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## MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regulation

Ryan W. Frank

*Alexander Blewett III School of Law at the University of Montana*, [ryan.frank@umontana.edu](mailto:ryan.frank@umontana.edu)

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***MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regulation*, 472 P.3d 1154  
(Mont. 2020)**

**Ryan W. Frank**

I. INTRODUCTION

MTSUN, LLC (“MTSUN”) initiated negotiations for a power purchase agreement (“PPA”) with NorthWestern Energy (“NorthWestern”) in September 2015 for a potential solar energy facility in eastern Montana.<sup>1</sup> In December 2016, at an impasse in contract negotiations with NorthWestern, MTSUN filed a petition with the Montana Public Service Commission (“PSC”) requesting that the agency exercise its statutory authority to set the terms of the contract for the proposed project.<sup>2</sup> Following MTSUN’s petition, the PSC issued a series of orders and reconsiderations which ultimately reconfigured the entirety of the agreement, including the terms that the parties had previously agreed upon.<sup>3</sup> After exhausting its administrative remedies, MTSUN challenged the PSC’s orders in the Eighth Judicial District Court, Cascade County alleging that the PSC violated the Public Utility Regulatory Policies Act (“PURPA”), Montana’s mini-PURPA (“mini-PURPA”), and the PSC’s own precedent in establishing the terms of the PPA.<sup>4</sup> *MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regulation* provides some insight into the PSC (one of the lesser-known state agencies) and the future of renewable energy in Montana.

II. LEGAL BACKGROUND

In establishing the legal framework, the Montana Supreme Court relied heavily on *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*,<sup>5</sup> a similar case it decided less than one month before its *MTSUN* decision.<sup>6</sup> Understanding these two important cases requires a foundational understanding of PURPA, mini-PURPA, PSC precedent, and the Montana Administrative Procedures Act (“MAPA”).

A. PURPA

The United States Congress enacted PURPA in 1978 to promote the development of renewable energy.<sup>7</sup> Importantly, PURPA mandates

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1. *MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regulation*, 472 P.3d 1154, 1159 (Mont. 2020).

2. *Id.*

3. *Id.* at 1162.

4. *Id.* at 1166.

5. 473 P.3d 963 (Mont. 2020).

6. *MTSUN*, 472 P.3d at 1158.

7. *Vote Solar*, 473 P.3d at 966 (citing 16 U.S.C § 824a-3 (2018)).

that large electric utilities acquire energy from small qualifying facilities (“QFs”) “at *standard-offer rates*.”<sup>8</sup> Under PURPA, small power QFs are those facilities with a capacity equal to or less than 80 megawatts (“MW”) that generate energy from renewable sources, such as solar.<sup>9</sup>

PURPA requires that rates are: (1) reasonable to electricity ratepayers (consumers); and (2) non-discriminatory to QFs in order to promote renewable energy development.<sup>10</sup> PURPA’s regulations expressly state that a rate equal to the avoided costs satisfies these requirements;<sup>11</sup> thus, a utility can purchase energy from a QF at the avoided cost rate. The rate a QF receives is equivalent to the utility’s avoided costs, which are the costs a utility would have incurred if the utility produced the electricity itself or purchased it from a provider other than the QF.<sup>12</sup> The avoided costs method balances the ratepayer’s interests with the renewable energy sector’s interests.<sup>13</sup> Avoided costs can be further sub-divided into avoided-energy and avoided-capacity costs.<sup>14</sup> Energy costs are the direct costs associated with *producing* the energy,<sup>15</sup> whereas capacity costs are the costs associated with *storing and delivering* the energy.<sup>16</sup> The Federal Energy Regulatory Commission (“FERC”), the federal agency tasked with implementing PURPA, directs utilities to submit capacity costs with energy costs for new facilities.<sup>17</sup> By considering both energy and capacity costs, the avoided costs encompass “the lower energy costs that might be associated with the new capacity.”<sup>18</sup>

PURPA allows for the creation of a legally-enforceable obligation (“LEO”).<sup>19</sup> Although it is not technically a contract, the Court states a LEO is a binding commitment that effectively requires both a QF to sell and an electric utility to purchase produced energy.<sup>20</sup> Regarding its policy purpose, the LEO “‘prevent[s] an electric utility from avoiding its PURPA obligation *by refusing to sign a contract,*’ or from ‘*delaying the signing of a contract,*’ so that ‘a later and lower avoided cost is applicable.’”<sup>21</sup> To

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8. *Id.* (citing 18 C.F.R. §§ 292.201, 292.203–.204 (2020) (emphasis added)).

9. *Id.*

10. *Id.* (citing 18 C.F.R. § 292.304(a)).

11. 18 C.F.R. § 292.304(b)).

12. *Vote Solar*, 473 P.3d at 966.

13. *Id.* (See Southern California Edison Company San Diego Gas & Electric Company, Commission Opinion, No. EL95-16-001, 1995 WL 327268 (FERC June 2, 1995) (Purchasing energy at the avoided cost rate means the rate at which the utility would pay for that energy if it produced it itself or purchased it from another supplier. Therefore, the consumer pays the same rate).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 966–67.

18. *Id.* at 967.

19. *MTSUN, LLC v. Mont. Dep’t of Pub. Serv. Regulation*, 472 P.3d 1154, 1158–59 (Mont. 2020).

20. *Id.* at 1159.

21. *Id.* at 1171.

further this purpose, reviewing courts look to the commitment of the QF rather than actions by the utility so that the utility and QF are equally committed.<sup>22</sup> Under PURPA regulations, the avoided cost rate for a QF is determined at the time parties establish a LEO.<sup>23</sup> Importantly, FERC stated that a LEO is created either at the time the QF and utility execute a contract, or at the time that a QF petitions its state utility commission due to some unnecessary delay or a utility's refusal to execute the agreement.<sup>24</sup>

Although it does not provide a specific contract length for QFs, PURPA requires public utilities to encourage long-term contracts, consistent with its underlying purpose.<sup>25</sup> Per the court, long-term contracts improve the economic viability for QFs and their projects.<sup>26</sup>

### B. Mini-PURPA & the PSC's Precedent

Montana adopted and enacted its version of PURPA, known as mini-PURPA, in 1981.<sup>27</sup> Like its federal predecessor, mini-PURPA promotes the economic viability of QFs in Montana.<sup>28</sup> In Montana, the PSC is the agency tasked with implementing mini-PURPA.<sup>29</sup>

Three areas of PSC precedent are pertinent here: (1) avoided-cost rates; (2) carbon adders; and (3) contract lengths. In calculating avoided-cost rates, historically, the PSC has used the proxy method. Under the proxy method, utilities base their avoided-cost calculation on “the projected capacity and energy costs of the utility’s next planned resource additions.”<sup>30</sup> The proxy method assumes that the purchase of energy from the QF, in theory, allows the utility to postpone construction of its next resource addition because it is able to source the energy from another facility at the same rate.<sup>31</sup> In calculating the capacity contribution, another avoided-cost consideration, the PSC has typically considered the hours an avoided-capacity facility is actually performing.<sup>32</sup>

Since 2012, the PSC has included carbon adder, a tool for incorporating environmental costs, in its calculation of avoided-cost rates.<sup>33</sup> The PSC approved this practice for hydroelectric QFs in 2014 and for small wind QFs in 2017.<sup>34</sup>

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22. *Id.* at 1159.

23. *Id.* (quoting 18 C.F.R § 292.304(d)(2)(ii) (2020)).

24. *Id.* (citing Cedar Creek Wind, LLC, Commission Opinion, No. EL11-59-000, 2011 WL 4710848 (FERC Oct. 4, 2011)).

25. *Vote Solar v. Mont. Dep’t of Pub. Serv. Regulation*, 473 P.3d 963, 967 (Mont. 2020).

26. *Id.*

27. *Id.*

28. *Id.* at 967–68.

29. *Id.* at 967.

30. *Id.* at 968.

31. *Id.*

32. *Id.* at 969.

33. *Id.*

34. *Id.*

The PSC has historically allowed NorthWestern to enter into long-term contracts with QFs without interference.<sup>35</sup> Directly preceding the issuance of its 2015 resource procurement plan, NorthWestern entered into seven 25-year contracts with wind, solar, and hydroelectric QFs.<sup>36</sup>

### C. MAPA

MAPA provides the appropriate standards of review for administrative agency decision appeals.<sup>37</sup> MAPA allows the reviewing court to “reverse or modify an agency decision” when the decision “exceeds its statutory authority, is affected by legal error, clearly erroneous in light of the whole record, arbitrary or capricious, or characterized by an abuse of discretion” and the decision affects the rights of a party.<sup>38</sup> The courts give a certain level of deference to agency decisions to account for the agency’s expertise in the area if the decision provides “a rational connection between the facts found and the choice made.”<sup>39</sup>

## III. FACTUAL BACKGROUND

MTSUN proposed an “80 MW single-axis tracking solar energy project” in eastern Montana.<sup>40</sup> In September 2015, seeking a buyer for its produced energy, MTSUN initiated discussions with NorthWestern, an electric utility in Montana.<sup>41</sup> Following initial correspondence between the parties, MTSUN was unable to contact NorthWestern despite its repeated attempts.<sup>42</sup> This period of prolonged silence continued for approximately six months before MTSUN filed an informal complaint with the PSC alleging that NorthWestern’s silence violated PURPA.<sup>43</sup>

Following the complaint, NorthWestern resumed contact and contract negotiations continued between the parties.<sup>44</sup> Between May 13, 2016, and November 30, 2016, MTSUN received six avoided cost estimates from NorthWestern.<sup>45</sup> These avoided cost estimates from NorthWestern fluctuated significantly from one estimate to another as displayed in the variance from the first avoided cost estimate to the

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35. *Id.*

36. *Id.*

37. MTSUN, LLC v. Mont. Dep’t of Pub. Serv. Regulation, 472 P.3d 1154, 1168 (Mont. 2020).

38. *Id.* at 1169 (citing MONT CODE ANN. §§ 2-4-702, 69-3-402 (2019)).

39. *Id.* (citing Mont. Env’tl. Info. Ctr. v. Dep’t of Env’tl. Quality, 451 P.3d 493, 501 (Mont. 2019)).

40. *Id.* at 1159.

41. *Id.*

42. *Id.*

43. *Id.* at 1159–60.

44. *Id.* at 1160.

45. *Id.* at 1160–61.

second.<sup>46</sup> NorthWestern pegged its first avoided cost estimate at \$46.64 per megawatt hour (“MWh”) and its second at \$35.48/MWh.<sup>47</sup> The sixth and final avoided cost estimate came in at \$43.48/MWh after a series of back and forth negotiations between the parties in which NorthWestern, on two occasions, claimed to have made an error in its avoided cost calculations.<sup>48</sup> The parties essentially agreed to terms for the avoided *energy* costs with NorthWestern estimating these costs to be \$40.86 and MTSUN estimating these costs to be \$40.18.<sup>49</sup> However, because MTSUN utilized the “proxy method” and NorthWestern utilized the “peaker method” for calculating avoided *capacity* costs, the parties were unable to agree on the avoided capacity costs.<sup>50</sup> Importantly, the proxy method relies on a future energy resource, whereas the peaker method relies on “the utility’s [current] least cost resource” in comparing avoided costs.<sup>51</sup>

At an impasse in negotiations regarding the avoided capacity costs, MTSUN petitioned the PSC on December 23, 2016 to establish terms for the PPA between the parties.<sup>52</sup>

#### IV. PROCEDURAL HISTORY

In its petition, MTSUN requested that the PSC resolve disputes over NorthWestern’s “obligation to purchase MTSUN’s electric generation.”<sup>53</sup> MTSUN contended that NorthWestern employed tactics to delay negotiations by not responding to communications from MTSUN as well as sending highly variable avoided cost estimates.<sup>54</sup> MTSUN further contended that NorthWestern’s actions and avoided cost estimates were both inconsistent with what PURPA, mini-PURPA, and their regulations require.<sup>55</sup>

In July 2017, the PSC issued Final Order No. 7535a (“First Order”) in response to MTSUN’s petition following a hearing and work session.<sup>56</sup> The First Order reconfigured the terms of the PPA so significantly that even terms the parties essentially agreed upon initially were changed.<sup>57</sup> The First Order determined (1) a LEO had not been established; (2) the correct avoided energy cost was \$16.98/MWh, not approximately \$40/MWh as the parties had agreed; (3) the carbon adder calculation would no longer be considered in avoided cost calculations; (4) the correct

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46. *Id.* at 1160.  
47. *Id.*  
48. *Id.* at 1160–61.  
49. *Id.* at 1161 (emphasis added).  
50. *Id.* (emphasis added).  
51. *Id.*  
52. *Id.*  
53. *Id.*  
54. *Id.* at 1162.  
55. *Id.*  
56. *Id.*  
57. *Id.*

avoided capacity cost was \$10.53/MWh; and (5) the contract length needed to be reduced from 25 to ten years.<sup>58</sup>

Both MTSUN and NorthWestern requested that the PSC reconsider the First Order, with NorthWestern taking issue with the contract length, and MTSUN objecting to all five determinations.<sup>59</sup> On reconsideration, the PSC issued its Order on Reconsideration, Order No. 7535b (“Second Order”).<sup>60</sup> The Second Order increased the contract length from ten to 15 years but left the other determinations in the First Order untouched.<sup>61</sup>

MTSUN appealed the Second Order to the Eighth Judicial District Court, Cascade County, and on June 18, 2019, the district court reversed the Second Order and remanded it back to the PSC.<sup>62</sup> In its order, the district court instructed the PSC to: (1) assign a 25-year contract length; (2) assign a carbon adder as calculated by the PSC staff; (3) use December 23, 2016 as the date in which a LEO was established; and (4) calculate the avoided capacity cost based on an 18 MW internal combustion engine, consistent with NorthWestern’s 2015 resources plan.<sup>63</sup>

Following the district court’s decision and a denied request for a stay by the same court, NorthWestern filed a motion with the Montana Supreme Court requesting a stay of the district court’s order.<sup>64</sup> The Court denied this motion on grounds that MTSUN would be personally harmed by the stay, whereas NorthWestern would not suffer irreparable harm if the stay were denied.<sup>65</sup>

In response to the district court’s decision, the PSC issued Order No. 7535c (“Third Order”).<sup>66</sup> In doing so, the Third Order recalculated the avoided capacity costs based on an 18 MW internal combustion engine.<sup>67</sup> The Third Order additionally contained a directive to NorthWestern to include in NorthWestern’s PPA with MTSUN a clause that the PPA is “terminated or void if the June 18 District Court Order is overturned or altered in any manner.”<sup>68</sup> This clause in the contract, an apparent rebuke of the district court’s order, essentially had the same effect as a court ordered stay.<sup>69</sup>

The PSC and NorthWestern (collectively “Appellants”) appealed the district court’s decision to the Montana Supreme Court.<sup>70</sup> The case was

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58. *Id.*  
59. *Id.*  
60. *Id.*  
61. *Id.*  
62. *Id.* at 1166.  
63. *Id.*  
64. *Id.* at 1168.  
65. *Id.*  
66. *Id.*  
67. *Id.*  
68. *Id.*  
69. *Id.*  
70. *Id.* at 1154.

submitted on briefs on January 15, 2020, and decided by the Court on September 22, 2020.<sup>71</sup>

## V. MONTANA SUPREME COURT DECISION

In reviewing the district court’s decision, the Court determined whether: (1) the PSC acted arbitrarily and unlawfully in finding that a LEO was not created;<sup>72</sup> (2) the PSC overstepped its statutorily-provided authority in dismantling the contract terms agreed to by the parties;<sup>73</sup> and (3) the PSC acted arbitrarily and capriciously in its calculation of the capacity contribution.<sup>74</sup>

### 1. A. Legally-Enforceable Obligation

In assessing whether a LEO was established, the Court first determined whether it had jurisdiction over the issue. Appellants contended the Court lacked jurisdiction to review the PSC’s decision regarding the LEO.<sup>75</sup> Appellants’ argument rested on a long-standing PURPA issue that causes confusion for both implementers of the act and those regulated by it.<sup>76</sup> The point of confusion pivots around whether the challenge involves an implementation challenge or an as-applied challenge.<sup>77</sup> Appellants contended that MTSUN’s LEO complaint was an implementation challenge, and thus, only federal courts had jurisdiction over the issue.<sup>78</sup>

The Court rejected Appellants’ assertion for several reasons. The Court stated federal courts have determined adjudication at the state level to be foundational in enforcing rights under PURPA.<sup>79</sup> Additionally, the Court explained that Section 210 of PURPA “provides for state judicial review respecting ‘any proceeding conducted by a State regulatory authority’ for purposes of ‘implementing any requirement of a rule.’”<sup>80</sup> With support from case law and the plain-language of PURPA itself, the Court determined that jurisdiction over MTSUN’s LEO challenge was appropriate.<sup>81</sup>

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71. *Id.*

72. *Id.* at 1169.

73. *Id.* at 1173.

74. *Id.* at 1174–75.

75. *Id.* at 1169.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* (citing *F.E.R.C. v. Mississippi*, 456 U.S. 742, 761 (1982); *Portland Gen. Elec. Co. v. Fed. Energy Regulatory Comm’n*, 854 F.3d 692, 698 (D.C. Cir. 2017)).

80. *Id.* at 1169–70 (quoting 16 U.S.C § 824a-3(g)(1) (2018)).

81. *Id.* at 1170.



Next, the Court determined the lawfulness of the PSC's *Whitehall Wind* LEO test.<sup>82</sup> This test requires that a QF "tender a PPA to the utility with a price term consistent with the utility's avoided cost."<sup>83</sup> The PSC claimed this requirement is not an insurmountable obstacle to obtaining a LEO.<sup>84</sup>

Instead, the Court found that the *Whitehall Wind* LEO test is not aligned with PURPA as it essentially requires a QF and utility to be in absolute agreement regarding avoided cost rates before a LEO is established.<sup>85</sup> The Court rejected PSC's interpretation of the *Whitehall Wind* test because that interpretation would nullify the policy purpose of a LEO. The Court reasoned that under this interpretation, utilities would not be discouraged from bad-faith acts if a LEO is only established upon complete agreement by the parties.<sup>86</sup> The Court was unpersuaded by the PSC's argument that "MTSUN was 'not required to predict the precise avoided cost'" because MTSUN and NorthWestern were within one dollar of one another in their proposed avoided energy costs.<sup>87</sup>

In application of its *Whitehall Wind* test, the PSC determined that a LEO was not established because "NorthWestern gave MTSUN several avoided-cost calculations."<sup>88</sup> In rejecting this argument, the Court relied on a FERC order that "extensive negotiations between parties are persuasive" and support a finding that the QF has committed itself to selling electricity to the utility.<sup>89</sup> Further, in a prior decision, the Court concluded that evidence of a utility's refused negotiations alone is insufficient to show a QF's commitment.<sup>90</sup>

The Court determined, among other things, MTSUN's site control, possession of the necessary permits, initiation of feasibility studies, two land holdings, performance of an environmental assessment, and possession of a right-of-way permit showed MTSUN's commitment to the proposed project and were sufficient to establish a LEO.<sup>91</sup> In addition to determining that a LEO had been established, the Court deemed the PSC's *Whitehall Wind* LEO test, as applied to MTSUN's December 23, 2016, petition to be "unlawful under PURPA, FERC regulations, and Montana's mini-PURPA."<sup>92</sup>

Under its analysis of the LEO issue, the Court determined that a LEO was established on December 23, 2016, the date that MTSUN filed

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82. *Id.* at 1170–71 (referencing *Whitehall Wind, L.L.C. v. Mont. Pub. Serv. Comm'n*, 347 P.3d 1273 (Mont. 2015)).

83. *Id.* at 1171.

84. *Id.* at 1170–71.

85. *Id.* at 1171.

86. *Id.*

87. *Id.*

88. *Id.* at 1170–71.

89. *Id.* at 1171 (citing *Cedar Creek Wind, LLC, Commission Opinion*, No. EL11-59-000, 2011 WL 4710848 (FERC Oct. 4, 2011)).

90. *Id.* (citing *Whitehall Wind, LLC. V. Mont. Pub. Serv. Comm'n*, 347 P.3d 1273 (Mont. 2015)).

91. *Id.* at 1172.

92. *Id.*

its petition with the PSC.<sup>93</sup> Under PURPA’s implementing regulations, a QF is “entitled to its avoided-cost calculation ‘at the time the obligation is incurred.’”<sup>94</sup> Ultimately, this means MTSUN is entitled to a 25-year agreement with an avoided-energy cost rate of \$28.68/MWh as well as a carbon adder of \$9.65/MWh.<sup>95</sup>

### B. Contract Terms

The Court next determined whether the PSC acted beyond its scope of authority in issuing the First Order by effectively dismantling the parties’ previously agreed-upon contract terms.<sup>96</sup> In Montana, state agencies are limited to the powers delegated to them by the state legislature.<sup>97</sup>

The Court determined the PSC’s dismantling of agreed-upon contract terms to be “contrary to federal and state law, FERC regulations, and FERC precedent.”<sup>98</sup> Because FERC prohibits state utility commissions from creating barriers or disincentives that could deter a QF and utility from entering into an agreement, the Court found that PURPA effectively supports the freedom to contract.<sup>99</sup> Here, the Court found the PSC’s altering of agreed-upon contract terms to directly contradict FERC’s principle that state utility commissions shall not create barriers to a party’s ability to contract.<sup>100</sup> Allowing the PSC to alter previously agreed-upon terms would have the practical effect of allowing the PSC to create the agreement and all of its terms.<sup>101</sup>

The Court also found the PSC’s dismantling of agreed-upon contract terms to be inconsistent with the agency’s authority to engage in quasi-judicial actions.<sup>102</sup> Under Montana law, “the PSC’s review is limited to ‘making determinations in *controversies*.’”<sup>103</sup> Accordingly, the PSC’s review is restricted “to only those controversies and issues that are disputed by the parties.”<sup>104</sup> Because neither MTSUN or NorthWestern disputed the agreed-upon contract terms, the Court determined the agreed-upon contract terms were not controversies under Montana law; therefore, the PSC exceeded its authority in re-writing certain provisions of the contract.<sup>105</sup>

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93. *Id.*

94. *Id.* at 1172–73 (citing 18 C.F.R § 292.304(d)(2)(ii) (2020)).

95. *Id.* at 1173.

96. *Id.*

97. *Id.*

98. *Id.* at 1174.

99. *Id.* at 1173.

100. *Id.* at 1174.

101. *Id.*

102. *Id.*

103. *Id.* (quoting MONT. CODE ANN. § 2-15-102(10) (2019)).

104. *Id.* (quoting MONT. CODE ANN. § 69-3-603 (2019)).

105. *Id.* at 1174.

### C. Capacity Contribution

Finally, the Court determined the PSC acted arbitrarily and capriciously in its calculation of the capacity contribution. In arriving at the capacity contribution, the PSC based its calculation on an aeroderivative unit (“AERO unit”), despite NorthWestern’s next planned generation unit being three internal combustion engine (“ICE”) units.<sup>106</sup> MTSUN contended that by basing the capacity contribution on the AERO unit, the PSC assumed that NorthWestern would not need additional capacity until 2025—the time at which the AERO unit would be available—despite NorthWestern maintaining a 28% deficit at the time of the Second Order and, therefore, the PSC violated PURPA.<sup>107</sup> To support its reliance on the AERO unit, the PSC claimed the AERO unit was appropriate because “MTSUN’s solar project cannot perform the same functions as NorthWestern’s planned 2019 ICE units.”<sup>108</sup>

When purchasing electricity from a QF allows the utility to delay “the addition of new capacity, then the avoided cost of the new capacity . . . should be used.”<sup>109</sup> Additionally, under FERC guidance, new capacity is based on “those resources planned for development contained in NorthWestern’s integrated resource plan.”<sup>110</sup> Furthermore, FERC has provided that its regulations guide public utility commissions in “determining a utility’s avoided cost of acquiring the *next unit of generation*.”<sup>111</sup> The Court relied on FERC’s guidance as well as the Court’s holding in *Whitehall Wind, LLC v. Mont. Pub. Serv. Comm’n*<sup>112</sup> to determine that the PSC failed “to rely on NorthWestern’s actual and full avoided costs contrary to PURPA, FERC regulations and precedent, and this Court’s precedent.”<sup>113</sup>

Additionally, the Court concluded that “avoided-cost calculations must be based on NorthWestern’s next planned unit of generation.”<sup>114</sup> Based on the FERC guidance and its own precedent, the Court determined the PSC acted unlawfully in basing its capacity contribution calculation on the AERO unit.<sup>115</sup> The Court also held that “whether a QF can perform

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106. *Id.* at 1174–75.

107. *Id.*

108. *Id.*

109. *Id.* at 1175 (citing Small Power Producing and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12214, 12216 (Feb. 25, 1980)).

110. *Id.*

111. *Id.* (citing California Public Utilities Commission, Commission Opinion, No. EL10-64-001, 2010 WL 4144227 (FERC Oct. 21, 2010)).

112. *Id.* (citing 223 P.3d 907, 910 (Mont. 2010) (the Court held that “avoided costs ‘must be reasonable and based on *current* avoided least cost resource data.’”))

113. *Id.*

114. *Id.*

115. *Id.*

exactly the same service of a utility's next planned generation unit is not a factor that PURPA requires consideration of in determining avoided costs" because the performance differences are accounted for "in the avoided capacity cost payments since MTSUN is only compensated for avoided capacity costs when it is contributing capacity during NorthWestern's peak load hours."<sup>116</sup>

The Court affirmed the district court's decision after finding that the PSC's actions while setting MTSUN's PPA terms were unlawful and, therefore, arbitrary and capricious at almost every step of the process.<sup>117</sup> These actions ultimately had the effect of "deflating the economic feasibility of MTSUN's project" which directly contradicts PURPA's policy purpose.<sup>118</sup> The Court additionally clarified that "MTSUN is entitled to the rates and contract terms set forth" in the Court's opinion.<sup>119</sup>

## VI. CASE ANALYSIS

Less than one month before its *MTSUN* decision, the Court decided *Vote Solar*, a case with many similarities to *MTSUN*. Taken together, the cases provide insight into the oftentimes ad hoc, piecemeal decisions issued by the elected commissioners of the PSC. To fully understand what these cases say about the PSC, the application of PURPA in Montana, and the future of renewable energy in Montana, one must first compare the overlap in the *MTSUN* and *Vote Solar* decisions.

### A. Comparing *Vote Solar* and *MTSUN*

*Vote Solar* stemmed from a challenge to a PSC order by *Vote Solar* and the Montana Environmental Information Center (collectively "Appellees").<sup>120</sup> Prior to the PSC orders at issue, NorthWestern submitted its biennial avoided cost application with the PSC, in which it proposed significant cuts to the standard-offer rates that NorthWestern must pay small QFs.<sup>121</sup> In Order Nos. 7500c and 7500d (collectively "Vote Solar Orders"), the PSC confirmed NorthWestern's proposed cuts to the standard-offer rates for small QFs.<sup>122</sup>

Appellees contended that in issuing the *Vote Solar* Orders, the PSC: (1) "arbitrarily and unlawfully reduced solar QF standard-offer rates by excluding carbon dioxide emissions costs and NorthWestern's avoided costs of operating its internal combustion engine resource units from the avoided-cost rate;" (2) "arbitrarily and unreasonably calculated solar QF's capacity contribution in determining avoided costs;" and (3) "arbitrarily

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116. *Id.* (citing 18 C.F.R. § 292.304(e) (2020)).

117. *Id.* at 1176.

118. *Id.*

119. *Id.*

120. *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*, 473 P.3d 963, 965 (Mont. 2020).

121. *Id.* at 969–70.

122. *Id.* at 965.

and unreasonably reduced maximum-length contracts to 15 years for solar QFs.”<sup>123</sup>

Between the two cases, only the issue regarding capacity contribution calculations was expressly raised in each.<sup>124</sup> However, there is considerable overlap in the PSC’s processes and all of the issues are closely intertwined, often involving a similar analysis for multiple issues. The first orders in both *MTSUN* and *Vote Solar* were issued by the PSC on July 21, 2017.<sup>125</sup> Like the First Order<sup>126</sup> and the Second Order<sup>127</sup> in *MTSUN*, the *Vote Solar* Orders focused on: (1) avoided costs; (2) carbon adder; and (3) contract length.<sup>128</sup>

In calculating avoided costs, the PSC was mostly consistent in its orders for both *MTSUN* and *Vote Solar*. In both cases: (1) the PSC calculated avoided energy costs and avoided capacity costs separately from one another;<sup>129</sup> (2) the PSC relied on the AERO unit as opposed to the ICE units;<sup>130</sup> and (3) the PSC utilized the SPP methodology for capacity contributions.<sup>131</sup> Where the PSC’s orders varied between the two cases was its calculation of avoided energy costs. The PSC used the peaker methodology in *MTSUN*<sup>132</sup> but used the proxy methodology in *Vote Solar*.<sup>133</sup>

In both orders relevant to *MTSUN* and *Vote Solar*, the PSC departed from its own precedent by not using a carbon adder in its avoided-cost calculations.<sup>134</sup> Additionally, the PSC justified its actions in both cases by explaining “that ‘the political forces that once indicated environmental regulatory action at the federal level was likely in the reasonably foreseeable future has diminished and, accordingly, the likelihood of carbon emissions regulation has decreased.’”<sup>135</sup> The *Vote Solar* court found this type of reasoning to be arbitrary because it is not “technical or scientific knowledge worthy of deference.”<sup>136</sup>

The third key area of similarity between the two decisions rests in the contract length determinations. In both *MTSUN* and *Vote Solar*, the PSC’s initial orders cut contract lengths for QFs from 25 to ten years, and then later increased to 15 years after NorthWestern requested the PSC

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123. *Id.* at 966.

124. *Id.*; *MTSUN, LLC v. Mont. Dep’t of Pub. Serv. Regulation*, 472 P.3d 1154, 1158 (Mont. 2020).

125. *Vote Solar*, 473 P.3d at 970; *MTSUN*, 472 P.3d at 1162.

126. *See MTSUN*, 472 P.3d at 1162.

127. *See MTSUN*, 472 P.3d at 1162.

128. *Vote Solar*, 473 P.3d at 970–73.

129. *Id.* at 970–71; *MTSUN*, 472 P.3d at 1163–65.

130. *Vote Solar*, 473 P.3d at 971; *MTSUN*, 472 P.3d at 1165.

131. *Vote Solar*, 473 P.3d at 971; *MTSUN*, 472 P.3d at 1164.

132. *MTSUN*, 472 P.3d at 1163.

133. *Vote Solar*, 473 P.3d at 971.

134. *Id.* at 972; *MTSUN*, 472 P.3d at 1164.

135. *Vote Solar*, 473 P.3d at 972; *MTSUN*, 472 P.3d at 1164.

136. *Vote Solar*, 473 P.3d at 977 (citing *Mont. Env’tl. Info. Ctr. v. Dep’t of Env’tl. Quality*, 451 P.3d 493, 501 (Mont. 2019)).

reconsider its decision.<sup>137</sup> The Court determined that the PSC’s decision regarding contract length directly contradicted PURPA’s requirements that “contracts must be long enough to ‘encourage’ and ‘enhance’ the economic feasibility of QFs.”<sup>138</sup>

In *Vote Solar*, the Court affirmed the district court’s decision on all issues.<sup>139</sup> Additionally, although not expressly stated by the Court in *Vote Solar* like it was in *MTSUN*, the Court’s analysis provided the impression that the methodologies used by the PSC at every step gave the practical effect of “deflating the economic feasibility” for new QFs in Montana.<sup>140</sup>

### B. The PSC

Public utility commissions generally vary state-by-state regarding their composition, authority, and duties. The Montana Code Annotated entrusts the PSC with the responsibility to “supervise and regulate the operations of public utilities.”<sup>141</sup> The commission’s responsibilities under this statute have evolved considerably since the early twentieth century when the PSC’s primary responsibility was regulation of the railroads.<sup>142</sup> Today, the PSC still maintains regulatory authority over the railroads, in addition to its regulatory authority over water, natural gas, and of course, electricity.<sup>143</sup> The composition of the PSC has also evolved significantly since the early twentieth century. Until 1974, it was comprised of a three-member board chosen by the electorate to serve staggered terms of six-years.<sup>144</sup> Now, the board is comprised of five elected commissioners who serve four-year staggered terms as officers of the state.<sup>145</sup> Commissioners are limited to two terms (eight years) within a 16-year time span.<sup>146</sup>

The PSC, by its own account, is one of the smallest government agencies in Montana.<sup>147</sup> Despite its size, the PSC and its commissioners have received a disproportionate amount of bad publicity in recent years including a hacked email scandal, absence at PSC meetings,<sup>148</sup> and a “hot-

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137. *Id.* at 972–73; *MTSUN*, 472 P.3d at 1162.

138. *Vote Solar*, 473 P.3d at 982.

139. *Id.* at 983.

140. *See MTSUN*, 472 P.3d at 1176.

141. MONT CODE ANN. § 69-1-102 (2019).

142. State of Montana, *What We Do For You*, PUBLIC SERVICE COMMISSION, <http://psc.mt.gov/About-Us/What-We-Do> (last visited Oct. 25, 2020).

143. *Id.*

144. *Id.*

145. MONT CODE ANN. §§ 69-1-103, 69-1-105(1) (2019).

146. MONT CODE ANN. § 69-1-105(3).

147. State of Montana, *supra*.

148. *Guest opinion: Time for a change on the Public Service Commission*, BILLINGS GAZETTE, (Oct. 23, 2020) [https://billingsgazette.com/opinion/columnists/guest-opinion-time-for-a-change-on-the-public-service-commission/article\\_658000ed-06a4-522b-afb3-39d395cda631.html](https://billingsgazette.com/opinion/columnists/guest-opinion-time-for-a-change-on-the-public-service-commission/article_658000ed-06a4-522b-afb3-39d395cda631.html).

mic” incident that was openly hostile to renewable energy projects.<sup>149</sup> This “hot-mic” incident involved a recording of Commissioner Bob Lake (“Lake Recording”) “discussing how a 10-year contract term and low avoided-cost rate would kill QF development in Montana altogether and that ‘dropping the rate that much probably took care of the whole thing.’”<sup>150</sup>

In addition to the Lake Recording, MTSUN provided the district court with three op-eds penned by Commissioners Brad Johnson, Roger Koopman, and Tony O’Donnell.<sup>151</sup> The three pieces were all openly hostile to solar energy development for QFs.<sup>152</sup> In Montana, as elected officials, candidates for the PSC run on partisan platforms in the general election with candidates from each of the two major parties.

Under its statutorily-delegated authority, the PSC has the power to “adopt reasonable and proper rules relative to all inspections, tests, audits, and investigations; adopt and publish reasonable and proper rules to govern its proceedings; and regulate the mode and manner of all investigations and hearings of public utilities and other parties before it.”<sup>153</sup> Although the statute providing the PSC with its powers expressly states that the PSC commissioners do not possess judicial powers,<sup>154</sup> they still clearly have significant control over inspections, investigations, and other proceedings.<sup>155</sup>

Another key component of the PSC is that the Montana Department of Public Service Regulation provides staff (“PSC Staff”) support which includes “economists, accountants, attorneys, rate analysts, enforcement and compliance personnel, and support staff.”<sup>156</sup> As seen in both *MTSUN* and *Vote Solar*, the PSC Staff, comprised of technical experts, do not share a typical supervisor-subordinate relationship with the commissioners that some might expect; this disconnectedness allows for the PSC Staff to provide pushback when it disagrees with the commissioners without fear of retaliation.<sup>157</sup> Importantly, although the PSC commissioners are in no way confined by staff recommendations, the Court in *MTSUN* did reference the PSC staff memo as a footnote in supporting its decision.<sup>158</sup>

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149. *MTSUN, LLC v. Mont. Dep’t of Pub. Serv. Regulation*, 472 P.3d 1154, 1166–67 (Mont. 2020).

150. *Id.*

151. *Id.* at 1166; *see* State of Montana, Commissioners, PUBLIC SERVICE COMMISSION, <http://psc.mt.gov/About-Us/Commissioners> (last visited Oct. 25, 2020).

152. *MTSUN*, 472 P.3d at 1166.

153. MONT CODE ANN. § 69-1-103(2) (2019).

154. MONT CODE ANN. § 69-1-103(1).

155. *See* MONT CODE ANN. § 69-3-103(2)(a)-(b).

156. State of Montana, *supra* note 141.

157. *Vote Solar v. Mont. Dep’t of Pub. Serv. Regulation*, 473 P.3d 963, 973 (Mont. 2020); *MTSUN*, 472 P.3d at 1165–66.

158. *MTSUN, LLC v. Mont. Dep’t of Pub. Serv. Regulation*, 472 P.3d 1154, 1162, n.23 (Mont. 2020).

### C. *The Future of Renewable Energy in Montana*

In looking at the Court's decisions in *MTSUN* and *Vote Solar* as well as the inner workings of the PSC, an image of the future of renewable energy regulation in Montana begins to form. Assuming a similar composition of both the PSC and the Montana Supreme Court in the years moving forward, a few key takeaways can be made: (1) the Court provides a crucial check on the PSC; (2) allowing partisan, elected officials to regulate the state's utilities both lends itself to, and encourages politics to become a pervasive force in the sourcing of Montana's electricity; and (3) these cases establish important precedent that constricts the PSC's interpretation and application of PURPA, mini-PURPA, and the relevant regulations for each.

First, both *MTSUN* and *Vote Solar* show the role the Court plays in reviewing the PSC's actions. As with all state agencies, administrative appeals of contested cases arising from the PSC's actions are subject to MAPA review.<sup>159</sup> MAPA provides that the Court must give deference to agency decisions that are within its statutory authority and well-reasoned.<sup>160</sup> It should be noted, however, that the process leading up to the Court's review of an action by the PSC is a long one. In *MTSUN*'s case, they initiated negotiations with NorthWestern in September 2015, and officially petitioned the PSC to intervene in December 2016.<sup>161</sup> This means *MTSUN* spent roughly four years filing petitions with the PSC, appealing to the district court, and then fighting an appeal at the Montana Supreme Court. In addition to the attorney's fees that *MTSUN* would have accrued in that period, *MTSUN* was likely incurring operating expenses given its commitment to the project at the time of initiating negotiations.<sup>162</sup>

Taken together, renewable energy proponents can be hopeful that the Montana Supreme Court will continue to hold the PSC accountable for erroneous decisions that negatively impact renewable energy projects. However, these same renewable energy proponents should be aware that a significant amount of time may be required before the Court has such a chance to hold the PSC accountable if litigation is bouncing back and forth between the PSC and the district courts. Additionally, it is not unreasonable to think that this time for review could, in and of itself, render smaller projects economically non-viable.

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159. *Id.* at 1168.

160. *Id.* at 1168–69.

161. *Id.* at 1159.

162. *See id.* at 1172 (“*MTSUN* . . . had actual site control over its proposed project areas, had conducted much of the necessary permitting, had submitted interconnection requests, and initiated feasibility studies for interconnection. *MTSUN* had two land holdings, one with a private landowner and the other with the Montana DNRC. . . . Additionally, *MTSUN* completed an environmental site assessment in May 2016, submitted its FERC form 556, obtained a right-of-way permit from Yellowstone County, was undergoing the Yellowstone County zoning compliance permitting process, and had scheduled its certificate of occupancy construction permit.”).



Next, the *MTSUN* and *Vote Solar* cases in conjunction with the basic composition and authority of the PSC show the role of politics in PSC decisions. As noted, the commission is comprised of partisan officials who are responsive to the constituents of their region. What this looks like with the current commission is a body of decision-makers who utilize “arbitrary and unlawful methodologies,”<sup>163</sup> author op-eds directly opposing solar development, and get caught in “hot mic” recordings openly discussing ways to kill solar development.<sup>164</sup> Although the Court’s *MTSUN* and *Vote Solar* decisions restrict the bounds that the PSC can work within regarding its decisions, the commissioner’s hostility towards renewable energy will likely create major roadblocks for renewable energy development that can only be addressed by the legislature or the electorate. In the future, this partisanship could pendulum the other way with renewable energy projects being pushed forward to the detriment of, for example, coal-produced electricity.

Finally, *MTSUN* and *Vote Solar* establish important precedent that the PSC must follow moving forward in its dealings with QFs. In affirming the district court’s decision, the Court in *MTSUN* and *Vote Solar* established several important limitations on the PSC’s authority. First, the PSC must include carbon adder in its avoided cost calculations.<sup>165</sup> Because carbon costs are a cost avoided by the utility when purchasing energy from a QF, not including the carbon adder would give utilities an artificially low price.<sup>166</sup> By including carbon adder, QFs receive a more appropriate rate.<sup>167</sup> Second, the PSC’s *Whitehall Wind* LEO test may no longer be used.<sup>168</sup> This effectively eliminates a major hurdle created by the PSC for establishing the existence of a LEO.<sup>169</sup> Third, the PSC may not alter contract terms that the parties have previously agreed to.<sup>170</sup> This eliminates the PSC’s ability to set its preferred terms for every PPA in the state and allows for freedom to contract among QFs and utilities.<sup>171</sup> Fourth, in calculating the capacity contribution for determining avoided costs, the PSC must rely on the utility’s *next* planned unit of generation.<sup>172</sup> This allows for a more accurate avoided cost calculation and higher rates to be paid to QFs from the utilities.<sup>173</sup>

These four limitations are binding on the PSC; tighten the bounds within which the PSC is able to interpret and apply PURPA, mini-PURPA, and the associated regulations; and should tend to limit the PSC’s biases

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163. *Id.* at 1176.

164. *Id.* at 1166–67.

165. *Vote Solar v. Mont. Dep’t of Pub. Serv. Regulation*, 473 P.3d 963, 977 (Mont. 2020).

166. *Id.* at 975–77.

167. *Id.*

168. *MTSUN*, 472 P.3d at 1169–73.

169. *Id.*

170. *Id.* at 1173–74.

171. *Id.*

172. *Id.* at 1174–76.

173. *Id.*

toward QFs. The strength of the precedent is further supported by Justice Rice's dissent in *Vote Solar* in combination with his concurrence in *MTSUN*.<sup>174</sup> In his *Vote Solar* dissent, he adamantly opposes the position the Court takes, going so far as to refer to the Court's review as imposing "judicial rates," implying that the Court has overstepped its authority.<sup>175</sup> Justice Rice's *MTSUN* concurrence, in which he repeatedly asserts *stare decisis* as his reason for concurrence, shows the Court's dedication to *stare decisis*.<sup>176</sup> The Court's commitment to recognizing its own precedent will work favorably for renewable energy projects in the future if the PSC does not adhere to the precedent established by *MTSUN* and *Vote Solar*.

## VII. CONCLUSION

*MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regulation* provides important insight into one of the state's smallest and most obscure agencies that wields a significant amount of authority and responsibility. In conjunction with *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation* and a basic understanding of the composition and authority of the PSC, renewable energy stakeholders should be somewhat optimistic about the future of renewable energy in Montana. The Court deemed the PSC's actions in both *MTSUN* and *Vote Solar* to be arbitrary, capricious, unreasonable, and unlawful. In doing so, the Court has shown that it will ensure the PSC is compliant with both state and federal laws when dealing with renewable energy production. These decisions together will rein in some of the PSC's ad hoc decision-making, ultimately improve the economic viability of new QFs, and provide a degree of safety for new renewable energy projects in Montana.

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174. See *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*, 473 P.3d 963, 984–91 (Mont. 2020); see *MTSUN*, 472 P.3d at 1176–78.

175. *Vote Solar*, 473 P.3d at 985.

176. *MTSUN*, 472 P.3d at 1176.