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Via electronic filing

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Re: Cypress Creek Renewables' Comments on Proposed Rulemaking
Docket No. N2018.3.15

Cypress Creek Renewables ("CCR") appreciates the opportunity to comment on the Montana Public Service Commission's ("PSC") proposed rule regarding the creation of a legally enforceable obligations ("LEO") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). CCR supports the PSC's efforts to establish a new LEO test that complies with PURPA and that facilitates the PSC's stated goal of amicable contract formation between utilities and Qualifying Facilities ("QFs").

However, CCR opposes the proposed rule as written because it imposes unreasonable and unjustifiable development requirements on the QF that may prevent a QF from securing price certainty despite having unequivocally established a commitment to sell its output to the utility. There is neither a legal nor rational basis for tying establishment of a LEO to development milestones such as site permits and land-use approvals, which have nothing to do with a QF's commitment to sell and are not typically required as a condition for Power Purchase Agreement ("PPA") execution. In addition, the PSC's proposed LEO standard doesn't address the situation where a QF has executed a PPA that has been fully negotiated with the utility, which by itself should be sufficient for LEO formation.

In addition, we are providing limited comments on the PSC's proposed rule regarding QF access to avoided cost data and proposed definition of "Production Profile."

1. Cypress Creek Renewables is a Developer of Qualifying Facilities in Montana.

Founded in 2014, CCR and its affiliates develop, finance, construct, own and operate utility-scale solar and solar plus storage projects across the United States. CCR has approximately 2.2 GW deployed to date and is in active development in approximately 25 states nationwide. The majority of this development to date has been under PURPA, giving CCR a broad national perspective on FERC and state implementation of the law. Since 2015 CCR and its affiliates have been seeking to develop small QFs in Montana pursuant to PURPA.

2. **The Development Milestones in the Proposed Rule Will Prevent QFs from Forming LEOs Even After They Have Unequivocally Committed Themselves to Selling Their Net Output.**

CCR's primary objection to the PSC's proposed LEO rule is that it would impose a number of development hurdles on QFs as conditions for LEO formation. These include requiring a developer 1) to have a legally recognized interest in the real property "such as a lease or ownership interest in the real property"; 2) to have obtained all required government land use approvals; and 3) to have obtained all necessary environmental permits to build the facility. As an initial matter, none of these development items are relevant to the question whether a QF has unequivocally committed to sell its output to the utility – which is the essential requirement for LEO formation under federal law.

In addition, these readiness or project maturity requirements are not required preconditions for a QF to execute a binding PPA (nor should they be) so should not be conditions of LEO formation. Rather, as with other commercial transactions, a party making a binding, enforceable commitment to a counterparty should be held accountable through appropriate damages if it fails to honor its legal obligations for whatever reason. Thus, when a QF establishes a LEO, the project developer voluntarily and knowingly assumes the risks associated with outstanding development items. The utility's sole concern is that the QF delivers the energy and capacity promised under the LEO or PPA, not the minutiae of project development.

Moreover, these elements of the PSC's proposed LEO rule would require a QF to be near-shovel ready before it could establish an unequivocal right to sell power to the utility. These requirements would force a QF into substantial outlays of development capital before it had any certainty on pricing from the utility, creating an undue burden on the QF. These development items can take months or years to secure, and developers cannot be reasonably expected to spend the time or development capital on securing long-lead and expensive development milestones without certainty as to offtake and pricing.

Finally, the PSC's development requirements are vague, creating uncertainty and the potential for litigation about what is and is not sufficient to satisfy these elements of the rule. For example, it is unclear whether an option to lease or purchase, which are the typical instruments for early stage QF site control, would be sufficient to satisfy the rule.

For all of the foregoing reasons, CCR opposes the proposed development requirements contained in subsection (c) of the proposed rule.

3. **The Revised Interconnection Requirement is Reasonable, but Should Provide Flexibility in the Case of Utility Delays.**

CCR believes that the requirement that the QF submit a signed Interconnection Request ("IR") in accordance with the utility's interconnection processes is reasonable. CCR appreciates the PSC reconsidering the requirements imposed under the *Whitehall Wind* standard, and ultimately bringing the proposed rule in line with FERC standards. Regarding the requirement laid out in Section (1)(b)(iv) of the proposed rules relating to QF compliance with utility timelines, CCR would suggest including a provision that allows for flexibility in the event the utility violates its own OATT timelines. Following the same logic that led the PSC to eliminate the Interconnection Agreement ("IA") requirement, the formation of a LEO should not be delayable by actions the utility takes or does not take on interconnection, keeping with the principle that the QF ultimately controls the formation of a LEO. CCR is otherwise supportive of the IR requirement.

4. **The Requirement that the QF Tender an Executed PPA with a Price Term Consistent with the Utility's Avoided Costs Within 14 Days of the Tender is Potentially Problematic.**

Subsection (a) of the proposed rule requires the QF to tender to the utility an executed PPA with a price term consistent with the utility's avoided costs within 14 days of the tender. This requirement is problematic because the QF may not have current avoided cost information or may have a disagreement with the utility regarding the appropriate avoided cost rate. The QF should therefore have the ability to establish a LEO by tendering an executed PPA with its reasonable calculation of the avoided cost rate at the time of tender, subject to an adjustment in the applicable avoided cost rate if the QF's price term is determined to have been inaccurate.

5. **The Proposed Rule Does Not Deal with the Situation Where a QF has Executed and Tendered to the Utility a PPA that has Been Fully Negotiated by the Parties.**

While the Commission's proposed LEO rule appropriately recognizes that a QF should be entitled to establish a LEO without having completed PPA negotiations with the utility, it does not deal with the situation where negotiations have been completed and the QF has tendered a signed PPA to the utility that is consistent with the agreement between the parties. In that circumstance, where the parties have effectively formed a contract and all that remains to fully memorialize that contractual relationship is the utility's signature on the PPA, the QF should be deemed to have established the LEO as of the date it tendered the signed PPA to the utility, with no further requirements.

6. **The PSC Should Consider an Alternative LEO Test Based Solely on the QF's Tender of a Binding, Executed PPA.**

Given that the essential element of LEO formation is the QF's commitment to sell its output to the utility, CCR recommends that the PSC consider adopting a different LEO standard under which the QF establishes a LEO when it tenders a binding, signed PPA to the utility. Where the PSC has approved a form PPA for use in PURPA transactions and an applicable avoided cost tariff, this is a simple matter – the QF can just insert its project specific information into the form PPA with pricing based on the tariff and tender it to the utility. However, where the PSC has not yet approved a form PPA and there is uncertainty about PPA pricing, such uncertainty should not operate to prevent LEO formation by QFs.

CCR recommends that in such situations the QF be deemed to have established a LEO when it tenders a PPA to the utility that binds the QF to sell its output to the utility; provided however, that if the utility proposes modification to the QF's tendered PPA, in order to preserve the LEO as of the date of the PPA tender, the QF must either: (i) execute the modified PPA within 30 days of receipt, or (ii) notify the utility within 30 days of receipt of the modified PPA that it wishes to engage in further negotiations. If the QF exercises option (ii), both parties shall participate in good-faith negotiations to achieve a mutually agreeable resolution. If the negotiations are successful, the QF must execute a final

PPA tendered by the utility reflecting the mutually agreeable resolution of such negotiations within 30 days of receipt. If the negotiations are not successful, the QF must dispute the utility's position on the PPA through the Commission's dispute resolution procedures and execute the final PPA tendered by the utility reflecting the Commission's resolution of the dispute within 30 days of receipt. Where the QF fails to execute a PPA tendered by the utility in accordance with this test within 30 days of receipt, it must reinitiate the LEO formation process by tendering a new signed PPA the utility; provided, however, that a QF may not in doing so establish a subsequent LEO at a higher avoided cost rate than it would have been eligible for under its initial PPA tender.

7. CCR is Generally Supportive of the PSC's Proposed Access to Data Rule, Subject to Certain Modifications.

CCR appreciates the PSC's attempt to improve QF access to utility avoided cost data and supports the proposed rule subject to the following modifications:

(1) At the end of section (1), add the following sentence: "This data shall include any price forecasts of future natural gas prices and wholesale market energy purchases in both heavy-load-hours and light-load-hours."

(2) Insert a new section (3) to read as follows: "(3) If a utility uses a non-proprietary software (e.g. Microsoft Excel) to calculate its avoided cost, the utility must provide a copy of the file within 14 days of receipt of a qualifying facility's request."

(3) Rewrite the first sentence of old section (3)/new section (4) to read as follows: "If a utility uses a proprietary modeling software to calculate its avoided cost, the utility must allow a qualifying facility, upon request, to conduct a reasonable number of avoided cost calculations using the utility modeling software with the qualifying facility's own assumptions and inputs at no cost to the qualifying facility."

(4) Rewrite the last sentence of old section (3)/new section (4) to read as follows: "A utility must accommodate reasonable requests by a qualifying facility to conduct additional avoided cost calculations using the utility's modeling software and may not charge the qualifying facility for use of the modeling software."

We hope these suggested modifications are self-explanatory and that the PSC agrees that they further the intent of the proposed rule to provide QFs with meaningful access to avoided cost data on reasonable terms.

8. The Proposed Definition of a Production Profile is Clear and Correct

CCR appreciates the PSC clarifying the definition of "production profile." This definition is clear and correct as it allows for the self-produced energy production modeling based on widely available data that is the industry standard for renewables.

9. Conclusion

CCR appreciates the PSC undertaking this administrative rulemaking to clarify its LEO standard and make other changes to its rules. The proposed LEO rule removes several obstacles to LEO formation, particularly around interconnection requirements, and clarifies several areas of uncertainty. However, CCR believes the proposed rule needlessly imposes readiness requirements on QFs that are not relevant to a QF's commitment to sell its net energy output. These requirements are inconsistent with other states' interpretations of PURPA as well as FERC rules, and do not comply with best practice. CCR believes that having a fair and clearly established LEO test, as proposed herein, will lead to amicable contract formation between QFs and utilities and ultimately contribute to fewer QF disputes brought before this Commission. Thank you again for the opportunity to present these comments.

Sincerely,

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