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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) REGULATORY DIVISION
Revised Tariff No. QF-1, Qualifying Facility) DOCKET NO. D2016.5.39
Power Purchase)

**NorthWestern Energy's Motion for and Brief in Support of Reconsideration
and Clarification of Final Order No. 7500c**

On July 21, 2017, the Montana Public Service Commission ("Commission") issued Final Order No. 7500c ("Final Order") in this docket. In the Final Order, the Commission decided issues that were not before it, failed to decide issues that were before it, and left certain issues murky. NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern"), pursuant to ARM 38.2.4806, moves the Commission to reconsider its decision to apply symmetrical treatment to utility resources and its decision not to address general tariff revisions. NorthWestern also asks the Commission to clarify the proper method of determining the avoided cost rate for the first five years of a ten-year contract.

I. BACKGROUND

In implementing the Public Utility Regulatory Policies Act of 1978 (“PURPA”), the Commission, based on the evidence before it, sets a standard rate that NorthWestern must pay to Qualifying Facilities (“QF”) with a nameplate capacity of three megawatts (“MW”) or less. ARM 38.5.1901(2) (j); 38.5.1902(5); 38.5.1905(4). NorthWestern filed an application in this docket for approval to update the standard rates in its QF-1 tariff and to make general changes to the tariff’s provisions. The Commission identified QF contract length and performance standards as additional issues for the parties to consider. NorthWestern’s application and the additional issues are the subject of this docket.

In the Final Order, the Commission approved new standard rates for NorthWestern’s QF-1 tariff. The Commission neither approved nor denied NorthWestern’s proposed general changes to the tariff; it simply did not acknowledge the proposed revisions. Finding that 25-year QF contracts impose undue forecast risk on customers, the Commission limited contract terms to ten years with a rate adjustment after five years to match the standard rate applicable at that time. The Commission also adopted a rule applying the ten-year contract term to utilities in their acquisition of or contract for additional resources. The Commission decided not to establish performance standards for the QF-1 tariff.

II. ARGUMENT

The Commission’s adoption of “symmetrical treatment” to non-QF resources by limiting utilities’ resource acquisitions to a ten-year standard is unlawful, unjust, and unreasonable. The finding is a “rule” that is applicable to all utilities. Since the Commission did not follow the Montana Administrative Procedure Act (“MAPA”) requirements for a rulemaking, the rule is invalid. The rule also conflicts with existing statutes regarding electricity supply resource

planning and procurement and fails to consider the differences between QF and non-QF resources.

The Commission's failure to address NorthWestern's request for general tariff changes that eliminate unnecessary language, define terms, and provide a table that clearly states the energy and capacity rates is unreasonable. Also, NorthWestern seeks clarification of the proper method of determining the avoided cost rate for the first five years of a ten-year contract.

A. *The Commission's "Symmetry" Finding Attempts to Create a Rule without Following MAPA.*

Prior to the Final Order, the QF-1 tariff included provisions allowing for contract terms of up to 25 years. The Commission identified this contract length as an issue to be addressed in this proceeding. Therefore, the contract term in the QF-1 tariff was an issue properly before the Commission. The Commission had the ability to consider in this docket whether a 25-year contract at the QF-1 rates imposes undue forecast risk on customers. In contrast, the QF-1 tariff does not apply to Montana utilities' acquisition of resources. The terms under which a utility acquires resources is not a component of the tariff and is not an issue in this proceeding. The Commission had no ability to apply the contract length applicable to the QF-1 tariff to utilities.

By applying the contract term of the QF-1 tariff to future utility acquisitions in order to implement a new policy, the Commission created a new standard applicable to all utilities. The Commission's statement of this new standard constitutes a de facto rule within the meaning of MAPA. MAPA defines a "rule" as an "agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy." § 2-4-102, MCA. The Montana Supreme Court has recently defined the Commission's expressions of standards implementing its policies to be rules. *See S. Montana Tel. Co. v. Montana Pub. Serv. Comm'n*, 2017 MT 123, 387 Mont. 415, 395 P.3d 473. In *Southern Montana Tel. Co.*, the Supreme Court

addressed whether the “rubric” the Commission created to judge motions for protective orders set a standard for all motions for protective orders. The Supreme Court determined that the rubric did set a standard of general applicability that implemented a Commission policy and constituted a rule within the meaning of MAPA. *Id.* A comparison of the Commission’s actions in that case with the Commission’s action in this docket demonstrates that the Commission promulgated a rule when it adopted a policy of symmetrical treatment and applied the QF-1 tariff contract term to all utilities.

The Commission did not follow the requirements in MAPA when it adopted this rule. Before an administrative agency adopts a rule, MAPA mandates that the agency “comply with the public notice and comment procedures detailed in §§ 2-4-302 and -305, MCA.” *State v. Vainio*, 2001 MT 220, ¶ 27, 306 Mont. 439, 35 P.3d 948. These procedures include, among other requirements, that the agency give written notice of its proposed rule, hold a hearing, afford interested parties the opportunity to submit data, views, or arguments, consider comments in those submissions, and issue a statement explaining its reasons for adopting the rule. §§ 2-4-302, -305, MCA.

The Commission did not give notice that it was proposing a rule applicable to all utilities. It did not hold a hearing or consider comments on this new rule. Because the Commission did not follow MAPA, application of the rule would violate NorthWestern’s due process rights. NorthWestern had no notice that the Commission was considering a rule regarding utilities’ resource acquisitions. NorthWestern had no notice that the Commission would consider anything about non-QF resources. No party advocated for treatment of non-QF resources. The Commission’s Notice of Public Hearing in this docket described the subject matter of the application and did not identify any issues with respect to non-QF resources. Simply put,

NorthWestern had no notice that it should or could offer testimony with respect to non-QF resources.

The Supreme Court has repeatedly held that the Commission cannot violate any person's, including a corporation's, right to due process. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Smith v. Bd. of Horse Racing*, 1998 MT 91, ¶ 11, 288 Mont. 249, 252, 956 P.2d 752, 754. Because the Commission did not provide NorthWestern an opportunity to be heard at a meaningful time and in a meaningful manner, the Commission violated MAPA and NorthWestern's constitutionally guaranteed due process rights by unlawfully promulgating a rule.

B. *The Commission's New Rule Conflicts with Statutes and Commission Rules.*

The Commission's new rule requires utilities, when they buy or build a new power plant or enter into a contract with a new power supplier, to demonstrate that the cost of that resource is justified relative to a ten-year projection of market prices or the cost of alternative ten-year resources. This rule conflicts with Montana statutes and regulations addressing utility supply resource planning and procurement. In addition to imposing the general obligation to provide reasonably adequate service, Montana statutes place specific planning and procurement obligations on utilities and state the objectives utilities shall pursue in resource planning and procurement. § 69-8-419, MCA. The statutes also require the Commission to adopt, through formal rulemaking, rules that guide utilities in their resource planning and procurement activities. § 69-8-419(3), MCA. The Commission's rules state that utilities should acquire resources that "efficiently provide electricity supply service to customers over the planning horizon." ARM 38.5.8204. "Planning horizon" means the longer of: (a) the longest remaining contract term in a utility's electricity supply resource portfolio; (b) the period of the longest lived electricity supply

resource being considered for acquisition; or (c) ten years. ARM 38.5.8202. (*Emphasis added.*) NorthWestern's 2015 Electricity Supply Resource Procurement Plan identifies needs over a 20-year planning horizon. The Commission's new rule limiting consideration to a ten year projection of market prices or the cost of alternative ten-year resources directly conflicts with its own rules regarding a planning horizon.

C. *The Commission's Rule Arbitrarily Applies Symmetry to Dissimilar Resources.*

The Commission requires utilities to perform a resource needs assessment before acquiring any multi-year electricity supply resource and to select resources that meet the identified needs. ARM 38.5.8210. Consistent with this requirement, NorthWestern evaluates resources as to whether they increase NorthWestern's ability to reliably meet customer needs.¹ The value that a resource provides to NorthWestern's system is dependent upon the balance between NorthWestern's and its customers' needs against the resource's capabilities. For example, NorthWestern is required to operate to the Reliability Based Control standard which can impact NorthWestern's need for flexible capacity that can ramp up and down on short notice. NorthWestern must maintain contingency reserves to ensure reliability under normal and abnormal conditions. Mandatory reliability requirements of the North American Electric Reliability Corporation and the Western Electricity Coordinating Council require NorthWestern to balance, on a moment-to-moment basis, the available resources to meet the electrical demand within the balancing authority area ("BAA"). The electrical reliability and security of transmission systems and BAAs can be greatly impacted by significant changes in the mix of generation facilities interconnected to the system. An example of a resource that addresses needs

¹ This includes the all-source third-party administered request for proposals, designed to identify sustained, dispatchable capacity needs that NorthWestern recently suspended due to recent Commission decisions.

for NorthWestern's system is the Dave Gates Generating Station that provides regulation services and helps optimize the portfolio by providing peak demand capacity, flexibility, and other needed ancillary services.

In contrast, utilities are not able to assess QFs and select them as resources that meet identified needs. Rather, utilities are required under PURPA to take QF output regardless of whether that output satisfies a need or not. The utility does not consider any factors before accepting QF output for its system; it is required by law to simply take the output. The result is that NorthWestern is forced to acquire resources that do not increase its ability to meet customer needs. For example, hydropower is the only renewable energy resource capable of providing base load and, dependent on automatic frequency control, required ancillary services such as load balancing and grid frequency regulation. Other forms of renewable generation are intermittent and non-dispatchable and require another associated source of generation, such as simple or combined cycle natural gas plants, to regulate grid frequency, increasing their carbon footprints.

The Commission did not consider the difference in these types of resources before stating a rule applicable to all resources. The disingenuousness of the Commission's assertion that its "symmetry" treatment ensures non-discriminatory treatment of QFs and other potential utility resources is apparent by the Commission's failure to acknowledge that QFs do not have an obligation to serve and do not face the same regulatory requirements as utilities.² It was arbitrary

² Similarly, the presumption of a "supply monopoly" is erroneous. For example, NorthWestern owns only about 13% of the electric generation in Montana and, for the retail customers whom NorthWestern has the legal obligation to provide supply service, owns only 60 % of the generation that serves them.

for the Commission to determine that since a 25-year QF contract exposes customers to market risk, a utility must justify the cost of all resources relative to a ten-year term.

D. *The Commission's Failure to Consider NorthWestern's Request for General Tariff Changes is Unreasonable.*

NorthWestern proposed several general changes to language in the QF-1 tariff.

Commission Staff summarized the changes as,

NorthWestern proposed several general changes to its QF-1 Tariff, including the elimination of Option 2(a), defining "Contract Length", and eliminating qualifying language referring to Option 3, which is no longer offered. Option 2(a) has never been used, although it has been available since August 2007... NorthWestern proposed to eliminate the Options 1(a), 1(b), and 1(c), which define long-term non-wind rates, short-term rates, and long-term wind rates, respectively, and replace them with a table of energy and capacity rates by contract length.³

In the Final Order, the Commission did not approve, deny, or even discuss the changes that NorthWestern requested. If the Commission intended to deny the requested changes, the Commission must explain its denial. If the Commission intended to approve the requested changes, the Commission must explain its reasoning. In doing neither, the Commission unreasonably failed to fulfill its duty to resolve tariff issues placed before it. The Commission should reconsider the Final Order and provide rulings on the matters that it did not address.

E. *NorthWestern Requests Clarification Regarding Calculating the Rate for the First Five Years of a Contract.*

In the Final Order, the Commission set the maximum contract length to ten years with a rate adjustment after five years. The Commission did not provide guidance on how to calculate the rate for the first five years. There are two alternatives: 1) the rate could be the levelized rate for a 10-year contract or 2) the rate could be the levelized rate for a 5-year contract. The

³ This internal memo from Staff to the Commission is not part of the record.

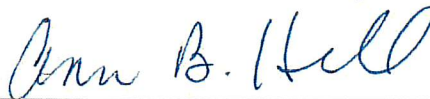
difference is significant. For illustrative purposes only, in its Application, NorthWestern proposed a 5-year rate of \$0.02185/kWh for solar QFs and a 10-year rate of \$0.2340/kWh. The second rate is higher because it is levelized over a longer period. Levelizing rates results in paying more than avoided cost in the early years and making it up in the late years. However, when rates are adjusted at the end of the fifth year, the opportunity to recover the over-payment from the early years is lost. The Commission should clarify which alternative it intended to be implemented.

III. CONCLUSION

The Commission violated NorthWestern's due process rights, imposed conditions inconsistent with the Electric Utility Industry Generation Reintegration Act, failed to resolve all matters before it, and left the method for calculating QF-1 tariff rates unclear. To remedy these deficiencies, the Commission should reconsider, modify, and clarify the Final Order.

Respectfully submitted this 31st day of July, 2017.

NORTHWESTERN ENERGY



Ann B. Hill

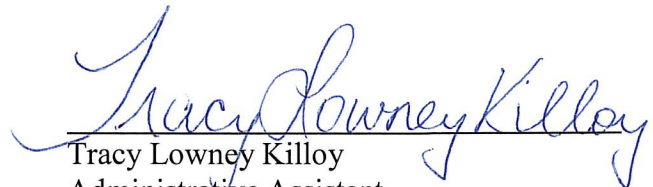
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CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's Motion for and Brief in Support of Reconsideration and Clarification of Final Order No. 7500c in Docket No. D2016.5.39, the QF-1 Avoided Cost Rate Filing, has been hand-delivered to the Montana Public Service Commission and the Montana Consumer Counsel this date. It has also been e-filed on the PSC website, emailed to counsel of record, and sent via First Class Mail to the attached service list.

Date: July 31, 2017


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