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**IN THE SUPREME COURT OF THE STATE OF MONTANA**  
**Supreme Court Cause No. DA 19-0363**

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MTSUN, LLC

*Applicant, Petitioner, and Appellee*

v.

THE MONTANA DEPARTMENT OF PUBLIC SERVICE REGULATION,  
MONTANA PUBLIC SERVICE COMMISSION,

*Respondent*

and

NORTHWESTERN CORPORATION d/b/a NORTHWESTERN ENERGY

*Intervener, Petitioner, and Appellant*

and

THE MONTANA CONSUMER COUNSEL

*Intervener*

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**MOTION FOR STAY OF DISTRICT COURT ORDER PENDING APPEAL**  
**AND APPLICATION FOR EXPEDITED CONSIDERATION**

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NorthWestern Energy (“NorthWestern”) moves this Court to stay the effect of the rates and contract terms set by the Honorable James A. Manley in the *Findings of Fact and Conclusions of Law for the Symmetry Finding in MTSun Order No. 7535b* (“District Court Order”), pending appeal. Since the District

Court only gave the Montana Public Service Commission (“PSC”) until July 18, 2019 to adopt the Court’s rates, NorthWestern requests expedited relief under Rule 29.

The District Court exceeded the scope of judicial review under the Montana Administrative Procedure Act (“MAPA”), set rates and contract terms, and ordered the PSC’s adoption within 30 days. In short, the District Court unlawfully substituted its judgment for the PSC’s. *See McGree Corp. v. Montana Pub. Serv. Comm’n*, 2019 MT 75, ¶ 8, 395 Mont. 229, 438 P.3d 326 (finding that the court may not substitute its judgment for that of the agency as to the weight of the evidence). The District Court’s rate setting will result in higher costs to NorthWestern and higher rates for customers. This extraordinary action warrants a stay.

NorthWestern immediately filed a motion to stay with the District Court. The PSC and Montana Consumer Counsel support a stay. MTSun, LLC (“MTSun”) opposes a stay. NorthWestern’s motion has been pending before the District Court since July 12, 2019. The District Court does not have time to consider a request for stay before its July 18, 2019 deadline for the PSC’s order.

In addition, the District Court already denied NorthWestern’s request for a stay in the consolidated case, which this Court separated into Cause No. DA 19-0223 and Cause No. DA 19-0363. *See* June 11, 2019 Order granting MTSun’s

motion to dismiss this case from Cause No. DA 19-0223. MTSun argues that the District Court should duplicate its decision to deny the stay here.

Due to the pending deadline, NorthWestern applies to this Court, pursuant to Rule 29 of the Rules of Appellate Procedure, to suspend Rule 22 in order to expedite consideration of this Motion for Stay.

## **I. Legal Background - PURPA**

Under the federal Public Utility Regulatory Policies Act of 1978 (“PURPA”), NorthWestern is required to purchase power from qualifying small power production facilities (“QFs”) such as solar farms like MTSun. 16 U.S.C. § 824a-3(a). The rate that NorthWestern pays for this power must be just and reasonable to customers and must not exceed the incremental cost of alternative power. 16 U.S.C. § 824a-3(b). In other words, the rate must not exceed the cost the utility would have paid to generate the power itself or purchase from another source. 16 U.S.C. § 824a-3(d). Federal regulations refer to this rate as the “avoided cost.” 18 C.F.R. § 292.304(a). The utility may pay the QF a standard rate that is set in a tariff. 18 C.F.R. § 292.304(c). Alternatively, the utility may pay the QF a rate calculated at the time the QF delivers the power to the utility or when the QF incurs a legally enforceable obligation to deliver the power. 18 C.F.R. § 292.304(d).

Each state must implement PURPA's requirements. 16 U.S.C. § 824a-3(f.) In Montana, the Legislature authorized the PSC to implement "mini-PURPA". *See* § 69-3-601, MCA, *et seq.* Under mini-PURPA, if a QF is too large to qualify for the tariff rate and NorthWestern and the QF cannot reach an agreement, the PSC must determine the rates and contract conditions. §§ 69-3-603 - 604, MCA. In determining the rates and contract conditions, the PSC must encourage long-term contracts and consider the availability and reliability of the power. § 69-3-604, MCA.

## **II. Factual Background**

Because MTSun is too large to qualify for a tariff rate, and because it could not agree to NorthWestern's proposed rates, the PSC had to determine the rates and contract conditions. §§ 69-3-603 - 604, MCA.

The complexity of valuing solar power, in light of its intermittent and non-dispatchable characteristics, is a central issue of this case. *See* 18 C.F.R. § 292.304 (factors affecting rates for purchases). MTSun's generation will be intermittent and not able to be dispatched when needed to serve load. Affidavit of John B. Bushnell ("Affidavit"), ¶ 4. The intermittent and non-dispatchable nature of the MTSun facility's generation affects both NorthWestern's ability to use the power to serve load and integrate the project into its system, as well as the avoided cost. Affidavit, ¶ 5.

### **III. An Immediate Stay is Warranted**

While Montana has not adopted factors in its rules relevant to whether a stay should be entered pending appeal, the federal courts consider whether the appellant is likely to succeed on the merits of the appeal; whether the appellant would suffer irreparable harm in the absence of a stay; whether the balance of harms favors a stay; and the public interest. *Cf. Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

#### **A. Appellants Are Likely To Succeed on Appeal**

NorthWestern is likely to succeed on the merits of the appeal because the District Court violated MAPA's prohibition against a court substituting its judgment for the agency's as to the weight of evidence on questions of fact. *See* § 2-4-704(2), MCA. Moreover, the District Court usurped the PSC's power to set rates in the first instance. *See* §§ 69-3-603 - 604, MCA ("*The commission shall determine the rates and conditions of the contract...*") (emphasis added).

Despite the authority the Legislature granted to the PSC and the limitations it placed on reviewing courts, the District Court calculated the avoided cost and set the contract term. For example, the District Court calculated the avoided cost of capacity based on its own technical finding that the "project does not provide exactly the same services as an ICE unit." *See* Order ¶ 31; ¶ 35(d). In another example, the District Court set the contract length based on its acceptance of MTSun's argument, rather than a finding that the PSC erred. *See* Order ¶¶ 20-21.

As a result, the District Court mistakenly found that “no testimony was provided in support of a 15-year contract” when, in fact, the record did include such testimony.

*Id.* Thus, the District Court exceeded its authority and unlawfully made itself the fact-finder and rate-setter, a roles that is assigned to the PSC.

This Court will likely at least partially reverse the District Court’s decision. Even a partial reversal will change the rates. Thus, a stay is necessary so that NorthWestern is not forced to unlawfully implement rates that are not just and reasonable and in the public interest.

**B. NorthWestern and Its Customers Are Harmed by Judicially-Established Rates**

The PSC determined the rates that NorthWestern would pay to MTSun for power over a 15-year term. Rather than remanding to the PSC for further consideration, the District Court directed the PSC to increase those rates and increase the term to 25-years. Because NorthWestern is allowed to recover from its customers the cost it incurs from QF power purchases, the District Court effectively increased customers’ rates, and implemented that increase for a longer term. *See* 18 C.F.R. § 292.304(m)(7). The District Court mistakenly focused on setting rates that encourage renewable development while overlooking the burden on NorthWestern and its customers for the expenses of that development. Without a stay, NorthWestern and its customers are harmed by this oversight.

### **C. The Balance of Harm Favors a Stay**

The balance of harm strongly favors a stay. The MTSun project is neither constructed nor connected to NorthWestern's system. Affidavit, ¶ 6. MTSun cannot claim any reliance on the District Court's order, because it has not had time to make any investments in response to it. The briefing in this case will conclude in a matter of months. If for some reason MTSun needs resolution, then it can move this Court to expedite consideration of the appeal.

### **D. A Stay is in the Public Interest**

Determining an accurate estimate of avoided cost is in the public interest. If avoided cost is set too high, NorthWestern and its customers pay too much for the power. Affidavit, ¶ 7. If avoided cost is set too low, renewable energy developers receive less of an incentive for development. *Id.* The public interest is best served by a stay during the time of this Court's review.

Allowing the expert agency to conduct the technical fact finding is in the public interest. Developing an accurate avoided costs estimate requires the PSC to conduct technical fact-finding. For example, the PSC considered MTSun's estimate using a proxy method and NorthWestern's estimate using a peaker method. Order No. 7435a ¶ 43; ¶46. The PSC had to resolve questions such as what base case portfolio should be used to measure changes in NorthWestern's net

position. Order No. 7435a ¶ 51. Notably, the issue of solar capacity contribution was an issue of first impression before the PSC. Order No. 7435a ¶ 74. Because calculating the value of solar generation is both novel and complex, it requires experience, expertise, and an understanding of PURPA and ratemaking. Affidavit, ¶ 8. As one Federal Court described, setting avoided cost is part of a “complex regulatory universe.” *Swecker v. Midland Power Co-op.*, 807 F.3d 883, 886 (8<sup>th</sup> Cir. 2015).

The Legislature assigned the PSC with the task of determining the rates that MTSun will receive. It is contrary to Montana law and well-established administrative law for a court to independently conduct the technical fact-finding that determines avoided cost. The public interest is harmed by the District Court performing the PSC’s technical fact finding.

#### **IV. Conclusion**

This Court should immediately stay the District Court’s Order regarding the contract rates and terms pending appeal. NorthWestern does not seek a stay of the District Court’s Order reversing the Symmetry Finding.

#### **Rule 16 Certification**

Pursuant to Rule 16 of the Rules of Appellate Procedure, undersigned counsel for NorthWestern Energy gave notice to the parties in this case prior to



filing this motion. MTSun opposes a stay. The PSC and Montana Consumer Counsel support a stay.

Dated this 15th day of July, 2019.

NORTHWESTERN ENERGY

/s/ Ann B. Hill

Ann B. Hill

Attorney for NorthWestern Energy

## **CERTIFICATE OF SERVICE**

I, Ann B. Hill, hereby certify that I have served true and accurate copies of the foregoing Motion - Stay to the following on 07-15-2019:

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