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 Sur-Reply in Opposition to Greycliff Wind Prime's Motion in Limine

NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") provides this Sur-Reply in Opposition to Greycliff Wind Prime, LLC's ("Greycliff") Motion in Limine to Exclude Use of PowerSimm Model ("Motion"). Greycliff raised four new arguments in its Reply in Support of Motion *In Limine* ("Reply") that NorthWestern asserts it could have raised in its initial Motion. The parties agreed that NorthWestern could file a sur-reply limited to responding to these new arguments.

Specifically, Greycliff argues that if the Commission denies its Motion it will "(1) … jeopardize Greycliff's rights to a full and fair hearing under the Montana Administrative Procedure Act ("MAPA"); (2) violate Greycliff's due process rights under the United States' [sic] and Montana Constitutions; (3) … set a precedent that would interfere and place unreasonable impediments in the way of amicable contract formation, which would be a violation of the Public Utility Regulatory Policy Act of 1978 … ("PURPA"); [and] (4) impermissibly burden Greycliff's right to petition its government for redress." Greycliff Reply, pp. 1-2. For the reasons discussed below, the Commission must dismiss this advocacy by Greycliff. Commission denial of Greycliff's Motion will not violate Greycliff's constitutional rights nor will it violate PURPA. The Commission must reject Greycliff's unsustainable arguments.

ARGUMENT

I. NEITHER MAPA NOR CONSTITUTIONALLY PROTECTED DUE PROCESS RIGHTS ENTITLE A PARTY TO FREE ACCESS TO PROPRIETARY SOFTWARE IN DISCOVERY.

Greycliff asserts that MAPA will be violated if the Commission does not require NorthWestern to provide "full and unfettered (i.e., not charged) access to the PowerSimm model[.]" Greycliff Reply, p. 5. Citing § 2-4-612(1) – (5), MCA, Greycliff argues that without free access to the modeling it will not be able to "present evidence and argument" regarding the PowerSimm model nor will it be able to conduct meaningful cross-examination for a "full and true disclosure of the facts." *Id.*, pp. 5-6. This argument is in error. The fact of the matter is that Greycliff is not willing to incur a small fee to support its case.

If Greycliff desires, it can present evidence contesting the use of the PowerSimm model and it will have an opportunity to conduct meaningful cross-examination of the appropriate NorthWestern witness on this issue. Greycliff took advantage of the opportunity to conduct

discovery on NorthWestern's testimony and exhibits in this case. Through discovery, Greycliff had the opportunity to ask NorthWestern questions to determine how the model worked. Instead, it simply asked for access to the model likely knowing from the Greenfield docket that NorthWestern could not grant such access per its licensing agreement with Ascend Analytics. Given that fact, NorthWestern provided Greycliff, as well as the Commission staff, with a proposal that, for a small fee, would provide a guided tour of PowerSimm to show how the model worked specifically in this case. Based on the information provided to date[1] as well as the opportunity for a guided tour of the model, Greycliff and its experts could develop a response to the PowerSimm model and/or conduct meaningful cross-examination regarding the model if it felt that the model was deficient in some manner. Greycliff's experts can test the veracity of NorthWestern's witnesses' testimony by reviewing the information produced in support of that testimony. Instead, Greycliff in this case wants free rein of the model presumably to propose an alternative avoided cost calculation at the expense of NorthWestern's customers. Nothing in MAPA requires one party to expend money for the other party to support its case. The Commission must therefore refuse to accept Greycliff's arguments that Commission denial of its Motion will violate MAPA.

As noted above, Greycliff also asserts that if the Commission fails to grant its Motion, the Commission will violate Greycliff's federal and state constitutionally protected due process rights. While Greycliff provides a handful of related references, it fails to provide any analysis to support its argument, i.e., it fails to show why the Commission would violate Greycliff's due process rights if it were to deny Greycliff's Motion. In fact, it is unclear to NorthWestern whether Greycliff is arguing that the Commission will violate Greycliff's substantive or

[1] NorthWestern recognizes that there are still outstanding objections regarding some of Greycliff's discovery questions.

procedural due process rights if the Motion is denied. For this reason alone, the Commission should decline to address Greycliff's argument. *See Menholt v. State, Dept. of Revenue,* 2009 MT 38, ¶ 15, 349 Mont. 239, 203 P.3d 792 (The Montana Supreme Court refused to address arguments from counsel that were "devoid of any analysis of the issues.").

Nevertheless, Greycliff's unsupported arguments fail to show that the Commission's actions might violate its rights. Procedural due process requires notice and opportunity for hearing. *Montanans for Justice v. State ex rel. McGrath,* 2006 MT 277, ¶ 30, 334 Mont. 237, 146 P.3d 759 (The Montana Supreme Court held that "[u]nder both federal and state jurisprudence the requirements for procedural due process are (1) notice, and (2) opportunity for a hearing appropriate to the nature of the case."). To date, nothing that has happened in this case has denied Greycliff with an opportunity for hearing or notice of that hearing. Additionally, substantive due process rights involve situations where government action deprives a party of life, liberty or property even if proper procedures were followed. *Englin v. Board of County Commissioners,* 2002 MT 115, ¶ 14, 310 Mont. 1, 48 P.3d 39. Here, Greycliff has failed to show how the Commission will deprive it of its property if the Commission fails to either exclude the PowerSimm model or grant Greycliff free access to the model. If the Commission decides to entertain Greycliff's due process arguments despite lack of any supporting analysis from Greycliff, for the reasons discussed herein, a Commission decision that either denies the Motion or requires Greycliff to expend resources for access to the model would not violate due process.

II. FAILURE TO PROVIDE FREE ACCESS TO A QF WOULD NOT VIOLATE PURPA.

Greycliff next argues that if the Commission refuses to grant Greycliff free access to the PowerSimm model "it may be failing in its duty under PURPA to 'encourage' QF development." Greycliff Reply, p. 10. In support of this argument, Greycliff cites the Federal Energy Regulatory

Commission's ("FERC") declaratory orders in *Hydrodynamics* and *Grouse Creek*. *Id.*, pp. 9-10. Review of each of these cases reveals that neither case is applicable here. First, *Grouse Creek* involved allegations from several QFs that the Idaho Public Utilities Commission acted in a way that prevented them from establishing a legally enforceable obligation. *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, 61,892 (2013). Next, as the Commission is well aware, the *Hydrodynamics* decision from the FERC involved the question of whether a Montana Administrative Rule was, in FERC's opinion, contrary to PURPA. *Hydrodynamics, Inc.*, 146 FERC ¶ 61,193 (2014). Neither case stands for the proposition advanced here by Greycliff that unless a QF has free access to modeling software, the Commission will violate PURPA because it is not encouraging the development of QFs. Greycliff cites no legal authority that demonstrates that PURPA entitles QFs to free access to modeling software used by a utility to calculate avoided cost rates. Thus, if the Commission denies Greycliff's Motion and does not allow Greycliff free access to the PowerSimm model, the Commission will not violate PURPA. The Commission should discard Greycliff's arguments on this point and deny the Motion.

III. THE COMMISSION WILL NOT VIOLATE GREYCLIFF'S FREEDOM OF SPEECH OR RIGHT TO PETITION FOR REDRESS IF GREYCLIFF HAS TO PAY FOR ACCESS TO POWERSIMM.

Finally, Greycliff asserts that it is entitled to free access to the PowerSimm model and to order "otherwise impedes Greycliff's right to petition its government for redress of grievances." Greycliff Reply, p. 11. Greycliff further argues that if the Commission refuses to grant free access to the model, it would violate the First Amendment of the United States Constitution and Article II, section 7 of the Montana Constitution,[2] which limits government actions restricting freedom of speech. *Id.* First, freedom of speech and the right to petition the government for

[2] Unlike the United States Constitution, the right to petition the government for redress is not found in the same provision as the freedom of speech. In Montana, that right is found in Article II, section 6 of the Montana Constitution.

redress are separate rights, but "share substantial common ground." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 131 S.Ct. 2488, 2494 (2011). However, in this case, NorthWestern is unsure how Greycliff's speech would be limited if the Commission denies its Motion – it will still have the right to present evidence to support its case.

Likewise, if the Commission denies Greycliff's Motion and refuses to grant Greycliff free access to the model, the Commission will not violate Greycliff's right to petition the government for redress. The purpose of that right is to allow access to government if a person believes he/she has been wronged. *Osborn v. Pennsylvania-Delaware Service Station Dealers Ass'n,* 499 F.Supp. 553, 556 (D. Del. 1980). Greycliff claims that the petition for redress entitles it to "full, fair, open and non-discriminatory access to every piece of information." Greycliff Reply, p. 12. Greycliff provides no authority to support this argument. Instead, the law provides that the right to petition for redress does not guarantee that the government will act on the petition or that the petition is successful. *Gehring v. All Members of State 1993 Legislature*, 269 Mont. 373, 377-378, 889 P.2d 1164, 1166 (1995). In this case, Greycliff has petitioned the government – the Commission – for redress and that petition is still pending. Denial of Greycliff's Motion or requiring Greycliff to pay for access to the model will not change that fact – the petition will still be pending. Given these facts and the law, the Commission must reject Greycliff's arguments that the Commission may violate its constitutional rights.

CONCLUSION

As stated in NorthWestern's Response Brief, there is no factual or legal basis to grant Greycliff's Motion. Additionally, Greycliff's claims that the Commission could violate its constitutionally protected rights have no legal or factual foundation. Greycliff has access to information and has an opportunity to see and understand how PowerSimm worked in this case.

If the Commission denies Greycliff's Motion and refuses to allow it free access to PowerSimm, it will not violate any due process, freedom of speech, or petitions for redress rights, nor will it violate PURPA. The Commission should ignore these unwarranted arguments and threats of constitutional violations. For the reasons discussed above as well as in NorthWestern's Response Brief, NorthWestern requests that the Commission deny Greycliff's Motion and not allow Greycliff to have free access to PowerSimm.

RESPECTFULLY SUBMITTED this 8th day of February 2016.

NORTHWESTERN ENERGY

By: Sarah Norcott

Sarah Norcott
John Alke

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's Sur-Reply in Opposition to Greycliff Wind Prime's Motion in Limine 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, emailed to counsel of record, and mailed to the remainder of the service list as follows:

Will Rosquist
MT Public Service Commission
Box 202601
Helena, MT 59620-2601

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

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

Patrick Pelstring
National Renewable Solutions
328 Barry Avenue, Ste. 100
Wayzata, MN 55391

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

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

Joe Schwartzenberger
NorthWestern Energy
11 E. Park Street
Butte, MT 59701

Pam LeProwse
NorthWestern Energy
11 E. Park Street
Butte, MT 59701

Date: February 8, 2016

Pam LeProwse

Pam LeProwse
Administrative Assistant
Regulatory Affairs