

1 HON. JAMES A. MANLEY
2 20th Judicial District Court
3 Lake County Courthouse
4 106 Fourth Avenue East
5 Polson, MT 59860
6 (406) 883-7250

7 **MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY**

8 VOTE SOLAR, MONTANA
9 ENVIRONMENTAL INFORMATION
10 CENTER, and CYPRESS CREEK
11 RENEWABLES, LLC,

11 Plaintiffs,

12 and,

13 WINDATA, LLC,

14 Plaintiff-Intervenor,

15 vs.

16
17 THE MONTANA DEPARTMENT OF
18 PUBLIC SERVICE REGULATION,
19 MONTANA PUBLIC SERVICE
20 COMMISSION, and NORTHWESTERN
21 CORPORATION,

20 Defendants,

21 and,

22 MONTANA CONSUMER COUNSEL,

23 Defendant-Intervenor.
24
25
26

Cause No. BDV-17-0776

Consolidated with:

Cascade County Cause No. DV-18-197

(Lewis & Clark County Cause No. ADV-2017-1015)

Lewis & Clark County Cause No. DDV-2017-1014

Lewis & Clark County Cause No. DDV-2017-1022

**ORDER
VACATING AND MODIFYING
MONTANA PUBLIC SERVICE
COMMISSION
ORDER NOS. 7500c AND 7500d**

1 *“No matter how cynical you get, it is impossible to keep up.”*

2 *– Lily Tomlin*

3
4 At the oral argument in this case, Mr. Uda, an intellectual and usually-circumspect attorney
5 who has done this work for a long time, said this is the first time he would say that an agency has
6 “gone rogue”. The record indicates Mr. Uda’s statement was not hyperbole.

7 The laws in this case, established by congress and our legislature, have origin in the 1970’s
8 and were adopted for the purpose of reducing our reliance and use of foreign energy and fossil
9 fuels, and to encourage development of renewable energy including wind and solar. The
10 Commission acted in direct contravention of this policy, in furtherance of a contrary purpose.
11

12 In order to accomplish the purpose of the legislation, the local electric companies, which
13 generally have monopoly ownership of the power grid, were required to allow utilization of the
14 grid for such new generation and to pay the renewable energy generator a fair price for the
15 electricity so generated.
16

17 Power transmission lines were historically created by quasi-governmental eminent domain,
18 because electricity distribution is, in part, for the general good of the public. To balance the
19 power of the monopolistic system and the public interest, power companies in Montana are
20 regulated by The Public Service Commission, which is to independently and fairly balance the
21 legitimate interest of the power company in a fair profit for its shareholders with the interests of
22 the public. Absent fair balancing by the Commission, compensation rates to renewable energy
23 developers could be set in a manner to, effectively, make such renewable energy development
24 economically unfeasible, and thereby eliminate competition. This could happen by either
25 reducing rates or contract lengths. That is what happened here.
26

1 The purpose to do that is demonstrated not only by the formal record and result, but also in
2 the words of the commissioners themselves. For example, during an underlying hearing,
3 Commissioner Lake and a staff member were unaware of an open microphone, and the following
4 was recorded:

5
6 (Staff member to Comm'r Lake,): "[the shortened contract length] ... *is going to kill development entirely.*"

7
8 (Comm'r Lake, in response): "... *actually, the ten year might do it if the price doesn't. And honestly, at this low price, I can't imagine anyone gonna get into it. [J]ust dropping the rate that much probably took care of the whole thing.*"

9
10 (June 22, 2017 Commission Work Session, Tr. 74).

11 Before the final commission decision on rehearing was even final, other commissioners
12 published the attached guest opinions in Montana newspapers.

13 The Commission arbitrarily cut rate and contract lengths by about half and effectively made
14 it economically impossible for solar and wind facilities to do business, as Commissioner Lake
15 predicted it would.

16
17 **LEGAL AND FACTUAL FINDINGS**

18 This case involves a challenge by Vote Solar, Montana Environmental Information Center,
19 and Cypress Creek Renewables, LLC, to the Montana Public Service Commission's
20 (Commission) decision in Commission Docket Number D2016.5.39. The Court heard oral
21 argument on September 7, 2018. Based on the administrative record and arguments of the
22 parties, the Court finds that the Commission acted arbitrarily and unreasonably in its challenged
23 decision—Order Nos. 7500c and 7500d—setting contract lengths and standard rates for
24 qualifying facilities (QFs) with generating capacity of 3 megawatts (MW) or less. Mont. Code
25 Ann. §§ 2-4-704, 69-3-402.
26

1 1. The Public Utility Regulatory Policy Act (PURPA) governs prices for power from
2 qualifying facilities, or QFs. 16 U.S.C. § 824a-3, *et seq* amending Federal Power Act, 16 U.S.C.
3 § 791, *et seq*; also *FERC v. Mississippi*, 456 U.S. 742, 745, 102 S.Ct. 2126, 72 L.Ed.2d 532
4 (1982); *Small Power Prod. and Cogeneration Facilities; Regulations Implementing Sec. 210 of*
5 *the Pub. Util. Reg. Pol. Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214, 12,224 (1980). PURPA
6 requires rates and contract terms be non-discriminatory. *See*, §§ 69-3-601 to 69-3-604, MCA;
7 *Colstrip Energy Ltd. P'ship v. Nw. Corp.*, 360 Mont. 298 ¶ 7, 253 P.3d 870, 2011 MT 99 (Mont.
8 2011).

9
10 2. Montana adopted PURPA and the Commission oversees its implementation. *See*, 18
11 C.F.R. 292.304(a)(1)(ii); also § 69-3-603(2) MCA; Final Order 7500c ¶ 130, Record Tab 123.
12 PURPA “requires large utilities to purchase energy from smaller qualifying facilities at rates that
13 allow the small facilities to become and remain viable suppliers of electricity.” *Whitehall Wind,*
14 *LLC v. Mont. Pub. Serv. Comm'n.*, 2010 MT 2, ¶ 2, 355 Mont. 15, 223 P.3d 907, 908-09
15 (*Whitehall Wind I*); also Sections 69-3-602(2) and 69-3-604(4), MCA; ARM 38.5.1901(2)(a)
16 (2016); 16 U.S.C. Section 824a-3(d); 18 C.F.R. §292.101(b)(6).

17
18 3. Methods used to determine the value of NorthWestern’s electricity “must be
19 consistent with” methods used to determine the value for QF electricity.” Order 7500c ¶ 111
20 citing and quoting *In re Greycliff, LLC*, Docket D2015.8.64, Order No. 7436e ¶16; Final Order
21 7500d ¶ 81, Record Tab 142 Rates for all QFs are based on costs NorthWestern avoids by
22 purchasing the QFs’ power. Order 7500c ¶ 122; ARM 38.5.1901(2)(a)(2016); *Am. Paper Inst.,*
23 *Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 415-18, 103 S. Ct. 1921 (1983); *Whitehall*
24 *Wind, LLC v. Mont. Pub. Serv. Comm'n.*, 2015 MT 119 ¶ 3, 379 Mont. 119, 347 P.3d 1273
25 (Mont. 2015)(*Whitehall Wind II*).

1 CONTRACT LENGTH

2 4. The Montana Administrative Procedure Act (“MAPA”) requires the Montana Public
3 Service Commission (“PSC”) to provide all parties with actual notice of the issues involved prior
4 to conducting a hearing. § 2-4-601, MCA. The PSC violated MAPA’s requirements for notice
5 by failing to provide actual notice of the symmetry issue before the hearing.

6 5. MAPA requires the PSC to afford all parties with the opportunity to present
7 evidence, respond to evidence, conduct cross-examination, or to present argument on the issues
8 during the hearing. § 2-4-612, MCA. The PSC violated MAPA’s contested case hearing
9 requirements by failing to afford an opportunity to respond and present evidence and argument
10 on the symmetry issue.

11 6. The PSC’s nearly 40-year old application of 18 CFR 292.304(a)(1)(ii) to QF
12 avoided cost, and not to contract length, is longstanding. This longstanding application “is an
13 invaluable aid in determining the meaning” of the regulation. *See, The Clark Fork Coal. v.*
14 *Tubbs*, 2016 MT 229, 384 Mont. 503, 380 P.3d 771, *citing Mont. Power Co. v. Mont. PSC*, 2001
15 MT 102, 305 Mont. 260, 26 P.3d 91. The PSC arbitrarily applied the QF-1 Tariff contract length
16 to NorthWestern’s non-QF resources.

17 7. It is a well-established principle of agency law that an agency has a duty to either
18 follow its own precedent or provide a reasoned analysis explaining its departure. *Waste Mgmt.*
19 *Partners of Bozeman, Ltd. v. Montana Dep’t of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944
20 P.2d 210 (1997). Nearly 40 years ago, the Montana Legislature authorized the PSC to determine
21 the rates and conditions of contracts for the sale of electricity from QF to utilities. § 69-3-604,
22 MCA. This case presents the first time the PSC applied the length of a QF contract
23 “symmetrically” to a utility’s non-QF resources. The PSC violated principles of administrative
24 law when it issued the Symmetry Finding instead of following its own precedent which did not
25 require “symmetry,” or providing a reasoned analysis to explain its departure from that
26 precedent.

1 8. The PSC’s authority is limited to the authority delegated to it by the Legislature.
2 *Bacus v. Lake County* (1960), 138 Mont. 69, 354 P.2d 1056. The PSC has authority to approve
3 contract lengths for QF resources. § 69-3-604(1), MCA. The PSC exceeded its statutory
4 authority to approve contract lengths for QF resources when it applied the contract length
5 “symmetrically” to NorthWestern’s acquisition of non-QF resources.
6

7 9. The Commission lacked substantial evidence necessary to determine that 15-year
8 contracts are sufficiently “[l]ong-term ... to enhance the economic feasibility of qualifying small
9 power production facilities,” as Montana law requires. Mont. Code Ann. § 69-3-604(2). A
10 majority of Commissioners admitted the evidentiary record on this issue was inadequate. See
11 Statement of Comm’r Koopman, at 22:14-23, Trans. of PSC Oct. 5, 2017 Work Session [Tab
12 147] (stating that the record was “*weak*”); id., Comm’r Kavulla, at 29:7-13 (relaying concern
13 from Commissioner O’Donnell that “*the evidentiary record in this proceeding on contract length*
14 *was frustrating*” to him”); id., Comm’r Kavulla, at 29:14-20 (“[D]espite noticing it [contract
15 length] as an additional issue and trying to engage in a real investigation of this, I don’t think,
16 frankly, but for a couple of, a bit of, testimony from parties and other jurisdictions findings on
17 this, I don’t think actually there’s much of an evidentiary record.”). This inadequacy was due in
18 part to the Commission’s failure to provide notice that it would address QF contract lengths in
19 the underlying proceeding until well after the intervention deadline had passed. See, Notice of
20 Application & Intervention Deadline [Tab 3]; Notice of Additional Issues [Tab 63]. This
21 procedure precluded the participation of interested stakeholders who, in a separate Commission
22 proceeding in 2015, submitted comments regarding the necessity of 20- to 25-year contracts.
23 See Notice of Inquiry and Opportunity to Comment, Docket No. N2015.9.74 (Sept. 24, 2015),
24 and comments submitted (Harbine Dec., Exhibits 1-8).
25
26

1 10. In the underlying proceeding, only the Montana Consumer Counsel and
2 NorthWestern Energy submitted testimony in support of a reduced contract length. See
3 Stamatson Additional Issue Test. [Tab 72]; LaFave Additional Issue Test. [Tab 73]. However, as
4 the Commission acknowledged in its order on reconsideration, this testimony—including
5 testimony about the decisions of other state commissions—did not provide “*evidence on how the*
6 *shortened contract lengths ... would provide [qualifying facilities] sufficient certainty with*
7 *regard to the potential return on investment in qualifying generating technologies or enhance the*
8 *economic feasibility of [qualifying facilities], as required by PURPA and Montana law.*” Order
9 on Reconsideration No 7500d ¶ 24. This Commission finding was consistent with the
10 Commission staff’s determination that the failure of the testimony regarding out-of-state
11 decisions to “*provide ... context of state-based policy or legislative directives that may guide or*
12 *limit the determination of QF contract lengths*” or to “*address the difference in facts and quality*
13 *of the record presented in each state’s decision regarding contract length determination,*”
14 negates its evidentiary value. Staff Mem. re Motions for Reconsideration 9 [Tab 141].
15 Accordingly, testimony from the Montana Consumer Counsel and NorthWestern Energy did not
16 provide substantial evidence to support the Montana Commission’s contract-length decision.

17 11. The testimony of Plaintiffs also did not support the Commission’s decision to reduce
18 QF contract lengths. Although Plaintiffs’ experts (Thomas Beach and Patrick McConnell) in the
19 underlying proceeding suggested that 15-year contract lengths may be sufficient in certain
20 circumstances, the testimony emphasized that the contract-length question is inextricably
21 connected to the rates NorthWestern Energy must pay for QF-generated electricity. *See,*
22 McConnell Additional Issue Test., at 3 (testifying that credit quality and term of a contract
23 “*along with the actual pricing*” of the agreement “*are the most critical components of the entire*
24
25
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1 *financing*") [Tab 70]; Beach Additional Issue Test., at 2 [Tab 69] (explaining that financing
2 depends on whether "*a long-term contract at fixed prices ... provides certainty that the*
3 *renewable QF will be able to meet its debt repayment obligations if it operates as anticipated*").
4 The Commission erred in "misapprehend[ing] the effect" of this testimony. *Whitehall Wind,*
5 *LLC v. Montana Pub. Serv. Comm'n*, 2015 MT 119, ¶ 8, 379 Mont. 119, 347 P.3d 1273. The
6 Commission's failure to consider the combined negative impact on QF-development resulting
7 from the Commission's contract length decision and concurrent decision to drastically reduce
8 standard rates was arbitrary. *Clark Fork Coal. v. Mont. Dep't of Env'tl. Quality*, 2012 MT 240, ¶
9 29, 366 Mont. 427, 288 P.3d 183 ("*Clark Fork Coal. IP*") (agency acted arbitrarily because it
10 "failed to consider the relevant factors").
11

12
13 12. NorthWestern's rates are set using forecast terms of 30 to 40 years. Order 7500d ¶
14 92. The Commission reduced the contract length for QF projects from 25 years to 15 years.
15 Order 7500d ¶¶ 14-30. Montana law requires "*Long-term contracts*" [...] "*to enhance the*
16 *economic feasibility*" of QFs. Section 69-3-604(2), MCA (emphasis added); accord 18 C.F.R. §
17 292.304(b)(5), (d)(2); *Amer. Paper Institute*, 461 U.S. at 414; Order 69 at 12,224; aff'd at
18 *Windham Solar, LLC*, 157 FERC ¶ 61,134, ¶¶ 5-8 (Nov. 22, 2016).
19

20 13. The Commission admitted that the methodologies adopted in this case cannot be
21 applied without discriminating against QFs, though the Commission promises future parity.
22 Order 7500c at ¶ 130; Order 7500d at ¶ 81; Order 7500d ¶ 88-89.

23 The Commission staff advised this promise does not ameliorate present day discrimination.
24 Staff memo October 2, 2017, p. 25 and p. 25 fn. 106. The Commission's decision to ignore its
25 expert staff and deviate from precedent is reversible error. *Montana Trout Unlimited*, 2006 MT
26 72; also §§ 69-3-402, MCA.

1 14. The Commission failed to abide by the canons of deference to precedent and did not
2 provide a rational analysis to support its reversal of course. The Commission failed to provide
3 compelling reasons to deviate from its precedent and its own longstanding interpretation of its
4 own rules.

5
6 15. In light of the whole record, the Commission's decision to reduce QF contract
7 lengths to 15 years was arbitrary and unreasonable. Mont. Code Ann. §§ 2-4-704, 69-3-402.

8 16. The staff recommendation in Table 4 at page 23 of its June 16, 2017 memo is
9 adopted using the values for contract terms of twenty-five years. *Whitehall Wind I* at ¶¶ 29-33; §
10 69-3-404(2), MCA.

11 AVOIDED ENERGY COSTS

12
13 17. The Commission's decision to reduce by more than half the standard rate that
14 NorthWestern Energy must pay for QF-generated electricity was also arbitrary and unreasonable.
15 NorthWestern Energy must pay a rate for QF power that equals its full "avoided costs" from not
16 having to generate that energy itself or purchase it on the market. 16 U.S.C. § 824a-3(b), (d); 18
17 C.F.R. § 292.101(b)(6); Admin. R. Mont. 38.5.1901(2)(a) (defining "avoided costs"). The rates
18 must be "just and reasonable to the electric consumers of the electric utility and in the public
19 interest" and "shall not discriminate" against QFs. 16 U.S.C. § 824a-3(b); 18 C.F.R. §
20 292.304(a); Admin. R. Mont. 38.5.1901(1). The drastic reduction of the standard rate for QFs
21 resulted from a combination of Commission decisions, each of which was arbitrary.

22
23 18. First, the Commission unreasonably eliminated from the rate the future regulatory
24 costs of carbon dioxide emissions, which renewable resources such as wind and solar facilities
25 allow NorthWestern to avoid. In eliminating these costs, the Commission failed to justify its
26

1 departure from recent Commission practice of including avoided carbon costs both in QF rates,
2 Order No. 7505b, *In the Matter of Crazy Mtn. Wind*, Dkt. No. D2016.7.56 (Jan. 5, 2017), and the
3 utility's own resource acquisitions. Absent a "reasoned analysis," such a departure was arbitrary.
4 *Waste Mgmt. Partners of Bozeman, Ltd. v. Mont. Dep't of Pub. Serv. Regulation*, 284 Mont. 245,
5 257, 944 P.2d 210, 217 (1997) (citation omitted); see also Staff Mem. re Motions for
6 Reconsideration, 18, 19 [Tab 141] (observing that the Commission had not explained how the
7 facts differed from Crazy Mountain Wind and, "absent that explanation, the Commission's
8 decision ... reduces to a case of the Commission changing its mind in an arbitrary manner").
9 Evidence demonstrates that although there is uncertainty regarding the measure of these costs,
10 they are not zero. *See*, NorthWestern, 2015 Electricity Supply Resource Procurement Plan, at 6-
11 1 (Mar. 31, 2016) ("2015 Plan"); Order No. 7323k ¶ 81, *In Re: Application of NorthWestern*
12 *Energy for Hydro Assets Purchase*, Dkt. No. D2013.12.85 (Sept. 26, 2014) ("Although highly
13 uncertain, all parties agreed that future carbon costs should not be considered zero."). The
14 Commission staff acknowledged that estimates of the value of carbon avoidance already account
15 for uncertainty about future carbon regulation and recommended that the Commission "maintain
16 the adjusted carbon cost" adopted in the Commission's avoided cost calculation for Crazy
17 Mountain Wind. Staff Mem. re Motions for Reconsideration 18, 19 [Tab 141]. The
18 Commission's contrary finding, disregarding the recommendation of its own technical staff, was
19 arbitrary.
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23 19. Second, the Commission unreasonably failed to consider NorthWestern's cost of
24 operating new generating resources that the utility plans to acquire in 2019, even though the
25 record evidence demonstrated that solar QFs would allow NorthWestern to avoid such costs in
26 high-demand hours. Beach Direct Test. 15 [Tab 61]); *see, also*, Hr'g Tr. 333:10-25, 336:11-12

1 (Testimony of NorthWestern witness John Bushnell) (explaining that units acquired in 2019 will
2 be operated to provide energy in high-demand hours) [Tab 107]. Because solar QFs may allow
3 NorthWestern to avoid the costs of operating these new units, the QFs must be compensated for
4 these avoided energy costs beginning in 2019. *See*, 18 C.F.R. § 292.304(b), (e).

5
6 20. Third, while the Commission adopted a 15-year restriction on NorthWestern’s cost-
7 recovery for its own assets to match the 15-year contract length available to QFs (the so-called
8 “symmetry finding”), the Commission failed to consider the impact of this decision on the
9 calculation of NorthWestern’s avoided costs. As Commission staff admonished, “[t]he planned
10 resources that form the basis for the avoided costs and rates approved in [the Commission’s
11 Order] may not be preferred resources” under the Commission’s symmetry finding. Staff Mem.
12 re Motions for Reconsideration 25 [Tab 141]. In other words, the assumption that QFs may
13 avoid the costs of operating a particular resource that NorthWestern planned to bring online in
14 2025 may no longer be valid. Therefore, “it is not possible to confirm that the approved
15 [standard] rates are reflective of NorthWestern’s avoided costs under [the symmetry] finding.”
16 *Id.* Because the Commission failed entirely to consider this issue “and articulate a satisfactory
17 explanation for its actions,” its decision was arbitrary and unreasonable. *Clark Fork Coal. v.*
18 *Mont. Dep’t of Env’tl. Quality*, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482 (“Clark Fork
19 Coal. I”); see Mont. Code Ann. §§ 2-4-704, 69-3-402.

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1 AVOIDED CAPACITY COSTS

2 21. The Commission's determination that solar QFs contribute just 6.1% of their overall
3 generating capacity to NorthWestern's capacity needs was also arbitrary, because it discounts
4 NorthWestern's substantial summertime capacity needs. In focusing only on a handful of peak
5 demand hours (220 hours over a ten-year period) that reflect primarily infrequent wintertime
6 spikes, the Commission overlooked evidence that NorthWestern lacks sufficient capacity to meet
7 peak customer demand in both the summer and winter. Bushnell Rebuttal Test., at JBB-5 [Tab
8 87]. In fact, NorthWestern's 1,084 MW of generation capacity, 2015 Plan, at 8-2 (Harbine Dec.
9 Ex. 9), has been inadequate to meet its summer peak demand in every year since 2011, Bushnell
10 Rebuttal Test., at JBB-5 [Tab. 87]. Additionally, the evidence demonstrated that NorthWestern's
11 summer peak demand exceeded winter peak demand in nearly half of the years evaluated. *Id.*
12 The Commission further misapprehended the effect of evidence of regional peak demand, which
13 the Commission conceded was the most relevant factor for determining NorthWestern's capacity
14 needs. Final Order No. 7500c ¶ 64; Order on Reconsideration No 7500d ¶ 54. Record evidence
15 demonstrating that regional peak demand occurs in the summertime supported broadening the
16 hours over which the Commission determined solar-QF capacity contribution. *See*, NWE Resp.
17 to Vote Solar Data Request VS-011(d) [Tab 35]; Beach Direct Test. 24 [Tab. 61].
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21 22. As Plaintiffs demonstrated based on record evidence, properly calculated for
22 NorthWestern's high-demand hours in the summer and winter months, the average capacity
23 contribution of solar resources is 36%, rather than 6.1%. Vote Solar Mot. for Reconsideration 25
24 (summarizing data from Bushnell Rebuttal Test., at Ex. JBB-6 [Tab 87]) [Tab 133]. The
25 Commission's calculation of solar QF capacity contribution was therefore arbitrary.
26

1 **ORDER**

2 Based on the foregoing, it is hereby **ORDERED** that:

- 3 1. The Commission's decision to ignore its expert staff and deviate from precedent is
4 reversible error.
- 5 2. The PSC's Symmetry Finding is reversed.
- 6 3. Montana Public Service Commission Final Orders 7500c and 7500d are vacated and
7 modified as follows:
- 8 a. The staff recommendation in Table 4 at page 23 of its June 16, 2017 memo is
9 adopted using the values for contract terms of twenty-five years.
- 10 b. Table 4 on page 23 of the June 16, 2017 staff memo must be amended to
11 include a carbon adder with no delay to the onset date, applied to contracts of not less than
12 twenty-five years.
- 13 4. Calculations to incorporate this modification to the memo must be submitted to the
14 Court within 20 days.

15 It is further **ORDERED** that this Court shall retain jurisdiction in this matter to ensure
16 consistency of the Commission's action on remand with this Order.

17 DATED this 2nd day of April, 2019.

JAMES A. MANLEY

18 _____
19 JAMES A. MANLEY
20 District Court Judge

21 cc: **Jenny Harbine**, Attorney for Vote Solar and Montana Environmental Information Center (Cascade County Cause No.
22 BDV-17-0776)
Marie P. Barlow, Attorney for Cypress Creek Renewables, LLC (Cascade County Cause No. BDV-17-0776)
Michael Uda / Christine McMurray, Attorneys for MTSUN, LLC (Lewis & Clark County Cause Nos. DDV-2017-1014 and
23 CDV-2017-1022)
Justin Kraske / Jeremiah Langston / Zachary Rogola / Jennifer Hill-Hart, Attorneys for Montana Public Service
Commission (Cascade County Cause Nos. BDV-17-0776 and DV-18-197, and Lewis & Clark County Cause Nos. ADV-2017-1015, DDV-
24 2017-1014 and CDV-2017-1022)
Ann Hill / Al Brogan, Attorneys for NorthWestern Energy (Cascade County Cause Nos. BDV-17-0776 and DV-18-197, and
25 Lewis & Clark County Cause Nos. ADV-2017-1015, DDV-2017-1014 and CDV-2017-1022)
Monica J. Tranel, Attorney for WINData, LLC (Cascade County Cause No. BDV-17-0776, and Lewis & Clark County Cause Nos.
26 ADV-2017-1015 and DDV-2017-1014)
Jason T. Brown, Attorney for Montana Consumer Counsel (Cascade County Cause No. BDV-17-0776, and Lewis & Clark
County Cause No. CDV-2017-1022)
Cheryl Miller, J.A. to Hon. Elizabeth A. Best
04/02/19 cWMc

BREAKING

Bozeman man pleads not guilty to killing father

https://www.bozemandailychronicle.com/opinions/guest_columnists/do-we-really-want-solar-energy-at-any-cost/article_4a50b00e-e4e0-504d-887f-e8e250b21e41.html

Do we really want solar energy at any cost?

By Roger Koopman, guest columnist Aug 2, 2017

The Public Service Commission's decision making in two recent solar energy rate cases have been so mischaracterized by ill-informed reporters and editorialists, that some Montanans actually believe the five commissioners "have it in" for solar, and are using their authority to kill solar development in our state. This is absolute balderdash, and this is one commissioner who can no longer allow this politically motivated disinformation campaign to go unchallenged.

For the record, I am a big fan of solar, as I am of emerging technologies of all kinds. As a free-market enthusiast, I cheer on all energy innovators and entrepreneurs and firmly believe that good public policy demands that we create an even playing field for all technologies, while providing special privileges for none. As a commissioner, being prejudicial and "taking sides" is simply not an option. Why? Because I am also duty-bound to protect the Montana consumer, assuring them "just and affordable rates," irrespective of the energy source. The law requires this, and I honor it.

Indeed, federal law (PURPA) explicitly demands that in the process of the PSC authorizing renewables rates and contracts, we must establish "consumer indifference," i.e., renewables rates that hold the rate-payer "harmless" relative to the least expensive energy source otherwise available.

PSC commissioners must follow this law to the letter. If you don't like it, write your congressman.

For years, the Montana Consumer Counsel has maintained that very long QF (renewables) contracts make consumer indifference impossible to achieve, given the constant state of innovation and change within the energy markets. Level, 25-year contracts may match the market on day one, but within a few years they are far removed from the actual market value of the energy being produced and purchased. Under these circumstances, the ratepayer assumes all of the risk. This hardly qualifies as "just" rate-setting or good public policy.

MCC economists have also pointed out that when wind and solar power purchase agreements have embedded in them, a "presumed" future cost of CO₂ regulation (carbon taxes, etc.), they are passing on to consumers a major price hike that doesn't now – and may never – exist. Better to have shorter length contracts that can be periodically adjusted to the market, and rates that reflect CO₂ penalties only after they come into existence, than be locked into 25 year contracts based on sheer guesswork and the silly assumption that markets never change.

Afraid of political repercussions, previous commissions have generally dodged these issues. But not your current commissioners. Instead, we rolled up our sleeves and went to work. Consider the PSC's recent decision to suspend the 4-year old QF-1 solar energy rates (set at approx. \$66 per MWH) until updated rates could be established. Out-of-state developers were perched at Montana's borders, ready to rush in and take advantage of these inflated rates, reaping windfall profits at consumers' expense.

Using the best information available, the PSC arrived at a current rate about one-third of the old one – saving ratepayers an average of \$2.6 million per project, while maintaining fair and accurate profit margins for developers. Included in our decision was the removal on the non-existent carbon tax, and the shortening of contract lengths from 25 to 10 years, with a re-set every five.

It is widely asserted that guaranteed renewables contracts of less than 25 years cannot attract financing, but no evidence has ever been supplied to the commission to support this claim. Were it true, that would only be because these projects are too risky in the first place – in which case, the ratepayer certainly should not be on the hook, guaranteeing business profits for 25 years!

Shorter wholesale contracts protect all parties, and more closely match the retail rate reviews that happen every four to six years in the utilities' own rate cases before the commission. Remember also that shorter contract lengths do not alter in any way, the PURPA requirement that utilities continue to purchase power from the QF renewables, from one contract to the next.

Attachment A

12/20/2017

Do we really want solar energy at any cost? | Guest Columns | Bozemandailychronicle.com

If under these more accurate and consumer-neutral rates, some solar projects struggle to justify their investments, it is certainly not because they are being discriminated against. Billions in targeted subsidies, tax credits and loan guarantees — together with state RPS mandates — hardly constitutes discrimination! The problem all forms of energy development are facing right now is a market characterized by surplus supply and over-built capacity, which greatly drives down wholesale prices and the prospects of a profitable project.

I suppose some of our more adamant critics will blame the PSC for that, too.

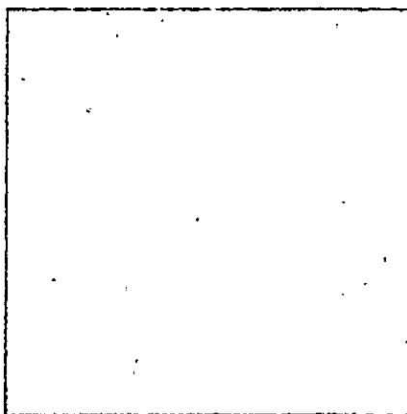
Roger Koopman represents Bozeman on the Public Service Commission, as commissioner for PSC District 3.

http://missoulian.com/opinion/columnists/ratepayers-have-constant-effective-advocate-in-montana-consumer-counsel/article_ff2e1e17-14ab-565e-8d96-b7966c933ab7.html

Guest column

Ratepayers have constant, effective advocate in Montana Consumer Counsel

ROGER KOOPMAN Jul 7, 2017



Roger Koopman

During my time on the Montana Public Service Commission, commissioners have faced many difficult and complex issues as we pursue the elusive goal called “the public interest.” The parties and special-interest groups that come before us are typically thoughtful, well-prepared and provide valuable input to the regulatory process – although generally driven by self-interest and ideological agenda. In the midst of these contentious cases, one entity has stood out as the ubiquitous defender of ratepayers’ interests, the Montana Consumer Counsel.

This tiny, constitutionally established state agency is driven by the singular objective of guaranteeing consumers a fair shake in the regulatory process.

Attachment B

In a perfect world, where freedom and free markets create vigorous competition for the consumer's dollar, the interests of companies and consumers coalesce, and the "public interest" takes care of itself.

But alas, we don't live in that perfect world, and with each passing year, we seem to drift further from it. There are two reasons for this – one avoidable, one not:

1. America's love affair with Big Government, and our increasing acceptance of the notion that politicians are smarter than consumers and bureaucrats are smarter than markets. We regularly discard America's traditional faith in freedom, and replace it with a trust in the kind of top-down economic manipulation that belongs in the dustbin of history.
2. The necessary and essential regulation of natural monopolies. Regulated power companies like NorthWestern Energy fall firmly into the monopoly category, owning the means of transmission and distribution in their service area, and thus facing no disciplining competition from the marketplace. That's the reason we have a state Public Service Commission. In Montana, the commission is charged by state statute to establish rates and regulatory parameters that are "just and reasonable" and "in the public interest." The PSC does not make law, but within our statutory framework, there is considerable discretion in the way the PSC goes about regulating in the public interest. That's where the help and input of the Montana Consumer Counsel fills a vital role.

In all of our deliberations, the MCC is the ever-present voice of the consumer, reminding us how our decisions will impact rates and other consumer priorities. In doing so, they are unafraid of sometimes testing the limits of troublesome federal mandates that often work against the consumer. Case in point was the important contribution the MCC made to our recent decision on rates and contract lengths for small-scale, independent solar projects. The consumer counsel has been arguing for years that long-term (up to 25 year) fixed-rate contracts are unworkable, and place consumers at great risk. The commission has agreed in principle, but hadn't yet found a good solution.

The MCC proposed a maximum contract length of five to seven years, with rate recalculations every three years. The commission's solution was largely patterned after the MCC model, offering a somewhat more generous 10-year contract with an automatic adjustment to current tariff rates in year six. However, the commission went further by including the utility into this same regulatory principle, calling for five-year reviews of the rate-based returns of any new generating asset owned by the company. This shared risk/shared reward approach more accurately reflects the changing realities of the energy marketplace, and creates an even playing field that favors no one and serves everyone.

Certainly, the MCC's positions aren't always adopted by the PSC, and the commission is willing to reexamine its decisions when presented with compelling new information. Every case stands on its own merits, and every party is given equal consideration. But the contribution the MCC provides, as exemplified in our most recent decision, affords exactly the kind of safeguards the framers of our state constitution had in mind. The Montana Consumer Counsel deserves the thanks of every Montana ratepayer.

Roger Koopman, R-Bozeman, is serving his second term on the Montana Public Service Commission, representing PSC District 3. He is a former two-term state legislator and operated a small business in Bozeman for 37 years.

Federally-imposed renewables come at a cost

by Roger Koopman

Those who view the EPA as a planet-saving benevolent dictator will apparently go to any lengths to "prove" their point.

An astounding article by former PSC Chairman Greg Jergeson, recently asserted that the EPA's massive new regulations on power plant CO2 emissions won't increase energy costs to Montana consumers. It makes you wonder what kind of mushrooms he's been eating on his hamburgers lately.

While I appreciate Mr. Jergeson's past service, his analysis of the Clean Power Plan couldn't have been more inaccurate. Every credible study confirms that this latest federal decree will dramatically increase the monthly power bills of both residential ratepayers and the businesses and industries that employ them.

Jergeson makes the very misleading statement that coal (which is responsible for 64.6% of Montana's total electricity generation), is comparatively expensive, basing his argument on the cost of energy from Colstrip Unit 4, an anomaly within the industry. Electricity from Colstrip Unit 4 is indeed some of the most expensive in NorthWestern Energy's portfolio. However, Jergeson avoids mentioning the primary reason for this: the rate-based debt load from an artificially inflated, speculative price that NorthWestern paid for CU4 – a purchase approved by the PSC in 2008, while under Jergeson's chairmanship.

Absent the Unit 4 anomaly, coal generated electricity is still among the cheapest, most reliable sources of energy available to Montana ratepayers – and would continue to be, if not for the extreme regulatory burden now bearing down on that industry by a power-obsessed federal agency (EPA) that apparently believes burning the U. S. Constitution is an acceptable CO2 emission.

By contrast, many renewable resources wouldn't be economically viable, were it not for the mountain of government subsidies they receive. Then too, the energy they produce is less reliable, requiring constant back-up (integration) by coal and natural gas plants to cover the shortfalls when nature isn't cooperating. These subsidies – which we all pay for in our taxes – create a convoluted economic picture that doesn't reflect true cost, and makes "green energy" look cheaper than it actually is. "Cheap" subsidized energy is an optical illusion, a contradiction in terms.

How heavy a dose of the subsidy narcotic do renewables need to be made competitive?

Solar is currently supported by a 30% investment tax credit, and for the last two decades, wind energy has been bolstered by a production tax credit of \$0.023 per kilowatt hour, covering up to one-third of the generation costs. No generating sources but renewables receive these kinds of enhancements to their bottom lines. Add to this the advantage of major state tax breaks and renewable (RPS) mandates, and you begin to realize just how much the scales are weighted against the consumer, who would be far better served by an even playing field and a truly competitive energy marketplace. Indeed, if politicians would quit rigging the game, get out of the way, and allow economic incentives to freely operate, innovators and developers of renewables would also greatly benefit in the long run. Freedom energizes. Interventionism paralyzes.

Whether CO2 emissions are, in net effect, a climatic calamity or an earth-greening benefit is an unsettled question. That scientific debate is just warming up (even while the earth, in recent years, has

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not.) Regardless of your views on that subject, we can all agree that the true cost of CO2 reduction – through forced renewables and the taxing and banning of fossil fuels – must be accurately represented in the public policy discussion.

Unfortunately, that picture is habitually shrouded by bad economics and partisan politics. Misleading commentaries like Jergeson's, assuring consumers that EPA's heavy hammer really won't hurt too badly nor cost too much are cruel contrivances, told to us by people who believe the heat of politics is more important than the light of truth.

The question is, how much more can Montana families bear? How much longer will we tolerate timid politicians who will not stand up to Washington and defend Montana's legitimate interests and Constitutional rights?

Roger Koopman is District 3 Public Service Commissioner from Bozeman. He previously served two terms in the Montana House of Representatives.

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Montana's clean energy future should not be financed on the backs of ratepayers

Tony O'Donnell, Guest Opinion

Published 2:04 p.m. MT July 27, 2017



(Photo: Kevin Hudson photo)

Imagine that you were forced to sign a 25-year contract for gas for your car at 3-4 times the market price. That's the exact situation NorthWestern Energy customers were facing without the Public Service Commission's recent action to reduce the contract length and rate available to small renewable projects known as Qualifying Facilities.

As usual with actions that put ratepayers first, those who would have us promote renewables at any cost are hopping mad.

The federal law that the commission must follow, PURPA, clearly states that ratepayers shouldn't pay more for one form of energy over another. That law also requires "long-term" contracts for renewable energy projects without providing a precise definition of "long-term."

Until recently, contracts were set at a term of 25 years; however, the commission received compelling testimony from the state consumer advocate, the Montana Consumer Counsel that fixed price, 25-year contracts were "excessively risky for customers." My colleagues and I on the commission agreed and earlier this month we voted to reduce contracts to a maximum of 10 years.

The price that NorthWestern must pay for the power supplied by renewables is ultimately born by the consumer. The PSC's charge is to ensure that customers, you and I, pay no more for alternative energy than we otherwise would for power generated by the utility or purchased from the open market. The longer the length of the contract the less accurate these calculations become, and the greater the likelihood that consumers will wind up paying too much.

Case in point, last June the commission blocked a proposal by a handful of developers to build 130 megawatts of new solar generating capacity at a highly inflated rate of \$66 per megawatt hour, roughly 3 times the market price today. That action is projected to save ratepayers an estimated \$65 million over the next 25 years based on a forecast of current market prices.

Shorter contracts provide a benefit to both consumers and QFs by ensuring that rates paid to developers more accurately reflect the actual cost of generating electricity.

Recently circulated stories have strongly suggested that the commission's actions were meant to "kill" wind and solar development in the state. There is no truth whatsoever to this claim. In fact, the commission recognizes that the risk associated with locking customers into long-term rates is universal and that's why we voted to apply the exact same treatment to NorthWestern, as well as QFs.

Attachment D

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To be sure, renewable development brings jobs and dollars to the local economy, but such concerns are outside the scope of the commission's mandate to select the least cost resource to reliably serve customers. Federal law clearly prohibits the commission from favoring one form of generation over any other. Such incentives are the sole privilege of the Montana Legislature or Congress.

In the coming weeks the commission will undoubtedly face motions to reconsider our decision. I will approach those requests with an open mind and will happily reverse my decision if presented with compelling new information, but any proposal must square with the legal requirement that rates remain neutral for customers. Montana's clean energy future must not be financed on the backs of ratepayers.

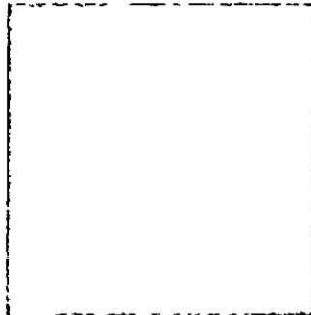
Commissioner Tony O'Donnell, Montana Public Service Commission

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GUEST OPINION: Montana PSC sides with consumers on solar pricing

By BRAD JOHNSON Aug 4, 2016



Brad Johnson
Kevin Hudson

It's safe to say that solar energy development has experienced incredible progress over the past decade and has the potential to one day revolutionize how we generate electricity in Montana. But should we be forced to pay more on our monthly electricity bill just to promote solar energy?

Some corporate solar developers operating in Montana are willing to allow exactly that, appearing content with throwing ratepayers under the bus to boost their own profits. This is unacceptable, and must not be tolerated.

Attachment E

My colleagues and I on the Montana Public Service Commission recently approved a request by NorthWestern Energy to temporarily suspend the dated, and almost certainly inflated rate NorthWestern Energy's customers are forced to pay for new solar energy generated by independent power producers. The rate will remain suspended until a new, more accurate rate is calculated later this year.

As expected, the decision did not sit well with out-of-state renewable energy developers and environmental activists operating in Montana.

At issue is a federal law known as the Public Utility Regulatory Policies Act, which requires utilities like Northwestern Energy to purchase power that independent renewable generators produce, whether needed or not, and pass the costs of that power straight through to their customers. The price consumers pay is set by state governments, varying state-by-state.

Corporate solar developers use this law as a guaranteed source of income for obtaining loans to finance projects, cherry picking the states with the highest government-assured rate to do business in. But PURPA also requires that customers shouldn't overpay for electricity produced by solar facilities, which is exactly what was happening in Montana.

The last time the PSC updated the PURPA rate was in 2013, when the commission established a price of \$66 per megawatt-hour. Since then, the factors that go into calculating the rate have changed significantly.

NorthWestern purchased over 400 megawatts of capacity from 10 hydroelectric dams in 2014 at \$56 per megawatt-hour, and current electricity market prices are near historic lows of about \$20 per megawatt-hour; both of which affect the calculation for what solar generators should be paid under the obligations of PURPA.

Simply put, it was well past time to put the rate on pause and update it again.

Predictably, renewable energy advocates immediately blasted the PSC's decision to suspend the rate, claiming that the commission acted unlawfully to stop renewable energy development in Montana. Such a claim is patently false.

The commission's decision was wholly within its legal authority, having nothing to do with anti-renewable sentiment and everything to do with the potential harm that the current rate could have on consumers.

In comments submitted to the PSC, the state's consumer advocate, the Montana Consumer Counsel, urged the commission to grant NorthWestern's request. The consumer counsel agreed that the current rate is outdated, and is far higher than what customers should pay for electricity from these solar projects. We took this analysis to heart while making our decision.

I strongly believe that renewable energy development has the potential to provide tremendous benefit to Montana in the form of jobs, taxes and a draw for companies to relocate their operations to our state with the appeal of a greener energy portfolio. But under the requirements of PURPA, electricity consumers should not pay more on their bills as a result of renewable energy development, which is what would have happened had the commission not acted.

Brad Johnson, R-East Helena, chairs the Montana Public Service Commission.