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

In the matter of the adoption of NEW RULE I pertaining to the creation of a legally enforceable obligation involving qualifying facilities, NEW RULE II pertaining to access to avoided cost modeling data for a qualifying facility, and the amendment of ARM 38.5.1901 pertaining to definitions	)))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On April 9, 2018, at 9:00 a.m., the Department of Public Service Regulation will hold a public hearing in the Bollinger Room, 1701 Prospect Avenue, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Department of Public Service Regulation will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Service Regulation no later than 5:00 p.m. on April 2, 2018, to advise us of the nature of the accommodation that you need. Please contact Rhonda Simmons, Department of Public Service Regulation, 1701 Prospect Avenue, Helena, Montana, 59620-2601; telephone (406) 444-6170; fax (406) 444-7618; TDD/Montana Relay Service (406) 444-4212; or e-mail rhonda.simmons@mt.gov.

3. The rules proposed to be adopted are as follows::

NEW RULE I CREATION OF A LEGALLY ENFORCEABLE OBLIGATION

(1) A legally enforceable obligation, as that term is used in 18 C.F.R. § 292.304, is created when a qualifying facility has:

(a) tendered an executed power purchase agreement to the purchasing utility with a price term consistent with the purchasing utility's avoided costs, calculated within 14 days of the date the power purchase agreement is tendered, with specified beginning and ending dates;

(b) undertaken at least the following work toward interconnection:

(i) submitted an interconnection request to the interconnecting utility which has been signed by the qualifying facility in accordance with the generator interconnection procedures of the interconnecting utility's Open Access Transmission Tariff (OATT);

(ii) paid any required deposit fee;

(iii) provided information sufficient to demonstrate that the qualifying facility has complied with the deadlines for an Interconnection Customer specified in the OATT; and

(iv) provided information sufficient to demonstrate that the qualifying facility has not waived deadlines applicable to the interconnecting utility, except that if such deadline or deadlines have been waived by the Interconnection Customer, or an alternative timeline has been agreed to by the Interconnection Customer, that a legally enforceable obligation will be created, for the purposes of this subsection, at the date or dates by which the Interconnection Customer agreed to in lieu of the deadlines specified in the OATT; and

(c) control of the site and permission to construct the qualifying facility, including at a minimum:

(i) a legally recognized interest in the real property on which the qualifying facility will be sited, such as a lease or ownership interest in the real property;

(ii) all required government land use approvals; and

(iii) all necessary environmental permits to build the facility.

AUTH: 69-3-103, 69-3-604(5), MCA
IMP: 69-3-102, 69-3-604(5), MCA

REASON: Adoption of NEW RULE I as proposed refines the "Legally Enforceable Obligation" standard set forth in *In re Whitehall Wind LLC*, Docket D2002.8.100, Order 6444e ¶ 47 (May 18, 2010) (*Whitehall Wind*). The refinements are necessary to provide additional clarity and improve implementation of the standard. In several recent administrative rate-setting proceedings, the interpretation and workability of the *Whitehall Wind* standard was called into question by qualifying facilities. In addition, although its declaratory statements are non-binding, the Federal Energy Regulatory Commission has advised the Public Service Commission (commission) that state-adopted standards for Legally Enforceable Obligations must be based on objective manifestations of a qualifying facility's (QF) commitment to sell energy to a utility, which the utility may not unilaterally obstruct. On November 24, 2017, the commission issued Order 7500d stating that the executed interconnection agreement element of the standard may warrant revisiting and inviting interested persons to initiate a rulemaking to address the interconnection agreement element of the standard. To date, no interested person has initiated a rulemaking. Because QFs in Montana seek to form Legally Enforceable Obligations or claim that they already exist, the proposed rule will clarify and refine a Legally Enforceable Obligation standard that has been difficult to implement efficiently. The proposed standard aligns the Montana standard with that of other states. *See Pub. Serv. Co. of Oklahoma v. State ex rel. Oklahoma Corp. Comm'n,* 115 P.3d 861, 873 (Okla. 2005) (noting that other jurisdictions have required a degree of project development before finding that a QF is capable of incurring a legally enforceable obligation). The proposed rule will also improve the public's access to and understanding of the substance of the standard by codifying it in an administrative rule instead of through piecemeal adjudicatory orders. Finally, the rulemaking process allows for full public and stakeholder participation in addressing a standard that affects multiple parties

and individuals that may not be able or willing to participate in contested case proceedings that concern this standard.

NEW RULE II QUALIFYING FACILITY ACCESS TO AVOIDED COST MODELING DATA (1) Upon a request from a qualifying facility, a utility shall provide reasonably transparent data concerning the utility's avoided cost.

(2) The utility must provide an initial avoided cost calculation within 14 days of receipt of a qualifying facility's production profile at no cost to the qualifying facility. In providing an initial avoided cost calculation to the qualifying facility, the utility must use the methodologies most recently approved by the commission for that utility.

(3) If a utility uses a proprietary modeling software to calculate its avoided cost, the utility must allow a qualifying facility, upon request, to conduct one avoided cost calculation using the utility modeling software with the qualifying facility's own assumptions and inputs at no cost to the qualifying facility. The utility must make its modeling software accessible to the qualifying facility within 14 days of the qualifying facility's request to conduct an alternative avoided cost calculation. The qualifying facility must have access to the modeling software for 14 days after the utility makes it available to the qualifying facility to conduct an alternative avoided cost calculation. A utility must accommodate reasonable requests by a qualifying facility to conduct additional avoided cost calculations using the utility's modeling software and may charge the qualifying facility a reasonable price for use of the modeling software beyond the single avoided cost calculation identified in this subsection.

(4) Pursuant to 69-3-206 and 69-3-209, MCA, a qualifying facility or utility may petition the commission for fines against a qualifying facility or utility for failure to adhere to this rule.

AUTH: 69-3-103, 69-3-604(5), MCA
IMP: 69-3-102, 69-3-604(5), MCA

REASON: Adoption of NEW RULE II, as proposed, codifies the commission's existing policy regarding qualifying facilities' access to proprietary modeling software. *See In re Greycliff Wind Prime*, *LLC*, Docket D2015.8.64, Order 7436d ¶ 24 (Mont. Pub. Serv. Comm'n Sept. 16, 2016); *In re Crazy Mountain Wind, LLC*, Docket D2016.7.56, Order 7505b ¶ 18–20 (Mont. Pub. Serv. Comm'n Jan. 5, 2017); *In re New Colony Wind, LLC*, Docket D2017.6.45, Order 7560a ¶ 34 (Mont. Pub. Serv. Comm'n Dec. 26, 2017). Qualifying facilities have expressed concern about how to tender an executive power purchase agreement to the purchasing utility with a price term consistent with the purchasing utility's avoided costs. The proposed rule addresses this concern by enhancing qualifying facilities' access to tools utilities use to calculate avoided costs and requires utilities to calculate avoided costs consistent with current commission policies. The proposed rule also seeks to encourage amicable contract formation between utilities and qualifying facilities, and seeks to discourage utilities and qualifying facilities from offering avoided cost calculations in furtherance of a litigation strategy rather than a genuine attempt to amicably form contracts. The proposed rule implements requirements designed to achieve the commission's expectation that utilities and qualifying facilities engage in "a robust bilateral negotiation process, centered around sound avoided cost principles, that

can better accommodate the moving parts of an unknown and unpredictable energy future." *See In re Greycliff Wind Prime, LLC*, Docket D2015.8.64, Order 7436d ¶ 24 (Mont. Pub. Serv. Comm'n Sept. 16, 2016).

4. The rule proposed to be amended is as follows, new matter underlined, deleted matter interlined:

38.5.1901 DEFINITIONS (1) through (2)(d) remain the same

(e) "Production profile" means the expected hourly generation output of a qualifying facility for a full year based an engineering analysis of the qualifying facility's power production capabilities and fuel use or availability.

(e) though (l) remain the same, but are renumbered (f) through (m).

AUTH: 69-3-103, MCA
IMP: 69-3-102, MCA

REASON: Amendment of ARM 38.5.1901 is necessary to provide a definition for production profile with respect to the proposed rules.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Rhonda Simmons, Department of Public Service Regulation, 1701 Prospect Avenue, Helena, Montana, 59620-2601; telephone (406) 444-6170; fax (406) 444-7618; or e-mail rhonda.simmons@mt.gov, and must be received no later than 5:00 p.m., April 25, 2018.

6. The commission, a commissioner, or a duly appointed presiding officer may preside over and conduct the hearing.

7. The Department of Public Service Regulation maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

9. With regard to the requirements of 2-4-111, MCA, the Department of Public Service Regulation has determined that the adoption and amendment of the above-referenced rules will likely significantly and directly impact small businesses. The small businesses that will be affected significantly and directly are any small qualifying facilities that decide to develop projects under these provisions. These small businesses will benefit from adoption of the proposed rules because the new rules provide more clarity on the creation of a legally enforceable obligation which

can lead to the development of an energy facility that sells power to a public utility. As stated in the rule reason section above, these rules will improve the public's access to and understanding of the substance of the standard by codifying it in an administrative rule instead of through piecemeal adjudicatory orders and this will benefit small businesses. The proposed rules also enhance qualifying facilities' access to tools utilities use to calculate avoided costs and requires utilities' to calculate avoided costs consistent with current commission policies. The department is unaware of any significant and direct adverse impacts that adoption of the proposed rules will have on other small businesses. The department is not aware of any alternative methods that may be reasonably implemented to minimize or eliminate any potential adverse effects of adopting the proposed rule while still achieving the purpose of the proposed rule.

/s/ JUSTIN KRASKE
Justin Kraske
Rule Reviewer

/s/ BRAD JOHNSON
Brad Johnson
Chairman
Department of Public Service Regulation

Certified to the Secretary of State March 6, 2018.