

UNITED STATES OF AMERICA 105 FERC ¶ 61,069
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

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

Docket No. ER03-1223-000

ORDER CONDITIONALLY ACCEPTING AND SUSPENDING POWER
PURCHASE AGREEMENT AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued October 17, 2003)

1. On August 18, 2003, Montana Megawatts I, LLC (MMI) and NorthWestern Energy Division of NorthWestern Corporation (NorthWestern Energy) (together, Applicants) filed a Power Purchase Agreement (PPA) between MMI and NorthWestern Energy. The PPA provides for MMI to sell to its affiliate, NorthWestern Energy, approximately 130 MW of power available from a new generating facility under construction near Great Falls, Montana (Project) for a term of 20 years.
2. In this order, we conditionally accept Applicants' PPA, suspend it for a nominal period, make it effective subject to refund, and establish hearing procedures, but hold the hearing procedures in abeyance pending settlement judge procedures.
3. This order ensures that MMI's proposed power purchase agreement will be just and reasonable.

Background

4. MMI is a direct, wholly-owned subsidiary of NorthWestern Generation I, LLC (NGI). NGI is a direct wholly-owned subsidiary of NorthWestern Energy Development, LLC, which in turn is a direct wholly-owned subsidiary of NorthWestern Growth Corporation. NorthWestern Growth Corporation is a direct

wholly-owned subsidiary of NorthWestern Corporation,¹ a public utility holding company.²

5. MMI has under development a 260 MW gas-fired combined-cycle generating facility located near Great Falls, Montana, and will be interconnected with the 230 kV substation and transmission system of NorthWestern Energy north of Great Falls, Montana. The Project has two units and is scheduled to begin commercial operation by November 2004.³

6. Northwestern Energy is a provider of electricity and natural gas, serving approximately 598,000 customers in Montana, South Dakota and Nebraska, and serves as the default supplier for retail customers who have not selected an alternative supplier under the restructuring legislation. The PPA was, according to the filing, the outcome of a resource optimization study which determined the need for additional load-following/peaking capability to supplement NorthWestern Energy's other supply arrangements.⁴

¹ On September 14, 2003, NorthWestern Corporation filed a petition under Chapter 11 of the Bankruptcy Code in the U.S. District Court for Delaware.

² In February 2002, NorthWestern Corporation completed the acquisition of the electric and natural gas transmission and distribution business of the Montana Power Company. From February 2002 through November 15, 2002, NorthWestern Corporation distributed electricity and natural gas in Montana through its wholly-owned subsidiary, NorthWestern Energy LLC. Effective November 15, 2002, NorthWestern Corporation transferred substantially all of the operations of NorthWestern Energy LLC to NorthWestern Corporation and has since operated that business as part of its NorthWestern Energy division.

³ To date, more than \$70 million has been invested by MMI to develop the Project, and it is approximately 35 percent complete. NorthWestern Corporation has stated that it will not expend any additional funds to complete the Project, and has initiated efforts to transfer the ownership rights in the Project to an unaffiliated developer that can complete the Project and supply the needed power to NorthWestern Energy.

⁴ In October 2001, the Project was included in the Default Supply Portfolio submitted to the Montana Public Service Commission (MPSC). In June 2002, the MPSC declined to pre-approve cost recovery for any of the contracts, including the Project, ruling in part that a utility must first incur expenses and then seek recovery through rates. The MPSC also found that NorthWestern Energy had not provided

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Instant Filing

7. Applicants request that the Commission accept for filing the cost-based PPA between MMI and its affiliate, NorthWestern Energy. The PPA provides that MMI will charge NorthWestern Energy a capacity payment of \$8.50/kW/month for the entire 20-year term of the agreement that is intended to recover return on rate base, associated income taxes and depreciation expenses. The annual revenues from the application of the capacity charge are approximately \$13 million per year. According to the Applicants, the PPA provides that actual pro-rata fixed and variable O&M costs (which include A&G expenses, property taxes, and other miscellaneous expenses) will be billed to NorthWestern Energy on a monthly basis. The agreement also provides for NorthWestern Energy to supply all of the natural gas needed for operation of its share of the Project.

8. In the transmittal letter, Applicants state that the PPA also contains a formula rate to assure that total billings to NorthWestern Energy over the term of the PPA do not exceed the billings that MMI would make under FERC authorized just and reasonable rates. Under the proposed formula, on an annual basis, the revenue requirement resulting from the application of the cost-of-service formula rate will be subtracted from the capacity and O&M payments made by NorthWestern Energy to MMI under the PPA. Positive differences will reflect payments by NorthWestern Energy in excess of the formula-determined amounts, and negative differences will reflect payments by NorthWestern Energy that are less than the formula-determined amounts. At the end of the 20-year term of the PPA, MMI will refund any positive differences to NorthWestern Energy, but MMI will not charge NorthWestern Energy for any negative balance in the account. Accordingly, the proposed formula serves to cap the rates charged under the PPA.

9. Although the Project is not expected to begin commercial operation until November 2004, Applicants request an effective date of October 17, 2003.⁵

Notice of Filing and Intervention

10. Notice of the filing was published in the Federal Register, 68 Fed. Reg. 52191 (September 2, 2003), with comments, protests, or interventions due on or before September 8, 2003. A late motion to intervene and protest was filed by the Montana

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adequate information to demonstrate that the proposed acquisition of power from MMI met the applicable MPSC guidelines.

⁵ It appears that any prospective buyer of the Project needs assurance of prior approval of the PPA before it will complete the Project.

Public Service Commission (Montana Commission) and the Montana Consumer Counsel (jointly, State Agencies).

11. The State Agencies argue that (1) MMI's application for approval of the formula rate should be rejected because it is not a sale of electrical energy but an attempt to monetize the sale of payment obligations which would be imposed on Montana electricity consumers; (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 filing requirements of the Commission's regulations. The State Agencies also present the affidavit of Dr. John W. Wilson, offering a rate computation contesting the rates proposed by Applicants. The State Agencies request that, in the alternative, the application should be set for hearing.

Discussion

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), we will grant State Agencies motion to intervene out-of-time, given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. The proposed formula rate includes a 15 percent return on common equity and an apparent error in the cash working capital allowance that may result in excessive revenues. Also, the formula rate component for fixed and variable O&M includes property taxes that are not booked to O&M accounts under the Uniform System of Accounts and the formula appears to limit the recovery to O&M and A&G booked to those accounts. Additionally, the issues raised by the State Agencies are matters best addressed in the hearing ordered below.

13. Based on the Commission's preliminary review, the Commission concludes that the PPA has not been shown to be reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we conditionally accept the proposed PPA for filing, suspend it for a nominal period to be effective October 17, 2003, subject to refund, and establish hearing procedures. However, we will hold the hearing in abeyance subject to the settlement judge proceeding instituted below.

14. The Commission believes that it would be in the best interests of the parties to resolve this dispute expeditiously and consensually, rather than through litigation. Accordingly, we will hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁶ If the parties desire, they may, by mutual agreement, request a specific

⁶18 C.F.R. ' 385.603 (2003).

judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge.⁷

15. The Commission finds the proposed rate schedule designations are not fully in compliance with Order No. 614.⁸ Original Sheet Nos. 62-69 of the proposed rate schedule are actually amendments to the original contract. Those changes must be incorporated into the contract in order to comply with Order No. 614. We also find that the language describing the formula rate cap is not included in the PPA. Therefore, we will require Applicants to file an amended PPA, which will include the formula rate language.

The Commission orders:

(A) Applicants' proposed PPA is hereby conditionally accepted for filing and suspended for a nominal period, to become effective on October 17, 2003, subject to refund.

(B) Applicants are hereby directed to submit a compliance filing, as discussed in the body of this order, within fifteen (15) days of the date of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly Sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the Regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the proposed PPA. As discussed in the body of this order, we will hold the hearing in abeyance to give the parties time to conduct settlement judge negotiations.

(D) Pursuant to Section 375.304 of the Commission's regulations, 18 C.F.R. ' 375.304 (2003), the Chief ALJ shall designate a Presiding ALJ for the purpose of conducting a hearing. The Presiding ALJ is authorized to conduct further proceedings pursuant to this order and the Commission's Rules of Practice and Procedure.

⁷If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. FERC's website contains a listing of Commission Judges and a summary of their background and experience. (www.ferc.gov- click on Office of Administrative Law Judges.)

⁸ See Designation of Electric Rate Schedule Sheets, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000).

(E) Within 45 days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge may provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If the settlement judge procedures fail, and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall convene a conference in this proceeding to be held within approximately seven (7) days of the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, including a date for Applicants submission of a case-in-chief, and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

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Linda Mitry,
Acting Secretary.