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

IN THE MATTER of the Petition of Greycliff Wind Prime, LLC To Amend or Repeal ARM 38.5.1902(5)	UTILITY DIVISION DOCKET NO. _____
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**GREYCLIFF WIND PRIME, LLC'S PETITION TO AMEND OR REPEAL A.R.M. §
38.5.1902(5)**

I. INTRODUCTION.

Petitioner Greycliff Wind Prime, LLC (hereinafter "Greycliff"), acting by and through counsel, hereby files this petition with the Montana Public Service Commission ("Commission") to request that the Commission amend or repeal A.R.M. § 38.5.1902(5) pursuant to M.C.A. § 2-4-315, and A.R.M. § 1.3.308. A.R.M. § 38.5.1902(5) was the subject of a recent Federal Energy Regulatory Commission ("FERC") declaratory order in *Hydrodynamics, et al*, 146 FERC ¶ 61,193 (March 20, 2014). In that order, FERC declined enforcement action, but clearly stated that A.R.M. § 38.5.1902(5) was inconsistent with FERC's regulations implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3 *et seq.* FERC stated in relevant part:

31. The Commission's regulations require that a utility purchase any energy and capacity made available by a QF. Under Section 292.304(d) of the Commission's regulations, a QF also has the unconditional right to choose whether to sell its power "as available" or at a forecasted avoided cost rate

pursuant to a legally enforceable obligation. In Order No. 69, the Commission explained that the “[u]se of the term ‘legally enforceable obligation’ is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with qualifying facility. Moreover, the Commission stated in *JD Wind 1, LLC*, that:

[A] QF has the option to commit itself to sell all or part of its electric output to an electric utility. While this may be done through contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state’s implementation of PURPA. Accordingly, a QF by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments either result in contracts, or in non-contractual, but binding, legally enforceable obligations.

32. In *Grouse Creek*, the Commission found the Idaho Commission’s requirement that a QF file a meritorious complaint to the Idaho Commission before obtaining a legally enforceable obligation “would both unreasonably interfere with a QF’s right to a legally enforceable obligation and also create practical disincentives to amicable contract formation.” Similarly, we find that requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract imposes an unreasonable obligation obstacle to obtaining a legally enforceable obligation particularly where, as here, such competitive solicitations are not regularly held.

33. The Montana Rule is therefore inconsistent with PURPA and the Commission’s regulations implementing PURPA to the extent that it offers the competitive solicitation process as the only means by which a QF greater than 10 MW can obtain long-term avoided cost rates. 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.

Hydrodynamics, 146 FERC ¶ 61,193, PP 31-33 (internal citations omitted).

(Internal citations omitted).

Since FERC found that A.R.M. § 38.5.1902(5), which it termed the “Montana Rule” was inconsistent with FERC’s regulations implementing PURPA, an unreasonable interference with a qualifying facilities (“QFs” or individually “QF”), and created a “practical disincentive” to amicable contract formation, the Commission should have acted by now to amend or repeal A.R.M. § 38.5.1902(5). Yet, in the approximately 18 months since the FERC’s decision in *Hydrodynamics*, despite several queries by Commission staff, the Commission has done nothing to address the fact that A.R.M. § 38.5.1902(5) remains in place.

More troubling, NorthWestern Energy (“NWE”) has informed Greycliff that FERC’s decision in *Hydrodynamics* is nothing more than FERC’s “litigation position” and that such a Declaratory Order does not by itself affect the validity of A.R.M. § 38.5.1902(5), and therefore NWE would not enter into negotiations with Greycliff for a long-term avoided cost rate which is Greycliff’s right under PURPA. See Letter, Al Brogan, attorney for NWE, to Michael J. Uda, attorney for Greycliff, July 8, 2015. Specifically, NWE has an obligation under 18 C.F.R. § 292.303(a), to purchase “any energy and capacity which is made available from a qualifying utility”) and Greycliff has the unconditional right under 18 C.F.R. § 292.304(d)(2)(ii), to choose how to sell its energy and capacity to NWE, either on an as available basis, or pursuant to a legally enforceable obligation (“LEO”) over a specified term dating from the time the LEO is incurred, also known as the right to forecast avoided cost rates.

In other words, despite NWE knowing full well that FERC has found that A.R.M. § 38.5.1902(5) is (1) inconsistent with its PURPA regulations, (2) a barrier to amicable contract formation, (3) an unreasonable implementation of PURPA, and (4) contrary to PURPA’s purpose of encouraging QF development, NWE’s position has not changed since *Hydrodynamics*. NWE knows full well that Greycliff is entitled to negotiate with NWE and if NWE refuses to negotiate

(as was the case with the Idaho utility in *Grouse Creek Wind Park I* a LEO is created. Thus, NWE is using a rule which is patently inconsistent with PURPA and FERC's implementing regulations to obstruct and interfere with Greycliff's right to a LEO and forecast long-term avoided cost rates which will permit Greycliff to obtain long-term financing by which it can construct and operate its wind generation facility.

It is unconscionable that A.R.M. § 38.5.1902(5) is still preventing QF development 18 months after FERC's decision in *Hydrodynamics*. For the foregoing reasons, Greycliff respectfully requests the Commission either amend or repeal A.R.M. § 38.5.1902(5) pursuant to M.C.A. § 2-4-315, and A.R.M. § 1.3.308. Under M.C.A. § 2-4-315, the Commission must, within 60 days after submission of this petition, either deny the petition in writing or initiate rulemaking proceedings in accordance with M.C.A. § 2-4-305.

II. STANDARDS

A. § 2-4-315, MCA.

M.C.A. § 2-4-315 provides:

An interested person . . . may petition an agency requesting the promulgation, amendment or repeal of a rule. Each agency shall determine and prescribe by rule the form for petitions and the procedure for their submission, consideration and disposition. Within 60 days after submission of a petition, the agency shall either deny the petition in writing or shall initiate rulemaking proceedings in accordance with 2-4-302 through 2-4-305. A decision to deny a petition or to initiate rulemaking proceedings must be in writing and based on record evidence. Record evidence must include any evidence submitted by the petitioner on behalf of the petition and by the agency and interested persons in response to the petition. An agency may, but is not required to, conduct a hearing or oral presentation on the petition in order to develop a record and record evidence and to allow petitioner and interested persons to present their views.

The Commission does not appear, contrary to the rules above, adopted a specific rule for promulgating, amending, or repealing an administrative rule. The rules adopted pursuant to the Montana Administrative Procedure Act ("MAPA"), therefore would apply to a petition by an

interested person to amend or repeal a rule as requested here. MAPA rule A.R.M. § 1.3.308 states the requirements for such a petition:

(a) The petition shall be in writing, signed by or on behalf of the petitioner, and shall contain, as illustrated by template 308a (www.armtemplates.com) a detailed statement of:

(i) the name and address of petitioner and of any other person known by petitioner to be interested in the rule sought to be adopted, amended or repealed;

(ii) sufficient facts to show how petitioner will be affected by adoption, amendment or repeal of the rule;

(iii) the rule that the petitioner requests the agency adopt, amend or repeal. Where amendment of an existing rule is sought, the rule shall be set forth with deletions interlined and proposed additions underlined; and

(iv) facts and propositions of law in sufficient detail to show the reasons for adoption, amendment, or repeal of the rule.

* * * * *

A.R.M. §1.3.308(2) states that “[t]he petition shall be considered filed when received by the agency.” A.R.M. § 1.3.308(3)(a) further states that upon receipt of the petition, the agency “may, but is not required to schedule a hearing or oral presentation of petitioner’s or interested person’s views to assist in developing the record.” A.R.M. § 1.3.308(3)(b) further states that the agency “shall, within 60 days after the date of submission of the petition, either (i) issue an order denying the petition; or (ii) initiate rulemaking proceedings in accordance with MAPA.”

The remainder of this Petition shall provide the required demonstration by § 2-4-315, MCA, and A.R.M. § 1.3.308 that A.R.M. § 38.5.1902(5) should be either repealed or amended.

III. GREYCLIFF'S PETITION TO AMEND OR REPEAL A.R.M. § 38.5.1902(5).

A. Petitioner's Name, Address and Contact Information

Greycliff Wind Prime, LLC
c/o Mr. Patrick Pelstring
President & CEO
National Renewable Solutions, LLC
328 Barry Avenue South, Suite 100
Wayzata, MN 55391
Telephone: (952) 473-7500
ppelstring@natrs.com
www.natrs.com

Greycliff's attorney for this proceeding is:

Michael J. Uda
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muda@mthelena.com

Mr. Uda will be signing this petition on Greycliff's behalf.

Interested Persons:

NorthWestern Corporation, d/b/a NorthWestern Energy
40 E. Broadway Street
Butte, MT 59701-9394

Montana Dakota Utilities Co.
518 Southgate Drive
Billings, MT 59101

Blackhills Power Corp.
625 9th St.
Rapid City SD 57701

B. Facts Showing Greycliff Will Be Affected By Repeal or Amendment of A.R.M. § 38.5.1902(5).

Greycliff proposed to own and operate a 25 megawatt ("MW") wind generation facility in Sweetgrass County, Montana near the town of Big Timber, Montana. The project will bring

economic development and jobs to the Big Timber area, along with considerable tax payments to state and local coffers. Greycliff formally requested that NWE meet with Greycliff to discuss negotiating a power purchase agreement (“PPA”) on or before July 8, 2015. In a letter written by NWE counsel Al Brogan, NWE declined on grounds of A.R.M. § 38.5.1902(5). Mr. Brogan stated: “An administrative rule (A.R.M. § 38.5.1902(5)) 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*.” In other words, despite FERC’s ruling in *Hydrodynamics*, NWE continues to refuse to negotiate with QFs, in this case Greycliff, in violation of PURPA. To that end, Greycliff has also filed a “Petition for Enforcement and Declaratory Ruling” with FERC concurrently with the filing of this Petition, as well as a “Petition to Set Terms and Conditions for Qualifying Small Power Production Facility Pursuant to MCA § 69-3-603” before this Commission.

If A.R.M. § 38.5.1902(5) is repealed or amended, NWE’s grounds for refusing to negotiate will evaporate, and Greycliff can enter into a PPA to sell the output from its wind generation facility to NWE. This is Greycliff’s right under PURPA, and NWE appears to be refusing to negotiate on the ground that a rule that it knows to be invalid has yet to be repealed or amended. A.R.M. § 38.5.1902(5) is plainly inconsistent with PURPA. It must be repealed or amended by the Commission.

C. Reason for Agency Action: A.R.M. § 38.5.1902(5) is Inconsistent with PURPA and Contrary to Law.

NWE and the other protesters in the FERC proceeding argued that A.R.M. § 38.5.1902(5) did not violate PURPA and was not inconsistent with FERC’s prior precedent. As noted above, *supra*, at Section I, FERC strongly disagreed. Greycliff has a right to a long-term forecast avoided cost rate commencing as of the date it incurred a legally enforceable obligation under 18

C.F.R. § 292.304(d)(2) and NWE has a corresponding obligation to buy any energy and capacity that Greycliff makes available under 18 C.F.R. § 292.303(a). NWE is using A.R.M. §38.5.1902(5) to deprive Greycliff of its PURPA rights and to evade NWE's obligations to buy energy and capacity made available by Greycliff.

D. Facts and Law Demonstrating Need for Amendment or Repeal of A.R.M. § 38.5.1902(5).

Without reiterating FERC's ruling in *Hydrodynamics*, Greycliff incorporates by reference FERC's discussion regarding A.R.M. § 38.5.1902(5), above. There is no reason this rule has not been repealed or amended 18 months after FERC's decision in *Hydrodynamics*. Legally, A.R.M. § 38.5.1902(5) is inconsistent with PURPA, an unreasonable implementation of PURPA, and inconsistent with the purposes of PURPA which is to "encourage" the development to of QFs. *Hydrodynamics*, 146 FERC ¶ 61,193, PP_31-33. Greycliff, which has twice attempted before this Commission to be certified as a Community Renewable Energy Project under Montana's Renewable Power Production and Rural Economic Development Act, M.C.A. §§ 69-3-2001 through -2010, has expended considerable resources on developing its project and attempting to obtain a PPA with NWE. NWE has no reasonable grounds to refuse to negotiate an agreement with Greycliff under PURPA, yet nonetheless it has. Until A.R.M. § 38.5.1902(5) is repealed or amended, NWE will continue to evade its PURPA obligations and QFs will continue to be unlawfully deprived of their rights under PURPA.

E. Repealed Rule

One option is for A.R.M. § 38.5.1902(5) to simply be repealed until the Commission and interested parties have the opportunity to fully examine consequences. However, that opportunity should not be used as a pretext for NWE to continue to evade its PURPA obligations. The rule can be repealed in whole now, with NWE having the obligation to

negotiate with QFs larger than the standard offer threshold do in many other states. A repealed A.R.M. § 38.5.1902(5) could look something like this:

Long-term contracts for purchases and sales of energy and capacity between a utility and a qualifying facility 3 MW or less may be accomplished according to standard tariffed rates as approved by the commission.

This repeal does not delete the entire rule, but leaves blank the section dealing with QFs larger than 3 MW. The Commission has considerable latitude in how it goes about implementing PURPA: “a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC’s rules,” *FERC v. Mississippi*, 456 U.S. 742, 751 (1982). Thus, the Commission could rely upon the resolution mechanism already existing in Montana’s mini-PURPA, M.C.A. §§ 69-3-601 through -604. There, if a utility and a QF are unable to agree to a long-term contract for sale of the QF’s energy and capacity to a utility, the QF or the utility may petition the Commission to set the terms and conditions. *See* M.C.A. § 69-3-603. This scheme would actually resolve a conflict between A.R.M. § 38.5.1902(5) and M.C.A. § 69-3-603. The statute, unlike the rule, does not require a QF to win a competitive solicitation, and in fact the statute states that if a QF and a utility cannot mutually agree on a contract for the sale of electricity, the Commission decides the dispute. If Montana’s mini-PURPA were consistent with A.R.M. § 38.5.1902(5), the statute would at least state something about competitive solicitations. There is no indication anywhere in the statute that the legislature contemplated using competitive solicitations to select QFs. The statute of course trumps the regulation in the event of an inconsistency between the statute and the regulation.

F. Amended Rule

To amend the Rule, it could be amended to reflect the following:

A long-term contract for purchases and sales of energy and capacity between a utility and a qualifying facility greater than 3 MW in size shall be accomplished by negotiation between the utility and the qualifying facility. The utility and the qualifying facility shall negotiate in good faith, and if no agreement can be reached through negotiations, either the utility or the qualifying facility may file a petition with the Commission pursuant to 69-3-603 to resolve the dispute. A failure to negotiate in good faith, on the part of either party, may result in summary ruling against the party who failed to negotiate in good faith. Long-term contracts for purchases and sales of energy and capacity between a utility and a qualifying facility 3 MW or less may be accomplished according to standard tariffed rates as approved by the commission.

Again, the benefit of this amendment is that it would eliminate inconsistency between the statute and the rule. It would also tend to reduce disputes between QFs and utilities, necessitating the filing of actions before the Commission. The idea is that it would eliminate impediments to “amicable contract formation” as identified by FERC in *Hydrodynamics*.

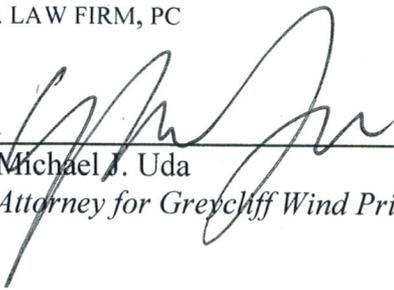
IV. PRAYER FOR RELIEF.

1. Greycliff respectfully requests that A.R.M. § 38.5.1902(5) be either amended or repealed as set forth herein. Greycliff believes that the glaring inconsistency between FERC’s decision in *Hydrodynamics*, declaring A.R.M. § 38.5.1902(5) inconsistent with FERC’s regulations, finding it an unreasonable implementation of PURPA, and contrary to the purposes of PURPA which is to encourage the development of QFs, dictates that A.R.M. § 38.5.1902(5) be amended or repealed as set forth herein. .

2. Such further relief as the Commission finds just and appropriate.

RESPECTFULLY SUBMITTED this 17th day of August, 2015.

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 17th day of August, 2015 2009 upon the following by first class mail postage pre-paid:

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

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