Montana Law Review Online

Volume 80 Article 10

2-18-2020

PREVIEW: Vote Solar v. Montana Department of Public Service Regulation: *Standards of Review for Decisions Under the Montana Administrative Procedure Act*

Lindsay Mullineaux

PREVIEW: Vote Solar v. Montana Department of Public Service Regulation: *Standards of Review for Decisions Under the Montana Administrative Procedure Act.*

Lindsay A. Mullineaux*

The Montana Supreme Court is scheduled to hear oral argument in this matter on Wednesday, February 26, 2020, at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana. Ann B. Hill will likely appear for the Appellant, Northwestern Energy, and Justine W. Kraske or Zachary T. Rogola will likely appear for Cross-Appellant, Montana Public Service Commission. Jenny K. Harbine will likely appear for Appellees, Vote Solar and Montana Environmental Information Center, and Marie P. Barlow will likely appear for Appellee, Cypress Creek Renewables, LLC.

I. INTRODUCTION

This case involves the Montana Public Service Commission's ("Commission") implementation of federal and state laws designed to promote development of small, renewable energy facilities, which includes establishing the rates utility companies must pay for power generated by such facilities.[1] The parties have extensively briefed the issue of whether the Commission reasonably established rates and contract terms for NorthWestern Energy's ("NorthWestern") purchases from certain small, renewable energy facilities in Montana.[2]

However, the threshold issue for the Court is whether the district court exceeded the scope of judicial review in vacating and modifying the Commission's decision.[3] This case represents the first time the Commission has determined a solar capacity contribution rate, and the resolution of this case will impact development of and investment in independent solar farms in Montana.[4]

---

* Candidate for J.D. 2021, Alexander Blewett III School of Law at the University of Montana.
[1] Appellees' Response Brief at 2, *Vote Solar v. Montana Dep't of Pub. Serv. Regulation* (Mont. Sep. 30, 2019) (No. DA 19-0223); Appellant's Opening Brief at 1, *Vote Solar v. Montana Dep't of Pub. Serv. Regulation* (Mont. Aug. 2, 2019) (No. DA 19-0223).
[2] Appellant's Opening Brief, *supra* note 1, at 1.
[3] *Id*.
[4] Cross-Appellant's Opening Brief at 11, *Vote Solar v. Montana Dep't of Pub. Serv. Regulation* (Mont. Sep. 13, 2019) (No. DA 19-0223).

II. FACTUAL AND PROCEDURAL BACKGROUND

In Montana, utility purchases of energy from small energy production facilities are governed by state statutes implementing the federal Public Utility Regulatory Policies Act ("PURPA").[5] PURPA was enacted in 1978 with the goal of encouraging development of renewable energy sources and reducing the nation's dependence on any single energy source.[6] PURPA requires utilities to purchase energy from qualifying small power production facilities—known as "qualifying facilities" or "QFs"—at rates that allow the QFs to become and remain economically viable.[7] The utilities then recover the costs of these mandatory purchases directly from the consumer.[8] Under PURPA, the rates "(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and (2) shall not discriminate against qualifying cogenerators or qualifying small power producers."[9] Essentially, PURPA creates an "avoided cost standard," where utilities must pay a rate for energy from QFs that reflects the costs the utilities would otherwise incur to develop or acquire generation capacity (i.e., capacity costs) and/or produce or purchase energy (i.e., energy costs).[10]

The Commission is tasked with implementing PURPA.[11] Under Montana law, the Commission is mandated to establish standard rates for the subset of very small QFs at issue in this case—those with capacity of 3 megawatts or less.[12] The Commission sets rates based on avoided costs, which includes calculating capacity contribution rates—a determination of the percentage QFs contribute of their overall generating capacity to NorthWestern's needs.[13] The Commission also sets contract terms and conditions.[14] While the Commission has discretion in establishing these terms, the Montana Legislature has set forth a policy stating the Commission shall encourage long-term contracts to enhance the economic feasibility of QFs.[15] Due to fluctuations in the market, Montana utilities file applications to update these standard rates every two years.[16]

---

[5] Appellees' Response Brief, *supra* note 1, at 2; *see also* 16 U.S.C. § 824a-3 (2018).
[6] Appellees' Response Brief, *supra* note 1, at 2.
[7] *Id.* at 3.
[8] Appellant's Opening Brief, *supra* note 1, at 3.
[9] Cross-Appellant's Opening Brief, *supra* note 4, at 3 (*quoting* 16 U.S.C. § 824a-3(b)).
[10] Appellees' Response Brief, *supra* note 1, at 4.
[11] Cross-Appellant's Opening Brief, *supra* note 4, at 3.
[12] *Id.* at 3–4.
[13] Appellees' Response Brief, *supra* note 1, at 28.
[14] Cross-Appellant's Opening Brief, *supra* note 1, at 4.
[15] *Id.*
[16] *Id.*

The Commission last updated NorthWestern's rates in 2014.[17] On May 3, 2016, NorthWestern filed its biannual application with the Commission, which requested a significant decrease in standard rates for QFs.[18] Also before the Commission was the issue of whether to reduce the maximum length of standard-offer contracts between Northwestern and the QFs.[19] After conducting a hearing and reviewing the record, the Commission issued an order establishing off-peak rates at $25.37 (down from $53.14), peak rates at $34.47 (down from $92.73), and establishing a solar capacity contribution of 6.1% (previously undetermined).[20] The order also lowered the maximum contract length from 25 years to 10 years.[21] Appellees moved for reconsideration.[22] On reconsideration, the Commission affirmed its decision except with regard to maximum contract length, which was increased from 10 years to 15 years.[23]

Concerned with the effect of the lowered rates on the economic viability of QFs, Appellees sought judicial review of the reconsidered order through the Montana Administrative Procedure Act ("MAPA").[24] On April 2, 2019, Judge Manley of the Eight Judicial District Court, Cascade County, vacated and modified the Commission's decisions, holding the Commission's rate calculation was arbitrary and unlawful and the Commission's reduction of standard-offer contract lengths was unsupported by the evidence.[25] The decision was remanded to the Commission with instructions to direct NorthWestern to identify new standard rates and contract lengths consistent with the district court's findings.[26] NorthWestern and the Commission appealed.[27]

III. SUMMARY OF ARGUMENTS

A. Appellant's and Cross-Appellant's Arguments

NorthWestern, Appellant, and the Commission, Cross-Appellant, (collectively "Appellants") each argue the Commission's rate and contract length decisions were reasonable, supported by evidence, and

---

[17] *Id.* at 5.
[18] Appellees' Response Brief, *supra* note 1, at 7.
[19] *Id.* at 8.
[20] Cross-Appellant's Opening Brief, *supra* note 4, at 8, 18.
[21] *Id.* at 18.
[22] Appellees' Response Brief, *supra* note 1, at 9.
[23] *Id.* at 10.
[24] Cross-Appellant's Opening Brief, *supra* note 4, at 17; *see also* MONT. CODE ANN. §§ 2–4–101 to 2–4–711 (2019).
[25] Appellees' Response Brief, *supra* note 1, at 10; Order Vacating and Modifying Montana Public Service Commission Order Nos. 7500c and 7500d at 1, *Vote Solar v. Montana Dep't of Pub. Serv. Regulation* (Mont. Apr. 2, 2019) (No. BVD-17-0776) [hereinafter Order].
[26] Appellees' Response Brief, *supra* note 1, at 10–11.
[27] Cross-Appellant's Opening Brief, *supra* note 4, at 3.

consistent with federal and state law.[28] Appellants contend the Commission correctly applied the historically used proxy method to establish Northwestern's avoided energy and capacity costs.[29] Appellants claim that, in applying this established method, the Commission correctly revised NorthWestern's avoided energy costs based on updated market price forecasts without utilizing a carbon adjustment.[30]

Appellants further contend the Commission correctly applied the industry-standard exceedance analysis, the same method utilized by Southwest Power Pool ("SSP"), which oversees the electric grid and wholesale power market in the central United States, to set the solar capacity contribution at 6.1%.[31] Regarding contract length, Appellants assert the 15-year maximum contract term is sufficient to support QF project development.[32] Appellants hone in on the fact that Montana public policy requires the Commission "to enhance the economic feasibility";[33] therefore, "the policy is not to make financing guaranteed at specified terms, but to make financing of the QF project possible."[34] In sum, Appellants maintain the Commission's decisions were the result of correct applications of the proxy method and the exceedance analysis and adequately balanced the needs of QFs with both the interests of utilities and the interests of consumers.[35]

Appellants further contend that, while the district court has jurisdiction to review Commission decisions, the district court exceeded the scope of judicial review by taking on "the legislative function of ratemaking."[36] Appellants maintain Judge Manley overstepped by disregarding the Commission's technical expertise and fact finding responsibilities[37] and erred in vacating and modifying the Commission's decisions rather than remanding the decisions to the Commission for further proceedings.[38] Additionally, Appellants insist the district court incorrectly applied the standard of review for informal agency proceedings, which evaluates whether decisions are "arbitrary, capricious, unlawful, or not supported by substantial evidence," rather than the standard of review for contested proceedings, which typically

---

[28] *Id.* at 22; Appellant's Opening Brief, *supra* note 1, at 10–11.
[29] Cross-Appellant's Opening Brief, *supra* note 4, at 10.
[30] *Id.* at 10, 13.
[31] Appellant's Opening Brief, *supra* note 1, at 8.
[32] *Id.* at 17.
[33] Cross-Appellant's Opening Brief, *supra* note 4, at 10 (*quoting* MONT. CODE ANN. § 69–3–604(2) (2019)) ("Long term contracts . . . must be encouraged in order to enhance the economic feasibility of qualifying small power production facilities").
[34] Appellant's Opening Brief, *supra* note 1, at 17.
[35] *Id.* at 10–11.
[36] *Id.* at 20.
[37] Cross-Appellant's Opening Brief, *supra* note 4, at 21.
[38] Appellant's Opening Brief, *supra* note 1, at 20.

involves a substantial evidence standard for findings of fact and a de novo standard for conclusions of law.[39] Appellants stress that, in reviewing Commission decisions, courts should continue to adhere to these well-established standards of review and refrain from incorporating new principles.[40]

B. Appellees' Arguments

Vote Solar, Montana Environmental Information Center, and Cypress Creek Renewables, LLC (collectively "Appellees") contend the district court correctly held the Commission's rate and contract lengths were arbitrary, unreasonable, and unlawful.[41] Appellees assert the Commission did not fairly compensate solar energy resources for energy generated.[42] Appellees specifically argue the Commission failed to accurately compensate QFs for avoided costs by excluding from calculations future regulatory costs associated with carbon dioxide emissions that NorthWestern avoids by purchasing energy from non-carbon emitting QFs.[43]

Further, Appellees contend the Commission's application of the proxy method was arbitrary and unlawful because it failed to fully compensate QFs for the operating costs of new resources NorthWestern planned to construct in 2019.[44] Moreover, Appellees assert the Commission's application of the SSP methodology in calculating the solar capacity contribution arbitrarily focused on a handful of infrequent and short-lived peak demand hours in the winter, where solar farms contributed less to NorthWestern's system capacity, thereby overlooking regional demand and solar contributions in the summer months, where customer demand also peaks.[45]

Finally, Appellees argued the Commission unjustifiably reduced the maximum duration of contracts from 25 years to 15 years.[46] Here, Appellees highlight the interplay between the contract length and rates, asserting that 15-year contracts, particularly in light of the combined impact resulting from the Commission's decision to drastically reduce rates, are insufficiently long-term to "enhance the economic feasibility" of qualifying facilities as required by Montana law.[47]

---

[39] Cross-Appellant's Opening Brief, *supra* note 4, at 39–40.
[40] *Id.* at 39.
[41] Appellees' Response Brief, *supra* note 1, at 14.
[42] *Id.* at 16.
[43] *Id.* at 24.
[44] *Id.* at 25.
[45] *Id.* at 28–30.
[46] *Id.* at 35.
[47] Appellees' Response Brief, *supra* note 1, at 36 (*quoting* MONT. CODE ANN. § 69–3–604(2)).

Appellees maintain the district court applied the correct standard of review and provided an appropriate remedy under Montana law.[48] Appellees assert the Commission's decision is controlled by Montana Code Annotated § 69-3-402; therefore, the Commission's decision must be set aside where it is "unlawful or unreasonable."[49] In addition, Appellees stress courts "may reverse or modify [the Commission's] decision" if it is, among other things, "in violation of … statutory provisions," "clearly erroneous," or "arbitrary or capricious."[50] Because agency action is arbitrary if the agency fails to consider relevant factors, including the standards and purposes of the statutes the agency administers, Appellees contend the district court correctly modified the Commission's decisions.[51]

IV. ANALYSIS

The Montana Supreme Court applies the same standards of review that a district court applies in reviewing Commission decisions.[52] Thus, the Court is immediately faced with this threshold issue. While the parties agree the Court must apply the standards of review set forth in MAPA, the parties disagree on the practical application of such standards.

Appellants urge the Court to distinguish standards of review in contested case decisions, i.e., MAPA decisions, from those in used in informal agency decisions, i.e., non-MAPA decisions.[53] Appellants cite to *NorthWestern Corporation v. Montana Department of Public Service Regulation*[54] as support for this proposition.[55] In *NorthWestern Corporation*, the Court explained "[a] district court reviews an administrative decision in a contested case to determine whether the agency's findings of fact are clearly erroneous and whether its interpretation of the law is correct."[56] The case further stands for Appellants' assertion that "findings of fact are clearly erroneous if (1) they are not supported by substantial record evidence; (2) if supported, whether the Commission nonetheless misapprehended the effect of the evidence; and (3) if supported and not misapprehended, this Court is left with a definite and firm conviction that a mistake has been made."[57]

---

[48] *Id.* at 43.
[49] *Id.* at 11.
[50] *Id.* (*quoting* MONT. CODE ANN. § 2–4–704(2)).
[51] *Id.* at 12–13.
[52] Appellant's Opening Brief, *supra* note 1, at 10.
[53] Cross-Appellant's Opening Brief, *supra* note 4, at 39–40.
[54] 380 P.3d 787 (Mont. 2016).
[55] Cross-Appellant's Opening Brief, *supra* note 4, at 39.
[56] 380 P.3d at 793–94 (*quoting* Williamson v. Montana Pub. Serv. Comm'n, 272 P.3d 71, 81 (Mont. 2012)).
[57] Cross-Appellant's Opening Brief, *supra* note 4, at 39; *see also Northwestern*, 380 P.3d at 793–94 (quoting *Williamson*, 272 P.3d at 81).

Appellants argue that these "well-established standards" are distinguishable from informal agency decisions, which the Court reviews on an "arbitrary, capricious, unlawful, or not supported by substantial evidence" standard.[58] However, Appellants' attempt to distinguish MAPA decisions from non-MAPA decisions is plagued by the fact that *NorthWestern Corporation* acknowledges that, under MAPA, "the court may reverse or modify the agency decision if the 'substantial rights' of the appellant were prejudiced because the administrative findings are . . . 'arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.'"[59] MAPA does not preclude use of an arbitrary standard; on the contrary, MAPA expressly enumerates it.[60]

In contrast, Appellees, relying on Montana Code Annotated § 2–4–704(2), assert the "arbitrary or capricious" standard applicable in MAPA decisions is interchangeable from the "arbitrary, capricious, unlawful, or not supported by substantial evidence" standard employed in non-MAPA cases.[61] Appellees further urge the Court to adopt the factor analysis set forth in *Clark Fork Coalition v. Montana Department of Environmental Quality*,[62] a non-MAPA case.[63] In *Clark Fork Coalition,* the Court held "in examining whether an agency decision applying a regulation was arbitrary or capricious, the courts consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[64] Certainly, the specific language of Clark Fork Coalition limits the holding to non-MAPA decisions by stating "[w]e review an agency decision not classified as a contested case under the Montana Administrative Procedure Act to determine whether the decision was 'arbitrary, capricious, unlawful, or not supported by substantial evidence.'"[65] However, the Court has already extended MAPA standards in similar areas, such as by applying MAPA's standard of review extensively to local government decisions.[66] Practically speaking, the substantial overlap in language between the two standards suggests implementation of the factor test may be appropriate under MAPA.

It is anticipated that the Court will find the district court was within its authority to vacate and modify the Commission decisions as arbitrary

---

[58] Cross-Appellant's Opening Brief, *supra* note 4, at 39–40.
[59] 380 P.3d at 794 (*quoting* MONT. CODE ANN. § 2–4–704(2)(ii)–(vi) (2019)).
[60] MONT. CODE ANN. § 2–4–704(2)(vi).
[61] Appellees' Response Brief, *supra* note 1, at 13.
[62] 197 P.3d 482 (Mont. 2008).
[63] Appellees' Response Brief, *supra* note 1, at 13.
[64] 197 P.3d at 488.
[65] *Id.* at 487 (*quoting* Johansen v. State, 983 P.2d 962, 965 (Mont. 1999)).
[66] Community Assoc. for North Shore Conservation, Inc. v. Flathead Cty, 445 P.3d 1195, 1204 (Mont. 2019); *see also* Aspen Trails Ranch, LLC v. Simmons, 230 P.3d 808 (Mont. 2010); Kiely Constr. LLC v. City of Red Lodge, 57 P.3d 836 (Mont. 2002).

without needing to address implementation of the factor test for MAPA decisions. Under Montana Code Annotated § 2-4-704(2), the district court has the right to reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decision are: (i) in violation of constitutional or statutory provisions; (ii) in excess of the statutory authority of the agency; (iii) made upon unlawful procedure; (iv) affected by other error of law; (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[67]

The district court's order addresses the Commission's decisions through these frameworks, holding: (1) the Commission lacked substantial evidence necessary to determine 15-year contracts are significantly long-term, as a majority of Commissioners admitted the evidentiary record on this issue was inadequate; (2) the Commission acted arbitrarily in in departing from the recent Commission practice of including avoided carbon costs in QF rates without providing any explanation; and (3) the Commission acted arbitrarily in setting the solar capacity contribution at 6.1% because it discounted record evidence demonstrating NorthWestern's substantial summertime capacity needs, as evidenced by the fact that NorthWestern's summer peak demand exceeded winter peak demand in nearly half of the years evaluated.[68]

Should the Court determine the standard of review principles for MAPA and non-MAPA cases are interchangeable, the Court is even more likely to affirm the district court's decision based on the Commission's failure to consider relevant factors, such as whether the agency adequately considered the factors relevant to choosing a rate that will best serve the purposes of the underlying statutes.

V. CONCLUSION

This case offers the Montana Supreme Court an opportunity to clarify the similarly worded doctrines of MAPA and non-MAPA standards of review. While the case may be resolved on the merits without reaching this issue, Montana law would benefit from clarification in this area. As the case involves a matter of first impression regarding the solar capacity contribution rates, the Court's holding will affect utilities; existing small, renewable energy facilities; developers and investors; and consumers residing in Montana.

---

[67] MONT. CODE ANN. § 2–4–704(2)(vi) (2019).
[68] Order, *supra* note 25, at 6, 9–10, 12.