

## MEMORANDUM

**Date:** July 18, 2016

**To:** Montana Public Service Commission ("MPSC")

**From:** Michael Uda on behalf of National Renewable Solutions, LLC ("NRS") on behalf of Greycliff Wind Prime, LLC ("GWP")

**Re:** Response to MPSC Staff's Memorandum in *Greycliff Wind Prime, LLC's Petition to have Commission Set Contract Terms and Conditions pursuant to MCA 69-3-603*

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### **Purpose**

This memo responds to the memorandum submitted to the MPSC by MPSC Staff ("Staff") dated July 14, 2016 in Docket No. D2015.8.64 (the "Staff Memo"). Based on the analysis provided in the Staff Memo, it is clear that Staff not only ignores basic legal procedure, but also misinterprets substantive Montana law. NRS, therefore, is compelled to respond in an effort to clarify these issues prior to a Commission Order in this proceeding. Staff's conclusions and the resulting proposed avoided cost price directly affect the GWP project's feasibility as the project is not viable at \$45.49/MWh.

### **Montana Basis Adjustment**

While the Staff memo recognizes GWP's claim that its due process rights will be violated if the MPSC takes into account NWE's untimely attempt to reduce the avoided cost calculation by this adjustment, Staff then fails to provide ANY comment on whether same would actually be a procedural error. NRS hopes the MPSC will not be so dismissive of basic procedural protections when formulating a final ruling in this matter.

Even setting aside the potential for procedural error, Staff's recommendation to include NWE's exorbitant claim of \$4.56/MWh should be rejected. In multiple, previous determinations of basis between Mid-C and Montana, \$1.00/MWh has been the norm. In fact, in NWE's current QF-1 Schedule – confirmed by resolution of the MPSC October 15, 2015 – the rate for this basis differential is fixed at \$.001/kWh (or \$1.00/MWh). It would be absolutely discriminatory to support charging larger QF projects a basis adjustment that is 456% of that applied to smaller projects. Neither NWE nor Staff provide an explanation for the huge difference.

Further, as NWE raised in this proceeding, there are times when their system is in a long position and times it is in a short position. In times when the NWE system is short, buying energy from the GWP QF actually saves NWE the basis differential (which is based on the non-firm hourly transmission rate under NWE's Open Access transmission Tariff). It is only when the NWE system is long that NWE might need to incur the cost of the claimed basis. That is, NWE may have to purchase transmission delivery service to move excess energy to the Mid-C market. Therefore, it makes no sense whatsoever to include this basis adjustment for every MWh that the GWP QF provides to NWE. It may be just this idea that supports the \$1.00/MWh adjustment in the QF-1 Schedule.

### **Whether GWP incurred a Legally Enforceable Obligation ("LEO")**

It is with regard to the incursion of a LEO that Staff misinterprets Montana law. As Staff correctly points out, in order to incur a LEO, a Qualifying Facility ("QF") must (1) tender an executed power purchase agreement ("PPA") (2) with a price term consistent with the utility's avoided costs (3) with specified beginning and ending dates and (4) with sufficient guarantees to ensure performance and (5) an executed interconnection agreement. Of these five requirements, Staff provides analysis only of (2) and (3).

Staff concludes that "Greycliff does not appear to have incurred a LEO." (Staff Memo at p. 3) It is unclear why Staff proceeds with further analysis after concluding that GWP did not incur a LEO, but the Staff Memo goes on

to provide a “proposal” as to what the MPSC should determine as the appropriate avoided cost price for GWP. Staff’s proposed avoided cost calculation is based on “January 2016 forward pricing ...” As such – and despite no discussion of any facts supporting such a conclusion – Staff apparently assumes that a LEO was incurred on or about January 2016. To be clear, it was NOT in January of 2016 that GWP tendered an executed PPA to NorthWestern Energy (“NWE”). The PPA that is relevant in this docket was tendered to NWE July 2, 2015, and, therefore, the question of whether a LEO was created can only be determined per the circumstances that existed as of July 2015. The only avoided cost price based on circumstances as of July 2015 that has been proposed is the price proposed by GWP.

To its credit, Staff recognizes the problem with the July 2015 timeframe for determining an appropriate avoided cost price when the Staff Memo declares: “Unfortunately, absent a Commission determination of avoided costs, it is difficult for either party to state with any certainty that a specific price term is consistent or for that matter inconsistent with the utility’s actual avoided costs.” (Staff Memo at p. 3, *emphasis added*) In other words, the MPSC’s “bright line” test of whether a LEO has been established is impractical (or perhaps impossible) in the absence of the utility making its avoided cost known. Without a known avoided cost to go by, QF’s are forced to make an educated guess as to what is “consistent” with the utility’s avoided cost, only to be delayed while the utility then pursues an after-the-fact analysis, rather than an avoided cost as of the date of the LEO. Without known avoided costs, the MPSC’s so-called bright line test continues to frustrate the intent of the Federal Energy Regulatory Commission’s (“FERC”) QF policies and rulings.

The Staff Memo also questions whether specified beginning and ending dates were included when GWP tendered the PPA. Staff attempts to read into the requirements that such dates must never change, but the MPSC’s Order setting out the requirements for whether a LEO has been incurred makes no mention of whether the specified beginning and ending dates must remain unchanged. In fact, given the ability of a Montana utility to take advantage of the MPSC’s LEO test by not making its avoided cost known, a requirement that the beginning and ending dates from a proposed PPA remain unchanged makes no sense. This is because the utility – as has happened in the instant case – may unilaterally cause delays by disputing the avoided cost proposal and calculations, and such delays may necessitate changes to planned beginning and ending dates for a PPA.

While Staff gets these two important issues wrong, the Staff Memo does include an enlightening statement near the end of their analysis of whether a LEO was incurred.

“Whether it was even possible for Greycliff to provide these requirements, given the circumstances, is doubtful.” (Staff Memo at p. 3, *emphasis added*)

While Staff seemingly acknowledges the fundamental – and quite possibly unattainable – hurdles placed before QFs attempting to do business with NWE, if the conclusions drawn by Staff are adopted it is clear that further litigation will likely ensue. Staff’s unsupportable conclusions lead to an avoided cost calculation that will not allow the GWP project to proceed. GWP has done all that it can to support its proposed price and to comply with FERC and Montana QF law.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served on this 18th day of July, 2016 upon the following by first class mail postage pre-paid:

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

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