Service Date: July 25, 2016

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-1, Qualifying Facility Power Purchase	))))	REGULATORY DIVISION DOCKET NO. D2016.5.39 ORDER NO. 7500

DISSENTING OPINION OF COMMISSIONER TRAVIS KAVULLA

I sympathize with the desire to protect consumers from out-of-market costs, but I disagree that the approach the Commission takes in the Order will actually protect them.

Simply put, this proceeding has not followed the process that would be necessary to permit the Commission "to temporarily suspend the availability of Schedule QF-1." Order 7500, Dkt. D2016.5.39, ¶ 61 (July 25, 2016). The rate available to these small power production facilities (QFs) was established after a contested case proceeding held pursuant to the Montana Administrative Procedure Act (MAPA). *Notice of Public Hearing*, Dkt. D2012.1.3, (Aug. 22, 2012). After another contested case proceeding which concluded last year, the Commission determined that the rate should not be modified. Order 7338b, Dkt. D2014.1.5, (May 4, 2015). Both of those ratemaking orders were the subject of litigation in Montana District Court after NorthWestern appealed them. The District Court affirmed the Commission's decision in the latter instance, and dismissed NorthWestern's petition in the former after the utility did not actively prosecute and ultimately abandoned its appeal. *See NorthWestern Corp. v. Mont. Pub. Serv. Comm'n*, ADV-2015-459, Order on Pet. for Judicial Review (Mont. 1st Jud. Dist. Ct. Mar. 3, 2016); *NorthWestern Corp. v. Mont. Pub. Serv. Comm'n*, CDV-2013-37, Order Dismissing Pet. (Mont. 1st Jud. Dist. Ct. Dec. 17, 2015).

Meanwhile, the process the Commission has followed that led to the present Order is not a product of a proceeding where all parties were afforded their right to respond to NorthWestern's submissions and present evidence, as is required by MAPA. Mont. Code Ann. § 2-4-612(1) (2015). Indeed, the intervention deadline to the proceeding occurred *only after* a hearing on NorthWestern's motion was held. Certain parties—or rather, quasi-parties, since the

intervention deadline had not arrived—participated in that hearing, but the developers of the projects that would be compensated under the rate schedule did not. The hearing commenced with the purpose of taking "argument" on NorthWestern's motion. Hr'g. Tr. 4:16-17, (June 9, 2016). Then, as a surprise to those in attendance, counsel for NorthWestern alerted the Commission that it also wished to offer evidence. Hr'g. Tr. 6:12-20 (June 9, 2016). No other quasi-party presented evidence at this hearing. Subsequently, one party (since granted intervention) has disagreed about the nature and the meaning of the evidence, and argued that the nature of the hearing precluded it from presenting evidence to inform the Commission's judgment. Appl. of FLS Energy for Rehearing 8-11 (July 1, 2016). There were no post-hearing briefs, and the party was not represented by counsel at the hearing, and so it was effectively excluded altogether from responding to NorthWestern's evidentiary submission.

Nowhere does the Order, in its conclusions of law, cite to a statute which empowers it to suspend a tariff without a full evidentiary hearing. Nowhere does the Order cite a precedent where, in the more than a century since Title 69 and its predecessor statutes have been Montana law, the Commission has done so. The Commission's only cited precedent relies on an order which is, in fact, an order on reconsideration, issued as the final act of a docket that had a sprawling evidentiary record and which consumed years. Order 7500, ¶ 31. Although the present Order itself is vague on this count, it appears to stand for the proposition that only *prima facie* evidence or good cause needs to be shown to justify the suspension of the Schedule QF-1 rate. Order 7500, ¶¶ 38, 43, 54, 58. I cannot understand how this reasoning enables the Commission to escape the process required by MAPA. The Commission compares itself to a court exercising its power to issue a writ or supervisory control or a writ of mandate, and cites to the enabling statutes and rules that permit this conduct. Order 7500, ¶ 32. Putting aside the inaptness of analogizing ratemaking to these writs, the difference is plain: There is no law that permits the Commission to do the same.

The parties and quasi-parties commenting in favor of NorthWestern's motion offer only limited precedents. NorthWestern's turn mostly on foreign jurisdictions, which may or may not have an analogue to MAPA and Montana's ratemaking statutes. Where NorthWestern cites to Montana cases, they are, at their core, decisions that continue to offer published rates to the QFs they affected. NorthWestern Energy's Mot. for Emergency Suspension (May 17, 2016), citing to Order 6124 (Dec. 17, 1998) and Order 6459a (Dec. 9, 2003). As I explain below, in this

circumstance, I believe the adoption of temporary rates would be appropriate, but that is not what the Order does. Meanwhile, the Montana Consumer Counsel's comments, as if in quiet acknowledgement of the unlawfulness of the proposition, are bereft of a single citation to legal authority in support of NorthWestern's position, with which it agrees. *Comments of the Montana Consumer Counsel* (June 6, 2016).

The Order suspending the Schedule QF-1 tariff, at its core, is substituting an unpublished rate subject to bilateral negotiation for the Schedule QF-1 rate approved by the Commission. Order 7500, ¶ 44. The Commission itself has been clear in even the most recent QF-1 proceeding that it has never granted NorthWestern's requests to change or suspend Schedule QF-1 before rendering a final decision. Order 7338a, (Oct. 8, 2014), ¶ 8, citing to Dkts. D2012.1.3, D2010.7.77, and D2008.12.146. In that order, the Commission again denied NorthWestern's request to change the rates at the outset of the QF-1 proceeding, citing MAPA and reasoning, "The parties to this Docket have not yet had a full opportunity to respond to NorthWestern's proposal []." *Id.* ¶ 17. The present Order is an unexplained departure from the Commission's previous legal reasoning.

Instead, the Order implies that the 25-year forecast which is the Schedule QF-1 rate became unlawful by failing to accurately reflect projected avoided costs sometime between when the Commission affirmed the rate after a full proceeding in Order 7338b (May 4, 2015) and a little more than a year later in this action. Order 7500 ¶ 56. This is erroneous. It is well-established that a rate approved by a regulatory commission and on file with it is *ipso facto* lawful; a regulated utility may not charge or pay anything other than that rate. Mont. Code Ann. § 69-3-305. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578, 101 S. Ct. 2925, 2931. 69 L.Ed.2nd (1981) (interpreting a similar provision of the Federal Power Act). A rate may ultimately be invalidated or changed through a Commission proceeding, but even PURPA's black-letter command that payments to QFs should be no more or less than avoided cost is qualified by a "recogni[tion] that avoided costs could change over time" and "that the supply characteristics of a particular facility may vary from the value from the average rates set forth in the utility's standard rate." *In re JD Wine 1*, 130 F.E.R.C. 61127, 61631 (Feb. 19, 2010); 45 Fed. Reg. 12214, 12223. As the Commission previously concluded in the face of much the same NorthWestern arguments raised in this docket, "To maintain the existing standard rates pending a final decision in this Docket is not a violation of PURPA." Order 7338a, Dkt. D2014.1.5 ¶ 15

(October 8, 2014). The present Order departs without reason from the rationale the Commission expressed no more than two years ago. It cannot be the case that certain on-file rates are unlawful depending on the theretofore unrevealed wisdom of the Commission. PURPA most certainly does not necessitate this legal impossibility, and I think the Order cannot possibly mean what it says.

So how, then, to rectify a situation where the Commission or an applicant thinks the tariffed rate is out-of-line with the rate as it should be? A very recent case from the Commission offers guidance. On Jan. 11, 2016, the upstream owners of Mountain Water Company (MWC), Montana's largest regulated water utility, sold the utility to another firm without the Commission's approval, even as a Commission review of that proposed sale was well underway. Order 7392q, Dkt. D2014.12.99, ¶ 2 (Feb. 5, 2016). Proposals in that docket included a modification of the rates MWC charges customers, in order to account for changes in the firm's cost of capital, which is one of the largest expenses that is factored into consumer rates because of the capital-intensive nature of the industry. *Id.* ¶ 15. The Commission did not, at that time, suspend the tariff immediately—a tacit recognition that such an action was a ratemaking action that required the MAPA process to be followed, no matter the extraordinary nature of the situation. (Nothing like the unauthorized sale of this utility had ever occurred in this jurisdiction.) Instead, the Commission properly instituted a ratemaking proceeding which included rounds of testimony from all parties, an evidentiary hearing that lasted multiple days, and post-hearing briefs. The proceeding spanned from the Commission's Notice of Investigation of Feb. 3, 2016 to the issuance of a final order on June 22, 2016, which found that the cost of capital had indeed changed significantly, making the approved MWC rates unjust and unreasonable, and ordered an adjustment in rates. Order 7475i, Dkt. D2016.2.15 (June 22, 2016). This was an emergency situation, but nonetheless the Commission followed MAPA. Such an approach would have been appropriate in this matter also.

Alternatively, the Commission sometimes establishes interim rates during the pendency of a proceeding, which are statutorily subject to a refund or surcharge after a final order makes a determination on rates. Mont. Code Ann. § 69-3-304. The Commission has never done so in a QF-1 order, but that is because a true-up would render meaningless the seeming statutory imperative to encourage "long-term contracts" that "enhance the economic feasibility" of QFs. Mont. Code Ann. § 69-3-604(2). (Whether this is a good or bad law I leave for another day.)

NorthWestern initially moved for interim rates "subject to adjustment back to the rate effective date, with interest" when the Commission issued a final order. *Notice of Appl. for Interim Rate Adjustment*, 2 (May 3, 2016). Then at hearing, during argument, NorthWestern contended, "No one is suggesting, to my knowledge, that we would have interim rates where the rates that would actually be paid under the contract would be revised later." Hr'g. Tr. 50:7-10, *see also* 75:17-18 (counsel for NorthWestern conceding under questioning, "that is not what I believe [the motion] should have said"). The QF-1 Schedule is a tariff designed to state a price which is then built into a long-term contract; the resulting standard contract itself is not subject to adjustment. I believe this approach would have been a reasonable one.

Certain quasi-parties disagreed that the interim rate statute is applicable to QF proceedings, but I do not read into the statute the same limitation. *Comments of Vote Solar and Montana Environmental Information Center*, 7-8 (June 6, 2016). The Commission, in my view, could have done what it has done in the past, which is to take a methodology which has previously been approved in a contested case conducted pursuant to MAPA and updated the essential variables on which the valuation methodology hinges in order to arrive at a rate which is less an act of discretion and more a formulaic update. *See* Order 7199d, Dkt. D2012.1.3, ¶ 107 (July 29, 2013). (Indeed, at a recent Commission roundtable on PURPA implementation, there was wide agreement that once a methodology had been approved, its input variables should be subject to routine updates to prevent the rate from becoming stale.[7]) A rate calculated in that manner would have reflected the market fundamentals which have changed, especially due to the falling price of natural gas, but would have left the more significant methodological changes that NorthWestern proposes to be resolved through this proceeding. The rates I believe reflect such an update are included as Appendix A to this opinion.

Finally, the Order is careful not to purport that it is suspending the mandatory purchase obligation of PURPA altogether. That action, even more clearly than this one, would be contrary to law. Convolutedly, the Order both suspends the Schedule QF-1 tariff—the subject of my discussion above—and it also waives the administrative rule that requires any solar QFs under three megawatts in size to contract only through a standard rate, a waiver permitted by another of the Commission's administrative rules. Mont. Admin. R. 38.5.1902(5) (2016) (standard rate

[7] Docket No. N2015.7.94, (June 1, 2016), a recording of which is available online at: http://psc.mt.gov/Docs/WorkSessions/WorkSessionVideo/20160601_1612_Work_Session.f4v

eligibility); Mont. Admin. R. 38.2.305(1) (waiver provision); Order 7500 ¶ 51 (ordering a waiver of the first rule). The practical effect of this is to make it so that a statutory prohibition on small QFs' contracting outside the standard-rate no longer applies. Mont. Code Ann. § 69-3-603(3)(a) ("authoriz[ing] a rate or term different from that in the rate schedule" is prohibited "if a qualifying small power production facility is eligible to sell electricity to a utility pursuant to a rate schedule approved by the commission").

After this rigmarole, the Order is able to declare that the market is, after all, still open to these QFs. They may pursue "amicable contract formation through good faith negotiation." Order 7500 ¶ 44. I believe this promise is illusory. NorthWestern is proposing rates in the present docket which, if and when approved by the Commission, will instantly supplant the negotiation process. *Id.* ¶ 64 ("The terms of this Order will expire as of the service date of a Final Order in this proceeding"). Were NorthWestern to agree to a contract price for a solar QF higher than the one it proposes in its advocacy to the Commission, it would be contradicting itself, and would expose itself to litigation risk in the present docket or to future disallowance claims in other rate cases. One imagines a very simple and pointless negotiation indeed, given these circumstances, one in which the monopsony buyer simply offers the price it has advocated in this proceeding and is unwilling to budge from it. While I generally agree that genuine negotiations are a better price-discovery tool than administrative proceedings that inquire as to the future "market" price of something, this is a negotiation process that can only fail. In effect, the Order allows NorthWestern to adopt as a *de facto* rate for the purpose of negotiating with small solar QFs, a rate which is not approved by the Commission, and which the Commission itself opines to likely by unreasonably low. *Id.* ¶ 30 ("The Commission disagrees with the precise approach NorthWestern applied to estimate its current avoided costs"), ¶ 35 (showing "an avoided cost estimate" substantially higher than the one NorthWestern proposes in its application).

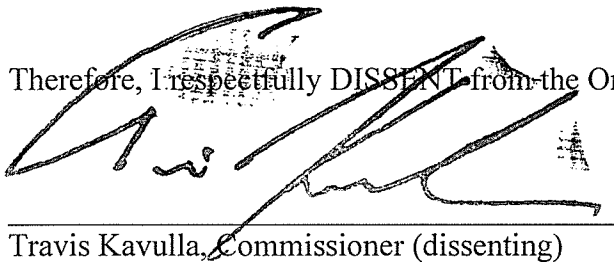
The Order also offers that, if a QF is unsatisfied with this, it can petition the Commission to set a rate at the actual avoided cost. *Id.* ¶ 44. Yet at this point, we are right back to where we started: a contested case proceeding to determine the appropriate avoided cost for small solar QFs.

Finally, the Commission argues that nothing in law prevents it from waiving the Mont. Admin. R. 38.5.1902(5) and depriving 3 MW solar QFs of the ability to obtain a standard-offer

rate. *Id.* ¶¶ 14, 54. This ignores some salient history. The issue of which QFs should be eligible for standard rates has been a topic of heated political debate for years. Most recently, in 2013, the Commission proposed to change the administrative rule to reduce the standard-offer threshold from 10 megawatts [MW] to 0.1 megawatts (100 kilowatts), responding to concerns that there would be a rush of QFs eager to take advantage of standard rates that could potentially grow stale too quickly for the Commission to change them[8]. (At that time, as I have related above, the Commission accepted the premise that there could be no "emergency" suspension of the standard rate, so changing the eligibility size was the only remedy to this concern, if accepted as valid.) The Commission's legislative overseers, the Energy and Telecommunications Interim Committee, disagreed with the Commission's rulemaking proposal, and unanimously objected to it, "because the proposed amendments to [Mont. Admin. R. 38-5-1902] did not consider a 3 MW cap." *See* Exhibit B. The Commission, upon further consideration, agreed with the legislative committee, and modified the rule to set a 3 MW threshold[9]. By waiving the rule, rather than merely changing the rate, the Commission countermands the legislative directive, to which it conceded just a few short years ago. Unlike my view of other aspects of the process that resulted in the present Order, I do not think that this waiver actually violates the law, but it does disregard a recent, significant act of legislative oversight on the very matter of which size of QFs should be able to obtain a standard rate.

Again, I appreciate the concern that the standard rate does not reflect avoided cost. However, I would have pursued other means to remedy this issue.

Therefore, I respectfully DISSENT from the Order,



Travis Kavulla, Commissioner (dissenting)

[8] MAR Notice 38-5-218 proposed amendment: http://www.mtrules.org/gateway/ShowNoticeFile.asp?TID=4813
[9] MAR Notice 38-5-218 notice of amendment: http://www.mtrules.org/gateway/ShowNoticeFile.asp?TID=5212

Dissenting opinion of Travis Kavulla, Appendix A

Order 7199d Blended Market-Combined Cycle Plant Approach										
Year	Annual Capital	Fixed O&M 0.025	Total fixed	Variable O&M 0.025	Natural Gas Cost Forecast	Fuel Cost 6.843	Market Price	Total Cost	CO2 Cost	Total Cost w CO2
	($/Kw-yr)	($/kW-yr)	($/kW-yr)	($/kWh)	($/MMBtu)	($/kWh)	($/kWh)	($/kWh)	($/kWh)	($/kWh)
2016										
2017							0.01991	0.01991	0.00000	0.01991
2018							0.02175	0.02175	0.00000	0.02175
2019							0.02314	0.02314	0.00000	0.02314
2020							0.02468	0.02468	0.00000	0.02468
2021							0.02583	0.02583	0.01352	0.03935
2022							0.02703	0.03903	0.01419	0.04122
2023							0.02827	0.04077	0.01490	0.04317
2024							0.02958	0.04259	0.01565	0.04523
2025	178.45	14.76	193.20	0.0052	3.72	0.02546		0.05521	0.00907	0.06428
2026	178.45	15.12	193.57	0.0054	3.86	0.02641		0.05634	0.00952	0.06587
2027	178.45	15.50	193.95	0.0055	4.00	0.02737		0.05748	0.01000	0.06748
2028	178.45	15.89	194.34	0.0056	4.14	0.02833		0.05863	0.01050	0.06913
2029	178.45	16.29	194.73	0.0058	4.29	0.02936		0.05985	0.01102	0.07087
2030	178.45	16.69	195.14	0.0059	4.45	0.03045		0.06114	0.01157	0.07271
2031	178.45	17.11	195.56	0.0061	4.61	0.03155		0.06244	0.01215	0.07459
2032	178.45	17.54	195.99	0.0062	4.78	0.03271		0.06380	0.01276	0.07657
2033	178.45	17.98	196.43	0.0064	4.95	0.03387		0.06518	0.01340	0.07858
2034	178.45	18.43	196.87	0.0066	5.14	0.03517		0.06670	0.01407	0.08076
2035	178.45	18.89	197.34	0.0067	5.33	0.03647		0.06822	0.01477	0.08299
2036	178.45	19.36	197.81	0.0069	5.53	0.03782		0.06980	0.01551	0.08531
2037	178.45	19.84	198.29	0.0071	5.73	0.03922		0.07143	0.01628	0.08771
2038	178.45	20.34	198.79	0.0072	5.94	0.04067		0.07312	0.01710	0.09022
2039	178.45	20.85	199.30	0.0074	6.16	0.04218		0.07487	0.01795	0.09282
2040	178.45	21.37	199.82	0.0076	6.39	0.04374		0.07668	0.01885	0.09553
							2013-2015 - 3-year levelized cost:	0.02152		0.01991
							2013-2036 24-year levelized cost:	0.04405		0.05098

All-in pricing for 3 MWac Solar Project					
	Current Tariff w/o CO2	Or. 7199d Method w/ CO2	Pct. Chg.	NWE Proposed w/ CO2	Pct. Chg.
Off-peak price	0.05314	0.04177	-18%	0.04366	-18%
On-peak price	0.09273	0.08136	-10%	0.04366	-53%
Off-peak MWh	4,798,515	4,798,515	0	4,798,515	0
On-peak MWh	2,332,951	2,332,951	0	2,332,951	0
Total MWh	7,131,466	7,131,466	0	7,131,466	0
Off-peak revenue	$ 254,993	$ 200,434	-18%	$ 209,503	-18%
On-peak revenue	$ 216,335	$ 189,803	-10%	$ 101,857	-53%
Total Revenue	$ 471,328	$ 390,237	-14%	$ 311,360	-34%
Effective unit price	0.06609	0.05472	-17%	0.04366	-34%

Projected 25-year levelized cost of Hydros = $55.86 (DR PSC-343)