

1 HON. JAMES A. MANLEY
2 20th Judicial District Court
3 Lake County Courthouse
4 106 Fourth Avenue East
5 Polson, MT 59860
6 (406) 883-7250

7 **MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY**

8 VOTE SOLAR, MONTANA
9 ENVIRONMENTAL INFORMATION
10 CENTER, and CYPRESS CREEK
11 RENEWABLES, LLC,

12 Plaintiffs,

13 and,

14 WINDATA, LLC,

15 Plaintiff-Intervenor,

16 vs.

17 THE MONTANA DEPARTMENT OF
18 PUBLIC SERVICE REGULATION,
19 MONTANA PUBLIC SERVICE
20 COMMISSION, and NORTHWESTERN
21 CORPORATION,

22 Defendants,

23 and,

24 MONTANA CONSUMER COUNSEL,

25 Defendant-Intervenor.
26

Cause No. BDV-17-0776

Consolidated with:

Cascade County Cause No. DV-18-197

(Lewis & Clark County Cause No. ADV-2017-1015)

Lewis & Clark County Cause No. DDV-2017-1014

Lewis & Clark County Cause No. DDV-2017-1022

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW
FOR THE SYMMETRY FINDING
IN MTSUN ORDER NO. 7535b**

1 **Part I. The "Symmetry" Ruling**

2 **FINDINGS OF FACT**

3 1. This case presents the first time the PSC applied the length of a Qualifying Facility
4 ("QF") contract "symmetrically" to NorthWestern's non-QF resources.

5 2. The PSC did not provide notice of the symmetry issue prior to the contested case
6 hearing.

7 3. The PSC did not afford parties with the opportunity to present evidence, respond to
8 evidence, conduct cross-examination, or to present argument on the symmetry issue during the
9 hearing.

10 4. The PSC based its Symmetry Finding on its conclusion that the prohibition against
11 discriminatory rates in 18 C.F.R. 292.304(a)(1)(ii) requires the PSC to apply QF contract lengths
12 to NorthWestern's non-QF resources but not to Montana Dakota Utilities, Inc.'s ("MDU") non-
13 QF resources. *See* QF-1 AR Tab 142, ¶¶ 90;111.

14 **CONCLUSIONS OF LAW**

15 5. The PSC violated MAPA's requirements for notice by failing to provide the parties
16 with notice of the symmetry issue before the contested case hearing. § 2-4-601, MCA.

17 6. The PSC violated MAPA's contested case hearing requirements by failing to afford
18 the parties an opportunity to respond and present evidence and argument on the symmetry issue.
19 § 2-4-612, MCA

20 7. The PSC violated an established principle of administrative law when it issued the
21 Symmetry Finding instead of following its own precedent, which did not require "symmetry," or
22 provide a reasoned analysis to explain its departure from that precedent. *Waste Mgmt. Partners*
23 *of Bozeman, Ltd. v. Montana Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210
24 (1997).
25
26

1 8. The PSC’s authority is limited to the authority delegated to it by the Legislature.
2 *Bacus v. Lake County* (1960), 138 Mont. 69, 354 P.2d 1056. The PSC has authority to approve
3 QF contract lengths. § 69-3-604(1). The PSC exceeded its statutory authority to approve QF
4 contract lengths when it applied the QF contract length “symmetrically” to NorthWestern’s
5 acquisition of non-QF resources.
6

7 9. 18 CFR 292.304(a)(1)(ii)’s prohibition against discriminatory rates neither requires,
8 nor gives the authority to, the PSC to apply the term it approves for QF contract lengths to
9 NorthWestern’s non-QF resources.
10

11 **Part II: Rates and Contract Length**

12 **FINDINGS OF FACT AND PROCEDURAL HISTORY**

13 10. This case arises out of MTSUN, LLC’s (“MTSUN”) efforts to develop an 80 MW solar
14 project located near Billings, Montana in Yellowstone County. MTSUN’s solar project is a self-
15 certified qualifying facility (“QF”) under the Public Utility Regulatory Policies Act of 1978
16 (“PURPA”) and thus MTSUN has the right to sell electricity wholesale to NorthWestern Energy
17 (“NorthWestern”). 16 U.S.C. § 824a-3; 18 C.F.R. § 292.207(a). NorthWestern is a public
18 utility selling electricity to retail customers. The Montana Public Service Commission
19 (“Commission”) is a state agency charged with administering laws pertaining to the economic
20 regulation of public utilities and QFs.
21

22 11. MTSUN filed a petition on December 23, 2016 requesting the Commission establish
23 the contract terms and rate for a power purchase agreement under which MTSUN would sell its
24 generation exclusively to NorthWestern. The Commission issued an order setting contract terms
25 and rates on July 21, 2017. D2016.12.103, Order No. 7535a (Jul. 21, 2017). MTSUN and
26 NorthWestern requested reconsideration of the Commission’s order. The Commission issued an

1 Order on Reconsideration. D2016.12.103, Order No. 7535b (Nov. 29, 2017). MTSUN
2 petitioned the Court for judicial review of the Commission’s Order on Reconsideration. In its
3 petition, MTSUN disputed the entirety of the Commission order including contract length, the
4 elimination of carbon as a price component, the value of the avoided cost of energy, the
5 determined value of capacity, and the date MTSUN incurred a legally enforceable obligation
6 (“LEO”).
7

8 PROCEDURAL BACKGROUND

9 12. MTSUN requested relief. The Commission, NorthWestern, and the Montana
10 Consumer Counsel (“MCC”) responded. MTSUN replied.
11

12 13. MTSUN augmented the record to include op-eds published by Commissioners
13 Johnson, Koopman, and O’Donnell while MTSUN’s case was pending and a “hot mic” recording
14 of Commissioner Lake recorded during a break in a Commission work session in Docket
15 D2016.5.39 that preceded the MTSUN Order No. 7535a. The published opinion articles
16 criticizing solar developers are evidence of bias on the part of the Commissioners.
17

18 14. MTSUN requested that the Court remand the case to the Commission to set an
19 appropriate fact base avoided cost rate for energy and capacity for a 25-year contract term based
20 on MTSUN’s LEO date of December 23, 2016. Further, MTSUN requests that the Commission
21 should be instructed to reinstate a carbon adder of \$9.56/MWh.

22 15. The Commission requested the Court affirm its Order 7535b in its entirety.

23 16. NorthWestern and the MCC requested that the Court affirm Order 7535b, except for
24 the “symmetry finding” relating to NorthWestern’s acquisition of its own generation assets.
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1 CONCLUSIONS OF LAW

2 To a large extent, the MTSUN issues were decided in the Court’s Order herein filed April
3 2, 2019.

4 Due Process

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6 17. MTSUN has alleged a violation of its due process right to be heard by an impartial
7 tribunal. In support, MTSUN presented evidence of several op-eds written by Commissioners
8 expressing negative opinions about solar developers in Montana while the MTSUN proceeding
9 was ongoing in front of the Commission. MTSUN argues that several of the decisions in the
10 MTSUN order lack legal and evidentiary support and can only be explained by Commission bias
11 and policy preferences. The Court agrees

12
13 18. Administrative agencies often serve multiple functions; they have quasi-legislative
14 functions as well as quasi-judicial functions. When the Commission is presiding over contested
15 case hearings, it is acting in a quasi-judicial function. The Commission is tasked with examining
16 the evidence in the record and making specific findings based on that evidence. M.C.A. § 2-4-
17 623. Here, the Commission improperly attempted to act as a quasi-legislative body by
18 implementing new policy rather than acting as an impartial trier of facts, a position the
19 Commission’s legal counsel acknowledged at hearing.

20
21 19. The Commission violated MTSUN’s due process rights in this proceeding by making
22 decisions based on bias and policy preferences and in conflict with the record evidence.
23 MTSUN was denied a fair hearing on its petition because four of the five individual
24 Commissioners actively demonstrated against solar developers while the MTSUN proceeding
25 was ongoing under their jurisdiction, and before final decision on reconsideration.
26

1 Contract Length

2 20. MTSUN objected to the Commission’s decision to limit the contract length for its
3 project to 15-years. MTSUN argued that there was no evidence in the MTSUN record to support
4 a 15-year contract, and that the limitation was both arbitrary and contrary to Montana law
5 requiring the Commission to encourage long-term contracts “to enhance the economic feasibility
6 of” qualifying facilities.” M.C.A. § 69-3-604.
7

8 21. This Court finds the Commission’s decision to limit MTSUN’s contract to a 15-year
9 term is clearly erroneous based on the lack of record evidence from the Commission proceeding.
10 MTSUN and NorthWestern did not dispute that 25-years was an appropriate contract length for
11 the project, and no testimony was provided in support of a 15-year contract. MTSUN Op. Br. at
12 19; D2016.12.103, Pub. Serv. Comm. Staff Memo. at 11 (Oct. 3, 2017). MTSUN is entitled to a
13 25-year contract under Commission precedent and based on testimony in the underlying MTSUN
14 docket.
15

16 Carbon Pricing

17 22. MTSUN argued that the Commission decision to award the project no value for its
18 ability to offset future carbon regulations was conjecture and an abuse of discretion. The
19 decision departed from the agency’s previous precedent without explanation based on the record.
20 MTSUN Op. Br. at 14-15. The Commission’s own staff advised the Commission that there was
21 no record evidence to support the departure from precedent. D2016.12.103, Pub. Serv. Comm.
22 Staff Memo., (Oct. 3, 2017).
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1 23. The Commission argued that it had used its own expertise in assessing the political
2 climate, including the recent presidential election, and had reached a decision that carbon was
3 not going to be a real cost in the foreseeable future. D2016.12.103, Order 7535b at ¶ 78-79. The
4 Commission claimed that its precedent had not changed, but the underlying facts had. MPSC
5 Ans. Br. at 16. The Commission provided no evidence that the information it claims to have
6 based its decision on was part of the record evidence; “an agency has a duty to either follow its
7 own precedent or provide a reasoned analysis explaining its departure.” *Waste Mgmt. Partners v.*
8 *Mont. Dep’t of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 218 (Aug. 26, 1997).
9

10 24. This Court finds that the Commission’s decision to eliminate carbon pricing for the
11 MTSUN project is arbitrary, capricious, and characterized by an abuse of discretion. Based on
12 the lack of record evidence, Commission precedent, and the applicable standard, MTSUN is
13 entitled to a carbon adder of \$9.65 per MWh as recommended by the staff based on the
14 Commission precedent from the Crazy Mountain Wind docket. D2016.12.103, Pub. Serv.
15 Comm. Staff Memo. at 21-22 (Oct. 3, 2017).

16 Legally Enforceable Obligation

17 25. MTSUN argued that the Commission’s determination that the MTSUN project had
18 not incurred a LEO before the end of the contested case proceeding was unlawful. The portion
19 of the Commission’s “Whitehall Wind” test the Commission relied on in making this assessment
20 was a requirement that a QF submit a signed contract with a price term consistent with the
21 utility’s avoided cost. Dkt. D2002.8.100, Order 6444e, ¶ 47 (2010). MTSUN presented
22 unrefuted evidence that NorthWestern and MTSUN were virtually in agreement on the avoided
23 cost of energy (with NorthWestern’s number actually being slightly higher), and that the only
24 difference in price term was the result of not knowing how the Commission would choose to
25 value solar project capacity. D2016.12.103, Pub. Serv. Comm. Staff Memo. at 15 (Oct. 3, 2017).
26

1 26. The Commission's determination that MTSUN did not establish a legally enforceable
2 obligation (LEO) for its project prior to the end of the administrative proceeding is unlawful as a
3 violation of PURPA as applied to the MTSUN project. A correct application of PURPA would
4 establish a LEO date for MTSUN as December 23, 2016, when MTSUN filed its petition with
5 the Commission. Since MTSUN and NorthWestern were virtually in agreement on the avoided
6 cost of energy on December 23, 2016, this Court finds that MTSUN is entitled to the agreed
7 upon rate for energy of \$28.68 per MWh as documented in the Commission staff's memo.
8 D2016.12.103, Pub. Serv. Comm. Staff Memo. at 15 (Oct. 3, 2017).

9
10 PowerSimm

11 27. MTSUN claimed a violation of due process based on NorthWestern's use of
12 proprietary software, PowerSimm, in avoided cost calculations. MTSUN argued that
13 NorthWestern's PowerSimm modeling is unavailable to QF developers and the Commission, and
14 is therefore improper evidence for the Commission to use in making a decision.

15 28. The Court concludes that the use of PowerSimm model lacked transparency. In order
16 for due process to be satisfied, the Commission must require all parties to have access to
17 information it uses in making its final determinations of contested issues. Relief can be granted
18 in this case by assigning MTSUN the avoided cost energy rate of \$28.68 per MWh from
19 December 23, 2016 which both parties agreed upon regardless of the PowerSimm modeling.
20 This Court makes this decision with the understanding that the Commission has apparently since
21 changed its rule on access to PowerSimm and thus direction from this Court may be of limited
22 usefulness going forward.

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1 Capacity

2 29. MTSUN argued that its capacity payment must be based on the next planned
3 generation unit in NorthWestern’s 2015 Integrated Resource Plan (“IRP”), which is an internal
4 combustion engine (“ICE”) rather than the aeroderivative unit the Commission relied on.
5 MTSUN cites *Whitehall Wind, LLC v. Mont. PSC* to say that avoided cost must be based on
6 current data. 2010 MT 2, 355 Mont. 15, 223 P.3d 907.

8 30. NorthWestern and the Commission argued that an ICE unit was an improper proxy
9 unit for calculating MTSUN’s avoided cost of capacity because MTSUN could not actually
10 avoid the planned ICE unit because a solar project and an ICE unit have different features.
11 However, as MTSUN argued, a solar project also does not provide all the same functionality of
12 an aeroderivative unit; this is why the price a project receives for capacity is based on the amount
13 of the next planned unit a project can avoid rather than being paid the price of the entire unit.

15 31. This Court agrees with MTSUN. The MTSUN project does not provide exactly the
16 same services as an ICE unit, but the capacity payment will take into account these differences
17 and therefore the avoided cost only compensates MTSUN for the amount that will be offset. The
18 Commission’s decision to rely on an aeroderivative unit was arbitrary and designed to result in
19 an artificially lower price, based on all the credible, substantial evidence.
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1 32. The Court may affirm, reverse, remand, or modify a Commission determination.

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3 Under M.C.A. § 2-4-704(2):

4 The court may affirm the decision of the agency or remand the case for further proceedings. The
5 court may also reverse or modify the decision if substantial rights of the appellant have been
6 prejudiced because:

- 7 (a) the administrative findings, inferences, conclusions, or decisions are:
- 8 (i) in violation of constitutional or statutory provisions;
 - 9 (ii) in excess of the statutory authority of the agency;
 - 10 (iii) made upon unlawful procedure;
 - 11 (iv) affected by other error of law;
 - 12 (v) clearly erroneous in view of the reliable, probative, and substantial
 evidence on the whole record;
 - 13 (vi) arbitrary or capricious or characterized by abuse of discretion or clearly
 unwarranted exercise of discretion

14 33. Under M.C.A. § 69-3-402, “the burden of proof shall be upon the party attacking or
15 resisting the order of the commission to show that the order is unlawful or unreasonable.” If the
16 burden is met, the Court should vacate or set aside the order. *Whitehall Wind, LLC v. Mont. Pub.*
17 *Serv. Comm.*, 2008 Mont. Dist. LEXIS 842

18 34. A finding is clearly erroneous if it is not supported by substantial evidence or fact.
19 *Whitehall Wind, LLC v. Mont. Pub. Serv. Comm.*, 2008 Mont. Dist. LEXIS 842. In contested
20 cases before an administrative agency, “findings of fact must be based exclusively on the
21 evidence and on matters officially noticed.” M.C.A. § 2-4-623(b)(2).

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1 **ORDER**

2 35. For the aforementioned reasons, this Court grants the relief requested by MTSUN and
3 remands this case to the Commission with specific instructions:

- 4 (a) The Commission must assign MTSUN a 25-year contract length.
5 (b) The Commission must assign MTSUN a price for carbon. The appropriate
6 price is \$9.65/MWh as calculated by the staff for this proceeding.
7 (c) MTSUN incurred a LEO as of December 23, 2016, and is entitled to the
8 avoided cost of energy NorthWestern and MTSUN agreed upon directly prior
9 to MTSUN's filing of its petition with the Commission, which is \$28.68/MWh.
10 (d) The Commission must calculate an avoided cost of capacity for MTSUN based
11 on an 18 MW internal combustion engine, as specified in NorthWestern's 2015
12 IRP.

13 36. The Court finds that MTSUN is entitled to additional relief to correct the delay the
14 Commission's actions have caused for the MTSUN project. The Court orders the Commission
15 to issue a new order in line with this Court's decision within 30 days of this final order.
16 Additionally, MTSUN must be allowed to update its commercial operating date from Dec. 31,
17 2018 to reflect the date in its updated Interconnection Agreement with NorthWestern.

18 37. The PSC's Symmetry Finding is reversed. The case is remanded to the PSC with
19 instructions to issue a new order consistent with the findings and conclusion above.

20 DATED this 18th day of June, 2019.

JAMES A. MANLEY

JAMES A. MANLEY
District Court Judge

21 cc: **Jenny Harbine**, Attorney for Vote Solar and Montana Environmental Information Center (Cascade County Cause No.
22 BDV-17-0776)
Marie P. Barlow, Attorney for Cypress Creek Renewables, LLC (Cascade County Cause No. BDV-17-0776)
23 **Michael Uda / Christine McMurray**, Attorneys for MTSUN, LLC (Lewis & Clark County Cause Nos. DDV-2017-1014 and
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24 **Justin Kraske / Jeremiah Langston / Zachary Rogola / Jennifer Hill-Hart**, Attorneys for Montana Public Service
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25 2017-1014 and CDV-2017-1022)
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06/18/19 cWMc