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September 25, 2015

Hand Delivered

Susan M. Hudson, Clerk
Vermont Public Service Board
112 State Street, 4th Floor
Montpelier, VT 05620-2701

Re: Docket No. 8571
Swanton Wind LLC response to Department's Motion to Dismiss

Dear Mrs. Hudson:

Enclosed for filing in the above-referenced docket please find an original and six copies of the Supplemental Testimony and Exhibits of John Zimmerman on behalf of Petitioner Swanton Wind LLC.

Mr. Zimmerman's testimony responds to issues raised in the Department's September 4, 1015 Motion to Dismiss. Swanton Wind appreciates the Department's recommendation and willingness to allow Swanton Wind to supplement its original filing.

While we appreciate the Department's accommodation, there appears to be a significant disagreement about Swanton Wind's legal entitlement under PURPA to sell the output of its proposed wind energy electric generation facility to Vermont's electric distribution utilities at long-term forecasted avoided cost rates. This federal entitlement is implemented by the Public Service Board, which is prohibited from imposing unreasonable obstacles to Swanton Wind obtaining a long-term legally enforceable obligation or contract at forecasted avoided cost rates.

The Department, joined by Vermont's largest vertically integrated electric utilities Green Mountain Power and Vermont Electric Cooperative (Monopoly Utilities), ask the Board to enforce a provision in Vermont's PURPA rule that prevents Swanton Wind from obtaining a long-term contract or legally enforceable obligation for its

output before it files for a certificate of public good.[1] Rule 4.104(H) requires a QF seeking a long-term avoided cost rate – whether levelized or non-levelized -- to demonstrate, after "due hearing" that its facility satisfies the "substantive criteria of 30 V.S.A. § 248(b)."[2] The Department explains that the demonstration required by Rule 4.104(H) is independent from the requirement to secure a certificate of public good under Section 248 where the QF must also prove that the facility satisfies the substantive criteria of Section 248(b).[3] If Rule 4.104(H) is applied in the manner the Department suggests, it means that Vermont QFs have effectively a single option for PURPA power sales: non-levelized *short-term* sales of one year or less.[4] This limitation violates FERC's PURPA regulations.[5]

The Department relies on decades-old Public Service Board decisions from the late 1980s in arguing for enforcement of Rule 4.104(H)'s independent showing under Section 248(b).[6] It is unreasonable and inconsistent with PURPA and FERC regulations to impose on QFs seeking long term avoided cost rates a pre-condition that they prove compliance with Section 248(b) in order to obtain a legally enforceable obligation for the purchase and sale of the QF's power.[7] Once a Vermont QF commits to selling its output to Vermont's electric distribution utilities at long-term avoided cost rates through an agreement with the Board-appointed purchasing agent, a legally enforceable obligation arises between the QF and the Vermont electric distribution utilities for the purchase and sale of the QF's output at the long-term avoided cost rates published by the Board.[8]

In this case, Swanton Wind's legally enforceable obligation arose as early as the date it paid the administrative fee to the purchasing agent and as late as this filing. In either event, preventing or delaying the purchasing agent's execution of the proposed purchase power agreement until Swanton Wind makes an independent showing of compliance with Section 248(b) is contrary to the letter and spirit of FERC's PURPA regulations. Since the Board's late 1980s decisions enforcing Rule 4.104(H), FERC has

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[1] Department of Public Service Motion to Dismiss, September 4, 2015 (DPS MTD). Upon information and belief, Green Mountain and Vermont Electric Cooperative will be joining the Department's Motion to Dismiss in their responsive filings.
[2] Pub. Serv. Bd. R. 4.104(H).
[3] DPS MTD at 2.
[4] See Pub. Serv. Bd. R. 4.104(E).
[5] *See Hydrodynamics, Inc.*, 146 F.E.R.C. ¶ 61,193 (March 20, 2014) (holding unreasonable obstacles to a QF obtaining a long term contract at forecasted avoided cost rates as inconsistent with PURPA and the Commission's regulations).
[6] DPS MTD at 2, 4.
[77] *See Hydrodynamics, Inc.*, 146 F.E.R.C. ¶ 61,193 (March 20, 2014) (holding unreasonable obstacles to a QF obtaining a long term contract at forecasted avoided cost rates as inconsistent with PURPA and the Commission's regulations).
[8] *Id*. (discussing FERC's holding in *Grouse Creek Wind Park, LLC*, 142 F.E.R.C. ¶ 61,187 (2013)).

made clear that long-term avoided cost rates are an option for QFs under FERC's regulations and that states may not erect unreasonable barriers to the ability of QFs to secure them.

For example, FERC determined that a Montana rule was inconsistent with PURPA and FERC's regulations because it offered a competitive solicitation process as the only way a QF greater than 10 MW could obtain long-term avoided cost rates.[9] In the same case, FERC also found unreasonable and inconsistent with PURPA an electric utility's tariff that, after an installed capacity of 50 MW had been reached, limited the options of QFs over 100 kW and up to 10 MW to only short term contracts or long-term contracts at variable, market-based rates, not forecasted avoided cost rates as required by PURPA.[10]

More recently, this past May, FERC emphasized the significance of the right to long-term, forecasted avoided cost rates in upholding an alternative renewable energy program in California.[11] Citing its decision in *Otter Creek Solar, LLC*, a case challenging Vermont's SPEED standard offer program, FERC explained that states may adopt alternative renewable energy programs with capacity caps under PURPA so long as QFs have other opportunities "to enter into long-term legally enforceable obligations at avoided cost rates."[12]

Like a competitive solicitation or capacity cap for long term rates, imposing a precondition that a project be reviewed for satisfaction with the 248(b) criteria is barrier to Swanton Wind's PURPA rights. In fact, interpreting Rule 4.104(H)'s requirement in the manner the Department recommends presents a Catch-22 for QFs because two key Section 248(b) criteria turn on where the power is sold and under what terms, namely need and economic benefit.[13] In the absence of an executed agreement or legally enforceable obligation under Vermont's PURPA rule, Swanton Wind cannot assert that it will sell power to the Vermont electric distribution utilities at Board approved avoided cost rates as a means to demonstrate Swanton Wind satisfies those criteria. And though the Board has found that sale into the regional energy market is sufficient for a QF to satisfy Section 248(b)'s need and economic benefit criteria,[14] Swanton Wind lacks nondiscriminatory access to the regional power market and cannot, in good faith, make that assertion even if that were its preferred choice for power sales. Swanton Wind has a right under PURPA to sell directly to Vermont's electric utilities through the

[9] *Hydrodynamics*, 146 F.E.R.C. ¶ 61,193 (March 20, 2014).
[10] *Id*.
[11] *See Winding Creek Solar, LLC*, 151 F.E.R.C. ¶ 61,103 (May 8, 2015).
[12] *Id*.
[13] 30 V.S.A. § 248(b)(2) and (4).
[14] *See, e.g., In re UPC Wind, LLC*, Docket No. 7156, Order of August 8, 2007.

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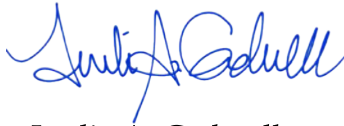
purchasing agent[15], and applying Rule 4.104(H) in a manner that erects unnecessary barriers to its ability to obtain long-term avoided cost rates is inconsistent with PURPA in the same way that competitive solicitations and capacity caps violate PURPA.

The Board has the discretion to waive Rule 4.104(H) and authorize the purchasing agent to execute the proposed PPA with Swanton Wind.[16] The executed PPA will allow Swanton Wind to move forward with the next stage of development, which includes securing financing, a certificate of public good under Section 248, and all other state and federal approvals before the project may commence construction. A waiver of the rule prior to execution of the PPA does nothing more than remove an unnecessary and artificial barrier to further development of the project. Since the Board has no power to waive Section 248 or any of the Section 248(b) criteria applicable to the Swanton Wind project, waiver of Rule 4.104(H) does not eliminate the protection afforded by Section 248 that the project promote the general good of the state.

A waiver of Rule 4.104(H) is just and appropriate to ensure that Swanton Wind and other QFs have the opportunity provided to them under the law to sell their output at forecasted avoided cost rates on a long term basis. Swanton Wind urges the Board to deny the Department's motion to dismiss and approve the proposed purchase power agreement as amended by this filing without a hearing or further proceedings.

Thank you for the opportunity to comment on the Department's motion.

Very truly yours,



Leslie A. Cadwell

Cc: Tim Duggan, for DPS
Peter Zamore, for GMP, VEC, VPPSA
Carolyn Alderman, for VEPP, Inc.

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[15] "The purchasing agent for the Vermont retail electric utility companies *shall* purchase electricity offered by *any* qualifying facility located within Vermont. . . ." Pub. Serv. Bd. R. 4.104(A).
[16] *See* Pub. Serv. Bd. R. 4.111(A).

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8571

Petition of Swanton Wind, LLC for approval of	)
Rule 4.100 power purchase agreement	)

SUPPLEMENTAL PREFILED TESTIMONY OF JOHN ZIMMERMAN

September 25, 2015

Mr. Zimmerman supplements his prefiled testimony to offer a commitment to a 20 year term and rate schedule. He explains why a long-term fixed price purchase power agreement is necessary to finance the Swanton Wind Project, describes the basics of the Project Finance structure, and explains how Project Finance differs from Corporate Finance, a structure typically used by investor-owned electric utilities and publicly traded companies with access to capital markets. Mr. Zimmerman also explains how long-term fixed price purchase power agreements under Vermont's PURPA program are consistent with state policy that encourages long term, stably priced contracts for energy and capacity as have recently been approved by state regulators.

1 Q1. Please state your name, occupation and business address.

2 A1. My name is John Zimmerman. I am the owner of Vermont Environmental
3 Research Associates, Inc. ("VERA") with an address of 30 Foundry Street,
4 Waterbury, Vermont.

5 Q2. Did you prefiled testimony in this docket previously?

6 A2. Yes, I did. My original prefiled testimony is dated August 10, 2015 and was
7 submitted with the Petition.

8 Q3. What is the purpose of your supplemental testimony?

9 A3. My supplemental testimony offers more substantiation for why a long term
10 purchase power agreement is necessary in order for the Swanton Wind Project to
11 obtain financing. I offer Exhibit Swanton Wind-2a, which is a commitment by
12 Swanton Wind to a 20-year term and corresponding rate schedule to substitute
13 for the election of a 10 or 30 year term as originally requested to satisfy the
14 Department of Public Service's criticism that Swanton Wind had not committed
15 to a contract term. I also explain how a long term contract under the Rule 4.100
16 program implementing PURPA is consistent with state energy policy.

17 Q4. Please describe the Swanton Wind's commitment to a 20-year term.

1 A4. Although I believe that it is important to provide Swanton Wind an opportunity
2 to explore financing options on a ten and thirty year basis, it is more important to
3 secure an agreement now in order to continue project development than it is to
4 maintain sixty day period to elect a contract term. Therefore, I requested and
5 received from VEPP, Inc., the purchasing agent, a twenty-year term with the
6 corresponding Board-approved rate schedule to amend the existing proposal.
7 The schedule attached as Exhibit Swanton Wind-2a replaces the ten and thirty
8 year schedules attached to Exhibit Swanton Wind-2. To be clear, Swanton Wind
9 seeks approval for the proposed agreement set forth in Swanton Wind-2 that it
10 negotiated with the purchasing agent for the 20 year term and rates set forth on
11 Exhibit Swanton Wind-2a.

12 Q5. How are other independently developed renewable energy projects usually
13 financed?

14 A5. Independently developed renewable energy projects are non-utility projects,
15 such as Swanton Wind, all of the standard offer projects, the Rutland Solar City
16 initiative projects, and other renewable energy projects undertaken by
17 developers other than utilities. These projects are usually financed through long-
18 term, fixed price PPAs with credit-worthy counter parties (i.e., Vermont's
19 utilities).

1 Q6. Why are long-term fixed price PPAs needed to finance independently-owned
2 renewable energy projects in Vermont?

3 A6. From the view of independent power developers, and their financing sources,
4 long-term fixed price power purchase agreements (PPAs) with credit worthy
5 sources, provide the predictability, stability, and integrity of the power sales
6 rates needed to obtain financing for the construction of new generation facilities.
7 There are few practical alternatives available for obtaining funding for these new
8 projects, as lenders are reluctant to take electric energy market risks.

9 Q7. Can you explain in concept, how independent power generation facilities are
10 funded?

11 A7. Over the last three decades, the majority of small, independently-owned power
12 generation facilities in the U. S. have been funded and built using Project
13 Financing. This financing structure usually involves the use of non-or limited-
14 recourse debt, together with equity from investors that can make efficient use of
15 any income tax benefits available. Project debt is repaid from a predictable
16 stream of cash flows; equity returns are generated from some combination of
17 remaining cash flows and income tax benefits over the operating life of the
18 project. The owners of a Project Financed generation project are typically single-
19 purpose companies whose only assets are the equipment, rights, and interests

1 needed to operate and maintain the project and sell its output to off-takers under
2 long-term fixed price power purchase agreements (PPAs).

3 Project debt in a non-recourse structure is secured by the project assets,
4 including long-term PPAs with off-takers, and lenders generally have no
5 recourse to the project owners' balance sheets. Because of this, banks or
6 institutions lending money to the project are particularly concerned about the
7 predictability of a project's cash flows, as specified in the PPA, and are reluctant
8 to take electricity market price risks. Therefore lenders require developers of
9 projects seeking financing to obtain long-term fixed price PPAs for the project's
10 output over at least the term of the loan – usually between 10 to 20 years. Also
11 important is the integrity of the generating equipment and its warranties, the
12 experience of the operators, property rights and the credit worthiness of off-
13 takers.

14 Q8. Does the Rule 4.100 and the rates established by the PSB earlier this year provide
15 the necessary qualities to finance independent power projects?

16 A8. The predictability, stability, and integrity of power sales rates obtained through
17 long-term fixed price PPAs of the type afforded through Rule 4.100, translates
18 directly into the predictability of a project's cash flows to make debt payments
19 and fund equity returns and is therefore necessary to attract competitive
20 financing for independent power facilities.

1 Q9. Do large power developers and electric utilities require long-term fixed price
2 PPAs and how do they differ from independent power producers?

3 A9. Electric utilities, national and foreign, regulated and unregulated, have the
4 capability to build and finance capital projects such as power generation facilities
5 using internally generated debt and equity funding through normal Corporate
6 Financing activities. These large corporations, often publically traded
7 companies, with easy access to public capital markets can and do use bilateral
8 contracts of various terms to acquire power supplies. Some have fixed prices,
9 but others reduce market price risk with the use sophisticated financial hedging
10 mechanisms to stabilize electric prices as a substitute for long-term fixed price
11 PPAs.

12 However, small, independent project developers with limited access to public
13 capital markets and these sophisticated financial hedging mechanisms, cannot
14 stabilize market price variability, and are therefore looking to achieve this price
15 stability under Rule 4.100 PPAs.

16 Nevertheless, often times these larger firms find it convenient and attractive
17 to form sole-purpose unregulated companies that can use the benefits of Project
18 Financing to fund power projects for a variety of reasons, such as separating
19 power plant investments from regulated business activities and the inability of a

1 parent company to use tax deductions or credits generated by the power projects
2 efficiently.

3 Q10. How is a long term, stably priced contract for the Swanton Wind Project
4 consistent with state energy policy?

5 A10. The Swanton Wind Project will add up to 20 MW in new wind to the Vermont
6 electric power supply portfolio on a long-term basis at Board-approved, stable
7 rates through the proposed Rule 4.100 purchase power agreement. This proposal
8 is good for rate payers and meets at least two express legislative policy goals.
9 One goal is to provide incentive for utilities to enter "affordable, long-term,
10 stably priced renewable energy contracts that mitigate market price fluctuations
11 for Vermonters." (Please refer to Section 8001(a)(3) of Title 30.) A second goal is
12 to promote the inclusion of renewable energy plants that are diverse in both
13 capacity and technology in the Vermont electric power supply portfolio. (Please
14 refer to Section 8001(a)(8) of Title 30.) Vermont's policies and strategies directed
15 toward encouraging long-term, stably priced renewable energy contracts are
16 protecting ratepayers from the volatility of the short-term electricity prices in
17 regional power markets. Our Governor just recently released a public statement
18 applauding Vermont's success in protecting Vermont ratepayers from rate shock
19 through the use of long-term stably priced contracts for renewable energy. Data
20 from the Department of Public Service shows that from 2008 to 2013, the cost of

1 power has gone down even as we incorporate more renewable energy into our
2 power supply. Swanton Wind's proposal for new in-state wind is consistent with
3 statutory energy policy and the state's trend to increase renewables through long
4 term contracts with stable rates.

5 Q11. When were rates last set under Rule 4.100 and when will they be re-set?

6 A11. The rates were set in February 2015. The Rule requires the rates to be set every
7 April. The Department of Public Service asked the Board to waive the annual
8 rate setting requirement in 2015 in light of the Board's February order, which the
9 Board did. The rates adopted in February are the only PURPA rates available in
10 Vermont until the Board acts in April 2016 to revise them or adopts a new rule.
11 Before February 2015, there were no rates available under this rule since
12 sometime in the late 1980s or early 1990s.

13 Q12. What is your understanding of a QF's right to long-term contracts at forecasted
14 avoided cost rates under PURPA?

15 A12. It is my understanding that long term sales or contracts at forecasted avoided
16 cost rates are not only allowed but required by PURPA. The Department of
17 Public Service has taken the position that this right does not exist under PURPA
18 or Rule 4.100 based on Public Service Board decisions from the late 1980s. It is
19 now 2015 and those decisions are out of date and inconsistent with recent orders

1 by the Federal Energy Regulatory Commission. Two such examples are attached
2 to my testimony (Exhibit Swanton Wind-3). My reading of these orders as a non-
3 lawyer layperson with experience in project finance and development, is that
4 QFs are entitled, per the Commission's PURPA regulations, to long term
5 contracts at forecasted avoided cost rates. As recently as early May 2015, the
6 Commission reiterated this entitlement when it explained why it was ok for a
7 California feed-in tariff to include caps on the amount of total capacity awarded
8 contracts the feed-in tariff program:

> 9 The Commission has held that, as long as a state provides
> 10 QFs the opportunity to enter into long-term legally
> 11 enforceable obligations at avoided cost rates, a state may
> 12 also have alternative programs that QFs and electric utilities
> 13 may agree to participate in.

14 In a decision issued last year, the Commission determined that a utility tariff was
15 inconsistent with PURPA because it did not include an option for certain QFs to
16 sell energy and capacity under anything but a short-term, fixed price agreement
17 or long term agreements at variable, market-based rates. The Commission also
18 found that Montana's PURPA rule was inconsistent with the Commission's
19 PURPA regulations because it required a competitive solicitation process as the
20 only way that certain QFs could secure long term avoided cost rates. Logic
21 dictates that if long term avoided cost rates were not an entitlement of QFs, then

1 the Commission would not have found Montana's PURPA rule or the utility
2 tariff to be inconsistent with PURPA and the Commission's regulations.

3 Q13. How do you respond to the suggestion that no long-term purchase power
4 agreement should be approved for execution by the Board before Swanton Wind
5 demonstrates that the project will satisfy the substantive criteria of Section
6 248(b)?

7 A13. Requiring a QF like Swanton Wind to make a showing that it meets the Section
8 248(b) criteria as a pre-condition to obtaining a long-term contract at forecasted
9 avoided cost rates is an unreasonable obstacle to Swanton Wind's rights to sell
10 power under PURPA. In my opinion, this requirement is an obstacle similar to
11 the obstacle placed by the Montana PURPA rule that the Federal Energy
12 Regulatory Commission found unreasonable and inconsistent with PURPA. As a
13 practical matter, if the Board agrees with this proposition, and forbids the Rule
14 4.100 purchasing agent from executing a long term contract before a QF
15 demonstrates that its project is eligible for a certificate of public good under
16 Section 248(b), then I predict that no independent power producer of new
17 renewable energy facilities, except those with high risk tolerance and significant
18 independent financial resources, will be able to finance projects and avail
19 themselves to the benefits of Vermont's only PURPA program. What
20 independent power developer would venture the substantial funds and effort

1 needed to perform the studies required to prepare and file a petition for a Section
2 248 certificate of public good without knowing, with a fair degree of certainty,
3 where its output will be sold and under what terms? As I explained earlier,
4 independent renewable energy projects in Vermont need PPAs in order to
5 finance their development and construction.

6 Q14. How does approving a Rule 4.100 contract before a project receives a certificate
7 of public good protect utility ratepayers from the risk of committing significant
8 up-front funds to project developers with nothing in return, as the Department of
9 Public Service has suggested?

10 A14. Allowing the purchasing agent to execute the proposed contract subject to the
11 project receiving a certificate of public good does not commit ratepayers to any
12 up-front funds or require ratepayers to underwrite the development risk. All of
13 the development and permitting risk remains on the independent power
14 producer, in this case Swanton Wind, LLC. Ratepayers are no more at risk for
15 up-front payments under Swanton Wind's proposed purchase power agreement
16 than they are under the Vermont standard offer program or any other fixed price
17 purchase power agreements, including those entered into by Vermont utilities. .

18 Ratepayers are further protected from this alleged risk by two other
19 provisions in the contract. First, the contract must be executed within 60 days of
20 a Board order authorizing the purchasing agent move forward with execution or

1 the agreement terminates. (See Exhibit Swanton Wind-2 at Section 2 (Effective
2 Date)). Second, Section 8 requires Swanton Wind to commission the project
3 within four years. Ratepayers bear no financial responsibility for the project
4 unless and until the project begins producing power, and then they are only
5 responsible for paying for the actual output their utilities receive at rates the
6 Board approved. Unlike utility-funded projects, ratepayers bear no responsibility
7 for unexpected costs incurred by independent power producers due to
8 contingencies, scope changes as a result of permit requirements, or delay.

9 Q15. How does the proposed purchase power agreement bind Swanton Wind to sell
10 its output to Vermont's electric utilities?

11 A15. Section 3 of the agreement obligates Swanton Wind to sell and deliver its output
12 to the Vermont electric utilities via the purchasing agent, and in return, the
13 utilities are bound to buy the output. The project is required to achieve
14 commissioning within 4 years.

15 Q16. Aside from the terms in the proposed purchase power agreement, how does the
16 Board know that Swanton Wind is otherwise committed to the project and
17 selling the output to Vermont's electric distribution utilities?

18 A16. First, Swanton Wind requested a long term contract from the purchasing agent
19 and paid the administrative fee required to negotiate the contract's terms months

1 ago. Second, Swanton Wind is in the ISO New England interconnection queue,
2 with position number 532, having engaged an engineer to submit a request and
3 paid a deposit for entry into the queue, and has deposited over $100,000 in the
4 ISO's account to fund its System Impact Study (SIS), which is well underway at
5 this time. Third, an investment of nearly $500,000 has been made by the owner
6 of Swanton Wind to develop the project, a sum far greater than the deposit
7 required to secure a spot in the Vermont standard offer program. Fourth,
8 Swanton Wind has already taken the first steps in the state certificate of public
9 good process by sending a forty-five day notice and holding a "meet and greet"
10 and an informational session about the project for neighbors and members of the
11 community. To move forward, Swanton Wind needs the purchase power
12 agreement with the purchasing agent to secure financing and make its case for a
13 certificate of public good under Section 248(b). A hypothetical purchase power
14 agreement is not financeable and puts the proverbial chicken before the egg in
15 terms of what Swanton Wind must show in order to obtain a certificate of public
16 good under Section 248.

17 Q17. What are Swanton Wind's other options for securing a long-term contract for
18 purposes of project financing?

19 A17. Unless a utility voluntarily agrees to take the project's output on financeable
20 terms, the only way for an independent power producer to develop new in-state

1 renewable energy projects to meet Vermont's long-term energy and capacity
2 requirements is through the mandatory purchase obligation under PURPA. The
3 standard offer program is a voluntary program for medium and small scale
4 projects. Since Rule 4.100 is the sole program implementing PURPA, Swanton
5 Wind can only enforce its PURPA rights through that program, which allows for
6 long-term contracts at forecasted avoided cost rates.

7 Q18. Why not use the ISO New England energy and capacity markets to sell Swanton
8 Wind's output?

9 A18. Smaller project projects by small independent power producers (20 MW or
10 smaller) like Swanton Wind are not able to participate in regional energy markets
11 efficiently as are Vermont utilities that maintain staff to manage these activities.
12 As mentioned previously mitigating electric price risks associated with these
13 volatile markets requires access to sophisticated financial hedging mechanisms
14 which are not available to small independent power developers. New renewable
15 energy projects like Swanton Wind require a long term, stably priced purchase
16 power agreement from a credit worthy source like provided in Rule 4.100, to
17 finance project development, procurement and construction.

18 Q19. What efforts have you made to secure a long term contract with one or more
19 electric utilities?

1 A19. Swanton Wind offered to negotiate a contract for the facility's energy and
2 capacity with Green Mountain Power (GMP), but GMP declined.

3 Q20. Why not follow up on the suggestion and explore selling the power to out-of-
4 state customers?

5 A20. Swanton Wind has offered to sell its output to the Vermont utilities via Rule
6 4.100 in order to keep the power in state for the benefit of Vermonters. Although
7 the project could fulfill the region's need for more renewable energy if it were
8 able to participate in the market on a non-discriminatory basis, the project owner
9 is a Vermonter committed to the project serving other Vermonters. We believe
10 PURPA gives Swanton Wind the right to do just that – sell to Vermont's utilities
11 so all Vermont ratepayers benefit from clean energy produced in Vermont.

12 Q21. Which electric utility would have the mandatory purchase obligation under
13 PURPA if Vermont did not implement PURPA through Rule 4.100's Vermont
14 composite system?

15 A21. Green Mountain Power because it is the interconnecting utility.

16 Q22. How many Vermont wind projects have a Rule 4.100 contract?

17 A22. To my knowledge none. Swanton Wind is the first wind project to request a
18 PURPA contract under Rule 4.100 since the rule was adopted decades ago. There

1 were no PURPA rates available for the other independent wind projects

2 developed in Vermont before Swanton Wind, such as the Sheffield Wind project.

3 Q23. Does this conclude your supplemental testimony?

4 A23. Yes, thank you.

Attachment E
Rate Schedule and Term

Swanton Wind, LLC

Governing Order:

Electricity and Other Products Related to Electric Generation delivered pursuant to this Agreement shall be priced at the rate listed below in accordance with the provisions of this Agreement Paragraph 3 "Purchase and Sale of Electricity," Paragraph 9 "Rates and Terms," and the provisions of the Vermont Public Service Board Order in Docket No. 8010 dated February 9, 2015. Terms defined in the Agreement are used herein with their defined meanings.

Rate Schedule:

VEPP Inc. will purchase the Producer's Electricity and Other Products Related to Electric Generation from the Facility described in Attachment A at the following time differentiated rates:

20 YEAR CONTRACT LEVELIZED	PEAK $/kWh	OFF-PEAK $/kWh	CAPACITY $/kW
JANUARY	$0.101	$0.075	$10.497
FEBRUARY	$0.097	$0.073	$10.497
MARCH	$0.073	$0.055	$10.497
APRIL	$0.060	$0.045	$10.497
MAY	$0.061	$0.044	$10.497
JUNE	$0.071	$0.051	$11.310
JULY	$0.090	$0.056	$11.310
AUGUST	$0.073	$0.051	$11.310
SEPTEMBER	$0.061	$0.045	$11.310
OCTOBER	$0.059	$0.044	$11.310
NOVEMBER	$0.066	$0.051	$11.310
DECEMBER	$0.084	$0.062	$11.310

On-Peak Hours are defined as all non-holiday weekdays beginning at 7:00 AM and ending at 10:59 PM. All other hours are Off-Peak Hours. Holidays are specified as: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.

Payment for Capacity will be the above monthly capacity rates multiplied by the appropriate qualified Capacity rating as recognized by the ISO-NE in its Capacity Markets.

Term of Agreement:

This Agreement shall remain in effect for a period ending twenty (20) years after the date "Electricity" is first "Delivered" to the "Distribution System."

KeyCite Yellow Flag - Negative Treatment

Distinguished by Whitehall Wind, LLC v. Montana Public Service Com'n, Mont., May 5, 2015

146 FERC P 61193 (F.E.R.C.), 2014 WL 1097409

FEDERAL ENERGY REGULATORY COMMISSION

***1** Commission Opinions, Orders and Notices

Before Commissioners: Cheryl A. LaFleur, Acting Chairman; Philip D. Moeller, John R. Norris, and Tony Clark.

Hydrodynamics Inc., Montana Marginal Energy, Inc., WINData, LLC
Hydrodynamics, Inc.
Montana Marginal Energy, Inc.
Two Dot Wind Energy, LLC
Two Dot Wind, LLC
Two Dot Wind Farm, LLC
Mo Wind, LLC
Greenfield Wind, LLC
Fairfield Wind LLC
Greenfield Wind II, LLC
Coyote Wind LLC

Docket No. EL13-73-000
Docket Nos. QF85-212-001, QF08-556-001, QF08-557-001, QF08-558-001
Docket Nos. QF08-559-001, QF08-598-001
Docket No. QF03-36-001
Docket Nos. QF03-127-001, QF04-87-001
Docket No. QF04-157-001
Docket No. QF10-668-001
Docket No. QF05-140-001
Docket No. QF11-449-002
Docket No. QF11-450-003
Docket No. QF13-425-001
Docket No. QF13-421-001

NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER

(Issued March 20, 2014)

1. On June 17, 2013, Hydrodynamics Inc. (Hydrodynamics), Montana Marginal Energy, Inc. (Montana Marginal Energy), and WINData, LLC (WINData) (collectively, Petitioners) submitted a Petition for Enforcement and Declaratory Order (Petition) pursuant to section 210(h)(2)(A) of the Public Utility Regulatory Policies Act of 1978 (PURPA) [1] requesting that the Commission take enforcement action, or, in the alternative, issue a declaratory order finding that A.R.M. § 38.5.1902(5) [2] and orders interpreting that rule issued by the Montana Public Service Commission (Montana Commission) fail to implement the rights set forth under PURPA and Commission regulations regarding legally enforceable obligations, and sales of energy and capacity between qualifying facilities (QFs) and utilities.

2. Notice is hereby given that the Commission declines to initiate an enforcement action pursuant to section 210(h)(2)(A) of PURPA. Our decision not to initiate an enforcement action means that Petitioners may bring an enforcement action against

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the Montana Commission in the appropriate court.[3] While we have chosen not to initiate an enforcement action, we find it appropriate to further comment on the matters at issue.

I. **Background**

3. Hydrodynamics states that it owns or operates four self-certified hydroelectric QFs located in Montana, totaling approximately 4.8 MW nameplate capacity.[4] Montana Marginal Energy states that it owns or has an interest in several wind-powered QFs, also totaling approximately 4.8 MW of nameplate capacity.[5] WINData is a Montana corporation owned by Martin Wilde (Wilde). Wilde is the managing member of a number of proposed QF projects including Coyote Wind, LLC (Coyote Wind), which is a proposed 80 MW wind-powered QF.[6] Petitioners state that each of the existing and planned facilities connect with, or will connect with, NorthWestern Corporation's (NorthWestern) transmission or local distribution systems.

***2** 4. Under section 292.304(d)(2) of the Commission's regulations,[7] QFs have the option either:
(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

5. In 1992, as part of its implementation of PURPA, the Montana Commission amended the Montana Rule to adopt a competitive solicitation approach for QFs with a threshold size greater than 3 MW of nameplate capacity.[8] The Montana Rule was later amended in 2007 to increase the threshold amount to 10 MW of nameplate capacity.[9]

6. Currently, under the Montana Rule, a QF larger than 10 MW can only receive a long-term contract for energy and capacity by winning a competitive solicitation. Otherwise, the Montana Rule dictates that a QF can only sell power at avoided cost rates under a short-term agreement.[10] The Montana Rule thus states:

> All purchases and sales of electric power between a utility and a qualifying facility shall be accomplished according to the terms of a written contract between the parties or in accordance with the standard tariff provisions as approved by the commission. A long-term contract for purchases and sales of energy and capacity between a utility and a qualifying facility greater than 10MW in size shall be contingent upon selection of the qualifying facility by a utility through an all-source competitive solicitation conducted in accordance with the provisions of ARM 38.5.2001 through 38.5.2012. Between competitive solicitations, purchases and sales of energy and capacity between a utility and a qualifying facility greater than 10MW in size shall be accomplished in accordance with the short-term standard avoided cost tariff approved by the commission or through negotiation of a short-term written contract. The utility shall recomputed [sic] the short-term and long-term standard tariffed avoided cost rates following public review and comment on each least cost plan filing, ARM 38.5.2001 through 38.5.2012. The recomputed avoided cost rates should reflect any amendments to the plan due to the comments of the commission and the public. If the qualifying facility is not selected, or does not participate, in the first available competitive solicitation, purchases and sales of energy and capacity shall continue only according to the terms of a newly negotiated short-term written contract or in accordance with the newly computed, short-term standard tariffed avoided cost rates. Long-

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term contracts for purchases and sales of energy and capacity between a utility and a qualifying facility 10MW or less may be accomplished according to standard tariffed rates as approved by the commission.

***3** 7. In 2006, the Montana Commission issued an order requiring NorthWestern to establish a cumulative installed capacity limit of 50 MW in its tariff applicable to QFs, Electric Tariff Schedule No. QF-1. [11] In 2010, the 50 MW installed capacity limit was eliminated for non-wind QFs, but remained for wind QFs. [12] The 50 MW installed capacity limit for wind QFs was eliminated by Montana Commission order in 2012. [13] In April 2013, however, the Montana Commission granted a stay of that order, pending appeal. Thus, presently, there is a 50 MW installed capacity limit for wind QFs, which applies to the cumulative purchases of all wind QFs greater than 100 kW but equal to or below 10 MW.

II. **Petition for Declaratory Order**

8. Petitioners challenge the Montana Commission's implementation of PURPA, stating that the Montana Rule is an unreasonable barrier to forming a legally enforceable obligation, given the Montana Commission's decisions interpreting the Montana Rule. [14] Petitioners argue that the Montana Rule requires QFs with an installed capacity greater than 10 MW to win a competitive solicitation in order to obtain long-term avoided cost rates under NorthWestern's Electric Tariff Schedule No. QF-1, and that such a QF cannot obtain a legally enforceable obligation because NorthWestern does not hold competitive solicitations. Petitioners argue that, because only one all-source competitive solicitation has occurred since 2002, and no rule prescribes that such solicitations must occur, the Montana Rule effectively eliminates a QF's right to obtain a legally enforceable obligation under 18 C.F.R. § 292.304(a), even through other means such as negotiation. [15] Additionally, according to Petitioners, the all-source competitive solicitation discriminates against QFs because only QFs greater than 10 MW are subject to the requirement of winning a competitive solicitation. Moreover, Petitioners claim that NorthWestern routinely acquires generation outside of all-source competitive solicitations. [16]

9. Petitioners argue that the 50 MW installed capacity limit on wind QFs 10 MW or smaller essentially removes any path for a wind QF to obtain a long-term avoided cost rate, unless the QF is 100 kW or smaller. [17] According to Petitioners, NorthWestern has signaled that it will not be purchasing any QF wind generation over 100 kW because it has already acquired 50 MW of wind QF generation. [18]

10. Petitioners state that the 50 MW installed capacity limit on wind, in conjunction with the Montana Rule, frustrates PURPA's goal of promoting the development of QFs. Petitioners state that the "[Montana Commission's] actions, taken together have completely and utterly chilled QF development in Montana and effectively permitted NorthWestern to block entry to any new QFs in Montana with an installed capacity larger than 10 MW and any wind QFs with an installed capacity greater than 100 kW." [19] Petitioners state that the "as available," short-term rate does not permit a QF or its investors to obtain the financing that would be available with forecasted avoided cost pricing. [20]

***4** 11. Petitioners request that the Commission pursue enforcement action against the Montana Commission under section 210(h) of PURPA because the Montana Rule, the 50 MW installed capacity limit on wind, and a Montana Commission decision interpreting these rules fail to implement PURPA. [21] In the alternative, Petitioners request that the Commission issue a declaratory order explaining that the Montana Commission's implementation of PURPA is improper and inconsistent with the Commission's regulations. [22]

A. **Notice of Filing and Responsive Pleadings**

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12. Notice of the Petition was published in the *Federal Register*, 78 Fed. Reg. 38,028 (2013), with interventions and protests due on or before July 8, 2013, later extended to July 19, 2013. The Montana Commission filed a notice of intervention, an answer and a motion to dismiss. Timely motions to intervene and protests were filed by the Montana Consumer Counsel, Edison Electric Institute (EEI), National Association of Regulatory Utility Commissioners (NARUC), and NorthWestern. Petitioners filed an answer to the protests on August 9, 2013.

1. **Montana Commission's Answer**

13. The Montana Commission states that, in Montana, QFs of any size can obtain a legally enforceable obligation by winning a competitive solicitation or negotiating with a utility. [23] The Montana Commission argues that its implementation of PURPA is not to blame for failed attempts by QFs over 10 MW to obtain long-term contracts. [24]

14. The Montana Commission describes NorthWestern's Electric Tariff Schedule No. QF-1 filed with the Montana Commission. [25] The Montana Commission explains that NorthWestern offers long-term contracts ranging from 19 months to 25 years under Option 1(c) to wind QFs 10 MW and under, subject to a 50 MW installed capacity limit for QFs over 100 kW. The Montana Commission explains that QFs under 10 MW may also seek long-term, energy-only contracts up to 25 years under Option 2(a) or Option 2(b). Finally, the Montana Commission states that QFs, whether over or under 10 MW, may request short-term contracts under Option 1(b), Option 2(a), and Option 2(b). [26]

15. The Montana Commission argues that the Montana Rule does not violate PURPA because the Commission has specifically supported competitive solicitations. The Montana Commission points to language in a Commission notice of proposed rulemaking that stated:

> The purpose of this proposed rule is to permit bidding programs that would accurately establish utilities' avoided cost. To accomplish this goal, the Commission proposes to amend its current regulations to establish conditions and to provide specific guidance to the state regulatory authorities and nonregulated electric utilities on the use of bidding programs to set avoided costs. This proposed rule sanctions the use of bidding as a procedure for purchasing electricity from QFs. [27]

***5** The Montana Commission cites the many benefits of competitive bidding, including an increased likelihood the utility will select the least cost option for meeting future electricity demand, flexibility and responsiveness to changing market conditions, and better matching of a utility's capacity additions and capacity needs. [28]

16. The Montana Commission argues that the infrequency with which competitive solicitations are held does not violate PURPA. [29] The Montana Commission cites Commission precedent that states that “there is no obligation under PURPA for a utility to pay for capacity that would displace its existing capacity arrangements.” [30]

17. The Montana Commission argues further that competitive bidding processes exist in other states such as Maine, Colorado, and Pennsylvania, pointing out that a lack of QF success, or increased difficulty in gaining long-term contracts, does not mean competitive bidding violates PURPA. [31] The Montana Commission also argues that there is no requirement under PURPA that all of a utility's procurement must occur through competitive solicitations. [32]

18. Lastly, the Montana Commission states that the 50 MW installed capacity limit is lawful, arguing that the Montana Commission has the right to eliminate the standard rates for purchases from QFs over 100 kW. [33] The Montana Commission claims that the 50 MW installed capacity limit applied to wind QFs is not discriminatory because wind resources are not similarly situated to other generators and need not be treated alike in all respects. [34]

2. **NorthWestern Protest**

19. NorthWestern first challenges whether Petitioners have standing to complain that the Montana Commission's rules and decisions violate PURPA.[35] NorthWestern argues that Petitioners are not aggrieved by the Montana Rule because that rule applies only to QFs larger than 10 MW, and Petitioners are therefore not subject to the rule. NorthWestern states that, although the proposed 80 MW Coyote Wind QF would be subject to the rule, Coyote Wind has not taken the steps required to obtain a legally enforceable obligation at a long-term avoided cost rate. Thus, NorthWestern states that WINData, which has proposed building Coyote Wind, is not suffering harm and cannot reasonably expect to suffer harm from the competitive bidding requirement; therefore, the Commission should not entertain the Petition.

20. With respect to the 50 MW installed capacity limit, NorthWestern argues that this limit does not alter NorthWestern's duty to purchase all energy from wind QFs under PURPA, and that NorthWestern is committed to fulfilling this duty.[36] NorthWestern contends that the 50 MW installed capacity limit only affects the rates that a wind QF would be entitled to receive, and that a wind QF would not be able to receive a long-term forecast rate under Option 1(c). Thus, NorthWestern states that wind QFs subject to the 50 MW installed capacity limit would still be paid a fixed or market-based energy price, but would not receive compensation for capacity. NorthWestern states that these practices are supported by Commission precedent in *Ketchikan*.[37]

***6** 21. NorthWestern also argues that the Commission approved the use of competitive bidding for QFs in *Southern California Edison Company*.[38] Furthermore, NorthWestern states that Petitioner's assertions that NorthWestern "routinely acquires resources outside of the competitive solicitation process" is inaccurate because, with limited exceptions, all long-term term commitments of seven years or more have been through the competitive solicitation set forth in the Montana Rule. Thus, NorthWestern argues that Petitioners are not deprived of any opportunities to obtain a long-term future avoided cost rate.[39]

3. **Montana Consumer Counsel's Protest**

22. Montana Consumer Counsel argues that, since it is for the states to determine what particular capacity is being avoided, the Montana Rule does not fail to implement PURPA.[40] Montana Consumer Counsel further argues that any cause of action relating to the Montana Rule arose over twenty years ago when the rule was placed into effect in 1992, and that the Petition should therefore be dismissed on limitation grounds. With respect to Petitioners' characterization of the Montana Commission's order involving Whitehall Wind,[41] Montana Consumer Counsel argues that other obstacles existed for Whitehall Wind that would have prevented a legally enforceable obligation, beyond the competitive solicitation process, including "site control, firm contract terms, and any economic or other analysis of the feasibility of its proposed project."[42] With respect to the stay of Order No. 7199d pending appeal, Montana Consumer Counsel argues that the Commission's role under PURPA is not to review the exercise of procedural discretion by a regulatory commission in a specific case.[43] Montana Consumer Counsel finally argues that sovereign immunity precludes federal administrative agencies of jurisdiction over claims against states and their agencies.[44]

4. **EEI's Protest**

23. EEI argues that the primary responsibility for implementation of PURPA falls to the states and that the Commission should continue its policy of giving states wide latitude in implementing PURPA.[45] EEI opines that competitive bidding is a valuable method of determining avoided cost and states that the Commission has a history of supporting competitive bidding.[46] EEI stresses the importance of avoided cost, explaining that QF rates that exceed avoided cost will, by definition, harm consumers. EEI states that, while bidding is not the only way to determine avoided cost in compliance with PURPA, it is reasonable and appropriate.[47]

5. **NARUC's Protest**

24. NARUC stresses that the Commission has previously acknowledged the efficiencies of determining avoided cost through competitive bidding.[48] NARUC explains that the frequency of competitive solicitations reflects the demand for future capacity. NARUC adds that in the absence of such solicitations, a zero capacity price is appropriately reflected in the short-term rates available to QFs over 10 MW.[49] NARUC also claims that the competitive solicitation process does not interfere with the possibility for negotiated agreements between utilities and QFs outside of the process.[50] Moreover, NARUC points out that a QF can initiate a proceeding against the utility before the Montana Commission where it could show irregularities in the utility's resource procurement process that discriminate against QFs.[51]

6. **Petitioners' Answer**

***7** 25. Petitioners respond that QFs are currently being harmed, pointing out that WINData has multiple proposed projects that are subject to the 50 MW installed capacity limit.[52] Petitioners claim that NorthWestern uses the 50 MW installed capacity limit as leverage to extract contract concessions from QFs.[53] Petitioners claim that, in December, 2012, the Montana Commission concluded that NorthWestern needed wind capacity and that "wind capacity was worth five percent capacity value of the surrogate avoided resource."[54] Petitioners argue that NorthWestern overstated the amount of QF power in its portfolio in its protest.[55] Petitioners contend that, despite its decision in Order 6444e, the Montana Commission is not taking the position that QFs in excess of the standard offer threshold of 100 kW may obtain a LEO outside of the competitive solicitation process.[56] Petitioners also argue that the Montana Commission's reliance on *Bidding NOPR*, in which the Commission proposed a competitive solicitation method for implementing PURPA, is questionable, contending that the proposed rule is vastly different from the Montana Rule and also point out that it was withdrawn and never adopted by the Commission.[57]

B. **Discussion**

1. **Procedural Matters**

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention and timely, unopposed interventions serve to make the entities that filed them parties to this proceeding.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Petitioners' answer because it has provided information that assisted us in our decision-making process.

2. **Commission Determination**

28. Section 210(h)(2)(B) of PURPA[58] permits any electric utility, qualifying cogenerator, or qualifying small power producer to petition the Commission to act under section 210(h)(2)(A) of PURPA[59] to enforce the requirement that a state commission implement this Commission's regulations. As the Commission stated in its 1983 Policy Statement,[60] we have discretion in choosing whether to exercise that enforcement authority under section 210(h)(2)(A) of PURPA. We may choose to exercise our enforcement authority, or, where the Commission refuses to bring an enforcement action within 60 days of the filing of a petition, under section 210(h)(2)(B) of PURPA, the petitioner may bring its own enforcement action directly against the state regulatory authority or non-regulated electric utility in the appropriate United States district court.[61]

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***8** 29. The Commission also can and sometimes does issue a declaratory order in response to an enforcement petition. [62] That declaratory order, issued separate from the Commission's authority under PURPA's section 210(h) enforcement regime, is within the Commission's discretion to issue an order "to remove uncertainty." [63] A notice of intent not to act and an accompanying declaratory order represent both the Commission's exercise of its discretion on such an enforcement action, as well as a statement of the Commission's position on the matter. The statement of position by the Commission, in a case where, as here, the Commission decides not to go to court on behalf of petitioners can provide assistance to a court on the Commission's thinking in the event that the petitioners decide to bring enforcement cases. [64]

30. In this order, we give notice that we do not intend to go to court to enforce PURPA on behalf of Petitioners; Petitioners thus may bring their own enforcement action against the Montana Commission in the appropriate United States district court. Notwithstanding our decision not to go to court to enforce PURPA on behalf of Petitioners, we elect to also issue a declaratory order finding that the 50 MW installed capacity limit and the Montana Rule are inconsistent with PURPA and the Commission's regulations under PURPA.

31. The Commission's regulations require that a utility purchase any energy and capacity made available by a QF. [65] 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. [66] 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 the qualifying facility." [67] 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 a 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.**34** Accordingly, 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. [68]

***9** 32. In *Grouse Creek*, the Commission found that 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." [69] Similarly, we find that requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract imposes an unreasonable obstacle to obtaining a legally enforceable obligation particularly where, as here, such competitive solicitations are not regularly held. [70]

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. [71]

34. Lastly, we find that the 50 MW installed capacity limit applicable to purchases from wind QFs larger than 100 kW but equal to or below 10 MW is inconsistent with PURPA and the Commission's regulations. NorthWestern acknowledges that it must purchase all energy from wind QFs, stating that the 50 MW installed capacity limit affects only the rates that certain wind QFs may receive. But, if the 50 MW installed capacity limit is met, wind QFs larger than 100 kW but equal to or below 10 MW

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are precluded from selling under Option 1(c), leaving these QFs with three options under Electric Tariff Schedule No. QF-1: Options 1(b), 2(a), and 2(b). [72] Option 1(b) is a fixed-price, short-term, energy-only agreement of up to 18 months. Options 2(a) and 2(b) are agreements up to 25 years but with only variable, market based rates. Thus, when the 50 MW installed capacity limit is reached, wind QFs larger than 100 kW but equal to or below 10 MW cannot obtain forecasted avoided cost rates, which is inconsistent with the Commission's regulations, which entitle a QF with a legally enforceable obligation to rates that, at the QF's option, are forecasted avoided cost rates. [73] Also, once reached, the 50 MW installed capacity limit effectively precludes wind QFs greater than 100 kW but equal to or below 10 MW from receiving compensation for capacity.

***10** 35. NorthWestern argues that the 50 MW installed capacity limit is supported by the Commission's decision in *Ketchikan*, which stated that “an avoided cost rate need not include capacity unless the QF purchase will permit the purchasing utility to avoid building or buying future capacity.” [74] In *Ketchikan*, however, the Commission explained that avoided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero. Applying *Ketchikan* to the case at hand, the installed capacity limit should represent the point at which NorthWestern's demand for capacity equals zero. However, neither the Montana Commission nor NorthWestern has established that a 50 MW installed capacity limit has any clear relationship to NorthWestern's actual demand for capacity, therefore the *Ketchikan* rationale does not apply. For the foregoing reasons, we find that the 50 MW installed capacity limit is inconsistent with PURPA's goal of promoting QF development and fails to implement the Commission's regulations requiring an electric utility to purchase any capacity which is made available from a QF, and at a rate that, at the QF's option, is a forecasted avoided cost rate.

36. In conclusion, we find that the Montana Rule and the 50 MW installed capacity limit are inconsistent with PURPA and the Commission's PURPA regulations.

The Commission orders:

(A) Notice is hereby given that the Commission declines to initiate an enforcement action under section 210(h)(2)(A) of PURPA.

(B) The Commission hereby finds that the Montana Rule and the 50 MW installed capacity limit are inconsistent with PURPA and the Commission's PURPA regulations, as discussed in the body of this order.

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.
Deputy Secretary

Footnotes

1 16 U.S.C. § 824a-3(h)(2)(A) (2012).

2 Administrative Rule of Montana § 38.5.1902(5) (2007) (Montana Rule).

3 16 U.S.C. § 824a-3(h)(2)(B) (2012).

4 Petition at 12. The four Hydrodynamics QF projects in Montana are South Dry Creek, Lower South Fork, Strawberry Creek, and Flint Creek.

5 Petition at 13. Montana Marginal Energy is in the process of developing the following projects: Two Dot Wind Farm, LLC, Greenfield Wind, LLC, and Fairfield Wind, LLC.

6 Petition at 14. In addition to Coyote Wind, Wilde is the managing member of Greenfield Wind, LLC, and Greenfield Wind II, LLC.

7 18 C.F.R. § 292.304(d)(2)(2013).

8 Montana Commission Answer at 6.

9 Petition at 17-18 & n.54.

10 Montana Commission Answer at 6.

11 *In the Matter of NorthWestern Energy*, Consolidated Docket Nos. D2003.7.86, D2004.6.96, D2005.6.103 (Montana Commission December 19, 2006) (Order No. 6501f) at P 193) *order on reconsideration*, (Montana Commission June 7, 2007) (Order No. 6501g) (finding that "the long-term, standard rate options must be available to QFs 10 MW or less," and establishing "a 50 MW installed capacity limit on new QFs entering contracts under the long-term standard rate options."). The Montana Commission further stated that once the 50 MW installed capacity limit is reached, it would consider whether to review its QF policies.

12 Petition at 17 (citing *In the Matter of NorthWestern Energy's Application for Approval of Avoided Cost Tariff for New Qualifying Facilities*, Docket No. D2008.12.146 (Montana Commission May 6, 2010) (Order No. 6973d) at P 150) (finding that "[t]he 50 MW installed capacity limit will remain for wind QFs in order to mitigate ratepayer risks related to uncertainty regarding actual wind resource costs, CO2 costs and wind integration costs.").

13 *Id.* (citing *In the Matter of the NorthWestern Energy's Application for Approval of Avoided Cost Tariff for New Qualifying Facilities*, Docket No. D2012.1.3 at P 75 (Montana Commission December 7, 2012) (Order No. 7199d)) (stating that "[t]he main purpose of the 50 MW installed capacity limit has been to balance the inherent uncertainty in determining long-term avoided costs, including integration costs, with the goal of encouraging long-term contracts based on avoided cost," and concluding that, while the impact of wind development on NorthWestern's need for integration services presented an unknown risk of higher costs, particularly when NorthWestern relied on other utilities to provide integration service, a 2011 Montana Wind Integration Study and the NorthWestern's construction of the Dave Gates Generating Station with 105 MW of regulating capability "reduced these risks enough for a reasonable balancing of customer and QF interests without an on-going installed capacity limit.").

14 Whitehall Wind had petitioned the Montana Commission for relief after NorthWestern refused to negotiate a long-term power purchase contract with Whitehall Wind. In response, the Montana Commission held that Whitehall Wind was only entitled to a short-term avoided cost rate because it had not won a competitive solicitation. It also found that Whitehall Wind had failed to make an "unconditional commitment" to sell its energy and capacity to NorthWestern and therefore had not incurred a legally enforceable obligation, stating that "the touchstone of a legally enforceable obligation or LEO is an absolute, unconditional commitment to deliver energy, capacity, or energy and capacity at a future date." The Montana Commission went on: "[t]o establish an LEO, a QF must tender an executed power purchase agreement to the utility ... and an executed interconnection agreement. The executed contract demonstrates an unconditional commitment." *In the Matter of the Petition of Whitehall Wind, LLC, for QF Rate Determination*, Docket No. D2002.8.100 (Montana Commission June 4, 2010) (Order No. 6444e).

15 Petition at 20, 25.

16 *Id.* at 19, 27.

17 *Id.* at 28.

18 *Id.* at 28-29.

19 *Id.* at 29-30.

20 *Id.* at 3.

21 *Id.* at 3, 7, 18.

22 *Id.* at 33.

23 Montana Commission Answer at 2.

24 *Id.*

25 Electric Tariff Schedule No. QF-1 provides the rate options available to QFs for sales to NorthWestern.
FN*tion 1(a)* is a long-term power purchase agreement available to non-wind QFs greater than 10 MW; it provides fixed, forecasted avoided cost rates for sales of energy and capacity. *Option 1(b)* is a fixed-rate, energy-only short-term power purchase agreement available to all QFs. *Option 1(c)* is a long-term power purchase agreement available only to wind QFs 10 MW or less; it provides fixed, forecasted avoided cost rates for sales of energy and capacity.
FN*tions 2(a) and 2(b)* are energy-only power purchase agreements up to 25 years with variable, market-based rates. The rate for Option 2(a), updated monthly, is based on NorthWestern's highest actual cost of 25 MWh purchases in the Mid-Columbia market in each hour. The rate for Option 2(b) is updated daily, and is based on the published Intercontinental Exchange Mid-Columbia index price for heavy load hours and light load hours.

26 *Id.* at 6-7 (citing NorthWestern's Electric Tariff Schedule No. QF-1).

27 *Id.* at 15 (citing *Regulations Governing Bidding Programs*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,455 (1988) (*Bidding NOPR*)).

28 *Id.*

29 *Id.* at 17.

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30 *Id.* (citing *City of Ketchikan, Alaska*, 94 FERC ¶ 61,293, at 62,061 (2001) (*Ketchikan*)).

31 Montana Commission Answer at 19-22.

32 *Id.* at 23.

33 *Id.* at 31.

34 *Id.* at 31-32.

35 NorthWestern Protest at 7.

36 *Id.* at 14.

37 "A qualifying facility may seek to have a utility purchase more energy or capacity than the utility requires to meet its total system load. In such a case, while the utility is legally obligated to purchase any energy or capacity provided by a qualifying facility, the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load." *Id.* at 15 (citing *Ketchikan*, 94 FERC ¶ 61,293 at 62,062).

38 *Id.* at 17 (citing *Southern California Edison Co*., 70 FERC ¶ 61,215, at 61,677 (1995)).

39 *Id.* at 20-21.

40 Montana Consumer Counsel Protest at 10.

41 *In the Matter of the Petition of Whitehall Wind, LLC, for QF Rate Determination*, Docket No. D2002.8.100 (Montana Commission June 4, 2010) (Order No. 6444e).

42 Montana Consumer Counsel Protest at 12.

43 *Id.* at 13.

44 *Id.* at 11-14.

45 EEI Protest at 4-5.

46 *Id.* at 6-9.

47 *Id.* at 9.

48 NARUC Protest at 4.

49 *Id.* at 5.

50 *Id.* at 4.

51 *Id.* at 5.

52 Petitioners Answer at 9-10.

53 *Id.* at 26.

54 *Id.* at 29-30 (citing Order 7199d).

55 *Id.* at 35.

56 *Id.* at 41-42.

57 *Id.* at 50.

58 16 U.S.C. § 824a-3(h)(2)(B) (2012).

59 *Id.* § 824a-3(h)(2)(A).

60 *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at 61,645 (1983) (1983 Policy Statement).

61 In those circumstances where the Commission refuses to act, the Commission may intervene as of right in an enforcement action brought by such a petitioner. 16 U.S.C. § 824a-3(2)(B) (2012).

62 *See, e.g*., *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012); *Morgantown Energy Associates*, 139 FERC ¶ 61,066 (2012), *denying reconsideration*, 140 FERC ¶ 61,223 (2012); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011) (*Cedar Creek*); *Southern California Edison Co*., 70 FERC ¶ 61,215, *order on reconsideration*, 71 FERC ¶ 61,269 (1995).

63 *See* 5 U.S.C. § 554(e) (2012); 18 C.F.R. § 385.207(a)(2) (2013).

64 *Industrial Cogenerators v. FERC*, 47 F.3d 1231, 1234-35 (D.C. Cir. 1995) (comparing a declaratory order to "a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action; the only difference is that the Commission itself formally used the document as its own statement of position"); *see also Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997).

65 18 C.F.R. § 292.303(a) (2013).

66 18 C.F.R. § 292.304(d) (2013).

67 *Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part & vacated*

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in part sub nom. Am. Elec. Power Serv. Corp. v. FERC, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp*., 461 U.S. 402 (1983).

68 *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P 25 (2009) (internal footnotes omitted) (citing *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 212 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250, at PP 136-137 (2007), *aff'd sub nom. Am. Forest and Paper Ass'n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008)); *accord, Cedar Creek*, 137 FERC ¶ 61,006, at P 32 (2011).

69 *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, at P 40 (2013) (*Grouse Creek)*.

70 Although the Montana Commission contends that its competitive solicitation requirement "is not contrary to PURPA for the simple reason that the Commission would not have proposed such an approach itself in its *Bidding NOPR* were it contrary to PURPA," *see* Montana Commission Answer at 14, the *Bidding NOPR's* proposed competitive solicitation methods and requirements were never adopted by the Commission in that rulemaking proceeding, and thus have no relevance here. *See Regulations Governing Bidding Programs*, 64 FERC ¶ 61,364 (1993).

Additionally, even if for the sake of argument the *Bidding NOPR* was considered relevant (and, as just noted, we believe that it is not), beyond noting that the *Bidding NOPR* proposed using competitive solicitations, the Montana Commission does not set forth how the specifics of its process align with the specifics of the proposal made in the *Bidding NOPR*, including, for example, 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 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.

FN*e Bidding NOPR*, FERC Stats. & Regs. ¶ 32,455 at 32,030-42. We also note that the *Bidding NOPR* proposed consideration of a 1 MW or below exemption from bidding requirements (while still allowing such QFs capacity payments). *Id.* at 32,043.

71 See 16 U.S.C, § 824a-3(a) (2012).

72 Montana Commission Answer at 7.

73 18 C.F.R. § 292.304(d)(2) (2013) (providing that rates, at the QF's option, can be based on "[t]he avoided costs calculated at the time the obligation is incurred.").

74 *Ketchikan*, 94 FERC at 62,062.

146 FERC P 61193 (F.E.R.C.), 2014 WL 1097409

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FEDERAL ENERGY REGULATORY COMMISSION
***1** Commission Opinions, Orders and Notices

Winding Creek Solar LLC

Docket Nos. EL15-52-000, QF13-403-002
NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER
(Issued May 8, 2015)

1. On March 9, 2015, Winding Creek Solar LLC (Winding Creek) filed a petition for enforcement against the California Public Utilities Commission (California Commission) pursuant to section 210(h)(2)(B) of the Public Utility Regulatory Policies Act of 1978 (PURPA). [1] Winding Creek petitions the Commission to initiate an enforcement action against the California Commission to remedy part of the California Commission's feed-in tariff program, called the Renewable Market Adjusting Tariff (Re-MAT), which Winding Creek alleges is inconsistent with PURPA.

2. Notice is hereby given that the Commission declines to initiate an enforcement action pursuant to section 210(h)(2)(A) of PURPA. [2] Our decision not to initiate an enforcement action means that Winding Creek may itself bring an enforcement action against the California Commission in the appropriate court. [3] We issue a declaratory ruling below, however.

3. Winding Creek [4] alleges that the Re-MAT program, a feed-in tariff program for eligible renewable energy generation sources with a generation capacity of 3 MW or less, [5] violates PURPA by imposing a 750 MW statewide cap on the obligation of utilities under section 292.304(d)(2)(ii) of the Commission's regulations [6] to provide qualifying facilities (QFs) a long-term avoided cost rate.

4. Winding Creek states that it previously filed a petition for enforcement pursuant to section 210(h) of PURPA in Docket No. EL13-71-000 arguing that the Re-MAT program violated PURPA and the Federal Power Act because it fixed the wholesale price for the purchase of power from a QF at a price that has not been determined to be the utility's full long-term avoided costs, and created a rule that eliminates a QF's ability to seek a long-term avoided cost pursuant to section 292.304(d)(2)(ii), except through the Re-MAT program. In *Winding Creek*, the Commission issued a Notice of Intent Not to Act and did not initiate an enforcement action with respect to the Re-MAT program. [7]

5. Winding Creek now argues that more recently the Commission declared that caps, such as caps imposed by the Re-MAT program, are unlawful and violate a QF's right under PURPA to sell energy and/or capacity at forecasted long-term avoided cost rates. [8] In the event that the Commission decides not to initiate an enforcement action, Winding Creek requests that the Commission issue a declaratory order stating that the caps imposed by Re-MAT are inconsistent with PURPA and the Commission's regulations.

***2** 6. In California, QFs 20 MW and smaller, including Winding Creek, may sell their net capacity to their host utility under a long-term PURPA contract at an avoided cost rate, containing both an energy and capacity component, pursuant to California's Standard Contract for QFs 20 MW or Under. [9] The Re-MAT program is a feed-in tariff program that is an alternative to California's standard PURPA avoided cost rate program. The Commission has held that, as long as a state provides QFs the opportunity to enter into long-term legally enforceable obligations at avoided cost rates, a state may also have alternative programs that QFs and electric utilities may agree to participate in; such alternative programs may limit how many QFs, or the total capacity of QFs, that may participate in the program. [10]

7. The Re-MAT program is such an alternative program. The Re-MAT program in California differs from *Hydrodynamics*, where the Commission ruled that an absolute cap of 50 MW on a utility's obligation to make PURPA purchases was inconsistent with PURPA, because once a utility had contracted for 50 MW of purchases from QFs, there were no other means to obtain a PURPA long-term avoided cost legally-enforceable obligation. Here, in contrast, Winding Creek and other QFs 20 MW and under may obtain a PURPA long-term, avoided cost legally-enforceable obligation to sell their net capacity to their host utility pursuant to California's Standard Contract for QFs 20 MW or Under. Given the availability of California's Standard Contract for QFs 20 MW or Under, Winding Creek has not demonstrated that the California Commission's implementation of PURPA, specifically the 750 MW statewide cap on the obligation of utilities under the Re-MAT program, is inconsistent with PURPA and our regulations.

By direction of the Commission.

Nathaniel J. Davis, Sr.
Deputy Secretary

Footnotes

1 16 U.S.C. § 824a-3(h)(2)(B) (2012).

2 16 U.S.C. § 824a-3(h)(2)(A) (2012).

3 16 U.S.C. § 824a-3(h)(2)(B) (2012).

4 Winding Creek's planned facility is an as-yet unbuilt 1 MW solar facility in Lodi, California, in the service territory of Pacific Gas and Electric Company.

5 The Re-MAT feed-in tariff program is part of California's Renewables Portfolio Standard Program that requires 33 percent of utility procurement be from eligible renewable energy resources by December 31, 2020.

6 18 C.F.R. § 292.304(d)(2)(ii) (2014).

7 *Winding Creek Solar LLC*, 144 FERC ¶ 61,122 (2013) (*Winding Creek*).

8 *Hydrodynamics, Inc*., 146 FERC ¶ 61,193 (2014) (*Hydrodynamics*).

9 *See* California Commission Decision D.10-12-035, pp. 14-15, 44-45, and the standard offer contract for QFs of 20 MW or less (Exhibit 6 to Attachment A to D.10-12-035). The energy component of the avoided-cost rate is based on a short-run formula while the capacity component is a forecast avoided cost which may escalate over time, but will not drop.

10 *Otter Creek Solar, LLC*, 143 FERC ¶ 61,282, at P 4 (2013), *reconsid. denied*, 146 FERC ¶ 61,192 (2014).

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