

Service Date: September 13, 2011

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Petition of)	REGULATORY DIVISION
NorthWestern Energy for a Declaratory)	
Ruling on the Applicability of 18 C.F.R.)	DOCKET NO. D2011.7.57
292.304 (f) and ARM 38.5.1903 (1) to)	ORDER NO. 7172
Contracts with Qualifying Facilities)	

**CONCURRING OPINION OF
COMMISSIONER TRAVIS KAVULLA**

The current Qualifying Facility regime is by no means desirable. When NorthWestern Energy Corp. (“NorthWestern” or “applicant” or “petitioner”) files its resource procurement plan, it sets in motion another docket whereby the Commission pursuant to PURPA and Montana law plays market maker and sets out to do the impossible: creating a durable rate which reflects the “avoided cost” of energy over a short and long term. As the last few years make clear, however, there is nothing consistent or durable about the wider economy to whose vicissitudes the energy market is subject. A meaningful avoided cost is difficult to concoct if it is only being revised biennially or at an even longer interval. Similarly, it is difficult to ignore the fact that this Commission’s rules have created a mode of political economy where nearly all QFs are built to a scale (10 aMW) which is decreed as an upper limit to a QF standard-offer contract by the Commission’s administrative rules. Perhaps the eventual answer lies in taking this Commission out of the market-making game and leaving that role to the market itself via processes which do not revolve around fixed and inflexible prices like requests for proposals. None of the foregoing is directly at issue in this docket, but is so inexorably linked to any matter touching upon QF policy that it deserves enunciation as a preface.

At issue here is the applicant’s attempt to use what is essentially a dead letter of the Commission’s administrative rules, explicitly intended for a utility which owns a considerable amount of base-load generation, to introduce an utterly novel concept into the realm of PURPA-based regulation as it exists in Montana: one which is neither countenanced by the clear language of the governing tariff, which states that a QF shall be paid for “all hours” of generation, nor by a

considered reading of the rule itself, nor, more quaintly, by a rudimentary sense of fair play and nondiscriminatory access which animates Montana’s implementation of PURPA.

While sensitive to the outcomes wrought upon the system by an antiquated regime of QF regulation—which, inopportunistically, NorthWestern seeks to exploit in this petition, rather than alter in a rulemaking—the Commission should try to enforce the letter and spirit of the law to the best of its ability. This includes an attempt to maintain impartiality between the assets NorthWestern owns or intends to own, and of those with whom it is entering into agreements. That guideline, and not an unremitting embrace of the status quo, is the spirit in which this Order, I hope, will be read.

The Dissent to this Order requires a few points of correction.¹ First, it confuses what is permitted under state and federal rules’ existing curtailment language by conflating “operational conditions”—when curtailment is explicitly contemplated—with “market conditions.” One is not the other. Market conditions, by which I mean a more expansive notion than the truncated view of spot prices the Dissent brooks, are anticipated by the avoided-cost tariffs. This Commission’s tariffs put forth a multifaceted calculation of avoided cost resulting in three options. One option is premised upon a price available at market, another upon the acquisition of a long-term base-load asset (pegged, in the last tariff, to Colstrip IV, an avoided cost essentially established when the Commission, including the dissenter, voted to allow the utility’s acquisition of it), and the third is based upon the cost of a long-term wind asset whose acquisition to comply with public policy is anticipated by the procurement plan. The asset being avoided, in other words, is different in term or fuelstock or uncertain other costs like wind integration in each of the three options, and therefore results in different avoided-cost rates. The Dissent should, but does not, ask itself: Could the prevailing low market prices be secured over a 25-year period? Obviously not.

The Dissent is accordingly confused about what is meant by “consumer indifference.” The consumer is indifferent to whether the utility pays a spot price to a QF generator equal to what it

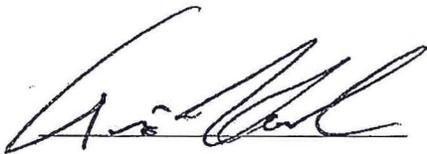
¹Indeed, the Dissent requires more than a few points of correction. But in the interest of brevity, this Concurring Opinion, because the Dissent is unintelligible in parts, will not attempt to impute a meaning to its language.

would pay at the spot market. But the consumer also is indifferent whether NorthWestern buys from a coal-fired plant in which the utility owns a stake versus purchasing from a different generator—if the price paid on- and off-peak is the same. So, too, does the consumer not care whether NorthWestern complies with a public-policy requirement by obtaining its own wind asset, signing a non-QF power-purchase agreement with a wind company, or signing to buy with a small QF. The avoided cost and terms and conditions of a QF contract should, then, reflect as much as possible those which prevail with respect to non-QF generators or purchases: that is the concept of indifference which appears to elude the Dissent.

There are numerous other errors in the Dissent. It misconprehends the nature of this year's overgeneration event and what it does and does not mean for the state's wholesale co-ops and utilities. It implies that a declaratory judgment's issuance in the absence of a public hearing is somehow improper. It pretends that the Order's "legal conclusions" are premised on a QF's concern over obtaining financing, when that point was merely reiterated within the Order, not advocated by it, as a comment the Commission had received (Order, p.5). Insidiously, even while inveighing against the "regulatory uncertainty" to which the Order will supposedly contribute, the Dissent appears to encourage NorthWestern to violate the same Order.

At its core, the Dissent is schizophrenic. While calling for a less activist Commission—a notion with which I am sympathetic—it forwards a vision of PURPA which goes far beyond the scope of the petition and itself engages in a dismal activism which is totally at odds with the clear meaning of the law and with the reality of electrical markets. Even while branding itself "populist," ironically the only thing the Dissent would accomplish is to encourage monopolism and set up a parallel set of rules which binds some but not others.

I CONCUR with the Order.

A handwritten signature in black ink, appearing to read 'Travis Kavulla', written in a cursive style.

Travis Kavulla, Commissioner