

Service Date: November 29, 2017

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Petition of)	REGULATORY DIVISION
MTSUN, LLC To Set Terms and)	
Conditions for Qualifying Small Power)	DOCKET NO. D2016.12.103
Production Facility Pursuant to M.C.A.)	ORDER NO. 7535b
§ 69-3-603)	

ORDER ON RECONSIDERATION

FOR MTSUN:

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FOR THE INTERVENORS:

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NorthWestern Energy
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BEFORE:

Brad Johnson, Chairman
Travis Kavulla, Vice Chairman
Roger Koopman, Commissioner
Bob Lake, Commissioner
Tony O'Donnell, Commissioner

COMMISSION STAFF:

Will Rosquist, Administrator, Regulatory Division
Jennifer Hill-Hart and Jeremiah Langston, Attorneys
Mike Dalton and Neil Templeton, Rate Analysts
Bob Decker, Policy Analyst

PROCEDURAL HISTORY

1. On December 23, 2016, MTSUN filed a *Petition of MTSUN, LLC to Set Terms and Conditions for Qualifying Small Power Production Facility Pursuant to M.C.A. § 69-3-603*. On January 6, 2017, MTSUN filed *MTSUN LLC's Errata to Petition to Set Terms and Conditions for Qualifying Small Power Production Facility Pursuant to M.C.A. § 69-3-603* (Petition). The Petition was complete and compliant on January 6, 2017.

2. MTSUN has proposed an 80 megawatt (MW) nameplate capacity solar project (Project) located near Billings, Montana, in Yellowstone County. Pet. at 1. MTSUN asserts the Project is a self-certified qualifying facility (QF) under the Public Utility Regulatory Policies Act (PURPA) creating a “legally enforceable obligation” (LEO) which requires it to sell all its output to NorthWestern Energy (NorthWestern), and obligates NorthWestern to purchase all of the Project’s output. *Id.* at 3–4. MTSUN asserted it was unable to obtain an agreement with NorthWestern on (1) long-term forecast avoided cost pricing from NorthWestern, and (2) the terms and conditions of a power purchase agreement (PPA). *Id.* at 4. MTSUN submitted a request to NorthWestern to commence the interconnection process, but argued to the Commission that QFs only have to negotiate a PPA with NorthWestern, and are no longer required to tender an executed interconnection agreement with the utility in order to establish an LEO, per the Federal Energy Regulatory Commission (FERC). *Id.* at 2–3 (citing *FLS Energy, Inc.*, 157 F.E.R.C. 62,111 (2016)).

3. The Commission issued a *Notice of Petition and Intervention Deadline* on January 12, 2017, and granted intervention to the Montana Consumer Counsel (MCC), NorthWestern, and the Montana Department of Natural Resources and Conservation (DNRC) on January 25, 2017.

4. On January 31, 2017, the Commission issued a Procedural Order setting the procedural schedule in this matter.

5. The Commission held a public hearing on April 28, 2017, at the Commission offices in Helena, MT. MTSUN and NorthWestern submitted timely post-hearing briefs. The Commission held a work session on June 29, 2017, to discuss and act on MTSUN’s Petition. The Commission issued Final Order 7535a on July 21, 2017.

6. On July 31, 2017, MTSUN and NorthWestern each filed separate motions for reconsideration of Order 7535a. MTSUN identified five issues for reconsideration of the

appropriateness of: (1) the Commission's finding that MTSUN did not establish an LEO; (2) a 10-year contract length for the PPA between MTSUN and NorthWestern; (3) the Commission's decision on carbon adjustments; (4) the Commission's avoided capacity cost calculation; and (5) the Commission's avoided energy cost calculation. NorthWestern raised the issues of symmetrical treatment to utility resources and the Commission's decision not to deduct network and transmission service upgrade costs and regulation costs from avoided costs.

7. On August 1, 2017, the Commission received a compliance filing from NorthWestern as required in Order 7535a, supporting an avoided energy cost rate of \$16.39/MWh in all hours, and a peak-load hour capacity rate of \$10.57/MWh.

8. On August 15, 2017, by delegation to Commission Staff and pursuant to Mont. Admin. R. 38.2.4806, the Commission waived the period for automatic denial regarding the motions.

9. On October 5, 2017, the Commission held a work session to discuss the motions for reconsideration. The Commission granted in part and denied in part the various requests for reconsideration as discussed in this Order on Reconsideration.

10. On October 30, 2017, the Commission found good cause to extend its decision on MTSUN's and NorthWestern's motions for reconsideration by 30 days, to no later than November 29, 2017. Not. of Comm'n Action (Oct. 30, 2017).

DISCUSSION AND FINDINGS OF FACT

Whether MTSUN established an LEO

11. In its Motion for Reconsideration, MTSUN argues that the Commission's determination that MTSUN did not incur an LEO is erroneous for two reasons: 1) the Commission's determination that MTSUN did not incur an LEO is in violation of PURPA and Montana's Mini-PURPA; and 2) the Commission departed from the FERC LEO regulation by not calculating MTSUN's avoided cost from December 23, 2016, the date that MTSUN filed its petition. MTSUN Mot. Recons. at 3 (Jul. 31, 2017).

12. MTSUN argues that the Commission's LEO determination, along with other determinations in Order 7535a, is contrary to the primary purpose of PURPA to "overcome utilities' refusal to purchase from non-utility producers" and that the Commission's decision actively discourages QF development. *Id.* at 7; *see* Order 6444e, Docket D2002.8.100 (May 18,

2010). Further, MTSUN argues that the Commission's *Whitehall Wind* LEO test is outdated and has been preempted by FERC, violates PURPA and Montana's mini-PURPA statutes, *see* Mont. Code Ann. § 69-3-601 to -604, and places the burden on the QF to demonstrate it satisfies the standard. *Id.* at 17.

13. MTSUN briefly discussed its exasperation with “what it considered to be NWE's delay tactics and its provision of multiple and inconsistent avoided cost estimates to MTSUN,” thereby forcing it to file a Petition with the Commission for a determination of an avoided cost rate. *Id.* at 4–5 (referencing Pet. ¶¶ 2–46) (In its Petition, MTSUN references an alleged email from NorthWestern, dated November 30, 2016, attached as Exhibit 11 to the Petition. The Commission reviewed Exhibit 11 and found that reference was not supported by the exhibit offered).

14. When QFs have requested enforcement of an LEO, the Commission has relied on its bright line LEO test established in the *Whitehall Wind* decision. *See, e.g. In re Crazy Mountain Wind, LLC*, Docket D2016.7.56, Order 7505c ¶¶ 9–24 (Mar. 6, 2017). Although MTSUN argues that the Commission's LEO test is unlawful, the Commission is not persuaded that it should change its LEO test this time. *See* Order 6444e ¶¶ 46–49.

15. States have the authority to determine the parameters of QF PPAs, “including the date at which a legally enforceable obligation is incurred under State law.” *Power Res. Grp, Inc. v. PUC*, 422 F.3d 231, 238, 165 F. App'x 378 (5th Cir. 2005) (*Power Resource III*). That Court noted that if FERC “had determined it necessary to set more specific guidelines concerning LEOs, it could have done so . . . [t]he plain text of the FERC regulation, however, fails to mandate that requirement. Rather, defining the parameters for creating an LEO is left to the states and their regulatory agencies.” *Id.* at 239. The plain language of FERC's regulation does not state all QFs must *always* be allowed to enter into LEOs. Rather state regulatory agencies, not FERC, under the cooperative federalism scheme created by PURPA, “were empowered to define the parameters of the circumstances” in which QFs could form LEOs. *Exelon Wind I, LLC v. Nelson*, 766 F.3d 380, 396–397 (5th Cir. 2014). FERC gives deference to states to determine when an LEO is incurred, although that deference is not unlimited and is still subject to FERC's regulations. *Cedar Creek Wind, LLC*, 137 F.E.R.C. 61,006, 61023–61024 (2011); *Grouse Creek Wind Park, LLC*, 142 F.E.R.C. 61,187, 61894 (2013); *Windham Solar LLC & Allco Fin. Ltd.*, 157 F.E.R.C. 61,134, 61,475 (2016) (“Thus, regardless of whether a QF can

provide firm output, that QF has the option to sell its output pursuant to a legally enforceable obligation with a forecasted avoided cost rate.”).

16. *Power Resource III* “does not stand for unalloyed deference to the state regulatory authority in interpreting FERC’s regulations,” particularly because FERC took a position that defining the parameters of LEO formation were within the state’s discretion. *Id.* at 411 (citing *Power Res. Group, Inc. v. PUC*, 422 F.3d 231, 238 (5th Cir. 2005); see *W. Penn Power Co.*, 71 F.E.R.C. 61,153, 61,495 (1995)). “At best, it stands for deference to the state regulatory authority when FERC has taken no action and has previously announced that it will leave an ambiguous provision to the state agencies to interpret.” *Id.* The court noted that the plain language of the rule does not conflict with FERC’s Regulation and concluded that, “just as in *Power Resource III*, the mere fact that the PUC rule prevents some QFs from entering into LEOs “at certain times does not mean the PUC failed to implement FERC’s regulation.” *Id.* (emphasis added). The First Circuit upheld this interpretation in a case finding that a state regulation in fact prevented any QF from having the option to sell under 18 C.F.R. § 292.304(d)(2)(ii), and that was inconsistent with the plain meaning of the rule. *Allco Renewable Energy, Ltd. v. Mass. Elec. Co.*, 208 F.Supp. 3d 390, 398–400 (1st Cir. 2016).

17. If a state commission believes a previously-determined avoided cost rate is no longer an accurate measure of a utility’s avoided costs, the appropriate response is to “determine a new avoided cost rate that better reflects the utility’s avoided costs consistent with the requirements and procedures identified in the Commission’s regulations under PURPA.” *FLS Energy, LLC*, 157 F.E.R.C. 61,211 (citing 18 C.F.R. § 292.304(b), (e) (2016)); *Windham Solar, LLC*, 157 F.E.R.C. 61,134, 61,475 (“These factors which include, among others, the availability of capacity, the QF’s dispatchability, the QF’s reliability, and the value of the QF’s energy and capacity, allow state regulatory authorities to establish lower avoided cost rates for purchases from intermittent QFs than for purchases from firm QFs.”). The Commission properly considered factors authorized by FERC in making its determination of avoided costs in this docket.

18. FERC has stated that an LEO is intended to prevent the utility from delaying the signing of a contract, so that a later and lower avoided cost is applicable. *FLS Energy, LLC*, 157 F.E.R.C. at 61,731. FERC found that when a utility can delay the facilities study and the tendering of an executable interconnection agreement, that requirement “made a fully-executed

contract a condition precedent to the creation” of a LEO, which is inconsistent with PURPA. *Id.* The Commission finds the utility gave MTSUN several avoided cost calculations throughout the negotiations and MTSUN did not adequately explain why it did not accept the rates, instead claiming an avoided cost rate nearly three times what the Commission found to be accurate.

19. Here, similar facts exist to *Power Resource III* and *Exelon Wind 1*. In Order 7535a, the Commission discussed FERC’s declaratory order that stated a requirement for QFs to have a signed Interconnection Agreement (IA) to create an LEO was inconsistent with PURPA, and FERC’s rules implementing PURPA, but did not remove the remaining components of the test. Order 7535a ¶ 35 (June 29, 2017) (citing *FLS Energy, Inc.*, 157 F.E.R.C. 61,211, 61,730 (2016)) (*see* Order 7505c, Docket D2016.7.56, ¶¶ 13–15 (Mar. 6, 2017)). The remaining steps set out in the *Whitehall Wind* test do not represent an insurmountable principle preventing QFs from ever being able to obtain an LEO, but are a matter of timing, akin to the 90-day rule in *Power Resource III*. MTSUN’s motion for reconsideration of the Commission’s LEO decision in Order 7535a is denied.

20. The Commission recognizes that the IA element of the *Whitehall Wind* test, as discussed in Order 7535a, is worthy of further analysis as a prong of a bright-line test. Accordingly, the Commission invites any interested party to initiate rulemaking to address these concerns. *See, e.g., Pet. of the Mont. Consumer Counsel to Amend ARM 38.5.2527 through 38.5.2528*, Docket N2017.9.76 (Sept. 25, 2017). The Commission has rulemaking authority in matters affecting QFs. Mont. Code Ann. § 69-3-604(5) (2017). Any interested person “may petition an agency requesting the promulgation, amendment, or repeal of a rule.” Mont. Code Ann. § 2-4-315.

PPA Contract Length

21. MTSUN requests the Commission reconsider its decision to set a maximum contract length of 10 years, asserting that the decision is unlawful, contrary to precedent, and not supported by evidence in the record. MTSUN Mot. Recons. at 24. MTSUN argues that the Commission’s ten-year contract length decision: violates PURPA and Montana’s Mini-PURPA; is not supported by any record evidence; is contrary to Commission precedent and offers no reasoned explanation for its departure from prior decisions; is legally improper and out of step

with the trend among other states; and is effectively a rulemaking made without proper notice and therefore in violation of due process. *Id.* at 24–37.

22. MTSUN argues that that PURPA and FERC, as well as Montana law, hold that the Commission “must encourage QFs through the use of long-term contracts of sufficient length that the QF has reasonable opportunities to attract financing.” *Id.* at 24–25 (citing U.S.C. § 824-a3(a); *Allco Renewable Energy, Ltd. v. Mass. Elec. Co.*, 208 F. Supp. 3d 390, 400 (D. Mass. 2016)); *Windham Solar, LLC v. Allco Fin. Ltd.*, 157 F.E.R.C. at 61,475–61,476; and Mont. Code Ann. § 69-3-604(3) (long-term contracts “must be encouraged in order to enhance the economic feasibility of qualifying small power production facilities”). MTSUN argues FERC recognized forecast error risk was accounted for in FERC Order 69, and that the risk is already accounted for in FERC regulation, with QFs sometimes overpaid and sometimes underpaid, and thus over the long term, avoided cost will pay QFs correctly. *Id.* at 26 (citing F.E.R.C. Order 69, 45 Fed. Reg., 12,214, 12,224 (1980), and 18 C.F.R. § 292.304(d)). MTSUN further argues there is no record evidence that the risks will not even out over time, and that the Commission engaged in speculation and should reconsider its decision. *Id.*

23. MTSUN contends that the record evidence does not support a finding that a 10-year contract is sufficient for QFs to attract financing, as no parties argued for a 10-year contract, and points out that NorthWestern did not contest the 25-year contract length requested by MTSUN. *Id.* at 26–27 (citing Test. John B. Bushnell 35 (Mar. 17, 2017)). MTSUN argues that although MCC advocated for a contract length less than 25 years, the MCC did not suggest that 10 years was the appropriate length, and was satisfied with a 20-year contract which the Commission found to be “reasonable” for Montana-Dakota Utilities. *Id.* at 26–27, 34 (citing MCC Post-Hr’g Resp. Br. 10 (June 1, 2017); Test. Jaime Stamatson 14 (Mar. 17, 2017); Final Order 7450a, Docket D2015.7.59, 145 (July 26, 2016)). Further, MTSUN argues that the Commission, having adopted FERC rules by reference, must adhere to FERC’s construction of those rules—state Commissions may not have the right to set a QF’s contract term. *Id.* at 27. MTSUN argues that, at a minimum, the Commission should rely on the testimony of QF developers, “the only entities who are in a position of going to capital and debt markets to obtain financing,” rather than the MCC which has no experience in this area, and contends the entirety of testimony on the relationship between contract length and economic feasibility was provided

by MTSUN developer Mark Klein. Mr. Klein supported a 25-year contract term, but said he could accept a shorter contract term with a higher price. *Id.* at 28 (citing Hr’g Tr. 89:7–9).

24. MTSUN argues that the Montana Supreme Court has held that “an agency has a duty to follow its own precedent or provide a reasoned analysis for its departure,” and that the Commission’s adoption of a 10-year contract term deviates from prior Commission decisions and that the Commission failed to offer legitimate reasons for departing from precedent. *Id.* at 28–30 (citing *Waste Mgmt. Partners v. Mont. Dep’t of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 217 (Aug. 26, 1997)). MTSUN argues that the Commission needs to explain its finding despite FERC’s decision in Order 69, and that the Commission is effectively admitting it departed from precedent without a reasoned explanation. *Id.* at 30–31. Further, it argues the Commission is undermining the very purpose of PURPA to encourage renewable generation and that ratepayers are already protected by the full avoided cost rule. *Id.* at 31.

25. MTSUN argues the Commission’s 10-year contract length decision is legally improper and out of step with the trend among other states, and refers to decisions by regulatory commissions in several states—Idaho, Washington, Oregon, Utah, and Illinois. *Id.* at 31–36. MTSUN argues that although neither PURPA nor FERC’s regulations implementing PURPA define how long a long-term contract must be, it reiterates that FERC has stated the contract must be of sufficient length to reasonably attract investment. *Id.* at 31 (citing *Windham Solar LLC, et al.*, 157 F.E.R.C. 61,134 (2016)). According to MTSUN, the Commission’s 10-year contract length decision is contrary to Montana law requiring that long-term contracts must be encouraged, and rests on an irrelevant definition of “long-term” selectively chosen by the Commission. *Id.* at 31–36; *see* Mont. Admin. R. 38.5.8202(7) (2017) (which provides electricity supply planning and procurement guidelines). MTSUN contends that although the Commission acknowledges the need to balance its duty to encourage QF development against the risk of inaccurate avoided cost predictions in its decision, because no testimony in the record holds that a 10-year contract would sufficiently encourage QF development, NorthWestern explicitly took no position on the issue of contract length, and the MCC did not suggest that 10 years was an appropriate contract length, the Commission executes no balancing in its decision. *Id.* at 34–35 (citing Order 7535a ¶ 109; *see* NWE Mot. Recons. (July 31, 2017); *infra* ¶¶ 27, 34).

26. MTSUN concludes that the Commission’s decision in Order 7535a setting a contract length maximum for MTSUN created a new rule on QF contract length without

providing notice to interested and affected parties and in violation of due process. *Id.* at 36–37 (citing Mont. Const. Art. II § 8; Mont. Admin. R. § 38.2.2401 (2017)).

27. NorthWestern’s motion for reconsideration does not ask the Commission to reconsider its decision to set the MTSUN contract term at 10 years. Although NorthWestern did not take a position on contract length in this docket, it noted that the 2017 Montana Legislature was looking at reducing the maximum contract length and that the Commission was deliberating contract length in another docket (D2016.5.39). Test. John B. Bushnell 35 (Mar. 17, 2017); *see* Order 7535a ¶ 95.

28. Montana law does not specify a specific contract length requirement for QF PPAs, but does require the Commission to encourage long-term contracts in order to enhance the economic feasibility of QFs. Mont. Code Ann. § 69-3-604.

29. FERC regulations provide QFs the option of selling energy and capacity to public utilities pursuant to contract rates based on estimates of a public utility’s avoided cost over the term of the contract. 18 C.F.R. § 292.304(b)(5), (d). However, when setting rates for QFs, states must consider “the terms of any contract or other legally enforceable obligation, *including the duration of the obligation.*” *Id.* § 292.304(e)(2)(iii) [emphasis added]; *see Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 404-405 (5th Cir. 2014); *JD Wind 1, LLC*, 129 F.E.R.C. 61,148 (2009); *Windham Solar LLC*, 156 F.E.R.C. at 61,475-61,476 (citing 18 C.F.R. § 292.304(d)(2)). FERC recognized that, like public utilities, QFs need sufficient certainty with regard to the opportunity to recover and earn a reasonable return on their investments in electric generating facilities. FERC Order No. 69, 45 Fed. Reg. 12,214, 12,218 (Feb. 25, 1980). In a declaratory order, FERC noted that given the “need for certainty with regard to return on investment,” along with Congress’ directive that the Commission “encourage” QFs, a contract should be long enough “to allow QFs reasonable opportunities to attract capital from potential investors,” but also noted FERC regulations do not specify a number of years for contract terms, and neither does PURPA. *Windham Solar LLC*, 157 F.E.R.C. at 61,476, n.13.

30. In *Allco Renewable Energy*, the 1st Circuit court reiterated that FERC furthers PURPA’s purpose by allowing a QF to establish a fixed contract price for its energy and capacity at the outset of its obligation, which provides a potential investor with reasonable certainty about the expected return on investment, and that FERC Order 69’s rationale that overestimations and underestimations of avoided costs will balance out still holds. *Allco*, 208 F. Supp. 3d at 400.

31. In explaining its departure from its recent precedent of 25-year QF contracts, the Commission observed that neither PURPA, nor FERC rules implementing PURPA, nor Montana's Mini-PURPA precisely define "long-term." In Order 7535a, the Commission looked to its only definition of "long-term" found in the Commission's rules, found in the default electric supplier procurement guidelines that provide guidance on long-term electricity supply and resource planning and procurement. Order 7535a ¶ 104 (citing Mont. Admin. R. 38.5.8202(7) (2017)). "Long-term" is defined in Mont. Admin. R. 38.5.8202(7) as "a time period at least as long as a utility's electricity supply resource planning horizon." "Planning horizon," in turn, means the *longer* of: (a) the longest remaining contract term in a utility's electricity supply resource portfolio; (b) the period of the longest lived electricity supply resource being considered for acquisition; or (c) ten years. Mont. Admin. R. 38.5.8202(7)–(8) (2017). NorthWestern references its 2015 Electricity Supply Procurement Plan which identifies needs over a 20-year planning horizon. NWE Mot. Recons. at 5.

32. Upon further consideration, the Commission finds several contracts in NorthWestern's portfolio expire in 2041, or 23 years from 2018, and one expires in 2042. NorthWestern 2015 Electric Supply Procurement Plan, Vol. 1 at 8-14 to 8-18, and Vol. 2 at 35. The Commission has recently recognized that the "longest lived electricity supply resource" being contemplated by NorthWestern may be a small-scale hydro project, with a 40-year life, or one of several other gas, wind, and solar projects with lives of 30 years. Order 7500d, Docket D2016.5.39 ¶ 26 (Oct. 5, 2017) ("The span of either metric exceeds that of 38.5.8202(8)(c), or 10 years. Thus, in Order 7535a, the Commission applied the shortest of the three metrics in the rule when it adopted a 10-year maximum contract length, which was not consistent with the rule".)

33. The Commission found that the definition of long term in ARM 38.5.8202(7) has limited relevance to the meaning of "long term" in the context of QF contracts. Order 7500d ¶ 27. The Commission's QF rules state, "[a]ll purchases and sales of electric power between a utility and a qualifying facility shall be compatible with the goal of the commission's integrated least cost resource planning and acquisition guidelines." Mont. Admin. R. 38.5.1902(6). QF contracts that comply with the Commission's QF rules and approved methods for determining avoided cost rates align with those goals. Order 7500d ¶ 27. The Commission has found that the definition of "long-term" in Mont. Admin. R. 38.5.8202(7) is made in the context of electricity

supply resource planning and procurement and not in the context of requirements for QF contracts. References in the Commission's QF rules to the resource planning rules provide utilities and QFs guidance relevant to contract negotiation but the Commission finds that they are not designed to control contract length in the context of setting rates. *Id.* The FERC findings in Order 69 and the regulations adopted therein pertaining to contract length, as well as Montana law governing QFs, which states "long-term contracts . . . must be encouraged in order to enhance the economic feasibility," provide the most applicable guidance regarding QF contract length. *Id.* The Commission reconsiders the provisions of Order 7535a related to the length of MTSUN's contract.

34. The issue of contract length and forecasting avoided cost for QF contracts has been discussed in several dockets before the Commission, including one in which the Commission explicitly asked for comments on the question of PURPA contract length. *In re the Inquiry by the Mont. Pub. Service Comm'n into its Implementation of the Pub. Util. Regulatory Policies Act of 1978*, Docket N2015.9.74; *In re Greycliff Wind Prime, LLC*, Docket D2015.8.64; *In re Crazy Mountain Wind*, Docket D2016.7.56; *In re NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1*, Docket D2016.5.39.

35. Most recently, in Docket D2016.5.39, the Commission recognized that the MCC did not know how PPA contract lengths "stimulated or stagnated QF development," but did provide testimony summarizing the contract length policies of other regulatory commissions, ranging from one to twenty years. *Id.* ¶¶ 24–25, 28 (noting that the contract lengths for several other utilities fall between these limits, and several of the terms of other states' QF tariffs are further differentiated by other factors, such as price indexing in the later years of contracts). Expert testimony in the record indicated 15 years was the maximum contract length necessary for QFs to obtain long-term financing, and that argument was not challenged or refuted by parties, including NorthWestern and the MCC, *id.* ¶ 25, and the Commission concluded that parties' arguments generally supported a QF contract length of at least 15 years. *Id.*

36. MTSUN observed correctly that NorthWestern did not advocate for a shorter contract length in this docket. It is true that, though MCC argued for shorter contract lengths in the context of forecast risk (including, in referenced testimony from MCC in recent QF-related dockets, specific contract lengths of five to seven years and the MCC did not suggest that 10 years was an appropriate contract length. *Supra* ¶¶ 23, 27.

37. The MCC raised the contract length issue for QF PPAs in its prefiled direct testimony, and this issue was considered by the parties in the docket, as well as at the hearing. Order 7535a ¶¶ 92–95 (*see also* Test. Stamatson at 14 (citing to Comments of the MCC, Docket N2015.9.74 (Oct. 23, 2015); Additional comments of the MCC, Docket N2015.9.74 (Dec. 23, 2015); Additional Issues Test. Jaime T. Stamatson, Docket D2016.5.39 (Nov. 29, 2016) (parties in docket D2016.5.39 were specifically directed to address appropriate contract length for PPAs between QFs and the utility)). The MCC specifically referenced the contract length policies of other regulatory commissions as examples, the policies varying widely, including a 15-year maximum QF contract length in North Carolina and Utah, and indicated it was satisfied with a 20-year contract, which the Commission found to be “reasonable” for Montana-Dakota Utilities (MDU) QF standard rates. Test. Stamatson at 14; MCC Post-Hr’g Resp. Br. 10 (June 1, 2017). However, the MCC did not offer testimony on how shorter terms would influence the ability of QF projects to obtain financing, which is an important consideration pursuant to Montana law. Test. Stamatson at 14.

38. In Order 7535a, the Commission discussed how neither PURPA, FERC, nor Montana law or rules set a specific contract length requirement for QF PPAs, but does permit state commissions to consider contract length when determining avoided cost. Order 7535a ¶ 97 (citing 18 C.F.R. § 92.304(e)(2)(iii)). The Commission maintains this authority as controlling and looks to precedent and record evidence for guidance in determining an appropriate contract length in this matter.

39. In Order 7535a, the Commission explained that low prices in the near-term forecasts relative to previous forecasting “suggest the market is increasingly saturated with energy.” *Id.* ¶ 107. A close reading of FERC Order 69 reveals that FERC’s observation that an avoided-cost-based price will sometimes outperform and sometimes underperform the market cannot itself be taken as a comment on, much less a disposition of, the appropriate length of the forecast and resulting obligation. Order 69 contains no discussion of whether a longer or shorter forecast period is less or more likely to result in forecast error, which is the subject of the Commission’s reasoning and which the Commission balances against the requirements under FERC Order 69 and Montana law to provide a contract length consistent with requirements, respectively, to allow “the need for certainty with regard to return on investment in new technologies” and to encourage QF development. 45 Fed. Reg. at 12,224.

40. In its reconsideration order on QF-1 standard rates, the Commission found that a 15-year maximum contract length for standard rate QFs was supported by record evidence, was reasonable and in the public interest, enhances the economic feasibility of QFs consistent with the requirements of Mont. Code. Ann. § 69-3-304, and appropriately balances a standard QF's need for certainty with regard to return on investment with the risk to customers from the price forecast risk extensively discussed in Final Order 7500c. Order 7500d ¶¶ 29–30; *see* Order 7500c, Docket D2016.5.39 ¶¶ 25–35 (June 22, 2017).

41. In that proceeding, the Commission found that North Carolina had a statute similar to Montana's law directing the Commission to encourage long-term contracts in order to enhance the economic feasibility of QFs. Order 7500d ¶ 29. Finding Mont. Code Ann. § 69-3-604 central to the determination of contract length in Montana, in reconsidering to extend the maximum contract length from 10 to 15 years, the Commission found persuasive the North Carolina Utilities Commission's (NCUC) decision to limit a QF contract to a maximum of 15 years because the NCUC is operating under a similar statutory regime, "to adopt this limit is responsive to the same risk to consumers the Commission is attempting to mitigate," and "it unfolded in a similar biennial ratemaking docket for the purpose of established standard, forecast rates for small projects." *Id.* These same facts are present in this proceeding as a result of the MCC's testimony. *Supra* ¶ 37. Additionally, in the QF-1 docket, those witnesses appearing on behalf of those parties seeking longer contract lengths themselves testified that a maximum 15 year contract was reasonable. Together, this led the Commission to hold that QFs seeking the QF-1 rate be permitted a maximum 15-year contract length with no adjustment during the time period of the contract. Order 7500d ¶ 114.

42. In this docket, the MCC argued that the maximum contract length for MTSUN should be twenty years, and cited as reasonable decisions on contract lengths from two jurisdictions that limited QF contracts to 15 years. *Supra* ¶ 37. Further, MTSUN's developer, Mark Klein, provided testimony that MTSUN would be willing to accept a shorter contract length, but noted that the economic feasibility of the project is dependent upon contract length, and that for a shorter contract, MTSUN would require a higher price. *Supra* ¶ 23.

43. The Commission finds that in this proceeding, like the QF-1 docket, the MCC's advocacy in this docket similarly "does not include evidence on how the shortened contract lengths they propose would provide QFs sufficient certainty with regard to the potential return on

investment in qualifying generating technologies or enhance the economic feasibility of QFs, as required by PURPA and Montana law.” Order 7500d ¶ 24. The Commission notes the willingness of MTSUN to accept an abbreviated contract length in exchange for a higher price, but the Commission observes it does not have the legal authority to inflate the rate paid to MTSUN beyond its calculation of avoided cost in order to satisfy a QF to accept an abbreviated contract length. Mr. Klein’s position, which seems to be that the rate his project gets paid should be higher when the contract is shorter in term is inconsistent with the Commission’s avoided-cost methodology. Mr. Klein also offers no evidence that demonstrates what an appropriate contract length is given the methodology for avoided-cost forecasting the Commission has used.

44. The question thus returns to the need to balance the conflicting mandates present in PURPA. In resolving this question here the Commission relies on MCC’s provision of examples of a sister jurisdiction which resolved the question of contract length within a similar legal context. *Supra* ¶ 41. The Commission also relies on the finding it made based upon the expert testimony of witnesses supporting longer contract length—that a 15-year maximum contract length was sufficient to fulfill the statutory mandate of enhancing QFs’ economic feasibility. *Supra* ¶ 40. It also relies on Mr. Klein’s testimony in finding that a 25-year contract length is not an inviolable standard within the QF developer community.

45. Meanwhile, MTSUN’s view that the last MDU standard-rate proceeding should be precedential on this proceeding is mistaken in several respects. First, that proceeding stands for the proposition, generally, that the Commission has made changes that curtail contract length. There, the Commission found that a reduction in QF contract length from 35 years to 20 years was reasonable. Order 7450a, Docket D2015.7.59 ¶ 45 (July 26, 2016). Contrary to MTSUN’s statement, MCC actually asserted that MDU should not offer standard QF rates for periods longer than 5–7 years. MDU, meanwhile, stated it considered 10 years to be “long-term” regarding power purchase agreements in the utility industry. In truncating maximum contract length by 15 years, from 35 to 20 years, the Commission decided to stop short of more significant reductions which could be “excessive without a more fully developed record.” *Id.* Notably, absent any participation by QFs in that docket, the Commission decided to avoid making more significant changes and instead limit itself to a reduction in term to 20 years so it “would more closely align with the available term of the standard rate offer the Commission has approved for NorthWestern Energy.” *Id.* Therefore, to rely on it here as precedent would be

circular and serve only to avoid considering the merits of the issue in a docket with more participation by parties. Second, to the degree that MTSUN is suggesting that MCC's testimony is the sole variable in both the MDU proceeding and the instant one, this is a misapprehension. The Commission, as noted above, does not base its conclusion solely on Mr. Stamatson's own expertise. Finally, it should be noted that MDU's avoided cost methodology differs in significant respects from NorthWestern's. For MDU, the Commission has required that QFs be paid for capacity based on the amount of capacity assigned to the QF on an annual basis under the resource adequacy tariff provisions of the Midcontinent Independent System Operator (MISO). *Id.* ¶ 41. Here, the capacity value of MTSUN is fixed at 6.1%. Likewise, the MDU energy rate is a function of a one-year production cost modeling exercise that does not rely on forecasts of variable costs and market prices over the life of the contract, but instead remains fixed. *Id.* ¶ 38. The MDU methodology, in other words, has built-in protections against forecast error that do not exist in the NorthWestern methodology. This suggests that NorthWestern's maximum contract length should probably be lower than MDU's, not the same or greater.

46. The Commission is entitled to change its mind in consideration of new or different facts. In 1987, the Montana Supreme Court upheld the Commission's decision denying Rozel Corp's 1984 and 1987 applications to provide garbage service, finding that competition in garbage service would be destructive and that the public's need for stability at that time outweighed any advantages brought by competition. *Rozel Corp. v. Dept. of Pub. Serv. Regulation*, 226 Mont. 237, 243, 735 P.2d 282, 286 (Mar. 31, 1987). The Montana Supreme Court has held that "an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure." *Waste Mgmt. Partners v. Mont. Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 218 (Aug. 26, 1997). Ten years later, in *Waste Management*, the Commission found the record contained evidence of inadequate service and the public need for another garbage hauler. *Id.* at 255. The Montana Supreme Court held that since *Rozel Corp.* none of the Commission's standards or application of the law changed, but the facts did, therefore, the Commission did not depart from established precedent. *Id.* at 258.

47. The Commission finds a 15-year maximum contract length is reasonable and in the public interest, and enhances the economic feasibility of MTSUN, and this is supported by record evidence and precedent. The Commission believes the findings in FERC's Order 69 and accompanying rules pertaining to contract length, as well as Montana law governing QFs, which

states “long-term contracts . . . must be encouraged in order to enhance the economic feasibility,” provide the most applicable guidance regarding QF contract length. References in the Commission’s QF rules to the resource planning rules provide utilities and QFs appropriate guidance relevant to contract negotiation but do not appear designed to control contract length or rates. The Commission reconsiders the provisions of Order 7535a related to the length of MTSUN’s contract and establishes a contract term of 15 years.

48. MTSUN argues that the Commission has effectively created a rule in violation of MAPA and due process. *Supra* ¶ 21. Before the Commission can adopt a rule, MAPA mandates that it “comply with the public notice and comment procedures detailed in §§ 2-4-302 and -305.” *S. Mont. Tel. Co. v. Mont. PSC, Dept. of Pub. Serv. Regulation*, 2017 MT 123, ¶ 15 (2017). MAPA defines a “rule” as “each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy.” *Id.* (citing Mont. Code Ann. § 2-4-102(11)(a)). In *Southern Montana Telephone Co.*, when the Commission adopted a rubric with three formulaic criteria that set a standard by which the Commission judged all motions for protective orders for salary information of regulated eligible telecommunication carriers (ETCs), the Montana Supreme Court found that the rubric did not call for balancing individual interests on a case-by-case basis, thereby setting a standard “of general applicability” that “implements” the Commission’s “policy” of providing for greater public disclosure of how the ETCs spend the federal subsidies they receive, thereby constituting a rule under MAPA. *Id.* ¶¶ 17–18. Because the Commission has not created a standard of general applicability here, and has in fact come to a conclusion based upon the law, precedent, and record evidence, it has made a determination unique to the facts in this docket and not a general rule in accordance with a policy of the Commission.

Avoided Energy Cost Calculation

49. In its order the Commission estimated avoided energy costs based upon a projection of wholesale electricity market prices using a Mid-C forward price strip from March 2, 2017. Order 7535a ¶¶ 48–49. MTSUN used NorthWestern’s 2015 Plan to develop an avoided energy cost of \$27.33/MWh, using a 308 MW CCCT as a proxy resource. It states that the estimated avoided energy cost would increase to \$30.48/MWh if the CCCT variable operation and maintenance (O&M) costs are included. MTSUN Mot. Recons. at 41–42. MTSUN

asserts that these avoided cost estimates compare favorably to the avoided energy cost estimate of \$28.68/MWh offered by NorthWestern on November 30, 2016. *Id.* at 42. MTSUN concludes that as of December 2016 there was no material disagreement between it and NorthWestern with respect to avoided energy cost estimates. *Id.* MTSUN argues that, therefore, it was inappropriate for the Commission to rely on March 2017 forward prices to estimate avoided energy costs in Order 7535a. *Id.*

50. MTSUN argues that Order 7535a arbitrarily and capriciously ignores the parties' similar avoided energy cost estimates in December 2016. *Id.* According to MTSUN, FERC has declared that a QF establishes an LEO on the date the QF committed to sell power; the LEO date is not based on the proposed avoided cost of the resource. *Id.* at 42-43. MTSUN claims that its commitment is established by its petition date of December 23, 2016, as well as its negotiations with NorthWestern over the previous year. *Id.* at 43. MTSUN argues that if the purpose of an LEO is to prevent a utility from delaying the signing of a contract to obtain lower expected avoided costs, then the Commission is prohibited from setting a rate that creates an incentive for the utility to obstruct and delay. *Id.*

51. MTSUN contends that avoided costs should be estimated based on information available at the time a QF files its petition with the Commission requesting a rate determination. MTSUN argues that a QF should not be expected to anticipate future market prices when it files a petition. *Id.*

52. MTSUN further asserts that forward wholesale market prices are highly seasonally dependent. *Id.* It argues that the March 2017 forward prices the Commission used were affected by atypically high generation from Pacific Northwest hydroelectric facilities. *Id.* Because of this anomaly, MTSUN claims the Commission erred in assuming that March 2017 forward prices are more representative than those from November 2016, upon which NorthWestern's December 2016 energy price offer was based. *Id.* at 43-44. MTSUN states that using forward market prices from summer or fall of 2017 would likely result in an avoided energy cost estimate higher than what the Commission estimated in Order 7535a. *Id.* at 44. MTSUN adds that estimating avoided energy costs using atypically lower spring season market prices increases price forecast risk. *Id.*

53. MTSUN argues that the Commission's use of March 2, 2017 forward market prices is arbitrary—the date reflects the timing of NorthWestern's prefiled testimony in this case

and forward market prices on any other date would have produced a different avoided energy cost. *Id.*

54. MTSUN further asserts that March 2, 2017 is not connected to the date on which MTSUN established an LEO. *Id.* According to MTSUN, the only reasonable forward market price dates are: December 2016 or just prior to the hearing, between the hearing and final order, or after the hearing, *id.* at 44–45; “or after the hearing if, as discussed in *Crazy Mountain* and *Greycliff*, the QF chooses to accept the Commission’s calculation which in this case would be July or August of 2017.” *Id.* at 45. MTSUN asserts that the forward market price date the Commission used is unrelated to any FERC or Commission precedent and should be reconsidered. *Id.*

55. MTSUN asserts that it established an LEO on December 23, 2016 when it filed its petition. It claims that if the Commission will not accept either MTSUN’s price of \$27.33 or NorthWestern’s November 30, 2016 price of \$28.68, then it must approve a price of \$27.39 consistent with NorthWestern’s response to data request PSC-049. *Id.*

56. MTSUN asserts that the Commission’s “symmetry” decision requiring NorthWestern to justify future investments based on 10-year market price projections (Order 7535a ¶ 114) means NorthWestern will not acquire new assets or long-term contracts. *Id.* As a result, MTSUN states that it is inappropriate to include the gas plants identified in NorthWestern’s 2015 resource plan in the base portfolio used to estimate the Company’s net position and, therefore, the Commission should reconsider the Long-1 adjustment to forecast energy prices. *Id.* MTSUN argues that the Commission should calculate NorthWestern’s long and short positions assuming no planned resources are acquired, and should calculate avoided energy costs based solely on projected market prices (83% peak, 17% off-peak). *Id.* at 45-46. It asserts that to do otherwise would impose excessive risk on ratepayers. *Id.* at 46.

57. MTSUN asserts that avoided energy costs should include variable O&M costs associated with the avoided capacity resource. *Id.* at 53–54. MTSUN also asserts that Order 7535a does not account for avoided wheeling costs associated with wholesale energy and capacity market purchases. *Id.* at 54. Again, it argues that the Commission’s “symmetry” decision will force NorthWestern to rely heavily on market purchases requiring firm point-to-point transmission service. MTSUN asserts that because its project is on NorthWestern’s system, it will avoid the cost of that transmission service, which MTSUN states is \$2.50/MWh. *Id.*

58. The Commission rejects MTSUN's petition estimate of \$27.33/MWh and NorthWestern's November 30 estimate of \$28.68/MWh as reasonable estimates of avoided energy costs in this proceeding. Both of these estimates were based on methods that were fully evaluated over the course of the proceeding and in Commission order. Order 7535a ¶¶ 43–61. The fact that the estimates were similar is not persuasive. The Commission's avoided cost responsibility in this proceeding is to determine, after reviewing the record, the costs that would be avoided through purchase of MTSUN energy and capacity. In this case, the Commission rejects the use of a carbon adder to supplement energy prices, and rejects avoided cost calculations based on 25-year levelized costs. Because each of the above estimates incorporated one or both of these factors, which in this case had significant effect on the magnitude of avoided energy costs, the Commission rejects their employment to inform its adopted cost.

59. The Commission rejects MTSUN's argument that it established a commitment to sell power on December 23, 2016, and therefore must accept one of the parties' December estimates or stand responsible for creating an incentive for utility obstruction and delay. MTSUN Mot. Recons. at 42–43. The Commission determines that MTSUN did not establish an LEO in December 2016. Order 7535a ¶ 42. MTSUN's petition price is almost three times greater than the Order 7535a price. The Commission is not providing incentive for obstruction and delay, instead it establishes a just and reasonable price for the purchase of MTSUN energy and capacity.

60. The Commission is not obligated to base its avoided cost decision only on information available to the parties at the time of petition filing. Instead, the Commission is obligated to find a just and reasonable purchase price based on the avoided cost of the utility and record evidence provided over the course of the proceeding. Avoided costs calculated using March 2017 forward quote strips are not inconsistent with this standard.

61. MTSUN asserts that Mid-C forward price strips are seasonally dependent and that basing avoided costs on a March 2017 price strip likely increases price forecast risk. MTSUN Mot. Recons. at 43–44. Mid-C forward price strips may indeed be seasonally dependent, but this statistical relation is not a fact established in the record. The method adopted by the Commission requires forward quotes as a base for avoided cost calculation. The record does not contain evidence supporting an optimal period from which these rates should be drawn. The procedural schedule constrains the utility to develop its avoided cost estimate within a limited window, or

risk the appearance of gaming the estimate. Because the record does not identify an optimally representative period for sampling forward price strips, and because the procedural schedule limited NorthWestern's ability to choose a biased or statistically unrepresentative strip, the Commission rejects this argument.

62. The Commission rejects MTSUN's argument that the Commission's reliance on March 2, 2017 forward price strips is arbitrary because Hansen filed testimony in March, and because a different strip choice would produce a different avoided cost. As discussed above, the procedural schedule established reasonable limits on a range of forward strips from which Hansen could choose to build his avoided cost estimate. Under the Commission's adopted method, different strips will produce different avoided costs. This is not surprising or unreasonable. Avoided cost estimates are point estimates that must lie within a zone of reasonability. The fact that different strips will produce different point estimates does not imply that some of the points will fall outside of this zone and so are unreasonable. MTSUN has failed to show that certain forward strips are statistically unreliable.

63. The Commission rejects MTSUN's argument that because March 2, 2017 forward price strips are unrelated to an LEO, they should be supplanted by December 2016 forward price strips, or a strip taken just prior to or after the hearing on April 28, 2017. *Id.* at 44–45. As discussed above, MTSUN did not establish an LEO, so an LEO or date of MTSUN commitment to provide energy and capacity at an established price cannot be a determinant of strip choice. The Commission did not rely on a random forward strip to calculate its adopted price. *Id.* at 45. As discussed above, the choice of strip was constrained by the adopted procedural schedule.

64. The Commission rejects MTSUN's request for adoption of a price consistent with data response PSC-049. This data response provided carbon and non-carbon estimates determined using a 25-year levelization period. The Commission finds a 25-year contract period to be unreasonable, and finds the 25-year point estimates from this data response to be unreliable.

65. MTSUN requests that the Commission remove the economically optimal portfolio (EOP) resources from the projected portfolio and reject the use of Long-1 adjustments in calculating avoided energy costs. *Id.* at 45-46. In Order 7535a the Commission noted it "has not pre-approved the EOP and the Commission's comments on the 2015 Plan indicate that the EOP may not be a least-cost portfolio of resources." The order reiterated that it would use the *Crazy*

Mountain method with respect to treatment of EOP resources. Order 7535a ¶¶ 50–51. The *Crazy Mountain* method was described in the relevant order as “assign[ing] a new facility’s projected energy production a value equal to the dispatch cost of the marginal unit in NorthWestern’s control, and not the market price, when the utility’s customer loads are fully supplied from NorthWestern’s owned or contracted resources and when the market price is higher than the dispatch cost.” *In re Crazy Mountain, LLC*, Order 7505b, Docket D2016.7.56, ¶ 77 (January 5, 2017). The verb tense of this sentence indicates that only existing resources should play a determining role in establishing the net load position of the customer demand to be supplied by a new resource, and likewise only existing resources’ dispatch costs should be used. Despite the Commission’s order in *Crazy Mountain*, apparently NorthWestern calculated the Long-1 adjustment by using the EOP resources to calculate net purchase and sale positions, although, contradictorily, the EOP resources’ dispatch costs were not used in calculating the Long-1 adjustments to avoided cost. Hr’g Tr. 238:11–23; Order 7505b ¶ 84. This calculation is inconsistent with the language describing the *Crazy Mountain* methodology in Order 7505b, and with the reasoning in Order 7535a that the EOP resources have not been pre-approved and may not be the least-cost marginal resources. Additionally, to assume that unbuilt EOP resources establish load positions for a QF that would achieve operation before any EOP resource is contrary to the proposition of establishing an avoided cost. The underlying assumption of PURPA is that a QF may, in whole or in part, substitute for other resources.

66. NorthWestern’s filing in compliance with ¶ 132 of Order 7535a, appears to reflect the erroneous application of the *Crazy Mountain* method. The Commission finds this method inconsistent with respect to the use of economically optimal resources, and therefore reconsiders and clarifies that its decision in Order 7535a requires the exclusion of EOP resources for the purpose of calculating the Long-1 adjustment. NorthWestern will recalculate in its compliance filing avoided energy costs based upon portfolio positions determined without EOP resources. Meanwhile, the Commission denies MTSUN’s request to disallow Long-1 adjustments altogether. The Commission has previously adopted Long-1 adjustments to reduce risk to ratepayers and to reflect symmetric evaluation of potential NorthWestern acquisitions. Order 7505b ¶¶ 77-84; Order 7505c, Docket D2016.7.56, ¶¶ 27-35 (Mar. 6, 2017). Additionally, to the degree that MTSUN’s argument against the Long-1 adjustment relies on the premise that NorthWestern may not be able to build the EOP resources under symmetrical conditions, this

argument is mooted by the Commission's direction to exclude the EOP resources from the calculation of the Long-1 adjustment.

67. The Commission rejects MTSUN's claim that avoided energy costs should include variable O&M costs associated with the avoided capacity resource. MTSUN Mot. Recons. at 53–54. The variable O&M costs of the aero-derivative combustion turbine (AERO) are not relevant to the calculation of avoided energy costs, since in the Commission's adopted component/peaker method, the avoided cost of energy is the projected system marginal cost of energy, which is not calculated using a proxy resource. Graves, Hanser, and Basheda, *PURPA: Making the Sequel Better than the Original*, Edison Electric Institute, 10 (Dec. 2006).

68. The Commission rejects MTSUN's argument that under utility cost recovery symmetry, MTSUN will allow NorthWestern to avoid future point-to-point transmission charges for wheeling energy and capacity from Northwest markets. Under the energy cost model adopted by the Commission in this and previous orders, transmission charges are contained within the avoided energy cost estimates in the form of discounts to Mid-C, since excess Montana capacity allows NorthWestern to purchase from Montana generators who would otherwise net Mid-C minus transmission costs after selling at Mid-C. Order 7535a ¶ 48; Ex. NWE-5, Hansen Test., at 9–10; Order 7436d, Docket D2015.8.64, ¶¶ 34–35 (Sept. 16, 2016); Order 7505b ¶¶ 41, 46, 65. Under these circumstances, NorthWestern can “share” transmission costs with the generator and purchase at a discount to Mid-C. These purchase discounts are already embedded within the market pricing model adopted by the Commission. Second, excluding EOP resources from net position and Long-1 calculations is consistent with an assumption of zero new resources.

69. The Commission reaffirms the avoided energy cost model adopted in Order 7535a, adjusted for a 15-year contract term and to conform to the *Crazy Mountain* methodology. *Supra* ¶¶ 48, 65–66.

Carbon Adjustment Decision

70. In Order 7535a, the Commission excluded costs attributable to the potential for future regulation of carbon dioxide emissions from the calculation of avoided costs. The Commission found persuasive MCC's testimony that including unknown future costs for carbon dioxide emissions in an avoided cost calculation unnecessarily exposes customers to risk.

71. In the *Crazy Mountain* docket, the Commission estimated an avoided carbon cost

of \$9.65/MWh for the time period 2019-2043, a slight reduction from the avoided carbon cost approved in the Greycliff docket. The Crazy Mountain decision was based on a material change in facts—a new presidential administration with different views on carbon regulation policy. *In re Crazy Mountain’s petition for QF contract rates*, Docket D2016.7.56, Order 7505b; *In re Greycliff Wind’s petition for QF contract rates*, Docket D2015.8.64, Order 7436d. MTSUN concedes that the Commission made a reasonable adjustment to prior carbon cost decisions in Crazy Mountain and that the Commission rightfully exercised its administrative expertise in determining an appropriate carbon cost. MTSUN Mot. Recons. at 39. MTSUN argues that, in contrast to Crazy Mountain, the Commission did not provide a reasonable explanation for its departure from the precedent set in that case.

72. While the Commission’s carbon cost adjustment in Crazy Mountain was based on a material change in facts, MTSUN contends that the Commission failed to identify such changes to support the Commission’s complete elimination of carbon costs in this case. MTSUN notes that its petition was filed approximately two weeks before the Commission issued its Crazy Mountain decision and that the Commission later reaffirmed that decision just 10 days before the public hearing on MTSUN’s petition. *Id.* at 37.

73. According to MTSUN, the rationale the Commission provides for eliminating avoided carbon costs is inadequate. MTSUN finds incongruous the Commission’s finding that, while its rationale for its Crazy Mountain carbon adjustment remains persuasive, it agrees with the MCC’s position that reducing the contract length and conveying renewable energy credits (RECs) to QFs leads to a better method for recovering carbon costs than direct inclusion in the avoided cost. *Id.* at 40 (citing Order 7535a ¶ 57). MTSUN states that if the Commission actually agreed with its Crazy Mountain rationale, it would have treated MTSUN the same way. *Id.*

74. MTSUN also contends that the Commission’s rationale for eliminating the carbon adder in this case—the Trump administration’s skeptical view of emission regulation and its opposition to the Obama Administration’s Clean Power Plan—is not reasonable because the Commission’s Crazy Mountain decision was based on the same facts. *Id.* at 40–41. MTSUN states that the Trump Administration’s views on carbon regulation existed when the Commission made both its Crazy Mountain and MTSUN decisions, so that fact does not support the Commission’s departure from precedent. *Id.*

75. The Commission has included the estimated, avoided carbon-emissions costs as

part of the avoided-cost projection in its treatment of several large, project-specific QF rate decisions pursuant to Mont. Code Ann. § 69-3-603 and non-QF resource evaluations. Order 7500c ¶ 76. Due to its decision in the hydroelectric resources docket, in succeeding QF litigation, the Commission found that “the carbon dioxide emission price forecast is built into the electricity price forecast” and stood separate and apart from the value a REC would entail. Order 7505b ¶¶ 58–59.

76. As it did in Order 7500d, the Commission excludes costs attributable to the potential price effects of carbon dioxide emission regulations. In that order, the Commission explained how it has included the estimated, avoided carbon-emissions costs as part of the avoided cost projection in its treatment of several recent large, project-specific QF rate decisions. Order 7500d ¶ 37 (citing Order 7500c ¶ 76). The Commission found that “the carbon dioxide emission price forecast is built into the electricity price forecast” and stood separate and apart from the value a REC would entail. *Id.* (citing *In re Crazy Mountain, LLC*, Docket D2016.7.56, Order 7505b ¶¶ 58–59). The Commission clarifies that this remains its view. *Contra* Order 7535a ¶ 57.

77. The Commission disagrees that nothing has changed in the way of material facts that would lead the Commission to take a view different than the one it did in *Crazy Mountain*, which was decided following the last presidential election but before the administration was seated. Any observer would readily concede that the national political situation has been fluid and rapidly evolving, including with respect to the regulation of emissions such as carbon dioxide. In the QF-1 docket, the Commission found that currently there is not a sufficiently accurate way to forecast a carbon emissions-related price adder that would serve as a proxy for the “increased operational cost of the marginal generating unit dispatched at the Mid-C liquid trading hub” were a particular type of carbon regulation to exist. The Commission makes this determination for three reasons: (1) unique uncertainty surrounds future emissions pricing; (2) it has become more apparent to the Commission that the relevant authority that provided a basis for the nationwide regulation of such emissions is actively seeking to repeal the regulation that could have given rise to a price effect on the wholesale energy market resulting from carbon dioxide, *see* Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60); and (3) pursuant to the Commission’s resource planning requirements,

NorthWestern will continue to incorporate explicit estimates of future emissions costs in an evaluation of the full range of supply- and demand-side resources available to meet retail supply needs, and the associated costs of preferred resources will continue to inform QF avoided cost rates. Order 7500d ¶¶ 38–39.

78. In deciding this matter roughly contemporaneously, with a similar if not identical set of facts before it, the Commission adopts those same findings here. *Cf. Waste Mgmt. Partners v. Mont. Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 257-58, 944 P.2d 210, 217-18 (1997) (noting that unless the factual landscape between two administrative proceedings has differed significantly, agencies should follow its precedent or provide a reasoned analysis explaining its departure). The record evidence concerning the likelihood of federal regulation imposing carbon costs are the same in these two proceedings. Compare Order 7500c ¶¶ 72, 75–79 (finding persuasive MCC's argument that QF retention of RECs should mitigate risk imposed on ratepayers and allow for potential recovery of future carbon costs) with *Test. Stamatson* at 11–13 (arguing the same). Additionally, the Commission evaluates the likelihood of carbon costs coming to fruition through the lens of its own “experience, technical competence, and specialized knowledge.” Mont. Code Ann. § 2-4-612(7) (“The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.”) (emphasis added). Because the Commission has the same record evidence, experience, technical competence, and specialized knowledge in these two proceedings, it arrives at the same result regarding carbon costs.

79. In addition, as information pertaining to state, regional, and federal carbon emissions regulation policies evolves, the associated risks and other implications of such policies can be revisited in future proceedings. To the extent MTSUN believes federal or state policy will result in monetized emissions costs in the near future, it has the option to sell its power under a short-term contract and re-contract after the monetized emissions costs are reflected in subsequent rates. Additionally, although it is not the Commission's view that RECs are necessarily identical to or encompassing of the price effects of all potential carbon-dioxide regulations, they are no doubt encompassing of a number of conceivable regulations. The Commission clarifies that MTSUN has the right to dispose of its RECs in any manner it sees fit, in order to capture this hypothetical value which is not encompassed within the calculation of energy and capacity made in this proceeding. This is the upside, for MTSUN, of the treatment in

Crazy Mountain, where in order to obtain the carbon price adder, the QF had to convey its RECs to NorthWestern. Order 7505b ¶¶ 57–59.

Avoided Capacity Cost Calculation

80. MTSUN asserts that the Commission’s reliance on an AERO to estimate capacity cost violates PURPA because the facility is not NorthWestern’s next planned generation unit. MTSUN Mot. Recons. at 46–47. MTSUN supports that claim with reference to direction in FERC Order 69 to base avoided energy and capacity costs on the costs of incremental purchases of energy and capacity that the utility would avoid through receipt of QF power. *Id.* (citing 45 Fed. Reg. at 12,216). MTSUN argues that the next avoidable resource is three 18 MW internal combustion engine (ICE) units rather than an AERO unit, and that this change alone would raise MTSUN’s avoided capacity rate from \$10.91/MWh to \$14.07/ MWh. *Id.* at 47. MTSUN asserts that the Commission’s avoided energy cost decision should include variable O&M costs associated with the avoided capacity resource. *Id.* at 53–54.

81. MTSUN asserts that the Commission’s adoption of the methodology used by Southwest Power Pool (SPP) to estimate capacity contribution is erroneous and miscalculated, as the Commission does not explain why the SPP method should be applied to NorthWestern’s Montana system when NorthWestern is capacity deficient and not a member of SPP. *Id.* at 47–48.

82. MTSUN also asserts that the SPP method assumes that the data is tied back to NorthWestern’s resource adequacy. *Id.* at 52. MTSUN argues that the SPP methodology was developed for summer peaking systems using rigorous Loss of Load Probability (LOLP) and Effective Load Carrying Capability (ELCC) analyses. *Id.* at 48. MTSUN claims that the SPP method is not applicable to a winter peaking utility with a capacity deficit. *Id.* It asserts that the Commission’s adoption of a “one size fits all” SPP application is not consistent with SPP’s reliance on LOLP and ELCC studies for all load serving entities, as NorthWestern has not performed similar studies on its Montana system. *Id.* at 50.

83. Finding further flaw with the Commission’s interpretation of the SPP method, MTSUN asserts that the Commission “seems to have accepted the conclusion that the SPP methodology requires the use of the 3% of the highest hours in a single peak month for the year,” as it applies 60% probability of generation exceedance to that set of observations. *Id.* at 48.

MTSUN asserts that the Commission assumes without evidence or basis in method that its own application of the SPP method is statistically superior to the methods suggested by MTSUN and NorthWestern. *Id.* MTSUN asserts that the lack of statistical analysis in Order 7535a undermines the Commission's reliance on, and interpretation of, SPP methodology. *Id.* at 49.

84. MTSUN states that Order 7535a fails to justify the application of results from the QF-1 decision to the MTSUN case. *Id.* at 49–50. It asserts that the Commission “apparently assumed, before doing the analysis, that MTSUN’s project provided no capacity value to NorthWestern, despite [NorthWestern’s] self-professed massive capacity deficit.” *Id.* at 52.

85. MTSUN states that the SPP method is “designed to measure the strongest correlation between actual hourly facility generation produced and the highest peak hours in every month of the year while taking into account the results of SPP’s LOLP and ELCC analyses.” *Id.* at 50. It asserts that the SPP method is “necessarily predicated on developing an adequately representative data set in order to perform the required regression analyses.” *Id.*

86. MTSUN attempts to demonstrate the sensitivity of the SPP method to the choice of top 3% of load hours in each year using two applications of 2006 NorthWestern load data and corresponding MTSUN generation estimates. In the first application, MTSUN uses the top 3% of load hours in each month; in the second application it uses the top 3% of load hours in the five “on-peak” months. MTSUN expresses the results of this analysis with correlation, p-value, capacity contribution, and sample size statistics for both examples. *Id.* at 50–51.

87. MTSUN asserts that the first application is “the SPP method followed strictly” and that the second application is the SPP method adopted by the Commission order, which used only data from the on-peak months of January, February, July, August, and December. MTSUN claims that the first application results in a stronger correlation between load and generation, a higher dependence between load and generation, and a capacity contribution of 13%. The second application results in a capacity contribution of zero. MTSUN is not surprised by this result since “the SPP method was developed for a system that is summer peaking and, without a statistically significant selection of data points the evaluation is not statistically meaningful.” *Id.* at 51.

88. MTSUN argues that the Commission’s capacity contribution calculation is at odds with the SPP method, which is resource specific, requires measurement of all available hourly net power output, and requires that net output is to be matched with the top 3% of loads for each month of each year. *Id.* at 52.

89. MTSUN believes that the Commission's method should be rejected because it does not strictly meet the revised SPP Planning Criteria and because the Commission failed to demonstrate how its method complies with an alignment of intermittent resource contribution and resource adequacy. *Id.* at 53; Docket N2015.11.91, Commission Comments at 12.

90. MTSUN recommends that the Commission reconsider its decision and, subsequently, to either strictly apply the revised SPP Planning Criteria or direct NorthWestern to immediately conduct LOLP and ELCC analyses to determine MTSUN capacity contribution. MTSUN Mot. Recons. at 53.

91. The Commission denies MTSUN's request to base avoided capacity costs on the capital, fixed O&M, and variable O&M costs of an ICE resource. The Commission's decision to base avoided capacity costs on the capital and fixed O&M costs of an AERO unit is consistent with long-standing Commission practice with respect to the proxy avoided cost method used to set standard rates, as well as the peaker method adopted by the Commission for several recent large QFs. While the capital and fixed O&M costs of an AERO reasonably reflect the cost of capacity to serve peak loads, the capital and fixed O&M costs of an ICE unit include additional costs for supplying capacity ramping in response to variable loads and intermittent generation. MTSUN did not demonstrate its ability to avoid such services. Order 7535a ¶¶ 64, 69, 72.

92. The Commission denies MTSUN's motion to reconsider its avoided energy cost decision with respect to the variable O&M costs associated with the avoided capacity resource, as they are implicitly included in the adopted energy price. The variable O&M costs of the AERO unit are not relevant to the calculation of avoided capacity costs, since such costs are a function of how much energy is produced. Variable O&M costs are captured in the marginal energy costs used in the Commission's adopted component/peaker method. *PURPA: Making the Sequel Better than the Original* at 10.

93. The fact that NorthWestern is capacity-deficient, i.e., lacks sufficient capacity to meet peak loads, does not persuade the Commission to reconsider the provision of its order establishing capacity cost. The fact that NorthWestern would need to purchase additional capacity in order to meet traditional definitions of resource adequacy implies only that the Commission may determine that some resources may contribute to capacity needs. In this case, where the capacity deficiency of NorthWestern greatly exceeds the nameplate capacity of MTSUN, the calculation of expected contribution does not depend upon the magnitude of

capacity deficiency; it depends only upon the expected ability of MTSUN to displace an alternative incremental capacity resource. The record shows that MTSUN would not contribute significant capacity during NorthWestern's winter peak load hours. Test. Bushnell at 24; Hr'g Tr. at 49.

94. Although MTSUN observed that NorthWestern's Montana electric utility is not a member of SPP, that fact is not relevant to the Commission's capacity decision. The Commission provided reasons for accepting the SPP proposal, as well as reasons for its rejection of NorthWestern's 85/10 proposal and MTSUN's proposal. Order 7535a ¶¶ 69–75. NorthWestern does not belong to any union of utilities that requires a specific method for calculation of resource capacity contributions, and the Commission has not previously addressed the issue of solar capacity in the context of QF rates. Thus, it is necessary for the Commission to adopt a method for determining MTSUN's capacity in this case, and the Commission found the SPP method more reasonable than the alternatives available in the record.

95. MTSUN's claim that the SPP method is dependent upon LOLP and ELCC analyses is not supported by record evidence. MTSUN Mot. Recons. at 48, 50–51. Indeed, the record shows that SPP does not require an LOLP analysis from NorthWestern; rather, it requires a net planning calculation similar to the calculation NorthWestern provided in this proceeding. Test. Michael S. Babineaux 7 (Mar. 17, 2017). If SPP does not require an LOLP analysis from a pool member, e.g., NorthWestern's South Dakota electric utility, it follows that the SPP method can be implemented without reference to a prior LOLP analysis.

96. MTSUN's claim that the SPP method is not applicable to a winter peaking utility is without merit. The method adopted by the Commission concentrates analysis on solar production in the peak load month of each year in the sample, without regard to season.

97. MTSUN's claim that the Commission misinterpreted the revised SPP Planning Criteria is without merit. NorthWestern described its usage and results of the SPP method in prefiled testimony. Test. Babineaux at 6–7, with ref. to Internal Exhibit__(MSB-3); Order 7535a ¶ 74. The SPP method used by NorthWestern is consistent with the SPP method adopted by the Commission in Order 7500c, after review of substantial detailed evidence regarding the SPP methodology. Order 7500c ¶¶ 62–63. In that order, the Commission explained its rationale for preferring the SPP method over NorthWestern's 85/10 method. *Id.* ¶ 58. The Commission reiterates that explanation in Order 7535a. Order 7535a ¶¶ 71–72. Contrary to the contention of

MTSUN, Order 7535a does not assert that the SPP method is statistically superior to the method proposed by MTSUN. *Id.* ¶ 69.

98. Order 7535a does not contain statistical analyses for the simple reason that the record does not contain such analyses, either for the SPP method or for the methods proposed by NorthWestern and MTSUN. The Commission's determination that the SPP method is statistically superior to the 85/10 method relies only on the Commission's conclusion that the SPP method, by sorting all of the 3% load/generation pairs by generation value, from all years, before determining exceedance, is superior to the 85/10 method, which stratifies the load/generation pairs by year before sorting and calculating exceedance. Order 7500c ¶ 58; Order 7535a ¶¶ 71–72. NorthWestern must meet its peak load needs in *all* years, so annual stratification is not necessary or preferred.

99. MTSUN's assertion that Order 7535a fails to justify the application of results from the QF-1 decision to the proposed MTSUN facility is not persuasive. The capacity contribution method adopted in the QF-1 proceeding is identical to the method adopted in this proceeding with regard to the SPP calculation algorithm. However, when that algorithm is applied strictly to the MTSUN data, the resultant capacity contribution is zero. Order 7535a ¶¶ 74–75. The Commission concluded, with deference to MTSUN, that the difference between the 6.1% result in Order 7500c and the 0% result in this case was due to the locational diversity of sampled resources in the QF-1 proceeding. Since FERC requires the consideration of aggregate capacity value, i.e., locational diversity, the Commission imputed the higher value of 6.1% capacity contribution for MTSUN. *Id.*

100. The Commission rejects MTSUN's attempt to demonstrate the statistical strength of an alternative capacity contribution method that is not in the record. MTSUN Mot. Recons. at 50–51. Alternative methods and statistical analyses are not contained in the set of information that may be used by the Commission without exposure to examination and rebuttal.

101. The Commission finds MTSUN misinterprets the SPP method. *Id.* ¶¶ 45–53. The Commission is persuaded that the SPP calculation of annual net renewable capability does not require supplementary LOLP or ELCC analysis in order to be effective in this docket. The Commission denies reconsideration of Order 7535a on avoided capacity costs and MTSUN's request to direct NorthWestern to perform LOLP and ELCC analyses.

Symmetry Finding

102. NorthWestern requests that the Commission reconsider “its decision to apply symmetrical treatment to utility resources” that, under the language of Final Order 7500c, requires utilities to apply a 10-year limit “in their acquisition of or contract for additional resources.” NWE Mot. Recons. at 1–2. In requesting reconsideration, NorthWestern raises three arguments: 1) the Commission’s symmetry finding attempts to create a rule without following MAPA; 2) the Commission’s new rule conflicts with statutes and existing Commission rules; and 3) the Commission’s rule arbitrarily applies symmetry to dissimilar resources. *Id.* at 3–6. The Commission notes that these arguments are nearly identical to the arguments raised in NorthWestern’s motion for reconsideration in Docket D2016.5.39 concerning the QF-1 standard rate, and the facts surrounding NorthWestern’s purchasing plans remain the same. *Compare id. with In re NorthWestern Energy’s Application for Approval of Avoided Cost Tariff Schedule QF-1*, Docket D2016.5.39; NWE Mot. Recons. 3–8 (Aug. 1, 2017) (arguing the Commission’s symmetry finding improperly established a rule that conflicts with relevant authorities and that applies symmetry to similar resources).

103. Since NorthWestern has advanced nearly identical arguments in these two proceedings, the Commission incorporates its findings in the QF-1 Order on Reconsideration here. *See In re NorthWestern Energy’s Application for Approval of Avoided Cost Tariff Schedule QF-1*, Docket D2016.5.39, Order 7500d, ¶¶ 76–94, 116 (Nov. 24, 2017); see also *Waste Mgmt. Partners v. Mont. Dep’t of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997) (“It is a well-established principle of agency law that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure.”). The Commission emphasizes this symmetry finding is not a rule because it is not generally applicable and does not concern other electric utilities like MDU. *See* Order 7500d ¶ 90 (explaining the differences between MDU and NorthWestern); Mont. Code Ann. § 2-4-102(11)(a) (“‘Rule’ means each agency regulation, standard, or statement of *general applicability* that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency.”) (emphasis added). The Commission reiterates it “will incorporate this symmetry finding into the Commission’s comments on NorthWestern’s 2015 procurement planning docket.” Order 7500d ¶ 116 (citing *In re NorthWestern Energy’s 2015 Electric Supply Procurement Plan*, Docket N2015.11.91 (filed Mar. 31, 2016)). In the QF-1 docket, the

Commission reasoned that this symmetry finding was supported by an examination of past resource acquisitions made by NorthWestern. See Order 7500d ¶¶ 83–86 (citing *In re NorthWestern Energy’s Application for Preapproval of Colstrip Unit 4*, Docket D2008.6.69, Order 6925f, Finding of Fact ¶ 222 (Nov. 13, 2008); *In re NorthWestern Energy’s Application for Preapproval of Dave Gates Generating Station*, Docket D2008.8.95, Order 6943e, Findings of Fact ¶¶ 211–233 (Mar. 21, 2012); *In re NorthWestern Energy’s Application for Preapproval of Spion Kop Wind Project*, Docket D2011.5.41, Order 71591 ¶¶ 113–132 (Feb. 16, 2012); *In re NorthWestern Energy’s Application for Preapproval of Hydroelectric Generating Facilities*, Docket D2013.12.85, Final Order 7323k ¶¶ 26–41, 51–59 (Sept. 25, 2014)). The Commission compared the similarities in projections used in valuing proposed utility acquisitions in preapproval dockets with the projections used in deriving avoided cost calculations in QF dockets. *Id.* ¶ 86 (“[E]ach time NorthWestern has asked the Commission to approve its acquisition of a power plant, it has established the rates consumers will pay in a manner similar to, or even identical to, the way in which the Commission forecasts the avoided cost rates paid to QFs.”). Despite this docket featuring a different QF, the Commission arrives at the same result regarding symmetry largely because the uncertainty in projecting future energy and capacity costs remains the same in these two QF dockets and future NorthWestern preapproval dockets. Therefore, the Commission reasserts its symmetry finding to ensure compliance with the non-discrimination mandate of PURPA. 18 CFR § 292.304(a)(1) (“Rates for purchases shall . . . [n]ot discriminate against qualifying cogeneration and small power production facilities.”).

Transmission Service Upgrade Costs and Regulation Costs Decision

104. Regarding the issue of transmission service upgrade costs, NorthWestern argues that the Commission did not consider the testimony presented regarding interconnection costs and transmission service costs applicable to MTSUN, and that it adopted its ruling from *Greycliff Wind Prime, LLC*, in error. MTSUN Mot. Recons. at 2-3; *In re Greycliff Wind Prime, LLC*, Docket D2015.8.64, Order 7436d, ¶¶ 45–49, 68–69. Regarding regulation cost deductions, NorthWestern argues that the Commission’s decision in Order 7535a is inconsistent with its decision in *Crazy Mountain Wind, LLC*, Order 7505b, although the facts are the same. NWE Mot. Recons. at 3.

105. In Final Order No. 7535a, the Commission notes that it has previously determined

that a QF is responsible for costs that exceed the costs that a utility would have incurred if it had not engaged in interconnected operations with MTSUN and instead generated or purchased the energy from another source. Order 7535a ¶ 84.

106. Because NorthWestern did not provide an estimate of its incremental interconnection costs, the Commission did not deduct network upgrade and transmission service upgrade costs from the avoided cost calculation. *Id.* ¶ 85. NorthWestern argues that the Commission erroneously adopted a decision from another case, and failed in its duty to apply the facts of this case and hold that MTSUN be responsible for incremental costs. NWE Mot. Recons. at 8. NorthWestern argues that because it is not planning to add energy resources or resources to fulfill Renewable Portfolio Standard requirements, the cost it would incur if it does not engage in interconnection operations with MTSUN is \$0, therefore MTSUN should be responsible for all incremental costs that will then be deducted from the avoided cost. *Id.*

107. The Commission declines to reconsider its decision on transmission service upgrade costs. NorthWestern has not shown that the entire incremental capacity increase related to MTSUN's expected transmission upgrades will be used to serve MTSUN energy, and that zero incremental capacity increase will be available to future users. NorthWestern testified at hearing that other customers could potentially benefit from the upgrades, although NorthWestern has not found that the upgrades would provide additional reliability. Hr'g Tr. 267:11–269:5. Additionally, the Commission has found the 2015 Plan that NorthWestern uses to be unreliable in its forecast of an EOP, and assumptions about what resources would be included in an EOP inform transmission costs. Even if NorthWestern is not planning to add energy resources, RPS-related or otherwise, MTSUN's capacity value suggests that MTSUN would allow the utility to avoid some increment of future capacity resources. In this case, MTSUN could also allow NorthWestern to avoid some measure of the expected interconnection costs of the avoided capacity resources. Taken together, NorthWestern's position seems to be that there is *no* avoidable transmission cost, and that there is no benefit to others from the transmission upgrade cost the utility would assign to MTSUN. In the context of the present record, the Commission is not persuaded by this sweeping claim.

108. NorthWestern states that the Commission correctly concluded MTSUN will impose incremental integration requirements on NorthWestern and that NorthWestern's regulation cost calculations are consistent with those approved in other proceedings. Order 7535a

¶ 89. The Commission declined to adopt NorthWestern’s regulation deduction because it is obsolete, having been replaced by the reliability-based control (RBC) standard. *Id.* NorthWestern argues that the Commission has inserted a new issue that was not raised in the docket since the record does not include testimony or evidence that its calculation is incorrect or unreasonable due to a transition to the new RBC standard. NWE Mot. Recons. at 9. NorthWestern notes that the Commission approved NorthWestern’s calculation for regulation costs on January 5, 2017, in the Crazy Mountain Wind docket, and no justification exists for a departure from that decision. *Id.* at 10.

109. The Commission declines to reconsider its decision on regulation costs. NorthWestern’s appeal to the Crazy Mountain decision is not persuasive. The Commission did not address the change in standard in *Crazy Mountain*, and no parties asked for reconsideration on the issue. Additionally, NorthWestern has not tariffed the cost of this particular service for QFs such as MTSUN, such as would provide the utility a safe harbor from re-evaluation of the underlying requirements of the service through the filed rate doctrine. In a proceeding such as this it is NorthWestern’s responsibility to demonstrate that its incremental regulation costs have not changed with the shift to the RBC standard. It is not reasonable for NorthWestern to recover costs estimated under a stale standard.

CONCLUSIONS OF LAW

110. All findings of fact that are properly conclusions of law are incorporated herein and adopted as such.

111. The Commission is invested with the “full power of supervision, regulation, and control” of public utilities. Mont. Code Ann. § 69-3-102. NorthWestern is a public utility subject to the Commission’s jurisdiction. *Id.* § 69-3-101.

112. PURPA requires electric utilities to offer to purchase electricity from QFs at rates that are “just and reasonable to the electric customers of the electric utility and in the public interest,” and which do not discriminate against QFs. 16 U.S.C. § 824a-3(b). “Nothing in [PURPA] requires any electric utility to pay more than the avoided cost for purchases.” 18 C.F.R. § 292.304(a).

113. “[N]ot less often than every two years,” NorthWestern must provide the Commission with specific “data from which avoided costs can be derived,” including its “plan

for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding 10 years.” 18 C.F.R. § 292.302(b). NorthWestern is required to submit such data “for use by the Commission in determining avoided costs and standard rates” within thirty days of filing a resource procurement plan. Mont. Admin. R. 38.5.1905(1).

114. “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); Mont. Admin. R. 38.5.1901(2)(a).

115. “[U]nder both state and federal law, rates for 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. The Court found that “[t]he PSC observed correctly that a utility must re-compute the long and short-term standard avoided cost rates after it submits an updated least cost plan filing.” *Id.* ¶ 26. “The PSC further noted in its order that the rate for sales may not exceed the utility’s avoided costs.” *Id.* The Commission is required to set rates based on current avoided cost data and rates that exceed the utility’s avoided cost are not just and reasonable or consistent with Montana law.

116. The Commission’s “experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.” Mont. Code Ann. § 2-4-612. The Commission has “sufficient technical expertise in avoided cost determinations to evaluate evidence even when a party has not sponsored a particular conclusion based on that evidence.” Order 7505c ¶ 27 (citing Mont. Code Ann. §§ 2-4-612(7), 69-3-601 to -604; *NorthWestern Corp. v. Mont. Dep’t of Publ. Serv. Regulation*, 2016 MT 239, ¶¶ 14–23, 385 Mont. 33, 380 P.3d 787 (finding that “NRDC [Natural Resources Defense Council] and HRC [Human Resource Council] were incorrect to argue that there was *no testimony* regarding actual free ridership and spillover calculations” when the Commission had elicited testimony and record evidence through admitted data requests and questioning at the hearing) (emphasis added)).

117. PURPA delegates broad authority to state regulatory commissions, which “play the primary role in calculating avoided cost rates and in overseeing the contractual relationship between QFs and utilities” *Indep. Energy Producing Assoc., Inc. v. Cal. Pub. Utilities Comm’n.*, 36 F.3d 848, 856 (9th Cir. 1994) (citing 16 U.S.C. § 824a-3(f)).

118. “[I]f a qualifying small power production facility and a utility are unable to mutually agree to a contract for the sale of electricity or a price for the electricity to be purchased by the utility,” either the QF or the utility may petition the Commission to set terms and conditions, including rates for sales of energy and capacity. Mont. Code Ann. § 69-3-603 (“The commission shall determine the rates and conditions of the contract upon petition”).

119. “When an electric utility is required to interconnect under section 292.303 of the Commission's regulations, that is, when it purchases the QF's total output, the state has authority over the interconnection and the allocation of interconnection costs.” F.E.R.C. Order No. 2006, ¶ 516.

120. FERC’s declaratory order is advisory only and is non-binding unless and until it is upheld by a federal district court. The Commission may decide to re-evaluate its LEO test in a future proceeding, based on FERC's guidance, however, only the federal court system can make such a determination as to the lawfulness of the LEO standard. *See Portland General Electric Company v. FERC*, 854 F.3d 692, 698 (D.C. Cir. 2017) (“FERC could avoid a great deal of confusion and waste of judicial resources by not using words like ‘shall’ and ‘must,’ and by making clear in its orders—as opposed to later in this court—that its discussions of PURPA-related issues are advisory only.”).

121. Montana law provides standards for determining rates and conditions for QFs, including: the PSC must encourage long-term contracts “in order to enhance the economic feasibility” of QFs, and set QF rates “using the avoided cost over the term of the contract”; the rates paid by a utility for the electricity purchased from a QF must be “established with consideration of the availability and the reliability of the electricity produced”; the Commission “shall set these rates using the avoided cost over the term of the contract”; and authorizing the Commission to adopt rules further defining the criteria for QFs, their cost-effectiveness, and other standards. Mont. Code Ann. § 69-3-604(2)–(5).

122. Mont. Admin. R. 38.5.1902(5) states that “[a]ll purchases and sales of electric power between a utility and a qualifying facility shall be accomplished according to the terms of a written contract between the parties or in accordance with the standard tariff provisions as approved by the commission.”

123. Mont. Admin. R. 38.5.1903(2)(b) states that each utility shall purchase energy and capacity made available by a QF at a standard rate or if the QF “agrees, at a rate which is a

negotiated term of the contract between the utility and the facility and not to exceed avoided costs to the utility.”

124. Mont. Admin. R. 38.5.1905(2) states that utilities “shall purchase available power from any qualifying facility at either the standard rate determined by the commission . . . or at a rate which is a negotiated term of the contract between the utility and the qualifying facility.”

125. Rates for purchases shall not discriminate against QFs. 18 C.F.R. § 292.304(a)(1)(ii). A QF may elect to be paid a rate based on forward projections at the time the QF incurs an obligation to sell its output. 18 C.F.R. § 292.304(d)(2)(ii). Such a rate for purchase is the product of a forecast for a given length of time. Imposing symmetrical treatment on utility-owned assets and other contracts for energy and capacity is therefore a necessary condition of the Commission’s decision to abbreviate the contract length available to QFs.

126. FERC’s rules state nothing in the rules “[l]imits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required” or “[a]ffects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.” 18 C.F.R. § 292.301.

127. In a contested case under the Montana Administrative Procedure Act, the Commission is generally “bound by common law and statutory rules of evidence.” Mont. Code Ann. § 2-4-612(2). Under the statutory rules of evidence, “a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense the party is asserting.” *Id.* at § 26-1-402; *Mont. Env’tl. Info. Ctr. v. Mont. Dept. of Env’tl. Quality*, 2005 MT 96, ¶ 14, 326 Mont. 502 (“the party asserting a claim for relief bears the burden of producing evidence in support of that claim.”); *see also* Mont. Admin. R. 38.5.182 (“A utility filing for an increase in rates and charges shall be prepared to . . . sustain the burden of proof of establishing that its proposed charges are just and reasonable”); Mont. Admin. R. 38.5.8213 (requiring modeling and analysis to meet the “burden of proof in prudence and cost recovery filings”); Mont. Admin. R. 38.5.8220 (discussing how a utility may “satisfy its burden of proof.”).

ORDER

IT IS HEREBY ORDERED THAT:

128. The PPA between MTSUN and NorthWestern will be set for 15 years.

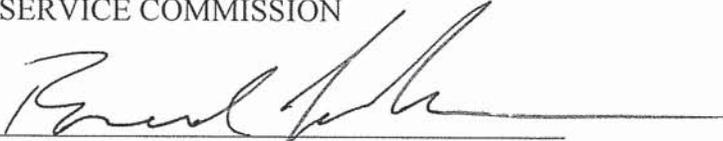
129. This 15-year forecast period applies to future NorthWestern owned and contracted resources.

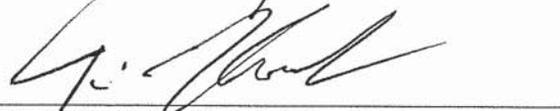
130. The Commission will incorporate this symmetry finding into the Commission's comments on NorthWestern's 2015 procurement planning docket. *See generally In re NorthWestern Energy's 2015 Electric Supply Procurement Plan*, Docket N2015.11.91 (filed Mar. 31, 2016).

131. The Commission reaffirms the avoided cost decision adopted in Order 7535a, adjusted for a 15-year contract term and to conform to the *Crazy Mountain* methodology. *Supra* ¶¶ 47, 69. NorthWestern must submit compliance work papers, based on the Commission's decisions in this Order, to verify these avoided cost estimates within 10 days.

DONE AND DATED this 5th day of October, 2017, by a vote of 5 to 0, with Commissioner Koopman dissenting on paragraphs 21–48 involving the decision to move the contract length to a 15-year term.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION


BRAD JOHNSON, Chairman


TRAVIS KAVULLA, Vice Chairman


ROGER KOOPMAN, Commissioner,
Dissenting. *Supra* ¶¶ 21-48.


BOB LAKE, Commissioner


TONY O'DONNELL, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)

