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

REPLY BRIEF OF APPELLANTS CED WHEATLAND WIND, LLC, CED TETON COUNTY WIND, LLC, AND CED PONDERA WIND, LLC

Michael J. Uda
Anna M. Kecskés
Colson R. Williams
Lowell J. Chandler
Uda Law Firm, P.C.

Zachary T. Rogala
Lucas R. Hamilton
Public Service Commission
1701 Prospect Avenue
P.O. Box 202601

3130 Saddle Drive, Suite 5
Helena, MT 59601
(406) 457-5311
michaeluda@udalaw.com
annakecskes@udalaw.com

Attorneys for Appellants

Benjamin J. Alke
Crist, Krogh, Alke & Nord, PLLC
209 S. Willson Ave
Bozeman, MT 59715
balke@cristlaw.com

Attorney for NorthWestern Energy

Jason Brown
Montana Consumer Counsel
P.O. Box 201703
Helena, MT 59601
jbrown4@mt.gov

Attorney for Montana Consumer Counsel

Helena, MT 59601
(406) 444-6169
luke.casey@mt.gov
zachary.rogala@mt.gov

Attorneys for Montana Public Service Commission

Sarah N. Norcott
NorthWestern Energy
208 N. Montana Ave, Suite 205
Helena, MT 59601
sarah.norcott@northwestern.com

Attorney for NorthWestern Energy

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SUMMARY OF REPLY ARGUMENT

Respondents' briefs repeatedly attempt to mislead the Court by misrepresenting the law,[1] misstating the record below, and incorrectly claiming CED's projects will burden ratepayers. In sum, Respondents' arguments violate PURPA's three fundamental principles of (1) encouraging QF development through a mandatory purchase at the utility's full avoided costs, (2) requiring utilities allow QF interconnection to the grid, and (3) prohibiting utility discrimination against QFs. *See generally Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

Regarding network upgrade costs, Respondents' arguments confuse state jurisdiction over interconnection costs to also include jurisdiction over the interstate transmission system; the Commission only has jurisdiction over interconnection, i.e., the tap into the transmission system, not beyond. Importantly, none of the Respondents refute the fact that the "network upgrades" at issue are interstate transmission facilities. Instead, Respondents embellish the definition of "interconnection costs" to include "transmission system costs"

[1] For example, the Commission's first misrepresentation is found in Footnote 5, page 19. While the Tenth Circuit reversed *Vote Solar v. City of Farmington*, 2020 U.S. Dist. LEXIS 23425 (D.N.M. Feb 11, 2020), it made clear that its decision concerned the scope of federal court jurisdiction. *Vote Solar v. City of Farmington*, 2 F.4th 1285, 1290 n. 6 (10th Cir. 2021). Indeed, the decision clarified, "[w]e do not circumscribe the scope of state jurisdiction under Section 210(g) with this decision," and provided it disagrees with confining implementation claims exclusively to federal courts since State court jurisdiction under Section 210(g) is broad. *Id.* *MTSUN v. Mont. PSC*, 2020 MT 238, and the Tenth Circuit decision are consistent.

contrary to law—including its own precedent—and attempt to distract the Court from the plain language of the Federal Power Act ("FPA") that dictates FERC has jurisdiction over the transmission facilities here. Regarding avoided energy costs and ancillary service deductions, Respondents assert that despite CED incurring a legally enforceable obligation ("LEO") for each project, CED's avoided cost calculations may be manipulated to the disadvantage of CED after the LEO date—and even after CED executes its power purchase agreement ("PPA"). Lastly, regarding the Commission's assignment of abbreviated 15-year contracts, Respondents suggest—without any legal support—that Montana statute, § 69-3-604(2), MCA, does not apply to CED.

ARGUMENT

I. RESPONDENTS FAIL TO REFUTE THAT THE NETWORK UPGRADES TO NORTHWESTERN'S TRANSMISSION SYSTEM ARE INTERSTATE FACILITIES SUBJECT TO FERC JURISDICTION; REGARDLESS, THE COST SHIFT TO CED IS UNLAWFUL.

A. Respondents' Arguments Rely on the Mistaken Premise that Transmission System Costs Are Equivalent to Interconnection Costs and Deliberately Mislead This Court.

The Commission could only have jurisdiction over transmission upgrades to NorthWestern's transmission system if they were deemed interconnection facilities. However, the transmission system facilities at issue are not interconnection facilities, and despite NorthWestern and the Commission's

misleading attempts to confound the two and confuse the Court, they are not the same.[2] Indeed, one example of Respondents misleading this Court is where the Commission states that its precedent of assigning QFs the costs for network upgrades to NorthWestern's system "is clear and unbroken" and quotes a sentence from its 1983 order, *In re PURPA Implementation*, Docket No. 83.1.2, Order No. 5017, ¶ 86 (Mont. PSC, Nov. 10, 1983).[3] *See* Comm'n Resp. at 30; *see also* NorthWestern Resp. at 21 (quoting same). This representation, however, is misleading at best and false at worst. The very next sentence in the 1983 Order clarifies such upgrades are the responsibility of the utility, not the QF:

> Later upgrades to maintain reliable and dependable service are solely the utility's responsibility (See Finding No. 57 of Order No. 4865).

Order No. 5017, ¶ 86. The fact is, per above Commission precedent, upgrades after the point of interconnection with the generator on the utility's transmission system are the responsibility of the utility. Indeed, the 1983 Order makes clear that the sentence quoted by the Respondents pertains to "interconnection facilities," not network upgrades; the plain language of the sentence indicates as much by using the phrase "upgrades required for interconnection to the utility grid system," and not "on

[2] Interconnection facilities are those facilities between the generator and the point of interconnection that are built to allow the generator and the utility to intertie/tap-into the transmission. Transmission system facilities are upgrades that occur after interconnection and are needed to maintain reliable and dependable service.

[3] The sentence quoted is: "[T]he 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." (Emphasis added).

the utility's grid system." *See* Order No. 5017, ¶¶ 85-86 (discussing interconnection costs in the context of interconnection facilities). Further demonstrating the Respondents' misrepresentation, Finding No. 57 of Order No. 4865 (*In re Avoided Cost Rates for QFs*, Docket No. 81.2.15, (Mont. PSC, Jan. 4, 1982)), cited in the 1983 Order provides:

> 57. The Commission also determines that, once intertie has been accomplished between the utility and QF, the utility, not the QF, should be financially responsible for any alterations or modifications that are necessitated by a change in the utility's system voltage.

(Emphases added). Accordingly, per Commission precedent, the term "interconnection costs" is limited to the costs up to the point of interconnection, i.e. "interconnection facilities," and Respondents' attempts to blur interconnection costs to encompass transmission system costs by misrepresenting Commission precedent is a red herring.[4]

Indeed, FERC precedent likewise supports CED's position. Specifically, in a similar case where a utility was attempting to require a QF pay for building a new transmission line for the utility, FERC held that "grid upgrades . . . are system transmission costs and are ineligible for recovery [by the utility] through direct assignment [to the QF] as interconnection costs." *Western Mass. Electric Co.*, 77

[4] Indeed, the 1983 Order defines interconnection costs as "costs for interconnection facilities and special or additional facilities i.e., control and protective devices and facilities to accommodate utility meter(s)." Order 5017, ¶ 80 (citing ARM 38.5.1904(2)(a), which has remained unchanged since enacted in 1981). The transmission facilities here are not interconnection costs.

F.E.R.C. P61,268, 62120 (Dec. 18, 1996). FERC continued that "[r]ather, such costs must be recovered through the public utility's transmission rates. . . . that all customers [meaning generators, not ratepayers] should share in all costs of the integrated grid, without regard to which customer caused the construction because all grid additions benefit all customers using the grid," and that "treatment of grid upgrades is controlled" by the FPA, not PURPA. *Id.* In other words, Respondents' attempts to paint the transmission facilities here, including the 160-mile, 230 kilovolt ("kV") transmission line (i.e. a 400+ MW capacity line), as an interconnection cost is incorrect and unsupported.[5] The disputed facilities are interstate transmission facilities and the transmission system costs associated with them are subject to FERC jurisdiction as explained below.[6]

B. Respondents' Arguments Run Contrary to the Plain Language of the FPA and Judicial Precedent; FERC Has Jurisdiction.

Respondents first improperly conflate the plain language of the FPA by narrowly reading the statute to only grant FERC jurisdiction over wholesale sales and not over interstate transmission facilities. Second, they argue that since the

[5] CED does not dispute its responsibility for interconnection facilities—nor the Commission's jurisdiction over such interconnection costs. And, contrary to Respondents' indications, see NorthWestern Resp. at 26 and Comm'n Resp. at 31, CED's projects are in an existing transmission corridor, not a remote area without transmission.

[6] As the D.C. Circuit made clear, the significant costs related to transmission facilities (including an "an estimated $298 billion in investment . . . needed between 2010 and 2030") is why FERC has jurisdiction and why its regulations govern cost allocation of such facilities. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 51 (D.C. Cir. 2016) (upholding FERC Order 1000 regarding cost allocation procedures).

Commission has jurisdiction over retail sales, it likewise has jurisdiction over retail transmission regardless of the facility's interstate nature; judicial precedent says otherwise.

Respondents rely heavily on *New York v. FERC*, 535 U.S. 1 (2002); however, that case concerned jurisdiction over wholesale versus retail sales which is not in dispute here. The dispute here is jurisdiction over transmission of electricity, not sales. As the D.C. Circuit clarified in a 2016 decision after *New York v. FERC*:

> [T]he Commission [FERC] possess greater authority over electricity transmission than it does over sales. Even though Section 201(b) does "limit FERC's *sale* jurisdiction to that at wholesale," there is no textual warrant for the suggestion that the Commission lacks jurisdiction over retail transmission. That is, the FPA preserves for the States relatively more authority than transmission authority.
>
> ….
>
> And the authority that Section 201(b) affords to the Commission [FERC] has expanded over time because transmission on the interconnected grids that have now developed "constitute transmissions in interstate commerce."

S.C. Pub. Serv. Auth., 762 F.3d at 63 (*citing New York v. FERC*, 535 U.S. at 7, 16-22 (2002)) (underlined emphases added); *see also Hartford Elec. Light Co. v. Fed. Power Comm'n*, 131 F.2d 953, 961 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943) (holding "Section 201(b) [16 U.S.C. § 824(b)] confers jurisdiction over" interstate transmission facilities "and disjunctively" interstate wholesale facilities); *Federal Power Comm'n v. Florida Power & Light Co*., 404 U.S. 453, 461 n. 10

(holding that FERC jurisdiction attaches "no matter how small the quantity . . . of interstate energy involved"). FERC has jurisdiction over the interstate transmission facilities at issue here; Respondents' unsupported arguments to the contrary must be rejected.

Respondents' attempt to negate the holding in *WMECO v. FERC*, 165 F.3d 922 (D.C. Cir. 1999), is meritless. Like the above cases, the D.C. Circuit concluded FERC had jurisdiction not because, as Respondents claim "[the] issue concerned transmission rates to a third party," *see* NorthWestern Resp. at 24 and Comm'n Resp. at 27, but rather because—as CED argues—the FPA "gives the Commission [FERC] jurisdiction over any contract that 'relates to' rates and charges for the transmission of electric energy[.]" *WMECO*, 165 F.3d at 927. Although Respondents cite a string of FERC cases, NorthWestern Resp. at 25, FERC lacked jurisdiction in those cases because the "transmission facilities [were] part of the qualifying facilities themselves, rather than as part of the interconnecting public utilities."[7] *Id*. In other words, where the QF generator has transmission lines as part of its interconnection facilities necessary to interconnect to the grid, FERC lacks jurisdiction. In contrast, FERC has exclusive jurisdiction over transmission facilities on the transmission owner's system. The interstate

[7] The *Cherokee County*, 175 FERC ¶ 61002 (2021) case is likewise irrelevant as it does not concern upgrades to a utility's transmission system, which is what is at issue here.

transmission facilities at issue here will not be prior to the point of interconnection but rather will be owned and operated exclusively by NorthWestern and/or the Western Area Power Administration ("WAPA").[8]

The facilities here are indisputably interstate transmission facilities—which, again, Respondents do not refute because they cannot. Clearly, the 160-mile, 230 kV transmission line facility at issue in CED Wheatland that NorthWestern itself stated would be the "first new transmission line of this length and magnitude constructed . . . in Montana since the early 1980s," is an interstate transmission facility. *See* CED Op. Br. at 27-29 (record cites that the line will also by wholesale customers and improve NorthWestern transmission system reliability). Clearly, FERC has jurisdiction over that interstate facility. The "network upgrade" transmission facility in CED Pondera concerns construction of new transmission facilities on both WAPA's and NorthWestern's transmission systems.[9] These are interstate facilities under the *Florida Power & Light* decision. 404 U.S. at 461 n. 10. This issue is settled, FERC retains exclusive jurisdiction over cost allocation of interstate transmission facilities and its rules govern here.

[8] *See* Teton-Pondera AR 59, Teton-Pondera H'rg Tr. Day 3, 534:20-538:9.
[9] *See id*.

C. Even If the Commission Had Jurisdiction, the Cost Shift of Network Upgrades to CED's QF Projects Lacks Legal Basis and is a Rogue Decision.

Of the few states known to have acted on QF-specific network upgrade cost allocation, none have been as brazenly discriminatory and anti-QF development as the Montana Public Service Commission. For example, recently on March 11, 2021, the Georgia Public Service Commission—relying on FERC regulations, as CED has advocated throughout this proceeding—concluded "modifications to the transmission system, (Network Upgrade Costs), that are required in order to facilitate the QF's interconnection shall be refunded (100%) back to the QF" since "these upgrades benefit the transmission system and therefore benefits all customers with improved grid reliability."[10] Likewise, the Oregon Public Utility Commission concluded that QFs are entitled to refunds where the network upgrade provides system-wide reliability benefits.[11] Conversely, the Commission has adopted a cost allocation policy to thwart QF development by insisting that QFs are wholly responsible for transmission system upgrades regardless of system reliability benefits and regardless of whether the "network upgrade" is a new 160-mile, 230 kV transmission line. This alone indicates the Commission has

[10] *Capacity and Energy Payments to Cogenerators Under PURPA (Consolidated)*, Docket Nos. 4822, 16573, 19279, Order, p. 9 (Georgia PSC, March 11, 2021) (Appendix A).

[11] *Investigation into Interconnection of PURPA Qualifying Facilities with Nameplate Capacity Larger Than 20 Megawatts to a Public Utility's Transmission or Distribution System*, Docket No. UM 1401, Order No. 10- 132, p. 3 (Oregon PUC, 2010) (Appendix B).

committed clear error of law here; there is simply no legal support for the Commission's decision.

II. THE COMMISSION ERRED IN ADOPTING ITS OWN EXTRA-RECORD CALCULATION OF AVOIDED COSTS AFTER CED'S LEOs.

A. The Date of the LEO Determines the Avoided Cost Methodology.

NorthWestern argues that, even if a QF has incurred a LEO, the QF "is not entitled to any particular methodology" to calculate avoided costs. *See* NWE's Response, p. 42. If true, the fundamental purpose of a LEO, which is to lock-in a QF's avoided cost calculation "at the time the obligation is incurred," 18 C.F.R. § 292.304(d)(1)(ii)(B), would be negated.[12] Rather than support its assertion that a LEO is irrelevant to avoided cost calculations, NorthWestern confusingly attacks CED's argument that it made during the District Court proceeding as its authority to support rendering the LEO prong of PURPA meaningless. *See* NorthWestern Resp. at 40-42. To be clear, while CED had argued during the District Court proceeding against the Commission's assignment of a 5% capacity factor, it did so because at that point the Commission had yet to concede that CED incurred LEOs. Once the Commission conceded that point, CED dropped the issue and did not pursue it on appeal to this Court. CED's avoided costs should be calculated as of

[12] *See New York State Elec. & Gas Corp.,* 71 FERC 61,027, n. 50 (1995) ("an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility").

the date of its LEO using the methodology in place at the time of the LEO. 18 C.F.R. § 292.304(d)(1)(ii)(B); *MTSUN*, ¶ 68.

B. Respondents Failed to Refute that the Commission's Extant Methodology at the Time of CED's LEOs was the Monthly Version of PowerSimm; CED Should Not Be Disadvantaged for Discovering Errors in NorthWestern's Newly Proposed Hourly Methodology.

As CED detailed in its Complaints/Petitions for Judicial Review,[13] the Commission has a troubling history of adopting new avoided cost methodologies on a case-by-case basis in order to meet its predetermined avoided cost calculations. The effect of this ongoing agency instability is that QF developers are left at a complete loss as to what methodology or precedent means for calculating avoided costs in Montana. Here, CED did what it thought was consistent with the law and filed its petition based on avoided cost calculations using the monthly version of PowerSimm which was the Commission's extant methodology.[14] However, rather than rely on its precedent for calculating avoided costs, the Commission—yet again—upended its precedent and adopted a new methodology after the close of evidence.

[13] *See* CED Teton/Pondera Complaint/Petition for Judicial Review, p. 12-17; *see also* CED Wheatland Complaint/Petition for Judicial Review, p. 11-16.

[14] *See In re Grizzly Wind, LLC and Black Bear Wind, LLC*, Docket No. 2019.02.009, Order No. 7661c, ¶ 33 (using the monthly version). *See also* n. 13 infra.

In this case, despite CED submitting calculations using the extant methodology, NorthWestern asserted that the Commission should adopt a new hourly version of PowerSimm and submitted avoided costs using that methodology. CED then presented unrefuted evidence of errors in NorthWestern's hourly version of PowerSimm. As a result, the Commission was left with no other avoided cost calculation except for CED's. Accordingly, desperate for a new avoided cost calculation to suit its predetermined outcome, the Commission inferred that the same issues equally affected CED's monthly version without any record basis for making this assertion. The two versions of PowerSimm are not the same; NorthWestern's witness from Ascend Analytics acknowledged that the two versions of the model go through a different post-processing and handling procedure.[15] NorthWestern's error occurred in post-processing. To make that point clear: If the versions were the same, and equally affected by the same error as the Respondents claim, the only logical conclusion would be that the avoided cost calculation output would be the same.[16] However, the monthly and the hourly versions produced radically different results, with NorthWestern's hourly results coming in at less than half of CED's proposed monthly results—a point that none

[15] *See* Teton/Pondera AR 59, Hr'g Tr. Day 2, Testimony of Brandon Mauch, at 431:2-433:1-6.

[16] *See* Teton/Pondera AR 59, Hr'g Day 1, Testimony of Keith Durand, at 150:22-25 – 151:1-6.

of the Respondents have addressed to-date.[17] It was error for the Commission to reject all record evidence and not only refuse to apply its precedential methodology, but also refuse to apply the methodology in place as of CED's LEOs. Section 2-4-704(2)(a)(v)(vi).

C. While CED Discussed the Proxy Methodology, CED Made Clear It Was Used as A Benchmark.

Respondents argue that because CED's witness Ms. Nayudu discussed the proxy methodology, the Commission was granted authority to adopt an extra-record calculation of avoided costs. *See* NorthWestern Resp at 38-39; Comm'n Resp. at 34-35. As CED has repeatedly stated, it presented an avoided cost (calculated using the proxy method) as a benchmark[18] to check the reasonableness of its calculation using the monthly version of PowerSimm, and as a launching board for a larger discussion[19] of calculating avoided costs moving forward in Montana. Despite Ms. Nayudu being clear in her testimony on this point,[20] and despite the Commission staff failing to ask any specific questions on her calculations or inputs during cross-examination,[21] the Commission seized the opportunity to adopt its own version of the proxy method and did so without input

[17] *See* Dist. Court Petitioner's Opening Brief, pp. 23-24.
[18] *See* Wheatland AR 58, Hr'g Tr. Day 1, Testimony of Leesa Nayudu, at 257:19-25 – 256:1-21.
[19] *See id.* at 220:10-25-221:1-8; *see also id.* at 296:20-25 – 297:1-16.
[20] *See also id.* at 145:7-18.
[21] *See, e.g., id*. at 211 – 217.

from the parties. Moreover, although the Commission claimed it could not rely on Ms. Nayudu's proxy calculation,[22] the Commission now attempts to bolster its own extra-record adoption of its proxy method by claiming its analyses "are derived from similar information." Comm'n Resp. at 36. Either Ms. Nayadu's proxy calculations were reliable, or they were not, the Commission cannot have it both ways by citing her calculations as credible yet also rejecting her calculation.

The Commission and NorthWestern also claim that CED's price terms are "astronomically high." NorthWestern Resp. at 39.[23] Astronomically high in comparison to what? The Commission has historically approved avoided cost prices from the PowerSimm model (a model that is NorthWestern's preferred model and, as it asserts, is supposed to produce prices to reflect sensitive changes in "demand, prices, weather, and other factors[,]" NWE's Response, p. 34). Despite historically approving this model, what is evident in this case is that the Commission is not interested in the model's results when it doesn't like the calculation. *See* Comm'n District Court Resp. Br., p. 13. Indeed, CED specifically explained during the proceeding below that the Commission's Final Orders in this case admit that its avoided costs have remained stagnant in the last

[22] *See* Teton/Pondera Final Order, ¶¶ 38, 46; Wheatland Final Order, ¶¶ 38, 46.

[23] Respondents incorrectly imply that CED is requesting the avoided cost price term calculated using the proxy method. *See* NorthWestern Resp. at 39; Comm'n Resp. at 38. CED was clear in its Opening Brief to this Court that it was requesting the Court to order avoided cost price terms calculated by the monthly version of PowerSimm, to which it is entitled to based on Commission precedent and the date of its LEOs. *See* CED's Opening Brief, p. 41.

3-4 years, despite the fact that natural gas prices (a major input) have fluctuated significantly over that period.[24] The extra-record proxy method in this case was simply the vehicle for the Commission to arrive at the predetermined acceptable price range. The Commission's decision as to avoided costs must be reversed.

III. RESPONDENTS FAIL TO POINT TO RECORD EVIDENCE TO SUPPORT THEIR ANCILLARY SERVICE DEDUCTIONS; REGARDLESS, THEIR ADOPTION OF VARIABLE DEDUCTION RATES IS CONTRARY TO PURPA.

A. The Commission's Orders Lack Record Support and Respondents Fail to Refute that Fact.

The Commission and NorthWestern both incorrectly assert that ordering an ancillary deduction that was substantially higher than the Commission's extant precedent was supported. *See* Comm'n Resp. at 40-41; *see also* NorthWestern Resp. at 32-33. However, NorthWestern specifically opposed providing any justification for applying its Open Access Transmission Tariff ("OATT") deduction rates in the record[25] and its unsupported policy arguments it now makes are insufficient to deviate from Commission precedent. *See* NorthWestern Resp. at 33 (arguing a failure to adopt the new OATT ancillary deduction would be "a waste of State resources"—even though calculating integration/ancillary deductions is typical in QF proceedings, *see MTSUN*, ¶ 19).

[24] *See* Dist. Court Petitioners' Opening Brief, p. 17-21; *see also* Teton/Pondera Final Order, ¶ 43; Wheatland Final Order, ¶ 43.

[25] *See* CED Opening Brief, p. 37, n. 33.

Contrary to Respondents' unsupported policy arguments, the Commission has a statutory obligation to ensure that a QF's avoided cost rates, including any deductions to the rates, are just, reasonable, and nondiscriminatory and its decision must be based on the record evidence. *See* 16 U.S.C. § 824a-3(b); *see also* 18 C.F.R. § 292.305; Section 2-4-704(2)(a)(v), MCA. CED submitted the only record evidence on this issue, and the Commission even acknowledged that CED's deduction was based on its extant precedent. *See* Order No. 7702b, ¶ 75; *see also* CED Opening Br. at 36, n. 30. The Commission's decision to break from its precedent without record support requires reversal. Section 2-4-704(2)(a)(v)(vi), MCA; *Waste Mgmt. Partners v. Mont. PSC*, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997).

B. The Commission and NorthWestern Advocate for Undermining PURPA's LEO Protections by Applying a Variable Deduction.

Not only are Respondents' arguments unsupported, but their arguments hinge on an unlawful conclusion that a QF incurring a LEO is meaningless. *See* Comm'n Resp. at 42-43; *see also* NorthWestern Resp. at 31-32. Establishing a LEO is critical to QF development since it is "the date that the QF has the right to have its avoided-cost rate determined." *MTSUN*, ¶ 6. As this Court has made clear, the LEO provision of PURPA "clearly requires that the data used to calculate the avoided costs must be based on current data at the time the LEO is incurred." *MTSUN*, ¶ 68. The purpose is to avoid utility (and/or an unfavorable state

commission) manipulation of the avoided cost rates after the date of the LEO. *See MTSUN*, ¶ 6; *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, 61,024 (2011). Allowing NorthWestern to manipulate rates after CED has incurred its LEOs is what the Commission and NorthWestern are requesting; such request is unlawful.

Since ancillary services are deducted from CED's avoided cost rates, *see* Dist. Court Order, p. 26, those deductions must be based on the data available at the time of CED's LEOs. *MTSUN*, ¶ 76. At the time of the LEO for Wheatland, Teton, and Pondera, the Commission had yet to issue an order assigning the interim OATT rates as ancillary service deductions to a QF. *See In re Caithness Beaver Creek I*, Docket No. 2019.06.034, Order No. 7680b, ¶ 121 (Dec. 9, 2019), Order No. 7680c, ¶¶ 65-71 (February 7, 2020). Therefore, the only lawful decision from the Commission would have been to order the ancillary service deductions submitted into evidence by CED, which were based on Commission precedent.

Even if incurring a LEO somehow does not lock-in the date that ancillary deductions be calculated from—which, again, Respondents' assertions lack support—the result of applying the OATT deduction rate is to insert a variable rate into CED's avoided costs in violation of PURPA's requirement that avoided costs be fixed at the time of LEO. 18 C.F.R. § 292.304(d)(1)(ii)(B); *see also Afton Energy v. Idaho Power Co.*, 107 Idaho 781, 785-86 n. 7, 693 P.2d 427, 431-32 (1984) (explaining FERC's regulatory intent was to allow QFs to "enter into fixed-

term contracts"). If the variable OATT ancillary deductions apply, a QF cannot reasonably estimate its expected return on investment after signing a PPA because the deduction will vary based on the whims of NorthWestern filing a new OATT proceeding before FERC. *See Small Power Prod. and Congregation Facilities; Regulations Implementing § 210 of PURPA*, Order No. 69, 45 Fed. Reg. 12,214, 12,218 (1980); *see also Vote Solar v. Mont. PSC*, 2020 MT 213A, ¶ 72. Given that NorthWestern's recent OATT FERC petition requested deductions that were exponentially higher than Commission precedent resulting in deductions of $12.43/MWh for Wheatland,[26] for Teton $14.59/MWh, and for Pondera $19.48/MWh[27]—around half of the total avoided cost calculation—infusing such uncertainty into CED's PPAs undermines its return on investment and need for "reasonable certainty of return on investment," *MTSUN*, ¶ 35. Regardless of whether the OATT deduction is permitted, allowing it to be variable is contrary to law requiring reversal.[28]

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[26] *See* Wheatland AR Tab 16, NorthWestern Intervenor Testimony, Prefiled Testimony of Dr. Ben Fitch-Fleischman, p. BFF-4.

[27] *See* Teton/Pondera AR Tab 26, NorthWestern Intervenor Testimony, Prefiled Testimony of Dr. Ben Fitch-Fleischman, p. BFF-4.

[28] While the Commission attempts to support a variable deduction by listing certain PPA price terms that will vary throughout the contract, the important difference is that all of those terms listed are cost variables that have been modeled and are predictable from a financial forecasting perspective. *See* Comm'n Resp. at 40. Moreover, none of the listed examples by the Commission can be unilaterally undermined by the utility over the course of the PPA. Conversely, if the ancillary deduction is based on the OATT, then that rate will change over the course of the PPA based on the whims of NorthWestern and its unilateral decision to file a new OATT proceeding to adjust the rates; such a variable and uncertain deduction is not predictable and forecastable unlike the terms listed by the Commission.

IV. THE COMMISSION IGNORED EVIDENCE AND MONTANA LAW IN ASSIGNING 15-YEAR CONTRACTS.

On the issue of contract length, the Respondents argue that CED did not provide specific evidence that it needed more than a 15-year contract term to obtain financing. *See* NorthWestern Resp. at 44; MCC Resp. at 9; Comm'n Resp. at 44. The Respondents triumphantly assert that CED's witness Mr. Durand was unable to state the exact return on equity over what number of years CED expects from the projects. However, CED did offer evidence to the Commission why a 20 to 25-year contract term would be proper (including considering the specific market in Montana and the expected life of the equipment). *See* CED's Opening Brief, p. 39-40.[29]

The Commission and NorthWestern only claim that because CED's parent company is a large corporation, with the potential ability to self-finance, a 15-year contract term is supported by the evidence. *See* NorthWestern Resp. at 43; Comm'n Resp. at 45. However, obtaining financing is not an issue, financing can be obtained on just about anything. Rather, the question the statute asks is whether the Commission encouraged "long-term contracts" "in order to enhance the economic feasibility of" CED's projects. Section 69-3-604(2), MCA. The Respondents effectively propose to insert "unless the owner of the QF is attached

[29] *See also* Wheatland AR 58, Hr'g Tr. Day 1, Testimony of Keith Durand, pp. 77-78, 113-114.

to a large parent corporation" into the statute. Obviously, such an assertion is not legally supportable. Secondly, CED did offer evidence that though self-financing was possible, any investment decision must still meet the rigorous standards for a sound business decision and ensure reasonable returns.[30] CED's parent company is irrelevant to its need for a long-term contract.

The Respondents similarly argue this case is distinguishable from *Vote Solar* and *MTSUN*. *See* NorthWestern Resp. at 44; MCC Resp. at 8; Comm'n Resp. at 44. However, Respondents each fail to address the argument made in CED's Opening Brief that the Commission's orders in these cases fail to comply with *Vote Solar's* requirements that the Commission consider abbreviated contract lengths as well as reduced avoided costs and compare functionally equivalent contracts awarded to utility resources. *See* CED's Opening Brief, p. 39 (citing *Vote Solar*, ¶¶ 70-73).

Lastly, the Commission argued that short-term contracts are acceptable because CED can simply negotiate a new PPA upon expiration. Comm'n Resp. at 46. Again, under statute the Commission is required to "encourage" long-term contracts so as to "enhance the economic feasibility" of QFs. Section 69-3-604(2), MCA. Requiring QFs to reengage in negotiations with a reluctant monopoly utility

[30] *See* Teton/Pondera AR 59, Hr'g Tr. Day 3, Testimony of Sean Wazlaw at 690-691.

(and, likely, another petition process) is contrary to the statute. The decision to assign short-term contracts of 15-years must be reversed.

CONCLUSION

For the above reasons, CED respectfully asks this Court to grant the relief requested in its Opening Brief.

Respectfully submitted this 20th day of October, 2021.

/s/ Michael J. Uda
Michael J. Uda
Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Reply Brief of Appellants is printed proportionately spaced Times New Roman typeface of 14 points, is double-spaced except for quoted, indented material and footnotes, and the word count as calculated by Microsoft Word is 4,996 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix.

DATED this 20th day of October 2021.

Lowell J. Chandler
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Michael J. Uda, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 10-20-2021:

Anna Maria A. Kecskes (Attorney)
3130 Saddle Drive
Suite 5
Helena MT 59601
Representing: CED Pondera Wind, LLC, CED Teton County Wind, LLC, CED Wheatland Wind, LLC
Service Method: eService

Colson Roger Williams (Attorney)
3130 Saddle Drive
Suite 5
Helena MT 59601
Representing: CED Pondera Wind, LLC, CED Teton County Wind, LLC, CED Wheatland Wind, LLC
Service Method: eService

Lowell Jack Chandler (Attorney)
3130 Saddle Dr., Suite 5
Helena MT 59601
Representing: CED Pondera Wind, LLC, CED Teton County Wind, LLC, CED Wheatland Wind, LLC
Service Method: eService

Jason Thomas Brown (Attorney)
111 N Last Chance Gulch, Ste.1B
Helena MT 59601
Representing: Montana Consumer Counsel
Service Method: eService

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

Sarah N. Norcott (Attorney)
208 N. Montana Avenue
Suite 205

Helena MT 59601
Representing: NorthWestern Energy
Service Method: eService

Benjamin J. Alke (Attorney)
2708 1st Avenue North, Suite 300
Billings MT 59101
Representing: NorthWestern Energy
Service Method: eService

Clark Robert Hensley (Attorney)
5890 Archer Drive
Missoula MT 59803
Representing: NorthWestern Energy
Service Method: eService

Lucas R. Hamilton (Attorney)
1701 Prospect Ave.
PO Box 202601
Helena MT 59620
Representing: Montana Public Service Commission
Service Method: eService

Electronically Signed By: Michael J. Uda
Dated: 10-20-2021