

Service Date: October 8, 2014

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

IN THE MATTER OF NorthWestern) REGULATORY DIVISION
Energy's Application for Qualifying Facility) DOCKET NO. D2014.1.5
Tariff Adjustment) ORDER NO. 7338a

CONCURRING OPINION OF COMMISSIONER TRAVIS KAVULLA

Discrimination is at the heart of the Motion for Interim Rate Relief before us in this matter. Here, NorthWestern Energy (NorthWestern) asks that its regulator establish a treatment for small, independent developers that NorthWestern itself would not and could not accept. Proof enough of this exists in NorthWestern's recent application for pre-approval of nearly a dozen hydroelectric generating facilities. That docket was premised on NorthWestern's repeated insistence that a measure of certainty is required regarding the revenues a generator can expect to earn before that generator can be built or bought. *See* Docket No. D2013.12.85 (the Hydro Docket). In that matter, NorthWestern asked the Commission to pre-approve a certain purchase price, which, once pre-approved, could never subsequently be disallowed. *See* Mont. Code Ann. § 69-8-421(7). NorthWestern has represented in that proceeding that without certainty of cost recovery, the transaction would not proceed. It is unreasonable and discriminatory to permit NorthWestern to exist under a legal framework that guarantees cost-recovery of a utility-owned asset's price, while expecting independent developers to have an opportunity to finance and construct a project whose rate is interim, subject to refund and re-establishment at some unknown rate, at some unknown point in the future. This discrimination is contrary to federal law. *See* 18 C.F.R. § 292.304(a)(1).

Even if such treatment did not violate federal law because of its discriminatory nature, as intervenors persuasively argue, it violates the black-letter law on interim ratemaking found in Montana code. The Commission is empowered only to adjust on an interim basis those rates that

affect “consumers.” *See* Mont. Code Ann. § 69-3-304. Qualifying Facilities (“QFs”) are not “consumers” in the context of the QF-1 Tariff. They are producers of energy, and the QF-1 Tariff’s adjustment, up or down, does not come home to roost upon consumers’ bills until and unless a contract is signed, and only then in the context of the electric supply cost-tracking dockets, whose interim rates *do* affect consumers. Inasmuch as QFs are ever consumers—of services like “wind integration” and “contingency reserves”—those services are rendered under separate tariffs, not the QF-1 Tariff to which NorthWestern seeks interim changes.¹

Even if interim rates were permitted under Montana and federal law and were not inherently discriminatory, the substance of the rates being proposed here may be discriminatory. This is an issue I hope to explore more as this matter proceeds to hearing. In the Hydro Docket, NorthWestern Energy proposed to pay a price for facilities it will own based on the net present value of expected revenues and costs. The revenues in the analysis NorthWestern conducted to support its acquisition are derived solely by multiplying the expected megawatt-hours of output by the expected forward wholesale energy price, discounted using NorthWestern’s anticipated cost of capital. *See* Direct Test. of Joseph M. Stimatz, p. 6 and Exhs. JMS-1 and JMS-2 (Dec. 20, 2013). This, NorthWestern testified in the Hydro Docket, is the “primary” analysis that justifies its agreed-to purchase price. *See* Hrg. Transcr. 7:13, Dkt. D2013.12.85 (July 11, 2014). NorthWestern’s valuation assigned *all* value of the hydro facilities (the Hydros) it wished to acquire to the future expected value on the open market of their energy production, not capacity (perhaps appropriately so, since they are almost all run-of-the-river facilities). The expected per-megawatt-hour price from the NorthWestern-owned Hydros, therefore, should be similar if not identical to the rate that is paid to hydroelectric QFs for their energy. Ironically, the current and unadjusted QF-1 Tariff brings those projects roughly to parity. The Motion, meanwhile, stands for the proposition that a megawatt-hour of a hydro QF’s production is one-fifth less valuable than a megawatt-hour of the NorthWestern-owned Hydros’ production.² No evidence has yet been tendered to support this ostentatious discrimination.

In its Motion and in oral arguments, NorthWestern has parroted the conclusory statement that the current rates “are substantially above the upper limit of avoided costs.” *See*

¹ It is for reasons of regulatory certainty that changes to these tariffs are probably ill-advised, if legally permissible.

² Compare the proposed QF-1 tariff applicable to non-wind facilities to the levelized per-megawatt-hour prices used in the Pre-filed Direct Testimony of Travis E. Meyer, Exh. TEM-2, p. 1, Docket No. D2013.12.85.

NorthWestern's Reply to Intervenors' Opposition to Motion for Interim Rate Relief, p. 5. No such thing has been established through evidence. The evidentiary record in this proceeding, so far, is thin, and only at live hearing and through the ongoing discovery process will many questions that parties have raised be able to be fleshed out in a thorough manner.

The recent behavior of NorthWestern toward independent developers has careened between paranoia and hostility. Yet, the supposed threat to ratepayers from these small projects has never been—here or elsewhere—lucidly described by the company. Even if there were some kind of onslaught of under-three-megawatt projects queueing up to sign contracts, it is hard to understand how a QF's decision to avail itself of a rate so similar to what NorthWestern is helping itself to in the Hydro docket imperils the consuming public. It sometimes seems as though only the dogma of monopolism impels NorthWestern to take the positions it does.

The Motion asks the Commission to depart from ordinary Commission practice for no good reason. It would establish a rate which is discriminatory on its face. For these reasons, I CONCUR with the Order.

Travis Kavulla, Commissioner