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

IN THE MATTER of the Petition of
Greycliff Wind Prime, LLC To Set Terms
and Conditions for Qualifying Small Power
Production Facility Pursuant to M.C.A. §
69-3-603

UTILITY DIVISION
DOCKET NO. D2015.8.64

**GREYCLIFF WIND PRIME, LLC'S REPLY IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT ON THE LEGAL ISSUE OF WHETHER
NORTHWESTERN ENERGY HAS AN OBLIGATION TO NEGOTIATE IN THE
ABSENCE OF THE ALL SOURCE COMPETITIVE SOLICITATION SET FORTH IN
A.R.M. § 38.5.1902(5).**

I. INTRODUCTION.

Petitioner Greycliff Wind Prime, LLC (hereinafter "Greycliff"), acting by and through counsel, hereby submits its reply in support of its motion for summary judgment with the Montana Public Service Commission ("Commission") on the question of whether legally, NorthWestern Energy ("NWE"), had an obligation to negotiate with Greycliff in the absence of an all source competitive solicitation conducted pursuant to the precise terms of A.R.M. § 38.5.1902(5). NWE's response brief contains insufficient legal arguments and factually incorrect statements, none of which justify denying Greycliff's motion for summary judgment.

NWE also failed to offer any material or substantial evidence which would preclude this Commission from acting on Greycliff's motion as a matter of law.

The three issues raised by Greycliff in its motion for summary judgment are as follows:

(1) Did NWE have an obligation as a matter of law under PURPA to negotiate with Greycliff, as a QF, when NWE is not holding competitive solicitations which comply with A.R.M. § 38.5.1902(5). and;

(2) When NWE refused to negotiate at all with Greycliff when it is not holding competitive solicitations which comply with A.R.M. § 38.5.1902(5), was Greycliff entitled as a matter of law to a LEO pursuant to 18 C.F.R. § 292.304(d)(2); and;

(3) When NWE refused to negotiate with Greycliff, and if the Commission determines a LEO was created by NWE's refusal to negotiate, and the Commission determines the contract terms and conditions proposed by Greycliff in its proposal and offer to negotiate¹ are consistent with PURPA and its implementing regulations, and are therefore just and reasonable,² does NWE as a matter of law have an obligation to accept those contract terms and conditions due to its refusal to negotiate?

NWE largely ignores the first two issues, with the exception of a brief excursion into an argument that NWE really sincerely attempting to negotiate with Greycliff when NWE was plainly *not* interested in negotiating as evidenced by its reliance on A.R.M. § 38.5.1902(5). In its July 8, 2015 response letter to Greycliff, NWE made plain that it was relying upon the continued legal viability of A.R.M. § 38.5.1902(5) as the basis for its refusal to negotiate a power purchase agreement ("PPA") with Greycliff. Notwithstanding NWE's implausible argument on its negotiating posture, the first two issues are questions of law. With respect to the final issue,

¹ As set forth in Exhibit 1 to Greycliff's Petition to Set Contract Terms and Conditions in this Docket, which is the letter from Michael J. Uda to NWE, Dated July 2, 2015.

² Greycliff's wind project is variously referred to herein as "Greycliff" or "Greycliff Project" or "the Project."

NWE mostly argues that a hearing is needed to determine the appropriate avoided cost for the Greycliff project. This is plainly untrue given the amount of recent avoided cost information available to the Commission and the parties which establishes the reasonableness of the Greycliff avoided cost PPA proposal. Summary judgment is therefore proper.

II. STANDARDS FOR SUMMARY JUDGMENT

NWE offers no affidavits or material and substantial factual information to counter Greycliff's motion for summary judgment. While NWE correctly cites the standard for summary judgment and Greycliff's burden under such a motion, NWE omits any mention of its own obligations as the party attempting to resist Greycliff's motion for summary judgment. For example, it is well-established that: "Once the moving party has met its burden, the party opposing the summary judgment motion *must present material and substantial evidence, rather than conclusory or speculative statements, to raise a genuine issue of material fact.*" *Heiat v. Eastern Mont. College*, (1996), 53 MT 162, 912 P.2d 787, 1996 Mont. LEXIS 34, 275 Mont. 322, 53 Mont. St. Rep. 162 (Mont. 1996)(citing *Howard v. Conlin Furniture No. 2, Inc.* (1995), 272 Mont. 433, 436, 901 P.2d 116, 118-19)(emphasis added). NWE has presented little more than legal argument and factual assertions in support of its opposition to Greycliff's motion for summary judgment and has failed to carry its burden of providing material and substantial evidence, and the remainder of this brief shall be devoted to demonstrating the lack of merit in NWE's opposition.

III. THE COMMISSION PLAINLY HAS THE POWER TO ENGAGE IN SUMMARY ADJUDICATION

NWE argues that the Commission lacks authority to engage in summary judgment determinations, although it offers no legal authority which would so limit the Commission's

powers. Greycliff pointed out in its motion for summary judgment that A.R.M. 38.2.1501(1) states “[a] motion may contain any matter relevant to the clarification of the proceeding before the commission.” Greycliff has filed such a motion, and NWE fails to address why this rule does not provide the Commission with authority to consider summary judgment motions.

Instead, NWE offers the argument that because the public would be effected by the rates in the Greycliff contract, the public’s right to participate would be limited or harmed by the Commission making a summary judgment determination. NWE’s argument is incorrect. First, any member of the public could have intervened to participate in the case (presuming they could demonstrate standing), but none have even attempted to do so. As such, the public is not a party and while the public may have the right to comment on Commission proceedings at the time, manner, and place provided for by the Commission, it does not have the rights of a party. The Commission has long allowed for public comment as part of contested cases, regardless of whether these were full blown hearings, settlements, partial settlements or the like. *See e.g.*, Docket D2001.1.5, *In the Matter of the Application of Montana Power Company* (2002) (approving a stipulation and foregoing a typical contested case hearing). It seems probable that the Commission would similarly provide opportunity for public participation on Greycliff’s motion for summary judgment at the appropriate time, manner, and place.

Second, NWE does not have standing to represent the interests of ratepayers or assert rights on their behalf because NWE’s interests often conflict with that of ratepayers. Representing consumers is the role of the Montana Consumer Counsel (“MCC”), which is a party to this proceeding, and who has submitted a response in opposition to Greycliff’s motion for summary judgment.

Third, nothing in the string-cited statutes regarding the MCC's role in Commission proceedings set forth in NWE's brief states or even implies that the Commission is precluded from disposing of cases on summary judgment. M.C.A. § 69-2-201 merely states that the MCC may appear at all public hearings as a representative of the public and has all the rights and powers of any party. That code provision does not state or even imply that the presence of MCC in a proceeding means that the Commission cannot summarily adjudicate matters where there is no material factual dispute and thus no hearing is necessary. M.C.A. § 69-2-204 is even further afield, as it simply requires the MCC to meet and confer with members of the public at times and places the MCC deems appropriate, and it states the MCC has all powers necessary to fully represent interests of the consuming public. M.C.A. § 69-2-212, if possible, is even more of a *non sequitur*, as it merely states that the Commission's notices of public hearing are to advise the consuming public of the MCC's existence and its obligations to represent the consuming public. In short, there is nothing in any of the statutes cited by NWE that remotely states or even implies the Commission may not act on a motion for summary judgment on the grounds that the MCC is a party to the case. Indeed, as set forth above, the MCC is a party to the proceeding, represents the consuming public, and has submitted a brief in opposition to Greycliff's motion for summary judgment.

Fourth, the Commission has used summary adjudication procedures in the past without holding a hearing. See *In the Matter of Whitehall Wind's Complaint Against NorthWestern Energy for Failing to Submit Avoided Cost Rate Information*, Order 6920b, Docket D2007.11.131 (2010); see also *In the Matter of the Petition of Whitehall Wind*, Order 6444e, Docket D2002.8.100 (2010). In the complaint against NWE for failing to submit avoided cost information required by 18 C.F.R. § 292.302, the Commission ultimately rightly determined that

a hearing would serve no useful purpose as the issue in that proceeding was whether NWE was properly complying with its obligations under the federal regulations. The Commission held that NWE had failed to do so. *Id.*, ¶ 5, ¶ 9, ¶ 12, and ordered NWE to produce the avoided cost information required by 18 C.F.R. § 292.302. In the second *Whitehall Wind* proceeding, the Commission refused to hold any contested case hearing and made the decision entirely on briefs over the objection of Whitehall Wind. NWE was not heard to express any concern over violation of the public's right to be heard in the *Whitehall Wind* case when the Commission refused to hold a contested case even though new evidence had been developed on appeal which was directed by the reviewing court to be included in the Commission's decision on remand.

In short, there is no need for an evidentiary hearing when the material facts are not in dispute, and NWE has produced no material and substantial evidence that Greycliff is not entitled to the avoided cost rate it seeks. NWE could have produced affidavits or evidence to dispute the avoided cost rate, but it opted not to do so. NWE's argument that the Commission must hold a full contested case hearing to consider evidence is not supported by the law, the facts, and past Commission practice.

IV. NWE'S ARGUMENTS ON GREYCLIFF'S PROPOSED AVOIDED COST RATE ARE MISLEADING

NWE argues that even though it testified that Greycliff's proposal as a community renewable project ("CREP") was cost-effective and should be approved by the Commission in Docket D2015.2.18, the Commission ultimately found that: "The Greycliff PPA was not the least-cost CREP offer" in Order No. 7935d. However, NWE fails to mention material parts of the Commission order in that case which are *contained in the same paragraph cited by NWE*: "NorthWestern initially considered a lower-cost offer from Invenergy, but did not select it

because Invenergy would not commit to achieve a commercial operation date (COD) in 2015. Ex. NWE-1 pp. 13-14.” In other words, Greycliff was the lowest-cost offer that would commit to a commercial operation date, which is no small matter given planning horizons and NWE’s other obligations to provide supply to its electricity customers.

The Commission also had other things to say about the Greycliff CREP proposal that NWE neglects to mention. The Commission found that NWE was itself to blame for its lack of justification of the Greycliff CREP project’s proposed contract rate:

Although a CREP resource need not necessarily be the least-cost to be the best choice, NorthWestern has not adequately addressed the possibility and impact of delaying full CREP compliance to 2016 to obtain lower total costs. Nor has it adequately addressed what might justify paying more for the Greycliff PPA, such as the feasibility and economic costs, risks, and benefits of rate basing (e.g., a B-T offer) versus entering the Greycliff PPA. Admin. R. Mont. 38.5.8212(1)(d) (2015).

Order No. 7935d, ¶ 27, D2015.2.18.

In other words, had NWE more adequately documented its reasoning, and its justification for proceeding with the Greycliff CREP proposal (in other words, had NWE more closely complied with the Commission’s regulations), Greycliff’s PPA might well have been the lowest priced proposal that would enable NWE to meet its CREP compliance standards. NWE’s failure to explain and document its process, as opposed to the Greycliff proposed CREP PPA price standing alone, was the reason the Commission did not approve the Greycliff CREP PPA as requested by NWE. And, in a phrase that should give pause to any claim that NWE represents the interests of ratepayers (and much less has standing to represent their interests), the Commission found “NorthWestern appears to have sacrificed lower-costs for its customers to reduce its own risk through what it perceived would be a ‘substantially simplif[ied] and potentially short[er]’ Commission preapproval process for the Greycliff PPA. Ex. NWE-1 p.

13.” In other words, NWE decided to place its own interests ahead of ratepayers by engaging in a pre-approval process that reduced its own risk. That has nothing to do with the objective reasonableness of Greycliff’s PPA price.

Finally, as the Commission knows, avoided costs are not calculated by the Commission on a resource specific basis but on system wide-planning and resource decisions as represented in NWE’s semi-annual Electricity Supply Resource Procurement Plan (“Electric Plan”) as required by law. In contrast, the CREP bidding process is by its nature limited to renewables, typically wind resources. The Commission eliminated the surrogate wind resource calculation in the QF-1 proceeding years ago, and now all avoided cost calculations are based on NWE’s Electric Plan, which includes various utility resource planning scenarios, but typically includes many scenarios other than just renewables. As NWE seemingly acknowledges in its brief, a CREP bidding process is not the same as an avoided cost calculation, nor is it an adequate surrogate for one.

NWE also ignores the fact that when one includes the cost of integration, Greycliff’s current QF avoided cost proposal is actually *less* than its CREP proposal. Bleau LaFave testified in the D2015.2.18 Docket that the Greycliff CREP proposal contract rate was “\$48.40 per MWh excluding regulation, (Exhibit BJL-02).”).” Prefiled Direct Testimony of Bleau J. LaFave, BJL-10, lines 7-10. Regulation costs were estimated by Mr. LaFave in that proceeding to be \$3.81 per MWh to \$6.53 per MWh. *Id.*, at BJL-14, lines 8-9. Greycliff’s proposed QF avoided cost rate is \$53.85 minus \$3.50 for integration for an effective rate of \$50.35 per MWh. If the Commission adds \$3.81/MWh to NWE’s estimated CREP proposal contract of \$48.40/MWh, the “all in” price of Greycliff’s CREP proposal which NWE advocated a few short months ago was \$52.21/MWh.

Thus, NWE omits material information from its argument that Greycliff's CREP proposal was not the least cost. Greycliff's CREP proposal might well have been the least-cost CREP proposal that would commit to a commercial operation date, which is important for utility planning. NWE failed to follow the Commission's CREP rules in failing to document its process, and it attempted to obtain quick pre-approval for the Greycliff project. None of these failings are Greycliff's; rather, they are NWE's failings.

In short, Greycliff's QF proposed avoided cost rate is quite reasonable in light of recent Commission considerations of avoided cost proposals. There is no reason for another hearing by which the Commission will go through yet another iteration of NWE's avoided cost proposals which undoubtedly will produce yet another calculation of NWE's avoided cost scant months after the Commission's recent orders.

V. GREYCLIFF'S PROPOSED AVOIDED COST IS NOT BASED SOLELY ON THE GREENFIELD RATE

Contrary to NWE's argument, Greycliff did *not* solely base its proposed QF PPA contract rate in its petition or its motion for summary on the Commission's decision in *Greenfield*, Docket D2014.4.43. *See* Prefiled direct testimony of Robert Stanton Walker (incorporated herein as Exhibit "1"). Mr. Walker's testimony indicates that the basis for the Greycliff QF PPA rate was Greycliff's CREP proposal, the Greenfield PPA price, and the other sources of potential avoided costs considered by the Commission in approving the Greenfield-NWE settlement in Docket D2014.4.43. Since these decisions were each considered by the Commission several months ago, and were in two instances supported by NWE, Greycliff believed (and continues to believe) these avoided cost calculations were reasonable benchmarks for its avoided cost proposal.

Greycliff is of course aware that the Commission's decision in *Greenfield* did not consider the avoided costs of the Greycliff project. Greycliff is also aware that the CREP process which is based on bidding by renewable resources eligible as CREPs does not produce an actual avoided cost calculation. However, among the sources the Commission considered in *Greenfield* were calculations based on NWE's avoided costs only a scant few months ago.

VI. NWE'S ARGUMENT THAT THE RATE WILL NOT BE REVIEWED FOR JUSTNESS AND REASONABLENESS IS MISPLACED

NWE argues that the Commission cannot rule on the avoided cost rate because, apparently, doing so would violate PURPA:

The Federal Energy Regulatory Commission's ("FERC") regulations provide that rates paid to QFs "[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, Inc. v. Pennsylvania Public Utility Commission*, 612 A.2d 604, 610 (Pa. Super. Ct).

(NWE Resp.Br. at p.4).

NWE's argument on this point is inaccurate. First, Greycliff explicitly stated the agreement including the rate would be subject to approval of the Commission in issue (3) of its motion for summary judgment:

- (3) When NWE refused to negotiate with Greycliff, and if the Commission determines an LEO was created by NWE's refusal to negotiate, *and the Commission determines the contract terms and conditions proposed by Greycliff in its proposal and offer to negotiate are consistent with PURPA and its implementing regulations, and are therefore just and reasonable*, does NWE as a matter of law have an obligation to accept those contract terms and conditions due to its refusal to negotiate?

(Emphasis added).

Therefore, the implication raised in NWE's argument that the Commission would be stripped of its obligation to ensure the justness and reasonableness of Greycliff's proposed

avoided cost rate by its request for summary judgment is plainly untrue. Greycliff recognizes that the Commission must consider the Greycliff avoided cost rate as part of the Commission's obligations under PURPA. The question presented by Greycliff's motion for summary judgment issue (3) is whether NWE wrongly failed to negotiate with Greycliff thereby producing a LEO, and if so, does NWE now have an obligation to accept Greycliff's proposed avoided cost rate if the Commission finds Greycliff's proposed rate consistent with PURPA? Given that NWE has raised no issues of material fact disputing the reasonableness of Greycliff's proposed avoided cost in the form of material and substantial evidence, summary judgment is proper. NWE itself supported Greycliff's CREP proposal and supported the stipulation in *Greenfield* and these Commission decisions are only a few months old. There is no disputed issue of material fact that Greycliff's 25-year proposed PPA avoided cost of \$50.35 is just and reasonable to consumers.

NWE's citation to the *Allegheny Ludlum* decision is inapposite. *Allegheny Ludlum* decided whether a challenge to a Pennsylvania Public Utility Commission's ("PUC") allocation of capacity costs to industrial customers in a rate design case was discriminatory. *Allegheny Ludlum* involved a petition for judicial review to a state trial court from a Pennsylvania PUC rate design decision involving the allocation of capacity costs to different customer classes. "The thrust of the substantive complaint is that the PUC, by declining to provide a demand allocation of QF capacity costs, has approved rates that *are excessive as to some classes and inadequate as to others*, thereby requiring their class to subsidize other classes, in claimed violation of federal and state law." *Id.* at 149 Pa. Commw. 106, 116, 612 A.2d 604 (emphasis added).

There are no industrial customers who have intervened in this proceeding, nor is this a rate design/cost allocation docket. If a particular customer decides that rates paid to a qualifying

facility are in the future inappropriately allocated to that customer or its customer class, then *Allegheny-Ludlum* would have some relevance to this discussion.

Since Greycliff's motion for summary judgment keeps in place the Commission's proper role for determining the justness and reasonableness of rates as consistent with PURPA, NWE has not raised any legal argument or issue of fact that would preclude summary judgment in Greycliff's favor.

VII. NWE Misapplies the *Whitehall Wind* Decision

NWE argues that since the Commission has yet to decide that a utility's failure to negotiate creates a legally enforceable obligation ("LEO"), and because NWE in the past refused to negotiate with Whitehall Wind in Docket D2002.8.100 and the Supreme Court recently upheld the Commission's decision that NWE's failure to negotiate did not create a LEO, then the Commission must necessarily hold a contested case hearing on the question of whether Greycliff incurred a LEO. NWE's argument does not fairly address the import of Greycliff's contention on the LEO issue.

First, Greycliff has fully complied with the Commission's *Whitehall Wind* Order 6444e, ¶ 47. Greycliff tendered to NWE a proposed power purchase agreement with a rate consistent with NWE's avoided costs, with sufficient guarantees to ensure performance, and also an executed interconnection agreement. *See* Exhibit 1 to Greycliff's Petition to Set Contract Terms and Conditions Pursuant to M.C.A. 69-3-603. NWE has not offered any evidence in opposition to Greycliff's motion for summary judgment that even suggests that Greycliff has not complied with the Commission's *Whitehall Wind* decision. Greycliff has met its burden to demonstrate it has, in fact, complied with the *Whitehall Wind* decision, and NWE, despite the opportunity,

provided no material and substantial evidence to the contrary. Therefore, summary judgment is proper.

Second, although NWE argues that it needs a hearing because the Commission has yet to hold that a failure to negotiate results in a LEO, the question of whether a legal duty exists is, and always has been, a question of law and not a question of fact. “The existence of a legal duty is a question of law.” *Gibby v. Noranda Minerals Corp.* (1995), 273 Mont. 420, 424, 905 P.2d 126, 128. The question of whether, under PURPA, a utility must negotiate with a QF, and if it fails to do so, the QF is entitled to a LEO is a question of law. Hearings are to determine questions of fact, not questions of law. Nothing raised by NWE regarding the Commission’s *Whitehall Wind* decision creates a material issue of fact that must be tried by the Commission and summary judgment is proper. Greycliff complied with the *Whitehall Wind* test, and NWE raises no material or substantial evidence to the contrary despite an opportunity to do so.

VIII. NWE’S ARGUMENT ON CONTRACT TERMS DOES NOT MEET THE STANDARD FOR RESISTING A MOTION FOR SUMMARY JUDGMENT

NWE argues that the Commission cannot grant summary judgment on the question of contract terms and conditions for the Greycliff project. For the Commission’s information, Greycliff essentially utilized the agreement that NWE had previously negotiated with Greycliff and submitted to the Commission when NWE sought approval of the Greycliff project as a CREP. Greycliff then inserted language utilized by NWE in other QF contracts to make it consistent with PURPA. Greycliff believes that the proposed contract terms and conditions are reasonable given their genesis and these terms and conditions do not preclude the Commission from granting summary judgment as NWE has not taken issue in its response with any specific provisions of the proposed Greycliff PPA despite an opportunity to do so.

IX. Greycliff Did Attempt to Negotiate with NWE and NWE Rebuffed Greycliff's Attempts to Negotiate

NWE argues that Greycliff's letter as set forth in Exhibit 1 to Greycliff's petition was not an effort to negotiate but rather a "demand letter." However, the letter sent by undersigned counsel on Greycliff's behalf was not the beginning of the process but the *end*. NWE does not dispute, nor reasonably could it, that Greycliff made attempts prior to the sending of Exhibit 1 to attempt to negotiate with NWE or meet with it and NWE did not cooperate. However, even standing alone, Greycliff's letter of July 2nd should have been fair warning to NWE to negotiate with Greycliff. It is true that Greycliff demanded immediate execution of an agreement in the letter. It is also true that NWE could have chosen any number of responses to the demand letter, ranging from "let's meet and try to work this out," to "no, we are not going to negotiate."

NWE chose to argue in its July 8th response to Greycliff's letter that A.R.M. §38.5.1902(5) did not require NWE to negotiate and that this regulation required Greycliff to win a competitive solicitation. *See* Exhibit 2 to Greycliff's Petition to Set Contract Terms and Conditions Pursuant to M.C.A. § 69-3-603. NWE also argued in its July 8th response to Greycliff's letter that the Federal Energy Regulatory Commission's ("FERC") decision in *Hydrodynamics*, 146 FERC 61,193 (2014) was merely FERC's litigating position and of no legal moment. Therefore, again, according to NWE's July 8th letter, because A.R.M. § 38.5.1902(5) had yet to be repealed or amended, NWE had no duty to discuss anything with Greycliff because it had not won a competitive solicitation as required by A.R.M. § 38.5.1902(5). NWE's ultimately stated in its July 8th letter that it would only negotiate a short-term rate and a short-term agreement with Greycliff which is consistent with A.R.M. § 38.5.1902(5).

In sum, NWE's reliance on A.R.M. § 38.5.1902(5) in its July 8th letter made it abundantly clear that no negotiations between NWE and Greycliff would take place, that NWE believed it

had no duty to negotiate, and that if Greycliff wished, NWE would negotiate a short-term rate and a short-term contract that NWE knew would preclude Greycliff from obtaining financing for its project. NWE's evident lack of sincerity on its willingness to negotiate with Greycliff is palpable.

In short, further attempts by Greycliff to negotiate with NWE were pointless. NWE was not going to negotiate with Greycliff at all, much less in good faith. NWE was standing by a rule that it knew or should have known was inconsistent with PURPA. NWE was not going to negotiate, and it made its intent clear to Greycliff.

NWE continues to disparage FERC's *Hydrodynamics* decision in its brief as it did in its response to Greycliff's letter. NWE relies on the District of Columbia Court of Appeals 1995 decision in *Industrial Cogenerators v. FERC*, 47 F.3d 1231, 1235 (D.C. Cir. 1995). NWE claims that declaratory orders "merely advise the parties of the [FERC's] position on an issue." *Id.* However, NWE doesn't quote the rest of the relevant language from *Industrial Cogenerators*:

Unlike the declaratory order of a court, which does fix the rights of the parties, this Declaratory Order merely advised the parties of the Commission's position. It was much like a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action; the only difference is that the Commission itself formally used the document as its own statement of position. *While such knowledge of the FERC's position might affect the conduct of the parties, the Declaratory Order is legally ineffectual apart from its ability to persuade (or to command the deference of) a court that might later have been called upon to interpret the Act and the agency's regulations in an private enforcement action; and because that could only be a district court, this court cannot have pre-enforcement jurisdiction to review the Declaratory Order.*

Id. (Emphasis added).

In other words, NWE's dismissal of FERC's decision in *Hydrodynamics* as well as FERC's declaratory orders which preceded *Hydrodynamics*, including *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, and *Grouse Creek Wind Park*, 142 FERC ¶ 61,187, ignores a clear and

consistent message from FERC that a failure to negotiate will result in the creation of a LEO for the QF. Greycliff withdrew its FERC petition in order to permit this Commission and NWE an opportunity to revise their processes to accommodate FERC's views.

FERC's position on this issue is exceedingly clear in light of *Hydrodynamics*, *Cedar Creek Wind*, and *Grouse Creek Wind Park*: utilities have an obligation to negotiate with QFs and if the utility refuses to negotiate, such refusal results in a LEO for the QF. NWE's casual dismissal of this line of FERC decisions is contrary to the long-held principle of judicial deference to agency interpretations of its own organic statutes. *See Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984)("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

Courts grant even greater deference to a federal agency where, as is the case with *Hydrodynamics*, *Cedar Creek*, and *Grouse Creek Wind Park*, FERC is interpreting its own regulations implementing the statute. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (administrative agencies' interpretations of their own regulations are controlling unless "plainly erroneous or inconsistent with the regulation"). In short, NWE's failure to take seriously FERC's decision in *Hydrodynamics* should be viewed in light of: (1) Greycliff's withdrawal of its FERC petition for enforcement against the Commission regarding § 38.5.1902(5); (2) Greycliff's ability to refile its petition for enforcement with FERC at any time; and (3) the prospect that should FERC decide to take enforcement action against the Commission, FERC is likely to receive great deference from the federal court regarding FERC's interpretation of its own rules under the *Chevron* doctrine. If Greycliff has to refile its petition with FERC over A.R.M. § 38.5.1902(5), there is a strong likelihood that Greycliff will prevail. However,

Greycliff believes that both the Commission and NWE understand that a utility is required to negotiate with a QF in the absence of solicitations required by A.R.M. §38.5.1902(5). To believe otherwise would be to promote an obviously unjust, unfair, and discriminatory system which prevents QFs from obtaining long-term contracts to sell their power in violation of 18 C.F.R. § 292.303.

X. THE COMMISSION SHOULD WAIVE A.R.M. § 38.5.1902(5) IN THIS PROCEEDING

NWE does not really address Greycliff's argument that the Commission has the authority to waive the application of any rule, and that the Commission should waive the applicability of A.R.M. § 38.5.1902(5) in this proceeding. As the Commission may recall, Greycliff spent considerable time in its motion for summary judgment comparing what is required by Montana's mini-PURPA statute, M.C.A. §69-3-601 through – 604, with the competitive solicitation requirement of A.R.M. §38.5.1902(5). Greycliff argued that A.R.M. § 38.5.1902(5) is patently inconsistent and in conflict with Montana's mini-PURPA and must therefore be amended or repealed. Particularly, in this proceeding, Greycliff specifically requested that NWE not be permitted to rely on A.R.M. §38.5.1902(5) and that the Commission waive that rule in this proceeding. Although NWE disparages FERC's *Hydrodynamics* decision which specifically declared that A.R.M. § 38.5.1902(5) was an unreasonable implementation of PURPA, NWE did not address the inconsistency between Montana's Mini-PURPA and the rule as argued by Greycliff in its summary judgment motion.

NWE's failure to respond to this argument should result in the Commission waiving the applicability of A.R.M. § 38.5.1902(5) and not allowing NWE to rely on the rule as a defense in this proceeding. NWE has offered no legal authority or argument which would prevent the

Commission from waiving the applicability of A.R.M. § 38.5.1902(5) in this proceeding as it is inconsistent with Montana's mini-PURPA.

XI. NWE'S REQUEST FOR ORAL ARGUMENT

Greycliff does not oppose NWE's request for oral argument, nor does it feel that it is required. Greycliff believes the Commission and Commission staff can carefully, thoughtfully, and fairly evaluate the parties' positions without oral argument.

XII. CONCLUSION

In conclusion, NWE has not offered any actual justification, legal or factual, which would justify denying Greycliff's motion for summary judgment. In summary, these are the specific issues upon which Greycliff requests summary judgment.

(1) Did NWE have an obligation as a matter of law under PURPA to negotiate with Greycliff, as a QF, when NWE is not holding competitive solicitations which comply with A.R.M. § 38.5.1902(5), and;

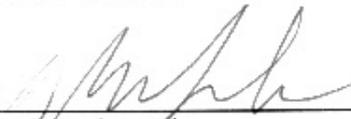
(2) When NWE refused to negotiate at all with Greycliff when it is not holding competitive solicitations which comply with A.R.M. § 38.5.1902(5), was Greycliff entitled as a matter of law to a LEO pursuant to 18 C.F.R. § 292.304(d)(2); and;

(3) When NWE refused to negotiate with Greycliff, and if the Commission determines an LEO was created by NWE's refusal to negotiate, and the Commission determines the contract terms and conditions proposed by Greycliff in its proposal and offer to negotiate are consistent with PURPA and its implementing regulations, and are therefore just and reasonable, does NWE as a matter of law have an obligation to accept those contract terms and conditions due to its refusal to negotiate?

Of these issues, the first two are plainly questions of law regarding questions of NWE's duties under the law which do not require a hearing. The third issue deals with a question of mixed law and fact, but the facts are not reasonably in dispute. The rate requested by Greycliff is eminently reasonable and the Commission should grant Greycliff's motion for summary judgment.

RESPECTFULLY SUBMITTED this 30th day of September, 2015.

UDA LAW FIRM, PC

By: 

Michael J. Uda
Attorney for Greycliff Wind Prime, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on this 30th day of September, 2015 upon the following by first class mail postage pre-paid:

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EXHIBIT 1

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Attorney for Petitioner Greycliff Wind Prime, LLC

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

IN THE MATTER of the Petition of
Greycliff Wind Prime, LLC To Set Terms
and Conditions for Qualifying Small Power
Production Facility Pursuant to M.C.A. §
69-3-603

UTILITY DIVISION
DOCKET NO. D2015.8.64

**PREFILED DIRECT TESTIMONY OF ROBERT STANTON WALKER ON BEHALF
OF GREYCLIFF WIND PRIME, LLC IN SUPPORT OF PETITION TO SET TERMS
AND CONDITIONS FOR QUALIFYING SMALL POWER PRODUCTION FACILITY
PURSUANT TO M.C.A. § 69-3-603**

Q. Please describe your education, background and work experience.

A. I graduated in 1990 from Texas A&M University with a Bachelor of Arts degree. I later attended the Texas A&M University School of Law, graduating in 1996. In 1997, I worked for Delhi Energy Services, Inc., as a power trader. In February of 1998, I moved to Tenaska Power Services, Inc., and was a power trader until July of 1998, and then became a senior power trader at Cargill-Alliant, LLC until June of 2002. In 2003, I opened my own law practice in Dallas, Texas. In 2006, I joined Cargill Power Markets, LLC as the Director of North American Transmission and Origination. In 2013, I left Cargill to join National Renewable Solutions, LLC

("NRS") to become Executive Vice President of NRS and I presently serve in that capacity. My resume is attached hereto as Exhibit 1.

Q. What is NRS' role in the Greycliff Wind Prime, LLC ("Greycliff") wind project?

A. Greycliff Wind Prime is a wholly owned subsidiary of Greycliff Wind LLC. Greycliff Wind Prime is a special purpose entity formed to hold the wind assets of this phase of the project. National Renewable Solutions is the managing partner and developer of Greycliff Wind, LLC. NRS also holds a minority equity interest in Greycliff Wind, LLC.

Q. Are you familiar with the way in which utilities' typically calculate avoided costs?

A. I am familiar with the concept of utilities using an avoided cost calculation for determining prices they would pay for energy and/or capacity from Qualifying Facilities. I understand there are a number of different methods for determining avoided cost, and I generally understand these calculations.

Q. Have you testified before in front of state regulatory commissions or courts?

A. Yes. In 2012 I testified before the Alberta Utilities Commission in a case involving the interpretation of rules for determining the priority treatment of offers for energy to be delivered and sold into the Alberta electric system as imports.

Q. Have you ever testified before on avoided costs?

A. No.

Q. Has understanding avoided costs and the manner in which they are calculated been part of your duties at either your past or present positions?

A. Yes, but only as a part of my understanding the energy markets and prospective pricing impacts in the energy markets where we participated.

Q. What is the purpose of your testimony?

A. To explain how Greycliff Wind Prime, LLC (hereinafter “Greycliff”) arrived at the proposed contract rate based on various avoided costs recently approved by the Montana Public Service Commission (“Commission”).

Q. How did Greycliff arrive at the contract rate in its offer to NorthWestern Energy (“NWE”) that Greycliff tendered to NWE on July 2, 2015, and which was included as Exhibit 3 to the Greycliff petition in this Docket?

A. We based it on avoided cost rates or contract rates recently approved or which were acceptable to NWE. First, we were obviously aware of the testimony of Bleu J. LaFave in Montana Public Service Commission Docket D2015.2.8, wherein he stated: “NorthWestern’s current 25-year levelized avoided cost for Greycliff is \$45.01 excluding regulation. Including the 25-year levelized price of \$3.39 for RECs, the overall cost for Greycliff increases to a total of \$48.40 per MWh excluding regulation, (Exhibit BJL-02).” Prefiled Direct Testimony of Bleu J. LaFave, BJL-10, lines 7-10. Noting that the avoided cost calculation utilized by Mr. LaFave specifically excludes integration costs, we felt the contract rate for our generation was eminently in line with what NWE seemed comfortable with only a few months ago.

Q. Why do you think NWE was comfortable with the proposed contract rate for purchases from Greycliff in Docket D2015.2.18?

A. Mr. LaFave testified in the docket that the best way to compare the “cost effectiveness” of the Greycliff project was as a Community Renewable Energy Project (“CREP”). Mr. LaFave testified that there was a “strong basis” for concluding Greycliff’s CREP proposal was cost effective under the CREP statute. BJL-8, line 22. Mr. LaFave further testified that NWE utilized the same method to calculate avoided costs as it used in the Greenfield Docket, D2014.4.43. BJL-11, lines 14-15. Mr. LaFave also testified that NWE used the same energy

price forecast in the Greycliff CREP evaluation that NWE had used in the Greenfield docket which was derived from NWE's 2013 Montana Electricity Supply Resource Procurement Plan. BJJ-12, lines 4-5. Mr. LaFave also testified that integration costs for the Greycliff Project ranged from \$3.81 to \$6.53 per MWh. BJJ-14, lines 8-9. Finally, Mr. LaFave testified that the Greycliff CREP proposal was "the least cost PPA resource resulting from a CREP RFP with a purchase price below the existing QF-1 Wind rates of \$53.14 per MWh in Off-Peak Hours and \$58.50 per MWh in On-Peak Hours established by the Commission in Docket No. D2012.1.3." BJJ-15, lines 12-15. In short, we thought our proposed contract rate was consistent with what we had proposed before, NWE had testified that it was cost effective, that it was lower than NWE's QF-1 Tariff rate for wind projects, and that our proposed contract rate was consistent with the methodology and the avoided cost rates calculated for the Greenfield project.

Q. But the avoided cost proposal you have made in this Docket differs from your CREP proposal? Why the difference?

A. Well, the proposal is different based on a number of considerations. Greycliff chose to increase the size of its project from 20 MW to 25 MW. This was done because the Greycliff project could realize economies of scale advantages with a larger project, which allows Greycliff to offer to sell its power at a lower price. Greycliff had initially signed a Small Generation Interconnection Agreement ("SGIA"). The SGIA limited the size of the project to 20 MW. As a part of expanding the project to 25 MW, Greycliff signed a Large Generator Interconnection Agreement ("LGIA"). Greycliff's proposed contract rate of \$53.85 with an effective rate of \$50.35 is quite reasonable. NWE offered to charge nothing for wind integration when Greycliff was a CREP project; the subtraction of the wind integration cost from Greycliff's proposal in this Docket subtracts a levelized cost of \$3.50/MWh for integration to reach the 25-year levelized

price of \$50.35. As with Greycliff's CREP proposal, the renewable energy credits or "RECs" will be transferred to NWE.

Q. Are there other reasons you think the Greycliff proposed contract rate is reasonable?

A. Mr. LaFave testified that the appropriate avoided cost benchmark was the avoided cost rate Greenfield and NWE stipulated to in D2014.4.43. In that case, the Commission looked at various avoided cost proposals and avoided costs set forth in executed contracts before approving the settlement proposed jointly by Greenfield and NWE for a proposed contract rate of \$53.99/MWh minus estimated integration costs of \$3.50/MWh in the event Greenfield chooses not to self-supply. See Docket D2014.4.43, p.5, ¶ 20, and p. 6, n.3, Order on Reconsideration, No. 7347a (April 14, 2015)(hereinafter, "Greenfield Order at ___"). Thus, over a 25-year term, the price approved by the Commission for Greenfield of \$53.99, minus \$3.50 for integration, produced a levelized "all in" price of \$50.49, which is almost identical to the proposal Greycliff is making in this proceeding.

Q. In deciding to approve the stipulation between Greenfield and NWE, did the Commission compare the stipulated avoided cost rate to other benchmarks?

A. Yes, the Commission considered six other estimates of avoided costs in determining the settlement between Greenfield and NWE was reasonable. First, the Commission considered NWE's initial proposal in the Greenfield Docket, which produced an estimated avoided cost of \$47.41 per MWh for energy, capacity and RECs over the proposed contract term. Greenfield Order, at p. 6, ¶ 22. Second, the Commission considered Greenfield's CREP bid in the 2013 CREP solicitation, which was a levelized rate of \$50.91 per MWh. *Id.*, ¶ 23. Third, the Commission considered NWE's response to Commission data request PSC-012. In that

response, NWE provided estimates of two different scenarios, one by which it calculated total electric supply costs including existing resources (inclusive of the newly acquired hydroelectric facilities), and another by which it calculated total electric supply costs utilizing existing resources plus adding Greenfield's at zero cost. *Id.*, ¶ 24. Utilizing assumptions from NWE's 2013 Plan, and taking the difference between the two scenarios produced a levelized rate of \$52.91 per MWh. *Id.* Fourth, the Commission considered NWE's relatively recent acquisition of Spion Kop, which had a projected levelized cost of \$53.15/MWh. *Id.*, ¶ 25. Fifth, the Commission considered the current QF-1 rate, which produced a levelized rate of \$53.58/MWh. *Id.*, ¶ 26. Finally, the Commission considered NWE's market-based discounted cash flow analysis NWE proposed in its acquisition of PPL Montana's hydroelectric facilities, which – utilizing Greenfield's projected output and PowerSimm mean market price projections – produced a levelized rate of \$54.83/MWh. *Id.*, pp. 6 & 7, ¶ 27.

Q. Did the Commissions' decision in the Greenfield Docket D2014.4.43, affect your opinion of the reasonableness of Greycliff's proposed avoided cost rate it offered NWE and requests in this proceeding?

A. Yes. After reviewing the mostly very recent Commission sources of avoided cost data, I was comfortable that our proposal was not only consistent with our prior CREP proposal, but it was consistent with the Commissions' approval of the Greenfield-NWE stipulation in D2014.4.43, and all the other potential sources of avoided cost calculations the Commission considered in the Greenfield docket.

Q. Does this Conclude Your Testimony?

A. Yes.

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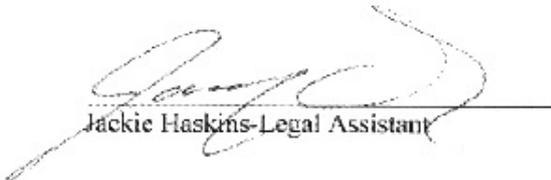
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