

Michael J. Uda
Anna M. Kecskés
Colson R. Williams
Lowell J. Chandler
UDA LAW FIRM, P.C.
3130 Saddle Drive, Suite 5
Helena, MT 59601
Telephone: (406) 457-5311
Email: michaeluda@udalaw.com

Counsel for QF Developers

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

IN THE MATTER of NorthWestern Energy's Petition for Rulemaking to Incorporate FERC's Rule Allowing Variable Cost of Energy Rates under PURPA	REGULATORY DIVISION DOCKET NO. 2021.09.118
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INFORMAL COMMENTS OF QF DEVELOPERS

Broad Reach Power, LLC, Clēnera, LLC, and Consolidated Edison Development, Inc., (“QF Developers”) submit these informal comments pursuant to the Montana Public Service Commission’s (“Commission”) Procedural Order No. 7819. Each of the QF Developers are developers of qualifying facilities (“QFs”) pursuant to the Public Utility Regulatory Policies Act (“PURPA”), 16 U.S.C. § 824a-3, and either currently operate projects and/or seek to develop additional QF projects in the state of Montana. QF Developers oppose NorthWestern Energy’s (“NorthWestern”) Petition for Rulemaking to Incorporate the Federal Energy Regulatory Commission’s (“FERC”) New Rules and to Amend Administrative Rules of Montana 38.5.1902, 1903, and 1905 to Require Variable Avoided Cost of Energy Rates under PURPA (“Petition”).

As highlighted below,¹ NorthWestern’s Petition lacks statutory authority under Montana and federal law, and, given the pending federal appeal of FERC Order No. 872 which calls the staying power of Order No. 872 into question, proceeding with this rulemaking Petition could be a waste of the state’s and interested party’s resources. Moreover, as Vice Chairman Johnson alluded to in the November 16 Work Session during the travel update, per his discussion with Commissioner Christie of FERC, FERC might soon reevaluate its decisions in Order No. 872 which provides further reasoning for denial of NorthWestern’s Petition.² For the below reasons, QF Developers respectfully request that the Commission deny NorthWestern’s rulemaking Petition. Regardless, QF Developers underline the importance of the Commission complying with the Montana Administrative Procedure Act’s (“MAPA”) rulemaking requirements prior to finalizing or adopting any rule changes.

BACKGROUND

On December 31, 2020, FERC amended some of its rules implementing PURPA. *See* Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978, Docket Nos. RM19-15-000 and AD16-16-000, Order No. 872, 85 Fed. Reg. 54638-01 (Sept. 2, 2020), 172 FERC ¶ 61041, 2020 WL 4037003 (July 16, 2020) (Final Rule); Docket Nos. R19-15-001 and AD16-16-001, Order No. 872-A, 85 Fed. Reg. 86656-01 (Dec. 30, 2020), 173 FERC ¶ 61158, 2020 WL 6822653 (Nov. 19, 2020) (Order on Rehearing) (hereafter “Order No. 872”). Multiple parties have since filed petitions for judicial review of Order No. 872, which are currently pending in a consolidated matter in the

¹ QF Developers submit these brief informal comments with the expectation and understanding that there will be another opportunity to submit formal comments in the event this rulemaking proceeding moves forward.

² November 16, 2021 MT PSC Business Meeting, Minute 38:50 to 40:05, <https://youtu.be/RZK8eKMuevY?t=2333> (discussing a “a stated intention of some [FERC] Commissioners to revise those PURPA rules”).

Ninth Circuit, *see* Ninth Cir. Case Nos. 20-72788, 20-73375, 21-70083, and 21-70113 (consolidated). Despite pending litigation that is directly challenging the issues presented by NorthWestern in its Petition, on September 24, 2021, NorthWestern filed its Petition with the Commission.³ On November 22, 2021, the Commission issued a Notice of Opportunity for Informal Comment (“Notice”) requesting interested parties submit informal comments on NorthWestern’s Petition by December 14, 2021. Upon motion for extension from the QF Developers’ counsel, the Commission issued Procedural Order No. 7819, which extended the deadline for interested parties to submit informal comments by December 23, 2021.

INFORMAL COMMENTS

I. NorthWestern’s Petition Would Violate Montana Statutory Requirements that Mandate QFs Receive Avoided Costs at a Fixed Rate Over a Long-Term Contract.

NorthWestern’s Petition to upend fixed avoided cost of energy payments lacks statutory authority under Montana law. *See MTSUN, LLC v. Mont. Dep’t of Pub. Serv. Regulation*, 2020 MT 238, ¶ 70, 401 Mont. 324, 354, 472 P.3d 1154 (reiterating that the Commission only has powers specifically conferred by the legislature). If granted, the result of its Petition will fundamentally upend and change how Montana QFs are compensated pursuant to their existing rights enshrined in the federal law PURPA, 16 U.S.C. 824a-3, and Montana’s “mini-PURPA,” § 69-3-601, et seq., MCA. While FERC in Order No. 872 eliminated the fixed-price contract requirement, FERC’s decision does not have the effect of upending Montana law. Under Montana statute, QFs have a right to receive a fixed avoided cost of energy over the life of the contract. *See* § 69-3-604, MCA. Specifically, Montana statute mandates that the “commission shall set these rates using the avoided cost over the term of the contract.” Section 69-3-604(4),

³ QF Developers acknowledge that Order 872 has not been stayed (to their knowledge) as a result of the pending litigation; however, they note that regardless of that fact, proceeding with this rulemaking could very well result in an imprudent use of state resources when Order 872 is altered or reversed during the appeal process.

MCA (emphases added). Montana law does not permit NorthWestern’s request to bifurcate avoided cost of energy and capacity into two separate categories or types of payments with one being at the time of delivery and one being fixed over the life of the contract. If the avoided cost of energy is calculated at the time of delivery, there is no “set[ting]” of the rates over the life of the contract since a major aspect of a QF’s contract price would be unknown and variable at the time of PPA execution or incurring a legally enforceable obligation (“LEO”). Moreover, § 69-3-604(2), MCA’s requirement that QFs receive long-term contracts so as to “enhance the economic feasibility” of QF development would not be met if a major aspect of a QF’s financing picture (avoided cost of energy) is a variable rate that is unknown at the outset of development of the project. Developers need certainty regarding return on investment, an as available/at the time of delivery rate fails to meet that need and the statutory requirements that aim to enhance QF development. *See Vote Solar v. Mont. PSC*, 2020 MT 213A, ¶ 70 (explaining QFs’ right to certainty regarding return on investment at the outset of development and comparing treatment that NorthWestern’s own resources receive which is a guaranteed cost recovery or rate of return). For this reason alone, QF Developers respectfully request that the Commission deny NorthWestern’s Petition for Rulemaking.

II. NorthWestern’s Petition Would Violate PURPA Since NorthWestern Is a Vertically-Integrated Utility and Must Treat QFs In A Non-Discriminatory Manner.

PURPA’s mandate is clear: QFs must not be discriminated against compared to the treatment of other generators on a given utility’s system in calculating the rates for purchases. 16 U.S.C. 824a-3(b)(2). As the current FERC Chairman Richard Glick stated in his dissent in Order No. 872, “fixed-price contracts have helped prevent discrimination against QFs by ensuring that they are not structurally disadvantaged relative to vertically integrated utilities that

are guaranteed to recover costs of their prudently incurred investments through retail rates.”⁴

NorthWestern is a vertically integrated utility that is guaranteed to recover costs of its investments through retail rates; stripping Montana QFs of the same right NorthWestern’s own generation receives and disadvantaging QFs as compared to NorthWestern’s own generation is discriminatory and unlawful under PURPA. *See Vote Solar*, ¶ 70. Unless NorthWestern is likewise willing to accept that it be paid for energy based on the price at the time of delivery, NorthWestern’s Petition will fail to comply with PURPA’s anti-discrimination requirements. For this reason, QF Developers respectfully request the Commission deny NorthWestern’s Petition for Rulemaking.

III. Moreover, given that Order No. 872’s Staying Power Is Questionable, QF Developers Request Denial of NorthWestern’s Petition for Purposes of Judicial Economy, Preservation of State Resources, and To Avoid Unnecessary Harm to the Parties.

As the Commission has acknowledged and is aware, there is a particular “contested nature of PURPA proceedings.”⁵ Since NorthWestern is effectively proposing to undermine the financing structure of QF development in Montana, the contested nature of this case will be no different than past contested PURPA proceedings. Accordingly, given that there is already considerable dispute in the federal courts regarding the lawfulness of Order No. 872 and there is potential that Order No. 872 could be reversed due to the pending appeal as well as based on Vice Chair Johnson’s discussion with FERC Commissioner Christie about the potential reversal of Order No. 872 by FERC,⁶ QF Developers request that the Commission deny NorthWestern’s Petition. Engaging in what will undoubtedly be a long, protracted rulemaking proceeding and

⁴ Chairman Glick Dissent, FERC Order 872, available at: https://www.ferc.gov/news-events/news/commissioner-richard-glick-dissent-part-regarding-qualifying-facility-rates-and#_ftn20.

⁵ Procedural Order at p. 1.

⁶ *Supra* FN 2.

potential appeal process for QF Developers, NorthWestern, and the Commission, when the very rule that NorthWestern is relying on is being litigated before the Ninth Circuit and subject to potential reversal is an imprudent use of the Commission's resources, QF Developers and other interested parties' resources, and NorthWestern's (i.e. ratepayers) resources. Moreover, if the Commission proceeds with and implements NorthWestern's requested rulemaking and it is ultimately held that Order No. 872 is invalid by the Ninth Circuit and/or reversed by FERC, not only will significant resources of all parties be wasted but QF Developers would also be unnecessarily harmed in the intervening period between the Commission finalizing this rule and the ultimate reversal of Order No. 872's decision regarding upending fixed rates. For this reason, QF Developers respectfully request that the Commission deny NorthWestern's Petition for Rulemaking.

IV. While NorthWestern's Petition Should be Denied for the Above Reasons, QF Developers Underline the Importance of the Commission Complying with MAPA's Rulemaking Procedures Prior to Upending a QFs' Right to a Fixed Avoided Cost of Energy Payment.

While NorthWestern insists that these major changes must be implemented by December 31, 2021, doing so would be squarely unlawful under Montana law governing rulemaking procedures and PURPA, § 16 U.S.C. 824a-3(f)(1). As the Montana Supreme Court has made clear, “[u]nless a rule is adopted in substantial compliance with these procedures [i.e. MAPA rulemaking procedures, § 2-4-301 et seq., MCA], the rule is not valid.” *State v. Vainio*, 2001 MT 220, ¶ 27, 306 Mont. 439, 35 P.3d 948. Likewise, while PURPA discusses a one-year timeline for implementing FERC rules, that timeline is explicitly qualified by the requirement that no new rule be implemented by a state until “notice and opportunity for public hearing” has been afforded to interested parties. 16 U.S.C. § 824a-3(f)(1). Meaning under both MAPA and PURPA, the Commission must comply with notice and comment procedures required by MAPA

prior to promulgating any rule changes suggested by NorthWestern. This informal process does not meet statutory requirements. Section 2-4-304(3), MCA (noting that nothing in the informal consultation process “shall relieve the agency from following rulemaking procedures required by this chapter”).

Moreover, notwithstanding the Commission’s obligation to comply with state and federal law regarding rulemaking procedures mandating notice and opportunity for public hearing, Order No. 872’s elimination of the fixed price contract requirement resulted in granting states the option to move to an at the time of delivery avoided cost of energy pricing, it is not a required rule change subject to 16 U.S.C. § 824a-3’s timing requirements. As made clear in Order No. 872, the adopted rule change gives “states the flexibility, should they choose to take advantage of this flexibility, to require that the avoided cost energy rates in QF contracts must vary depending on avoided costs at the time of delivery (rather than being fixed at the time a LEO is incurred).” Order No. 872, ¶ 36. Meaning this is not a required rule change and the timeline provided in 16 U.S.C. § 824a-3(f)(1) is not applicable here contrary to NorthWestern’s insistence. Accordingly, if the Commission opts to move forward with this rulemaking, QF Developers expect that the Commission will comply with MAPA’s rulemaking procedures prior to adopting any changes suggested by NorthWestern.

CONCLUSION

For the foregoing reasons, QF Developers respectfully request that the Commission deny NorthWestern’s Petition for Rulemaking. Proceeding with NorthWestern’s request would inevitably result in violations of Montana statute, PURPA, and be an imprudent use of state and interested parties’ resources given the pending Ninth Circuit appeal of FERC Order No. 872 and FERC’s potential reversal of Order No. 872. However, if the Commission chooses to grant

NorthWestern's Petition for rulemaking, QF Developers request and expect a full and formal rulemaking process prior to any adoption of NorthWestern's proposed rule changes.

Respectfully submitted this 23rd day of December 2021.



Michael J. Uda
UDA LAW FIRM, P.C.
3130 Saddle Drive, Suite 5
Helena, MT 59601
Telephone: (406) 457-5311
Email: michaeluda@udalaw.com

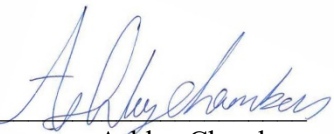
CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December 2021, a true and accurate copy of the foregoing **INFORMAL COMMENTS OF QF DEVELOPERS** in Docket No. 2021.09.118 has been e-filed with the Montana Public Service Commission and emailed to the email list below.

Will Rosquist
Ben Reed
Lucas Hamilton
Montana Public Service Commission
1701 Prospect Avenue
Helena, MT 59601
wrosquist@mt.gov
ben.reed2@mt.gov
lucas.hamilton@mt.gov

Shannon Heim
Clark Hensley
NorthWestern Energy
208 N. Montana Ave
Suite 205
Helena, MT 59601
Clark.hensley@northwestern.com
shannon.heim@northwestern.com
Cyndee.fang@northwestern.com

Jason Brown
Montana Consumer Counsel
P.O. Box 201703
111 North Last Chance Gulch, Suite 1B
Helena, MT 59620
Jbrown4@mt.gov
ssnow@mt.gov

By: 
Ashley Chambers
Paralegal
Uda Law Firm, P.C.