Michael J. Uda
Uda Law Firm, P.C.
7 West Sixth Avenue
Power Block West, Suite 4H
Helena, MT 59601
(406) 457-5311
michaeluda@udalaw.com

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

IN THE MATTER OF NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-l, Qualifying Facility Power Purchase	))))	REGULATORY DIVISION DOCKET NO. D2016.5.39

Joint Motion of FLS Energy, Inc. and Cypress Creek Renewables, LLC for Reconsideration on of Commission Order No. 7500 Granting NorthWestern Energy's Motion for Emergency Suspension of the QF-1 Tariff for New Solar Qualifying Facilities with Nameplate Capacities Greater than 100 kW

I. INTRODUCTION

FLS Energy, Inc. ("FLS") is the developer of 14 advanced-stage, 3 MW AC solar photovoltaic projects in Montana (the "FLS Projects"). Cypress Creek Renewables ("CCR") is the developer of 11 advanced-stage small solar photovoltaic projects, two of which, Chester Solar and Portage Solar (the "CCR Projects"), are at issue on this motion.[1] The FLS Projects and the CCR Projects (collectively, the "Projects") are all Qualifying Facilities ("QFs") under the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. §§ 2601 *et seq.*, and are eligible

[1] CCR's other projects already had fully-executed Power Purchase Agreements with NorthWestern prior to the Commission's action, and are not affected by the Commission's recent actions.

for the NorthWestern Energy ("NorthWestern") QF-1 Tariff. FLS and CCR ("Joint Movants") respectfully request that the Montana Public Service Commission (the "Commission") grant reconsideration of its June 16, 2016 Order granting with modification NorthWestern Energy's Motion for Emergency Suspension of the QF-1 Tariff for New Solar Qualifying Facilities with Nameplate Capacities Greater than 100 kW ("the Emergency Motion"). *See* Order No. 7500, Dkt. D.2016.5.39, Order on Northwestern Energy's Motion for Emergency Suspension of Tariff Schedule QF-1 (served July 25, 2016) ("Order 7500").

Order 7500 effectively suspended the availability of the current QF-1 tariff with respect to *all* solar QFs over 100 kW nameplate capacity, until the approval of new rates by the Commission. Although the Commission sought to establish a "safe harbor" allowing any QF that had, by June 16, 2016, established a legally enforceable obligation ("LEO") under the test established by the Commission in *Whitehall Wind,* Order No. 6444e, Dkt. D2002.8.100 (May 10, 2010), to contract at QF-1 rates, this "safe harbor" did not in practice allow any additional QFs to obtain power purchase agreements ("PPAs") at current QF-1 rates. Thus, Order 7500 effectively suspended <u>all</u> contracting under the QF-1 tariff with solar QFs over 100 kW for the duration of this proceeding. By shutting down the existing rate schedule, Order 7500 either established a *de facto* interim rate (not approved by the Commission) for solar QFs between 100 kW and 3 MW equal to NorthWestern's claimed current avoided cost, or lowered the eligibility cap for QF-1 rates from 3 MW to 100 kW. In either case, it did so without following the procedures Montana law requires for the modification of standard offer rates and tariffs.

The extraordinary relief granted by the Commission should be reconsidered because it is unlawful, unreasonable, and unjust. The Commission had no legal authority to suspend the QF-1 tariff and its action in this regard violates state and federal law. And even if the Commission had

that authority, the "safe harbor" test the Commission devised to allow certain QFs to continue contracting is contrary to PURPA and results in an unjust and unreasonable shutdown of all further contracting under QF-1 rates for the duration of this proceeding. Nor did the Commission, in granting relief to NorthWestern, follow lawful procedures or provide adequate notice to affected parties of the nature of the proceedings.

There are several other more defensible standards the Commission could have used to determine what QFs should have been excluded from the suspension of QF-1 rates. If the Commission declines to reconsider its suspension of QF-1 rates, it should reconsider the "safe harbor" standard employed in Order 7500, in favor of one of these more reasonable alternatives, such as allowing QFs that have entered executed a Facilities Study Agreement and have agreed to pay for interconnection facilities and upgrades to enter into PPAs at current QF-1 rates. The Joint Movants further submit that the Commission should clarify Order 7500 to ensure that NorthWestern does not improperly withhold interconnection agreements ("IAs") it is legally required to provide to interconnection customers who are QFs.

II. BACKGROUND

A. Procedural History

On May 3, 2016, NorthWestern filed an Application for Approval of Avoided Cost Tariff Schedule QF-1 ("Application"), requesting Commission approval of new QF-1 rates on both an interim and final basis. On May 13, 2016, the Commission issued a notice setting an intervention deadline in this matter of June 10, 2016.

On May 17, 2016, NorthWestern filed its Emergency Motion requesting suspension of its obligation to contract with QFs under its QF-1 tariff. The Emergency Motion was based on concerns that the continued availability of standard offer rates under QF-1 would result in a "flood" of requests for new PPAs, obligating NorthWestern to contract for hundreds of

megawatts of solar power at rates above its current actual avoided cost. Northwestern characterized its request for relief as "narrow" and "temporary." Emergency Motion at 6, 11.

At the time NorthWestern filed its Emergency Motion, FLS and NorthWestern were on the verge of entering into PPAs at QF-1 rates for the FLS Projects. FLS and NorthWestern had been negotiating the terms of these PPAs since February 2016. Throughout the negotiation process, including after it filed the Application, NorthWestern had represented to FLS that the current QF-1 rates would remain available until the Commission adopted either interim or new final avoided cost rates. At no time had NorthWestern suggested to FLS that it might seek relief from the Commission beyond its already-pending request for interim rates. When FLS expressed concern to NorthWestern about the breadth of the Emergency Motion, NorthWestern reaffirmed its commitment to honor the current QF-1 rates and sign PPAs for the FLS Projects. NorthWestern reiterated this commitment to FLS on the day of the Commission's hearing on the Emergency Motion. After the Emergency Motion was filed, FLS tendered signed PPAs for the FLS Projects to NorthWestern for execution.

CCR was also in negotiations with NorthWestern concerning PPAs for the CCR Projects when the Emergency Motion was filed, and tendered executed PPAs for those projects to NorthWestern prior to the Commission's action on the Emergency Motion. NorthWestern represented to CCR that it would execute those PPAs.

Based on NorthWestern's representation that it would enter into PPAs based on the current QF-1 tariff for the 14 FLS Projects, FLS submitted comments to the Commission, but did not oppose the Emergency Motion or seek intervention in the avoided cost proceeding prior to hearing on the motion. In its comments, FLS strenuously objected to any order excusing NorthWestern from its obligation to enter into PPAs for FLS's 14 advanced projects, pointing

out that such relief would preclude the development of those projects and likely cause FLS to lose the approximately $750,000 it has invested to date in the development of its Montana portfolio. *See* Comments of FLS Energy, Inc. in response to NorthWestern Energy's Motion for Emergency Suspension of the QF-1 Tariff for New Solar Qualifying Facilities with Nameplate Capacities Greater than 100 kW (June 6, 2016) at 1-2.

Like FLS, CCR (based on its understanding that NorthWestern would execute the pending PPAs) commented on the Emergency Motion but did not intervene or oppose the Emergency Motion.

The Commission held a hearing on the Emergency Motion on June 9, one day before the intervention deadline in the avoided cost proceeding. At the hearing, NorthWestern's counsel, consistent with his commitment to FLS, modified NorthWestern's request for relief to exclude the PPAs for the FLS Projects subject to the agreement from the requested suspension of QF-1 rates. Transcript of June 9, 2016 Hearing ("June 16 Hrg. Tr.") at 53, 33:23. NorthWestern also acknowledged that it was legally obligated to enter into PPAs with FLS on which agreement had been reached on all terms. *Id.* at 48:13-16.

In a work session held on June 16, 2016 ("the June 16 Work Session"), the Commission voted to grant NorthWestern's requested relief, but with substantial modifications. Rather than authorize NorthWestern to contract with the QFs identified by NorthWestern at the hearing, the Commission established a "safe harbor" authorizing NorthWestern to execute standard offer PPAs only with QFs which had established an LEO under the test established by the Commission in *Whitehall Wind,* Order No. 6444e, Dkt. D2002.8.100, 2010 WL 10129008 ¶ 47 (May 10, 2010), before June 16, 2016. Dkt. D2016.5.39, Notice of Commission Action (June 16, 2016) ("June 16 NOCA") at *2.* The *Whitehall Wind* test requires a QF to have tendered a

signed PPA to the utility and executed an IA before establishing an LEO. This safe harbor test was not based any Staff recommendation or request from a party and was not discussed in the June 9 hearing. Rather, it was proposed during the June 16 Work Session as a "bright-line" test for continued eligibility for QF-1 rates (though that test was to be applied only retroactively).[2]

The Commission took this action while acknowledging that it did not know how many QFs would be eligible for the revised safe harbor and how the Commission's action would impact solar developers' investments in Montana. Commission staff also acknowledged that because there is considerable variation among QFs as to when in their development cycle they obtain IAs, they were not certain the *Whitehall Wind* LEO test could distinguish projects that had "passed the point of no return" in terms of development, and thus were (in the Commission's view) entitled to contract at current rates.

On July 1, FLS filed an application for rehearing, seeking to introduce evidence relating to: (i) the efforts FLS has made to obtain interconnection for its Montana projects, and their current interconnection status; (ii) FLS's unconditional commitment to sell energy and capacity from its Projects to NorthWestern; and (iii) the refusal of NorthWestern's transmission department to enter into further IAs with QFs in the wake of the June 16 NOCA. Dkt. 2016.5.39, Application of FLS Energy for Rehearing on NorthWestern Energy's Motion for Emergency Suspension of the QF-1 Tariff for New Solar Qualifying Facilities with Nameplate Capacities Greater than 100 kW (July 1, 2016) ("Application for Rehearing"). FLS argued that the proposed additional evidence was relevant to the Emergency Motion and the relief granted by the Commission; that FLS could not have presented this evidence at the hearing on the

[2] As discussed further below, while a bright-line test can provide helpful guidance to QFs and other parties when applied on a *prospective* basis, a bright-line test that is applied only retrospectively on the basis of past conduct has no such advantages.

Emergency Motion; and that it would be unfair and unreasonable not to allow FLS the opportunity to present this evidence.

At a July 7, 2016 Work Session considering the application for rehearing, the Commission and Staff acknowledged that the Commission had established the safe harbor without having taken evidence or argument regarding the actual interconnection status of any project or the effect of its order on QFs under development in Montana. Staff also acknowledged that parties had no reason to suspect the Commission might consider interconnection status to be relevant to the relief ultimately granted. Nonetheless, the Commission denied FLS's motion for rehearing, finding that there were "no material changes of fact or of law that have occurred since the conclusion of the hearing that would necessitate rehearing," and that the public interest did not require the reopening of the proceeding. Dkt. D2016.5.39, Notice of Commission Action (July 13, 2016).

B. Commission Order 7500

On July 25, 2016, the Commission issued a final order granting NorthWestern's motion for emergency relief and suspending the availability of Schedule QF-1 for solar QFs larger than 100 kW. The Commission based its ruling in part on NorthWestern's having made a *prima facie* case that the current, Commission-approved QF-1 tariff rates exceed NorthWestern's current avoided costs, and that they "are not just and reasonable and in the public interest." Order 7500 ¶ 38. The Commission held, however, that the alleged disparity between tariff rates and actual avoided cost would not, on its own, justify the "extraordinary remedy" of suspending a Commission-approved tariff. *Id.* ¶ 32, 39. Only in concert with "the large number of solar developers requesting contracts [under QF-1] and interconnection agreements, and the associated total generating capacity" did the alleged price disparity give rise to an "emergency" so as to

justify relief. *Id.* ¶ 39. The Commission characterized its suspension of the QF-1 tariff as "narrow" and "temporary" pending approval of an interim or final avoided cost rate. *Id.* ¶ 43.

Order 7500 exempted from the suspension any QF that had satisfied the *Whitehall Wind* LEO test by submitting a signed PPA and signing a final IA as of June 16, 2016. Order 7500 ¶¶ 60-63. In justifying its use of this test to identify projects eligible for this "safe harbor," the Commission stated that the "requirements for establishing a legally enforceable obligation ... are a reasonable standard ... which has withstood challenges in state district court and at FERC." *Id.* ¶ 47. The Commission further stated that "This [LEO] standard demonstrates an unequivocal commitment by a QF to deliver energy or capacity, or both, to a utility," such that it would be "reasonable" to exempt from the QF-1 suspension any QF that met the requirements of the test as of June 16, 2016. *Id.*

The Commission did note with concern that "irregularities in NorthWestern's generator interconnection process may have unreasonably prevented QFs from" meeting the *Whitehall Wind* test, and further stated that the Commission "may exempt additional QFs from the suspension in a future order." *Id.* ¶ 47. This discussion appears to refer to the fact that (as set forth in FLS's Application for Rehearing and discussed at the July 7 Work Session) NorthWestern was required by its Small Generator Interconnection Procedures to tender IAs for several FLS projects well in advance of June 16, and its failure to do so prevented these projects from obtaining signed IAs before the June 16 cutoff. The Commission may also have been cognizant of the fact (also discussed in FLS's Motion for Rehearing) that since the June 16 NOCA was issued, NorthWestern has refused to provide executable IAs for <u>any</u> QF projects, in clear violation of its interconnection standards and its duty to provide interconnection services on a nondiscriminatory basis.

C. The Impact of Order 7500

None of the FLS or CCR Projects met the *Whitehall Wind* LEO test as of June 16, 2016.[3] These projects had tendered signed PPAs to Northwestern by the deadline, but did not have signed IAs in place. This is not, however, due to a lack of diligence by FLS or CCR in pursuing interconnection of these projects. To the contrary, all the Projects had completed NorthWestern's System Impact Study process and had received System Impact Study Reports prior to the filing of the Emergency Motion. In all cases the results of the System Impact Study, and the associated cost of interconnection facilities and/or system upgrades, were acceptable to FLS and CCR, respectively, and each company requested that NorthWestern complete the Facilities Study for each of its projects – the final step before execution of an IA.[4] In the case of nine of the FLS Projects and both of the CCR Projects, the relevant party had made (and NorthWestern had accepted) a $10,000 Facilities Study payment, in addition to the prior $5,000 payments for the System Impact Studies.[5] In the case of seven of those nine FLS projects, prior to the Commission's June 16 NOCA: (i) NorthWestern had completed the Facilities Study, and (ii) FLS had advised NorthWestern that the Facilities Study report was acceptable and had requested that NorthWestern provide FLS an IA for execution. NorthWestern did not complete the Facilities Studies for the other two FLS Projects until June 17, 2016, after which FLS

[3] Joint Movants believe that no other QFs in Montana met the *Whitehall Wind* LEO test as of June 16. Nine CCR-developed projects had fully executed PPAs and IAs with NorthWestern as of that date, but because those projects already had PPAs they would have been unaffected by Order 7500 in any event.

[4] The companies' acceptance of the interconnection costs is further evidenced by the fact that they tendered an executed PPA to NorthWestern for each of the Projects. Each PPA bound the FLS- or CCR-owned project company to deliver energy, capacity, and environmental attributes to NorthWestern, and subjected the project company to damages for failing to do so, without (at least in any contingency relating to interconnection or interconnection costs.

[5] Those nine projects are Glass Solar, Martin Solar, Canyon Creek Solar, River Solar, Malt Solar, Fox Farm Solar, Valley View Solar, Couch Solar and Ulm Solar. With respect to four other FLS Projects, FLS discovered after the June 16 NOCA that it had inadvertently failed to make the Facilities Study payment and that NorthWestern, without any prior notice to FLS, had terminated the interconnection process with respect to those projects. With respect to a fifth project, Bear Gulch Solar, NorthWestern sent the System Impact Study Agreement to an incorrect email address and it was not returned by FLS in the required timeframe.

promptly advised NorthWestern that the Facilities Study reports for those projects were acceptable and requested IAs for execution. NorthWestern completed the Facilities Studies for the two CCR Projects on June 17 and 30, 2016, respectively, and CCR promptly requested IAs.

Section 3.5.7 of NorthWestern's Small Generator Interconnection Procedures obligates NorthWestern to tender an executable IA within five (5) business days of a request from an interconnection customer that has completed its facilities study and agreed to pay for the interconnection facilities and upgrades identified in the study. NorthWestern did not meet that obligation with respect to FLS projects that requested IAs in early June 2016, and were entitled to have them before the June 16 cutoff. Nor did it return the requested IAs for the CCR projects. In fact, since issuance of the June 16 NOCA NorthWestern has refused to execute *any* more IAs for qualifying facilities (including the FLS and CCR projects), even though neither the June 16 NOCA nor Order 7500 relieves it of that obligation. NorthWestern has thereby prevented these QFs from establishing LEOs under the *Whitehall Wind* test since June 16, 2016.

As noted above, Joint Movants believe that Order 7500 will have a similar impact on other developers' projects, and will in fact result in no additional QFs over 100 kW being allowed to contract under QF-1 rates. Accordingly, although the Commission has acknowledged its obligations under PURPA and state law to balance the interests of ratepayers against its obligation to promote QF development, the Commission has in effect ordered a complete shutdown of contracting for solar QFs over 100 kW under the QF-1 tariff for the duration of this proceeding.

III. ARGUMENT

A. Standard for Reconsideration

Motions for reconsideration are authorized by A.R.M. 38.2.4806, which allows a party to seek reconsideration of any aspect of a Commission order that is unlawful, unjust or unreasonable. Joint Movants respectfully request that the Commission reconsider Order 7500, in whole or in part, on the following grounds:

(1) The Commission lacks legal authority to "suspend" a Commission-approved tariff;

(2) The Commission's suspension of the QF-1 tariff was unlawful and procedurally defective;

(3) The "safe harbor" test set forth in Order 7500 is unfair, unreasonable, and unlawful, so that even if the Commission does not reconsider its suspension of QF-1 rates, it should adopt a different "safe harbor" test;

(4) The Commission's decision to effectively suspend *all* QF-1 contracting for QFs over 100 kW was unreasonable and unfair to project developers;

(5) Even if the Commission does not reconsider its suspension of QF-1 rates, Order 7500 should be amended to exempt the Projects from the suspension, because: (a) the Projects have made sufficient commitments to deliver energy and capacity and should be excluded from the suspension of the QF-1 tariff; and (b) seven FLS projects that were entitled to receive IAs prior to June 16 and were only prevented from doing so by NorthWestern's failure to meet its legal obligations; and

(6) The Commission should amend its order to clarify that NorthWestern is still obligated to provide interconnection agreements for QFs.

B. The Commission's suspension of the QF-1 tariff pending approval of new rates is contrary to law.

Order 7500 does not explain adequately the basis for the Commission's authority to suspend, in its entirety, the current QF-1 rate for all solar QF projects with an installed capacity

between 100 kW and 3 MW. Indeed, Order 7500 departs from past Commission practice, runs contrary to Montana's "mini-PURPA" statute, (Mont. Code. Ann. §§ 69-3-601 through -604), is not supported by the statutes or the Commission's own regulations regarding interim rate adjustments, and violates PURPA.

1. The Commission has no legal authority to "suspend" an approved tariff.

Order 7500 cites no Montana or federal law empowering it to suspend a Commission-approved tariff, and no Montana precedent for doing so. The Commission attempts to justify its suspension of QF-1 rates based on the assertion that it has implied powers, similar to that of a district court judge, to issue a "writ of mandate" or "writ of supervisory control." Order 7500 ¶ 32. However, it is well-established that the Commission has no authority to issue such judicial remedies. In *Montana Power Co. v. Public Service Commission*, 206 Mont. 359, 671 P.2d 604 (1983), the Commission attempted to enjoin, without notice or opportunity for hearing to the utility, a corporate reorganization of the utility. In considering whether the Commission could do this, the Montana Supreme Court noted that "[w]hile full power of supervision, regulation and control of utilities is granted to the Commission, the legislature has provided that this power does not include judicial powers." *Mont. Power Co.*, 206 Mont. at 372, 671 P.2d at 611 (citing Mont. Code Ann. § 69-3-103(1)). The Supreme Court held that the Commission could not issue an injunction on its own, but would have to go to Court to obtain an injunction if it wished to enjoin the utility reorganization. The Court rejected the Commission's argument that the Commission needed the authority to issue an injunction to prevent "irreversible or irreparable harm to ratepayers," finding that the remedies already granted to the Commission – specifically, the ability to obtain an injunction in court – were sufficient to accomplish this goal. *Id.* at 377-378, 671 P.2d at 614.

Importantly, the *Montana Power* Court also clarified that that the Commission has no inherent common law powers, and that the Commission "has only limited powers, to be ascertained by reference to the statute creating it, and ***any reasonable doubt as to the grant of a particular power will be resolved against the existence of the power.***" *Id.* at 371, 671 P.2d at 611 (emphasis in original) (quoting *Polson v. Public Service Commission*, 155 Mont. 464, 473 P.2d 508 (1970)). Given the absence of any clear legal authority to support its suspension of the QF-1 tariff, it must be concluded that the Commission lacked authority to suspend the QF-1 tariff and must reconsider Order 7500.

Order 7500 also attempts to justify the suspension by characterizing it as a "waiver" of A.R.M. § 38.5.1902(5) "with respect to the eligibility of solar QFs larger than 100 kW for standard rates." This regulation provides that QFs with a nameplate capacity of 3 MW or less are eligible for standard offer rates, and requires that all purchases and sales of electric power between a utility and a QF eligible for standard offer rates be accomplished according to the terms of a written contract between the parties "or in accordance with the applicable standard tariff provisions as approved by the commission." As noted above, each of the FLS projects is less than 3 MW and is eligible for standard offer rates under this regulation.

Order 7500 invokes the waiver authority of A.R.M. § 38.2.305(1), which allows the Commission to waive any rule "as good cause appears and as justice may require" so long as such waiver is not precluded by statute. Order 7500 ¶ 54. Here, however, the Commission's waiver <u>is</u> precluded by statute. Mont. Code Ann. § 69-3-603(3)(a) requires any QF eligible for a standard offer rate to contract at that rate, and bars it from petitioning the Commission to authorize a different rate. The Commission's supposed "waiver" of the standard offer provisions of A.R.M. 38.5.1902(5) would prevent these eligible QFs from contracting at the Commission's

approved rate, and from complying with the requirements of Mont. Code Ann. § 69-3-603(3)(a). Therefore A.R.M. § 38.2.305(1) cannot not authorize the Commission's action.

2. The Commission's suspension of the QF-1 tariff was procedurally defective.

Although the Commission characterized the action it took in Order 7500 as "suspending" the QF-1 rates (a term without any meaning under applicable Montana law and regulations) what the Commission in fact did was change the current QF-1 rate schedule to lower the eligibility cap from 3 MW to 100 kW for an indefinite period of time. Alternatively, the Commission may be said (as Commissioner Kavulla characterized it) to have established a new interim rate, equal to NorthWestern's current calculated avoided cost rate. Order 7500, Dissenting Opinion of Commissioner Travis Kavulla at 6. In either case, the Commission failed to follow the procedures required for amendment of standard rates and tariffs, ***even on a temporary basis***.

Mont. Code Ann. § 69-3-304 authorizes the Commission to temporarily approve rate increases or decreases, and requires any decision on a request for temporary rates to be "based upon consistent standards appropriate for the nature of the case pending." Commission regulations and the Montana Administrative Procedures Act ("MAPA") establish procedural requirements for the consideration of interim rate requests, including notice and an opportunity to be heard. A.R.M. §§ 38.5.501 *et seq.*; Mont. Code Ann. § 2-4-612.

Whether the utility seeks to change a rate or to suspend it, the law requires a full evidentiary hearing, and new tariffs must be submitted prior to changing the rate. *See* Mont. Code Ann. § 69-3-303(1) and (2) (requiring notice and a hearing that comports with the requirements of the Montana Administrative Procedure Act ("MAPA") before the Commission may change rates). MAPA, in turn, requires that each party have the opportunity to respond and

present evidence and argument on all issues involved, as well as the right to conduct cross-examination required for a full and true disclosure of facts. *Id.* § 2-4-612.

The Commission has required adherence to these requirements in response to previous requests for interim changes to approved rates and tariffs. For example, in Docket D2014.1.5, the Commission considered and rejected a motion by NorthWestern to grant an interim downward rate adjustment or to suspend NorthWestern's QF-1 purchase obligations pending approval of a new QF-1 tariffed avoided cost rate. *See* Ord. 7338, Docket D2014.1.5, ¶¶ 1-2 (Sept. 18, 2014). In its findings of fact, the Commission noted that although NorthWestern had previously requested interim standard rates, the Commission had never *granted* interim rates in a QF-1 standard rate docket. Or. 7338, Docket D2014.1.5, ¶¶ 8-9. In its conclusions of law, the Commission cited the Federal Energy Regulatory Commission's ("FERC") longstanding recognition that avoided costs may change over time, and held that maintaining existing standard rates pending a final decision on avoided cost rates would be consistent with PURPA. *Id.* ¶¶ 8-9 (citing *In re JD Wind 1*, 130 FERC 61127, 61631 (Feb. 19, 2010); 45 Fed. Reg. 12214, 12223).

The Commission also explained that before adopting interim or final rates, the Commission is required to observe MAPA requirements, and "afford all parties an opportunity 'to respond and present evidence and argument on all issues involved,' and 'to conduct cross-examinations required for a full and true disclosure of facts.'" *Id.* ¶¶ 15-17 (quoting Mont. Code Ann. § 2-4-612). Only after full consideration of all avoided cost data submitted by the parties may rates be adjusted. Because the parties had not had a full opportunity to respond to NorthWestern's proposal, to present arguments, or to conduct cross-examination, the Commission found that there was "no evidentiary basis to determine NorthWestern's actual

avoided costs or to find—as would be required under PURPA—that its proposed interim rates are just and reasonable, in the public interest, and not discriminatory." *Id.* ¶ 20.

The Commission did not follow these procedures before changing approved rates and tariffs in Order 7500. It did not provide notice of its intention to change rates or alter the QF-1 eligibility cap, and did not take evidence from all interested parties regarding the proposed changes. It did not offer the opportunity to effectively cross-examine the witnesses put on by NorthWestern. And the Commission's decision to change the effective rates and/or eligibility cap was based not on a full and fair consideration of the evidence, but on the fact that NorthWestern had made out a *prima facie* case that the QF-1 rates were too high. Order 7500 ¶ 30. The Commission's actions in this respect were unlawful on procedural grounds.

Even if the Commission had not been required to follow these procedures, additional concerns are raised by the lack of full and fair notice to affected parties or an opportunity for those parties to be heard on all factual issues implicated by the Emergency Motion and the relief granted by the Commission.

To recap: NorthWestern filed its application for new QF-1 rates on an interim and permanent basis on May 3, 2016. On May 13, 2016, the Commission issued its notice of application and deadline for intervention. That notice set an intervention deadline of June 10, 2016. On May 17, 2016, NorthWestern filed its motion for emergency suspension of the QF-1 rates with respect to solar facilities with a nameplate capacity between 3 MW and 100 KW. On June 7, 2016, the Commission, acting by notice of staff action, stated:

> On May 24, 2016, the Commission issued a Notice of Emergency Motion and Opportunity to Comment and Request Hearing ("Notice"). The notice advised that "[u]pon its own motion or upon request by an interested party, the PSC *may* hold a hearing on June 9, 2016 at 2:00 p.m. at the PSC's business offices. The Commission through a delegation of authority to staff, hereby sets this matter for hearing on June 9, 2016 at 2:00 p.m. at the Commission's business offices.

Notice of Staff Action (June 7, 2016) (emphasis added). The notice thus provided was that there ***might be*** a hearing should the Commission or another party request it. There was no notice that this would be an evidentiary hearing *until the morning* of June 9, 2016, and that notice came only in an email exchange between NorthWestern and Commission staff. An email notice from Commission Staff the day before the hearing indicated that the Commission would only hear oral argument on the motion, with each side allotted ten minutes for argument. Thus, no party other than NorthWestern knew that there would be an evidentiary hearing until the morning of June 9. Nor did any party have an opportunity to adduce witnesses given the extremely short notice, particularly since the intervention deadline in the proceeding was not until the close of business the next day. The Commission did not grant the petitions to intervene until June 17, 2016, eight days after the hearing.

The Commission granted NorthWestern's request for relief, as modified by the *Whitehall* Wind safe harbor, at the June 16 Work Session. However, the remedy that the Commission ultimately granted was neither discussed nor mentioned by the Commission, any party, any witness, or any commenter at the June 9 hearing. Neither Joint Movants nor any other party had any inkling at the June 9, 2016 hearing that this test, or any test which involved interconnection status, might be considered as a remedy.[6] Nor did the Commission grant requests to intervene until after it had already selected and imposed a remedy. Thus, the affected parties here were given no genuine opportunity to appear, present testimony or other factual or documentary evidence, or conduct cross-examination on the facts represented by NorthWestern or the relief ultimately granted by the Commission. The Commission's two-day notice of hearing does not

[6] Commission staff acknowledged during the July 7 Work Session on FLS's motion for rehearing that neither FLS nor any other party had any reason to suspect that it might need to present evidence related to its projects' interconnection status.

comport with the Commission's own rule on notice, which states that the Commission is to provide at least 20 days' notice of hearing.

The Commission's suspension of QF-1 rates without observing these procedural requirements violates the due process rights of affected parties including the Joint Movants. The Fourteenth Amendment to the U.S. Constitution provides that a state shall not "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. art. XIV, § 1. The Montana Supreme Court has also recognized that where, as here, the Commission takes summary action without giving affected parties notice and an opportunity for a hearing, it actions may violate the due process guarantees of the Montana Constitution. *Montana Power Co. v. Public Serv. Comm'n*, 206 Mont. 359, 671 P.2d 604 at 607-11.

To satisfy due process, parties must have "the opportunity to be heard `at a meaningful time and in a meaningful manner.'" *Id.*, 671 P.2d at 609 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). The notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. *Walker v. Hutchinson City*, 352 U.S. 112, 115 (1956). The Commission's notice here was not "reasonably calculated" to inform parties of the nature of the proceedings that could affect their interests, because it did not inform them of the factual issues the Commission would consider, or even that the Commission would be taking factual evidence.

In light of the fact that the relief granted in Order 7500 is, as the Commission acknowledges, "extraordinary" and unprecedented, the Commission should have been ***more,*** not less, scrupulous about ensuring that its actions were procedurally sound and fair to all involved. Instead, the Commission has totally disregarded the parties' statutory and constitutional rights to notice and the opportunity to be heard. The Commission should therefore either vacate its

decision or modify its decision to produce a fair result to the parties whose procedural rights have been ignored.

3. The suspension of QF-1 rates violates PURPA and state law.

Order 7500 proceeds on the assumption that a disparity between standard rates and a utility's current avoided cost calculations is an emergency justifying the extraordinary remedy of suspending a PURPA standard offer tariff, if too many QFs want to contract under those rates. Such disparities, however, are a normal and predictable result of setting standard rates on a periodic basis, and they do not justify an extreme remedy.

In periods where avoided costs are decreasing (such as when natural gas prices are in decline), such disparities inure to the benefit of QFs; when avoided costs rise, the utility and the ratepayers benefit.[7] FERC recognized this possibility when it first implemented PURPA regulations in FERC Order No. 69, and observed that over time the disparities would net out:

> The Commission recognizes this possibility [that current avoided costs might be lower than the rates provided in the contracts] but is cognizant that in other cases, the required rate will turn out to be lower than the avoided cost at the time of purchase.... Many commentators have stressed the need for certainty with regard to return on investment in new technologies. The Commission agrees with these ... arguments, and believes that, in the long run, "overestimations" and "under estimations" of avoided costs will balance out.

FERC Order 69, 45 Fed. Reg. 12214, 12224 (1980). Citing this instruction from FERC, the Ninth Circuit Court of appeals has recognized that public utilities who wish to mitigate the impact of these disparities should do so within the confines of their tariff (e.g., by providing flexible pricing mechanisms), rather than resorting to extraordinary relief. *Indep. Energy Producers Ass'n, Inc. v. Calif. Pub. Serv. Comm'n*, 36 F.3d 848, 858-59 (9th Cir. 1994). And this Commission recognized as recently as 2012 that "'the proper remedy for such a situation is

[7] Certainly, NorthWestern does not appear to have complained about the disparity between standard offer rates and avoided cost rates, or to have sought relief from the Commission, when avoided costs rose in excess of QF-1 rates in 2003-2010.

to ensure that future standard offer contracts contain more flexible pricing mechanisms.'" Dkt No. D2012.1.3, Order No. 7199d, 2012 WL 7008279 (Dec. 7, 2012) ¶ 81.

Thus FERC, the Ninth Circuit, and this Commission all recognize that the proper remedies for any disparity between avoided costs and standard offer rates are to be found under the Commission's normal procedures for rate-setting, rather than in some new-found power to grant extraordinary relief.

This position is consistent with the "filed-rate" doctrine, which under state and federal law prohibits a utility from charging any rate other than the one(s) approved by the state utilities commission. *See NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007); *see also Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (describing filed-rate doctrine under the Natural Gas Act). Under state law, the filed-rate doctrine is codified in Mont. Code Ann. § 69-3-305, which provides that a public utility may not "charge, demand, collect, or receive a greater or less compensation for a utility service performed by it within the state or for any service in connection with a utility service than is specified in the printed schedules, including schedules of joint rates, that may at the time be in force[.]" Mont. Code Ann. § 69-3-305(a).

The prohibition on a utility charging or receiving rates different from those published in its tariff is long-standing Commission policy. In *Application of Lone Mountain Springs,* the Commission held that:

> a public utility is prohibited . . . from charging rates not contained in its filed tariffs. While the Commission may approve a change in rates, . . . the change must be reflected in filed tariffs before it can be lawfully implemented. . . **As a result, before a utility may avail itself of a permanent or temporary or permanent rate change, it must file a revised tariff reflecting the change.**

Ord. 5660d, ¶ 9, Docket No. D92.9.55 (1993) (emphasis added)). Although the Commission may believe that it has not changed the filed rates because the QF-1 tariff has been only "suspended" for projects between 3 MW and 100 KW, the fact is that the published avoided cost

rate is no longer available for a period which will likely be months, rendering the tariff unavailable. *See* Order 7500, Dissenting Opinion of Commissioner Travis Kavulla at 3-4, 6. Order 7500 thus violates not only PURPA but the filed-rate doctrine under state and federal law.

Order 7500 also violates the filed-rate doctrine as embodied in federal law. The United States Supreme Court has made clear that the filed-rate doctrine applies with equal force to federal and state courts. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 581-82 (1981). The doctrine also applies to efforts by state regulators to modify the terms of a FERC-mandated rate determination or cost allocation. *See Entergy La., Inc. v. La. Pub. Serv. Comm'n.* 539 U.S. 39, 47-49 (2003).

C. The "safe harbor" established by Order 7500 is unlawful, unreasonable, and unfair.

Order 7500 purports to create a "safe harbor" under which solar QFs that met the *Whitehall Wind* LEO test on June 16, 2016, may contract at current QF-1 rates. However, for a number of reasons this standard is unlawful, unjust, and unreasonable and should be reconsidered.

1. The Commission's adoption of its safe harbor test was procedurally defective.

First, the Commission's adoption of this standard was procedurally defective, in that (as discussed above) the Commission gave no notice to the parties or to the public that it was considering this standard or one like it. Because no affected party had notice or an opportunity to comment on the standard, the Commission's decision to adopt it was (as discussed above) contrary to Montana law and violated due process. And because the Commission took no evidence regarding the safe harbor test and had only limited facts before it, it was (as it acknowledged) unaware of the impact of its action on QFs individually or NorthWestern's

interconnection queue as a whole. A decision made in deliberate ignorance of the consequences is arbitrary and unreasonable.

2. A "safe harbor" test that requires an executed IA is unreasonable and unfair because it does not reflect the realities of project development.

The Commission's decision to define the safe harbor by reference to the *Whitehall Wind* LEO test is problematic for other reasons. From a factual standpoint, a test that requires a QF to have obtained a signed IA does not fairly distinguish (as the Commission intends to) between projects that are "past the point of no return"—those that have unconditionally committed to sell power to NorthWestern—and those that have not. Because different developers put interconnection milestones at different points in their development cycle, interconnection status is not a good proxy for project development status. Moreover, much of the interconnection process is in the control of the utility, so that a project's progress in the interconnection process may depend less on the developer's diligence than on the utility's compliance with its own obligations. This is inconsistent with the LEO concept, which according to FERC is intended to give the QF, not the utility, control over when the QF commits itself to sell and the utility to buy. *JD Wind 1, LLC,* 129 FERC ¶ 61,148 at P 25, 29 (Nov. 19, 2009).

3. A "safe harbor" test based on the *Whitehall Wind* LEO test is unlawful under PURPA.

It is open to question whether the *Whitehall Wind* test even complies with PURPA. As FERC noted in *Hydrodynamics,* pursuant to the LEO concept "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations." *Id.* at P 31 (quoting *JD Wind 1*, LLC, 129 FERC ¶ 61,148, at P 25 (2009)). Similarly, in *Grouse Creek Wind Park*, FERC ruled that QFs are "entitled to a legally enforceable obligation in those

situations where, for example, a utility has refused to negotiate a contract." 142 FERC ¶ 61,187, P 40 (2013).

In short, FERC has found that a utility's refusal to sign a contract or otherwise fulfill its PURPA obligations cannot prevent the establishment of an LEO, and in some cases may *result* in an LEO being established. FERC also found that state commissions may not—as the Idaho commission had done through requiring a meritorious complaint by the QF, and as the "Montana Rule" (A.R.M. § 38.5.1902(5), since repealed) had done by requiring QFs to win a competitive solicitation in order to be entitled to a long-term avoided cost rate—create practical disincentives to amicable contract formation. *Whitehall Wind's* requirement that a QF obtain an executed IA prior to obtaining an LEO is inconsistent with these rulings. Such a test takes control over establishment of an LEO out of the QF's hands and puts it into the hands of the utility, which has control over when a QF gets access to an executable IA. NorthWestern's recent conduct in refusing to tender final IAs for QFs clearly demonstrates just how inappropriate the *Whitehall Wind* test is.

Contrary to statements made in Order 7500 (Order 7500 ¶ 47), FERC did not approve the *Whitehall Wind* LEO test in the *Hydrodynamics* case or any other decision. In *Hydrodynamics* FERC merely recited the *Whitehall Wind* test by way of background, in a decision holding another aspect of Montana's PURPA program to have violated FERC regulations, in part because it was contrary to the "express goal of PURPA to 'encourage' QF development." *Hydrodynamics*, 146 FERC ¶ 61,193, P 33 (2014). Nor have Montana courts ever approved the *Whitehall Wind* test. The Supreme Court case cited in Order 7500, *Whitehall Wind LLC v. Mont. Pub. Serv. Comm'n*, 2015 MT 119, 379 Mont. 119, 347 P.3d 1273 (2015), reviewed the *Whitehall Wind* decision only with respect to the Commission's retrospective analysis as to the

existence an LEO. That analysis was based on a "totality of circumstances" inquiry, not on the new "bright-line" LEO test established by the Commission (for prospective use only) in *Whitehall Wind*.

But even if *Whitehall Wind* did provide a valid test for determining the establishment of an LEO, it does not provide a valid basis for granting extraordinary and unprecedented emergency relief and for killing projects that Joint Movants have been assiduously developing in good faith based on current law and practice. Each of the Projects committed to sell its output to NorthWestern. The Projects invested a substantial amount of money in the interconnection process, they each tendered signed power purchase agreements to NorthWestern after negotiations, and did everything within their power to demonstrate its commitment to sell their generation to NorthWestern.

Moreover, although it is possible in some circumstances (perhaps including those involved in *Whitehall Wind* itself) that the execution of a PPA by a QF may not fully demonstrate a QF's commitment to sell its output to the utility, this is demonstrably not the case with respect to the Projects. Both by the terms of their binding PPAs and by their communications with the NorthWestern transmission department, the Projects had fully and unequivocally committed themselves to selling their output to NorthWestern. Consequently, it was inappropriate for the Commission to rely on the *Whitehall Wind* LEO test in establishing the "safe harbor" for QFs to contract under QF-1 rates.

4. Order 7500's safe harbor test effectively suspends QF-1 rates for *all* solar QFs over 100 kW, and does not properly tailor the relief granted to the issues presented by the Emergency Motion.

NorthWestern's emergency motion requested "narrow, temporary" relief from its obligation to enter into new contracts at QF-1 rates. After filing its motion, NorthWestern asked to exclude from the suspension certain late-stage projects (including FLS's) for which

NorthWestern and the project developer had negotiated a complete PPA that was ready for execution, finding it a reasonable compromise. June 79 Tr. at 33:22-34:3, 48:16-20

In acting on NorthWestern's emergency request, the Commission observed that the alleged disparity between QF-1 rates and NorthWestern's current avoided cost calculations did not, on its own, constitute an emergency. June 16 Order ¶ 39. Only in concert with the "large number of solar developers requesting contracts and IAs, and the associated ***total*** generating capacity," could the alleged cost disparity justify the "extraordinary remedy" of suspending the QF-1 tariff. *Id.* ¶ 39, 32. The Commission acknowledged its duty to "mitigate" the situation while "reasonably acknowledging commitments already made by QFs" in Montana. *Id.* ¶ 46.

The Commission has previously acknowledged its obligation under state and federal law to "properly balance the interests of QFs in furthering their projects while protecting ratepayers from uneconomic projects." *Whitehall Wind* ¶ 46, 51 ("All federal and state laws with respect to QFs attempt to strike a delicate balance between encouraging QF development and ratepayer indifference."). The Commission has also noted its obligation to act in a fashion "reasonably designed to implement" the requirements of PURPA and FERC's implementing regulations. June 16 Order ¶ 51 (quoting FERC Order 69). Montana statute also requires the Commission, in determining rates and conditions for purchases of power from QFs, to encourage long-term PPAs for small QFs "in order to enhance the economic feasibility of qualifying small power production facilities." Mont. Code Ann. § 69-3-604(2).

Order 7500 does none of these things. It does not "mitigate" a problem supposedly caused by the ***total*** generating capacity lined up to receive the current QF-1 rates. It does not attempt to balance the interests of QFs in furthering their projects against the interests of ratepayers, or acknowledge in any way the substantial investment of developers in creating

projects dependent on the continued availability of QF-1 rates for their financial viability. Instead, the Order effectively shuts down ***all*** further contracting at QF-1 rates during the pendency of the avoided cost proceeding.

Notwithstanding their relatively advanced stage of development the Projects and Joint Movants' firm commitment to deliver power from these projects to NorthWestern, none of the Projects meets the *Whitehall Wind* LEO test. And although Joint Movants are not privy to the interconnection and PPA status of all other QFs in Montana, they are not aware of ***any*** other QF that does.

Put another way: in its motion for emergency motion, NorthWestern complained that it was facing "immediate execution" of QF-1 PPAs representing 75 MW of solar capacity, with perhaps 80 MW of additional solar projects eligible to contract at QF-1 rates in the interconnection queue. Emergency Motion at 7-8. NorthWestern also alleged that there could be 285 MW more in the interconnection queue "in the near future." Emergency Motion at 4. However, at the hearing, NorthWestern stated that it had executed nine PPAs with Cypress Creek and was prepared and legally obligated to execute 14 PPAs with FLS and another 22 PPAs with another developer, Pacific Northwest bringing the total amount of contracted solar power under QF-1 rates to 135 MW. June 9 Tr. at 34:24-35:2. The relief the utility requested at the hearing was to be relieved of the obligation to contract at the current QF-1 rate with any QFs other than these 45 projects.[8]

At the June 16 Work Session, notwithstanding NorthWestern's modification and limitation of its Emergency Motion, a motion was made to suspend eligibility for the current QF-1 rate for all but 54 MW of additional projects to contract at QF-1 rates. Ultimately the

[8] 45 3 MW facilities totals 135 MW. However, FLS believes that some of the facilities in question are smaller than 3 MW, so the total may be somewhat lower.

Commission abandoned that option in favor of exempting only the QFs that met the *Whitehall Wind* LEO test as of the date of the hearing. This resulted—as the Commission acknowledged it might—in ***zero*** additional projects representing ***zero*** additional MW of solar capacity to contract at QF-1 rates. And it left FLS, a developer who has been working in good faith to develop QFs in Montana for the past year, that has spent substantial resources in doing so, and that had fully obligated itself to sell the output of the FLS Projects to NorthWestern, with nothing to show for its efforts and a total write-off of its investment.

When FLS petitioned for rehearing to allow the Commission to consider further evidence concerning the impact of the June 16 decision on QFs under development in Montana,[9] the Commission denied the petition. Commission Members and Staff also stated in the July 7 Work Session that the Commission was aware, when it applied the *Whitehall Wind* test to the Emergency Motion, that there might be no projects that qualified for an LEO under that test; and that even if the Commission had known that *no* projects would qualify for exclusion from the suspension, that would not have changed the Commission's ruling.

So rather than creating "tailored" relief to "mitigate" the alleged emergency of potentially excessive contracting at the current QF-1 rates, and rather than "balancing" the interests of QFs and ratepayers, the Commission simply shut down all further contracting under the approved QF-1 rates. This action was unreasonable, unfair, and in derogation of the Commission's duty to act in a way reasonably designed to implement PURPA and FERC rules. NorthWestern had already proposed a reasonable resolution of the emergency to the Commission – to limit eligibility for the current QF-1 rates to the 135 MW of projects for which executed PPAs had been tendered by the developers. In its deliberations on the Emergency Motion the Commission totally ignored

[9] As explained in the Petition for rehearing, FLS had neither reason nor opportunity to introduce such evidence prior to the June 16 work session.

this tailoring of the requested relief and did not even discuss it as a possible resolution of the matter. FLS continues to believe that the test presented by NorthWestern at the hearing offers a reasonable and legally defensible resolution of the matter and requests that the Commission modify its order to adopt that test for eligibility for the current rates.[10] That test would strike a reasonable balance and ensure that NorthWestern and its ratepayers are not subjected to the alleged potential deluge of additional solar QF development while protecting the interests of developers who were far along in the development process based on the current QF-1 tariff and regulatory structure.[11]

Finally, while Joint Movants appreciate the Commission's desire to establish a "bright-line" test for determining which QFs will be allowed to contract at current QF-1 rates, Joint Movants submit that such a bright-line test is fair and desirable only when it is *prospective* in application and can provide guidance and certainty to regulated parties. Where (as here) a test is to be applied only retrospectively, these advantages disappear and a bright-line test simply becomes an arbitrary cutoff. The Commission recognized this distinction in *Whitehall Wind*, in which it applied a "totality of circumstances" test to determine whether an LEO existed in the instant case, and went on to establish a bright line LEO test to be applied "prospectively only." The Commission further clarified that it would continue to examine the "totality of circumstances" when considering the existence of LEOs for projects with pending rate petitions. *Whitehall Wind* ¶¶ 46-49.

D. The Commission should reconsider Order 7500 and adopt an alternative "safe harbor" test.

[10] Joint Movants believe that the CCR Projects should have been, and should be, included in this proposal as well.

[11] At a minimum this should be the test where the PPA binds the QF to deliver its output to NorthWestern regardless of interconnection status or costs, and subjects it to damages for failing to do so, as is the case with all of the FLS PPAs.

If the Commission does not reconsider its decision to suspend the current QF-1 rate, it should consider adopting a "safe harbor" test more defensible than the retrospectively-applied *Whitehall Wind* test. There are several alternatives.

For example, the safe harbor test could be modified grant eligibility for the current QF-1 rates to any QF that had, considering the facts and circumstances, established a firm commitment to sell energy and/or capacity to NorthWestern as of June 16. This test would address one deficiency of the *Whitehall Wind* – *i.e.*, that it relies on the existence of an executed IA, which (as discussed below) is contrary to PURPA and also does not reflect the realities of project development. The terms of FLS's PPAs with NorthWestern, which obligate FLS's projects to deliver power to NorthWestern notwithstanding any problems achieving interconnection, demonstrate such a commitment.

If, however, the Commission insists on including an element of the eligibility test based on interconnection status, Joint Movants submit that a more appropriate, fair, and defensible test would be to use (i) the execution of a Facilities Study agreement by the QF, and (ii) the payment by the QF of the $10,000 Facilities Study fee before the Commission's June 16 NOCA, rather than execution of an IA, for this purpose. At that point in the process, a QF has obviously decided to proceed with the project and the finalization and timing of its IA is largely within NorthWestern's control. Joint Movants believe that nine of the FLS Projects and both CCR Projects would meet this test. This would strike a much more reasonable balance in resolving the matter than the outcome produced by Order 7500.

Finally, the Commission could continue to use the *Whitehall Wind* LEO test but apply it not as of June 16, 2016, but at some date certain in the near future. This would give QFs on the verge of obtaining IAs (which may already be entitled to have obtained them) fair notice of the

requirements for contracting under current QF-1 rates and an opportunity to comply with the Commission's requirements. Given NorthWestern's failure (and now refusal) to comply with its obligations to timely provide IAs to eligible QFs, though, the Commission would also need to direct NorthWestern to comply with its obligations in this regard.

Although Joint Movants maintain that the Commission lacked authority to suspend QF-1 rates, and that any safe harbor based on the *Whitehall Wind* LEO test is inconsistent with PURPA, any of these proposed tests would be legally and equitably more defensible than the test set out in the current Order. Accordingly, Joint Movants respectfully request that the Commission reconsider Order 7500 and adopt a modified test for eligibility for the current QF-1 tariff as described herein.

Whatever the standard, as Order 7500 indicates that the Commission's primary objective is to devise a safe harbor so that only QFs that have "demonstrate[d] an unequivocal commitment . . . to deliver energy or capacity, or both, to a utility" (Order 7500 ¶ 47) are eligible to contract at QF-1 rates. Each of the FLS Projects and CCR projects has clearly met that standard by making an unequivocal commitment to deliver energy and capacity to NorthWestern. Therefore they should qualify for any safe harbor, whether they meet the *Whitehall Wind* LEO test or not. There are several indications of this unequivocal commitment.

First, even though these projects have not obtained fully-executed IAs, Joint Movants have made very substantial investments in obtaining interconnection for each of these projects—investments that are inconsistent with anything less than a total commitment to deliver energy and capacity to NorthWestern. Moreover, these projects all have (at a minimum) completed facilities studies, and so are far enough along in the interconnection process that FLS and CCR well understand the likely future costs of interconnection, and are each fully prepared

to pay those costs. The Commission included interconnection status in the *Whitehall Wind* LEO test because it observed that "interconnection obstacles" could derail otherwise-feasible projects, meaning that until an IA is in place there is a substantial likelihood a project will not be able to deliver under a signed PPA. *Whitehall Wind* ¶ 47.[12]

There is no potential, let alone likelihood, for interconnection to "derail" the Projects that have tendered PPAs to NorthWestern. Nine of the FLS Projects and both CCR Projects have a completed facilities study and FLS well understands (and is prepared to pay) the significant costs of interconnection. No further study need be conducted on these projects, and there is no likelihood that further "interconnection obstacles" would arise before these projects have IAs. For these projects, tendering a signed PPA to NorthWestern unequivocally committed them to deliver energy and capacity to NorthWestern.

The PPAs NorthWestern negotiated with FLS and CCR (the terms of which, other than identifying information about each project, location, and construction and operation dates, are identical) included substantial penalties if either party failed to perform, notwithstanding any "interconnection obstacles" that might arise.

For example, if a project does not achieve commercial operation by the date specified in the PPA, the PPA seller must pay NorthWestern "delay damages" of $375 per day for each day commercial operation is delayed (Art. 1, Sec. 7.4) and must provide a refundable cash deposit or a letter of credit to guarantee payment of these damages. (Sec. 7.1, 7.3) If a project fails to achieve commercial operation within 90 days after the deadline, NorthWestern may terminate

[12] The Commission in *Whitehall Wind* also observed that obtaining an IA requires a QF to "have sufficiently defined its project and made adequate progress that the project would be more than a mere speculative, paper proposal." *Whitehall Wind* ¶ *47.* FLS's projects are clearly more than "mere speculative" proposals, evidenced by: (1) FLS's significant past investment in the interconnection of each project; (2) the fact that each project has already gone through Facilities Study; and (3) FLS's tendering of signed PPAs for each project to NorthWestern that bind the QF to sell its output to NorthWestern and to pay damages to NorthWestern for failing to do so irrespective of interconnection arrangements or costs.

the PPA and the seller must pay NorthWestern total damages of $33,750. (Sec. 7.4.2) In addition, if NorthWestern's cost for obtaining replacement energy on the market exceeds the contract price, the seller must compensate Northwestern for the additional cost of obtaining replacement energy. (Sec. 8.5) And with respect to the FLS PPAs, "interconnection obstacles" do not excuse the QF from its commitment to sell, as Section 14.2 excludes from *force majeure* provision of the PPA "the inability or failure of Seller to arrange for, acquire or procure transmission services." These contract provisions mean that after tendering an executed PPA for a particular project, FLS and CCR would be obligated to deliver to NorthWestern the energy, capacity, and environmental attributes generated by the project on time, regardless of any expense or difficulty incurred in achieving interconnection.

E. In the alternative, the seven FLS projects that were entitled to receive IAs prior to June 16 should be exempted from the Commission's order and allowed to contract at QF-1 rates.

Even if the Commission does not grant reconsideration on other grounds, it should amend its Order to exempt from the suspension of the QF-1 tariff the seven FLS projects that had tendered PPAs to NorthWestern by June 16 and that would have had IAs in place by then if NorthWestern had fulfilled its legal obligation to tender final IAs in a timely fashion.

As discussed in FLS's motion for rehearing, FLS requested IAs for seven of its Montana projects on June 1 and June 8, 2016.[13] Pursuant to Section 3.5.7 of NorthWestern's Small Generator Interconnection Procedures, NorthWestern was obligated to return signed IAs for those projects within five business days, i.e. by June 8 and 15, respectively.[14] Northwestern has yet to deliver ***any*** of the requested IAs.[15] In fact, since the Commission's June 16 Work Session,

[13] FLS submitted its request for IAs for six projects on June 1, and for the seventh project on June 8.

[14] In the July 7 Work Session, Commission Staff concurred with this interpretation of NorthWestern's interconnection procedures.

NorthWestern has categorically refused to tender IAs for any more QF-1 projects, claiming that it "cannot execute a new Interconnection Agreement for any solar QF project between 100 kW and 3 MW in size seeking a contract at the standard long term rate."

So by June 16, these seven QFs had done everything in their power to commit themselves to selling their output to NorthWestern, thereby establishing an LEO. Only NorthWestern's failure to comply with the interconnection procedures prevented those QFs from getting IAs. FERC has clearly established that one of the primary purposes of the LEO concept is to give the QF control over when it commits itself to selling its output, and to prevent a utility's intransigence from preventing establishment of an enforceable obligation. It would be inequitable, unreasonable, and inconsistent with PURPA to deny those QFs the opportunity to contract at QF-1 rates because of NorthWestern's inaction.

F. The Commission should amend its order to clarify that NorthWestern is still obligated to provide IAs for QFs.

As discussed above, NorthWestern's transmission department has refused to provide IAs for QFs above 100 kW, claiming that the Commission's order on emergency relief (as expressed in the June 16 NOCA) bars it from doing so. Of course neither the June 16 NOCA nor Order 7500 does any such thing, and NorthWestern's conduct in this regard raises serious questions about the utility's adherence to the requirement that there be a "firewall" between its supply and transmission departments. Although Joint Movants submit that Order 7500 clearly does not authorize NorthWestern to stop providing IAs to QFs, and Commission staff confirmed this at the July 7 Work Session, the Commission should amend Order 7500 to eliminate any doubt on this point.

---

[15] Section 3.5.7 of FERC's Small Generator Interconnection Procedures requires that "Upon completion of the facilities study, and with the agreement of the Interconnection Customer to pay for Interconnection Facilities and Upgrades identified in the facilities study, the Transmission Provider shall provide the Interconnection Customer an executable interconnection agreement within five Business Days."

IV. CONCLUSION

In granting NorthWestern's Emergency Motion, the Commission attempted to protect ratepayers from excessive costs while also honoring its obligation under PURPA and Montana law to promote the development of QFs. However, Order 7500 fails to achieve this goal because it effectively prevents any solar QF over 100 kW—no matter how firm its commitment to delivering energy and capacity to NorthWestern—from getting a PPA at current QF-1 rates. The extraordinary relief granted by the Commission is the result of a flawed process and it conflicts with state and federal law. Order 7500 is also unreasonable because it was formulated in ignorance of the relevant facts, and unjust to QFs because it does not recognize their reasonable investments and in fact punishes them for relying on NorthWestern's compliance with its legal obligations.

The Joint Movants respectfully request that the Commission reconsider Order 7500 and abrogate it entirely. Failing that, the Commission should adopt a more just, reasonable, and legally defensible "safe harbor" test; and should direct NorthWestern to comply with its legal obligation to provide QFs nondiscriminatory access to interconnection.

Respectfully submitted, this 4th day of August 2016.

UDA LAW FIRM, P.C.

By: _____

Michael J. Uda

Of Attorneys for FLS Energy, Inc., and Cypress Creek Renewables

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2016, I served the foregoing by first-class mail, postage prepaid mail on the following:

Kate Whitney
Administrator
Public Service Commission
1701 Prospect Ave.
Helena, MT 59620-2601

Tom K. Hopgood
Luxan & Murfitt, PLLP
P.O. Box 1144
Helena, MT 59624
thopgood@l uxanmurfitt. com

John Alke
North Western Energy
208 N. Montana, Suite 205
Helena, MT 59601
john.alke@northwestern.com

Eric Christensen
Cairncross Hempelmann
524 Second Ave., Suite 500
Seattle, WA 98104
echristensen@cairncross.com

Al Brogan
North Western Energy
208 N. Montana, Suite 205
Helena, MT 59601
al.brogan@northwestern.com

Jeffrey Wagner
Volkswind USA Inc.
205 SE Spokane Street, Ste306
Portland, OR 97202
Jeffrey.Wagner@volkswind.com

Tracy Killoy
North Western Energy
208 N. Montana, Suite 205
Helena, MT 59601
tracy.killoy@northwestern .com

Jason Brown
Montana Consumer Council
111 North Last Chance Gulch, Suite 1B
P.O. Box 201703
Helena, MT 59620-1703
jbrown4@mt.gov

BY: _____
Jackie Haskins
Legal Assistant