debt. It's not the generation it's the repayment of the debt.

Staff: Well that's the point is that, is that if you want to really hold NorthWestern to the same standard that you do QFs, and you expect NorthWestern to evaluate its resources on a five year basis, well if you expect them to repay the capital cost of their resource in five years the rate will be astronomical, it won't pencil out.¹²

Commissioner Lake: But see we don't require that of the QFs...¹³

This conversation reveals Commissioner Lake and the Commission's animus toward development of renewable energy in Montana, which is being used to justify a willful and purposeful refusal to follow the law with the intent of killing off QFs. This factual development satisfies the good cause requirement and WINData should be allowed general intervention in this proceeding.

4. Legal Standard

Intervention in Commission proceedings is addressed under Montana Administrative Rule 38.2.2401 *et. seq.* which provides in relevant part:

¹² Commissioner Kavulla (Commissioner, District 1) enters the room from the right on the video.

¹³ Commissioner Kavulla presses a button and the audio ends.

38.2.2403 GENERAL INTERVENTION

(1) Any person, other than the original parties to the proceeding, who shall desire to appear and participate in any proceeding before the commission, and who does not desire to broaden the issues of the original proceeding, may petition in writing for leave to intervene in the proceeding. Such a petition shall be filed no later than the intervention deadline established in a procedural order, if one is entered. If no procedural order is entered, the petition shall be filed no later than one week prior to the commencement of hearing. No such petition or motion shall be filed after these times, except for good cause shown. [...]

The June 22, 2017 work session comments by Commissioner Lake demonstrate his personal as well as the Commission's hostility toward QF projects and renewable energy, desire to kill QF development, and refusal to apply and follow the law, which establishes the good cause requirement for general intervention at this juncture under ARM 38.2.2403.

5. Conclusion and Relief Requested

The law requires the Commission to serve the same sauce to the goose that it serves to the gander. A segregated rate structure put in place for the purpose of killing QF development and ensuring that no one will get into it violates federal and state law, raising due process, equal protection and other legal issues. WINData specifically requests the Commission:

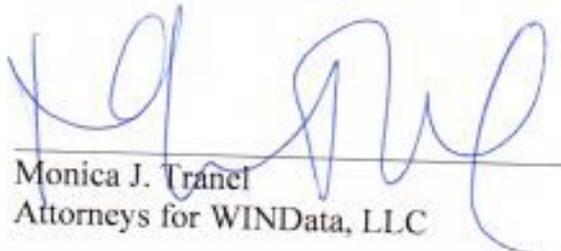
1. Order NorthWestern to file a rate case for all its electricity assets by August 31, 2017 for purposes of ensuring application of a rate methodology consistent with that used for QFs; and either
2. Reopen Commission Docket No. D2013.12.85 [the Hydros docket] to:

- a. apply a DCF model using a five year forecast with some terminal value at the end of that five year period which may not be included in rates; and
 - b. set the rate for the hydros based only on generation costs and not the purchase price of the asset; and
 - c. Immediately reduce all rates for NorthWestern by the "Long 1" adjustment and delay the carbon onset adder until 2025 as applied to QFs; or
3. Apply the same methodology to QFs as applied to NorthWestern's most recently acquired asset, the Hydros, using long-term contracts, immediate carbon onset adders, and no Long 1 adjustment.

The methodology to establish NorthWestern's rates must be applied to QF projects to determine the appropriate rate for renewable energy; or the methodology for QF projects being used by the Commission must be applied to NorthWestern today. To do anything less is to create a segregated rate methodology that violates the law.

Dated: July 27th, 2017

TRANEL LAW FIRM, P.C.



Monica J. Tranel
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CERTIFICATE OF SERVICE

I certify that on the 7th day of July, 2017, a true and accurate copy of the foregoing was electronically filed with the Montana Public Service Commission and duly served upon the parties listed below by depositing the same, postage prepaid, in the United States mail to:

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P.O. Box 202601	<input type="checkbox"/> Fax
Helena, MT 59620-2601	<input checked="" type="checkbox"/> Email

Montana Consumer Counsel	<input checked="" type="checkbox"/> Mail
111 North Last Chance Gulch Ste 1B	<input type="checkbox"/> Overnight Delivery Service
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