

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Montana Megawatts I, LLC and NorthWestern
Energy Division of NorthWestern Corporation

Docket Nos. ER03-1223-001
and ER03-1223-002

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued May 10, 2004)

1. On November 17, 2003, the Montana Public Service Commission (Montana Commission) and the Montana Consumer Counsel (jointly, State Agencies) filed a joint request for rehearing and clarification of the order issued in this proceeding on October 17, 2003, in which the Commission conditionally accepted Montana Megawatts I, LLC (Montana Megawatts) and NorthWestern Energy Division of NorthWestern Corporation's (NorthWestern Energy) (together, Applicants) power purchase agreement, suspended it for a nominal period, and made it effective subject to refund, and established hearing procedures, but held the hearing procedures in abeyance pending settlement judge procedures.¹ In this order, we deny State Agencies' request for rehearing. We also conditionally accept Montana Megawatts' First Revised FERC Rate Schedule No. 1.

Background

2. On August 18, 2003, Applicants filed a Power Purchase Agreement (PPA) between Montana Megawatts and NorthWestern Energy. The PPA provides for Montana Megawatts to sell to its affiliate, NorthWestern Energy, approximately 130

¹ Montana Megawatts I, LLC, 105 FERC ¶ 61,069 (2003).

MW of power available from a new generating facility under construction near Great Falls, Montana (Project) for a term of 20 years.²

3. The Commission conditionally accepted the PPA for filing (subject to a compliance filing addressed below), suspended it for a nominal period and made it effective October 17, 2003, subject to refund, and set it for hearing. The Commission also held the hearing in abeyance to allow for settlement judge procedures.

Request for Rehearing and Clarification

4. The State Agencies argue that: (1) Montana Megawatts' PPA with NorthWestern Energy should be rejected because it is not a sale of energy, but a financing device to impose a 20-year payment obligation on Montana customers and which subsequently will be sold to a non-affiliate; (2) the filing is an attempt to circumvent the jurisdiction of the Montana Commission to determine default supply costs under Montana law; and (3) the application does not comply with the 120-day advanced notice requirements of the Commission's regulations.

Discussion

5. State Agencies argue that Montana Megawatts' filing should be rejected because it is not a sale of electrical energy but an attempt to monetize the sale of 20 years of payment obligations, which would be imposed on Montana customers. The State Agencies explain that Montana Megawatts' parent intends to sell the Project to a non-affiliate, which would complete construction of the plant (which is only partly completed) and sell the resulting power to NorthWestern. State Agencies thus believe that the PPA is purely and exclusively a financing device.³ We do not agree with the State Agencies' characterizations. The filing under consideration requested approval of a power sales contract between Montana Megawatts and NorthWestern Energy for the sale of power by Montana Megawatts to NorthWestern Energy. The filing is thus appropriately before the Commission. That Montana Megawatts' parent may ultimately sell the Project, and transfer the power sales contract at issue here, to an unaffiliated developer, does not make the filing any less appropriately before the Commission.

6. State Agencies further argue that the filing is an attempt to circumvent the jurisdiction of the Montana Commission to determine default electricity supply costs under Montana law, also that the filing interferes with consumer protection and the power purchase may be imprudent. We do not agree with those assertions. First, we

² Applicants stated that more than \$70 million has been invested by Montana Megawatts to develop the Project, and it is approximately 35 percent complete.

³ Rehearing at 6.

understand that the Project is part of a comprehensive, long-term electricity default supply plan presently before the Montana Commission, and nothing in our October 17, 2003 Order denies the Montana Commission the authority to review that supply plan under Montana law. In this regard, we note that, while public utility sales at wholesale in interstate commerce, *i.e.*, sales for resale, are subject to our jurisdiction under the Federal Power Act,⁴ such matters as, for example, the construction or siting of generation are not within the scope of the Commission's authority,⁵ and the prudence of a power purchase likewise typically can be reviewed by a State commission.⁶ Moreover, State Agencies requested and were granted a trial-type evidentiary hearing where the reasonableness of the rates could be addressed and resolved.⁷

7. The State Agencies also argue that the Commission was arbitrary and capricious in waiving, without explanation or good cause, the requirements of section 35.3 of the Commission's regulations that a rate schedule be tendered no more than 120 days prior to commencement of service. We disagree. Montana Megawatts explained that it filed the PPA more than 120 days in advance of the anticipated completion date of the Project (noting that the Project was, as yet, only partially completed) to allow sufficient time for review of the justness and reasonableness of the proposed PPA. Montana Megawatts believed that a timely resolution of issues related to its proposed PPA would facilitate a sale of the Project to a non-affiliated third party who will complete the Project.⁸ Our acting on the proposed PPA in these circumstances, although it had been filed more than 120 days in advance of the commencement of service, was proper and consistent with past practice. In fact, the Commission often reviews and acts on filings involving transactions that will not take place until months or years later – often, similar to this case, because of the need to

⁴ 16 U.S.C. § 824 (2000); *see* 16 U.S.C. §§ 824(d), 824(e) (2000).

⁵ 16 U.S.C. § 824 (b)(1) (2000); *see, e.g.*, Cleco Power LLC, 101 FERC ¶ 61,008 at P 117, *order on reh'g*, 103 FERC ¶ 61,272 (2003); American Municipal Power-Ohio, Inc., 58 FERC ¶ 61,182 at 61,566 (1992).

⁶ *See, e.g.*, Progress Energy, Inc., 97 FERC ¶ 61,141 at 61,628 & n.7 (2001); Central Vermont Public Service Corp., 84 FERC ¶ 61,194 at 61,973-75 (1998).

⁷ October 17, 2003 Order, 105 FERC ¶ 61,069 at P 11, 13; *see* Motion to Intervene and Protest at 23.

⁸ October 17, 2003 Order, 105 FERC ¶ 61,069 at P 4-9 & nn.4-5.

put rate schedules for sales from new generation in place prior to the date service is expected to commence to ensure the financing of that new generation.⁹

8. Accordingly, in light of the discussion above, we will deny State Agencies' request for rehearing.

9. We note that in the period of time since the October 17 Order issued, we have announced a new policy with respect to cost-based PPAs between affiliates.¹⁰ Given that this proposal was filed prior to the date of the Mountainview order, we will not apply the new standard here. However, Montana Megawatt's original filing indicated that a Request for Proposals (RFP) was issued in 2002 in order to survey potential alternatives to this PPA. According to the applicants, that RFP process reinforced their conclusion that this PPA is competitive with other supply options. While this information was merely provided as background by applicants and is not relied upon in either this or the prior order, we note that we would require any new proposals similar to this one to provide greater detail as to the RFP process and results.

Compliance Filing

10. On November 3, 2003, Montana Megawatts filed in Docket No. ER03-1223-001 its First Revised FERC Rate Schedule No. 1. That filing was made in an attempt to comply with our directive calling for revisions to the PPA.¹¹ On November 24, 2003, the State Agencies filed a conditional protest to Montana Megawatt's revised rate schedule. The State Agencies argue that, to the extent the compliance filing seeks to have the Commission revisit the conditional nature of the acceptance of the PPA, the State Agencies protest the request for an October 17, 2003 effective date.

11. Our review indicates that the intent of Montana Megawatts' compliance filing was to simply comply with the Commission's October 17 Order and not to have the Commission revisit the conditional nature of the acceptance of the PPA. No prejudice to the State Agencies' positions will result from our acceptance of the revised rate schedule. However, the proposed compliance filing still does not fully

⁹ See, e.g., PSI Energy, Inc. and Consumers Power Company, 56 FERC ¶ 61,237 at 61,911 & n.29 (1991); Dartmouth Power Associates Limited Partnership, 53 FERC ¶ 61,117 at 61,358 & n.29, 61,361 (1990).

¹⁰ Southern California Edison Co., 106 FERC ¶ 61,183 (2004) (Mountainview).

¹¹ October 17, 2003 Order, 105 FERC ¶ 61,069 at P 15.

comply with the directives of the October 17 Order. While Montana Megawatts incorporated amendments to comply with Order No. 614, it failed to add language to the PPA describing the formula rate cap as directed in the October 17 Order.¹² Therefore, Montana Megawatts is directed to make a further compliance filing which will include the language describing the formula rate cap.

The Commission orders:

- (A) State Agencies' request for rehearing is hereby denied.
- (B) Montana Megawatts is hereby directed to submit a further compliance filing, as discussed in the body of this order, within (15) days of the date of this order.
- (C) Montana Megawatts' compliance filing is hereby conditionally accepted for filing, as modified above, effective October 17, 2003.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹² Id. at P 15.