Michael J. Uda
UDA LAW FIRM, P.C.
7 West Sixth Avenue
Power Block West, Suite 4H
Helena, MT 59601
Telephone: (406) 457-5311
Facsimile: (406) 447-4255
Email: michaeluda@udalaw.com

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

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

I. INTRODUCTION

Petitioner Greycliff Wind Prime, LLC, ("Greycliff"), acting by and through undersigned counsel, respectfully submits its post-hearing reply brief before the Montana Public Service Commission ("Commission") in the above-captioned Docket. NWE offers arguments in support of its view of the legally enforcement obligation ("LEO") issue which are not only nonsensical, but contrary to the plain language of the Commission's Decision in paragraph 47 of the Commission's Order in *Whitehall Wind, LLC*, Order 6444e, D2002.8.100. Curiously, NWE's argument really appears to be about not whether Greycliff created a LEO but rather when the LEO was created. The evidence available to the Commission clearly shows that the LEO was created as of July of 2015, and NWE's explanation for why it moved the date of the LEO to January of 2016 (using, for some reason, data from February of 2016) not only makes no sense, but is contrary to 18 C.F.R. § 292.304(d) and the Federal Energy Commission Regulatory Commission's ("FERC") policy expressly stating that the data reasonably available to the qualifying facility ("QF") at the time an LEO is created must be used to calculate avoided cost.

NWE also disingenuously claims that the avoided cost it calculated for Greycliff as a CREP was $45.01, but NWE's own post- hearing brief in the Greycliff CREP docket, D2015.2.18 states: "The singular issue in this case is whether Greycliff, *at an effective total cost between $53.40 and $56.95 per MWh,* depending upon the cost of regulation, is a cost effective CREP resource within the parameters of the cost cap contained in § 69-3-2007(1), MCA. If the Commission determines the agreed-upon price is within those parameters, or some reasonable approximation of those parameters, it needs to approve the Greycliff PPA as requested by NorthWestern." NWE Post Hearing Brief at p. 5 (emphasis added). As is discussed in further detail below, the all-in price to be paid to the Greycliff project by NWE was $49.01/MWH including renewable energy credits which were to be transferred to NWE. Greycliff was not assigned responsibility for any integration costs, which made the effective rate to ratepayers for Greycliff's CREP project between $53.40/MWH and $56.95/MWH. An apples-to-apples comparison would compare this proposed cost to ratepayers to Greycliff's proposed $53.85/MWH in its LEO letter to NWE on July 2, 2015, which produces an overall cost to rate payers lower than the rate that NWE was arguing *for* prior to Greycliff's creation of its LEO.

In general terms, NWE's arguments are either contrary to law, illogical, or contrary to the known facts. On this record, the Commission must grant Greycliff's request for an avoided cost at $53.38/MWH as set forth in the testimony of Greycliff's expert, Roger Schiffman.

II. ARGUMENT

A. Greycliff's LEO Was Created as of July 2015 and NWE's Arguments to the Contrary Are Illogical and Contrary to Law and Fact.

NWE's main argument continues to be its persistent and illogical claim that Greycliff had to ask NWE what its avoided cost was prior to Greycliff filing its petition in order to create an LEO. NWE has no legal authority for such a requirement. Greycliff used the benchmarks available to it at the time it sent its letter to NWE on July 2, 2015, including the posted QF-1 rate, which NWE relied upon in justifying both the Greenfield settlement at $53.99/MWH in Docket D20014.43 and NWE's selection of the Greycliff CREP proposal which was in the same range as the posted QF-1 rate in Docket D2015.2.18. The *Whitehall Wind* test, assuming its continued vitality in light of recent FERC pronouncements, does not require that a QF be precise in estimating a utility's avoided costs or play a guessing game with the utility. The rate offered by the QF must only be "consistent" with the utility's avoided costs under the *Whitehall Wind* test, and the only available information to Greycliff when it created its LEO were the publicly available benchmarks available to it at that time, which consisted of public statements made by NWE or Commission orders which were published a few months previously.

NWE makes a series of misleading arguments regarding what Greycliff should have done instead of relying upon public avoided cost figures published in Commission proceedings which were of a few months' vintage, but among the most disingenuous is the argument that Dockets N2013.12.84 and N2015.11.91 would have been a "starting point to determine if its proposed price is consistent with NorthWestern's avoided costs." NWE Resp. Br. at p.11. First, NWE only submitted this avoided cost information that NWE was *always* required by the Public Utility Regulatory Policies Act of 1978 *16 USC § 824a-3, et seq.* ("PURPA") to file with the Commission because Whitehall Wind was forced to file a complaint with the Commission in order to compel NWE to file the data it was required to produce by FERC's and the Commission's regulations since 1981! *See* Order 6920b, *In the Matter of the Complaint of Whitehall Wind, LLC Against NorthWestern Energy For Failure to Submit Annual Avoided Cost Information*, Docket D2007.11.131. NWE's obstructionist attitude regarding its obligations under PURPA is nowhere more evident than in its opposition to following the very requirement to publish avoided cost information that it now touts as an important part of the LEO process. Greycliff will leave the Commission to imagine, whether in the absence of the willingness of Whitehall Wind to spend resources to sue to force NWE's hand that it would have ever published avoided cost information as it was required to do for 26 years under 18 C.F.R. § 292.302 and A.R.M. § 38.5.1905.

Second, and more importantly, the information submitted by NWE pursuant to 18 C.F.R. § 292.302 and A.R.M. § 38.5.1905 is not subject to contested case procedures and is a notice docket only. As such, NWE's filing is not subject to the rigors of the evidentiary process, including cross-examination. In short, NWE's published avoided cost information, that it was forced to produce by Commission order 6920b, is simply an untested assertion by NWE regarding its short-term avoided cost energy and capacity rates (5 years for energy, 10 years for capacity) and by itself would not resolve any potential dispute between a QF and a utility. anything. It is not a "starting point" for calculating avoided costs any more than would Greycliff undertaking the absurd task of asking NWE for its current avoided cost.

As pointed out in Greycliff's opening brief, NWE's circular argument is that for a QF's proposal to be consistent with NWE's avoided cost, the QF must agree with NWE's proposed avoided cost or, according to NWE the QF will not create a LEO. Because, if anything is plain from this proceeding, it is likely that NWE will come in with an avoided cost number that is so out of touch with its actual avoided costs that it precludes reaching a negotiated agreement between NWE and the QF. Although NWE now claims it would not, somehow, use such a proposed inquiry by a QF against a QF, there is no basis for such a claim because it is continuing to dispute a LEO even *after* it produced its avoided cost data!

NWE continues to stake out anti-QF, illogical positions that would, if adopted by the Commission, plainly violate PURPA as discussed by FERC in a series of decisions such as *Hydrodynamics,* 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.

This is precisely what happened in July of 2015. NWE did not say in its letter of July 8, 2015 that Greycliff should request avoided cost information so negotiations could begin. Instead, what NWE said to Greycliff was the equivalent of "go away." After citing the now amended rule A.R.M. § 38.5.1902(5), NWE refused to do anything in response to Greycliff's request for a contract stating;

> This administrative rule remains in effect. As the Commission stated in Order No. 7347a, which you cited in your letter, "A project as large as Greenfield is not eligible for standard rates." Order No. 7347a, ¶ 36 (ARM 38.5.1902(5)). An administrative rule is not rendered invalid by FERC's announcement of its litigation position in a Notice of Intent Not to Act and Declaratory Order such as that issued in *Hydrodynamics*. . . . Neither FERC regulations nor PURPA require that all QFs must always be allowed to enter into LEOs. ... NorthWestern declines to agree to purchase Greycliff's energy and capacity at the rates set for [sic] Greenfield in Order No. 7347a.

Exhibit 2 to Petition of Greycliff Wind Prime, LLC.

NWE's response of July 8, 2015 is significant for both what it said and what it did not say. NWE did *not* respond by saying that Greycliff's avoided cost calculation was mistaken, or by providing different avoided cost numbers for Greycliff's project. Instead, NWE said it would not enter into an agreement based on the *Greenfield* settlement in Docket D2014.4.43 and instead offered Greycliff only the published short-term rate contained in the QF-1 tariff. If NWE truly believed that the QF-1 rate was irrelevant, why did it offer Greycliff the short-term QF-1 rate? Plainly at the time of Greycliff's LEO in July of 2015, NWE did not disclose any other avoided cost information to Greycliff other than the QF-1 rate, and NWE did not in any way indicate to Greycliff at that time that the QF-1 rate was irrelevant.

What did Greycliff know as of July 2015? As of July 2, 2015, Greycliff knew the public avoided cost rates which had been published only a few months before in the *Greenfield* and *Greycliff* CREP proceedings. What Greycliff did not know is that NWE was going to concoct this farcical *post-hoc* argument months *after* NWE failed to provide any information to Greycliff except the QF-1 rate. When Greycliff proposed a rate with which NWE plainly disagreed in July of 2015, if NWE's *post-hoc* argument is to be now credited and it truly believed the position it is now taking, then NWE should have countered Greycliff's proposed avoided cost rate with an alternative avoided cost rate. Instead, NWE concocted this *post-hoc* argument months after Greycliff sent its July 2, 2015 letter and only after Greycliff was forced to file its petition. It seems obvious that NWE did not respond with its opinion of current avoided cost information in July of 2015 because it did not wish to open the door to negotiations and therefore refused to participate in any discussion. Thus if Greycliff had actually asked NWE what its avoided cost rate was in July of 2015 such an overture would not have produced any negotiations much less any agreement but instead would have produced the same "go away" response contained in NWE's letter of July 8, 2015.

What NWE was doing, in short, is forcing Greycliff to spend a considerable amount of resources litigating when NWE could have, if NWE's new *post-hoc* rationale is to be credited, simply have offered an alternative avoided cost proposal to Greycliff. In other words, NWE could have itself prevented the very situation of which it now complains by responding to Greycliff's July 2, 2015 letter which proposed an avoided cost rate for its project by simply offering a counter-proposal. NWE did not do so because it refused to negotiate and it did not want to open the door to negotiation in any way.

Third, while NWE claims that had Greycliff asked for its position on avoided cost the rate "could have been easily computed." NWE Brief at p. 9, this contention is specious. In this case, it took *six months* for NWE to provide *any* avoided cost calculation to Greycliff. In other words, it took filing a complaint and commencing litigation for NWE to provide any avoided cost information to NWE – which is precisely the point that Greycliff's counsel has made to the Commission several times The only way to resolve a QF-utility dispute over avoided cost is to file litigation and obtain discovery and the differences between the parties can at least be focused and sharpened, as happened here. If NWE now believes it has an obligation to negotiate and provide avoided cost information to QFs, that new found attitude only came *after* Greycliff filed its petition to amend A.R.M. § 38.5.1902(5) to eliminate the competitive solicitation requirement which the Commission ultimately amended in December of 2015. Even then, NWE has done practically everything in its power to prevent scrutiny of its avoided cost methodology. Greycliff requested in discovery that NWE provide access to the PowerSimm model, and to provide all calculations, assumptions and modeling parameters underlying its avoided cost calculation. NWE objected to requests for hourly data, provided only data values with no formulae, refused to provide modeling parameters or meaningful access to PowerSimm, and neglected to disclose key components of its avoided cost calculation until cross-examination at hearing (Tr.182-183, 184-186) (Schiffman testimony.)[1]

Fourth, although NWE now contends the prices that Greycliff relied upon are "unsubstantiated" and "random" this is another frivolous argument. NWE itself relied upon the QF-1 rate in arguing for the reasonableness of the Greycliff CREP agreement in Docket D2015.2.18 and the Commission staff reviewed multiple price points (including the QF-1 rate, NWE's acquisition of the PPL Hydroelectric facilities, and Spion Kop, among others) in the *Greenfield* Docket, D2014.4.43. Far from being "unsubstantiated" and "random" (which implies if not states that Greycliff pulled these avoided cost determinations from thin air), these price points were either argued for by NWE or approved by the Commission, or both. These avoided cost projections were the subject of at least a Commission hearing and review by Commission staff, and these avoided cost numbers were published a scant few months prior to Greycliff sending its letter to NWE on July 2, 2015. These were the only reasonable benchmarks by which to approximate NWE's avoided costs during the July time frame. No other source of information, including asking NWE what its avoided cost might be in NWE's opinion and the data that NWE was required to produce pursuant to 18 C.F.R. § 292.30,2 would have produced a reliable benchmark given NWE's apparent willingness to artificially lower its avoided cost estimates in a variety of ways as demonstrated in Greycliff's opening brief and in this brief.

Fifth, NWE does not really argue against the creation of a LEO per se only its timing, as it seemingly admits in its response brief that Greycliff does have a right to a contract at forecast avoided cost rates. Therefore, the only real issue is when that obligation arose. Although NWE omits this particular finding from the case it cites, *PECO v. Penn. Pub. Util. Comm'n*, 544 Pa.

[1] Greycliff concurs with the Montana Consumer Counsel's position in its brief that if the modeling costs are borne by ratepayers they should be transparent and available to parties.

475, 677 A.2d 931 (1995), the Pennsylvania Supreme Court upheld the Pennsylvania Public Utility Commission's decision that the QF created a LEO under conditions described in an earlier case, *Armco Advanced Materials Corp. v. Penn. Pub. Util. Comm'n*, 135 Pa Commw., 15, 579 A.2d 1337 (1990) (referred to by the *PECO* Court as *Milesburg II*). The PECO court quoted *Milesburg II* for the following holding:

> *Where a QF has done everything within its power to create such an obligation,* either by tendering a contract to the utility *or by petitioning the PUC to approve a contract or to compel a purchase*, and only an act of acceptance by the utility *or an act of approval by the PUC remains* to establish the existence of a "contract" then the *"legally enforceable obligation" contemplated by 18 C.F.R. § 292.304(d)(2) has been created and the QF is entitled to rates based on avoided costs calculated from the date of the QF's action.*

PECO, 544 Pa. 475, 481-482 (quoting *Milesburg II*, 135 Pa. Commw. at 33, 579 A.2d at 1247 (emphasis added by the *PECO* court).

In other words, a QF could either tender a contract to the utility or file a petition with the PUC and, in either event, a LEO would be created. Although it is plain the Commission has adopted its own rule in *Whitehall Wind*, what Greycliff did here was consistent with both *Whitehall Wind* and *PECO*. Consistent with *Whitehall Wind*, Greycliff tendered a contract and a signed interconnection agreement to NWE. Greycliff essentially sent back the same agreement that NWE had proposed to this Commission only a few months before as part of the CREP process, with minor changes to reflect that Greycliff would be a QF and not a CREP project. Greycliff signed the proposed contract, which contained both a beginning and an end date, and the rate it proposed was consistent both with the rate that NWE had proposed only a few months previous and *with every other real world benchmark regarding avoided cost reasonably available to Greycliff at that time in July of 2015.* Greycliff also provided sufficient guarantees of performance, according to the terms that NWE had previously agreed to when Greycliff was a CREP. Consistent with *Milesburg II*, Greycliff both tendered a contract in July of 2015 and filed its petition in August of 2015. Under any reasonable test of whether a LEO was created, it was created in July/August of 2015.

B. Greycliff's LEO was Created in July of 2015 and the Avoided Cost Must Be Based Upon Information Available at that Time[2]

NWE ignores the authority and argument from Greycliff's opening brief that 18 C.F.R. 292.304(d) (2) requires avoided cost to be based on information that was available at the time of the QF's LEO. Greycliff offered authority from FERC itself; "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); the South Dakota Public Utilities Commission South Dakota in the *Oak Tree* Complaint decision in Docket EL 11-06, ¶ 18 (May 17, 2013)("[T]he 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."); the North Carolina Public Utility Commission, 2014 N.C. PUC LEXIS 1827, *53 (emphasis added)(stating that avoided costs should be calculated "based upon the best information available at the time . . ." *PECO* and *Milesburg II* from Pennsylvania also reiterate this requirement in 18 C.F.R. 292.304(d)(ii) that avoided costs must be calculated, if the QF so chooses, "at the time the obligation is incurred." Therefore, all case law and authority available to this Commission indicates that July of 2015 is the proper date for an avoided cost determination, and that determination must be based on information reasonably available at that time. NWE has no material argument against this position.

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2 Although Greycliff is not devoting much discussion in this brief to the Montana Consumer Counsel's brief, it is important to note that its position that the Commission should use current information is a violation of PURPA if the Montana Consumer Counsel's position is that the most current information should be used regardless of the data of a LEO. Such a position would violate FERC regulations and numerous regulatory decisions.

C. NWE's Position that it Updated its Avoided Cost Projections in January Based on a Change in Greycliff's COD is Contrary to Law

NWE's argument that Greycliff's decision to change the commercial operation date ("COD") in the agreement in January of 2016 required NWE to move the date upon which Greycliff's avoided cost rate would be calculated is consistent with *none* of the foregoing decisions from FERC or other state agency decisions. Greycliff, regardless of its COD, was entitled to rates based on information available at the time the obligation was incurred in July of 2015. And, contrary to NWE's argument, Greycliff is not blaming the Commission for the protraction of this proceeding. It is, however, a fact that Greycliff filed its petition on August 17, 2015, and M.C.A. § 69-3-603(2) (a) requires the Commission to reach a decision in 180 days after receiving a petition. Given the delays in resolving the issues between Greycliff and NWE, the proceeding dragged on longer than could have been anticipated and threatened Greycliff's ability to perform its obligations to guarantee a COD before the end of 2017. NWE's argument that Greycliff's request for a delay in COD changes its utility resource planning may or may not be true, but there is: (1) no evidence that this assertion is true; and (2) any basis for assuming a 25 MW project would throw NWE's entire planning process into disarray given that NWE was months late in filing its 2015 Electric Resource Procurement Supply Plan and did so *after* Greycliff filed its petition in this proceeding.

And it is a fact that NWE's interconnection process is a fourteenth month process from beginning to end of construction, as indicated in the executed Large Generator Interconnection Agreement ("LGIA") between NWE and Greycliff. Since Greycliff could be penalized under its agreement with NWE if Greycliff failed to achieve COD by the date in its proposed agreement with NWE, Greycliff acted prudently given the delays in the proceeding and the possibility NWE would not be able to complete the interconnection construction process by the time of the former

COD. Greycliff, in other words, did nothing wrong and NWE has no argument that it needed to change its calculations of avoided cost based on this change, particularly when it runs counter to all legal authority on the subject.

D. NWE Did Not Calculate a \$45.01 Contract Price for Greycliff's PPA – The Proper Comparison is \$49.01 plus Integration to Ratepayers versus \$53.85 or \$53.38/MWH to Ratepayers.

NWE's argument that it calculated a \$45.01/MWH avoided cost for Greycliff as a CREP project is misleading at best. NWE did in fact calculate a \$45.01 *energy and capacity* only rate for the Greycliff project in February of 2015 and testified to the same in April of 2015 (three months prior to Greycliff's July 2, 2016 LEO letter to NWE). However, NWE omits to mention that in the Greycliff CREP proceeding (just as is the case here), that Greycliff was *also* being paid for environmental attributes (including RECS and potential avoided carbon costs). In the Greycliff CREP Docket, D2015.2.18, NWE Ex.-2, contained within the prefiled testimony of Mr. LaFave, is a table appears as BJL-1 which states a levelized rate for energy, capacity and environmental attributes of \$49.02/MWH. In that same testimony, Table BJL-2 shows an all in cost to NWE's customers of either \$52.63/MWH or \$55.55/MWH. In that same filing, the Greycliff CREP contract proposed by NWE does not even mention that Greycliff is responsible for integration costs. *See* Appendix 1 to NWE's Application in Docket D2015.2.18.

As noted above, NWE's post-hearing brief stated that the sole issue in Docket D2015.2.18 is whether "Greycliff, at an effective total cost *between \$53.40 and \$56.95 per MWh*, depending upon the cost of regulation, is a cost effective CREP." NWE's post hearing brief at p. 5 (emphasis added). The only way "effective total cost" can be read in this context is "effective total cost to ratepayers." Thus, the effective comparison of the original \$53.85/MWH proposed by Greycliff in its LEO letter of July 2, 2015(or Mr. Schiffman's avoided cost projection of \$53.38/MWH) is either the \$52.63/MWH or \$55.55/MWH set forth in BJL-2 or the

$53.40/MWH or $56.95/MWH set forth in NWE's April 22, 2015 post-hearing brief, and not to the $45.01/MWH proposed by NWE for Greycliff's energy and capacity alone as NWE misleadingly suggests in its Response Brief. Greycliff does not deny that it will have to pay for integration charges. What this plainly means is that Greycliff proposed a $53.85/MWH contract rate which was either approximately the same or less than the "all in" cost to NWE's consumers a scant two months before Greycliff sent its LEO letter to NWE. As noted previously, NWE's brief proposing the $53.40/MWH or $56.95/ MWH in Docket D2015.2.18 was submitted by NWE to the Commission on April 22, 2015, a mere 71 days prior to Greycliff's LEO letter of July 2, 2015.

E. NWE's Deduction of $5.02 from avoided cost for "Montana Conditions" was Not Disclosed by NWE and Should not be Permitted by the Commission

Greycliff argued in footnote 1 to its Opening Brief on page 20 that "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 Mr. Hanson testified, NWE did not previously disclose this adjustment to the parties, either in testimony or in discovery response. That adjustment, with 2% losses applied to NWE's Mid-C average price strip, using a discount rate of 7.03%, results in a levelized value of $5.99/MWh. NWE's response brief at p. 16 admits that Mr. Hanson did not in fact provide to Greycliff or the Commission the "specific dollar amount deducted from the Mid-C prices for transmission. As noted by Mr. Hansen this was simply an oversight. Tr., p. 144: 11-12." NWE offers two equally facetious arguments in response to its obvious and prejudicial failure to disclose this calculation prior to hearing: first, it claims that Greycliff and the Commission should have been able to figure out this number based on data provided; second, it cites a QF-1 docket as justifying NWE use of this approach.

There is no reasonable way for Greycliff or the Commission to have "backwards engineered" NWE's deduction to Mid-C prices based on the information that NWE provided in its testimony or discovery. First, NWE's responses to data requests were spreadsheets with millions of values for various variables and provided the spreadsheets without any formulas. There was no realistic way for Greycliff to verify NWE's calculations or even what these variables purported to measure since they were provided without formulas. Greycliff had no reasonable way, therefore, to verify any cost number or what portion of avoided cost NWE allegedly attributed from these calculations to Greycliff's project. There was simply no way for Greycliff to verify any number associated with NWE's "Montana" adjustment to Mid-C prices in this proceeding without full access to NWE's PowerSimm model and its assumptions, methodologies, and statistical parameters, which NWE refused to provide to Greycliff.

Second, as Greycliff contended in its Opening Brief:

> 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."

Greycliff Open. Brief at pp. 15-16.

Regardless of NWE's claim that Mr. Hanson's decision to surprise the parties and the Commission was a mere oversight, NWE had an obligation to disclose this information to Greycliff in discovery as Greycliff asked NWE to produce all workpapers. Consistent with its approach to conceal the basis for its avoided cost calculations in discovery, NWE remained silent in its discovery responses to the prejudice of Greycliff, even though it submitted updated data responses to a number of other data requests despite not being requested to do so by the Commission or the parties. Greycliff cannot now conduct discovery or cross-examination of Mr. Hanson, and his decision to withhold this information, whether it was intentional or negligent, renders this adjustment insupportable under the law.

NWE's argument that this sort of adjustment has been approved in a prior QF-1 proceeding is curious, given NWE's previous claims that those rates are irrelevant to the determination of avoided costs in this proceeding and also stale. Apparently, according to NWE, the QF-1 rate calculations only matter when they are a basis for reducing Greycliff's avoided cost, which is typical of NWE's "heads we win, tails you lose" approach to avoided cost in this proceeding.

Mr. Schiffman did not believe such an adjustment was appropriate, and the lack of appropriateness of such adjustment from Mid-C to Montana is one reason why Greycliff provided footnote 2 (page 20) with a link to avoided cost decisions of the Idaho Public Utilities Commission ("IPUC") in its Opening Brief. The IPUC decisions on avoided cost are in the range proposed by Greycliff instead of NWE. Although NWE complains such rates are irrelevant, NWE freely cites in its brief legal authority from Idaho and Pennsylvania in a remarkable display of disingenuousness.

F. NWE Testified That it has a Need for the Greycliff Project, and NWE's Position that it need Not Pay for Energy Violates PURPA.

NWE also argues that, under PURPA, it is not required to pay for QF power that is not needed, and that paying the market price for QF power exposes its ratepayers to too much risk. See NWE Resp. Brief at p. 5, and pp. 11-12. This argument is a misstatement of PURPA. While FERC rules do not require *capacity* payments to QF's when there is not a demonstrated need for capacity, utilities are *required* to pay for QF *energy* under all circumstances:

> In implementing section 210 of PURPA, the Commission made clear that an avoided cost rate need not include capacity costs (as distinct from energy costs) where a QF does not "permit the purchasing utility to avoid the need to construct a generating unit, to build a smaller, less expensive plant, or to reduce firm power purchases from another utility." Order No. 69, FERC Stats. & Regs., Regs. Preambles 1977-1981 P30,128 at 30,865. The Commission commented:
>
> > 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.
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> Order No. 69, FERC Stats. & Regs., Regs. Preambles 1977-1981 P30,128 at 30,870 (emphasis added). Accordingly, an avoided cost rate need not include capacity unless the QF purchase will permit the purchasing utility to avoid building or buying future capacity. *Thus, while utilities may have an obligation under PURPA to purchase from a QF*, that obligation does not require a utility to pay for *capacity* that it does not need.

City of Ketchikan, 94 F.E.R.C. P 61,293, 62061-6206 (2001).

This is also not the first time that NWE has misstated FERC PURPA policy regarding when utilities must pay for energy and capacity. *Hydrodynamics Inc.*, 146 F.E.R.C. P61,193, ¶ 35 (2014) (in rejecting NWE's contention that the 50 MW cap imposed by the Commission was lawful based on FERC's decision in *Ketchikan*, FERC stated: "In *Ketchikan*, however, the Commission explained that *avoided cost rates need not include the cost for capacity* in the event that the *utility's demand (or need) for capacity is zero*. That is, when the demand for capacity is zero, the cost for capacity may also be zero. Applying *Ketchikan* to the case at hand, the installed capacity limit should represent the point at which NorthWestern's demand for capacity equals zero." (Emphasis added). In short, FERC has never stated that *energy* avoided costs should be similarly reduced when avoided capacity costs equal zero.

There is no evidence in this proceeding, however, that Greycliff would not offset some capacity needs of NWE since NWE's 2015 Electric Resource Procurement Plan includes plans to construct new generating units which would charge customers for capacity. As noted above, a payment for capacity value based on avoided procurement is not new policy. FERC addressed this very issue when it adopted Order 69 implementing Section 210 of PURPA in 1980. In response to claims that avoided cost should not include capacity payments, FERC explained that purchases of power from QFs "will fall somewhere on the continuum between" firm and non-firm service or capacity and energy. For facilities that demonstrate "a degree of reliability that would permit the utility to defer or avoid construction of a generating unit or the purchase of firm power from another utility, then the rate for such a purchase should be based on the avoidance of both energy and capacity costs." Order No. 69, FERC Stats. & Regs., Regs. Preambles, 1977-1981, P 30, 128 at 30,882 (1980).

Moreover, NWE witness Mr. LaFave testified that the Greycliff project "is needed" and brings value to the NWE system (Tr. at p. 116). In its response brief, NWE does not address the key point raised by Greycliff at hearing demonstrating that NWE operates its system by buying and selling energy, and that Greycliff output should be valued at market price because that is *the marginal cost avoided by NWE.*

NWE also fails to come to grips with NWE's discriminatory approach when it comes to valuing its own resources as opposed to how it values QF generation:

> Q. (Commissioner Kavulla) Will it [NWE's combined cycle natural gas plant to be constructed in 2025 according to NWE's 2015 Electric Supply Resource Plan] be dispatched with respect to the avoidable costs of the fuel at

Colstrip? Or will it be dispatched only with respect to market price and the variable costs of the combined-cycle?

A (Mr. LaFave). The second.

Q. So why are you proposing to use the former for the purpose of evaluating the revenue that--or the compensation for this facility when that's not what you would do for a combined-cycle or what really any economist would do to value a plan?

A. From this particular plan in the docket that we have in front of them, this was during the time we were developing that particular forecast for the 2015 plan. As identified I believe in one of the PSC questions, we did run the scenarios against the EOP to show the difference underneath that plan to make sure that we--and provided that information of what that effect would have on that particular plan. Prior to that we did not have that available to us, so we didn't--we did not include that. Prior to that we did not have that available to us, so we didn't--we did not include hat. And it is not represented in my exhibit, my last exhibit, but it is within the PSC questions.

Q. You note there are certain resources that NorthWestern has in its portfolio that don't operate under a dispatch, or much of one. They have to run based on the weather.

A. Correct.

Q. But I don't recall NorthWestern ever coming to us in a pre-approval docket suggesting that those resources should be valued at zero when NorthWestern would be in a long position and when they would have to liquidate that power into the market. I seem to remember always that NorthWestern has proposed using the market price for the purpose of valuing those resources.

A. And that benefit goes back to customers in those owned resources. And in this particular case what we're putting forward is that benefit should also go back to the customers in a QF comparison, not back to the QF developer.

Q. But long or short--I mean, customers are paying a dollar-per-megawatt hour levelized price for owned resources. And the amount of money that you could attract from liquidating in the market will be more or less than that sum of money, just like it is with the power purchase agreement price for QF, right?

A. Right. But the benefits still should go to the customer.

Q. I don't disagree with that. I just don't see how the two methodologies are consistent.

> A. From a--if you are talking specifically-- are you talking specifically about the location where we are long generation and the market price is higher than the variable cost? Is that what you are talking about, or which specific scenario are you referring to?
>
> Q. No. I'm just talking about when you create a net present value of a proposed utility-owned resource. And in the specific scenario it wouldn't be long and the market being above the variable cost, but where instead NorthWestern is long and the market price is lower than the projected levelized cost or variable cost of the unit. NorthWestern doesn't seem to have assigned the lower value to a utility-owned resource. Does it?
>
> A. That value is attributed back to the customers when it's cleared out.

Tr. at p. 108, line 24 through p. 110, line 25.

Mr. LaFave's answers to Commissioner Kavulla's line of questioning are evasive and non-responsive. Perhaps this is because Mr. LaFave knows that NWE, in fact, values its own resources very differently. If Mr. LaFave is suggesting that it might in the future value its own resources the way it values generation provided it by a QF, this is counter to NWE's entire history of treating its own resources differently than the way it treats QFs. Regardless, NWE's future intentions are irrelevant to this proceeding.

What Mr. LaFave seems to suggest in his answers to Commissioner Kavulla is that utility owned resources produce some unique benefit to ratepayers through opportunity sales than do QFs. This is incorrect; the benefit is precisely the same to ratepayers when market clearing prices are used to value both utility owned generation and avoided costs for QF projects. However, in NWE's "heads we win, tails you lose" universe, NWE proposed avoided cost methodology would result in a wealth transfer from the QF to ratepayers in a way that discriminates against QFs by treating NWE's own resources in a better, superior fashion. By applying to Greycliff the lower of market or the variable cost of operating Colstrip Unit 4 ("CU4") when NWE is long, NWE is discounting the price the QF receives in avoided cost in a way that favors NWE's own generation by not applying the same approach to the valuation of its own resources. NWE is thus discriminating in favor of its own resources by assigning the market clearing price to the value of its own resources, while assigning the lower value of either CU4 or market to Greycliff.

In this way, NWE is violating the very principle of consumer indifference inherent in PURPA, and is violating 18 C.F.R. §292.304(a)(1)(ii), which expressly prohibits discrimination. Such prohibition includes the very discrimination practiced by NWE here, namely a decision by a utility to treat its own resources in a more favorable way than it does QF resources. NWE really has no argument that it is not doing that in this case, except to say that assigning the market value to Greycliff in all hours would expose its customers to market risk that they are already paying NWE to avoid. What NWE either negligently or intentionally ignores, is that the very same thing is true of utility owned resources. There is no basis for NWE's discriminatory treatment.

G. NWE Admits It Did Not Do a Differential Revenue Requirement

NWE's notion that it does not need to pay full avoided cost for QF power appears to be based on NWE's misreading of PURPA and FERC Order 69 and is central to NWE's approach to its avoided cost methodology. As noted in Greycliff's Opening Brief, NWE is misinterpreting FERC Order 69. FERC Order 69 has always required utilities to pay full avoided cost to QFs. What the passage NWE relies upon in FERC Order 69 actually means is that 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," NWE continues to persist in defending its discriminatory methodology.

In fact, NWE's view that it need not pay full avoided cost to QFs seems to be the entire rationale for using PowerSimm in this proceeding. NWE had to come up with a way to treat Greycliff differently from its own resources, and NWE justified its differential treatment of Greycliff by relying upon FERC Order 69 for the position it did not have to pay full avoided cost to QFs when NWE was long on power. Then NWE utilized PowerSimm to show when NWE was in a purchase mode (i.e., short on power) or sale mode (i.e., long on power). When NWE was deemed by PowerSimm to be in a purchase mode, NWE applied the market value. When NWE was in a sale mode, NWE assigned a lesser value than the full value of the market. *See* Tr. at p. 83, lines 21-25, through p. 84, lines 1-8.

Greycliff also argued in its Opening Brief that FERC Order 69 describes how to properly perform a differential revenue requirement analysis, and that such an analysis necessarily includes all systems costs – which would include off-system sales. *See* Greycliff Open. Br. at p. __ (*citing* FERC Order 69, 45 Fed. Reg., 12, 214, 12, 216).

Although NWE now admits that it did not complete a differential revenue requirement analysis, it continues to try and obfuscate the issue by claiming it utilized a QF-In/QF-Out approach. NWE Resp. Br. at p. 12. Mr. Hanson testified at hearing that his approach is not differential revenue requirements approach because it does not include transmission costs:

> Q. [Ms. Farkas] In your DVR analysis did you calculate revenue requirements for a full portfolio of resources including and excluding Greycliff?
>
> A. As discussed by Mr. LaFave, we do not have the transmission costs included in PowerSimm for a total differential revenue requirement.

Tr. at p. 129, lines 6-11.

However, NWE either does not know or has failed to come to grips with the proper method for calculating a differential revenue requirement analysis. The central problem with NWE's differential revenue requirement analysis is that it does not (and cannot, given the way NWE utilized PowerSimm) *measure changes in the variable operating cost of the NWE system* (also known as changes in production cost), but instead NWE only used PowerSimm to calculate a net short or net long position (Tr. 178).

H. Absent NWE's reliance on PowerSimm, Greycliff and NWE both used a Mid-C price forecast, however Greycliff used a Publicly Available Fundamentals Based Forecast and NWE used a four-year Forward ICE Price Strip Which is Not a Fundamentals Based Forecast.

As Greycliff pointed out both at hearing and in its Opening brief, if the Commission eliminates NWE's obviously incorrect interpretation of FERC Order 69 which expressly does *not* permit NWE to avoid its obligation to pay full avoided cost to Greycliff by assigning a value less than full market price, NWE's approach is precisely the same as Greycliff's approach to calculating avoided cost. NWE only used PowerSimm to determine whether it was long or short, and then assigned Greycliff less than full market price when NWE was long. Absent that error by NWE – which only accounts for approximately $1 dollar in NWE's avoided cost calculation – both NWE and Greycliff's expert Mr. Schiffman utilized Mid-C power prices as the basis for the avoided cost in valuing all of Greycliff's energy production (Tr. 179). Thus, the primary decision the Commission must make in this proceeding with regard to an appropriate avoided cost pricing is which source of the Mid-C price forecast the Commission finds more reliable and more credible.

Throughout this proceeding – in testimony, in response to cross-examination, and in its Opening Brief – Greycliff presented in detail the need for the Commission to utilize a fundamentals based forecast in projecting energy prices at Mid-C (Tr. 40-41, 49-51). It is undeniable and unrefuted in the record that the electricity industry is undergoing (and will continue to undergo) substantial changes due to U.S. EPA regulations, coal plant retirements, natural gas market dynamics, and the expansion of renewable energy resources. Only a fundamental structural model can reflect those types of changes in projecting future energy prices (Tr. 40-41).

Only Greycliff's avoided cost estimates use a fundamental forecast, with reliance upon the Northwest Planning and Conservation Council ("NPCC") Seventh Annual Power Plan. NWE attempts in its Response Brief to discredit the NPCC forecast by claiming it is not "Montana-specific", and also by arguing that market heat rates implicit in the NPCC forecast do not change "after 2024". Although NWE claims that these "facts" discredit Greycliff's Mid-C price forecast in favor of its own Mid-C price forecast, these arguments are specious at best.

First, Mr. Schiffman used the region that includes Montana in his estimate of avoided costs. In addition, NWE's reliance on a Mid-C forecast is not a Montana electric price forecast and, as will be spelled in more detail below, is a less reliable and probative forecast of future power prices because it is not a fundamentals based forecast.

Second, in actuality, the implied market heat rates in the NPCC forecast *decline throughout the forecast* period, reflecting key efficiency improvements in the regional power market, as renewable resources and energy conservation investments expand. *Power prices in the forecast rise due to real escalation in natural gas prices.* So NWE's contention that spark spreads remain constant after 2024 is false, inaccurate, and is unsupported by the record evidence. *See* Mr. Schiffman's Response to NWE-022, which includes a spreadsheet labeled "PMRG Greycliff Avoided Cost Projection – February 2016.xlsx." This spreadsheet effectively refutes NWE's belated claim regarding spark spreads. What is irrefutable is that Mr. Hanson testified his spark spreads remain unchanged over time which, as Greycliff pointed out in its Opening Brief, is irretrievably and irremediably wrong. Open. Br. at p. 14.

In its Response Brief, NWE makes an ineffective attempt to rescue its Mid-C price forecast based on a near-term ICE forward price strip by arguing that these prices represent some sort of liquid market. NWE. Br. at p. 16. However, the indisputable record evidence clearly demonstrates that there is no actual traded volume underlying the ICE forward curve (Tr. at p. 48-52). Mr. Schiffman testified at hearing that he looked at the trading volumes since 2013 for the ICE index and there were no reported transactions: "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." Tr. at p. 49, lines 13-18.

Ignoring Mr. Schiffman's testimony to the contrary, NWE nonetheless cites Mr. LaFave's testimony stating that "ICE is what the regional community – regional companies are transacting at locally." This self-serving testimony blithely ignores that there is *no* record evidence that any transactions are taking place at the ICE Mid-C index used by NWE. If this is in fact the case, and Mr. Schiffman plainly testified that it is, the ICE Mid-C forward price strip's not only an unreliable basis for forecast long-term power prices beyond 2020, but also an unreliable *short-term* indicator of power prices in the Northwest.

Moreover, NWE completely ignores Greycliff's objection to Mr. LaFave's testimony at hearing on the grounds that Mr. LaFave first deferred to Mr. Hanson questions about volumes traded at the ICE indexed prices relied upon by NWE during cross-examination and then later attempted to answer questions about market liquidity and volumes traded on friendly redirect from NWE's counsel (Tr. 119-120). NWE also ignores Mr. LaFave's prior testimony where he was unable to state whether there was any trading volume underlying the ICE forward price strip.

(Tr. 75-76). The record evidence clearly shows that there is no actual volume underlying the ICE price strip. NWE has produced no evidence whatsoever to counter Mr. Schiffman's testimony based on his research since 2013.

NWE did not, contrary to its claim, use a fundamentals based forecast which is at all similar to the robust, region wide effort that produced the NPPC forecast. NWE's avoided cost is based first on a short-term Mid-C price index until 2020, but which forecasts power prices based on self-reported opinions about future power prices which reflect no actual transactions at those prices. Although NWE did use a fundamental escalator by applying the Energy Information Administration/Annual Energy Outlook's ("EIA/AEO) natural gas price escalator, that escalator is but one of thousands of variables which are utilized by EIA in producing its fundamentals based AEO. When Mr. Schiffman attempted to use the entire EIA/AEO fundamentals based power forecast to calculate Greycliff's avoided cost, it produced an avoided cost of approximately $80/MWH. If NWE had used the rest of that fundamentals based AEO/EIA forecast it would likely have produced a similar avoided cost for Greycliff. Instead, NWE selected a single variable from a fundamentals based forecast and claimed it was a fundamentals based forecast, which is the equivalent of saying a mammal is an elephant because it is gray.

Another serious error with NWE's avoided cost forecast, apart from the fact it is based on short-term, self-reported prices with zero transactions (and is thus an illiquid market), is Mr. Hanson's assumption that spark spreads remain constant over the entire length of NWE's forecast. Implicit in such a price strip are indeed, perhaps, expectations of future power market pricing, but the reported collective opinions represented by the ICE Mid-C price strip are merely indicative prices which as stated above are based entirely on self-reported data and which include zero volume. There is simply no way for such a forecast to take into account the known and expected fundamental shifts which the NPCC's Seventh Annual Power Plan predicts will fundamentally change power markets in the next 25 years.

NWE's arguments are an attempt to distort reality. Based on the overwhelming evidentiary record before it, the Commission must use the NPCC forecast prices at Mid-C as the primary basis for its avoided cost calculation for Greycliff. And because Greycliff established a LEO in July, 2015, the Commission must use the interim version of the NPCC forecast that was used by Greycliff, as the assumptions and computer simulations underlying that forecast were developed in the spring and summer of 2015, and based on data forecast at that point in time. The final version of the NPCC forecast was not available until the winter of 2016, well after Greycliff created its LEO.

I. NWE's Deductions to Avoided Cost Are Discriminatory, Unlawful and Invitation to Error

NWE's response brief attempts to resurrect its many "deductions" to Greycliff's avoided cost. However, these attempts are unavailing as they are either: (a) factually wrong; (b) legally incorrect, or (c) both. First, NWE continues to argue that a day-ahead vs. real-time energy price adjustment is warranted, which as Mr. Schiffman testified double-counts for wind integration charges (Tr. 186-187). Greycliff's initial brief demonstrates there is a bias between day-ahead historical energy prices at Mid-C, with Powerdex prices being $2.48/MWh lower than ICE which subsumes the magnitude of the "adjustment" proposed by NWE. There is no record evidence to support NWE's adjustment other than the study performed by Mr. Schiffman, and this discredits NWE's contention that there is any real difference between day-ahead and real-time energy prices (Tr. 181-182). On cross-examination by Commissioner Kavulla, Mr. Hanson admitted that in creating a net present value for resources NWE proposed to own, it had never made a day-ahead to real-time adjustment. Tr. at p. 111, lines 9-15. Again, NWE is doing nothing more than favoring its own resources and discriminating against Greycliff. NWE's Response brief simply repeats, without proof, that the difference between ICE and PowerDex is solely accounted for by the fact one is a day ahead market and one is real time market. NWE Resp. Br. at p. 21. As noted above, Mr. Schiffman's analysis compared day-ahead prices from the two sources and refuted NWE's claims. Furthermore, there is no record evidence to support NWE's assertion and it cites nothing in its Response brief to verify this claim other than its own assertion and there is no evidence that NWE ever studied the issue or conducted any analysis. The Commission should not be misled by NWE's mischaracterization of the difference in prices between these two indexes, and should reject this proposed adjustment to avoided cost.

Second, NWE also ignores the clear record evidence showing that its proposed deduction to avoided cost for transmission network upgrade costs is anti-competitive and discriminatory against Greycliff and violates PURPA. 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 such, NWE's proposal to reduce avoided costs by interconnection network upgrade costs discriminates against Greycliff -- as such costs could not be applied to competing non-QF generators such as a merchant plant -- and, given the discrimination, NWE's proposal 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. Furthermore, NWE also admitted at hearing it includes interconnection network upgrade costs in its calculations of the value of its own avoidable resources (Tr. at p. 97, lines 9-22). NWE's decision to include such costs in valuing its own resources while subtracting such costs from Greycliff's avoided costs also discriminates against Greycliff and violates the PURPA principles of avoided cost and consumer indifference. As noted in Greycliff's Opening Brief, 18 C.F.R. § 292.306(a) also reiterates this requirement of non-discrimination: "(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."

NWE's proposed approach to interconnection network upgrade costs would treat Greycliff differently than it would treat a merchant generator and the way in which NWE values its own resources, and therefore must be rejected by the Commission as a violation of PURPA and FERC's implementing regulations.

J. Summary Table and Discussion of Differences Between NWE and Greycliff

As outlined in Table 1, which was set forth in Greycliff's Opening Brief at p. __, if NWE's inappropriate deductions are removed from NWE's proposed avoided cost forecast it produces a similar – even slightly higher – avoided cost forecast for the Greycliff project than proposed by Greycliff Removing the inappropriate adjustments which are biased either factually, legally, or both, produces an avoided cost of $53.84/MWH which is almost identical to Greycliff's proposed avoided cost in its LEO letter of July 2, 2015, and is in the same range as Mr. Schiffman's avoided cost forecast produced using the NPCC's Seventh Annual Power Plan of $53.38/MWH.

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	$5.99
Reverse PowerSimm Off-System Sales Adjustment	$1.00
Adjusted NWE Avoided Cost (Offer)	**$53.84**

To assist the Commission and to separate the rhetorical wheat from the chaff, the summary of the reasons for removing each of these inappropriate reductions is as follows:

- The entirety of bias between the ICE Day Ahead Firm versus the PowerDex Real Time Price Adjustment is subsumed in the bias over time between these indexes rather than an indication of firmness. Nor does NWE include such adjustments in valuing its own resources, so this deduction is also discriminatory and therefore a violation of PURPA.
- An avoided cost deduction for Interconnection Network Upgrade Costs is inappropriate as it is a violation of FERC Orders 2003 and 2006, as well as FERC's PURPA regulations in that it treats Greycliff's plant differently than a similarly situated non-QF and the way NWE values its own resources. Thus this adjustment is also discriminatory.
- There is no legal basis for NWE's claim that Greycliff's LEO took place in January of 2016 versus July of 2015. All relevant case authority suggests that the

rates must be calculated from the date the obligation was incurred and that was the date that Greycliff complied with the requirements of *Whitehall Wind.* NWE's argument that Greycliff did not provide a price term "consistent" with its avoided cost is, at best, disingenuous.

- NWE's failure to disclose its Mid-C to Montana "adjustment" until the evidentiary hearing was inappropriate and a failure on NWE's part to carry its burden. No discovery or cross-examination was even possible on this "adjustment" given that this "adjustment" was only disclosed at hearing. Due process dictates that NWE not be able to rely on such an untimely disclosure even assuming it was accidental, which is only an assumption given various other discriminatory and inaccurate calculations offered by NWE in this proceeding.
- NWE's PowerSimm adjustment of $1/MWH is not dictated by FERC Order 69, and in fact is counter to specific directives on how to run a differential revenue requirement analysis in FERC Order 69.

In conclusion, none of NWE's adjustments are just or reasonable for the reasons set forth in this brief. NWE bears the burden on each of these adjustments, since it was NWE that proposed each of them. NWE has plainly failed to carry its evidentiary burden on each adjustment.

K. DISPUTED CONTRACT TERMS

NWE's arguments on disputed contract terms fare no better than its arguments on avoided cost.

1. <u>Wind Integration and Contingency Reserves.</u>

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.

As noted in Greycliff's Opening Brief at page 24, Greycliff's proposed amount of $1.49/MWH was originally provided to Greycliff by Mr. LaFave in a telephone call. Greycliff also noted that when it was a CREP, Section 5.3 of the CREP agreement between NWE and Greycliff included a figure of $28,906 per month. Greycliff further pointed out in its Opening Brief that NWE's proposed QF contract differed significantly from NWE's proposed CREP contract in how NWE proposed to charge Greycliff's QF project for integration/regulation services and there is no non-discriminatory basis for NWE's change in the definition or the pricing of integration/regulation services.

NWE argues now that the zonal rates contained in the QF-1 rate are inappropriate to apply to Greycliff's project and alleges that applying the zonal rates would result in a 5% as opposed to an 18% regulation percentage. However, the fact that the integration rate would be lower is not a legally justified basis for proposing policy change in the middle of a docket which discriminates against larger QFs. Avoided costs do not vary based on the size of the QF project (unless it was a very large wind project) –after all it is *NWE's* avoided costs and not the project's avoided cost. The zonal charges for regulation should remain constant regardless of the difference between a 3 MW project and a 25 MW wind project. Formerly, the integration charge based on the costs of Dave Gates Generating Station were used for projects with a standard offer threshold of 10 MWs, and indeed approximately five 10 MW projects were provided with zonal WI-1 rates.

NWE has not provided any analysis to support its wind integration argument other than the naked assertion that it is appropriate to use a different wind integration charge for large wind QFs and that zonal rates should not apply. The Commission may recall that these zonal rates were premised upon the idea that encouraging the development of QFs in certain locations would assist NWE's ability to regulate its balancing area authority. Now, without any real explanation, NWE wishes to abandon this approach in the middle of this contested case proceeding. If geographic diversity of wind projects produces system benefits, and NWE plainly implies that Greycliff's project does, there is no reason that Greycliff should not also be credited with providing locational diversity systemic benefits.

NWE's opportunistic shift regarding wind integration feeds Greycliff's argument about NWE's multiple and obvious attempts to discriminate against QF's and to artificially lower its avoided costs so as to prevent QFs from fairly competing against NWE for load. NWE also does not respond to the argument that NWE proposed entirely different integration charges when Greycliff was a CREP, thus admitting it is discriminating against Greycliff as a QF. There is no reason, other than discrimination, for this change. The Commission should accept Greycliff's proposed contract language as requested in its Opening Brief.

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 argued in its Opening Brief that since Greycliff will not be paid in the event of an emergency condition *(see* Section K.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. Greycliff also argued that 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. Furthermore, Greycliff argued that 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).

Finally, Greycliff pointed out that 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.

NWE's response to Greycliff's argument is frivolous. NWE merely argues its definition is consistent with 18 C.F.R. § 292.101(b)(4). However, NWE's response ignores FERC's decision in *Pioneer Wind Park* which expressly states that FERC regulations only permit curtailment of a QF during a system emergency if purchases or sales from or to the QF would contribute to the emergency, citing 18 C.F.R. § 292.307(b). Greycliff's definition is consistent with FERC regulations and FERC guidance, and NWE's is plainly not consistent with either. The Commission should reject NWE's shameless attempt to curtail Greycliff in system emergencies and not pay for the power regardless of whether Greycliff has anything to do with NWE's system emergency, even if such emergency condition occurs in another part of the state.

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 Greycliff's opening brief makes clear, the *only* curtailments permitted under PURPA and FERC's implementing regulations are for emergency conditions and under "light loading" conditions for QF projects selling power on "an "as available" basis as defined by FERC's regulations, in 18 C.F.R. § 292.307(b) and 18 C.F.R. § 292.304(f). Citing *Pioneer Wind Park*, Greycliff noted the express language 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). Therefore, NWE's proposed Section 6.7.1 which claims a right to curtail at any time and for any reason it deems necessary in its discretion is thus wildly inconsistent with PURPA.

NWE's response is an invitation to litigation against the Commission. It urges yet again, as it did with respect to A.R.M. § 38.5.1902(5), that the Commission ignore FERC's construction of 18 C.F.R. § 292.307(b) because FERC's orders are not binding on the Commission. Whether binding or not, NWE's proposed Section 6.7.1 is on its face inconsistent with 18 C.F.R. 292.307(b). NWE's argument is, without saying more, less than compelling.

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.

Greycliff noted in its Opening Brief that 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. NWE urges the Commission to ignore these FERC decisions and FERC regulations. To paraphrase a former Commission staff attorney in advising the Commission in Docket D2015.8.63 (regarding repeal of A.R.M. § 38.5.1902(5)), one wonders whether NWE's lawyers would be urging the Commission to ignore FERC precedent and its regulations if these lawyers still worked for The Commission. NWE's position, which is that the Commission ignore FERC precedent directly on point is plainly absurd, and the Commission should adopt Greycliff's proposed Section 6.7.4 and decline NWE's invitation to error.

NWE next argues that there is nothing wrong with using compensated curtailment in the event of light loading conditions. First, NWE's proposed Section 6.7.4 specifically states that NWE does not have 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."* NWE is apparently unfamiliar with its own proposed Section 6.7.4. Furthermore, QFs with long-term PPAs calculated pursuant to a LEO may not be curtailed for light loading reasons as set forth in *Pioneer Wind Park.* If a QF wishes to agree to compensated curtailment, that is one thing. However, Greycliff did not agree and PURPA's implementing regulations prohibit curtailing Greycliff for light loading conditions against Greycliff's will. Again, NWE's position is an invitation to Commission error.

5. "<u>Uncompensated Curtailment" Definition</u>:

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.

NWE appears to rely upon its arguments from contested issues 2 and 3 to address this issue, but these arguments are frivolous. As noted in Greycliff's Opening Brief, 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 its power pursuant to a LEO. 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 for which Greycliff would not then be paid. Plainly, if such an outage is NWE's fault, Greycliff should be paid for the power it would have delivered to NWE. The Commission should 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 Interconnection Costs

Greycliff has never argued it is not responsible to pay up front for the costs of interconnection network upgrades. Rather, Greycliffe's dispute with NWE over Section 4.3 is whether NWE is: (1) obliged to calculate proposed interconnection and transmission related costs from the date that Greycliff incurred its LEO (July 2, 2015) rather than continuing to argue that NWE cannot possibly compute these costs for Greycliff in a timely way despite knowing of the Greycliff project for at least two years; (2) obligated to reimburse Greycliff for interconnection network upgrade costs it assumes responsibility for initially rather than subtracting these costs from Greycliff's avoided cost rate. Failing to reimburse Greycliff for interconnection network upgrades is not only inconsistent with FERC Orders 2003 and 2006 but also unlawfully discriminates against QFs. NWE's proposal to discriminate against Greycliff by subtracting this amount from Greycliff's avoided cost is therefore contrary to law.

8. 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.

Greycliff argued in its Opening Brief that this Commission has no authority, under any circumstances, to order the amendment or termination of Greycliff's agreement. Greycliff pointed out, specifically, that "PURPA is a federal law and federal primacy dictates that only Congress can adopt legislation that would retroactively repeal or amend a law." Greycliff

Opening Brief at p. 31. NWE's Response Brief argues that the Commission should have the authority to order amendment or terminate Greycliff's contract in the event of a Congressional repeal. The problem for NWE is that its definition does not state that, and does not even mention Congress.

Without an amendment to clarify that Congress rather than the Commission may order a repeal of PURPA, NWE's definition is an invitation to potential mischief and error. Indeed, there are numerous contract and constitutional doctrines which would preclude repeal or amendment of a PURPA contract even in the event of a Congressional repeal, and Greycliff cannot be required to accept a contract term which provides the Commission with the right to order the amendment or termination of its contract when the Commission plainly has no such authority.

III. 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 various *post-hoc* arguments regarding the source of what NWE deems to be "consistent" avoided cost information is not helpful, is ahistorical in that NWE itself made no such suggestions to Greycliff prior to the commencement of this proceeding, and is illogical in that it provides no real alternative other than to ask NWE what its avoided cost was as of July 2, 2015. If Greycliff disagreed with NWE's opinion of its avoided cost, Greycliff could not, according to NWE, incur an LEO because any number offered by Greycliff which was higher than NWE's claimed avoided cost would preclude creation of a LEO. This is a difficult position to take seriously. Such a pointless exercise is plainly also not required by the Commission's decision in *Whitehall Wind.*

The information available to Greycliff at the time it created its LEO was that $53.85/MWH was a reasonable benchmark for avoided cost based on publicly available data.

Greycliff was not required to do anything else. Since then, Mr. Schiffman's electric price forecast, based on the fundamentals-based NPPC Seventh Annual Power Plan, produced an avoided cost including integration and supplemental reserves of $53.38/MWH. NWE's attempt to impose a $3.80 price adjustment based on a January 2016 forward price strip is not consistent with PURPA, particularly 18 C.F.R. § 292.304(d)(ii). If NWE's inappropriate and discriminatory adjustments are removed from its avoided cost calculation, even NWE's avoided cost would produce an avoided cost rate of roughly $53.84/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 implementing regulations or confer upon the Commission powers it does not have, i.e., to override federal law.

RESPECTFULLY SUBMITTED THIS 1st Day of JULY, 2016

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 1st day of July, 2016 upon the following by first class mail postage pre-paid:

Kate Whitney
Montana Public Service Commission
1701 Prospect Avenue
P.O. Box 202601
Helena, MT 59620-2601

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

Monica Tranel
Montana Consumer Counsel
P.O. Box 201703
Helena, MT 59620

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

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

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

I hereby certify an original was e-filed, and ten copies of the foregoing were hand-delivered to the following:

Public Service Commission
1701 Prospect Ave.
P.O. Box 202601
Helena, MT 59620-2601

Jackie Haskins-Legal Assistant