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	)	UTILITY DIVISION N2018.3.15 JOINT COMMENTS OF MTSUN, LLC AND CAITHNESS ENERGY, LLC

I. NEW RULE I CREATION OF A LEGALLY ENFORCEABLE OBLIGATION

According to the Federal Energy Regulatory Commission ("FERC"), a legally enforceable obligation ("LEO") is formed by a QF committing to sell its power to a specific utility. *JD Wind I, LLC*, 129 FERC ¶ 61,148. The Montana Public Service Commission's ("Commission") proposed New Rule I requires QFs to take substantial steps beyond what FERC has contemplated and is therefore inconsistent with FERC's regulations and, consequently, impermissible. A project's LEO date informs many other aspects of the project, and therefore it is necessary for a QF to be able to establish a LEO early in its development. The proposed rule, as currently written, continues this Commission's problematic practice of requiring QFs to make substantial investments of time and resources before being able to establish a LEO. This is plainly backwards. The LEO date informs the avoided cost rate, which informs the viability of any given project; requiring a QF to take substantial costly steps before being assured financial viability creates impermissible barriers to entry. It is well established by the adoption of the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3, et. seq. ("PURPA"), as well as its legislative history and FERC's implementing regulations, that utilities have, charitably, been "reluctant" to purchase independently generated power. FERC's goal with distinguishing between a LEO and a contract, was to ensure that QFs are

able to establish LEOs entirely without the consent or interference of utilities obligated to purchase QF power under PURPA. This should be an acknowledged premise in crafting any workable LEO standard.

As expressed by Michael Uda at the April 9th hearing, the Commission's proposed rules are focused on an issue that is non-existent and do not solve the problems that continue to bring QF projects before the Commission. The problem, as will be discussed further below, is not that a QF may create a LEO then never complete the project; there has been no evidence that this leads to harm to the ratepayers. The utility will replace any power they would have expected to buy from the QF on the market, and according to the utility, the market is continuing to decline. Consumers are therefore not harmed by QFs that never materialize. NorthWestern's own yearly planning often includes projects that never materialize; NorthWestern adjusts for that in real time and is able to buy power from the market as needed.

Rather, the problem is that QF developers have been unable to build their projects because they cannot get the utility to negotiate with them, and then they cannot establish a LEO until after a full Commission proceeding – a lengthy and expensive proposition for any developer. The Commission's current LEO approach has been a significant deterrent to QF developers because they cannot realistically plan projects and make the investments the Commission wants to see without knowing they have a specific LEO date, which, by law, is the date on which an avoided cost calculation is to be derived. The most critical change needed in Montana's LEO standard is a recognition that a LEO date is the starting place, not the end, for any QF development. The LEO date is the date from which the avoided cost will be calculated, *not* the date at which the avoided cost is already known and agreed to. Such an approach places whether and when a LEO will be created in the utility's hands, which is inconsistent with FERC's regulations implementing PURPA.

Furthermore, requiring a QF to continually attempt to hit the utility's avoided cost in a PPA before establishing a LEO creates a situation in which developers are constantly chasing a moving target as avoided cost fluctuates. In addition, it also permits the utility to delay the project, so that a later and lower avoided cost applies, which is also impermissible under PURPA. *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006, 61,023 (2011). The proper and workable order contemplated by FERC is that a project incurs a LEO and *then* the utility and QF negotiate a price based on that date. The Commission's insistence on a price term "consistent with" the utility's avoided cost, which does not appear in FERC's regulations, is not only inconsistent with those regulations, it poses a significant barrier to entry and essentially places in the hands of the utility whether a LEO is created. This is not permitted by FERC's regulations or any decision by FERC regarding the purpose and intent of its LEO regulation, 18 C.F.R. § 292.304(d)

A. A LEO should be created when a QF commits to sell to a particular utility by naming that utility on its FERC Form 556 and initiating the interconnection process.

By naming a particular utility in Section 4 of a QF's filed FERC Form 556, the QF is committing to interconnect and sell its output to that particular utility. Under 18 C.F.R. § 292.207(c)(1), QFs are required to provide a copy of their Form 556 to "each electric utility with which it expects to interconnect, transmit or sell electric energy to." Thus, when the utility receives the Form 556, it has notice of the QF's intent to sell to that utility. When a QF initiates the interconnection process by filing an interconnection request with the utility, the utility receives all relevant information about the parameters of the project. At this point, the QF has done everything necessary to demonstrate its commitment to sell its output to that particular utility, and has thus obligated the utility to purchase that output. *JD Wind I, LLC*, 129 FERC ¶ 61,148 (2009) ("Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric

utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations."). The actual terms of the PPA will be negotiated with the utility as the project moves forward, but this establishes a firm date for all modeling and avoided cost assumptions to be based around. This straight-forward LEO creation will ease negotiations by providing a clear starting point. Additionally, having a straightforward standard will mean that the LEO date will already be clearly established before a QF would need to come to the Commission and thus it would be one less variable for the Commission to have to consider in contested proceedings.

The Commission's reluctance to allow QFs to easily form LEOs is based on an illogical fear that there will be some substantial harm caused by QFs establishing LEOs and then failing to complete their projects. This concern is unrealistic. Shortly after creating a LEO, the QF and utility will formalize the terms of the commitment through a PPA. Standard PURPA PPAs contain a damages clause, and a termination clause for non-performance. After the PPA is signed, if the QF fails to complete the project or otherwise cannot fulfill its commitment to the utility, the damages clause will require the QF to pay liquated damages and, potentially, result in termination of the agreement. This is the correct way to handle this potential problem. On the other hand, if the QF creates a LEO and then does nothing further, and therefore never signs a PPA and never gets built, the utility has no damages. There is no inherent risk in allowing QFs to form LEOs early in the process.

B. The new rule should make it clear that the *latest possible* date that a QF may have been found to have created a LEO is the date a QF files a petition with the Commission.

By the time a QF files a petition with the Commission, it is clearly committing to making a substantial investment in time and legal expenses; commitment to the project is undeniable. Filing a

petition with the Commission is not an early step in the development process; on the contrary, it is a step that most QF developers would prefer to never take. Petitions for contested case proceedings are only filed after negotiations between the utility and the QF have reached an impasse.

Adding this provision would also ensure that the Commission and the parties have access to all relevant information during the proceeding because nothing that happens after the date the petition is filed can legally have any influence on the outcome. The preamble to the FERC regulations makes it clear that the avoided cost determination should precede the QF developer's decision to invest in the project. Small Power Production and Cogeneration Facilities, 45 Fed. Reg. 12,214, 12,218 (Feb. 25, 1980) ("Order 69"). The Commission's present rule, and the new proposed rule, puts the proverbial cart in front of the horse, requiring substantial investments in the project without knowing, until the end of the contested case proceeding, the avoided cost rate the project will receive for its energy and capacity. These costs include the substantial risk and cost associated with litigation, a cost many developers do not want to incur. If the Commission is concerned about having the best projects, i.e., ones that will produce the best product at the lowest price, placing such a substantial barrier to entry in the way of the QF will not necessarily produce the best portfolio – it will only produce a portfolio of projects willing to spend the money and take the risk of a lengthy contested case proceeding that may not produce a rate at which the project can be developed. This has happened to several projects recently, including the MTSUN project.

A related problem, caused by the "consistent with" standard in the current LEO rule, is that the Commission does not even decide whether the QF has a LEO until after the proceeding has been concluded. Apart from disincentivizing new projects from even attempting to seek contracts with NorthWestern, this permits NorthWestern to continue to advocate for later and lower prices, an express violation of FERC's declarations about the purpose and intention of its rules. *Cedar Creek*

Wind, LLC, 137 FERC ¶ 61,006, 61,023 (2011). Furthermore, the Commission's current approach to LEO formation, which will continue under the proposed rule, is that QFs must make an investment decision on whether to spend significant amounts of time and money on a contested case proceeding without assurance that the Commission will decide that an LEO has been formed even then. Again, this plainly violates clear FERC pronouncements on LEO formation, including *Grouse Creek Wind Park*, which stands for the proposition that filing of a contested case proceeding is a sufficient but not necessary condition for creation of a LEO. 142 FERC ¶ 61,187 at ¶ 40 (2013). Specifically, FERC said:

> [A] QF has the option to commit itself to sell all or part of its electric output to an electric utility. While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a noncontractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA. . . Moreover, the tool of 'seek[ing] state regulatory authority assistance to enforce the PURPA-imposed obligation' does not mean that seeking such assistance is a necessary condition precedent to the existence of a legally enforceable obligation.

Id. For the Commission to ignore the substantial investment in resources it takes to commence a Commission contested case proceeding would be a clear violation of FERC implementation policy. If the Commission's concern is truly whether or not a QF is committed to building its project, the fact that they are willing to go through a Commission proceeding to work out contract terms is sufficient proof of commitment.

C. As long as the Commission retains the requirement that QFs submit an executed PPA "with a price term consistent with the purchasing utility's avoided cost," utilities will refuse to negotiate with QFs.

Under A.R.M. § 38.5.1902(5), "All purchases and sales of electric power between a utility and a qualifying facility that is not eligible for standard offer rates shall be accomplished according

to the terms of a written contract *negotiated* between the parties" (emphasis added). In spite of this administrative rule, NorthWestern Corporation d/b/a/ NorthWestern Energy ("NorthWestern"), Montana's largest utility (and the only utility to date involved in contested PURPA proceedings), has repeatedly shown an unwillingness to negotiate. In doing so, NorthWestern has consistently used the Commission's "consistent with" language as a pretext not to engage in serious negotiation, instead relying on a "take it or leave it" approach based on numbers generated by NorthWestern through its reliance on its PowerSimm modeling. This model, as is further discussed below, is not equally available to both parties, its internal assumptions and parameters are opaque, and it cannot simply be relied on to produce an avoided cost calculation that is unquestioned – particularly since the calculations vary wildly, sometimes over a relatively brief period of time. Case in point: it became very clear during the *New Colony Wind* hearing that NorthWestern's position is that whatever number it reaches from its own modeling is the only possible number they can offer a QF that would be "consistent with" the utility's avoided cost.

During the *New Colony* hearing, one of NorthWestern's witnesses, Mr. John Bushnell, testified that New Colony was told that "negotiations could not continue. . . because the formula for avoided cost was a mechanical exercise and not a negotiation." *In the Matter of the Petition of New Colony Wind, LLC to set Terms and Conditions for Qualifying Small Power Production Facility Pursuant to M.C.A §69-3-603*, Hr'g Tr. Day 2, 231: 2-6 (Oct. 31, 2017). The way NorthWestern has interpreted the LEO requirements prior to a contested case hearing is that the only negotiated price they could accept would be if the QF came in lower than whatever rate NorthWestern offered. *Id.* at 237:13-238:2. As a result, this language clearly creates a practical disincentive to amicable contract negotiation, a standard which FERC has held to be "at odds with [FERC]'s regulations implementing PURPA." *Grouse Creek Wind Park I*, 142 FERC ¶ 61,187 at P40 (2013).

Further, FERC has consistently held that a legally enforceable obligation can exist before a contract, and, more importantly, before contract terms are agreed upon. In *Grouse Creek Wind Park I*, FERC stated:

> In order to protect the rights of a QF, once a QF makes itself available to sell to a utility, a legally enforceable obligation may exist prior to the formation of a contract. A contract serves to limit and/or define bilaterally the specifics of the relationship between the QF and the utility. A contract may also limit and/or define bilaterally the specifics of the legally enforceable obligation at the heart of that relationship. But the obligation can predate the signing of the contract.

Although the Commission has not required a utility signed contract, it has indirectly required a contract that the utility would agree to sign. This is inconsistent with FERC's intent to ensure that a QF may establish a LEO *without* a utility's consent. *See, e.g.*, Order No. 69 at 30,880.

The Commission has consistently held that this standard in the LEO test is not unworkable because the Commission can look back and decide whether the avoided cost number the QF offered to the utility at the time the QF claims to have established a LEO was, in the Commission's view, "consistent with the utility's avoided cost" at that time. *See, e.g.*, Order 7560a at ¶ 19 ("[T]he Commission finds that NorthWestern's avoided cost for New Colony, as of May 2017 and based on the Commission's current avoided cost estimation practices, is $26.74/MWh. . . . Given the significant difference between this avoided cost estimate and New Colony's asserted LEO price. . . the Commission concludes that the price in the asserted LEO is not consistent with NorthWestern's avoided cost in May 2017. Therefore, New Colony did not incur an LEO."). However, this is an incorrect way to view the issue. The Commission's argument accepts the inevitability of a contested case hearing because it has basically said, "It's okay if the utility's originally offered avoided cost was incorrect because the Commission can always calculate the correct avoided cost at a later date." The problem is that this approach gives the utility no incentive to negotiate and every incentive to

just give the QF one number and wait for the QF to file a petition at the Commission. This is turn permits the utility to argue for a later and lower avoided cost, which the QF is then stuck with, even if it varies greatly from the utility's initial avoided cost. This happened in the *MTSUN* proceeding, where NorthWestern's last offer prior to MTSUN's commencement of a contested case proceeding was substantially higher than the avoided cost the Commission would embed in its order. Unless this Commission wants to continue to receive a substantial number of QF complaints, then it must remove the "consistent with" requirement in the current LEO rule, and furthermore adopt a rule that the LEO date is created no later than the date that negotiations ended or when the utility refused to negotiate off its initial offer. Otherwise, the Commission will continue to receive more QF complaints than it would plainly like to resolve.

D. Parts (b) and (c) of the Commission's Proposed New Rule I requires the QF to have completed steps that rely on other actors capable of causing delay beyond the control of the QF, and those parts are therefore impermissible.

Part (b) of the Proposed New Rule I has several requirements related to the interconnection process. These requirements are at best unnecessary, and at worst problematic. The FERC regulations do not contemplate interconnection in relation to LEO formation, and the proposed requirements are thus inconsistent with FERC's implementing regulations. Under FERC Order 888, interconnection employees should be unaware as to whether the project requesting interconnection is a QF or not. Specifically, FERC said:

> [W]e recognize that additional safeguards are necessary to protect against market power abuses. Functional unbundling will work only if a strong code of conduct (including a requirement to separate employees involved in transmission functions from those involved in wholesale power merchant functions) is in place.

75 F.E.R.C. P61,080, 61238 (April 24, 1996). This distinction is to ensure that interconnection studies are completed in a fair and neutral manner regardless of whether the project being studied is

a utility-owned project, a QF, or any other project selling power pursuant to a PPA. That line of distinction is currently difficult to maintain in Montana when the requirements for LEO formation involve the interconnection process, and therefore for any contested case proceeding the utility relies on interconnection and transmission employee testimony. By continuing to rely on the interconnection process as part of the LEO standard, the Commission's proposed new rules perpetuate this problem and forces transmission personnel into knowing what FERC Order 888 has attempted to proscribe.

Part (c) of the Proposed New Rule I contains a mix of permissible and impermissible requirements. Specifically, Commenters do not object to proposed requirement (c)(i), requiring qualifying facilities to have "control of the site and permission to construct the qualifying facility." Obtaining site control is in the hands of the developer and does not require cooperation from a party like the utility which has no incentive for the project to be completed. Deciding where the project will be located is one of the very first steps in creating a project, so it is likely a developer would obtain site control early in the process of developing a project. Therefore, site control can give the Commission a specific commitment it is looking for without being a barrier to entry.

On the other hand, Commenters object to the inclusion of the remaining requirements that "all required government land use approvals" and "all necessary environmental permits to build the facility" be obtained before a QF can incur a LEO. These processes rely on QFs submitting paperwork and then waiting an indeterminate amount of time for everything to be processed. This creates a large degree of uncertainty for developers working to plan projects. Again, such requirements force the developer to make investment decisions before knowing the avoided cost for the project, which is exactly backward according to the stated purpose of PURPA, as set forth in Order 69. Order 69 at 12,218. Unlike the proposed requirement that a developer have land control,

requiring that the developer have already obtained all necessary permits means that the developer may do everything in its control to commit to sell its power to the utility (such as begin the process for getting all relevant permits), but it would then be waiting on the actions of organizations outside of its control to complete the process before obtaining a LEO. This creates a substantial disincentive to amicable contract formation, and violates FERC directives on LEO formation.

E. The new rule should actively incentivize the utility to negotiate fairly with QF developers.

The Commission's current and proposed rules provide no material incentive for utilities to negotiate reasonably with QF developers. As noted above, although A.R.M. § 38.5.1902(5) references a process for the utility and QF to negotiate a contract, the Commission has consistently been hearing cases resulting from NorthWestern refusing to participate in meaningful negotiations. If this is the case, and NorthWestern does not have to really negotiate (as opposed to making a take it or leave it offer), there is no real reason for the negotiation requirement of A.R.M. § 38.5.1902(5). Under the current rules, the utility has nothing to lose from a contested case proceeding. Since utilities do not make money off QF projects like they do when they own the generating assets, they have an incentive to ensure that QF projects are never able to deliver power to the utility's customers. If a utility is required to litigate a contested case proceeding, its legal fees are theoretically and practically recouped from ratepayers. If the Commission ultimately determines that the QF did form a LEO and the utility has to buy the project's power, the result is that the utility has to comply with an obligation it always had anyway. In short, the utility has little incentive to cooperate in negotiations, and a substantial incentive not to negotiate in a way that leads to an actual agreement between the utility and a QF.

In contrast, the party that incurs a substantial cost due to forced participation in litigation via a contested case proceeding is the developer who must now not only pay the costs of the proceeding, but also bear the cost and risk of a project that has been substantially delayed, sometimes by more than a year. One of the Commission's primary goals in drafting rules should be to reduce reliance on Commission intervention as the solution for every disagreement between the utility and QF developers.

The Commission should incorporate meaningful incentives to negotiation in its new rules. For example, the Commission could enact sanctions for failure to negotiate in good faith. Sanctionable behavior could potentially include a refusal to move off an original offer, refusing to permit access to PowerSimm in a meaningful way, or purposefully offering numbers that are below avoided cost as a way to make it appear as though negotiations are genuine. At this point, NorthWestern is making the pretense of negotiating with developers, and insisting that its PowerSimm generated number is the only right avoided cost estimate. As long as this situation continues, the Commission will continue to have to deal with QF disputes in a way that imposes barriers to entry on QF developers. As FERC has clearly stated to the Commission and NorthWestern once before, LEO rules that create barriers to amicable contract formation do not comply with its regulations. *Hydrodynamics, Inc.*, 146 FERC ¶ 61, 193 at ¶33 (2014) ("The Montana Rule creates. . . a practical disincentive to amicable contract formation because a utility may refuse to negotiate with a QF at all. . . . Such obstacles to the formation of a legally enforceable obligation were found unreasonable by the Commission in *Grouse Creek*, and are equally unreasonable here and contrary to the express goal of PURPA to 'encourage' QF development.").

The Commission should also consider working with the legislature to enact a statute like the Minnesota Public Utilities Commission has whereby a utility must pay a QF's attorneys fees and

costs if the QF is determined to be the "prevailing party" in a contested case proceeding. Minn. Stat. § 216B.164, subd. 5. The Minnesota statute recognizes that a utility will be more likely to engage in negotiations if there is a risk that their failure to acknowledge a legitimate position of a QF might result in being responsible for the legal fees and costs that are caused by the utility's refusal to be reasonable and by the Commission being required to resolve the disputes between the parties.

A less punitive suggestion offered by Mr. Uda at the hearing, is for the Commission staff to facilitate mediation as a means of encouraging negotiation and reaching compromise without requiring a full Commission hearing. The idea as presented by Mr. Uda involves each interested party presenting the Commission staff with their proposed avoided cost and having the staff provide a range of what they thought was reasonable and would be accepted by the Commissioners. This way, the utility and the QF can continue difficult negotiations with more knowledge, but without the full Commission being required to resolve the issues. This solution is less costly for project developers than a full hearing and takes less of the Commission's valuable time and resources to resolve these issues. Once again, the goal here is to create an environment in which the utility and the QF have a reasonable chance at establishing fair contract terms between themselves without Commission intervention.

II. NEW RULE II QUALIFYING FACILITY ACCESS TO AVOIDED COST MODELING DATA

A. Proposed Rule II currently leaves too many loopholes for utilities to exploit to interfere with QFs' ability to use the access effectively.

When QFs have previously attempted to gain access to NorthWestern's proprietary PowerSimm software, the utility placed so many restrictions on access to PowerSimm that the access was, in effect, illusory. In order for this rule to function as the Commission intends, the QFs' rights must be made explicit. For example, the QF must have the ability to take as many notes as

necessary while using the software, and should be able to make adjustments to the parameters and inputs and output runs as the QF gains knowledge and insight as to how the modeling works. During the hearing, NorthWestern's representative, Mr. Bushnell, made it clear that if a QF did a model run using the utility's proprietary software, it would be completed by the QF giving inputs to Ascend Analytics (the software developer) and then receiving the end result, but the QF would not be able "to change the model or run the model."

The proposed rule refers to QF developers being able to make multiple calculations using the utility's software if they make a reasonable request to do so. What constitutes a "reasonable request" by a QF to conduct additional avoided cost calculations using the utility's modeling software? It is unclear whether the utility would be in the position of deciding whether the request is unreasonable. If it is the utility, then its judgment about the reasonableness of a QF developer's request may lead to a dispute that the Commission must decide. If it is the Commission, there is no mechanism currently in place other than a satellite contested case proceeding, again likely initiated by the QF to resolve the reasonableness of the QF developer's request. In either event, the efficiency of such a rule would be outweighed by the anticipated costs. Additionally, the model is very expensive and QF developers should not be forced to spend money on expensive modeling just to figure out what the utility is doing or to establish a lawful and appropriate avoided cost. If the Commission wants to make a fair and open process, then it needs to insist on something affordable and all parties need access to the same information. This is why in the past, Mr. Roger Schiffman, testifying on behalf of QF developers has attempted to rely on publicly available energy forecasts as part of his presentation to the Commission.

Similarly, the requirement that a utility must provide "reasonably transparent data concerning the utility's avoided cost" is ambiguous. What is "reasonably transparent data?" At the April 9

hearing, Mr. Bushnell asserted that NorthWestern was fine with that language in the rule because that was already NorthWestern's practice. Several QF developers in recent proceedings have clearly disagreed with the proposition that NorthWestern has been "reasonably transparent" with the date it has provided. This conclusion is only reinforced by the Commission's decision to include this Proposed Rule II, which is an attempt to increase developer access to NorthWestern's data. Again, who decides the issue under Proposed Rule II if the QF and the utility disagree about how transparent the data must be? These rights need to be specifically laid out for QF developers to be able to take full advantage of the benefit of this rule.

B. The proposed rule still does not address the issue of QFs having access to the modeling software but not having access to the utility's internal input parameters and assumptions, including stochastic assumptions.

The proposed rule only allows QFs to do runs using a utility's proprietary software using the QFs own inputs and assumptions. The issue that has come up during multiple recent Commission hearings is the legitimacy of the utility's (specifically, NorthWestern's) inputs and assumptions used in its own modeling. For example, in the *MTSUN* docket, NorthWestern did its modeling using all resources identified in NorthWestern's 2015 economically optimal portfolio including assets that had not yet been acquired and which a QF project might be able to displace. *See*, *MTSUN, LLC*, Dkt. No. D2016.12.103, Order 7535a at 12-13. In another recent case, *New Colony*, NorthWestern was including an adjustment (the "Long-2" adjustment) in its proprietary modeling despite having been repeatedly told by the Commission not to include it. Without having access to the utility's input and assumptions, a QF still will not truly know what the utility did to reach its avoided cost number. There is also a concern over how the model itself operates, i.e., how it reaches the determination that the utility is long or short, and the stochastic and other parameters that are embedded in the model's operating characteristics.

C. Proposed Rule II does not resolve the issue of "consistent with the utility's avoided cost" because it doesn't answer the question of what happens if a QF runs the software using its own inputs and assumptions and arrives at a different number than the utility.

While this rule is an important step towards making the LEO process run more smoothly, it does not resolve the issue of what transpires if the parties are unable to reach an agreement on the avoided cost determination. Theoretically, such an approach would allow QFs to present better evidence at a contested case proceeding, but it leaves unresolved what would occur if the utility refuses to negotiate off its own calculated number, which has been a repeated problem. Under the proposed rule, the utility will run the model using its inputs and assumptions, and the QF will run the model using a potentially different set of inputs and assumptions. If the modeling results in different calculated avoided cost rates, the utility still has no incentive under the proposed rules to negotiate off its original avoided cost calculation in the direction of the QF's avoided cost calculation. Most likely, if the language of "consistent with the utility's avoided cost" remains in Proposed Rule I, the utility will continue to take the position that it cannot move from its original position and the Commission will still have to adjudicate multiple QF contested cases which are filed due to this very problem.

III. CONCLUSION

In the preamble to FERC's regulations, FERC explicitly stated, "[I]n order to be able to evaluate the financial feasibility of a cogeneration or small power purchase facility, an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility." Order 69 at 12,218. The first step in being able to reasonably estimate the expected return on investment is to have a LEO date from which the developer can confidently develop an avoided cost estimate. QF developers must be able to establish LEO dates very early on in their planning because everything else is dependent on that one date.

In closing, Commenters would like to remind the Commission that several of the issues the rulemaking is aimed at addressing are currently before the courts in various proceedings. While it will most likely take a significant amount of time before these issues are resolved in court, the court may very well have valuable commentary and direction for the Commission on the issues, and the Commission may want to consider that in the timing of its rulemaking.

Respectfully submitted this 25th day of April, 2018

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