

SARAH NORCOTT
NorthWestern Energy
208 N. Montana, Suite 205
Helena, Montana 59601
Tel. (406) 443-8996
Fax (406) 443-8979
sarah.norcott@northwestern.com

JOHN ALKE
NorthWestern Energy
208 N. Montana, Suite 205
Helena, Montana 59601
Tel. (406) 444-8183
Fax (406) 443-8979
john.alke@northwestern.com

Attorneys for NorthWestern Energy

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

IN THE MATTER OF the Petition of)	REGULATORY DIVISION
Greycliff Wind Prime, LLC to Set Contract)	
Terms and Conditions for a Qualifying)	DOCKET NO. D2015.8.64
Small Power Production Facility)	

**NorthWestern Energy’s Response Brief to Greycliff Wind
Prime LLC Motion for Summary Judgment
(Oral Argument Requested)**

INTRODUCTION

This docket was initiated by a Petition by Greycliff Wind Prime, LLC (“Greycliff”) to establish the terms and conditions of a power purchase agreement with NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern”), in accordance with the provisions of § 69-3-603, MCA. Procedural Order No. 7436 has been entered in the docket, and a contested case hearing has been set for purposes of establishing terms and conditions of a power purchase

agreement. The Montana Consumer Counsel (“MCC”) has intervened in the proceeding to represent the interests of NorthWestern’s customers.

On September 4, 2015, Greycliff filed with the Commission what it styled a Motion For Summary Judgment (“Greycliff Motion” or “Motion”). Greycliff claims it is entitled, as a matter of law, to a power purchase agreement with NorthWestern at terms and conditions of Greycliff’s choosing, rather than as determined by the Commission in accordance with § 69-3-604, MCA. Greycliff’s Motion claims, in pertinent part: “That NWE’s failure to negotiate resulted in the creation of a LEO for Greycliff, on the terms and conditions set forth in Greycliff’s proposal.” Greycliff Motion, at p. 11.

Greycliff’s Motion has no basis in law or fact. As explained by NorthWestern in this Response Brief, this matter must proceed to a contested case hearing in which the Commission will determine the terms and conditions of any power purchase agreement in accordance with the provisions of §69-3-604, MCA.

FACTS

Greycliff’s proposed wind farm has been before this Commission in previous proceedings. In the last proceeding, PSC Docket D2015.2.18, Greycliff’s proposed wind farm was rejected as not being the lowest cost option for renewable energy available to NorthWestern: “The Greycliff PPA was not the least-cost CREP offer.” Finding of Fact 24, Order No. 7395d, PSC Docket No. D2015.2.18 (Order issued May 27, 2015.) In that docket, NorthWestern had requested the approval of the Commission to enter into a power purchase agreement with Greycliff at a 25-year levelized price of \$49.02 per megawatt hour (“MWh”) (excluding the cost of regulation). *Id.* at Finding of Fact 14.

Greycliff asserts in its Motion that it is entitled, as a matter of law, to now sell its power to NorthWestern at a 25-year levelized price of \$53.85 per MWh. Exhibit 3 to Greycliff's Petition, at p. 14, Section 5.5.1. According to Exhibit 1 to Greycliff's Petition, the price at which it claims it is entitled to sell power to NorthWestern, as a matter of law, is from the Commission's decision in the *Greenfield* docket, PSC Docket No. D2014.4.43. The avoided costs of Greycliff's proposed wind farm were not at issue in the *Greenfield* docket. The Commission's decision in the *Greenfield* docket makes clear it is not based upon an avoided cost calculation. PSC Docket No. D2014.4.43, Order No. 7347a, Findings of Fact 19-28. According to the Commission in the last Greycliff docket: "Greenfield's price was a negotiated, project-specific price for a QF based on an unapproved avoided cost method." PSC Docket No. D2015.2.18, Order No. 7395d, Finding of Fact 34.

The \$53.85 per MWh price demanded by Greycliff in this proceeding is not the last determined avoided cost for the Greycliff project. In the last Greycliff proceeding, the avoided cost of power from the project, on a 25-year levelized basis, was \$45.01 per MWh, excluding regulation. Exhibit (BJL-02) to the Pre-filed Direct Testimony of Bleau LaFave, NWE Ex.-2, in PSC Docket No. D2015.2.18. If the 25-year levelized price of renewable energy credits at the time (\$3.39) is added to that number, the resulting avoided cost was \$48.40 per MWh. *Id.* Importantly, whatever the avoided costs were estimated to be in the previous docket for the Greycliff project are no longer relevant. It will be incumbent upon the Commission, in this proceeding, to determine what NorthWestern's current avoided costs are using a methodology it approves, reflecting current information which correlates to Greycliff's claim of a legally enforceable obligation ("LEO").

ARGUMENT

I. *The public's constitutional right to participate in this proceeding precludes the Commission from granting Greycliff's Motion.*

The Commission has not adopted in its procedural rules the provisions of M. R. Civ. P. 56, the rule of civil procedure governing motions for summary judgment in Montana District Court. Greycliff argues that notwithstanding that fact, “nothing in Commission’s [sic] rules precludes the filing of [summary judgment] motions.” Motion, p. 3. Greycliff’s argument ignores that the Montana constitution and the statute implementing the MCC preclude the Commission from granting Greycliff’s Motion.

The correct calculation of the Greycliff project’s avoided costs is a critical element of the proceeding instituted by Greycliff in this docket. § 69-3-604(4), MCA. The Federal Energy Regulatory Commission’s (“FERC”) regulations provide that rates paid to QFs must “[b]e just and reasonable to the electric consumer of the electric utility.” *See* 18 C.F.R. § 292.304(a)(1)(i). Therefore, a rate that “works substantial inequitable treatment on a particular ratepayer” is a violation of PURPA. *Allegheny Ludlum Corporation v. Pennsylvania Public Utility Commission*, 612 A.2d 604, 610 (Pa. Super. Ct. 1992). The Commission has adopted the FERC’s regulations. ARM 38.5.1901(1).

The public has a constitutional right to be heard in matters before the Commission. Art. II, sec. 8, Mont. Const. Moreover, the Montana Constitution created the MCC to represent the interests of utility customers before the Commission. Art. XIII, sec. 2, Mont. Const. The statutory structure governing Commission proceedings contemplates that contested case matters will be heard in a public hearing, at which members of the public will be allowed to testify, assisted by the MCC. §§ 69-2-201, 69-2-204, 69-2-212, MCA. The MCC has intervened in this docket.

This case is not a dispute between two parties to a commercial transaction. Nor is it a personal struggle over an individual's occupational license. NorthWestern's customers ultimately pay, in the rates they pay for electric service from NorthWestern, the avoided costs which the Commission will establish in this docket. The Commission is legally obligated to conduct a formal contested case hearing in this matter, which not only allows full participation by NorthWestern, but by the MCC. The Commission cannot, consistent with its responsibilities under Montana's Constitution, purport to grant summary judgment to Greycliff.

II. *Greycliff has not met the standard for establishing entitlement to a summary judgment under the Montana Rules of Civil Procedure.*

Even if it is assumed, arguendo, that the Commission has the power to issue summary judgment, without holding a public hearing as required by Montana law, the Commission cannot issue summary judgment in favor of Greycliff in this docket. To succeed on a motion for summary judgment in Montana District Court, the moving party must establish that there are no material issues of fact, and that they are entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3). The moving party has the initial burden of proof. *Bonilla v. University of Montana*, 2005 MT 183, ¶ 11, 328 Mont. 41, 116 P.3d 823. Additionally, "all reasonable inferences which may be drawn from the offered proof must be drawn in favor of the party opposing summary judgment." *Montana Society of Anesthesiologists v. Montana Bd. of Nursing*, 2007 MT 290, ¶ 20, 339 Mont. 472, 171 P.3d 704. "The law favors full litigation of all issues brought before a court." *Wagner v. Glasgow Livestock Sales Co.*, 222 Mont. 385, 389, 722 P.2d 1165, 1168 (1986).

At a minimum, there are two substantial issues of material fact, which preclude summary judgment under M. R. Civ. P. 56:

- (1) What contractual terms and conditions the Commission should establish as reasonable; and
- (2) Whether or not there is an LEO binding Greycliff to sell its power to NorthWestern at the terms and conditions to be established by the Commission in this docket.

Obviously, the Commission has not yet had an opportunity to establish reasonable terms and conditions for a power purchase agreement between Greycliff and NorthWestern, as the scheduled contested case hearing has not yet been held nor has any party presented any evidence. Just as obvious is the fact that Greycliff has bound itself to nothing, unless the Commission determines, after hearing, that the terms and conditions desired by Greycliff are in fact the reasonable terms and conditions which should be imposed in a power purchase agreement between Greycliff and NorthWestern. If the Commission ultimately establishes terms and conditions different than those proposed by Greycliff in its draft agreement, Greycliff has not created an LEO.

When presented with a motion for summary judgment, the presiding judge “must identify the applicable law, apply it to the uncontroverted facts, and determine who wins the case.” *Cole v. Valley Ice Garden, L.L.C.*, 2005 MT 115, ¶ 4, 327 Mont. 99, 113 P.3d 275. The applicable law in this state is that a qualifying facility, to create an LEO, must:

tender an executed power purchase agreement to the utility with a price term consistent with the utility’s avoided costs, with specified beginning and ending dates, and with sufficient guarantees to ensure performance during the term of the contract, and an executed interconnection agreement.

Order No. 6444e, ¶ 47, Docket No. D2002.8.100 (May 18, 2010) (“Whitehall Wind Docket”).

The Commission has not determined that failing to negotiate a power purchase agreement creates an LEO. In the Whitehall Wind Docket, the Commission specifically found that

NorthWestern had failed to negotiate with the qualifying facility. *See* Order No. 6444c, ¶ 8 (January 2, 2003). Notwithstanding this finding, the Commission found that the qualifying facility had not established an LEO. The Commission’s decision was recently upheld by the Montana Supreme Court. *Whitehall Wind, LLC, v. Montana Public Service Commission*, 2015 MT 119, 379 Mont. 119, 347 P.3d 1273.

Greycliff argues that “FERC has clearly held that a utility’s refusal to negotiate may create [an] LEO.” Motion, p. 6. Declaratory orders issued by the FERC are not legal precedence until enforced by a federal district court decision. Declaratory orders “merely advise[] the parties of the [FERC’s] position” on an issue. *Industrial Cogenerators v. FERC*, 47 F.3d 1231, 1235 (D.C. Cir. 1995); *see also, Idaho Power Co. v. Idaho Public Utilities Commission*, 155 Idaho 780, 788, 316 P.3d 1278, 1286 (2013). They resemble “a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action.” *Industrial Cogenerators*, 47 F.3d at 1235. As such, until a federal district court enforces the declaratory order, such orders are “legally ineffectual.” *Id.* The FERC declaratory orders cited to by Greycliff have not been upheld by a federal district court.

Greycliff asserts in its Motion that it sent a letter to NorthWestern attempting to “negotiate an agreement.” Motion, p. 5. The letter, which is Exhibit 1 to the Petition, cannot be fairly described as a request for negotiations. It is, on its face, a demand letter in which Greycliff asserts NorthWestern has no choice but to “immediately execute” Greycliff’s proposed contract: “[i]f NorthWestern does not respond to this LEO letter or indicates disagreement that Greycliff has incurred an LEO in writing as of July 10, 2015, Greycliff will pursue any available legal remedy, including an action before the Commission to enforce the LEO and PURPA.”

Citing to Exhibit 2 of the Petition, NorthWestern’s response to the Greycliff demand letter, Greycliff claims it is undisputed that NorthWestern “refused to negotiate.” Motion, p. 5. A cursory review of Exhibit 2 indicates that instead of refusing to negotiate, NorthWestern offered to enter into a contract with Greycliff: “[NorthWestern] stands ready and willing to enter into a short-term contract at [a] short-term rate....”

III. *The issues in this docket have been framed by Greycliff’s Petition.*

This docket was instituted upon petition of Greycliff to establish reasonable terms and conditions of a power purchase agreement between NorthWestern and itself in accordance with § 69-3-604, MCA. Section 69-3-603, MCA, provides in pertinent part that “if a qualifying small power production facility and a utility are unable to mutually agree to a contract for the sale of electricity to be purchased by the utility,” the Commission must determine the appropriate rate to be paid by the utility for the power sold by the qualify facility. That cannot occur without holding the contested case hearing scheduled by the Commission in its Procedural Order No. 7436 entered in this docket.

ORAL ARGUMENT

NorthWestern respectfully requests that the Commission hold oral arguments on Greycliff’s Motion. M. R. Civ. P. 56(c)(2)(A).

CONCLUSION

The Commission cannot enter summary judgment as demanded by Greycliff in this docket. Even if M. R. Civ. P. 56 had any application to this proceeding (which it does not), Greycliff’s Motion fails to meet the standard for a motion for summary judgment. This case must be heard by the Commission in a contested case hearing in which the public is entitled to appear before the Commission.

Dated this the 22nd day of September 2015.

NORTHWESTERN ENERGY

By: John Alke
John Alke
Sarah Norcott
Attorneys for NorthWestern Energy

CERTIFICATE OF SERVICE

I hereby certify that a copy of the NorthWestern Energy's Response Brief to Greycliff's Motion for Summary Judgment in Docket No. D2015.8.64 has been hand delivered to the Montana Public Service Commission and to the Montana Consumer Counsel this date. It has also been e-filed on the PSC website and emailed to the service list as follows:

Kate Whitney, Administrator
MT Public Service Commission
Box 202601
Helena, MT 59620-2601

Sarah Norcott
NorthWestern Energy
208 N. Montana Ave Suite 205
Helena, MT 59601

Monica Tranel
Montana Consumer Counsel
111 N. Last Chance Gulch Ste 1B
P.O. Box 201703
Helena, MT 59620-1703

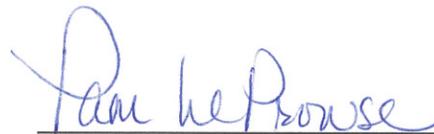
John Alke
NorthWestern Energy
208 N. Montana Ave Suite 205
Helena, MT 59601

Michael J. Uda
Uda Law Firm, P.C.
7 Sixth Street West
Power Block West, 4H
Helena, MT 59601

Joe Schwartzenberger
NorthWestern Energy
40 E. Broadway
Butte, MT 59701

Pam LeProwse
NorthWestern Energy
40 E. Broadway
Butte, MT 59701

Date: September 22, 2015



Pam LeProwse
Administrative Assistant
Regulatory Affairs