

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

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 38.5.1902 pertaining to )  
Cogeneration and Small Power )  
Production )

TO: All Concerned Persons

1. On September 24, 2015, the Department of Public Service Regulation published MAR Notice No. 38-5-232 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1442 of the 2015 Montana Administrative Register, Issue Number 18.

2. The department has amended the rule as proposed in Version B, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

38.5.1902 GENERAL PROVISIONS (1) through (4) remain as proposed.

(5) All purchases and sales of electric power between a utility and a qualifying facility that is not eligible for standard offer rates shall be accomplished according to the terms of a written contract negotiated ~~contract~~ between the parties ~~or in accordance with the applicable standard tariff provisions as approved by the commission.~~ The utility shall compute the avoided costs for a qualifying facility that is not eligible for standard offer rates at the time the qualifying facility requests a contract. Only qualifying facilities having a nameplate capacity not greater than 3 MW are eligible for standard offer rates. All purchases and sales of electric power between a utility and a qualifying facility that is eligible for standard offer rates shall be accomplished according to the terms of a written contract between the parties or in accordance with the applicable standard tariff provisions as approved by the commission. The utility shall recompute short-term and long-term avoided costs for standard offer rates following submission of its least cost plan filing, ARM 38.5.2001 through 38.5.2012, or procurement plan filing, ARM 38.5.8201 through 38.5.8229. ~~Long-term contracts for purchases and sales of energy and capacity between a utility and a qualifying facility 3 MW or less may be accomplished according to standard tariffed rates as approved by the commission. Long-term contracts for purchases and sales of energy and capacity between a utility and a qualifying facility larger than 3 MW may be accomplished at a rate which is a negotiated term of the contract between the utility and the qualifying facility.~~ The contract shall specify:

(a) through (7) remain as proposed.

3. The department has fully considered the written and oral comments on the proposed rule. In this case, there were no opponents to the proposed amendment. A summary of the comments received and the department's responses, including the principal reasons for and against adoption, are as follows:

COMMENT 1: Greycliff Wind Prime, LLC (Greycliff) proposed Version C to reduce barriers to amicable contract formation and increase the incentive to negotiate rather than litigate. Greycliff asserted that nothing in law requires a competitive solicitation process to set avoided cost rates, and that the existing rule has hampered negotiations between the utilities and large qualifying facilities (QFs). It acknowledged that under certain circumstances, competitive solicitations may be used to set avoided costs rates, but said that relying on solicitations that are never held runs afoul of the Public Utility Regulatory Policies Act (PURPA), that short term rates do not encourage or enable long-term contracts, and that a conflict exists between the rule and 69-3-603, MCA.

Greycliff compared the risks presented by QF contracts to the risks presented by rate based utility assets. It alleged discriminatory treatment of QFs by the utility with respect to certain assumptions about the future, and alleged that QF contracts have certain advantages. Greycliff also discussed the potential for wind development in Montana and the need to comply with the Clean Power Plan. It also made certain arguments, including legal arguments, in response to broader comments by the Montana Consumer Counsel (MCC) and NorthWestern Energy (NorthWestern).

RESPONSE 1: Although Version C would clearly require negotiations, it would also add new requirements that would need to be administered and adjudicated. Creating a new process for summary ruling or a more specific standard for negotiations would likely invite additional litigation. Also, a summary ruling process could force customers to pay more than avoided cost for QF power, thereby violating the principle of consumer indifference. For these reasons, the commission declines to adopt Version C, and finds that revised Version B will be simpler to administer and better ensure customer indifference. The commission finds that it need not resolve all of the broader legal and policy disagreements between Greycliff, NorthWestern, and MCC in this rulemaking proceeding.

COMMENT 2: The MCC emphasized the principle of consumer indifference, and asserted that for larger QFs, "the route to a long-term contract has been through a competitive solicitation." According to MCC, competitive solicitations "offer a superior means of determining avoided cost." It suggested adding a requirement for periodic competitive solicitations, but also recognized the complexity of defining such a process: "The issues involved in designing a role for competitive solicitations do not appear to be amenable to resolution by means of . . . the proposal currently before the Commission." It recommended broadening the scope of this proceeding or Docket N2015.9.74. It urged the commission to reject Version C.

In addition to its comments regarding competitive solicitations, the MCC proposed to eliminate rate levelization for large QFs. It also proposed to add new provisions concerning legally enforceable obligations (LEOs), utility resource acquisitions, and adjustments to new contracts based on subsequent commission decisions.

RESPONSE 2: The commission disagrees that competitive solicitations have been the primary route to long-term contracts for large QFs. In practice, the utility and

large QFs have utilized contested case procedures to determine long-term avoided cost rates pursuant to 69-3-603, MCA. As the MCC acknowledged, creating new requirements for periodic solicitations is beyond the scope of this rulemaking proceeding. With this proceeding concluded, such requirements may be considered in Docket N2015.9.74. As discussed above, the commission declines to adopt Version C.

The commission finds that MCC's proposals to eliminate rate levelization for large QFs and add new provisions concerning LEOs, utility acquisitions and contract adjustments are beyond the scope of this rulemaking proceeding.

COMMENT 3: NorthWestern commended the commission "for addressing the contradictory administrative provisions" regarding large QFs. According to NorthWestern, the competitive solicitation rule serves an important regulatory purpose, and the "policy reasons that supported the competitive solicitation requirement in 1992 are still present." However, it also recognized an apparent conflict between certain rules, and said the commission has "wide latitude" in implementing PURPA. NorthWestern warned against creating conflicts with the Electric Procurement Guidelines, and suggested that if the commission repeals the competitive solicitation rule, it should do so based on reasonable necessity.

NorthWestern stated that Version A could be workable, but strongly opposed Version C. According to NorthWestern, Version A "eliminates the current conflict between ARM 38.5.1902(5) and ARM 38.5.1903(2)(b)," but does not eliminate implementation uncertainty. It proposed the revised Version B to preserve the same substantive provisions as the original Version B, but more clearly maintain the distinction between large QFs and standard offer QFs. According to NorthWestern, revised Version B also clarifies that the utility's obligation to compute avoided cost when it begins negotiations with a large QF, and to base that computation on what it knows at that time.

RESPONSE 3: The commission agrees with NorthWestern that revised Version B is preferable to Versions A and C, and finds that adopting revised Version B is reasonably necessary for several reasons.

First, revised Version B will better ensure consumer indifference to QF contracts. Because NorthWestern's own generation resources have not been selected through competitive solicitation processes, requiring large QFs to be selected through such a process does not ensure customer indifference.

Second, the commission shares NorthWestern's concern about the apparent conflicts between certain rules. A conflict also exists between the competitive solicitation rule, which makes long-term contracts contingent on a solicitation, and 69-3-603, MCA, which creates an ongoing right to petition the commission for long-term rates. See *e.g.* Dkts. D2014.4.43, D2015.8.64. As a result, the competitive solicitation rule has not been followed in practice.

Third, policies favoring competitive solicitations remain in effect, and are not in conflict with revised Version B. See Mont. Code Ann. §§ 69-8-419(2)(d), 69-3-2005(1)(a); Mont. Admin. R. 38.5.2010, 38.5.8212.

Fourth, as the federal agency responsible for overseeing states' implementation of PURPA, FERC's legal opinion is persuasive in this case because it is consistent with Montana's existing practice, which allows QFs to petition the commission to enforce PURPA rights. 16 U.S.C. § 824a-3(h) (2015). Harmonizing the commission's rule with FERC's decision should clarify this issue and reduce litigation.

Finally, the commission agrees with NorthWestern that revised Version B appropriately clarifies the utility's obligation to calculate avoided costs and the distinction between large QFs and standard offer QFs.

COMMENT 4: Martin Wilde, commenting on behalf of WinDATA, LLC and Montana Marginal Energy, LLC, observed that the commission itself recently approved a long-term, forecasted rate for a large QF outside of the context of a competitive solicitation. Mr. Wilde suggested that the competitive solicitation requirement has caused additional litigation because NorthWestern has relied on it to refuse to negotiate. Mr. Wilde urged the commission to adopt any of the versions proposed.

RESPONSE 4: The commission agrees that it has approved long-term avoided cost rates outside a competitive solicitation process. See *e.g.* Dkt. D2014.4.43. It adopts revised Version B to encourage negotiation in lieu of contested case proceedings, and to better ensure customer indifference.

/s/ JUSTIN KRASKE

Justin Kraske  
Rule Reviewer

/s/ BRAD JOHNSON

Brad Johnson  
Chairman  
Department of Public Service Regulation

Certified to the Secretary of State December 14, 2015.