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IN THE SUPREME COURT OF THE STATE OF MONTANA
CAUSE NO. DA 21-0250

CED WHEATLAND, LLC, CED TETON COUNTY WIND, LLC, AND CED PONDERA WIND, LLC,
Petitioners/Appellants
v.
MONTANA DEPARTMENT OF PUBLIC SERVICE REGULATION, MONTANA PUBLIC SERVICE COMMISSION,
Respondent/Appellee,
and
NORTHWESTERN ENERGY,
Respondent/Appellee,
and
MONTANA CONSUMER COUNSEL,
Respondent/Intervenor.

On Appeal from the Montana First Judicial District Court Lewis and Clark County, Hon. Mike Menahan, Presiding
Consolidated Cause No. ADV 2020-1292

RESPONSE BRIEF OF APPELLEE NORTHWESTERN ENERGY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

I. THE PUBLIC UTILITIES REGULATORY POLICIES ACT OF 1978 ("PURPA") 3

II. AVOIDED COST CALCULATIONS MUST BE APPROPRIATE TO PROTECT NORTHWESTERN'S CUSTOMERS 7

III. CONED IS A MULTI-BILLION DOLLAR COMPANY 9

IV. THE DISTRICT COURT REVERSED IN PART AND AFFIRMED IN PART 10

STANDARD OF REVIEW 13

SUMMARY OF ARGUMENT 14

ARGUMENT 16

I. THE COMMISSION PROPERLY DETERMINED THAT CONED – AND NOT MONTANA CONSUMERS – ARE RESPONSIBLE FOR A $267 MILLION TRANSMISSION LINE 16

A. ConEd knowingly located the Wheatland project at a site that requires a new transmission line 16

B. PURPA requires ConEd to pay for interconnection costs, which includes the new transmission line and network upgrades necessary to connect ConEd's projects 18

C. The Commission properly determined that ConEd is responsible for the costs of all network upgrades, including the new transmission line 20

D. ConEd attempts to avoid the clear application of the law with new arguments..... 22

1. The Comission has jurisdiction to allocate interconnection costs..... 23

2. It is not discriminatory to require ConEd to pay interconnection costs..... 27

II. THE COMMISSION PROPERLY DETERMINED THAT CONED DOES NOT GET SPECIAL TREATMENT FOR ANCILLARY SERVICES 30

A. The rates for ancillary services are established by a FERC approved tariff..... 30

B. The date ConEd Incurred a LEO is irrelevant to ancillary services..... 31

C. Substantial evidence supports the Commission's decision 32

III. THE COMMISSION DID NOT ACT ARBITRARILY BY CALCULATING AVOIDED ENERGY COSTS BASED ON A METHODOLOGY PROPOSED BY CONED..... 34

A. The PowerSimm modeling submitted by both NorthWestern and ConEd contained errors..... 34

B. ConEd requested that the Commission adopt the proxy method 36

C. The Commission did not act arbitrarily by adopting a methodology proposed by ConEd 38

D. The existence of a LEO does not entitle ConEd to any particular methodology 40

IV. THE COMMISSION PROPERLY DETERMINED THAT 15-YEAR CONTRACTS WERE APPROPRIATE BASED ON THE EVIDENCE IN THE RECORD 43

CONCLUSION 46

CERTIFICATE OF COMPLIANCE 47

TABLE OF AUTHORITIES

Cases: **Pages**

Armco Advanced Materials Corp., v. Pa. Pub. Util. Comm'n,
579 A.2d 1337, 1340 (Pa. Commw. Ct. 1990) 5

Caithness Beaver Creek, LLC v. MPSC, et al
Cause No. CDV 2020-290..... 31

Californians for Renewable Energy v. California Public Utilities Commission,
922 F.3d 929 (9th Cir. 2019) 19

FCC v. Fox Television Stations, Inc.,
566 U.S. 502 (2009) 39

Federal Power Commission v. Southern Cal. Edison Co.,
376 U.S. 205, 209, 84 S.Ct. 644 (1964) 24

Idaho Power Co. v. Idaho Public Utilities Commission
155 Idaho 780, 316 P.3d 1278 (2013) 27

Industrial Cogenerators v. FERC,
47 F.3d 1231 (D.C. Cir. 1995)..... 27

Montana-Dakota Utilities Co. v. Montana Dept. of Public Serv. Regulation
223 Mont. 191, 725 P.2d 548 (1986)..... 45

NorthWestern Corp. v. Montana Dep't of Pub. Serv. Regulation,
2016 MT 239, 385 Mont. 33, 380 P.3d 787 13

Portland Gen. Elec. Co. v. FERC,
854 F.3d 692 (D.C. Cir. 2017)..... 23

Vote Solar and *MTSUN v. Montana Pub. Serv. Com'n*,
2020 MT 213A, 401 Mont. 85, 473 P.3d 963.....*passim*

Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dept. of Pub. Serv. Regulation,
284 Mont. 245, 944 P.2d 210 (1997).....13, 14, 39

Williamson v. Mont. Pub. Serv. Comm'n,
2012 MT 32, 364 Mont. 128, 272 P.3d 71 13

Whitehall Wind LLC v. Mont. Pub. Serv. Comm'n,
2010 MT 2, 355 Mont. 15, 223 P.3d 907 6

Whitehall Wind LLC, v. Montana Pub. Serv. Comm'n
2015 MT 119, 379 Mont. 119, 347 P.3d 1273 .....13, 41

Western Massachusetts Elec. Co. v. F.E.R.C.
165 F.3d 922 (D.C. Cir. 1999)..... 24, 25, 26

Statutes:

16 U.S.C. § 796 4

16 U.S.C. § 824a-3 .....*passim*

16 U.S.C. § 824d 30

Section 2-4-704, MCA..... 13

Section 69-3-603, MCA.....6, 36, 40

Section 69-3-604, MCA..... 6

Section 69-3-2003, MCA..... 30

Other Authorities:

18 C.F.R. § 35.28 30

18 C.F.R. § 292.101 ..... *passim*

18 C.F.R. § 292.303 ..... 19, 26, 28

18 C.F.R. § 292.304 ..... *passim*

18 C.F.R. § 292.305 32

18 C.F.R. § 292.306 ..... 19, 23

ARM § 38.5.1901 ..... *passim*

ARM § 38.5.1904 ..... 19, 23

Cal. Pub. Utils. Comm'n,
134 F.E.R.C. 61,044 (2011) 4, 5

CBC I, Order 7628b
Dkt. No. D2018.8.52 21

CBC II, Order 7680b
Dkt. No. D2019.06.034 21

Cherokee County Cogeneration Partners, LLC,
175 F.E.R.C. ¶ 61,002 (2021) 25

Clarion Power Company
39 F.E.R.C. ¶ 61317 (1987) 25

Coso Energy Developers
48 F.E.R.C. ¶ 61,044 (1989) 25

Gamma Mariah, Inc.
44 F.E.R.C. ¶ 61,442 (1988) 25

Grizzly/Black Bear, Order 7661c,
Dkt. Nos. D2019.2.8, D2019.2.9 21

Kenfield Wind Park, Order 7068b
Dkt. No. D2010.2.18. 21

MTSUN, Order No. 7535a,
Dkt. No. D2016.12.103 .....21, 41

Order No. 5017, (November 1, 1983)
Dkt. No. 83.1.2..... 21

Public Serv. Co. of Colo.,
167 F.E.R.C. ¶ 61,141 (2019) 27

S. Cal. Edison Co.,
71 F.E.R.C. ¶ 61,269 5

Standardization of Generator Interconnection Agreements and Procedures, 104 F.E.R.C. ¶ 61,103 (2003) 19, 27

Sycamore Cogeneration,
40 F.E.R.C. ¶ 61,237 (1987) 25

Western Mass.,
66 F.E.R.C. ¶ 61,167 (1994) 24

STATEMENT OF ISSUES

1. Whether the Montana Public Service Commission ("Commission") properly determined that ConEd – and not Montana consumers – must pay for a $267 million transmission line that is necessary solely due to ConEd's siting decision.

2. Whether the Commission properly determined that ConEd is subject to the same FERC-approved ancillary tariff rates as every other generator who connects to NorthWestern's system.

3. Whether the Commission acted arbitrarily by using a method to calculate avoided costs that ConEd proposed.

4. Whether the Commission properly determined that 15-year contracts are appropriate for all ConEd's projects when the developer is a multibillion dollar company with the ability to self-finance.

STATEMENT OF THE CASE

NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") could not reach an agreement regarding the terms and conditions for it to purchase electricity and capacity generated by three limited liability companies owned by Consolidated Edison Development, a subsidiary of Consolidated Edison Incorporated ("ConEd"). The companies are CED Wheatland Wind, LLC ("ConEd Wheatland"), CED Teton County Wind, LLC ("ConEd Teton"), and CED Pondera Wind, LLC ("ConEd Pondera"). The amount paid by

NorthWestern to purchase power from ConEd will ultimately be paid by NorthWestern's customers.

ConEd Teton and ConEd Pondera filed separate petitions with the Commission on September 16, 2019, that were eventually consolidated. NorthWestern and the Montana Consumer Counsel ("MCC") intervened. The Commission held a contested case hearing and rendered a decision on March 23, 2020. *See* Order No. 7699c, Dkt. D2019.09.067 ("Teton/Pondera Order").[1] ConEd Teton and ConEd Pondera sought reconsideration and then petitioned for review of the Commission's decision in District ourt.

ConEd Wheatland filed a petition with the Commission on October 4, 2019. NorthWestern and the MCC intervened. The Commission held a contested case hearing and rendered a decision on April 22, 2020. *See* Order No. 7702b, Dkt. D2019.10.076 ("Wheatland Order"). ConEd Wheatland sought reconsideration and then petitioned for review of the Commission's decision in District Court.

[1] The relevant orders from the Commission and District Court are included in Appellants' Appendix.

The two petitions for judicial review were consolidated before the District Court (Judge Menahan). The District Court reversed in part and affirmed in part. *See Order on Petitions for Judicial Review* (April 19, 2021) ("Order"). ConEd appeals from certain portions of the Order.

STATEMENT OF FACTS

I. THE PUBLIC UTILITIES REGULATORY POLICIES ACT OF 1978 ("PURPA").

This matter concerns a dispute between NorthWestern and ConEd over the price of electricity and related costs for three qualifying facilities ("QFs") pursuant to PURPA. ConEd wants NorthWestern customers to pay $267 million for a transmission line that is necessary because ConEd knowingly located its project in an area that lacks sufficient transmission capacity. ConEd also demands special terms that are inconsistent with the law and would result in inflated costs to NorthWestern's customers and a windfall for ConEd.

PURPA encourages cogeneration and small power production by requiring a utility to purchase electricity and capacity generated by a QF. 16 U.S.C. § 824a-3(a). Cogeneration facilities[2] capture otherwise

[2] Not all QFs generate renewable energy.

wasted heat and turn it into thermal energy; small power-production facilities produce energy primarily by using "biomass, waste, renewable resources, geothermal resources, or any combination hereof." 16 U.S.C. 796 (17)-(18). A small power-production QF must be 80 megawatts ("MW") or less. 16 U.S.C. § 824a-3(a).

Because the cost of power[3] purchased from QFs is ultimately paid by utility customers, PURPA requires that rates for purchases from a QF must be just and reasonable to the utility's customers and in the public interest. *Id.* The encouragement of QF development "must be undertaken along with the endeavor to hold the ratepayer neutral or indifferent to the source of energy they consume." *Vote Solar v. Montana Dep't of Pub. Serv. Reg.*, 2020 MT 213A, ¶ 7, 401 Mont. 85, 473 P.3d 963. Nothing in PURPA requires an electric utility to pay more for power from a QF than for electricity from another source. *See* 18 C.F.R. § 292.304(a).

PURPA is designed to enable QF development in a manner that keeps consumers "financially indifferent." *Cal. Pub. Utils. Comm'n*, 134

[3] The term "power" is meant to include both the cost of electricity and capacity.

F.E.R.C. 61,044, 61,160 (2011); *see also S. Cal. Edison Co.*, 71 F.E.R.C. 61,269, 62,080 ("The intention was to make ratepayers indifferent as to whether the utility used more traditional sources of power or the newly-encouraged alternatives."). The rates for purchases from a QF cannot be above the "'incremental cost of alternative electric energy', thereby assuring that the overall effect on ratepayers of the PURPA program would be neutral." *Armco Advanced Materials Corp., v. Pa. Pub. Util. Comm'n*, 579 A.2d 1337, 1340 (Pa. Commw. Ct. 1990) (*citing* 16 U.S.C. § 824a-3(a)); *see also Vote Solar*, ¶ 7.

PURPA ensures rates do not increase costs for consumers by requiring a calculation of avoided costs. 18 C.F.R. § 292.304(b)(2). "Avoided costs" are "the incremental costs as determined by the commission to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 16 U.S.C. § 824a-3(d); ARM § 38.5.1901(2)(a). In short, avoided costs represent the amount a public utility would spend to generate the electricity itself or acquire it from another source.

Congress delegated authority to the Federal Energy Regulatory Commission ("FERC") and state regulatory agencies with the expertise and knowledge of local conditions to enforce PURPA and determine avoided costs. Montana, in turn, enacted its own "Mini-PURPA" law, which provides that if a utility and QF cannot agree on terms, the Commission shall require the utility to purchase the power at rates and conditions determined by Commission. Section 69-3-603(1), MCA. "The commission shall determine the rates and conditions of the contract upon petition of a qualifying small power production facility or utility during a rate proceeding…." Section 69-3-603(2)(a), MCA. "The commission shall set these rates using the avoided cost over the term of the contract." Section 69-3-604(4), MCA. "Thus, under both state and federal law, rates of purchases from qualifying facilities must be reasonable and based on current avoided least cost resource data." *Whitehall Wind LLC v. Mont. Pub. Serv. Comm'n*, 2010 MT 2, ¶ 21, 355 Mont. 15, 223 P.3d 907.

II. AVOIDED COST CALCULATIONS MUST BE APPROPRIATE TO PROTECT NORTHWESTERN'S CUSTOMERS.

NorthWestern provides electricity to more Montanans than any other public utility. Its mission is to provide safe and reliable service to its customers in Montana and other states.

NorthWestern does not object to adding new renewable resources to its system. NorthWestern does object to adding unnecessary resources to its system at inflated costs that harm its customers. In this case, ConEd's Wheatland project would require NorthWestern to build a new transmission line at a cost of $267 million. That amount equals roughly 50% of NorthWestern's entire investment in all transmission facilities in the state of Montana (after depreciation) and would serve only a single 75-MW QF. Wheatland Tr. 312. ConEd also proposed avoided cost rates for its three wind projects that were approximately two times as high as those calculated by NorthWestern. *See* Wheatland Order, ¶¶ 24-25; Teton/Pondera Order, ¶¶ 21-22; *see also* Wheatland Order, ¶ 19 (finding that "the price terms for avoided energy proposed by CED are approximately $18-20 greater than any determination of avoided energy cost made by the Commission" during the same time frame).

NorthWestern has a diverse supply of hydro, wind, and solar resources on its system.[4] Wheatland Administrative Record ("Wheatland AR") 16, p. MSB-7. NorthWestern owns numerous hydroelectric facilities with a total maximum generating capacity of 487 megawatts. *Id.* NorthWestern also owns or has under contract wind facilities with an even greater maximum generating capacity. *Id.* It likewise contracts with solar facilities, though at lesser amounts. *Id.*

NorthWestern must provide reliable and adequate service. Section 69-3-201, MCA. Providing customers with reliable electric service is a complex endeavor. The amount of electricity required to serve NorthWestern's customers is called "load." The amount of load changes constantly. For example, customers need more electricity on a cold day in January or a hot day in July than on days with moderate temperatures or during the middle of the night. Similarly, the amount of electricity being generated also changes constantly. Wind farms generate electricity when the wind blows. Solar projects generate electricity when the sun shines.

[4] NorthWestern is committed to renewable energy. In Montana, more than 60% of NorthWestern's energy is generated by carbon-free resources. *See* Wheatland AR 16, p. MSB-7.

To provide a frame of reference, NorthWestern's minimum load is 450 megawatts. *See* Wheatland Tr. 306-307. That is roughly the same as the amount of wind energy currently installed on NorthWestern's system.[5] *Id.* Thus, if the wind blows when NorthWestern is operating at minimum load, it must shut down other facilities or sell excess electricity. *See id.*

III. CONED IS A MULTI-BILLION DOLLAR COMPANY.

Appellants in this matter are three limited liability companies owned entirely by ConEd. *See* Teton/Pondera Tr. 678, 684-685. Appellants qualify as QFs under PURPA because they are separate limited liability companies that each own projects with a nameplate capacity of less than or equal to 80-MW.

ConEd is an enormous corporation that owns one of the largest public utilities in the United States. It operates in New York and New Jersey. According to its 2018 annual report, ConEd earned over $12 billion in annual revenues. *See* Teton/Pondera Tr. 52-53. That includes

[5] The amount of wind on NorthWestern's system will increase as other projects that have been approved become operational. Wheatland Tr. 307.

over $750 million from the division that includes companies such as the Appellants in this case. *Id.*

ConEd has the resources to self-finance construction of the projects. At hearing, ConEd's project development manager testified:

> Q. …The question is whether the opportunities to secure financing for Wheatland are different than those for Teton/Pondera.
>
> A. They're no different.
>
> Q. So as with those projects, you would have access to upstream capital? And by upstream I mean from parent companies potentially?
>
> A. Potentially, yes,
>
> Q. And could you potentially self-finance this project?
>
> A. Potentially, yes.

Wheatland Tr. 585; Teton/Pondera Tr. 676, 685. There is no other evidence in the record specific to ConEd's projects regarding financing.

IV. THE DISTRICT COURT REVERSED IN PART AND AFFIRMED IN PART.

The Commission issued a detailed final order in the Teton/Pondera matter on March 23 and in the Wheatland matter on April 22. *See* Teton/Pondera Order; Wheatland Order. The orders set

various terms and conditions for NorthWestern to purchase electricity and capacity from ConEd. *See generally, id.*

ConEd petitioned for judicial review on every issue, even issues where the Commission granted relief ConEd requested. For example, ConEd initially requested an avoided capacity payment based on a 5% capacity contribution for all projects. Order, pp. 8-9. The Commission awarded that payment, yet ConEd still petitioned for judicial review, contending the Commission acted arbitrarily by not awarding more. *Id.*

Relevant to this appeal, ConEd contended that the Commission erred by: (i) determining that ConEd was responsible for all interconnection costs associated with its projects, including a new transmission line that is estimated to cost $267 million for Wheatland; (ii) concluding that ConEd is subject to the same FERC-approved ancillary tariff that applies to every other generator who connects to NorthWestern's transmission system; (iii) applying a methodology to calculate avoided energy costs that ConEd presented and recommended

to the Commission; and (iv) granting 15-year contracts based on the respective records in these matters.[6]

The District Court affirmed the Commission on those issues and others, finding that substantial evidence supported the Commission's decisions. *See generally*, Order. The District Court also reversed and remanded to the Commission two issues: (i) carbon adder; and (ii) the existence of a legally enforceable obligation ("LEO"). *Id.* at p. 35. Following the Commission's final orders, this Court issued its opinions in *Vote Solar* and *MTSUN v. Montana Pub. Serv. Com'n*, 2020 MT 238, 401 Mont. 324, 472 P.3d 1154. The Commission conceded the carbon adder and LEO issues based on its understanding of *Vote Solar* and *MTSUN*. Accordingly, the District Court found ConEd established LEOs for each of its three projects and remanded for the Commission to calculate avoided costs on the date a LEO was incurred. Order, p. 35. It also remanded for the Commission to add a carbon adder to the calculation of avoided costs. *Id.*

//

[6] More detailed discussions of each issue are provided in the relevant sections below.

STANDARD OF REVIEW

This Court applies the same standards of review in an administrative appeal as the district court below. *North Western Corp. v. Montana Dep't of Pub. Serv. Regulation*, 2016 MT 239, ¶ 25, 385 Mont. 33, 380 P.3d 787. Section 2-4-704, MCA, governs administrative appeals. "A district court reviews an administrative decision in a contested case to determine whether the agency's findings of fact are clearly erroneous and whether its interpretation of the law is correct." *North Western*, ¶ 25. Judicial review of a final agency decision must be confined to the record. *See* § 2-4-704(1), MCA.

"'The court may not substitute its judgment for that of the agency' in weighing factual evidence." *Whitehall Wind, LLC v. Montana Pub. Serv. Com'n*, 2015 MT 119, ¶ 7, 379 Mont. 119, 347 P.3d 1273 ("Whitehall II") (citing § 2-4-70(2), MCA). "A finding of fact is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the court with a definite and firm conviction that a mistake has been made." *Id.* (*quoting Williamson v. Mont. Pub. Serv. Comm'n*, 2012 MT 32, ¶ 25, 364 Mont. 128, 272 P.3d 71); *see also Waste*

Mgmt. Partners of Bozeman, Ltd. v. Montana Dept. of Pub. Serv. Regulation, 284 Mont. 245, 249, 944 P.2d 210 (1997).

SUMMARY OF ARGUMENT

PURPA requires a utility to purchase electricity and capacity generated by a QF. It does not entitle ConEd to a windfall at the expense of NorthWestern's customers.

The Commission and District Court properly found that ConEd must pay for all interconnection costs associated with its projects, including a $267 million transmission that is necessary only because of ConEd's siting decision. The transmission line constittues an interconnection cost. PURPA provides that a QF is responsible for all interconnection costs, including any incremental network upgrade costs as determined by the Commission. It also requires that utilities purchase power generated by QFs at rates that are just and reasonable to the consumer and in the public interest. It would violate PURPA and create a dangerous precedent to force Montanans to pay hundreds of millions based on the siting decisions of QFs.

The Commission and District Court properly found that ConEd must pay the rates set in NorthWestern's FERC-approved tariff for

ancillary services. That tariff applies to every other generator that connects to NorthWestern's transmission system. ConEd is not entitled to special treatment by getting to pay a special rate.

ConEd cannot credibly contend that the Commission erred when it adopted the proxy method to calculate avoided energy costs. ConEd introduced the proxy method into this matter, submitted expert calculations based on the proxy method;, had its experts testify the Commission should adopt the proxy method, and argued that the Commission should adopt the proxy method in a post-hearing brief. Substantial evidence in the record justifies the Commission's decision because ConEd presented that evidence. The Commission did not act arbitrarily or unlawfully when it used the proxy method.

The Commission and District Court properly determined that 15-year contracts are appropriate for these projects based on the record. The only evidence specific to financing for these projects is that ConEd is a multi-billion dollar company that has the ability to self-finance. 15-year contracts are not *per se* unreasonable. The Commission's decision to award 15-year contracts is not arbitrary and is supported by substantial evidence.

ARGUMENT

I. THE COMMISSION PROPERLY DETERMINED THAT CONED – AND NOT MONTANA CONSUMERS – ARE RESPONSIBLE FOR A $267 MILLION TRANSMISSION LINE.

A. ConEd knowingly located the Wheatland project at a site that requires a new transmission line.

Interconnection costs represent the reasonable costs incurred by a public utility directly related to the installation and maintenance of the facilities necessary to permit interconnected operations with a QF. 18 C.F.R. § 292.101(7); ARM § 38.5.1901(1)(d).

The developer of a QF project decides where it should be located. Wheatland Tr. 190. ConEd chose to site its 75-MW Wheatland project in a rural area of Wheatland, County that lacked sufficient transmission capacity. Because of ConEd's siting decision, NorthWestern must build a new transmission line to interconnect ConEd's project and transmit electricity to NorthWestern's customers.[7] Wheatland AR 16, AMM-4 to AMM-6.

[7] ConEd's Teton and Pondera projects also required network upgrades to the transmission system in the amounts of $3.27 million and $2.49 million respectively. Teton/Pondera AR 26, AMM 8-9. These projects do

ConEd applied for interconnection to NorthWestern's system on July 18, 2018. Its application triggered an extensive evaluation and review process, including a System Impact Study and Facilities Study. *See* Wheatland AR 16, AMM-4 to AMM-6. NorthWestern completed the initial Facilities Study on October 1, 2019, and identified the need for a new 160-mile, 230 kilovolt (kv) transmission line. [8] The line is a required interconnection cost. *Id.*

ConEd knew a transmission line would be necessary if it sited the Wheatland project at that location. NorthWestern provided a draft of the Facilities Study to ConEd and had several calls to discuss the results. Wheatland AR 16, AMM-5. It provided a final copy of the study to ConEd. *Id.* In spite of the Facilities Study reflecting the need for a new transmission line and associated substantial costs, ConEd decided to proceed with the interconnection of Wheatland at its selected location.

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not require a new transmission line, but do require upgrades to other transmission system components. *Id.*

[8] There is an existing transmission line in the area of the Wheatland project. The existing line cannot accommodate the additional load that would be generated by the project.

The record shows that the transmission line is estimated to cost $267 million. *See* Wheatland Final Order ¶ 60. The exact location the transmission line has not been determined. Construction will be subject to the Major Facilities Siting Act which is administered by the Montana Department of Environmental Quality. *See* Wheatland AR 16, TDP-4 to TDP-8. NorthWestern estimated that the construction of the line would take 7-9 years based on the time needed for similar projects. *Id.*

ConEd did not dispute before the Commission that its siting decision for the Wheatland project required the construction of a new transmission line. Nor did it dispute the that the line will cost $267 million and take almost a decade to build. Instead, ConEd disputed its responsibility to pay for the transmission line. ConEd contends it is not required to pay all costs directly related to interconnecting any of its projects—costs that NorthWestern would not otherwise incur.

B. PURPA requires ConEd to pay for interconnection costs, which includes the new transmission line and network upgrades necessary to connect ConEd's projects.

PURPA provides that a QF is responsible for any interconnection costs, which are determined to be necessary for the project by the state regulatory authority. Under PURPA, "any electric utility shall make

such interconnection with any qualifying facility as may be necessary to accomplish purchases or sales under [PURPA]." 18 C.F.R. § 292.303(c)(1).

> "Each qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority…may assess against the qualifying facility on nondiscriminatory basis with respect to other customers with similar load characteristics."

18 C.F.R. 292.306 (emphasis added); *see Californians for Renewable Energy v. California Public Utilities Commission*, 922 F.3d 929, 940 (9th Cir. 2019) ("FERC regulations place the burden of paying the cost to connect to the power grid on the QF."); *see also* ARM § 38.5.1904 (providing that a QF "shall be fully responsible for interconnection costs" associated with its project). Moreover, in Order No. 2003, FERC explained that "[w]hen an electric utility is obligated to interconnect under Section 292.303 of the Commission's Regulations, that is, when it purchases the QF's total output, the relevant state authority exercises authority over the interconnection and the allocation of interconnection costs." 104 FERC ¶ 61,103, ¶ 813 (2003).

The new transmission line constitutes an "interconnection cost" based on the plain language of the applicable rules in both the Code of Federal Regulations and the Montana Administrative Rules.

> Interconnection costs means the reasonable costs of connection, switching, metering, **transmission**, distribution, safety provisions and administrative costs incurred by the utility directly related to installation and maintenance of the physical facilities necessary to permit interconnected operations with a qualifying facility **which the electric utility would not have incurred if it had not engaged in interconnected operations**.

18 C.F.R. § 292.101(7) (emphasis added); *see also* ARM § 38.5.1901(1)(d) (mirroring FERC regulation).

Moreover, the rule concerning interconnection costs applies evenly to NorthWestern and any QF. If a QF allows NorthWestern to avoid or defer any costs, then a QF receives a benefit through an increased avoided cost payment. Conversely, if the QF causes NorthWestern to incur a cost it would not otherwise incur, then the QF is responsible for such costs. *See* Final Order No. 7661c ¶ 58, Docket No. 2019.02.009.

C. The Commission properly determined that ConEd is responsible for the costs of all network upgrades, including the new transmission line.

ConEd must pay for interconnection costs for all three projects, including the cost of the new transmission line, based upon the plain

language of the rules, FERC guidance, and prior precedent. 18 C.F.R. § 292.101(7); ARM § 38.5.1901(1)(d). It has long been the law in Montana that a QF is required to pay any upgrades required by interconnection. Order No. 5017, ¶ 86 (November 1, 1983) Dkt. No. 83.1.2 ("the Commission emphasizes that upgrades required for interconnection to the utility grid system, at the time that the QF interconnects, shall be the cost burden of the QF."); *see also* Wheatland Order ¶¶ 67-74; *In re Kenfield Wind Park*, Dkt. No. D2010.2.18, Order 7068b, ¶¶ 74–88 (Jun. 23, 2010); *In re MTSUN*, Order No. 7535a, ¶¶ 84–85, Dkt. No. D2016.12.103; *In re Grizzly/Black Bear*, Order 7661c, ¶ 58, Dkt. No. D2019.2.8, D2019.2.9; *In re CBC I*, Order 7628b, ¶ 74, Dkt. No. D2018.8.52; *In re CBC II*, Order 7680b, ¶¶ 102–104, Dkt. No. D2019.06.034; *Teton/Pondera Order*, ¶ 81.

NorthWestern's customers are not neutral or indifferent to a new $267 million transmission line. "PURPA requires that utilities purchase electricity generated by QFs at rates that are 'just and reasonable' to the consumer, 'in the public interest,' and non-discriminatory to the QF." *Vote Solar* ¶ 41 (citing 16 U.S.C. § 824a-3(a)). The Commission "must fairly balance the interests of its ratepayers with that of the QF

such that it complies with PURPA and 'encourages' renewable energy development while making the ratepayer indifferent as to the energy source." *Id.*

NorthWestern can obtain energy to serve its customers from sources that do not require a new $267 million transmission line. Wheatland AR 16, AMM-15. The transmission line is necessary only because of the siting decision of ConEd. PURPA expressly prohibits a QF from passing the cost of that transmission line onto NorthWestern's customers. 16 U.S.C. § 824a-3(a).

The Court should affirm the Commission's decision to require ConEd to pay for the cost of all network upgrades caused by its projects, including a new transmission line.

D. ConEd attempts to avoid the clear application of the law with new arguments.

ConEd raised different arguments below regarding the transmission line. It contended the Commission could not require payment because the transmission line did not constitute an "interconnection facility." *See* Order, p. 20. ConEd also contended the Commission improperly assigned the costs of subsidizing NorthWestern's aging system to QFs under the guise of interconnection

costs. *Id.* at. 22. The District Court properly addressed and rejected those arguments in its Order.

ConEd now raises a new argument on appeal, contending that the Commission lacks jurisdiction to include a transmission line in interconnection costs. That argument contradicts the language of PURPA, applicable precedent, and the record in this case.

1. The Commission has jurisdiction to allocate interconnection costs.

"State-based adjudication serves as the mainstay for enforcing PURPA rights." *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 697 (D.C. Cir. 2017). Section 210(g) of PURPA provides for state judicial review respecting "any proceeding conducted by a State regulatory authority" for purposes of "implementing any requirement of a rule" under § 210(a). 16 U.S.C. § 824a-3(g)(1).

Consistent with the federal rules, the Montana Administrative Rules provide that a QF "shall be fully responsible for interconnection costs" and define interconnection costs to include "transmission." ARM § 38.5.1904; ARM § 38.5.1901(1)(d); *see also* 18 C.F.R. § 292.101(7); 18 C.F.R. 292.306. The Commission has jurisdiction to determine

interconnection costs, including transmission lines, based on the plain language of the rules.

ConEd attempts to avoid the clear application of law by sowing confusion. ConEd invokes the Federal Power Act which grants federal jurisdiction over the transmission of electric energy for wholesale. *Federal Power Commission v. Southern Cal. Edison Co.*, 376 U.S. 205, 209, 84 S.Ct. 644 (1964). The purchase of electricity from a QF (ConEd) by a public utility (NorthWestern) has nothing to do with the transmission of electric energy for wholesale.

ConEd claims similar issues have been addressed by FERC and the D.C. Circuit, citing *Western Mass.*, 66 F.E.R.C. P61,167 (F.E.R.C. Feb. 3, 1994); *WMECO*, 165 F.3d 922, 924 (D.C. Cir. 1999). However, that matter involved the transmission of electricity interstate to be sold to a third party. It is not similar to this case at all. It involved a QF (Altresco) which sought to connect to the system of one public utility (WMECO) in order to transmit its electricity for sale to a second utility (NEPCO). FERC found it had jurisdiction (as opposed to the state commission) because the agreements at issue concerned transmission rates to a third party.

> The agreements "relate to" transmission rates, the Commission held, because the purpose of the interconnection was to facilitate transmission of Altresco-generated power to NEPCO. Therefore the agreements fell within the Commission's jurisdiction under § 205(c).

WMECO, 165 F.3d at 924. Moreover, the court noted that "WMECO had no obligation to connect" the QF under PURPA because it was only transmitting the electricity and not purchasing it. *Id.* That is not the case here, where ConEd is interconnecting to and selling electricity directly to NorthWestern. NorthWestern must connect to ConEd and is not transmitting electricity generated by ConEd to a third party.

FERC has addressed instances that are actually similar to this case and universally declined to assume jurisdiction. *See Coso Energy Developers*, 48 F.E.R.C. ¶ 61,044 (1989); *Gamma Mariah, Inc.* 44 F.E.R.C. ¶ 61,442 (1988); *Sycamore Cogeneration*, 40 F.E.R.C. ¶ 61,237 (1987); *Clarion Power Company*, 39 F.E.R.C. ¶ 61317 (1987); *see also Cherokee County Cogeneration Partners, LLC*, 175 F.E.R.C. ¶ 61,002 (2021) (FERC order declining to hear matter as the issue was a state jurisdictional QF matter). In fact, the *WMECO* decision itself states that a QF would be responsible to pay interconnection costs based on its siting decision.

> If a qualifying facility seeking interconnection for transmission purposes located its plant far from the utility's lines knowing that the interconnection costs would be spread among the utility's customers, the utility could simply refuse to transmit the power. Although the utility would still have an obligation to purchase the qualifying facility's output, *see* 18 C.F.R. § 292.303(a), **the qualifying facility, rather than the utility's customers, would wind up paying for the interconnection**. A qualifying facility could not afford to take that risk and therefore would do all it could to keep the costs of interconnection to a minimum.

WMECO, 165 F.3d at 928 (emphasis added). That is exactly the situation here. ConEd knowingly located its facility in area without adequate transmission. Its decision resulted in higher interconnection costs. It cannot foist those costs upon NorthWestern's customers to increase its own profits. The Commission's decision that ConEd must pay for the costs of a new transmission line complies with PURPA, the relevant rules, and long-standing precedent.

Montana is a large state that is sparsely populated. There are numerous areas where a QF could be located that would require an expensive new transmission line. NorthWestern's customers cannot be required to pay for any such lines. The Commission properly found that a QF is responsible for the financial consequences of its own siting decisions, not Montanans.

2. It is not discriminatory to require ConEd to pay interconnection costs.

ConEd relies on authority that does not involve PURPA or QFs to contend the Commission erred. For example, it contends that FERC and federal circuit precedent "clearly dictate that the Commission may not shift the cost responsibility of NorthWestern's network upgrades to CED."[9] ConEd Br. 30. ConEd then cites authority that is completely unrelated to QFs, citing Public Serv. Co. of Colo., 167 F.E.R.C. ¶61,141, 61,747 (2019) and *Standardization of Generator Interconnection Agreements and Procedures*, 104 FERC ¶ 61,103, ¶ 424 (July 24, 2003) ("*Standardization")*.

[9] In footnote 26 of its brief, ConEd represents that the issue of "network upgrades" is currently pending before FERC. However, FERC decided it would not take any enforcement action and any further guidance provided by FERC on the issue is merely advisory and non-binding. *Industrial Cogenerators v. FERC*, 47 F.3d 1231, 1235 (D.C. Cir. 1995); *see also, Idaho Power Co. v. Idaho Public Utilities Commission*, 155 Idaho 780, 788, 316 P.3d 1278, 1286 (2013). They resemble "a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action." *Industrial Cogenerators*, 47 F.3d at 1235. As such, until a federal district court enforces the declaratory order, such orders are "legally ineffectual." *Id.*

The authority cited by ConEd is not only inapplicable, it actually supports the Commission's decision in this case. The *Standardization* guidance provided by FERC (and cited by ConEd) expressly states that it does "not address interconnection issues related to qualifying facilities (QFs) under the Public Utility Regulatory Policies Act of 1978 (PURPA)." *Standardization* at ¶ 810. It goes on to state:

> When an electric utility is obligated to interconnect under Section 292.303 of the Commission's Regulations, that is, when it purchases the QF's total output, **the relevant state authority exercises authority over the interconnection and the allocation of interconnection costs**.

Id. at ¶ 812 (emphasis added).

Similarly, the other cases cited by ConEd concern transmission customers and not QFs, like the ConEd projects.[10] The distinction is significant. Transmission customers are required to pay a transmission service rate. That means transmission customers typically pay the cost of the new transmission line over time through the payment of

[10] ConEd's reliance on *Pioneer Wind Park I, LLC ("Pioneer")*, 145 F.E.R.C. ¶ 61,215 (December 16, 2013) is misplaced because it addressed a different issue than interconnection costs. In fact, a footnote in *Pioneer* that addresses the issue relevant to this case actually supports the Commission's decision. *Id.*, fn. 73.

transmission service rates. Wheatland AR 16, AMM-9. In contrast, QFs do not pay a transmission service rate. Instead, QFs must directly pay for the cost of transmission network upgrades – if those costs are directly related to interconnection of their project and would not be otherwise incurred. ARM § 38.5.1901(2)(d); 18 C.F.R. § 292.101(b)(7).[11]

This distinction also rebuts ConEd's arguments regarding discrimination. QFs are treated similarly to transmission customers as both must pay for costs associated with transmission service – one through a subsequent rate while the other upfront. It is not discriminatory to require ConEd to pay for a transmission line necessitated by its project. It is necessary to protect customers and comply with PURPA. Again, customers are not neutral or indifferent to buying electricity from ConEd if they are required to pay for network upgrades, including a $267 million transmission line, for ConEd's QFs.

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[11] The Commission's decision is consistent with FERC policy, which strongly encourages policies that promote efficient siting decisions to protect customers. *Standardization at* ¶ 33.

II. THE COMMISSION PROPERLY DETERMINED THAT CONED DOES NOT GET SPECIAL TREATMENT FOR ANCILLARY SERVICES.

A. The rates for ancillary services are established by a FERC approved tariff.

Ancillary services support the transmission of capacity and energy from generating resources to load while maintaining reliable operation of the system. They include services related to system protection, energy imbalances and scheduling. *See e.g.*, § 69-3-2003, MCA.

ConEd's projects will require ancillary services. There are four ancillary services that apply. Three of those services apply to all generators on NorthWestern's transmission system and one service is specific to wind generators. NorthWestern provides ancillary services based on an Open Access Transmission Tariff ("OATT"). An OATT is a tariff accepted and approved by FERC that requires a utility to furnish non-discriminatory transmission services. *See* 18 C.F.R. § 35.28. By definition, an OATT applies standard requirements to ensure system reliability and fairness. OATT rate schedules must be just and reasonable and are approved by FERC pursuant to the Federal Power Act. 16 U.S.C. § 824d (a); 18 C.F.R. § 35.28(c).

Even though FERC sets the rates for these services, the Commission is required by PURPA to set avoided cost rates for QFs. The Commission appropriately determined that ConEd should be charged for ancillary services according to the OATT in effect at the time any ancillary service charges are incurred. This is the same approach taken by the Commission in *Caithness Beaver Creek, LLC v. MPSC, et al* (Cause No. CDV 2020-290), which was recently affirmed by Judge Seeley. *See Order on Petition for Judicial Review*, pp. 36-39 (December 2, 2020) (Cause No. CDV 2020-290).

B. The date ConEd incurred a LEO is irrelevant to ancillary services.

ConEd misrepresents the effect of a LEO on ancillary services. Under PURPA, ConEd has the option to obtain a rate for energy and capacity at the time it incurs a LEO. 18 C.F.R. § 292.304(d). PURPA does not provide ConEd with the option of obtaining a rate of ancillary services at the time of a LEO.[12] *See* 18 C.F.R. § 292.304-306. ConEd

[12] Even if the Court accepts ConEd's argument, this argument has no merit as FERC had approved NorthWestern's OATT on an interim basis at the time ConEd incurred its LEOs.

cannot lock in a rate for ancillary services for the life of the contract.[13] It must pay a rate that is reasonable, in the public interest, and similar to rates paid by other generators. 18 C.F.R. § 292.305.

By definition, a rate which is based on cost principles and consistently applied to other generators—such as a tariff—is reasonable, non-discriminatory, and in the public interest. 18 C.F.R. § 292.305(a)(2). "Rates for sales which are based on accurate data and consistent systemwide costing principles shall not be considered to discriminate against any qualifying facility to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics." *Id.* The Commission found the tariff applies here. ConEd is not entitled to special treatment.

C. Substantial evidence supports the Commission's decision.

ConEd's argument that the Commission decided to apply OATT rates without any support in the record is misplaced. NorthWestern's OATT is evidence and is contained in the record. NorthWestern's

[13] The Commission decision acknowledges this fact by ordering that the ancillary services costs that ConEd pays over the life of the contract will vary as the OATT changes. Wheatland Final Order ¶ 79; Teton/Pondera Final Order ¶ 86.

witness, Joe Stimatz, calculated the cost of ancillary services based upon these OATT rates.[14] Wheatland AR 16, JMS 1-12; Teton/Pondera AR 26, JMS 1-12. The Commission is not required to recalculate or justify the OATT rates in every proceeding before they can be applied to QFs. This would be a waste of State resources especially when FERC, the regulatory body with the authority to approve such rates, already performs that task. That is also impractical and undermines the entire purpose of a tariff. Substantial evidence supports the Commission's decision regarding ancillary service charges. *See also Order on Petition for Judicial Review*, pp. 36-39 (December 2, 2020) (Cause No. CDV 2020-290).

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[14] At the time of the proceeding, the OATT rates were interim rates, meaning they had not been finally approved by FERC. The Commission addressed this by finding that, to the extent FERC reduced or rejected the interim rates, the ancillary charges to ConEd would be adjusted accordingly. *See* Wheatland Order, ¶ 79. FERC ultimately approved the interim rates without any adjustment. *See North Western Corp.,* 174 F.E.R.C. ¶ 61,074 (2021).

III. THE COMMISSION DID NOT ACT ARBITRARILY BY CALCULATING AVOIDED ENERGY COSTS BASED ON A METHODOLOGY PROPOSED BY CONED.

A. The PowerSimm modeling submitted by both NorthWestern and ConEd contained errors.

There are different methods for calculating avoided energy costs. NorthWestern typically calculates them by using a model called PowerSimm, which simulates future demand, prices, weather, and other factors. In this case, NorthWestern presented an avoided energy cost calculation based on PowerSimm, as did ConEd.

NorthWestern submitted "hourly" avoided cost calculations using the PowerSimm model. *See* Teton/Pondera Order, ¶¶ 21-22. ConEd submitted "monthly" avoided cost calculations using the PowerSimm the model. *Id.* The two approaches are similar. The PowerSimm model always generates hourly data. To calculate monthly data, that hourly data is aggregated into monthly data. *See id.*

NorthWestern submitted hourly data because it represents industry standard and is more accurate. See e.g. Wheatland AR 16, BFF-14 to 16. The market for electricity goes up and down in real time, not on a monthly basis. *Id.* QFs typically advocate for the monthly

approach, however, because it results in higher avoided cost calculations. See e.g. In addition, in this case, ConEd did not use the correct inputs in its PowerSimm modeling, which, in turn, increased the avoided cost number even further.[15]

During the hearing, however, it became apparent there had been an error in the PowerSimm model that affected all the calculations submitted by both NorthWestern and ConEd.[16] Wheatland Order, ¶ 37. The Commission rejected the avoided every cost rates calculated by both NorthWestern and ConEd as a result of that error. Id. at ¶ 39. The Commission also found that it could not simply dismiss ConEd's petition for failure of parties to meet their respective burdens and that it was required by law to set avoided cost rates within 180 days of the

[15] ConEd did not include the correct resources in its modeling data. The Commission found that ConEd deviated from Commission precedent by excluding various resources from its modeling when calculating avoided costs, which had the effect of increasing ConEd avoided cost calculation. Teton/Pondera Order, ¶¶ 17-19.

[16] ConEd claims that the Commission improperly rejected the monthly PowerSimm results because the identified errors only impacted the hourly calculation. ConEd Br. 20. However, NorthWestern presented testimony from Dr. Ben Fitch-Fleischmann that an error in the PowerSimm simulation model would exist for either the monthly or the hourly method. Teton/Pondera Tr. 431.

filing of the Petition. *Id.* (citing § 69-3-603(2)(a), MCA). Accordingly, the Commission applied the proxy method introduced by ConEd because that method does not rely on PowerSimm. *Id.*

B. ConEd requested that the Commission adopt the proxy method.

During proceedings before the Commission, ConEd submitted avoided energy cost calculations by an expert (Ms. Leesa Nayudu) based on an alternate method for calculating avoided costs called the "proxy" approach. The proxy approach involves calculating avoided costs based on a "proxy" resource. ConEd also presented the testimony of two expert witnesses at hearing, Mr. Keith Durand and Ms. Nayudu, who both testified that the Commission should use the proxy method. Mr. Durand testified:

> Q. (ConEd's counsel) So are you here today to support the hourly model or the monthly model or what is your position here today?
>
> A. I think that the Commission might want to seriously consider a different alternative approach that would be a lot more transparent, like the proxy approach.

Wheatland Tr. 118. Similarly, Ms. Nayadu provided the following testimony when questioned by the Commission:

Q. … So I guess back to my original question. If we determine both Mr. Durand and NorthWestern's estimates to be unreliable, is it your position that we rely on yours?

A. You could. That's one way of doing it, yes.

Q. Okay. And if not yours, or if the Commission determined your estimate to be unreliable, then what would your position be that this commission should do to establish avoided cost?

A. I would still recommend the proxy method because I think that's pretty widely used by utilities and PUCs. Or I shouldn't say PUC Commissions. So, yeah, I think it should be a proxy method. Now we can quibble about whether I used the right proxy or whether I used the right heat rate or things like that. That can be fine-tuned based on the assumptions that you guys want to use. So I think the methodology is correct, the inputs, maybe not.

Q. And that would be the Commission's own, I guess – that would be the Commission's own application of your proxy method?

A. Yes.

Wheatland Tr. 216:15-217:2. ConEd even submitted calculations by Ms. Nayudu based on the proxy method. *See* Wheatland AR 31.

ConEd then requested that the Commission adopt the proxy approach. A heading in its post-hearing brief stated **"If the Commission**

rejects PowerSimm, it can set avoided energy cost using the Proxy Method." Wheatland AR 42, p. 18 (emphasis in original). ConEd suggested that the Commission could set avoided cost rates for its projects using the proxy method even if it did not use Ms. Nayudu's calculation. *Id.* It also noted that the Commission had used the proxy approach to determine avoided costs in prior QF matters, suggesting that such an approach was supported by precedent. *Id.*

C. The Commission did not act arbitrarily by adopting a methodology proposed by ConEd.

ConEd introduced the proxy method in these matters; presented calculations prepared by its expert (Nayudu) of avoided costs based on the proxy method; had its experts testify that the Commission should adopt the proxy method; and argued that the Commission can set avoided energy cost using the proxy method if it rejects PowerSimm. The Commission did what ConEd requested when it rejected PowerSimm and set avoided energy costs using the proxy method.

ConEd now contends that the Commission acted arbitrarily by adopting the method it proposed. ConEd's argument that the Commission *sua sponte* adopted the proxy method without support strains credulity. ConEd cannot credibly contend the Commission did

not have a factual basis for adopting the proxy method when ConEd *provided* the Commission with the factual basis upon which it based its position.

ConEd's real complaint is that the Commission did not adopt the astronomically high avoided energy cost rate that its expert calculated using the proxy method. Instead, the Commission used the correct inputs to accurately calculate avoided costs. That is not arbitrary or a basis for reversal. Certainly not when ConEd's own expert recommended the proxy method and acknowledged her inputs may have been incorrect. Wheatland Tr. 216:15-217:2 ("So I think the methodology is correct, the inputs, maybe not.")

ConEd contends the Commission acted arbitrarily by departing from prior precedent when adopting the proxy method. "If an agency declines to follow precedent, it must 'provide a reasoned analysis explaining its departure' from any prior precedent." *Waste Mgmt. Partner v. Mont. Dep't Pub. Serv. Reg.*, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997); *see also FCC v. Fox Television Stations, Inc.*, 566 U.S. 502 (2009) ("the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the

reasons for the new policy are better than reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.").

The Commission provided a reasoned analysis for its use of the proxy method. It found that the calculations submitted by ConEd and NorthWestern were both unreliable as a result of an alleged defect with PowerSimm model that NorthWestern was unable to refute. *See* Wheatland Order, ¶¶ 34-35. The Commission had to calculate avoided energy cost within the statutory time period. Section 69-3-603(2)(a), MCA. It did so using a method that was introduced by ConEd. Wheatland Order, ¶ 32 ("Nayudu presents an alternative avoided cost of energy based on the capital and running costs of a proxy aeroderivative combustion turbine").

D. The existence of a LEO does not entitle ConEd to any particular methodology.

ConEd contends that it is entitled to have avoided energy costs calculated using the extant methodology at the time it incurred LEOs. That position is unsupported by law and is inconsistent with other positions taken by ConEd in this case.

A LEO is a "'non-contractual, but binding' commitment from a QF to sell power to a utility." *MTSUN*, ¶ 6. The creation of a LEO provides a QF "with the right to have its avoided-cost rate determined" on the date a LEO is formed. *Id.* (citing 18 C.F.R. § 292.304(d)(2)(ii)); *see also Whitehall II* (recognizing a that the "touchstone of a legally enforceable obligation…is an absolute, unconditional commitment to deliver energy, capacity, or energy and capacity at a future date.").

There is no requirement that avoided costs be calculated using a specific model, much less any requirement that the avoided costs be calculated **incorrectly** with an inaccurate model. The relevant rule provides that the creation of a LEO allows a QF to sell electricity based on either:

> (A) The avoided costs calculated at the time of delivery; or
> (B) The avoided costs calculated at the time the obligation is incurred.

18 C.F.R. § 292.304(d)(2)(ii). The point of using a model is to calculate avoided costs accurately.

ConEd's argument is revealing. The point of a LEO is to allow a QF – who has committed itself to sell electricity to a public utility – to have the option of selecting the avoided cost at the time of delivery or

when a LEO is incurred. In District Court, ConEd took the opposite position on the issue of avoided capacity costs. The Commission held that it would maintain its longstanding practice of assigning a capacity contribution value of 5% to wind QF projects. Order, pp. 8-9. ConEd argued that practice was outdated and the Commission erred by NOT adopting a new methodology and using that new methodology in the LEO calculation. *Id.*

It appears ConEd is willing to take whatever position could lead to a higher avoided cost calculation. It initially suggested the proxy approach because its expert used that method to calculate an exorbitantly high avoided energy cost rate.[17] It now opposes the approach because the Commission's application of the proxy method resulted in a lower number. ConEd is not entitled to any particular methodology. The Commission did not act arbitrarily or unlawfully by using the proxy method based on the record in this case.

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[17] ConEd's expert (Nayudu) used the proxy method to calculate an avoided cost rate of $77.52 per MWh for the Wheatland project. *See* Wheatland Tr. 145:7-18.

IV. THE COMMISSION PROPERLY DETERMINED THAT 15-YEAR CONTRACTS WERE APPROPRIATE BASED ON EVIDENCE IN THE RECORD.

ConEd did not introduce any evidence specific to its projects to justify a contract longer than 15 years. It did not present any witnesses to show what capital is necessary for construction. *See* Teton/Pondera Tr. 611. It did not present any actual evidence it needed a contract longer than 15 years to obtain financing. The applicable evidence in the record concerning this issue are: (i) the projects are owned by ConEd; (ii) ConEd is a multibillion dollar company; and (iii) ConEd has the ability to self-finance the projects and may do so. *See* Teton/Pondera Tr. 52-53, 678, 684-685; Wheatland Tr. 585.

This Court did not hold that QFs are automatically entitled to 25-year contracts. "To be sure, 15-year contracts, standing alone, are not per se unreasonable." *Vote Solar*, ¶ 73. The decisions in *Vote Solar* and *MTSUN* were based on their respective records. In *Vote Solar*, the Court held that "because the PSC failed to consider shortened contract lengths in conjunction with greatly reduced standard-offer QF-1 rates" the district court properly found that 15-year contracts were not sufficient. *Vote Solar*, ¶ 73. In *MTSUN*, the "District Court found that MTSUN and NorthWestern did not dispute that 25 years was an

appropriate contract length for the project, and no testimony was provided in support of a 15-year contract." *MTSUN*, ¶ 47.

Each case must be determined based on evidence in the record. The record in this case is different from *Vote Solar* and *MTSUN*. First, it does not involve reduced standard offer QF-1 rates. Next, NorthWestern and ConEd did not agree to an appropriate contract length for the project. Finally, there is substantial evidence supporting 15-year contracts. The QFs at issue are owned by a multibillion dollar company that has the ability to self-finance the projects. Wheatland Tr. 585; Teton/Pondera Tr. 676, 685. Substantial evidence supports the Commission's decision to award a 15-year contract.

ConEd did not present any evidence specific to its projects regarding financing. Wheatland Tr. 54; *see also* Teton/Pondera Tr. 611. ConEd's argument that it presented evidence in support of its request for a 25-year contract term is misleading. *See* ConEd Br. 40. It presented only abstract evidence that developers generally earn more money from longer contracts. *See id.* It may be true that developers generally earn more profit from longer contracts, but that does not mean a longer contract is justified in every case. ConEd bears the

burden of proof. *See Montana-Dakota Utilities Co. v. Montana Dept. of Public Serv. Regulation*, 223 Mont. 191, 198, 725 P.2d 548 (1986). In this case, the same witnesses who provided that testimony also testified they did not have any knowledge specific to the projects at issue. Teton/Pondera Tr. 52-53, 678, 684-685; Wheatland Tr. 585. ConEd could have presented evidence relevant to financing its projects in order to obtain a longer contract, but did not.

The record clearly supports the Commission's decision to award 15-year contracts. To hold otherwise means that QFs are always entitled to 25-year contracts, even when a longer contract results in windfall profits for a multibillion dollar company. That is not the law in Montana. 15-year contracts are not *per se* unreasonable. *Vote Solar*, ¶ 73.

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CONCLUSION

The Court should affirm the District Court's Order.

RESPECTFULLY SUBMITTED this 1st day of October 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionally spaced Century text typeface of 14 points; is double spaced (except for footnotes and quoted and indented material which are single spaced); with left, right, top and bottom margins at one inch; and the word count as calculated by Microsoft Word does not exceed 10,000 words, excluding the Table of Contents, Table of Authorities and Certificate of Compliance.

DATED this 1st day of October 2021.

CRIST, KROGH, ALKE & NORD, PLLC

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