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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	Cause No. D2015.8.64 GREYCLIFF WIND PRIME, LLC'S INITIAL POST-HEARING BRIEF

PETITIONER GREYCLIFF WIND PRIME, LLC'S INITIAL POST-HEARING BRIEF

I. INTRODUCTION

Petitioner Greycliff Wind Prime, LLC, ("Greycliff"), acting by and through undersigned counsel, respectfully submits its initial post-hearing brief before the Montana Public Service Commission ("Commission") in the above-captioned Docket. There are a number of important policy issues and legal issues for the Commission to consider and decide in this Docket. First, there is the issue of legally enforceable obligation ("LEO"). Despite clear, bright line rules, NorthWestern Energy ("NWE") has continued to misinterpret the Commission's rules for incurring a LEO, including the imposition of NWE conditions that not only make little sense, but would actually prevent a qualifying facility ("QF") such as Greycliff from ever incurring a LEO.

Second, a timing issue exists as to when and based on what data NWE's avoided cost should be calculated. NWE's avoided cost to be applied to Greycliff must be calculated based on data available at the time Greycliff's LEO was incurred, which is July 2, 2015. Instead of using data available during the July 2015-time frame, NWE has strategically proposed to use more recent data from January of 2016 in order to reduce the avoided cost that PURPA requires NWE to pay Greycliff. According to NWE this was done because Greycliff changed its requested Guaranteed Commercial Operation Date, the date of Guaranteed Commercial Operation Date ("COD"), but the COD has nothing whatsoever to do with the date on which a LEO was established or the date upon which an avoided cost analysis must be performed.

Third, Greycliff's proposed avoided cost, based on data available from the July 2015-time frame, produces an avoided cost consistent with Commission-approved avoided cost numbers just a few months prior to Greycliff's LEO. Fourth, Greycliff's use of the Northwest Power and Conservation Council ("NPPC") Seventh Power Plan, which is a fundamentals-based forecast which took into account multiple actual and forecast changes in the Pacific Northwest energy markets (including electric plant retirements, natural gas prices, fuel switching, NWE generation, transmission constraints. etc.), as the basis for Greycliff's electric price forecast is a vastly superior approach to calculating avoided costs than NWE's approach in this proceeding. The NPCC's Seventh Annual Power Plan is an objective, transparent electric price forecast, and was produced through a public process and was a consensus-based approach to developing a fundamentals-based electric price forecast.

Fifth, there are multiple, serious defects in NWE's avoided cost forecast which discredits NWE's approach in this proceeding. NWE's electric price forecast which it used to develop its avoided cost forecast is entirely based on a single Intercontinental Exchange ("ICE") Mid-C price strip which extends out only to mid-2020, is not transparent, is relatively illiquid, and

which has had no reported trades since 2013. In other words, no one is buying and selling power based on the Mid-C price strip utilized by NWE. Furthermore, since there are no prices at all for the period beyond mid-2020, NWE absurdly escalated that rate using a single nominal natural gas escalator based on the Energy Information Administration's Annual Energy Outlook ("EIA/AEO") which is based on Henry Hub (a natural gas trading hub in Louisiana). The irrationality of such an approach is evident when one considers that no gas from Henry Hub is delivered to Montana. Finally, NWE absurdly contended that there will be no change in spark spreads (the relationship between gas prices and energy prices) for a period of 25 years in the future. One only needs to look back historically to see that such an assumption of a stable relationship between gas and electricity prices is incorrect.

While NWE claims it used a "fundamental" forecast, it plainly did not do so. Why NWE would make such an obviously incorrect claim is unclear, but it is perhaps because fundamentals-based electric price forecasts are the industry standard as Greycliff witness Mr. Schiffman testified and NWE realized that in order to claim credibility for its forecast it would have to make this claim. Whatever the reason, NWE's claim is plainly wrong. There is nothing in NWE's estimate using the ICE Day Ahead Mid-C price strip which would reflect known and expected changes in energy markets which will occur in the future, and no real way for that price strip to do so. A "fundamentals" based electric price forecast considers and attempts to capture the evolution of energy markets over time in response to changes such as environmental regulation, plant retirements, fuel switching, and a host of other factors. None of these are remotely considered in a single ICE Mid-C day ahead price strip. The ICE Mid-C day ahead price strip not even a reliable opinion or predictor of future electric prices in the Pacific Northwest, particularly when one considers that the entire region consists of load between 20,000 and 30,000 MWs annually. However, energy is being bought and sold in the Pacific

Northwest, it is not being bought and sold on that single ICE Mid-C price strip. The only thing "fundamental" about NWE's electric price forecast is that, as noted above, it did apply the EIA/AEO nominal natural gas price escalator to the non-fundamental ICE Mid-C strip beyond the mid-2020. However, other than that, there is nothing remotely "fundamental" about NWE's approach to its electric price forecast.

To be clear, both Greycliff and NWE are using electric price forecasts based on Mid-C: Greycliff is using a publicly available, transparent, fundamentals-based forecast, NWE's electric price forecast is based a non-fundamentals single price strip with no reported transactions at those prices and no prices at all beyond 2020. Both Greycliff and NWE then escalate those prices.

Sixth, although NWE claims it performed a differential revenue requirement model to calculate its avoided cost, it admitted at hearing that it did not (and claimed it could not) actually do so. NWE used PowerSimm to model when it was either in a net sale or net purchase position. The Greycliff project was then assigned NWE's projected market price if it was in net purchase position, or if Greycliff was in a net sale position, the lower of the variable cost to operate Colstrip Unit 4 (CU4) or the market price was assigned, depending on whether the variable cost of CU4 was higher than the market price or lower than the market price. If the market price was lower than the variable costs of operating CU4, the market value was assigned to Greycliff. If the market price is above the variable costs of operating CU4, then Greycliff was assigned the variable costs of CU4. Although it made relatively little difference overall in NWE's avoided cost, this remarkable "heads we win, tails you lose" approach makes little sense. Unless CU4 is going to be backed down and will not sell into the market, this approach simply means that the value of sales of QF power into the market is being assigned to ratepayers at the expense of the QF. This is a violation of the "consumer indifference" approach that underlies PURPA. NWE

cannot claim, as it often does, that all it seeks is ratepayer neutrality when it is promoting a wealth transfer from the QF to its ratepayers.

Seventh, NWE further adjusted downward its already biased avoided cost by utilizing a number of inappropriate and unlawful reductions from its already artificially lowered avoided cost. NWE proposes to violate the anti-discrimination provisions of 18 C.F.R. § 292.304(a)(ii) by treating QFs differently than other generators by essentially double-charging the QF for the interconnection by further reducing Greycliff's avoided cost. Not only is Greycliff obliged to pay its interconnection costs (NWE terms them "network upgrades," but then clarified at hearing these were interconnection "network upgrades"), NWE also simultaneously proposes to reduce Greycliff's avoided cost by the cost of those interconnection "network upgrades." This is something NWE admitted at hearing it cannot do with non-QF generators. Nor does NWE's day-ahead versus real time deduction appropriate as it is based on no evidence other than that there may be an overall bias between the ICE and Powerdex reported prices. NWE claims it is attempting to capture the intermittent nature of wind versus firm resources, but that intermittency is already reflected in a lower capacity payment to Greycliff as well as charges for integration.

Finally, Greycliff will discuss why Greycliff's positions on contract terms are reasonable, consistent with the law, and do not violate PURPA. In many instances, NWE is insisting on contract provisions that do no comport with PURPA or federal law.

II. ARGUMENT

A. Greycliff Incurred a Legally Enforceable Obligation on July 2, 2015 and its Avoided Costs Must Be Based Upon Information Available to It as of that Date.

Although there is reason to believe that the Commission's ruling in final order 6444e in *Re the Matter of Whitehall Wind for QF Rate Determination*, Docket No. D2002.8.100, (*Whitehall Wind)* has limited vitality in light of recent FERC pronouncements regarding what

state commissions and utilities may and may not impose in the way of unreasonable impediments to contract formation, Greycliff took the conservative position and complied with the Whitehall Wind rule. Order 6444e states:

> 47. To establish an LEO, a QF 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. The executed contract demonstrates an unconditional commitment. If the utility also executes the contract, the utility would be able to enforce the obligations undertaken by the QF. Interconnection expenses may be so high as to derail an otherwise feasible project. Only by acknowledging and agreeing to an interconnection agreement can a QF demonstrate that it is prepared to proceed despite any interconnection obstacles. Further, an interconnection agreement requires that a QF have sufficiently defined its project and made adequate progress that the project would be more than a mere speculative, paper proposal.

In its July 2, 2015 letter to NWE, Greycliff appended a signed contract, with a price term consistent with what was known at the time regarding NWE's avoided cost rate. The contract had a beginning and ending date and sufficient guarantees to ensure Greycliff's performance. Greycliff also tendered a signed interconnection agreement for the Greycliff project.

NWE's strained argument, as set forth in Mr. LaFave's testimony is that Greycliff never bothered to ask NWE what its avoided cost was. There are two obvious problems with NWE's argument. Contrary to NWE's apparent belief, what NWE believes its avoided cost to be is not what, in fact, NWE's avoided cost actually is under the Commission's determinations. If Greycliff had called NWE, and NWE had stated what it believed to be its avoided cost rate thus far in this proceeding, and Greycliff failed to tender a contract at that rate, according to NWE no LEO would be created as Greycliff failed to comply with NWE's interpretation of the rule. This argument is difficult to take seriously.

The second major problem with NWE's argument is that, prior to an ultimate Commission determination of NWE's avoided cost, the only information reasonably available to a prospective QF is the publicly available information that was of recent vintage. NWE's position appears to be that if it believes those recent Commission-approved avoided cost determinations are not consistent with NWE's understanding of what its current avoided cost is, then no LEO may be established. This creates a circular game where a QF must not only agree to NWE's contention regarding what an avoided cost is in order to create a LEO (which would presumably render the LEO rule meaningless since if there was agreement on the price term a contract should, theoretically, be mostly a formality in a majority of instances), but the QF must also not rely upon any other sources of information for what it believes to be "consistent" with NWE's current avoided cost. As Mr. Robert Walker testified at hearing, the only reasonable sources of information available to Greycliff were the Commission orders in D2014.4.43, which considered the $53.99/MWh avoided cost stipulated to by NWE to be reasonable based on consideration of a number of other recent Commission-approved avoided costs or avoided cost-like calculations. If the QF relies on other information that disagrees with NWE's belief as to its avoided costs, then no LEO can be created. If no LEO can be created, then the QF may not obtain the benefit of a long-term avoided cost forecast which would violate PURPA and no LEO can ever be created. The implications of this sort of reasoning appear to be little more than self-serving rhetoric by NWE.

Nor does the Commission's holding in paragraph 47 of *Whitehall Wind* actually state anything about a QF asking NWE about its avoided cost. It just states it must be "consistent," with the utility's avoided costs and based upon the information reasonably available to it, Greycliff's proposal was less than other recently-approved Commission rates associated with projects. "Consistency" does not mean "precisely accurate," it means that it must not be

consistent with what is known at the time. If *Whitehall* Wind is interpreted to mean that it must be close or precisely what NWE thinks it is, and NWE does what it has done in this proceeding, and deliberately understates its avoided costs, *then no QF will ever create a LEO again.* The *Whitehall Wind* order, if read in the way NWE suggests, would plainly be contrary to FERC directives as set forth in *Hydrodynamics et al*, 146 FERC ¶ 61,193, P. 33:

> The Montana Rule creates, as well, a practical disincentive to amicable contract formation because a utility may refuse to negotiate with a QF at all, and yet the Montana Rule precludes any eventual contract formation where no competitive solicitation is held. Such obstacles to the formation of a legally enforceable obligation were found unreasonable by the Commission in *Grouse Creek*, and are equally unreasonable here and contrary to the express goal of PURPA to "encourage" QF development.

If a LEO cannot be created unless a QF agrees with the utility regarding its avoided cost, it creates yet another disincentive to amicable contract formation, and in fact creates a barrier to any negotiations. There is no point to negotiations between a QF and a utility if the QF must accept as a premise that it agrees with NWE's estimate of avoided cost or otherwise forego creating a LEO. This argument is not only ill-considered and illogical, but it violates PURPA and FERC's directives to states on whether such impediments are lawful.

More importantly, what NWE attempted to do in this case regarding updating its avoided cost to a January 2016-time frame based on a reasonable and considered request by Greycliff to move back its guaranteed COD is also punitive to Greycliff as well as inconsistent with PURPA. FERC's implementing regulation, 18 C.F.R. § 292.304(d) states:

> (d) Purchases "as available" or pursuant to a legally enforceable obligation. Each qualifying facility shall have the option either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, *in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term*, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) *The avoided costs calculated at the time the obligation is incurred.*

(Emphasis added).

Thus, the avoided costs must be calculated as of the time Greycliff incurred the LEO, in other words, on July 2, 2015. Thus, any information used to derive Greycliff's avoided cost must be based on information available at or prior to the time the LEO was created. FERC itself has made this clear: "Under our regulations, [a QF] has the right to choose to sell pursuant to a legally enforceable obligation, and, in turn, *has the right to choose to have rates calculated at avoided costs calculated at the time that obligation is incurred.*" *JD Wind 1*, 129 FERC ¶ 61,148 at P 29 (emphasis added). This was also the conclusion reached by the South Dakota Public Utilities Commission in its final order in *The Matter of the Complaint by Oak Tree Energy, LLC Against NorthWestern Energy for Refusing to Enter Into a Power Purchase Agreement*, Docket EL11-06, ¶ 18 (May 17, 2013).

> In the Interim Order, the Commission directed the parties to utilize current market conditions and projections in determining proper natural gas inputs and proper electric market rates. On reconsideration, the Commission determined that this use of current inputs violates the PURPA requirement that the avoided cost must be determined as of the LEO date of February 25, 2011, *and the Commission accordingly found that cost inputs and projections should be as of such date.*

(Emphasis added).

Or as the North Carolina Public Utility Commission recently stated the matter: "The Commission concludes that establishing avoided cost rates based *upon the best information available at the time* and making such rates available in long-term fixed contracts, as required by

Section 210 of PURPA should leave the utilities' ratepayers financially indifferent between purchases of QF power versus the construction and rate basing of utility-built resources." *In the Matter of Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities*, 2014 2014 N.C. PUC LEXIS 1827, *53 (emphasis added).

There is no legal justification for NWE's decision to switch from a July 2015 forward price strip to a January 2016 forward price strip. NWE's stated basis for this unilateral change, which was not based on PURPA or FERC's regulations, comes in the form of Mr. LaFave's Revised Supplemental Testimony (which was voluntarily offered by NWE and not in accordance with the Commission's established procedural schedule), which states:

> NorthWestern used the July 6, 2015 price curve because it was close to the date that Greycliff contacted NorthWestern about its QF project. In January, Greycliff notified NorthWestern of the requested change to the start date for the project. *Since this is a substantial change, NorthWestern must use a NWE price forecast to accurately reflect NorthWestern's avoided costs*. The NWE forward price curve used by NorthWestern is from January 15, 2016.

NWE Ex. 4, at p. 3, lines 13-19 (Emphasis added).

Note there is nothing in the regulations or any other law or policy which justified this change in avoided cost calculations by Mr. LaFave, which is precisely in opposition to what 18 C.F.R. § 292.304(d) requires. Conveniently, this change to January 2016 from July 2015 reduced NWE's avoided cost according to Mr. LaFave by $3.80/MWH. NWE Ex. 4, at p. 4, lines 1-6.

The "start date" for the project was also not the issue for Greycliff, contrary to Mr. LaFave's testimony. The Guaranteed Commercial Operation Date was the issue. Greycliff made this request to change the Guaranteed Commercial Operation Date because NWE's construction schedule for completing the interconnection with Greycliff's project is 14 months. The delays in this proceeding (approximately 6 months by the time the final order is released), also necessitated Greycliff's need to delay the Guaranteed Commercial Operation Date. But for

those two factors, Greycliff would not have moved back the Guaranteed Commercial Operation Date. Since Greycliff can be penalized by NWE if it does not achieve commercial operation by the Guaranteed Commercial Operation Date, Greycliff needed to move back the date to ensure there was adequate time following the final order in this proceeding so that Greycliff could meet the Guaranteed Commercial Operation Date. Notwithstanding the foregoing, the Guaranteed Commercial Operation Date bears absolutely no relation to the date upon which Greycliff incurred its LEO and the date upon which Greycliff's avoided cost must be calculated using data available at that time.

B. Greycliff's Avoided Cost Methodological Approach is Sound, Unbiased, Transparent, Based on Fundamentals in the Energy Market and Reliable while NWE's Avoided Cost Methodological Approach Is Not.

The key disputed issue regarding Greycliff's and NWE's long-term avoided cost avoided cost forecasts is the proper method for estimating those costs. Although both parties developed avoided cost estimates that focus on the Mid-C trading hub, which is consistent with both prior Commission orders and the current QF-1 methodology, the key difference in methodologies between the parties focuses on development of price projections at Mid-C. While NWE utilized the PowerSimm model in its analysis, as will be explained below in Section D, that model was used only to determine if NWE is in a net purchase or net sales position.

In deciding between the two competing Mid-C forecasts, the Commission should focus on which electric price forecast focuses on a realistic view of the future. Greycliff's forecast utilizes an independent source, is analytically robust, and recognizes the key structural factors influencing electricity and fuels markets. The United States Environmental Protection Agency's rules such as It is undeniable that U.S. EPA rules such as the Mercury and Air Toxic Rules ("MATS"), the Cross State Air Pollution Rule ("CSAPR") and the Clean Power Plan ("CPP") are and will continue to have a profound influence in shaping regional power markets. The

industry is in the midst of fundamental changes affecting the generation mix, given penetration of renewable energy technologies, environmental compliance actions, and the long-term trend of increasing reliance upon natural gas as a fuel source for power generation. Because of that, it is necessary to utilize a fundamentally derive forecast of power prices and avoided costs.

The NPPC's Seventh Power Plan is just such a fundamental forecast and estimates electric prices for the Pacific Northwest, including the Mid-C exchange. Mr. Schiffman admitted he did not have the final NPPC power plan but only the draft as of November when he was hired to critique NWE's avoided cost testimony and its analysis. However, the numbers in that plan more accurately reflect information available as of July 2, 2015 than do the updated numbers from the NPCC in its final plan. The assumptions underlying the Seventh Power plan were developed Spring/Summer 2015. Furthermore, the price points around which Greycliff made its July 2, 2015 offer to sell to NWE were all prior to July 2, 2015 and of a few-months vintage.

NWE's claim that its forecast is a fundamentals based forecast is obviously incorrect. NWE did not use a fundamental approach in developing its avoided cost projections, or its energy price forecast at Mid-C. Instead, NWE simply relied upon a near-term "forward strip" of energy prices at Mid-C, and then extrapolated those values based on the nominal escalation rate for Henry Hub natural gas prices, as published in the 2015 EIA/AEO.

At hearing, NWE described its forecast as being "fundamental", because it used the EIA/AEO gas price escalation, and the EIA/AEO represents a fundamental forecast. This contention is misleading. As Mr. Schiffman testified at hearing, the EIA/AEO is based on the National Energy Modeling System, and is developed at a higher level of detail than the NPCC forecast. Moreover, NWE's methodology kept spark-spreads constant throughout the forecast period, never changing. The approach does nothing to reflect key structural aspects of the

industry, driven by changes in the generation mix. NWE's avoided cost approach relies too heavily upon the short-term ICE forward price strip at Mid-C. This ICE MID-C market has had no actual trading volume in any period, dating back to 2013. As Mr. Schiffman testified at hearing:

> In terms of the forward prices, for example, the ones that NorthWestern used in the forward strip, in my view there is not credible sources of forward prices in those forward price strips. And the reason for that is an entity like--in this case they have used the ICE exchange, which I think might be the only current view of like a forward price strip at Mid-C. What they do is they basically survey market participants. They say if you were going to sell on-peak power 12 months from now, what price would you charge? There is not any publicly available detail about who they are surveying, how many people they are surveying. If you look at when they report those price strips, if you look at how many transactions actually are traded at the prices that they are posting, the volume is zero. There is no transactions trading at those prices. That's the case for the two dates that NorthWestern has used to pull its strips. I went back and looked at all trade dates through 2013 that were published basically for that price strip at ICE and there was always zero volume. So I personally don't think it's a credible source of power prices in the short-term. In the long-term, you know, the industry standard is to use fundamental modeling. And the reason for that is because, you know, with the shale gas development, with the EPA regulations affecting the coal units in terms of the MATS regulations and the Haze regulations in the west affecting coal plants in the next three, four years with CPP or some derivative form of carbon regulation with, you know, the fundamental switch in the industry of natural gas expansion and renewable energy expansion. So basically gas is becoming more prominent and coal is declining, which affects both underlying power prices and spark spreads are the fundamentals that go into the power price formation. Plus, it affects natural gas prices because the largest forecast component of growth in gas demand is from electric generation. So people run the fundamental forecasts because they know that all these structural changes are happening. And those structural changes are not reflected in the growth quotes. I mean, the short-term, you know, maybe 12 months, they are. In natural gas markets, you know, the broker quotes, there's at least some volume under the transactions for maybe 12 to 18 months. But in the power side they tend to be very low volume and based on really what people are self-reporting that they may trade at, but which they are not actually trading at.

Tr. at p. 48, line 17, through p. 50, line 22.

In short, the Mid-C forward price forecast utilized by NWE in this proceeding as the basis for its avoided cost is based on a survey of market participants, is not transparent, is not

liquid, and is a mere indication of short-term trading possibilities. It is not a robust indication of long-term expected energy prices at Mid-C. Forward price strips represent nothing more than opinions of potential future prices and unless someone is buying and selling at those prices it is no more than opinion. It is analogous to someone attempting to predict five years from now what natural gas prices will be. It is common and expected to be wrong about such opinions.

A fundamentals based forecast, which the NPCC's Seventh Power Plan decidedly is (just as NWE's forecast is decidedly not), attempts to capture changes in the market by taking into account known and expected changes in a host of variables. NWE's forward price strip does not even extend beyond mid-2020. There is simply no way for such a simple price strip to capture fundamental evolutions in the market. That NWE used a fundamentals-based escalator from the EIA-AEO is acceptable, but multiplying an obviously incorrect assumption by a nominal escalation factor does not make it a fundamentals-based forecast or make it an accurate predictor of energy prices for 25 years.

Another issue is the way in which NWE applied spark spreads to its electric price forecast. NWE witness Luke Hanson testified at hearing that:

> What I do or what I have performed is I took the electricity and the natural gas forecasts from the first, I guess now it would be three and a half years, 2018 through July of 2020, and that data has been provided by ICE. Upon that time I'm escalating both of those by this same forecast as if we were multiplying two numbers, both the electric forecast and the gas forecast, by the same rate. *It will maintain that same relationship that we see in the market today.*

Tr. at p. 159, lines 1-11 (emphasis added).

Mr. Schiffman responded that Mr. Hanson's obviously incorrect assumption that spark spreads will remain constant for 25 years is why it is necessary to use a fundamentals based forecast:

> I think that the aspect of the fundamental model is important for calculating power prices in this region or in any region in the U.S. Mr. Hansen testified that the spark spreads are going to remain constant through time. *That's the whole*

reason to do the fundamental modeling, is because the underlying power system is changing substantially and the spark spread will not remain constant.

Tr. at 182, lines 11-20 (emphasis added).

The foregoing passage absurdly suggests without taking into account any of the known and expected changes in energy markets, including the implementation of EPA's NWE regulations, that the relationship between natural gas and electricity prices will remain constant. There is absolutely no foundation for such an assumption. As the Commission knows, NWE's belief that spark-spreads will remain constant over the next 25 years is self-serving and is clearly incorrect. Any realistic estimate of avoided cost must reflect known and likely changes in the industry and must be accounted for by the Commission in its decision on forecast avoided cost.

C. NWE's Adjustments to its Avoided Costs Are Discriminatory and Violate the Principle of Consumer Indifference.

In addition to the "adjustment" for an updated January 2016 ICE MID-C price strip, NWE also made several other inappropriate and discriminatory adjustments to its Mid-C energy prices. First, at hearing Mr. Hanson testified that the Mid-C prices were adjusted downward by $4.33/MWh, plus 2% losses, and that the deduction was further reduced by applying 2 percent annual inflation. Tr. at p. 144, lines 16-20. NWE did not identify this adjustment anywhere in its testimony despite having filed at least 4 different rounds of testimony. NWE also did not identify this adjustment in responding to data requests, despite being asked by both Greycliff and the PSC staff for all workpapers used to develop its avoided cost projection.

Instead, NWE chose to not disclose this adjustment until the hearing, when Mr. Hanson was being questioned by Commissioner Kavulla. This gave Greycliff and the Commission staff no opportunity to respond to this undisclosed adjustment to determine the appropriateness of Mr. Hanson's calculations, the assumptions made therein, or even to double check his computations.

NWE's decision to reduce Mid-C prices by $4.33/MWH, plus 2% line losses and applying a 2 percent annual inflation factor without disclosing that calculation prior to hearing is, at a minimum, inappropriate, as it appears to have been designed to prejudice the Commission staff and the parties. Furthermore, if the Commission were to base its decision in any way on such undisclosed testimony, it would not only encourage such testimony in the future, it would also violate the due process of parties who have every right to expect that testimony and responses to data requests which comprise the record that will be disclosed prior to hearing order that the Commission staff and parties will be able to adequately prepare for cross-examination of witnesses presenting testimony and evidence at hearing.

NWE also made two other inappropriate, discriminatory adjustments to its avoided cost projections. NWE proposes to reduce its avoided cost projection by over $5.02 /MWH to reflect costs it calculates are related to what NWE testified are interconnection network upgrade costs, which are properly considered reimbursable to projects under FERC Order 2003 and FERC Order 2006. As Mr. Schiffman testified, NWE's proposal to reduce avoided costs by network upgrade costs discriminates against Greycliff, such costs could not be applied to competing non-QF generators such as a merchant plant, and given the discrimination, it violates PURPA. *See* 18 C.F.R. 292.304(a)(1)(ii) (requiring that avoided cost rates not be discriminatory against QFs). NWE admitted at hearing it could not apply such charges to non-QF generators. *E.g.*, tr. at p. 71, lines 11-17 (Q. [By Mr. Uda] "Would you agree with me that if a project is not a qualified facility, there would be no opportunity to reduce the rates that that facility is selling to NWE by the interconnection costs? [By Mr. LaFave] A. For that specific example, yes, I would agree."). Furthermore, since NWE admitted at hearing it includes network upgrade costs in the calculations of the value of its own avoidable resources, such deductions actually violate the

PURPA principle of avoided cost and indifference to consumers by excluding avoided network upgrade costs from NWE's estimate of its avoided cost:

> Q. [By Ms. Farkas] And so taking Greycliff out of the equation, does NorthWestern expect to incur interconnection network upgrade costs as it installs the resources outlined in the 2015 plan?
> A. [By Mr. LaFave]. Yes.
> Q. Okay. And will customers be indifferent to the cost of those upgrades?
> A. As outlined in the plan, and in any resource that NorthWestern adds to its system, all the costs are included under the evaluation. *So the interconnection costs would be included as part of the evaluation of whether or not they are just and reasonable to serve NorthWestern's customers.*

Tr. at p. 97, lines 9-22.

The Commission must not violate the principle of consumer indifference and the requirements of 18 C.F.R. § 292.304(a)(1)(ii) by subtracting (rather than adding avoided network upgrade costs as reflected in its own resource plan) from NWE's avoided cost. The Commission cannot include the network upgrade cost adjustment in its determination of avoided cost. 18 C.F.R. § 292.306(a) also reiterates this requirement: "(a) Obligation to pay. Each qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may assess against the qualifying facility on a nondiscriminatory basis with respect to other customers with similar load characteristics."

In considering a settlement regarding its own interconnection policy, including consideration of non-discrimination as between QFs and non-QF generators, the California Public Utilities Commission ("CPUC") stated:

> FERC implemented PURPA through a series of rulemakings that resulted in, among other things, the promulgation of FERC's Small Generator Interconnection Procedure (SGIP) in 2006, which was drawn, in part, from the then-existing Rule 21. The SGIP contains the federal regulations for interconnection for QFs and represents FERC's effort to standardize the terms and conditions of interconnection service. FERC then encouraged states to rely upon SGIP as a source of interconnection rules to further harmonize state-federal interconnection practices. FERC also anticipated that the rules adopted in the SGIP would "reduce

> interconnection time and costs...preserve reliability, increase energy supply, lower wholesale prices for customers by increasing the number and types of NWE generation that will compete in the wholesale electricity market, facilitate development of non-polluting alternative energy sources, *and help remedy undue discrimination*."

Order Instituting Rulemaking on the Commission's Own Motion to improve distribution level interconnection rules and regulations for certain classes of electric generators and electric storage resources, 2012 Cal. PUC 408, ** 50-51 (citations omitted, emphasis added).

In short, the CPUC noted that FERC encouraged states to follow the interconnection rules for QFs which are applicable to non-QFs, and in part, this would remedy undue discrimination of precisely the type that 18 C.F.R. § 292.306(a) was designed to prevent and what NWE is attempting to impose on Greycliff in this proceeding.

NorthWestern also proposed to reduce avoided cost by $1.99/MWh to reflect its calculation of historical differences between day-ahead and real-time energy prices at Mid-C. But, as Mr. Schiffman testified, there is no actual real-time energy market at Mid-C, with trading volumes underlying the Powerdex data used by NWE averaging only roughly 600 MW:

> In addition, as Ms. Farkas, I think, was leading to, there's historically—there's a bias between the ICE price and Powerdex prices; where historically ICE prices have been $2.48 a megawatt-hour higher than Powerdex prices. And so that adjustment or that bias basically is almost the sole amount of Mr. LaFave's calculation in terms of difference between day-ahead and real-time market. So I don't believe that the ata can be relied upon. I also don't believe there is actually a real-time market at Mid-C that's meaningful. The volumes in that market from the data that Mr. LaFave has published are—they average 630 megawatts which is quite small. I don't think that the participants, market participants in the Pacific Northwest are satisfying their real-time energy market needs and balancing needs by trading through that index at Mid-C.

Tr. at 180, line 20, through 181, line 13.

As noted, Mr. Schiffman testified at hearing that market participants in the Pacific Northwest balance system needs by using existing thermal and hydro generating facilities, not by "trading" real-time energy at Mid-C. In its calculated adjustment, NWE compared historical

Day-Ahead energy prices published by ICE, with historical Real-Time energy prices published by Powerdex. But, as Mr. Schiffman showed in his testimony, historic energy prices published by Powerdex have averaged $2.48/MWh lower than those reported by ICE, for the same periods, and both for Day-Ahead products. As such, there is a downward bias in the Powerdex data series, and the magnitude of that bias subsumes the entire adjustment proposed by NWE. Furthermore, Commissioner Kavulla pointed out through cross-examination of Mr. LaFave that NWE does not make this adjustment for its own resources:

> Q. Okay. Do you know if NorthWestern, in creating a net present value for resources that it proposes to own, has made a day-ahead to real-time adjustment?
> A. No, not that I'm aware of.
> Q. It hasn't?
> A. No.

Tr. at p. 111, lines 9-15.

Furthermore, the day-ahead versus real-time adjustment by NWE is supposed to account for the intermittent nature of wind generated output, but Greycliff is already obligated to pay for integration. Thus, NWE is attempting to charge Greycliff twice for the fact that Greycliff's output is intermittent. If NWE believes the integration charge is insufficient to account for the intermittent nature of wind generation, then the problem lies in the integration charge not with adding another deduction to Greycliff's avoided cost.

Thus, not only is the adjustment proposed by NWE potentially an overall bias in prices between the day-ahead and real time published prices as demonstrated by Mr. Schiffman, but it is also plainly discriminatory based on an admission by Mr. LaFave. The Commission cannot rely upon NWE's approach and calculation, and must reject this proposed discriminatory adjustment to avoided cost.

NWE "updated" its avoided cost offer to $36.04/MWh in its March, 2016 Supplemental Testimony. However, that update included several changes that are inappropriate, as explained

in this Brief. Reversal of the inappropriate adjustments results in an adjusted NWE avoided cost of $53.84/MWh, which is close to the value proposed by Greycliff.

Table 1 -- NWE Energy Proposed Greycliff Avoided Cost – Environmental Attributes Included (Updated Supplemental Testimony March 2016), With "Adjustments" Reversed

Variable	Levelized Avoided Cost Impact ($/MWh)
NWE Avoided Cost (Offer) March, 2016 Testimony	**$36.04**
Reverse DA Firm vs. RT Price Adjustment	$1.99
Reverse Interconnection Network Upgrades Adjustment	$5.02
Reverse January, 15 2016 ICE Mid-C Price Strip Update	$3.80
Reverse Mid-C to Montana "Adjustment", not Disclosed Until Hearing[1]	$5.99
Reverse PowerSimm Off-System Sales Adjustment	$1.00
Adjusted NWE Avoided Cost (Offer)	**$53.842**

D. **NWE's Only Used PowerSimm to Calculate When it was in a Net Purchase or Sale Position but Failing to Assign the Market Value in All Hours Does not violate FERC Order 69 and is Also Discriminatory**

1 Mr. Hanson testified that this "adjustment" to Mid-C prices was $4.33/MWh, plus 2% losses (Tr. 144-145; Tr. 155-156). Mr. Hanson also stated that the $4.33/MWh value was escalated nominally using a 2% rate of inflation (Tr. 146). As he testified, NorthWestern did not previously disclose this adjustment to the parties, either in testimony or in discovery response. That adjustment, with 2% losses applied to NorthWestern's Mid-C average price strip, using a discount rate of 7.03%, results in a levelized value of $5.99/MWh.

2 It should be noted that the Idaho Public Utility Commission's avoided cost rates for a variety of projects and a variety of sizes, has published as of December, 2015, rates in roughly the same range as that proposed by Greycliff in this proceeding. *See, e.g.,* http://www.puc.idaho.gov/electric/PacifiCorp%20rates%2012-14-15.pdf (avoided cost rates for PacifiCorp).

As noted previously, above, NWE used its PowerSimm modeling runs to determine whether NWE was in a net purchase position or a net sale position. Once NWE made the determination as to whether it was in a net purchase or sale position, NWE then applied its Mid-C forecast to Greycliff as the avoided cost value in cases when it is in net purchase position, and when NWE is in a net sales position and the market price at Mid-C is below the variable cost of operating Colstrip Unit 4, NWE assigned the value of its Mid-C forecast to the Greycliff project. When NWE is in a net sales position, and the market price at Mid-C is above the operating cost of Colstrip Unit 4, then NWE applied the variable cost of Colstrip Unit 4 as avoided cost value instead of the Mid-C forecast.

NWE's methodological approach in applying the value of market or the variable cost of CU4 rests on two flawed assumptions. The first assumption is that FERC Order 69 states that NWE is not required to pay for avoided cost value under certain conditions. FERC Order 69 says no such thing in actuality:

> A qualifying facility may seek to have a utility purchase more energy or capacity than the utility requires to meet its total system load. In such a case, while the utility is legally obligated to purchase any energy or capacity provided by a qualifying facility, the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load. These rules impose no requirement on the purchasing utility to deliver *unusable* energy or capacity to another utility for subsequent sale.

45 Fed. Reg. 12, 214, 12, 219 (Emphasis added).

In other words, there is no obligation in PURPA requiring one utility to deliver unusable energy or capacity to another utility when that latter utility would then be required to subsequently re-sell it. This is not at all the situation in which NWE is proposing to essentially take Greycliff's output, re-sell it in the market, and make a profit. Moreover, if the energy can be sold by a utility to a third party, and make a profit on that sale, that energy is not "unusable" in any real world sense of the word. Yet, despite the plain, obvious meaning of the word

"unusable," Mr. LaFave testified this is one of the primary reasons he decided not to assign market prices for values for Greycliff in hours when the utility is long and instead assign the incremental variable cost of operating CU4 (except when market value is lower than the variable cost of CU4, in which case, Mr. LaFave opportunistically assigned the market value to the Greycliff Project. *See* Tr. at p. 83, lines 21-25, through p. 84, lines 1-8.

Another reason that Mr. LaFave felt strongly that the market value should not be assigned to Greycliff when NWE is in a net sale position (except when market is below the variable cost of operating CU4) is due to the fact that NWE's existing market portfolio protects its ratepayers from market risk. According to Mr. LaFave, assigning a market value to Greycliff's production when CU4 is available to meet those needs exposes customers to the risk of paying market prices at a time when CU4 is available. However, unless CU4 is being backed down in order to accommodate purchases from QFs (and Mr. LaFave concedes in practice that it is not being backed down, Tr. at p. 82, lines 17-25 through p. 83, lines 1-8), then any sales made by a QF or CU4 are exactly the same: opportunity sales which benefit total system revenues to offset utility system costs. The difference lies in the fact that the utility will still recover its fixed investment in its generation and opportunity sales from that generation which should rightly go to ratepayers to offset those fixed costs. In contrast, if opportunity sales are not properly credited back to the QF, it will be unable recover some if its fixed investment in plant, and thus ratepayers are subsidized and a wealth transfer from the QF to customers is created. This violates the principle of consumer indifference which is one of the key concepts of PURPA.

The subsidy, and exposure to market risk, is being transferred from the ratepayer to the QF. The utility is making opportunity sales of QF power and those sales are at market prices, if the customer is not being assigned the value of those sales then the customer is being treated more preferentially than it would with a similar utility-owned resource. In point of fact, there is

no increased "market risk" to customers from paying QFs a market price when the utility is long on generation, particularly if the QF's energy can be sold at a price above the contract price. In contrast, utility owned generation poses a risk to customers if it does not operate, and no opportunity sales are made, because the customer must still pay for the fixed costs associated with utility owned assets.

Furthermore, FERC Order 69 describes how a differential revenue requirement analysis is to be properly performed in calculating avoided costs, and it does not include a discount from total system sales based on alleged market risk:

> One way of determining the avoided cost is to calculate the total (capacity and energy) costs that would be incurred by a utility meet a specified demand in comparison to the costs the utility would incur if it purchased energy or capacity or both from a qualifying facility to meet part of its demand and supplied the remaining needs from its own facilities. The difference between these two figures would represent the utility's net avoided cost. In this case, the avoided costs are the excess of the total capacity and energy costs of the system developed in accordance with the utility's optimal capacity expansion plan, *excluding* the qualifying facility, over the total capacity and energy cost of the system (before payment to the qualifying facility) developed in accordance with the utility's optimal capacity expansion plan *including* the qualifying facility

45 Fed. Reg., 12, 214, 12, 216 (emphasis in original)

In short, to properly conduct a differential revenue requirement analysis, one must include all system costs to meet its demand, and this necessarily includes costs of energy and capacity. That energy and capacity may be supplied by the utility's own generating resources, and must include both market purchases and sales to third parties which then offset the cost of market purchases in the utility's revenue requirement. Equivalent treatment of QF and utility owned generation requires inclusion of both off-system sales and off-system purchases; including purchases but not sales understates avoided cost. If FERC truly believed that such

system costs (which includes sales) were not usable, it would not have approved of such a differential revenue requirement approach.

NWE's approach is also discriminatory against QFs, as Mr. LaFave admitted under cross-examination from Commissioner Kavulla. Tr. at 109, line 8, through p. 110, line 10. As such, NWE's avoided cost approach adjustment is therefore discriminatory in that it is treating its own generation in a preferential way, and also because NWE seeks to artificially and illegally suppress its estimated avoided costs. Absent this one aspect of NWE's avoided costs involving NWE's assignment of market prices to Greycliff in a differential and discriminatory way, both Greycliff's and NWE's avoided cost projections rely upon forecast energy prices at Mid-C. However, despite all the testimony focused on the treatment of off-system sales in the avoided cost methodology, the difference from that aspect alone only impacts avoided cost by about $1/MWh. However, reversing that $1/MWH adjustment and adding it to other inappropriate adjustments which are reversed in Table 1 above, produces an avoided cost estimate for NWE of $53.85/MWH, which again is very close to Mr. Schiffman's forecast of $53.39 (including integration and supplemental reserves) and the price proposed by Greycliff when it created the LEO on July 2, 2015, which was $53.85 (excluding integration).

E. DISPUTED CONTRACT TERMS

As represented in the NWE and Greycliff's Joint Motion Regarding Contract Terms and Conditions, several contract issues remain despite the parties' good faith efforts at negotiation:

1. Wind Integration and Contingency Reserves.

Greycliff Proposed Section 5.11

5.11 Wind Integration and Contingency Reserves. Seller must provide Contingency Reserves and Wind Integration for the Term of this Agreement. Seller agrees to accept payment adjustments by NorthWestern for Contingency Reserves and Wind Integration, with Wind Integration costs of $1.49/Megawatt Hour. In the alternative, Seller shall self-supply Wind Integration and Contingency Reserves.

NorthWestern Proposed Section 5.11

5.11 Integration/Regulation Services. NorthWestern shall provide integration, regulation and all other required ancillary services ("*Integration/Regulation Services*") after the In-Service Date and during the Term of this Agreement. Seller will be assessed charges for Integration/Regulation Services at the levelized rate of $_____ per month. NorthWestern will invoice Seller or adjust the total monthly payment made to Seller to reflect the charges for Integration/Regulation Services.

The primary dispute over this provision has to do with the amount of the costs assessed with for wind integration and contingency reserves. Greycliff initially obtained the amount in a telephone conversation with Mr. LaFave of NWE. However, Greycliff would note that when it was a Community Renewable Energy Project ("CREP"), Section 5.3 stated:

> Wind Integration and Contingency Reserves. Seller must provide Contingency Reserves and Wind Integration for the Term of this Agreement. Seller agrees to accept payment adjustments by NorthWestern for Contingency Reserves and Wind Integration, with Wind Integration costs of $28,906 per Month. In the alternative, Seller shall self-supply Contingency Reserves.

NWE changed the definition, Greycliff contends, because Greycliff was now a QF instead of a CREP. NWE did not include the definitions it is now including and in fact proposes to charge for all integration/regulation services and "all other ancillary services" which it did not propose to do with Greycliff's CREP project. There is no reason, other than discrimination against QFs, for this change. It is unwarranted and unnecessary and the Commission should accept Greycliff's proposed contract language.

2. Definition of "Emergency Condition".

Greycliff Proposed Definition

"Emergency Condition" means a condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property provided that NorthWestern's purchases from Seller contribute to such Emergency Condition, or where sales by NorthWestern to Seller contribute to such Emergency Condition provided that such discontinuance of

sales by NorthWestern to Seller is implemented by NorthWestern on a nondiscriminatory basis.

NorthWestern Proposed Definition
"Emergency Condition" means any condition or situation which is imminently likely to endanger life or property, or to adversely affect the security of, or cause damage to the NorthWestern System, the Facility or the Transmission Provider.

Greycliff believes that since Greycliff will not be paid in the event of an emergency condition (see Section E.5, below, defining uncompensated curtailments), then NWE should not be able to curtail for an emergency condition unless and until NWE demonstrates that such curtailment is, in some way, related to Greycliff. If a system emergency occurs in a remote part of NWE's system which will not be affected in any way by either sales or purchases from Greycliff, then Greycliff should be paid in the event of such emergency conditions if NWE decides nonetheless to curtail Greycliff. Also, NWE's position regarding "emergency condition" is not consistent with FERC's recent decision in *Pioneer Wind Park I, LLC*, 145 F.E.R.C. ¶ 61,215, PP. 36-37 (hereafter *Pioneer Wind Park*):

> 36. We find that the proposed section 4.4(b) curtailment provision violates PURPA and the Commission's PURPA regulations. The Commission's PURPA regulations permit a purchasing utility to curtail a QF's output in two circumstances: (1) in system emergencies, pursuant to section 292.307(b) of the Commission's regulations; or (2) in light load periods, pursuant to section 292.304(f) of the Commission's regulations, *but only if the QF is selling its output on an "as available" basis.* It is undisputed here that Pioneer Wind and PacifiCorp intend to enter into a long-term, fixed rate PPA based on avoided costs calculated at the time the obligation is incurred; *Pioneer Wind's sale here is not intended to be on an "as available basis."* Under these circumstances, the Commission's PURPA regulations only permit PacifiCorp to curtail Pioneer Wind's QF output during system emergencies, pursuant to section 292.307(b) of the Commission's regulations.
>
> 37. The proposed section 4.4(b) curtailment provision would unlawfully permit the purchasing utility to curtail purchases from the QF in broader circumstances than those permitted by the Commission's PURPA regulations which authorize curtailments in system emergencies. *Specifically, the Commission's regulation in section 292.307(b) permits the purchasing utility to discontinue purchases during any system emergency if such purchases would contribute to such emergency.* The Commission's regulations define a "system emergency" to mean "a condition on a

> utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property." The proposed section 4.4(b) curtailment provision requires Pioneer Wind to agree that, prior to the in-service date of PacifiCorp's Transmission Energy Gateway Segment D project, PacifiCorp can curtail Pioneer Wind's QF output, in accordance with section 4.4(a) of the draft PPA, before it curtails any existing PacifiCorp Network Resource that was designated as a Network Resource prior to execution of the PPA between Pioneer Wind and PacifiCorp. Therefore, PacifiCorp's proposed section 4.4(b) curtailment provision would provide PacifiCorp with the right to curtail Pioneer Wind's QF output before any existing PacifiCorp Network Resource, which was designated as a Network Resource prior to execution of the PPA, and, importantly, *regardless of whether the purchase from Pioneer Wind contributes to the emergency at issue*. Moreover, this proposed curtailment provision violates the non-discrimination protections for QFs, included in PURPA and the Commission's PURPA regulations, by granting a preference in curtailment priority to PacifiCorp's existing Network Resources, which were designated as Network Resources prior to execution of the PPA with Pioneer Wind, as compared to Pioneer Wind.

(Emphasis added).

NWE's proposed language would plainly be contrary to the requirements of 18 C.F.R. § 292.307(b)(2) which states that:

> (b) Discontinuance of purchases and sales during system emergencies. During any system emergency, an electric utility may discontinue:(1) Purchases from a qualifying facility if such purchases would contribute to such emergency; and (2) Sales to a qualifying facility, provided that such discontinuance is on a nondiscriminatory basis

Consequently, NWE's proposed definition of "emergency condition" is contrary to FERC's guidance and its regulations, and would be discriminatory and unlawful just as FERC stated in Pioneer Wind Park. The Commission must accept Greycliff's version of "emergency condition" as it is entirely consistent with 18 C.F.R. § 292.307(b)(2).

3. NWE's Curtailment Rights

COMMISSION RESOLUTION ITEM # 3 - Curtailment Right
Greycliff Proposed 6.7.1
6.7.1 Curtailment Right. No curtailments shall take place unless such curtailments are consistent with 18 C.F.R. §292.304(f) and decisions of the

Federal Energy Regulatory Commission interpreting this regulation.

NorthWestern Proposed 6.7.1
6.7.1 Curtailment Right. NorthWestern may curtail the delivery of Energy from the Facility at any time and for any reason deemed sufficient by NorthWestern in its sole discretion.

As noted above, the only curtailments permitted under PURPA and FERC's implementing regulations are for emergency conditions and for sales of "as available" energy as defined by FERC's regulations, in 18 C.F.R. § 292.307(b) and 18 C.F.R. § 292.304(f). *Pioneer Wind Park, supra,* makes clear that: "The Commission's PURPA regulations permit a purchasing utility to curtail a QF's output in two circumstances: (1) in system emergencies, pursuant to section 292.307(b) of the Commission's regulations; or (2) in light load periods, pursuant to section 292.304(f) of the Commission's regulations, *but only if the QF is selling its output on an "as available" basis."* (Emphasis Added). Since NWE has reserved to itself the right to curtail at any time and in its discretion, it's proposed curtailment right under proposed Section 6.7.1 is inconsistent with PURPA and FERC's implementing regulations and Greycliff's proposed Section 6.7.1. is entirely consistent with PURPA and FERC's implementing regulations. Therefore, the Commission must accept Greycliff's proposed contract provision regarding NWE's curtailment rights.

4. NWE's Right to Curtail for "Light Loading Conditions"

Greycliff Proposed 6.7.4

6.7.4 Light Loading Periods. NorthWestern may not curtail Seller during light loading periods as prohibited by 18 C.F.R. § 292.304(f).

NorthWestern Proposed 6.7.4

6.7.4 Light Loading Periods. NorthWestern is not obligated to accept or pay for Energy from Seller if, due to operational circumstances, purchases from Seller will result in costs greater than those which NorthWestern would incur if it did not make such purchases. This Section 6.7.4 is only applicable in the case

of light loading periods in which NorthWestern must cut back base-load generation in order to purchase the Seller's production followed by an immediate need to utilize less efficient generating capacity to meet a sudden high peak. Power purchase agreements that are "take or pay" are expressly included as "base-load" for these purposes if they have high start-up costs, a lag in re-start times, and other peak-load contracts would have to be relied upon in the interim while the base-load contracts were curtailed or "cut back" from generation, awaiting start-up.

NorthWestern shall give 30 days' written notice to Seller and the Commission of any period in which NorthWestern expects that curtailment pursuant to this Section 6.7.4 may be necessary. During such period, if NorthWestern curtails Seller, NorthWestern shall document such curtailment and promptly provide such documentation to Seller. In the event that NorthWestern later determines that the curtailment was not operationally necessary, or was not otherwise allowed as an Uncompensated Curtailment by Section 210 of PURPA, FERC's regulations implementing PURPA, and Montana Administrative Rules Title 38, Chapter 5, Subchapter 19, the curtailment shall be deemed a Compensated Curtailment and NorthWestern shall, within a reasonable time compensate Seller for Lost Production Damages.

As noted above, NWE's proposed provision 6.7.4 is plainly unlawful under PURPA and FERC's implementing regulations. Greycliff's proposed version of 6.7.4. is lawful and consistent with FERC's regulations and its decision in *Pioneer Wind Park* and must be accepted by the Commission. No "light loading" curtailments are permitted under 18 C.F.R. § 292.304(f) for QFs which are selling their output on a long-term, forecasted avoided cost rate pursuant to a LEO.

5. "Uncompensated Curtailment" Definition:

Greycliff Proposed Definition

"Uncompensated Curtailment" means a curtailment arising out of or resulting from: (i) scheduled or unscheduled outages of the Facility or the NorthWestern System, provided that such scheduled or unscheduled outages are not the result of any negligence, intentional act, or other mis-, mal-, or nonfeasance on the part of NorthWestern Energy; (ii) a request of the Transmission Provider or Transmission Authority under the GIA or applicable tariff, including a curtailment arising from or related to transmission congestion or outage on the Transmission Provider's System; (iv) an Emergency Condition or event of Force Majeure of the Facility or the NorthWestern System; or (iv) an order of a Governmental Agency or Transmission

Authority for any reason.

NorthWestern Proposed Definition

"Uncompensated Curtailment" means a curtailment arising out of or resulting from: (i) scheduled or unscheduled outages of the Facility or the NorthWestern System; (ii) during light loading periods pursuant to Section 6.7.4 if interruption of Energy deliveries during light loading periods is allowed by Section 210 of PURPA, FERC's regulations implementing PURPA, and Montana Administrative Rules Title 38, Chapter 5, Subchapter 19; (iii) a request of the Transmission Provider or Transmission Authority under the GIA or applicable tariff, including a curtailment arising from or related to transmission congestion or outage on the Transmission Provider's System; (iv) an Emergency Condition or event of Force Majeure of the Facility or the NorthWestern System; or (iv) an order of a Governmental Agency or Transmission Authority for any reason.

The primary difference in Greycliff's and NWE's respective definition of "uncompensated curtailment" is that it removes the plainly unlawful reference to "light loading periods" as defined by 18 C.F.R. § 292.304(f) which *Pioneer Wind Park* clearly states is inapplicable to projects which are proposing to sell on anything other than an "as available" basis. Greycliff seeks a long-term contract pursuant to a LEO, and is not selling on an "as available" basis and therefore curtailments for light loading do not apply to Greycliff. Furthermore, NWE's proposed definition of "uncompensated curtailment" would permit NWE to commit an act of mis-, mal-, or nonfeasance resulting in a scheduled or unscheduled outages. Plainly, if such an outage is NWE's fault, Greycliff should be paid for the power it would have delivered to NWE. The Commission must adopt Greycliff's version of the definition of "uncompensated curtailment."

6. PPA Pricing.

This is the subject matter of the Commission's avoided cost rate determination hearing and no more needs to be said except that the parties plainly disagree.

7. Proposed Final Sentence to Paragraph 8.5.

Greycliff Proposed Final Sentence to 8.5
This Agreement will not terminate regardless of the repeal of PURPA.

NorthWestern Proposed Final Sentence to 8.5
Unless ordered by the Commission, the repeal or amendment of PURPA subsequent to the execution and delivery of this Agreement shall not provide a basis for amending or terminating this Agreement.

This may seem to the Commission like a minor disagreement, but Greycliff believes the law is settled that this Commission has no authority to repeal PURPA. PURPA is a federal law and federal primacy dictates that only Congress can adopt legislation that would retroactively repeal or amend a law. NWE's contract language in the final sentence to Section 8.5 is in invitation to error and potential mischief if the Commission were to accept it, and therefore Greycliff believes its version should be accepted by the Commission.

II. CONCLUSION

Greycliff incurred a LEO on July 2, 2015 by complying with the Commission's rule established in its 2010 *Whitehall Wind* decision. NWE's suggestion that it can preclude the formation of a LEO by requiring a QF to agree with NWE's estimate of avoided costs (which asking NWE would necessarily produce) is not required by that Order nor is it logical or sensible that a QF would do so. The information available to Greycliff at the time it created its LEO was that $53.85 was a reasonable benchmark for avoided cost based on publicly available data. Since then, Mr. Schiffman's electric price forecast, based on the fundamentals-based NPPC Seventh Power Plan, produced an avoided cost included integration and supplemental reserves of $53.85. NWE's attempt to impose a $3.80 price adjustment based on a January 2016 price strip is not consistent with the law. If NWE's inappropriate and discriminatory adjustments are removed

from its avoided cost calculation, it produces a rate of roughly $53.85/MWH (including integration, supplemental and spinning reserves), which is approximately equivalent to both Greycliff's initial proposal and with Mr. Schiffman's detailed and very thorough analysis. None of NWE's proposed contract provisions are reasonable and are each either plainly inconsistent with PURPA and FERC's implementations or confer upon the Commission powers it does not have, i.e., to override federal law.

RESPECTFULLY SUBMITTED THIS 10th of JUNE, 2016

UDA LAW FIRM, PC

By: _____

Michael J. Uda

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on this 10th day of June, 2016 upon the following by first class mail postage pre-paid:

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