

170 FERC ¶ 61,266
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

NorthWestern Corporation

Docket No. EL19-3-000

ORDER DENYING PETITION FOR DECLARATORY ORDER

(Issued March 27, 2020)

1. On October 2, 2018, NorthWestern Corporation (NorthWestern) filed, pursuant to Rule 207 of the Commission’s Rules of Practice and Procedure,¹ a petition for declaratory order (Petition). In the Petition, NorthWestern requests that the Commission issue a declaratory order determining that (1) in periods when NorthWestern has excess generation and cannot back down its generation, the avoided cost for energy from Qualifying Facilities (QF) should be zero; and (2) nothing in the Public Utility Regulatory Policies Act of 1978 (PURPA),² including the rule against “non-discrimination” in pricing of avoided cost, permits the establishment of a rate in excess of the utility’s avoided costs. As discussed below, we deny the Petition.

I. Background

2. In a 2017 proceeding before the Montana Public Service Commission (Montana Commission) regarding the avoided cost rate that NorthWestern must pay for the energy output produced by Crazy Mountain Wind, LLC’s (Crazy Mountain Wind) QF, NorthWestern proposed different methods for calculating avoided costs in three different scenarios.³ As pertinent here, in the scenario labelled “Long-2,” NorthWestern is long on energy and no assets in its portfolio can be backed down because of partner contracts or reliability requirements that make the resources “must-run,”⁴ and NorthWestern must sell

¹ 18 C.F.R. § 385.207(a)(2) (2019).

² 16 U.S.C. § 824a-3 (2018).

³ *In the Matter of the Petition of Crazy Mountain Wind for the Commission to set certain Terms and Conditions of Contract between NorthWestern Energy and Crazy Mountain Wind, LLC*, Final Order, Order No. 7505b, Docket No. D2016.7.56, ¶ 44 (Mont. Pub. Serv. Comm’n Jan. 5, 2017) (Crazy Mountain Wind Final Order).

⁴ Petition at 5; see Montana Commission Answer at 3; NorthWestern Testimony, Docket No. D2016.7.56, at 5:22-23 (Mont. Pub. Serv. Comm’n Sept. 22, 2016)

the energy into the market in order to ensure that its portfolio is balanced with the load.⁵ NorthWestern proposed that, in Long-2 periods, the Crazy Mountain Wind QF be paid an avoided cost of zero⁶ (Long-2 adjustment) because, according to NorthWestern, it cannot avoid any costs by purchasing from the QF.⁷ NorthWestern argued before the Montana Commission that this zero valuation complies with the Commission's finding in Order No. 69 that, when a QF "seek[s] to make a utility purchase more energy or capacity than the utility requires to meet its total system load[,] . . . the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load."⁸

3. As relevant here, as it had done previously,⁹ the Montana Commission rejected the zero valuation proposed in the Long-2 adjustment, finding that NorthWestern must

(Testimony of Bleau J. LaFave) (LaFave Test.). *But see* Crazy Mountain Wind Final Order ¶ 66 ("In the second adjustment (Long-2), the market price is less than the operating costs of all dispatchable generating units within NorthWestern's control. In this circumstance, NorthWestern assigns QF power an avoided cost of \$0.").

The other two scenarios are (1) when NorthWestern is short on energy; and (2) when NorthWestern is long on energy but its existing resources can be backed down (labelled "Long-1"). In these circumstances, NorthWestern proposed an avoided energy rate reflecting the variable costs of NorthWestern's dispatchable resources with the highest variable costs. Crazy Mountain Wind Final Order ¶¶ 44-45; Montana Commission Answer at 2-3.

⁵ Petition at 5; LaFave Test. at 9:8-9.

⁶ Crazy Mountain Wind Final Order ¶ 45.

⁷ Petition at 6; *see* Crazy Mountain Wind Final Order ¶¶ 68, 70.

⁸ Crazy Mountain Wind Final Order ¶ 67 (citing *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,870, (cross-referenced at 10 FERC ¶ 61,150), *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), (cross-referenced at 11 FERC ¶ 61,166), *aff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983)).

⁹ *Id.* ¶ 75 (citing *In the Matter of the Petition of Greycliff Wind Prime, LLC to Set Contract Terms and Conditions for Qualifying Small Power Production Facility*, Order

instead use the Long-1 adjustment,¹⁰ for two main reasons. First, the Montana Commission disagreed with NorthWestern's assertion that Order No. 69 implies that avoided costs must be zero in periods in which NorthWestern is long on energy.¹¹ The Montana Commission had previously stated that a more comprehensive reading of Order No. 69 "suggests a non-zero avoided cost 'at any given time' unless the utility's highest-cost economically-dispatched generating unit has a variable cost of zero or incremental energy from QFs causes the utility to shut down all of its own generating units."¹² Second, the Montana Commission found that, because NorthWestern had not valued its own resources with the Long-2 adjustment (including its 2014 purchase of eleven hydroelectric facilities), it would be discriminatory towards QFs to use this adjustment for QFs only.¹³ The Montana Commission stated that two things could change its mind: (1) NorthWestern could file a petition for declaratory order at the Commission seeking clarification of Order No. 69; or (2) NorthWestern could begin using the same analysis of its own costs when it acquires generation plants in the future.¹⁴

II. NorthWestern's Petition

4. On October 2, 2018, NorthWestern filed its Petition, requesting that the Commission determine that (1) in periods when NorthWestern has excess generation and cannot back down its generation, the avoided cost for energy from QFs should be zero; and (2) nothing in PURPA, including the rule against non-discrimination in pricing of avoided cost, permits the establishment of a rate in excess of the utility's avoided cost.¹⁵

5. Regarding the first issue, NorthWestern argues that a utility can avoid no costs by purchasing from a QF when the utility's load is relatively light, all of the utility's owned dispatchable resources are operating but backed down to minimum levels, and any

on Reconsideration, Order No. 7436e, Docket No. D2015.8.64, ¶¶ 12-16 (Mont. Pub. Serv. Comm'n Nov. 4, 2016) (Greycliff Order on Reconsideration)).

¹⁰ Crazy Mountain Wind Final Order ¶ 84. In the Long-1 adjustment, the avoided-cost payment is mitigated to the marginal dispatchable unit's operating costs. *Id.* ¶ 66.

¹¹ *Id.* ¶ 75 (citing Greycliff Order on Reconsideration ¶¶ 12-16).

¹² Greycliff Order on Reconsideration ¶ 13 (citing Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,865-66).

¹³ Crazy Mountain Wind Final Order ¶¶ 73-75, 84.

¹⁴ *Id.* ¶ 75.

¹⁵ Petition at 1.

partner contracts are supplying energy under “must-take” provisions. Regarding the second issue, NorthWestern argues that, because the purchase rate for QF energy “should only include payment for energy or capacity which the utility can use to meet its total system load,” any rate above zero in that situation would be in excess of the avoided cost.¹⁶

III. Notice of Filing and Responsive Pleadings

6. Notice of NorthWestern’s Petition was published in the *Federal Register*, 83 Fed. Reg. 50,914 (Oct. 10, 2018), with interventions and protests due on or before November 1, 2018.

7. PacifiCorp, Portland General Electric Company, One Energy Enterprises LLC, National Rural Electric Cooperative Association, Consolidated Edison Development, Inc. (ConEd), VK Clean Energy Partners, LLP (VK Clean Energy), Black Bear Wind LLC and Grizzly Wind LLC (jointly, Black Bear), Allco Renewable Energy Limited (Allco), and Beaver Creek Wind Projects (Beaver Creek) filed timely motions to intervene. Edison Electric Institute filed a motion to intervene out-of-time. The Montana Commission filed a notice of intervention and comments. Allco, Black Bear, Beaver Creek, ConEd, and VK Clean Energy filed protests. EEI filed comments out-of-time. Allco submitted a motion to supplement its protest out-of-time. NorthWestern filed an answer to the comments and protests. VK Clean Energy filed an answer to NorthWestern’s answer.

IV. Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

9. Pursuant to Rule 214(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2019), we grant EEI’s late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

10. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept NorthWestern’s answer and VK Clean

¹⁶ *Id.* at 13 (quoting Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,870).

Energy's answer because they have provided information that assisted us in our decision-making process.

B. Commission Determination

11. We deny the Petition. The decision to issue a declaratory order is discretionary,¹⁷ and here we exercise our discretion and decline to address NorthWestern's Petition and the various arguments raised in this proceeding. Whether or not avoided energy costs can be zero depends on the facts of the case, and here NorthWestern provides insufficient information upon which to base such a determination. In particular, NorthWestern asserts that the avoided cost rate for energy should be zero in Long-2 periods, that is, periods during which NorthWestern is long on generation in that, according to NorthWestern, partner contracts or reliability requirements make the resources "must-run" and unable to be curtailed. However, we cannot determine if the resources are truly must-run because NorthWestern has not provided sufficient information regarding these partner contracts and/or reliability requirements. Specifically, NorthWestern has not provided sufficient information regarding when the must run resources were acquired, under what process they were acquired, whether they are affiliate-owned, controlled, or operated, or the operating characteristics that make a must run designation appropriate. It also has not provided sufficient information regarding when and for how long the Long-2 designation exists, nor an estimate of the MWs involved. We are also left to speculate as to how, during any particular period, NorthWestern is able to ascertain that QFs are the source of excess generation on NorthWestern's system rather than other inflexible supply sources (including, for example, the partner contracts for "must run" resources themselves).¹⁸ To determine whether and when avoided costs can be zero in a particular

¹⁷ *Vote Solar Initiative & Mont. Env'tl. Info. Ctr.*, 158 FERC ¶ 61,032, at P 13 (2017); see 5 U.S.C. § 554(e) (2012) (providing that an agency "may" issue a declaratory order); 18 C.F.R. § 385.207(a)(2) (providing for the filing of petitions for declaratory order without requiring Commission action); *Hydrodynamics Inc.*, 146 FERC ¶ 61,193, at P 29 (2013) ("The Commission also can and sometimes does issue a declaratory order in response to an enforcement petition. That declaratory order, issued separate from the Commission's authority under PURPA's section 210(h) enforcement regime, is within the Commission's discretion to issue an order 'to remove uncertainty.'").

¹⁸ Another example is that, although NorthWestern requests that the Commission declare that avoided costs can be zero, it does not consistently distinguish between as-available rates pursuant to 18 C.F.R. § 292.304(d)(1) and long-term fixed rates under a legally enforceable obligation or contract pursuant to 18 C.F.R. § 292.304(d)(2). This lack of distinction is problematic because, while both as-available rates and long-term fixed rates arguably could be zero or even negative in certain situations, NorthWestern has not

situation, we must have more concrete facts to analyze and upon which to base such a determination. Here, NorthWestern has not presented sufficient information to make such a determination.

The Commission orders:

NorthWestern's Petition is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

described the facts in sufficient detail for us to determine if NorthWestern asks us to address as-available rates, long-term fixed rates, or both.