IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0223

VOTE SOLAR, MONTANA ENVIRONMENTAL INFORMATION CENTER, and CYPRESS CREEK RENEWALES, LLC,
Petitioners/Appellees,

and

WINDATA, LLC,
Petitioner/Intervenor/Appellee,

v.

MONTANA DEPARTMENT OF PUBLIC SERVICE REGULATION, MONTANA PUBLIC SERVICE COMMISSION,
Respondent/Appellant,

and

NORTHWESTERN CORPORATION, d/b/a NORTHWESTERN ENERGY,
Petitioner/Respondent/Appellant,

and

MONTANA CONSUMER COUNSEL,
Respondent/Intervenor.

APPELLEE WINDATA, LLC'S OPENING BRIEF

On Appeal from the Montana Eighth Judicial District Court
Cascade County, Cause No. BDV-17-0776
The Honorable James A. Manley, Presiding

APPEARANCES:

MONICA J. TRANEL
TRANEL LAW FIRM, P.C.
202 W. Spruce Street
Missoula, Montana 59802
(406) 926-2662
mtranel@tranelfirm.com
Attorneys for Petitioner/Intervenor/ Appellee WINDATA, LLC,

ANN B. HILL
NorthWestern Energy
208 N. Montana Ave., Ste. 205
Helena, MT 59601
ann.hill@northwestern.com
Attorneys for Petitioner/Respondent/Appellant NORTHWESTERN ENERGY

JUSTIN KRASKE
JEREMIAH LANGSTON
Special Assistant Attorneys General
PUBLIC SERVICE COMMISSION
1701 Prospect Avenue
P.O. Box 202601
Helena, MT 59620-2601
jkraske@mt.gov; jlangston@mt.gov
Attorneys for Respondent/Appellant MONTANA PUBLIC SERVICE COMMISSION

JASON T. BROWN
Montana Consumer Counsel
P.O. Box 201703
Helena, MT 59620-1703
jbrown4@mt.gov
Attorneys for Respondent/ Intervenor MONTANA CONSUMER COUNSEL

MICHAEL J. UDA
Uda Law Firm, P.C.
7 West 6th Avenue
Power Block West, Suite 4H
Helena, MT 59601
michaeluda@udalaw.com
Attorneys for MTSun, LLC

MARIE P. BARLOW
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
marie@sanger-law.com
Attorneys for Petitioner/Appellee CYPRUS CREEK RENEWABLES, LLC

JENNY K HARBINE
Earthjustice
313 East Main Street
Bozeman, MT 59715
jharbine@earthjustice.org
Attorneys for Petitioner/Appellee VOTE SOLAR and MONTANA ENVIRONMENTAL INFORMATION CENTER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

MONTANA CODE ANNOTATED

ADMINISTRATIVE RULES OF MONTANA

UNITED STATES CODE

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER

INTERNET RESOURCES

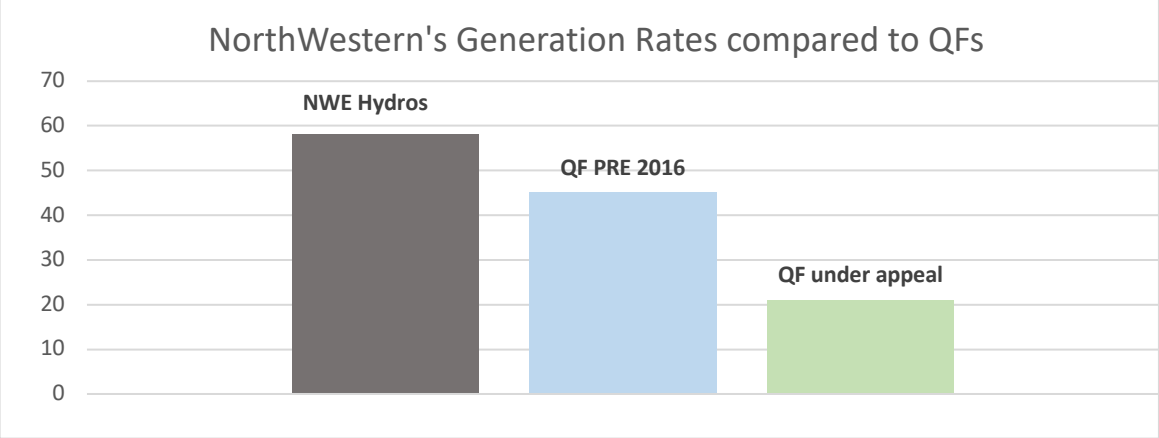
APPENDIX

STATEMENT OF THE ISSUE

The District Court vacated Montana Public Service Commission Final Orders 7500c and 7500d as unlawful and unreasonable.[1] Did it err?

STATEMENT OF THE CASE

Small wind and solar generators are eligible to receive long-term fixed rates that are not discriminatory as measured against NorthWestern's rates. This allows them to compete against NorthWestern, a monopoly and monopsony utility with no incentive to purchase power at wholesale from competing suppliers. The Commission must enforce federal and state non-discrimination laws. The Commission set rates and contracts for independent producers at less than half NorthWestern's. Is that discriminatory?



[1]Appendix Document 1, Order Vacating and Modifying MPSC Orders 7500c and 7500d; Appendix Document 2, *In The Matter Of Northwestern Energy's Application For Interim And Final Approval Of Revised Tariff No. QF-1, Qualifying Facility Power Purchase*, Docket No. D2016.5.39, Final Order 7500c issued July 21, 2017; Appendix Document 3, Final Order on Reconsideration issued November 24, 2017.

STATEMENT OF FACTS

The Public Utility Regulatory Policy Act (PURPA) was passed in 1978, when America was focused on steady oil price increases and concern over energy imports from politically unstable countries.[2] PURPA was ground-breaking because it required utilities to buy power from companies that were not utilities, creating a new industry of non-utility power generators.[3] These non-utility generators are called qualifying facilities, or QFs.[4]

Montana adopted PURPA and the Commission oversees its implementation.[5] This Court said "PURPA requires large utilities to purchase energy from smaller qualifying facilities at rates that allow the small facilities to become and remain viable suppliers of electricity."[6]

In response to ongoing litigation[7] over cost over-runs, siting, resource acquisition, and environmental concerns related to Colstrip, the legislature passed the Integrated Least-Cost Resource Planning and Acquisition Act, which found

---

[2] 16 U.S.C. § 824a-3, *et seq* amending Federal Power Act, 16 U.S.C. § 791, *et seq;* also *FERC v. Mississippi*, 456 U.S. 742, 745, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982).

[3] https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/primer.pdf (last visited September 23, 2019).

[4] Section 210 of PURPA, codified at 16 U.S.C. § 824a-3; also *Small Power Prod. and Cogeneration Facilities; Regulations Implementing Sec. 210 of the Pub. Util. Reg. Pol. Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980).

[5] *See* §§ 69-3-601 to 69-3-604, MCA (Montana's mini-PURPA); also *Colstrip Energy Ltd. P'ship v. Nw. Corp..*, 360 Mont. 298 ¶ 7, 253 P.3d 870, 2011 MT 99 (Mont. 2011).

[6] *Whitehall Wind, LLC v. Mont. Pub. Serv. Comm'n.*, 2010 MT 2, ¶ 2, 355 Mont. 15, ¶ 2, 223 P.3d 907, 908-09 (*Whitehall Wind I*); *also* Sections 69-3-602(2) and 69-3-604(4), MCA.

[7] See *Northern Plains Resource Council v. Board of Natural Resources and Conservation*, 594 P.2d 297, 181 Mont. 500, 36 St.Rep. 666 (Mont. 1979).

that it is the policy of Montana "to encourage utilities to acquire resources in a manner that will help ensure a clean, healthful, safe, and economically productive environment."[8] Following deregulation and reregulation, NorthWestern is required to plan for its long term resource needs using a procurement plan process set out in statute.[9] Planning and procurement are intermingled, and relevant here in that they drive the timing of when and how rates for these small generators are set. By rule, NorthWestern must compute short-term and long-term avoided costs following submission of its least cost plan.[10]

All qualifying facilities are capped by federal and state law at 80 megawatts (MW).[11] A subset of very small QFs under 3 MW are at issue in this case. For comparison NorthWestern's hydroelectric facilities have a total nameplate capacity of 442 MW, NorthWestern's interest in Colstrip Unit 4 has a nameplate capacity of 222 MW, and Judith Gap's nameplate capacity is 135 MW.[12] QFs with maximum production capability greater than three megawatts must negotiate rates through a contract with NorthWestern or petition the Commission to set the rates and terms

[8] Section 69-3-1201(1), MCA.
[9] Sections 69-8-419 and 69-8-420, MCA.
[10] ARM 38.5.1902(5), citing 38.5.2001 through 38.5.2012, and ARM 38.5.8201 through 38.5.8229.
[11] Section 69-3-601(3)(a) MCA; 18 C.F.R. §§292.203 – 204.
[12]https://www.northwesternenergy.com/docs/default-source/documents/defaultsupply/plan15/volume1/chapter8existingresources (last visited September 29, 2019).

of the contract.[13] The capacity of a facility to produce electricity is typically measured in megawatts – MW.[14] Energy produced in a specific time-period is measured in megawatt hours - MWh.[15]

In Montana, facilities under 3 MW are entitled to standard rate contracts as these projects do not have the resources to negotiate independent contracts with NorthWestern.[16] Montana's cap for generators qualifying for off the shelf standard rates has varied between 3 and 10 MW, and has varied in its application to different resources like hydro, wind, and solar.[17] The benefit of standard tariff rates is that a small generator with limited resources can obtain a contract without going through a lengthy bilateral "negotiation" with a hostile utility.

NorthWestern files its application to establish rates for these small generators every two years, and then files compliance tariffs that are regularly updated.[18] Before deregulation QF rates were set based on the costs of coal-fired

---

[13] Section 69-3-603, MCA; ARM 38.5.1902(5).
[14] See https://www.wind-watch.org/faq-output.php (last visited September 28, 2019).
[15] *Id*.
[16] Appendix Document 2, Docket D2016.5.39, Final Order 7500c ¶ 1; ARM 38.5.1901(j); ARM 38.5.1902(5).
[17] https://leg.mt.gov/content/Bills/Primers/Energy/Utility%20Planning.pdf; https://psc.mt.gov/Portals/125/Documents/news/pr/2017PR/PSC%20Solar%20FactSheet.pdf; Administrative Rule of Montana 38.5.1902(5), implementing history and amendments, available at http://www.mtrules.org/gateway/ShowNoticeFile.asp?TID=5212 (last visited September 24, 2019).
[18] See Docket No. D2008.12.146, NorthWestern's Application for Avoided Cost Tariff for QF1 rates, available at https://dataportal.mt.gov/t/DOAPSC/views/EDDISearch_15650306559830/PSCEDDISearch?iframeSizedToWindow=true&%3Aembed=y&%3AshowAppBanner=false&%3Adisplay_count=no&%3AshowVizHome=no&%3Aorigin=viz_share_link (last visited September 24, 2019).

generation.[19] In 2010, Colstrip Unit 4 served as the proxy for costs that NorthWestern could avoid with purchases from QF sources.[20]

In 2013, the Commission proposed reducing the cap for these standard rate contracts to 100 kilowatts.[21] Small generators pushed back, and the Commission ended up capping the size for the very small generators who could access the standard rate tariff at 3 MW. As required by rule, NorthWestern filed its biennial QF application in January of 2014, but failed to provide sufficient information to support the proposed rates The Commission denied the Application.[22] If the 2013 rates were "incorrect" NorthWestern had the ability to change that. It did not do so.

YEAR	CAP FOR STANDARD RATE	RESOURCES
2007	NW proposed 5 MW cap, Commission rejected and retained 10 MW cap[23]	
2010	10 MW and smaller	Wind broken out separately as resource with individual price options[24]
2013	Cap lowered from 10 MW to 3MW	
2017		Solar broken out separately[25]

[19] Appendix Document 4, Order No. 7338b ¶ 6 in PSC Docket No. D2014.1.5, May 4, 2015.
[20] App. Doc. 4, Order 7338b ¶ 6.
[21] Administrative Rule of Montana 38.5.1902(5), implementing history and amendments, available at http://www.mtrules.org/gateway/ShowNoticeFile.asp?TID=5212 (last visited September 24, 2019).
[22] App. Doc. 4, Docket No. 2014.1.5, Order 7338b ¶¶ 36 - 37.
[23] http://www.mtrules.org/gateway/ShowNoticeFile.asp?TID=811 (last visited September 24, 2019).
[24] Order 6973d (April 2010*),* see also https://psc.mt.gov/Portals/125/Documents/news/pr/2017PR/PSC%20Solar%20FactSheet.pdf (last visited September 24, 2019).
[25] App. Doc. 2, Order 7500c.

The next time NorthWestern filed an application to set QF1 rates was in 2016. That proceeding resulted in Orders 7500c and 7500d, now before this Court.[26]

After the evidentiary hearing was held, at a work session to determine what the appropriate rate should be, one Commissioner, unknowingly speaking while his video microphone was on and being recorded, made the following statements:[27]

Commissioner Lake:	Well it's a five-year contract. […]
Staff:	It's essentially a five-year rate but, yeah, which is, I mean, it's going to probably kill QF development entirely …
Commissioner Lake:	**Well, actually the ten year might do it if the price doesn't. And honestly at this low price, um, I can't imagine anyone gonna get into it.**
Staff:	No, no one …
Commissioner Lake:	So it becomes a totally moot point **because just dropping the rate that much probably took care of the whole thing.**
Staff:	Well it did except for one issue. Which is the other, the ancillary amendment which is holding NorthWestern to the same standard…
Commissioner Lake:	We're, we're still live.

[26] App. Docs. 2 and 3.

[27] See https://www.youtube.com/watch?v=Q1YO2sXa8wU Commission video (last visited September 29, 2019); http://billingsgazette.com/news/ government-and-politics/hot-mic-records-troublingconversation-about-solar-regulations/ article_8499a49d-e281-5dd7-aae7-aecccfa0394e.html (last visited September 28, 2019); and http://ypradio.org/post/hot-mic-throws-shade-montana-solar-interview-billings-gazette-reporter-tom-lutey#stream/0. See also electronic recording of June 22, 2017 work session (last visited September 28, 2019).

Staff: Yeah, but our, I think our mics are off so we're ok.

Staff: But anyway, they're not going to be able to hear.

Following the hot mic incident, WINData requested intervention, which was denied. Reconsideration of Final Order 7500c was also denied.[28]

While the decision under review by this Court applies to generators under 3 MW, WINData is participating because the methodology used to set rates for small independent generators is the same used for bigger generators. WINData currently has projects in development, including Golden Flats Wind, for which a contract – a Power Purchase Agreement, or PPA – from NorthWestern has been requested and rejected. The Court's decision will impact rates WINData seeks for its projects and whether they get built.

The District Court reversed the Commission, finding that the decision to value NorthWestern's resources including a value for carbon while denying that to renewable resources was discriminatory and that the use of 30 and 40 year terms to value NorthWestern's while applying terms of 15 years and less to QFs was also discriminatory.[29] The District Court directed the Commission to submit a compliance filing within twenty days, and on April 22, 2019 the Commission

[28] App. Doc. 3, Order 7500d.
[29] App. Doc. 1, Dist. Court Order p. 13.

entered its compliance filing as ordered by the District Court.[30]

In response to a request from Vote Solar to amend its order to address an internal consistency relating to the question of the symmetry finding, the District Court entered an Order on June 17, 2019 amending the order to address the inconsistency.[31] The Court directed the Commission to order NorthWestern to make a compliance filing consistent with the Court's findings within 30 days.

In response, the Commission issued Order 7500e to comply with District Court Order.[32] The Commission included in its Order:

> NorthWestern shall include language in any contract that it signs with respect to this docket that the contract is terminated or void if the Order issued by the District Court is overturned or altered in any manner by the Montana Supreme Court on appeal. Mont. Code Ann. § 69-3-604.[33]

This Court stayed implementation of the District Court's decision, and no compliance filing was made. This appeal follows.

STANDARD OF REVIEW

This Court reviews Orders 7500c and 7500d using the same standard that the district court applied.[34] The Commission's conclusions of law are reviewed de

---

[30] Appendix Document 5, MPSC Compliance Filing, April 22, 2019.
[31] Appendix Document 6, June 17, 2019 Order Granting Motion to Alter or Amend.
[32] Appendix Document 7, Order 7500e.
[33] Appendix Document 7, Order 7500e, ¶ 17.
[34] *McGree Corp. v. Mont. Pub. Serv. Comm'n*, 2019 MT 75 ¶6, 395 Mont. 229, 438 P.3d 326 (Mont., 2019), citing *Nw. Corp. v. Mont. Dep't of Pub. Serv. Regulation* , 2016 MT 239, ¶ 25, 385 Mont. 33, 380 P.3d 787; and also citing Section 2-4-704, MCA.

novo to determine if they are correct.[35] Findings of fact are reviewed for clear error.[36] The Commission's findings may be reversed or modified if WINData and other developers' rights have been prejudiced because the Commission's findings are "in violation of ... statutory provisions," "affected by other error of law," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."[37]

SUMMARY OF THE ARGUMENT

Does PURPA require state commissions to apply non-discrimination standards when determining rates for renewable energy resources?

ARGUMENT

I. State utility commissions may not discriminate against renewable resources.

Implementation of PURPA requires the Montana Commission to:

(1) encourage the development of qualifying facilities (QFs);

(2) prevent discrimination against QFs; and

(3) ensure that the resulting rates paid by electricity customers remain just and reasonable and in the public interest.[38]

---

[35] *McGree, id*., citing *Nw. Corp*. , ¶ 25.
[36] *McGree, id*., citing *Nw. Corp*. , ¶ 25; *Skelton Ranch, Inc. v. Pondera Cnty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 26, 375 Mont. 327, 328 P.3d 644
[37] *McGree Corp. v. Mont. Pub. Serv. Comm'n*, 2019 MT 75, 395 Mont. 229, 438 P.3d 326 (Mont. 2019), citing *Williamson v. Mont. Pub. Serv. Comm'n*, 2012 MT 32, ¶ 25, 364 Mont. 128, 272 P.3d 71; Section 2-4-704(2)(a)(i), (iii), (iv), (v), (vi), MCA.
[38] S*ee* 16 U.S.C. § 824a-3 (2018).

Under PURPA, state utility commissions are responsible for calculating the avoided-cost rates for utilities subject to their jurisdiction.[39] Montana has adopted FERC's rules,[40] which require that "the methods used to attribute value to energy and capacity that would be produced by a resource the utility plans to own must be consistent with methods used to attribute value to energy and capacity that would be produced by a QF, if avoided cost-based rates are to be nondiscriminatory."[41] The Commission explicitly adopted this standard.[42]

Investor-owned utilities like NorthWestern have an economic disincentive to purchase energy from QFs because doing so passes up an opportunity to rate base and earn a profit on that increment of capacity. NorthWestern's rates are set by multiplying the value of its rate base times a rate of return.[43] NorthWestern is motivated to keep electricity supply in its rate base to increase its profits. NorthWestern will not easily relinquish this stable profit to purchase generation from renewable resources – generation on which NorthWestern earns no additional profit. The most critical requirement of PURPA is that the rates and contract terms

---

[39] 45 Fed. Reg. at 12,216; PURPA §210(b), (f), 16 U.S.C. § 824a-3(b), (f). *Indep. Energy Producing Assoc., Inc. v. Cal. Pub. Utilities Comn*., 36 F.3d 848, 856 (9th Cir. 1994), citing 16 U.S.C. § 824a-3(f).

[40] Section 69-3-603 to 604, MCA; Montana Administrative Rule 38.5.1901, *et seq*.

[41] 18 CFR § 292.302(b); *Small Power Prod. and Cogeneration Facilities; Regulations Implementing Sec. 210 of the Pub. Util. Reg. Pol. Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214, 12,216 (Feb. 25, 1980).

[42] App. Doc. 2, Order 7500c ¶ 111.

[43] §§ 69-3-301 MCA *et seq*; ARM 38.5.101 *et seq*; also ARM 38.5.601 *et seq*.

must be non-discriminatory.[44]

Methods used to determine the value of NorthWestern's electricity "must be consistent with" methods used to determine the value for QF electricity.[45] Rates for all QFs, including projects up to 80 MW, are based on NorthWestern's "avoided costs" – the calculation of costs NorthWestern avoids by purchasing the QFs' power.[46] For all QFs, as for NorthWestern's resources, the methodology to set rates is – or ought to be – the same, even if the actual rates themselves may vary.[47] If NorthWestern's rates reflect a cost for carbon resources, that cost must also be reflected in QF rates.[48] If NorthWestern's resources are valued using thirty and forty-year spans, similar time periods must be used to calculate QF rates.

One would think, reading the appealing parties' arguments, that PURPA has a single component – to not "harm" consumers. NorthWestern does not use the word "discriminate" – or any version of it – in its brief. The Consumer Counsel just squeaks out the word discriminate at page 16, managing 3 uses of it referring to the District Court's order. The Commission uses the word just once, citing

---

[44] *See* 18 C.F.R. 292.304(a)(1)(ii); also § 69-3-603(2) MCA; Final Order 7500c ¶ 130.
[45] App. Doc. 2, Order 7500c ¶ 111; App. Doc.3, Final Order 7500d ¶ 81.
[46] 16 U.S.C. § 824a-3(d); 18 C.F.R. § 292.304(b); Mont. Code Ann. § 69-3-604; ARM 38.5.1901(2)(a); Order 7500c ¶ 122; ARM 38.5.1901(2)(a) (2016); *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.,* 461 U.S. 402, 415-18, 103 S. Ct. 1921 (1983); *Whitehall Wind, LLC v. Mont. PSC*, 2015 MT 119 ¶ 3, 379 Mont. 119, 347 P.3d 1273 (Mont. 2015)(*Whitehall Wind II*).
[47] App. Doc. 2, Order 7500c ¶ 111.
[48] App. Doc. 2, Order 7500c ¶¶ 107, 111, citing *In re Greycliff Wind Prime, LLC*, Docket No. D2015.8.65, Order 7436e (Nov. 4, 2016), ¶ 16.

PURPA. None of the appealing parties explain and analyze the reality that the Commission – and this Court – are bound by PURPA's requirement that "Rates for sales by utilities" "*shall not discriminate* against the qualifying cogenerators or qualifying small power producers."[49]

Rather than focusing on the legal framework imposed by PURPA, the appealing parties wave their hands over "judicial rate-setting" claiming that this Court can't possibly review the complexities of the Commission's decisions – and therefore, must simply affirm them. But, the Court is faced with a straightforward question of law: does PURPA and its implementing regulations prohibit discrimination?

A. NorthWestern's resources include a value for carbon and QF resources must as well.

The appealing parties' argument that QF pricing did not include a carbon adder in 2011 and so should not have one in 2017 is incorrect for two reasons. First, the metric against which QF rates are determined is *NorthWestern's* resources – all of which include a carbon adder – and therefore, it is discriminatory to deny it for renewable resources in the QF tariff.

Second, use of a carbon adder is not a function of political whimsy. Carbon pricing policies have been adopted by an estimated 46 countries and 24 subnational

[49] S*ee* 16 U.S.C. § 824a-3(c)(2), (2018)(emphasis added).

jurisdictions around the world and use of carbon pricing is a mainstream view among economists as the tool to address carbon emissions.[50]

1. NorthWestern's resources are the metric against which discrimination is measured, not a QF1 time capsule.

The appealing parties ask this Court to look only into the silo of time and compare QF rates today with QF rates in 2011, justifying removal of carbon pricing now because it wasn't used in earlier QF tariffs. This argument ignores that NorthWestern's avoided costs are determined using two data points: planned future acquisitions, and resources recently acquired.[51] QF rates are derivative of NorthWestern's – they are not a stand-alone rate based on a QFs costs. PURPA obligates the Commission, and this Court, to use *NorthWestern's* rates as the benchmark to determine what the QFs rates should be – not the 2011 QF rates that were based upon NorthWestern's application.[52]

The Commission acknowledged that its decisions discriminate against small renewable projects, favoring NorthWestern's coal over wind and solar:

> In this order, the Commission deviates from a precedent it has followed for several years with regard to the review of large QF and non-QF resource procurements by NorthWestern, including its preapproval of NorthWestern's

---

[50] https://www.worldbank.org/en/results/2017/12/01/carbon-pricing (last visited September 28, 2019); https://www.nytimes.com/2018/10/08/business/economic-science-nobel-prize.html# (last visited September 28, 2019).
[51] Order 7500d at ¶¶ 35, citing *In re NorthWestern Energy's Application for Approval of Revised Tariff No. QF-1*, Docket D2012.1.3, Final Order 7199d p. 38 (Concurring Opinion of Kavulla, Nov. 20, 2012), citing Ord. 6973d, Docket D2008.12.146, pp. 57-58 (Apr. 13, 2010).
[52] 16 U.S.C. § 824a-3, *et seq* amending Federal Power Act, 16 U.S.C. § 791, *et seq;* also *FERC v. Mississippi*, 456 U.S. 742, 745, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982).

hydroelectric acquisition in 2014.[53]

A fundamental tenet of PURPA is that the avoided cost rates may not discriminate against a QF as compared to the utility's own generation resources.[54] The Commission embedded carbon emissions as part of any non-discriminatory price forecast for any asset brought on line in Montana when it adopted a price forecast from NorthWestern that included the cost of carbon regulation for its acquisitions of Spion Kop, Dave Gates Generating Station, and the PPL Hydros. PURPA requires a utility to pay QFs at the utility's avoided-cost rate: the rate the utility would have incurred obtaining energy from a source other than the QFs.[55] NorthWestern's resources have included a cost for carbon, and it's but-for costs must also include carbon to satisfy PURPA.[56] The District Court's reversal of the Commission's Orders should be affirmed.

NorthWestern's 2015 Procurement Plan and recent resource acquisition decisions, including the PPL Hydros, account for potential carbon costs. These resource acquisitions were approved by the Commission. The Commission told NorthWestern "it is correct planning practice to analyze impacts of carbon

[53] App. Doc. 2, Order 7500c citing Docket D2013.12.85, Order 7323k (Sep. 25, 2014), ¶¶ 88-90.
[54] 16 U.S.C. § 824a-3(b)(2).
[55] 18 C.F.R. § 292.101(b)(6); Mont. Admin. R. 38.5.1901(2)(a) (2016); 16 U.S.C. Section 824a-3(d); 18 C.F.R. §292.101(b)(6).
[56] *Winding Creek Solar v. Peterman*, Nos. 17-17351, 17-17532, slip op. at 10, (9th Cir. July 29, 2019), citing *Kisor v. Wilkie*, 588 U.S. —, No. 18-15, slip op. at 11–19 (June 26, 2019).

regulation."[57] This Court advised that "under both state and federal law, rates for purchases from qualifying facilities must be reasonable and based on *current avoided least cost resource data*."[58]

The Commission urges this Court to affirm its decisions based upon post hoc rationalizations. Legally this argument should be rejected because it was not made to the District Court and must be rejected here as it is being raised for the first time on appeal.[59]

Factually, the Commission's reliance on the repeal of the Clean Power Plan is simply another verse in its changing political winds song. But, the metric is not political winds, it is whether NorthWestern's resources use carbon pricing. They do, and QF prices must include carbon pricing as well. Even if the Court strays down the path as invited by the Commission, the fact of the matter is that carbon pricing is a mainstream view among economists to address carbon emissions.[60] The current administration's whimsy is not a governing force to justify going astray.

The Commission's statement that NorthWestern's 2019 Procurement Plan "does not account for carbon costs" is misleading. In fact, NorthWestern considers carbon in two scenarios, and relies on carbon costs from the 2015 Plan with

---

[57] App. Doc. 9, October 2, 2017 Staff Memo p. 18.
[58] *Whitehall Wind I*, 355 Mont. at 19, 223 P.3d at 910 (emphasis added).
[59] *Covey v. Brishka*, 2019 MT 164 ¶ 38 (Mont. 2019).
[60] https://www.worldbank.org/en/results/2017/12/01/carbon-pricing (last visited September 28, 2019); https://www.nytimes.com/2018/10/08/business/economic-science-nobel-prize.html# (last visited September 28, 2019).

implementation in 2025.[61] To say NorthWestern does not include carbon in a "base case" – an undefined term – for the 2019 Plan is no excuse to justify removing carbon from QF resources now while NorthWestern's resources are predicated upon carbon pricing, which is the only barometer that matters under PURPA.

And, NorthWestern must file for a new QF rate calculation following submission of its Procurement Plan.[62] NorthWestern skipped filing its 2017 Procurement Plan altogether, and now the Commission is asking this Court to use post hoc rationalization to apply a misreading of the 2019 Plan to 2016 QF1 rates. The District Court correctly applied PURPA's non-discrimination mandate, and that should be affirmed.

NorthWestern's avoided least cost resource data available to the Commission at the time it issued Orders 7500c and 7500d included carbon pricing. NorthWestern and the Commission may not simply pick and choose what assumptions and methods to use on an ad hoc basis.[63] The Commission's post hoc rationalization evidences its desire to choose sides and pick winners, and serve one sauce to NorthWestern and another to QFs in violation of PURPA.

The appealing parties argue that Montana ratepayers are "harmed" by the

[61] Appendix Document 10, excerpts from NorthWestern's 2019 Resource Plan, 9- 11.
[62] ARM 38.5.1902(5).
[63] *FERC v. Mississippi,* 456 U.S. 742, 745-46 (1982); *Power Resource Group, Inc. v. Pub. Util. Comm'n of Texas,* 422 F.3d 231, 233 (5th Cir. 2005).

District Court's decisions and are "overpaying" for energy produced by small solar and wind projects under the new tariff. But nowhere do they advise the Court of the baseline costs against which such "overpayments" are being measured. And, no one tells this Court that the claimed "overpayment" still doesn't touch NorthWestern's rates. The fact is that QF resources are a much better deal for consumers than NorthWestern's resources. One Commissioner described it:

> Customers have paid slightly more than $460 million in just the past five years in premiums over and above the market price of energy for the coal, hydro and wind power plants the company owns.
> Put another way, if NorthWestern had instead bought energy from other suppliers – the independently owned share of Colstrip or excess supply from wind farms — every NorthWestern customer would have saved on average $1,250.[64]

But, what each ratepayer may have saved had the Commission priced NorthWestern's resources differently is not the governing legal principle. The Commission – and this Court – must apply PURPA's mandate to not discriminate against small wind and solar projects in favor of NorthWestern's coal plants. If NorthWestern's resources are priced with a carbon adder, that must be applied to renewable energy resources. The Commission said as much and admitted that it's decision to remove the carbon adder was discriminatory. The District Court's decision must be affirmed.

And if it is true that new solar and wind should be priced without carbon and

[64] Appendix Document 8, Exhibit 14, Kavulla Opinion Editorial.

are the least cost resources for Montana ratepayers, then neither NorthWestern nor the Commission should be seeking to buy more of Colstrip and saddling Montanans with enormous unfunded liabilities. Both the Commission and NorthWestern should be pursuing more of these cheap resources – not less.

The common thread among the appealing parties is to ask this Court to put blinders on. NorthWestern asks the Court to ignore PURPA's non-discrimination mandate, never even mentioning that part of the statute in its brief. The Consumer Counsel does the same, focusing on a least-cost resource argument although non-discrimination and an obligation to create a market for renewable energy projects is the law. The Commission asks the Court to ignore staff recommendations and the Commissioners' biased articles against this project.

The Court must reject this know-nothing approach. Looking at the record, the District Court correctly applied PURPA's mandate to treat renewable energy on par with NorthWestern's resources. It should be affirmed. As noted by the U.S. District Court for the District of Montana, reviewing the same Order under review here, these renewable energy projects "answered our nation's call for new energy at a clearly agreed and effective compensation only to find ultimately, after expending hundreds of thousands of dollars in performance, that the agreed upon payment had been cut in half."[65] The Commission's failure to abide by the law, its

[65] *Bear Gulch Solar, LLC v. Mont. Pub. Serv. Comm'n*, 356 F. Supp.3d 1041 (D. Mont. 2018).

regulatory cartwheels, and arbitrary reduction of prices, are wrong. The District Court correctly applied PURPA and reversed the Commission's arbitrary pricing.

2. Carbon pricing is a mainstream economic tool to address climate change.

The appealing parties argue that the Commission's decision to remove carbon from QF resources was based on record evidence – but Orders 7500c and 7500d do not rely on record evidence, they rely on the "uncertainty" of carbon emissions pricing[66] and "anticipated changes in the political landscape."[67] The District Court correctly applied the law in reversing the Commission.[68]

One Commissioner noted that the carbon price was "inexorably built into the price of the Hydros – a tax paid up front on an environmental externality that presently has only a very small, even non-existent, market price in Montana […]"[69] The speculative nature of carbon regulation did not dissuade the Commission for NorthWestern's resources. PURPA's non-discrimination mandate compels the Commission to treat QFs the same way – it is, after all, NorthWestern's avoided costs that determine the price. NorthWestern's resources include a carbon adder.

---

[66] Order 7500d Para. 38
[67] Order 7500c at ¶¶ 76-77Order 7500d PARA 38.
[68] *Montana-Dakota Utilities Co. v. Montana Dept. of Public Service Regulation*, 725 P.2d 548, 223 Mont. 191, 43 St.Rep. 1648 (Mont. 1986); *Montana-Dakota Utilities Co. v. Montana Dept. of Public Service Regulation*, 752 P.2d 155, 231 Mont. 118 (Mont. 1988).
[69] App. Doc. 9, October 2, 2017 Staff Memo p. 18; Order 7500d at ¶¶ 85-86, 93, citing *In re NorthWestern Energy's Application for Preapproval of Hydroelectric Generating Facilities*, Docket D2013.12.85, Final Order 7323k p. 8 (Dissenting Opinion of Commissioner Kavulla)(Sept. 25, 2014).

The Commission said that "it is correct planning practice to analyze impacts of carbon regulation."[70]

Further, the Commission gave NorthWestern the carbon adder in 2014 – when carbon costs were no more likely to occur than they are today. At the time of the PPL Hydro acquisition, neither the Clean Power Plan nor the Paris Climate Accord were in place – which is the Commission's argument for not using it now.[71] The Commission justified its exclusion of carbon for QFs noting that "the relevant authority" regulating carbon emissions "is actively seeking to repeal the regulation that could have given rise to a price effect on the wholesale energy market resulting from carbon dioxide."[72]

The Commission gave NorthWestern a carbon adder at a time when there was *no carbon regulation in place*.[73] The Commission's argument that this Court should apply post hoc rationalization and look to the repeal of the Clean Power Plan – after the Commission issued its decision – is as arbitrary as the decision it is

---

[70] App. Doc. 9, October 2, 2017 Staff Memo p. 18.
[71] *See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Clean Power Plan)(Oct. 23, 2015). The Paris Agreement was adopted on December 12, 2015 at the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change held in Paris. *See* United Nations Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en. The Commission included a carbon adder in the PPL Hydro acquisition on September 26, 2014, over a year before any carbon regulations were in place.
[72] Final Order 7500d ¶¶ 38, 39; Order 7500d ¶ 38.
[73] *See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

defending. The only time that the carbon adder was in fact the law was while the Commission was determining what price to use to set QF rates – and it did not apply it.

NorthWestern benefits on both ends – on the front end, because it received a carbon adder based on *potential* regulations[74] – and on the back end, by cutting out competition from small renewable energy resources based on repeal of the regulation that was in place while the Commission was deciding the QF tariff. [75] As Commission staff said, this "reduces to a case of the Commission changing its mind in this case in an arbitrary manner."[76] The Commission staff went on: "[t]he record evidence in this case does not demonstrate that further changes in the political landscape have occurred […] and warrant further adjustment in the projected carbon adder."[77]

The Commission seemed perfectly capable of acknowledging what the law is – finding that "methods used to attribute value to energy and capacity that would be produced by a resource the utility plans to own must be consistent with methods used to attribute value to energy and capacity that would be produced by a QF, if

[74] October 2, 2017 Staff Memo p. 18; Order 7500d at ¶¶ 85-86, 93, citing *In re NorthWestern Energy's Application for Preapproval of Hydroelectric Generating Facilities*, Docket D2013.12.85, Final Order 7323k ¶¶ 26–41, 51–59 (Sept. 25, 2014); also citing *In re Crazy Mountain Wind*, D2016.7.56, Order 7505b.
[75] Order 7500c ¶ 132.
[76] October 2, 2017 Staff Memo p. 19.
[77] October 2, 2017 Staff Memo p. 18.

avoided cost-based rates are to be nondiscriminatory."[78] The Commission was simply unwilling to abide that standard in setting rates for QFs.[79] The Commission acknowledged this violates PURPA.[80] It justified its admitted discrimination by promising to apply this adjustment to NorthWestern "on a prospective basis."[81]

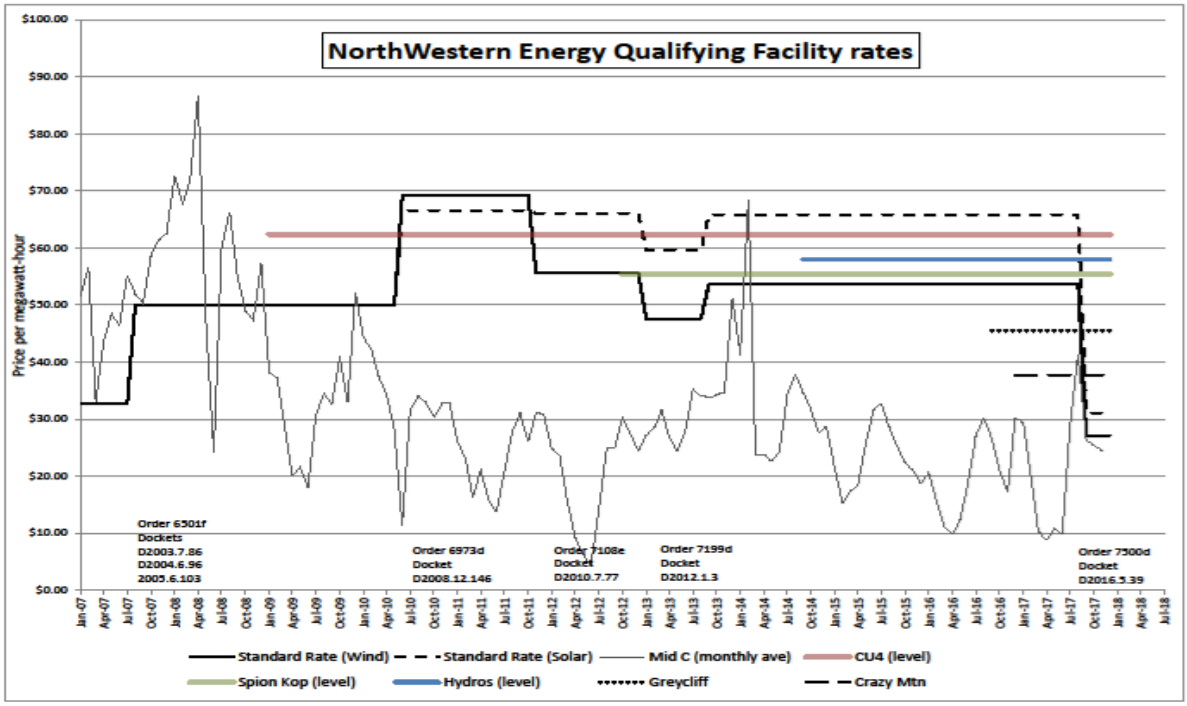
The true metric to be used by the Commission and this Court is whether the QF rates are non-discriminatory as measured against NorthWestern's costs.[82] No party has argued that NorthWestern's costs don't include carbon, or are appropriately valued over a fifteen-year span – nor can they. Rather, the appealing parties ask the Court to look back in time – and focus on the QF's costs. But, that is not the metric.[83] The District Court correctly rejected the Commission's discriminatory treatment of QF resources, and must be affirmed.[84]

If the Commission rues a carbon adder of $250 million to NorthWestern that has not come to pass, it cannot fix its mistake by discriminating against QF

---

[78] Order 7500c ¶ 111, citing and quoting *In re Greycliff, LLC*, Docket D2015.8.64, Order No. 7436e ¶16.
[79] Order 7500c ¶ 111.
[80] Order 7500d at ¶ 81.
[81] Order 7500d ¶ 89.
[82] *Whitehall Wind, LLC v. Mont. Pub. Serv. Comm'n.*, 2010 MT 2, ¶ 2, 355 Mont. 15, ¶ 2, 223 P.3d 907, 908-09 (*Whitehall Wind I*); *also* Sections 69-3-602(2) and 69-3-604(4), MCA
[83] Order 7500c ¶ 122; ARM 38.5.1901(2)(a) (2016); *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.,* 461 U.S. 402, 415-18, 103 S. Ct. 1921 (1983); *Whitehall Wind, LLC v. Mont. Pub. Serv. Comm'n*, 2015 MT 119 ¶ 3, 379 Mont. 119, 347 P.3d 1273 (*Whitehall Wind II*).
[84] § 69-3-401, MCA, *Williamson v. Mt. Pub. Serv. Cmn*., 2012 MT 32, ¶ 25, 364 Mont. 128, 272 P.3d 71; Section 69-3-402(1), MCA; *Molnar ex rel. Residents of Public Service Commission v. Montana Public Service Commission*, 177 P.3d 1048 ¶ 7, 2008 MT 49, 341 Mont. 420 (Mont. 2008).

resources and calling it consumer indifference. In an effort to defend its actions in this docket, the Commission published a chart that confirms that NorthWestern's resources are valued at much higher rates that those given to QF resources: [85]



PURPA does not require QFs to provide generation at less than NorthWestern's avoided costs to *benefit* consumers. The Commission may have gotten it wrong by embedding carbon in NorthWestern's resources: But add carbon the Commission did, and PURPA's nondiscrimination mandate compels that cost

[85] MPSC Myth v. Fact, available at https://psc.mt.gov/Portals/125/Documents/news/pr/2017PR/PSC%20Solar%20FactSheet.pdf (last visited September 25, 2019).

to be included in QF resources as a correct reflection of NorthWestern's avoided costs.

B. NorthWestern's resources are valued over several decades and QF resources must be as well.

The Commission reduced the contract length for QF projects from 25 years to 15 years.[86] NorthWestern's rates are set using forecast terms of 30 to 40 years.[87] The District Court correctly found that the Commission's decision to arbitrarily reduce contract terms for QF resources was unreasonable and should be reversed. No party testified that 15 year contracts satisfies the two legal mandates: 1) long-term contracts are required by law; and 2) non-discrimination.

1. The law explicitly requires long term contracts for QF resources.

"*Long-term contracts* for the purchase of electricity by the utility from a qualifying small power production facility *must be encouraged in order to enhance the economic feasibility* of qualifying small power production facilities."[88]

The Commission initially reduced the contract length for QFs to five years.[89] Even more troubling, the Commission did so without providing notice and an opportunity to be heard by interested parties like WINData. On reconsideration, the Commission walked back its level of discrimination allowing up to 15-year

[86] App. Doc 3, Order 7500d ¶¶ 14-30
[87] App. Doc 3, Order 7500d ¶ 92.
[88] Section 69-3-604(2), MCA (emphasis added).
[89] App. Doc. 2. Order 7500c ¶¶ 108-114, 132.

contract terms for QFs. Although the adjustment to 15 years is arguably less discriminatory than the 5-year term, less discrimination is not the legal standard.

PURPA provides QFs with the right to lock in long-term, fixed, avoided-cost rates calculated at the time of the obligation.[90] This right is offered to QFs in light of Congress's recognition that "cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis-a-vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable."[91] FERC explained that the benefit of offering QFs fixed rates is to provide "certainty with regard to return on investment."[92]

FERC affirmed this long-standing right to long-term, *fixed* rates based on forecasts at the time the obligation is incurred – not rates that might be trued-up at some point in the future to account for circumstances months or years later.[93] FERC "has long held that its regulations . . . are intended to reconcile the requirement that the rates for purchases equal to the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments, by

[90] *See* 18 C.F.R. § 292.304(b)(5), (d)(2).
[91] *Am. Paper Institute, Inc.*, 461 U.S. at 414 (internal quotation omitted).
[92] Order 69 at 12,224 (Feb. 25, 1980).
[93] *Windham Solar, LLC*, 157 FERC ¶ 61,134, PP 5-8 (Nov. 22, 2016).

necessity, on estimates of future avoided costs and has explicitly agreed with previous commenters that stressed the need for certainty with regard to return on investment in new technologies."[94] This Court has confirmed this requirement in requiring that long-term contracts must be encouraged *to enhance the economic feasibility* of QFs.[95]

The Commission looked to Idaho and North Carolina to justify shortening contracts for QFs, but in doing so, ignored this Court's precedent and PURPA. It also ignored the fact that Idaho's adoption of two-year contracts has resulted in no QF projects coming on line. The mandate to lock in long-term contracts is to protect QFs in Montana from the result Idaho achieved – and to ensure that PURPA, which remains the law, be implemented.[96] The District Court correctly applied the law and should be affirmed.

The Commission attempts to mollify QFs with a pithy note that contracts can be negotiated later if the political landscape changes again.[97] The Commission's direction to QFs to sell energy under a short-term contract and "re-contract after the monetized emissions costs are reflected in subsequent tariff rates" implicitly recognizes the fallacy of its decision.[98] The District Court

---

[94] *Id.* at ¶ 8 (internal quotation omitted).
[95] § 69-3-604(2), MCA.
[96] *See* 16 U.S.C. § 824a-3(b)(2) (rates for purchases from QFs "shall not discriminate against qualifying cogenerators or qualifying small power producers"); 18 C.F.R. § 292.304(a).
[97] App. Doc. 3, Order 7500d ¶ 39.
[98] App. Doc. 3, Order 7500d ¶ 39.

correctly reversed it.

2. NorthWestern gets the benefit of long-term contracts.

The Commission calculated NorthWestern's rates using 30 to 40 year terms for its own resources, but fails to give QFs those same contract length terms. The Commission noted that risk related to contract length occurs with NorthWestern's resources, "and often to a greater degree," and NorthWestern's resources are "contributing to the very risk that they purportedly seek to offset."[99] In spite of that, the Commission imposed short contract terms on QFs while at the same time allowing NorthWestern's 30-year and longer estimates for its own resource costs.[100]

The Commission explicitly recognized the discriminatory impact of short contracts. The impact will be ameliorated, the Commission promised, in the future. "[G]oing forward, any resource the utility acquires or contracts with must be subject to the same standard."[101] The District Court rejected this temporal promise of future justice and this Court should do the same.

Commission staff recognized that promises of future parity do not ameliorate present day discrimination, telling the Commission that

> [T]he Commission's symmetry finding relies on future implementation […] renders it ineffective as a means of establishing nondiscrimination in this

[99] App. Doc. 3, Order 7500d ¶ 114.
[100] App. Doc. 3, Order 7500d ¶ 92.
[101] App. Doc. 2, Order 7500c ¶ 27, 29 and 114, p. 35.

> case. Under FERC's rules implementing PURPA, the Commission's avoided cost determination in this case must be nondiscriminatory *presently*; but the Commission's symmetry finding rests on future Commission action, which is fraught with the potential that the Commission may not follow through. The Commission has merely provided direction as to how discriminatory treatment of QFs may be avoided in future proceedings in which NorthWestern's generation assets are at issue. However, at present, the Commission's symmetry finding has no more effect than the Commission's comments on, for example, NorthWestern's procurement plans.

The staff noted further that the Commission's symmetry "*dictum* may have even less effect than Commission comments on procurement plans because, unlike resource planning, there is no explicit statutory obligation for the Commission to achieve symmetrical treatment."[102]

The Commission arbitrarily and unreasonably gave NorthWestern the benefit of long term contracts, while denying that benefit to QFs. The District Court was correct in finding Commission Orders 7500c and 7500d unreasonable and unlawful and this Court should affirm the District Court.

II. The District Court applied the correct standard of review and the remedy is within the MAPA options.

Review of an agency decision under MAPA is de novo for legal conclusions to determine if they are correct. For findings of fact, review is for abuse of discretion – but where an agency incorrectly applies the law, it gets no deference. The District Court did not vacate the Orders because they ignored staff

[102] App. Doc. 9, Staff memo October 2, 2017, p. 25 and p. 25 fn. 106.

recommendation, as argued by the Commission. Rather, the District Court found that it was arbitrary to abandon the Commission's prior practices, reject staff recommendations, and then defend its order as within its area of expertise.

The District Court was within its authority to vacate and modify Orders 7500c and 7500d. The Commission implemented the District Court's order with a compliance filing in April. The appealing parties suggest that the District Court reviewed the Commission's decision using a "hard look" but this is nowhere in the District Court decision. The District Court found that the Commission acted arbitrarily and unreasonably in issuing Orders 7500c and 7500d,[103] and vacated and modified the orders to implement staff recommendations. The Commission then filed a compliance filing implementing the Court's Order. There is no discussion of a "hard look" standard of review.

Bizarrely, without any supporting legal reference and contrary to clear Montana Supreme Court case law on this point, the Commission argues that this Court lacks jurisdiction to review this case and that the District Court did not have authority to modify the Commission's decision. NorthWestern frames the District Court's decision as "rate-setting" – and argues that the District Court's only option was to remand the case to the Commission for further proceedings. But, this is not what MAPA contemplates.

[103] App. Doc. 1, Order p. 3.

The Montana Administrative Procedures Act governs the District Court's review.[104] A reviewing court may reverse *or modify* the agency decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decision are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[105]

The District Court vacated Orders 7500c and 7500d because they were arbitrary and were not based on record evidence. It was correct in doing so.[106]

III. The Commissioners' bias is relevant.

Rather than address the clear bias demonstrated in opinion articles and the hot mic recording, the appealing parties simply ask this Court to ignore these

---

[104] *Fish v. Trap Free Mont. Pub. Lands*, 2018 MT 120 ¶11, 417 P.3d 1100, 391 Mont. 328, citing *Williamson v. Mont. Pub. Serv. Comm'n*, 2012 MT 32, ¶ 25, 364 Mont. 128, 272 P.3d 71.
[105] Section 2-4-704(2), MCA; see also *Williamson* , ¶ 25.
[106] *Molnar v. Fox* , 2013 MT 132, ¶ 17, 370 Mont. 238, 301 P.3d 824.

"sensationalized" statements. Amazingly, the Commission then goes on to offer "post hoc" justification for the decisions, with no supporting evidence, no ability of the parties to challenge these evidentiary statements, and no evidence in the record as to whether they are even accurate. This Court should reject this after the fact advocacy by the appealing parties.

The appealing parties fault the District Court for relying on staff recommendations, but the Commission cannot both reject its expert staff recommendation and cloak itself in the fortress of "expertise" to avoid reversal. Refusing to heed its staff's advice to reconsider Order 7500c, the Commission stubbornly stood by its exclusion of the carbon adder.[107] By defending its decision to remove carbon under the cloak of its own expertise, it puts into question who the experts are and what the experts are recommending. The Commission is free to ignore its staff, but it must find a defense other than its own expertise to justify its departure from its own precedent and its rejection of its staff recommendation.[108]

The District Court correctly looked to the staff recommendation that refusal to include a carbon adder in QF rates "reduces to a case of the Commission changing its mind in this case in an arbitrary manner."[109] The Commission

---

[107] App. Doc. 3, Order 7500d ¶¶ 31-39.
[108] *Montana Trout Unlimited v. Montana DNRC*, 133 P.3d P. 37, 2006 MT 72, 331 Mont. 483 (Mont. 2006) citing, *Montana Power Co. v. Mont. Pub. Serv. Comn*, 2001 MT 102, 305 Mont. 260, 26 P.3d 91
[109] App. Doc. 9, October 2, 2017 Staff Memo p. 19; citing *Crazy Mountain Wind*, Commission Docket No. D2016.7.56.

eliminated any value for carbon,[110] justifying its about-face by saying it "possesses the authority and technical fact finding expertise to appropriately balance the future risk of carbon costs to be borne by customers."[111] It also cited its "experience, technical competence, and specialized knowledge."[112] But, the Commission's technical fact-finding experts – its staff – recommended the Commission retain the carbon adder for QFs.[113] Staff recommended carbon at "a 25-year levelized avoided energy cost of $0.007/kwh in the total avoided energy cost." On reconsideration, after the Commission rejected staff's initial recommendation, "staff recommends that the Commission reconsider its decision[] to […] exclude a carbon adjustment. Staff concludes that record evidence does not support [that] decision."[114]

The District Court correctly reversed the Commission for ignoring its expert staff recommendations on technical issues.[115] In *Trout Unlimited*, the Department of Natural Resources (DNRC) was implementing rules about the interplay of groundwater and surface water in closed basins.[116] Its expert staff hydrogeologist concluded that pre-stream capture of tributary groundwater could have an

---

[110] App. Doc. 3, Final Order 7500d, ¶¶ 31-39.
[111] App. Doc. 2, Final Order 7500c ¶ 76.
[112] App. Doc. 3, Final Order 7500d ¶ 103.
[113] Appendix Document 11, June 16, 2017 Staff Memo, p. 6.
[114] App. Doc. 9, October 2, 2017 Staff Memo p. 2.
[115] *Montana Trout Unlimited v. Montana DNRC*, 133 P.3d P. 37, 2006 MT 72, 331 Mont. 483, citing *Montana Power Co. v. Mont. Pub. Serv. Comn*, 2001 MT 102, 305 Mont. 260, 26 P.3d 91.
[116] *Trout Unlimited, id*. at ¶¶ 9-11

immediate and direct impact on surface water. Disregarding its expert staff, the DNRC reached the opposite conclusion.[117] This Court reversed the DNRC's interpretation, discussing at length the DNRC's expert hydrogeologist's findings.[118]

In this case, as in *Trout Unlimited*, the Commission rejected its expert staff recommendation. The Commission justified the deviation based on its expertise, without explaining that the deviation is counter to its expert staff recommendation – indeed, its staff called the Commission's action "arbitrary." The District Court found that decision arbitrary – as did the Commission's own staff.[119] This Court should affirm the District Court's reversal of the Commission's arbitrary and discriminatory decisions.

This Court has previously looked to the Commission staff for guidance on avoided cost calculations to determine whether the Commission went astray.[120] In *Whitehall Wind I*, the district court sought information from the Commission's staff economist to determine whether the Commission's rates for a QF were reasonable.[121] The Commission's staff economist verified for the district court that

---

[117] *Id*. at ¶¶ 40.
[118] *Id*. at ¶¶ 41-43.
[119] §§ 69-3-402, MCA.
[120] *Whitehall Wind, LLC v. PSC*, 2010 MT 2, ¶¶ 29-33, 355 Mont. 15, 223 P.3d 907, 911 (*Whitehall Wind I*)(district court properly allowed record to be augmented under § 69-3-404(2), MCA).
[121] *Whitehall Wind I,* ¶¶ 13-14.

the avoided cost rate set by the Commission was approximately one-third the appropriate rate.[122] This Court affirmed the district court's reversal of the Commission, noting that the district court properly determined that the Commission's calculation of the avoided cost rate was clearly erroneous.

In this case, the Court should follow that precedent and affirm the District Court's decision, in which it implemented the staff recommendations as to what the correct avoided cost should be – and this Court should not ignore the Commissioners' demonstrated and publicized bias. A contrary decision will result in QF resources that produce energy with no carbon, receiving *zero* value for being carbon-free, while NorthWestern, whose resources include Colstrip, receives a carbon dioxide emission adder calculated to be approximately $250 million dollars for the Hydros alone.[123]

The District Court correctly looked at the Commissioners' bias and based on the record, reversed and modified Orders 7500c and 7500d. This Court should affirm the District Court's conclusions.

CONCLUSION

The mandate of PURPA has been little abided due to entrenched monopoly

[122] *Whitehall Wind I, id*. at ¶ 28.
[123] App. Doc. 9, October 2, 2017 Staff Memo p. 18; Order 7500d at Para. 85-86, Docket D2013.12.85, Final Order 7323k ¶¶ 26–41, 51–59 (Sept. 25, 2014); also D2016.7.56, *In re Crazy Mountain Wind*.

interests being unwilling to offer renewable energy producers viable contracts, and dinosaur state commissions being unwilling to enforce the law. The District Court was correct in enforcing the non-discriminatory obligations of PURPA, and reversing the Commission's orders. The law compels the Commission to set rates for QF resources using NorthWestern's avoided costs in a nondiscriminatory way. NorthWestern's resources include carbon, and they are valued over periods up to forty years. QF resources must be treated the same.

WINData asks this Court to affirm the District Court's decision, and vacate Commission Orders 7500c and 7500d, as unlawful.

Respectfully submitted this 30th day of September, 2019.

By: */s/ Monica Tranel*
MONICA J. TRANEL
Attorney for Petitioner/Intervenor/ Appellee WINDATA, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word county calculated by Microsoft Word for Mac, including footnotes, is less than 10,000 words, excluding the certificate of service and certificate of compliance.

/s/ Monica Tranel
MONICA J. TRANEL

CERTIFICATE OF SERVICE

I, Monica Joan Tranel, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-30-2019:

Marie Phillips Barlow (Attorney)
1041 SE 58th Place
Portland OR 97215
Representing: Cypress Creek Renewables, LLC
Service Method: eService

Jason Thomas Brown (Attorney)
1701 Prospect Ave
Helena MT 59601
Representing: Montana Consumer Counsel
Service Method: eService

Jenny Kay Harbine (Attorney)
313 E Main St
Bozeman MT 59715
Representing: Montana Environmental Information Center, Vote Solar
Service Method: eService

Justin Wade Kraske (Attorney)
Montana Public Service Commission
P.O. Box 202601
Helena MT 59620
Representing: Montana Public Service Commission
Service Method: eService

Michael J. Uda (Attorney)
7 West 6th Avenue, Suite W4H
MT
Helena MT 59601
Representing: MTSun, LLC
Service Method: eService

Ann B. Hill (Attorney)
208 N. Montana Ave. Suite 205
Helena MT 59601
Representing: NorthWestern Energy

Service Method: eService

Zachary Taylor Rogala (Attorney)
Montana Public Service Commission
PO Box 202601
Helena MT 59620
Representing: Montana Public Service Commission
Service Method: eService

Electronically signed by Stephanie Spokas on behalf of Monica Joan Tranel
Dated: 09-30-2019