

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

IN THE MATTER OF the Petition of) REGULATORY DIVISION
Greycliff Wind Prime, LLC to Set Contract)
Terms and Conditions for a Qualifying Small) DOCKET NO. D2015.8.64
Power Production Facility) ORDER NO. 7436b

ORDER DENYING SUMMARY JUDGMENT

PROCEDURAL HISTORY

1. On August 17, 2015, Greycliff Wind Prime, LLC (“Greycliff”) filed with the Montana Public Service Commission (“Commission”) a *Petition to Have Commission Set Contract Terms and Conditions Pursuant to MCA 69-3-603* (“Petition”).

2. On August 20, 2015, the Commission issued a *Notice of Petition and Intervention Deadline*, with an intervention deadline of September 3, 2015.

3. On September 4, 2015, Greycliff filed with the Commission a *Motion for Summary Judgment on the Legal Issue of Whether NorthWestern Energy has an Obligation to Negotiate in the Absence of All Source Competitive Solicitation Set Forth in ARM 38.5.1902(5)* (“Motion”). On September 9, 2015, the Commission granted intervention to the Montana Consumer Counsel (“MCC”) and NorthWestern Energy (“NorthWestern”). On September 10, 2015, the Commission issued *Procedural Order 7436*.

4. On September 18, 2015, Greycliff filed the *Prefiled Direct Testimony of Robert Stanton Walker*. On September 21, 2015, the MCC filed a *Response of the Montana Consumer Counsel to Greycliff Wind Prime, LLC’s Motion for Summary Judgment*. On September 22, 2015, NorthWestern filed its *Response Brief to Greycliff Wind Prime LLC’s Motion for Summary Judgment*.

5. On September 30, 2015, Greycliff filed its *Reply in Support of Motion for Summary Judgment Regarding Arguments of the Montana Consumer Counsel* and its *Reply in Support of Motion for Summary Judgment on the Legal Issue of Whether NorthWestern Energy*

has an Obligation to Negotiate in the Absence of the All Source Competitive Solicitation Set Forth in ARM 38.5.1902(5). The Commission held an oral argument on November 4, 2015. On December 1, 2015, the Commission held a regularly scheduled work session to discuss and act on Greycliff's Motion.

6. The same day that it filed its Petition in this case, Greycliff also filed a *Petition to Amend or Repeal A.R.M § 38.5.1902(5)*. See Dkt. D2015.8.63. The Commission ultimately granted Greycliff's *Petition to Amend*, initiated a rulemaking, and amended Section 38.5.1902(5). 24 Mont. Admin. Reg. 2318 (Dec. 24, 2015).

FINDINGS OF FACT

7. Greycliff moved for summary judgment, seeking that the Commission waive Mont. Admin. R. 38.5.1902(5), and that the Commission grant summary judgment on two issues, specifically: (a) that NorthWestern had an obligation to negotiate; and (b) that NorthWestern's failure to negotiate resulted in the creation of a legally enforceable obligation (LEO) for Greycliff. Mot. 11 (Sept. 4, 2015).

8. Greycliff presents an extensive list of purportedly undisputed facts. See Mot. at 5. NorthWestern counters that at least two material facts are in dispute, namely, what contractual terms and conditions the Commission should establish as reasonable, and whether or not there is an LEO binding Greycliff to sell its power to NorthWestern at the terms and conditions established by the Commission. Resp. at 6.

9. Greycliff asserts that the material facts are not in dispute, most importantly that NorthWestern refused to negotiate in response to Greycliff sending a proposal including terms and conditions, and a power purchase agreement (PPA) with a proposed avoided cost "consistent with the Commission's most recently approved avoided cost for NWE..." *Id.* at 5. NorthWestern, contrary to Greycliff's assertions, denies that it refused to negotiate. NorthWestern asserts that Greycliff's "letter... cannot be fairly described as a request for negotiations. It is, on its face, a demand letter in which Greycliff asserts NorthWestern has no choice but to 'immediately execute' Greycliff's proposed contract..." NorthWestern Resp. 7 (Sept. 22, 2015).

10. NorthWestern asserts that sending a "demand letter" does not in fact initiate negotiations. Greycliff's request for summary judgment hinges on the purported fact that

NorthWestern refused to negotiate. NorthWestern denies it refused to negotiate.

11. Furthermore, in response to PSC-010, Greycliff asserted that since it became a QF, there has been only a single telephone discussion with NorthWestern in terms of communication, and that Greycliff at such time made it clear that it was not attempting to negotiate the QF proposal during the call.

12. In light of the differing sets of facts provided by Greycliff and NorthWestern, it appears there is at least “doubt as to whether a genuine issue of material fact exists,” and this doubt “must be resolved in favor of the party opposing summary judgment.” *Christian v. Alt. Richfield Co.*, 2015 MT 255, ¶ 12, 380 Mont. 495.

13. Although the parties did not negotiate prior to Greycliff’s filing its Petition, both Greycliff and NorthWestern indicated that they are willing to negotiate. *See* Oral Arg. Tr. 37-41, Nov. 4, 2015. The Commission finds that given their lack of objection, the parties should attempt to negotiate before this proceeding continues. The parties’ negotiation should include all relevant contract terms and conditions, including price.

CONCLUSIONS OF LAW

14. The Commission is invested with “full power of supervision, regulation, and control” of public utilities. Mont. Code Ann. § 69-3-102 (2015). NorthWestern is a public utility subject to the Commission’s jurisdiction. *Id.* § 69-3-101.

15. “[I]f a qualifying small power production facility and a utility are unable to mutually agree to a contract for the sale of electricity or a price for the electricity to be purchased by the utility,” either the QF or the utility may petition the Commission to set terms and conditions, including rates for sales of energy and capacity. *Id.* § 69-3-603 (“The commission shall determine the rates and conditions of the contract upon petition”).

16. Mont. Admin. R. 38.5.1902(5) states that “[a]ll purchases and sales of electric power between a utility and a qualifying facility shall be accomplished according to the terms of a written contract between the parties or in accordance with the standard tariff provisions as approved by the commission.” Mont. Admin. R. 38.5.1903(2)(b) states that each utility shall purchase energy and capacity made available by a QF at a standard rate or if the QF “agrees, at a rate which is a negotiated term of the contract between the utility and the facility and not to exceed avoided costs to the utility.” Mont. Admin. R. 38.5.1905(2) states that utilities “shall

purchase available power from any qualifying facility at either the standard rate determined by the commission... or at a rate which is a negotiated term of the contract between the utility and the qualifying facility.”

17. The Federal Energy Regulatory Commission’s rules state nothing in the rules “[l]imits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required” or “[a]ffects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.” 18 C.F.R. 292.301.

18. “A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.” Mont. R. Civ. P. 56. Where “the Montana Rules of Civil Procedure do not govern an administrative proceeding, they may still serve as guidance for the agency and the parties.” *Citizens Awareness Network v. Mont. Bd. of Env’tl. Review*, 2010 MT 10, ¶ 20, 355 Mont. 60, 227 P.3d 583. “A motion may contain any matter relevant to the clarification of the proceeding before the commission.” Mont. Admin. R. 38.2.1501 (2015).

19. There is well established case law detailing the particulars of summary judgment. The Montana Supreme Court has asserted:

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Summary judgment is an extreme remedy that should never be substituted for a trial if a material factual controversy exists. The moving party must "'exclude any real doubt as to the existence of any genuine issue of material fact' by making a 'clear showing as to what the truth is.'" If there is any doubt as to whether a genuine issue of material fact exists, that doubt must be resolved in favor of the party opposing summary judgment.

Christian, ¶ 12. In addition, the Montana Supreme Court has articulated that:

Summary judgment is appropriate only when the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Conclusory statements, speculative assertions, and mere denials are insufficient to defeat a motion for summary judgment.

Davis v. State, 2015 MT 264, ¶ 7, 381 Mont. 59, 357 P.3d 320.

20. Based on the foregoing, summary judgment is inappropriate. There is doubt as to whether genuine issues of material fact exist, and that doubt must be resolved in favor of NorthWestern.

21. Mont. Admin. R. 38.2.2701 states that the Commission may “in any proceeding,

on its own motion or upon petition by any party, with reasonable notice, request all interested parties to attend one or more prehearing conferences for the purpose of determining the feasibility of settlement...” Furthermore, “[t]he purposes of the conference may include... matters as may aid in the disposition of the proceeding, or settlement thereof.”

ORDER

IT IS HEREBY ORDERED THAT:

22. Greycliff’s Motion is hereby DENIED.

23. Northwestern and Greycliff negotiate for at least thirty days in an effort to mutually agree to contract terms and conditions, including an avoided cost rate, beginning on the service date of this Order; and

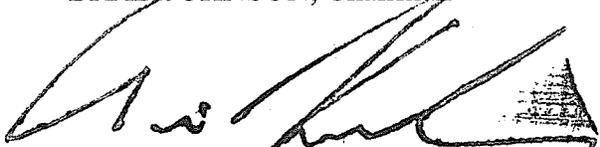
24. Counsel for NorthWestern and Greycliff attend a prehearing conference to discuss the progress of their negotiations on January 29, 2015.

DONE AND DATED this 8th day of December, 2015, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION



BRAD JOHNSON, Chairman



TRAVIS KAYULLA, Vice Chairman



KIRK BUSHMAN, Commissioner

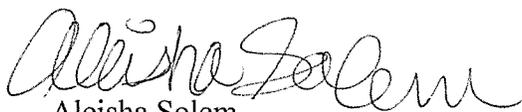


ROGER KOOPMAN, Commissioner



BOB LAKE, Commissioner

ATTEST:



Aleisha Solem
Commission Secretary

(SEAL)