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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 RECONSIDERATION OF ORDER NO. 7500c**

Pacific Northwest Solar, LLC ("PNW") hereby moves the Montana Public Services Commission ("Commission") for reconsideration of Commission Order No. 7500c. In short, PNW asks the Commission to reconsider the entirety of the Order, and specifically the following two portions of the Order:

(1) That the QFs, like PNW, established a legally enforceable obligations ("LEO") with regard to certain projects prior to the issuance of Commission Order 7500, despite the

fact that NorthWestern Energy ("NWE") had not yet executed the relevant power purchase agreements ("PPAs");[1]

(2) That the Commission's decision to reduce the term of the applicable QF-1 PPA to 10 years is untenable under the circumstances and dissuades, instead of supports, further power development in the state.

I. THE COMMISSION SHOULD RECONSIDER THE STANDARD IT USES TO EVALUATE LEGALLY ENFORCEABLE OBLIGATIONS.

The Commission's Order incorrectly draws 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.

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[1] This request is separate and apart from the Joint Motion for Reconsideration filed by NWE and PNW as to PPAs executed before the issuance of Order 7500.

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. 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 (and adopted in Order 7500c) 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 reconsider its position relative to LEOs and adopt the bright line rule espoused in *A.W. Brown* to evaluate whether a LEO was established.

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 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 *Hydrodyanmics* to the instant Final 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.

Given the above, the Commission should reconsider its LEO standard and find that where a QF has committed itself to sell energy to NWE, as outlined above, the QF should be found to have established a LEO.

II. THE COMMISSION SHOULD RECONSIDER THE SEVERE REDUCTION IN PPA TERM.

The Commission's decision to severely and quickly drop the PPA term to just a fraction of its prior offering was a significant departure from Commission history and has the undue effect of stonewalling power development (both renewable and traditional power). Longer term contracts provided for the ability to forecast actual costs (to ratepayers), provide a hedge against pricing spikes, and allow for the reasonable and measured development of power resources in the state.

While it is always true that establishing long-term rates available to a QF (or even the utility when the utility to seeking approval for new assets) have the potential to inject uncertainty, the uncertainty is modulated by a net benefit to ratepayers of certainty of pricing. Where contracts terms are longer, there is a certainty to the cost of the energy generated (again, this applies equally, as it should, to both traditional and renewable generation, as well as independent QFs and the utility). By adopting reasonable length contracts, the ratepayers of Montana will hedge their exposure to price spikes – as the underlying power already contracted for will have been at set prices regardless of external pricing factors. That simply will not be the case if prices spike in the coming years. In that instance, the avoided cost schedule will be updated, and could result in significant cost increases to the ratepayers. By adopting a deminimis contract length, the Commission is essentially betting on pricing always going down – that is a costly bet, especially if pricing either stagnates or goes up (by any measure), and severely so if pricing skyrockets as a result of any external factors which impact energy pricing. These risks can be avoided by establishing longer term contracts (even if not the original term, a term of at least 15 years).

Additionally, as even NWE must recognize, it is nearly impossible to establish financial viability of a new energy resources with the knowledge of only five (5) years of contract pricing. Any asset that is developed must acknowledge the cost of construction and the viability of selling the energy (whether that be directly to ratepayers or through the utility to ratepayers). Simply put, conducting that analysis on such a short guarantee of pricing makes all forms of energy development unlikely. Instead, a longer term should be utilized to encourage new development of energy resources which will benefit the ratepayers of Montana in the years to come. To be sure, an energy development is unlike other developments, where the end product can be sold to anyone, anywhere, anytime. Here, while market forces are paramount in establishing pricing, it cannot be overlooked that there is still a monopoly by NWE as the utility. A developer cannot simply excise NWE from the system and attempt to sell directly to the ratepayers. Developers are in a symbiotic relationship with NWE, providing new energy resources that are then balanced and blended with the other resources at NWE's disposal to provide the energy supply demanded by the public. Thus, it is impossible to compare the open market with a monopolistic utility where developers have but one route of involvement, and instead the Commission should consider the devastating impact of such shortened PPA terms (as no project, PNW or otherwise, is viable on such a short term).

It is prudent planning to have longer contract terms to hedge against price risk, providing certainty to ratepayers, and encouraging long-term development of efficient energy resources to supply the needs of the state. Therefore, PNW asks the Commission to reconsider its position on the PPA term, and find that an appropriate term is no less than fifteen (15) years.

III. CONCLUSION

In light of the above, PNW asks this Commission to reconsider Commission Order 7500c especially as to the following:

1. That the Commission find that a LEO is established where the QF committed itself to sell the energy from a given project; and
2. That the Commission either leave the PPA term as it was previously or limit the reduction to a fixed term of no less than fifteen (15) years.

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Respectfully submitted this _____ day of July, 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 _____ day of July, 2017 upon the following:

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