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

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IN THE MATTER OF Inquiry by the Montana Public Service Commission into its Implementation of the Public Utility Regulatory Policies Act of 1978	))))	REGULATORY DIVISION DOCKET NO. N2015.9.74

REPLY COMMENTS
OF THE MONTANA CONSUMER COUNSEL

The Montana Consumer Counsel ("MCC") submits these reply comments in accordance with the Commission's Notice of Inquiry and Opportunity to Comment, issued September 24, 2015.

I. OVERVIEW ON REPLY.

On September 24, 2015, the Commission issued its Notice of Inquiry and Opportunity to Comment ("Notice") regarding a review of its implementation of the Public Regulatory Policies Act of 1978 ("PURPA") and five issues identified in Order No. 7338b.[1] On September 28, 2015, the PSC released a staff memorandum dated August 11, 2015, and requested commenting parties to respond to several questions outlined by Commission staff relating to the five broad issue areas identified in Order No. 7338b. On October 23, 2015, the NW Energy Coalition ("NWECC"); NorthWestern Energy ("NorthWestern"); the Montana Department of Natural Resources and Conservation's State Water Projects Bureau ("SWBP"); Renewable Northwest ("RNW"); LEO Wind, LLC and Hydrodynamics, Inc. ("LEO/Hydro"); and WINData, LLC and Crazy Mountain Wind, LLC ("WIND/Crazy"), as well as the MCC, submitted initial comments in response to the Commission's Notice.

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1 *In the Matter of NorthWestern Energy's Application for Qualifying Facility Tariff Adjustment*, Order No. 7338b, Docket No. D2014.1.5, at 8 (2015).

The interests of six of the seven commenting parties[2] resolve into three distinct (and sometimes divergent) perspectives on PURPA and its administration: (1) the utility perspective, represented by NorthWestern; (2) the qualifying facility ("QF") developer's perspective, represented by LEO/Hydro, WIND/Crazy, RNW and NWECC;[3] and (3) the consumer's perspective, represented by MCC. As MCC stated in its initial comments in this proceeding, Section 210(b) of PURPA (16 U.S.C. § 824a-3) and Section 304(a) of the PURPA regulations of the Federal Energy Regulatory Commission ("FERC") (18 C.F.R. § 292.304(a))[4] require that rates for purchases from qualifying facilities shall: "(1) be just and reasonable to the electric consumer of the electric utility and in the public interest, and (2) not discriminate against qualifying cogenerators and qualifying small power producers." The regulatory requirement that PURPA rates be just and reasonable to the consumer is primary in the Commission's consideration in conducting its inquiry in this proceeding.

These reply comments address six broad areas in which the comments submitted so far in this proceeding diverge along the lines of the three economic interests involved: (1) the duration of QF power purchase agreements; (2) the role of competitive solicitation in establishing avoided cost; (3) non-competitive avoided cost methodology; (4) capacity "values" and integration costs for variable energy resources (wind, solar, run-of-river hydro and others); and (5) the requirements for the formation and enforcement of the extra-contractual "legally enforceable obligation" ("LEO") referenced in 18 C.F.R. § 292.304(d). As in its initial comments, the MCC represents the interests of Montana's electric consumers, and seeks to have those interests accorded appropriate consideration as the Commission moves forward with its evaluation of its administration of PURPA.

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[2] The SWPB's comments requested that SWPB be included in the future roundtable discussions contemplated by the Commission's Notice, but did not offer any substantive position on any of the issues outlined in that Notice and the accompanying Staff memorandum.

[3] RNW and NWECC are advocacy organizations presenting comments in the interests of QF developers specifically in this docket, and LEO/Hydro and WIND/Crazy are actual QF developers.

[4] FERC's PURPA Regulations are adopted and incorporated by reference into the Commission's PURPA regulations by ARM § 38.5.1901(1).

II. REPLY COMMENTS.

A. Duration of QF Power Purchase Agreements

As explained in its initial comments (at 4), the MCC supports a substantial shortening of the current 25-year term for QF power purchase agreements, and believes that a presumptive term of between five and seven years ought to be sufficient to balance the desire of QF developers for ease of project financing with the interest of consumers in mitigating the risk of inaccurate or excessive forecasts of avoided cost over extended contract terms. NorthWestern agrees (NorthWestern Initial Comments at 4-6) that "shortening the contract length would mitigate forecast risk to . . . consumers" and observes that commercial power purchase agreements generally have tenures not exceeding a five- to seven-year duration. This tendency toward shorter contract terms in the commercial context results from the recognition by parties freely contracting for power purchases that reliable time horizon for price forecasts based on market conditions generally falls in that five-year to seven-year range, with seven years representing the outside edge of reliable forecasting.

Among the QF developer interests, only NWECC acknowledges that "a contract length of 10-15 years would allow financing" and asserts without specific factual support that "there is little to no financing available for contracts shorter than ten years" (NWECC Initial Comments at 3). The remaining QF developer interests argue predictably for the retention of the current 25-year contract term, based on ease of financing considerations.[5] Comments by LEO/Hydro and WIND/Crazy to the effect that FERC's PURPA regulations somehow "require" a long-term contract or any specific contract duration are not supported by the regulation text or preamble on which they rely. There is no minimum QF contract duration required by FERC's QF regulations. That issue is left entirely to each State's PURPA implementation authority.

The Commission should find the analogy to commercial power purchase agreement tenures to be persuasive here. Shortening the duration of the QF power

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[5] RNW Initial Comments at 2; LEO/Hydro Initial Comments at 7-8; WIND/Crazy Initial Comments at 8-9.

purchase agreement terms to the five-year to seven-year range would not discriminate against QFs, it would treat them on an equal footing with competitive alternatives and thus satisfy the non-discrimination requirement of PURPA Section 210(b) (16 U.S.C. § 824a-3) and Section 304(a) of the FERC's PURPA regulations (18 C.F.R. § 292.304(a)), as adopted by ARM § 38.5.1901(1). Failing to shorten the duration of QF power purchase agreement terms as MCC recommends would contravene the foregoing statutory and regulatory requirements, because the current 25-year term is manifestly not just and reasonable to electric consumers.[6]

QF developers and their financing entities have no entitlement to long term contracts at the ratepayers expense. Reading such a provision into the statute eviscerates its plain meaning and ignores the requirement that rates be just and reasonable for consumers.

B. Competitive Solicitation

As explained in MCC's Initial Comments (at 5-6), there is no substitute for the discipline of competitive solicitation in establishing avoided cost rates that meet the statutory and regulatory criterion of justness and reasonableness to electric consumers. The FERC's commentary to the effect that the competitive solicitation requirement contained in ARM § 38.5.1902(5) is "inconsistent with PURPA" in *Hydrodynamics, Inc.*, 146 FERC ¶ 61,193 at PP 32-33 (2014) rests entirely on the fact that regular all source competitive solicitations were not conducted by NorthWestern, and not on any criticism of the use of competitive solicitation as a means of setting avoided cost. It is not the concept of competitive solicitations that is problematic. Rather, it is the reality that no regular all source solicitation requirement was imposed that is FERC's concern. Indeed,

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6 MCC understands that the Idaho Public Utilities Commission will shortly issue its order on reconsideration of its Order No. 33357 (referenced in MCC's Initial Comments at 4), in which the Idaho Commission shortened the term of its basic, IRP-based PURPA power purchase agreement from twenty years to two years. The Commission should review that order on reconsideration when issued. MCC expects that the order on reconsideration will, along with the Idaho Commission's Order No. 33357, provide a thorough and compelling analysis of the issue of QF power purchase agreement duration.

FERC has long approved the use of competitive solicitation as a means of setting a utility's avoided cost.[7]

NorthWestern's Initial Comments (at 13) treat the question of competitive solicitation as having been foreclosed by the Commission's Notice of Proposed Amendment (Mont. Admin. Reg. 38-5-232) to ARM § 38.5.1902(5) in connection with Docket No. D2015.5.68. This does not appear to be an accurate understanding of the Commission's intentions concerning the future of competitive solicitation as a means of setting a utility's avoided costs, nor is it an accurate reflection of the rulemaking process. If the Commission had intended to foreclose future use of competitive solicitation through its Notice of Proposed Amendment, there is no reason why the Commission would have pursued the issue through the questions contained in Staff's memorandum in this proceeding, and there is no reason to proceed with comments and a roundtable.

Among the QF commenters, NWECC and RNW do not address competitive solicitation at all. LEO/Hydro (Initial Comments at 2, 17) and WIND/Crazy (Initial Comments at 17-18) favor elimination of competitive solicitations for avoided cost based on the critique expressed by FERC in *Hydrodynamics* and their representation of their own experiences in dealing with NorthWestern. These comments should be seen as reasons for the Commission to reform its competitive solicitation requirements and processes, rather than to reject entirely the idea of using competitive solicitations to determine avoided costs. WIND/Crazy's suggestion that competitive solicitations are "illegal" under PURPA appears to be premised on a mistaken reading of FERC's *Hydrodynamics* declaratory order, which actually provides considerable guidance concerning modifications to Montana's competitive bidding requirements that would be necessary to have that competitive bidding regime comply with PURPA.[8]

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[7] *See So. Cal. Edison Co.*, 70 FERC ¶ 61,215 at 61,676, *reconsideration denied*, 71 FERC ¶ 61,269 (1995).

[8] *Hydrodynamics, Inc.*, 146 FERC ¶ 61,163 at P 32 n. 70 (indicating that a PURPA-compliant competitive solicitation regime would need to demonstrate "whether, in Montana, QFs are given the opportunity to satisfy NorthWestern's capacity needs; whether the competitive solicitation is all-source bidding (including demand response) that treats QFs comparably; whether NorthWestern is permitted to

In sum, no one objects to the use of competitive solicitations as the means to establish avoided cost rates for QFs. It is the reality of actually holding them that is problematic for QFs. No one has offered any explanation or justification for removing their requirement altogether, which the decision in *Hydrodynamics* does not require.

C. Non-Competitive Avoided Cost Methodologies

The initial comments on this issue indicate less divergence of views than might have been expected, and offer some constructive additions to the observations in MCC's Initial Comments on the problems inherent in using the differential revenue requirement method for determining avoided costs based on a non-transparent modeling exercise. There appears to be a fair consensus that the differential revenue requirement methodology, in the abstract, can be a fair and reasonable method for determining avoided costs. MCC agrees with the observations of the QF commenters[9] that a "black box" modeling exercise, unleavened by significant transparency concerning modeling inputs and assumptions and the effects of modifying those inputs and assumptions, is highly undesirable and fails to promote confidence in the results it produces. MCC invites the Commission's attention to MCC's suggestions in its Initial Comments (at 7-8) about how that process might be improved.

D. Capacity "Values" and Integration Costs for Variable Energy Resources

MCC's Initial Comments (at 9) approached the question of capacity values for variable energy resources from a different perspective than that of virtually all of the other commenters. MCC stands by its observations on calculating capacity values for variable energy resources in its Initial Comments (at 15-18). MCC clarifies here its position that – as indicated by NorthWestern (NorthWestern Initial Comments at 4) –

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negotiate to acquire electric capacity and associated energy outside the competitive solicitation while that solicitation is ongoing; whether the solicitation is transparent; and whether the Montana Commission has the ability and responsibility to certify, i.e., essentially review and approve, the final selections and prices that result"). Those demonstrations are worth evaluating in order to bring the discipline of competition to bear on the process of establishing avoided costs in a manner appropriately protective of the interests of electric consumers in just and reasonable rates.

[9] LEO/Hydro Initial Comments at 4-5; WIND/Crazy Initial Comments at 3-4.

capacity values (if any) associated with variable energy resources should be calculated and included as avoided costs only to the extent that the specific resource at issue has the ability to deliver capacity with a degree of reliability comparable to that of the resource that the variable energy resource causes to be deferred or displaced. To hold otherwise would overcharge electric consumers for capacity, and that result would be inconsistent with the requirements of Section 210(b) of PURPA that rates for QF purchases be just and reasonable to electric consumers.

The accurate determination of integration costs for variable energy resources has been a longstanding concern to the Commission, as most recently stated in Order No. 7338b at ¶¶ 24-26. NorthWestern states (Initial Comments at 10) that its "2015 Plan will calculate technology-specific integration requirements and costs." MCC looks forward to reviewing those calculations and the supporting data and analyses when NorthWestern's 2015 Plan is filed. As the Commission's concerns in Order No. 7338b demonstrate, variable energy resource integration costs are most productively evaluated in the context of a data-driven analysis, rather than in the context of generalizations.

E. Formation and Enforcement of Legally Enforceable Obligations

MCC's Initial Comments suggested (at 18-19) that the Commission's existing standard (announced in *Whitehall Wind*, Order No. 6444e at ¶ 47 (Docket No. D2002.8.100, June 4, 2010)) for determining whether or not a "legally enforceable obligation" within the contemplation of 18 C.F.R. § 292.304(d) had been formed appears adequate. MCC also suggested (*id.*) that the appropriate legal and factual framework for evaluating whether an LEO has been formed could be found in Montana law on contracts implied-in-fact.

None of the October 23 comments make a compelling case for a different approach. NorthWestern asks the Commission (NorthWestern Initial Comments at 11) to adopt the ready-to-deliver-in-90-days standard applied by the Public Utilities Commission of Texas Rule 25.242, which the United States Court of Appeals for the Fifth Circuit found to be consistent with PURPA in *Exelon Wind I, LLC v. Nelson*, 766

F.3d 380, 399-400 (5th Cir. 2014). That appears to the MCC to be a more extreme approach than Montana's situation currently requires.

The QF commenters appear generally to prefer an approach under which the imposition of an LEO is an automatic, or default, result in most cases. That approach appears neither necessary nor justified. It is certainly not consistent with the overriding requirement of PURPA that rates be just and reasonable to electric consumers.

CONCLUSION

MCC recognizes that these two rounds of comments represent the beginning of the Commission's evaluation of its administration of PURPA. The foregoing reply comments highlight the significant areas of agreement and disagreement among the three industry perspectives that have emerged from the October 23 round of comments. In formulating its conclusions, the Commission must be guided by *both* requirements of PURPA Section 210(b), and particularly the requirement that rates for the purchase of QF output must be just and reasonable to electric consumers and consistent with the public interest.

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Respectfully submitted November 6th, 2015.

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