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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,)	DOCKET NO. D2016.5.39
Qualifying Facility Power Purchase)	

**Joint Motion of FLS Energy, Inc. and Cypress Creek Renewables, LLC
For Reconsideration of Order 7500c**

I. INTRODUCTION

FLS Energy, Inc. ("FLS") and Cypress Creek Renewables ("CCR") (collectively, "Movants") hereby request that the Montana Public Service Commission ("the Commission") reconsider the July 21, 2017 Final Order issued in this proceeding. See Order No. 7500c, Dkt. D.2016.5.39 (served July 21, 2017) ("Order 7500c"). Movants support the Motion for Reconsideration of Order No. 7500c filed this same day by Vote Solar and Montana Environmental Information Center ("Vote Solar / MEIC"), and hereby incorporate by reference Vote Solar / MEIC's arguments that the Commission should reconsider Order 7500c on the following grounds:

(1) the Commission's decision to drastically reduce contract lengths to just ten years with a five year adjustment is unlawful and unreasonable; (2) the Commission's total avoided cost calculation misapplied the proxy method, significantly undervaluing the costs avoided by solar energy; and (3) the Commission applied an unlawful, unjust and unlawful capacity value to solar resources.

Movants file this separate Motion to provide further argument concerning the grounds warranting reconsideration of the Commission's decision to reduce the maximum term of QF-1 standard offer contracts for PURPA Qualifying Facilities ("QFs") to ten years, with a five-year rate reset. The decision of the Commission was unlawful, unjust, and unreasonable because it was inconsistent with Montana law and the federal Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. §§ 2601 *et seq.*, and implementing regulations, and also inconsistent with all the relevant evidence in the case concerning contract length.

II. BACKGROUND

Prior to Order 7500c, Tariff Schedule QF-1 authorized QF contracts with a maximum duration of 25 years. Neither NorthWestern nor any other party to this proceeding proposed to change this in their initial filings in this matter. In the a Notice of Additional Issues of October 26, 2016, however, the Commission requested additional testimony on the maximum available contract length in Tariff Schedule QF-1.

In its additional testimony, NorthWestern asserted that a 10-year maximum contract term would help to mitigate ratepayers' exposure to "forecast risk." Ex. NWE-9, Prefiled Additional Issues Testimony of Bleau LaFave (Nov. 9, 2016) ("LaFave Addtl. Iss. Test.") at BJJ-3 – BLJ-5. The MCC advocated contracts with a maximum length of five to seven years, with a recalculation of rates at least every three years. However, it did not provide any basis for selecting these intervals other than generalized concerns about forecast risk.

Ex. MCC-2, Prefiled Additional Issues Testimony of Jaime Stamatson (Stamatson Addtl. Iss. Test.) at 4. Neither NorthWestern nor the MCC offered any testimony concerning the impact of shorter contract terms on the ability of QFs to attract capital.

FLS and Cypress Creek offered uncontradicted testimony that QF contracts with a term shorter than 15-25 years would make it prohibitively difficult for QFs to obtain financing to build their projects. Vote Solar / MEIC also offered testimony that renewable QF development has generally occurred only where 15-30 year contract lengths have been offered and with at least 50% of the contract price fixed. Ex. VS-3, Prefiled Additional Issues Testimony of Thomas Beach at 2-5. In its June 16, 2017 Memorandum, the Commission Staff recommended that the maximum length contract length in the QF-1 tariff be reduced to 15-20 years. According to the Staff, “This range represents a compromise between the objectives of: 1) encouraging QF development, including by making financing feasible; and 2) minimizing forecast risk in the determination of avoided energy costs.” Memorandum from Mike Dalton, Neil Templeton, Bob Decker, Will Rosquist to Public Service Commission (June 16, 2017) (“Staff Memorandum”) at 21. The Staff further recommended maintaining fixed prices for the full contract term.

In its June 22, 2017 work session, the Commission voted to approve the Staff’s recommendations, with a few significant modifications. Significantly, the Commission voted to reduce the maximum duration of standard offer QF-1 contracts from 25 years to 10. Moreover, the Commission decided that rates under QF-1 contracts would be fixed only for the first five years of the contract, and would be reset after five years to equal then-current avoided cost rates. The Commission issued a Final Order memorializing this decision on July 21, 2017. *See* Order 7500c.

III. ARGUMENT

A. Standard for Reconsideration

Motions for reconsideration are authorized by A.R.M. 38.2.4806, which allows a party to seek reconsideration of any aspect of a Commission order that is unlawful, unjust or unreasonable. Joint Movants respectfully request that the Commission reconsider Order 7500 on the following grounds, in addition to those cited by Vote Solar / MEIC in their Motion for Reconsideration.

B. The Commission's decision to reduce QF-1 contract duration to ten years, with a five-year reset, is inconsistent with the law and with the evidence.

1. PURPA and Montana state law require contracts of sufficient duration to encourage QF development and allow QFs reasonable access to capital.

As the Commission has acknowledged, a principal objective of PURPA is to encourage the development of certain types of qualifying facilities by providing a market for their electric energy and capacity. Order 7500c ¶ 99 (citing Order No. 69, 45 Fed. Reg. 12214, 12221 (Feb. 25, 1980); and *FERC v. Mississippi*, 456 U.S. 742, 751 (1982)). This requires providing QFs sufficient certainty with regard to the opportunity to recover and earn a reasonable return on their investments in electric generating facilities. *Id.* (citing Order 69, 45 Fed. Reg. at 12224.)

FERC recently clarified that QFs' need for certainty with regard to return on investment, together with Congress's directive under PURPA to "encourage" QFs, mean that the duration of a contract or other legally enforceable obligation under PURPA must be long enough to allow QFs "reasonable opportunities to attract capital from potential investors." *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61,134 at P. 8 (Nov. 22, 2016). Montana state law also requires that, in the context of Commission decisions regarding rates and conditions for QF sales, "long-term contracts for the purchase of electricity by the utility from a qualifying small power production facility must be encouraged in order to enhance the economic feasibility of qualifying small power production

facilities.” Mont. Code Ann. § 69-3-604(2). The Commission acknowledges these binding legal requirements in Order 7500c, but its application of these is completely unsupported by the evidence before it.

2. The Commission’s decision to shorten QF-1 contract duration to ten years is inconsistent with the evidence.

As discussed, the Commission has acknowledged that it must, under PURPA and Montana law, establish standard contract terms that encourage QF development and provide QFs with reasonable access to capital. Order 7500c at ¶ 100 (citing *Windham Solar* and Mont. Code Ann. § 69-3-604(2)). However, the only relevant evidence in the record shows that ten-year contract terms, especially with a five-year rate reset, do not fulfill this requirement.

NWE and the MCC provided testimony setting forth their view that QF-1 contract terms shorter than 25 years are necessary to protect ratepayers from the risk of overpayment in the event future avoided cost rates fall below current projections. However, neither NWE nor the MCC offered any evidence concerning the impact of shorter contract duration on QFs’ ability to obtain financing. For NorthWestern, Mr. LaFave simply testified to his personal belief that (contrary to what PURPA requires) “I do not think QF developers have a vested right to rely upon project finance.” LaFave Addtl. Iss. Test. at BJL-5. For MCC, Mr. Stamatson also opined about forecast risk for ratepayers under long term contracts, but did not offer any testimony about QF financing. Stamatson Addtl. Iss. Test. at 4-5. Indeed, Mr. Stamatson testified that he did not have any idea how shorter contract lengths would impact QF development. Transcript of Proceedings, Docket D2016.5.39 (Jan. 19, 2017) at 294:12-21.

The only evidence concerning the impact of contract duration on QFs’ ability to obtain financing was provided by witnesses put on by Movants and by Vote Solar / MEIC. Movants’ witness Mr. McConnell testified that the duration of a QF’s fixed-price PPA is one of the most

important factors in obtaining financing, and that he had never seen a loan maturity or amortization for a project under 75 MW extend beyond the term of a fixed price PPA. Ex. FLS-1, Prefiled Additional Issues Testimony of Patrick McConnell at 3. According to Mr. McConnell's uncontested testimony, "the cash flow profiles of investments with PP As of less than at least 15 years, and in most cases 20 years, simply do not make economic sense." *Id.* at 4. In other words, a QF that cannot obtain a fixed-price contract of 15 years or longer does not have reasonable access to financing. Neither NWE, the MCC, nor any member of the Commission had any questions for Mr. McConnell with regard to his testimony. Transcript of Proceedings, Docket D2016.5.39 (Jan. 18, 2017) at 47-49.

Consistent with Mr. McConnell, Mr. Beach testified on behalf of Vote Solar / MEIC that, in his experience, financing entities are not willing to lend money to QFs without a long-term contract at fixed prices to provide certainty that the QF will be able to meet its debt repayment obligations. Ex. VS-3 at 2. Mr. Beach also testified that in general, development of renewable QFs has occurred only where QFs have access to long-term, fixed-price contracts with terms of 15 to 30 years, such that QFs can secure long-term financing for the capital costs of their projects. In states where only short-term contracts have been available, very few QFs are developed. *Id.* at 3.

It follows from Mr. McConnell and Mr. Beach's testimony that if the Commission reduces QF-1 contract durations to less than ten years, as it does in Order 7500c, QFs cannot obtain access to financing and QF development in Montana will be discouraged rather than encouraged. Requiring avoided cost rates to be reset after five years will only exacerbate the problem.

The Commission does not cite any evidence to rebut Mr. McConnell or Mr. Beach's testimony. In fact, beyond reciting FERC requirements and the parties' contentions, Order 7500c

fails completely to address the impact of shortening QF-1 contracts on QFs' ability to obtain financing.

Instead of citing evidence to support its decision, the Commission leans on a recent decision of the Idaho Public Utilities Commission ("PUC") limiting the length of certain PURPA contracts to two years. Order 7500c at ¶ 101-02. But the decision of another utilities commission is not binding on this commission, and Movants submit that the Idaho PUC's decision was contrary to PURPA and should not be accorded any weight. More importantly, the Idaho PUC's decision on a matter of policy is not *evidence*, and cannot be used rebut the uncontested evidence provided by Movants and Vote Solar / MEIC showing that shorter contract durations, especially in combination with a five-year rate reset, deprive QFs of reasonable access to capital and discourage QF development. Nor does the fact that the North Carolina Utilities Commission ("NCUC") requires utilities to offer standard offer contracts of 5, 10, or 15 years support the Commission's decision to shorten QF-1 contracts to ten years. *See* Order 7500c at ¶ 103. In fact, the NCUC recently rejected requests from utilities to eliminate the 15-year option, finding that a 15-year maximum term length for standard offer contracts (with a five MW eligibility threshold) would appropriately balance the costs, benefits, and risk to utilities, consumers, and QFs. *In the Matter of Biennial Determination of Avoided Cost Rates for Electric Utility Purchase from Qualifying Facilities*, Dkt. No. E-100, Sub 140, Order Setting Avoided Cost Input Parameters (N.C.U.C. Dec. 31, 2014) at 21-22.

Order 7500c also cites A.R.M. 38.5.8201-02 for the proposition that a "long-term" contract in the PURPA context "is minimally understood as ten years." Order 7500c at ¶ 105. Leaving aside the fact that the cited regulations are intended to provide policy guidance on electricity supply resource planning and procurement, and not to address the financing needs of QFs or any other

commercial issue, the regulations clearly don't define "long term" to mean ten years. Rather, A.R.M. 38.5.8202(7) defines "long-term" to mean the longer of: (1) ten years, (2) the longest remaining contract term in the utility's resource portfolio, or (3) the period of the longest lived electricity supply resource being considered for acquisition. Movants are unaware of the longest remaining contract term in NWE's resource portfolio, but NWE's 2015 Electricity Supply Resource Procurement Plan identifies needs over a 20-year planning horizon. NorthWestern Energy, 2015 Electricity Supply Resource Procurement Plan (Mar. 31, 2016) at 1-6. Consequently, "long term" in this context must mean at least 20 years, if not longer.

Because the only evidence shows that shortening QF-1 contract duration to ten years will deprive QFs of reasonable opportunities to attract capital, will compromise the economic feasibility of QFs in Montana, and will discourage QFs from entering into long-term contracts, the Commission's Order violates PURPA and Montana state law and must be reconsidered. *See Windham Solar*, 157 FERC at 61,475–61,476; Mont. Code Ann. § 69-3-604(2).

3. A five-year rate reset for QF-1 contracts violates PURPA.

In addition to reducing the duration of QF-1 contracts, Order 7500c requires that avoided cost rates in QF-1 contracts be subject to adjustment after five years to match the then-effective QF-1 rate. Order 7500c at ¶ 110. As discussed above, this five-year rate reset creates price uncertainty and further compromises QFs' ability to obtain financing. It is also inconsistent with PURPA.

FERC regulations provide that a QF has the right to sell its output to a utility pursuant to a legally enforceable obligation, at rates based (at the QF's election) on either: (i) the avoided costs calculated at the time of delivery; or (ii) the avoided costs calculated at the time the obligation is incurred. 18 C.F.R. § 292.304(d)(2) (emphasis added). As explained by FERC, this requirement

is also intended to provide the QF with certainty, by enabling it “to establish a fixed contract price for its energy and capacity at the outlet of its obligation.” 45 Fed. Reg. 12224.

Order 7500c provides that under a ten-year QF-1 contract, avoided costs would be reset after five years “to match the then-effective QF-1 tariffed rate.” Order 7500c at ¶ 110. Accordingly, after five years the QF would not be selling its output at rates based on avoided costs calculated at the time the obligation is incurred (*i.e.*, at the outset of the contract or when a legally enforceable obligation is otherwise established), but at avoided cost rates calculated at some later date. This is clearly contrary to PURPA and the Commission must reconsider its decision in this regard.

IV. CONCLUSION

Although the Commission has acknowledged its legal duty to establish standard rates and terms that encourage QF development and provide QFs with reasonable opportunities to access capital, it has forsworn that obligation by reducing QF-1 contract terms to ten years and requiring rates under such contracts to be reset after five years. And it has done so in the face of clear and uncontested evidence that its actions would discourage QF development in Montana by depriving QFs of reasonable access to capital. Accordingly, Order 7500c was unlawful, unjust and unreasonable.

Movants respectfully request that the Commission reconsider Order 7500c and issue a revised order restoring the duration QF-1 contracts to 15-20 years, with fixed prices for the duration of the contract. In the future, the Commission should not take action to reduce the duration of such QF-1 contracts without evidence showing that such shortened duration would not unduly interfere with QFs’ ability to obtain financing. Movants also support and join in requesting

reconsideration of those issues raised by intervenors Vote Solar and Montana Environmental Information Center.

RESPECTFULLY SUBMITTED, this 31st day of July, 2017.

UDA LAW FIRM, PC

By:


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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2017, I served the foregoing by first-class mail, postage prepaid mail on the following:

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