

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Montana-Dakota Utilities Co.
Financial Incentive – Power Purchase
Agreement Rates

Case No. PU-21-373

**MDU'S BRIEF IN SUPPORT OF ITS APPLICATION FOR THE POWER PURCHASE
AGREEMENT FINANCIAL INCENTIVE**

INTRODUCTION

On August 17, 2021, Montana-Dakota Utilities Co. (“Montana-Dakota”) submitted its Application for Rate Treatment of a Financial Incentive with the Public Service Commission (“Commission”) pursuant to N.D.C.C. § 49-06-02(4). Montana-Dakota is seeking to recover in rates a financial incentive related to two Power Purchase Agreements (“PPAs”) entered into with Minnkota Power Cooperative (“Minnkota”). Montana-Dakota is proposing the financial incentive be recovered in the Company’s existing Generation Resource Recovery Rider (“GRRR”) – Rate 56. As Montana-Dakota qualifies for the statutory financial incentive and its proposed rate is reasonable, Montana-Dakota respectfully requests the Commission approve its Application.

FACTS AND BACKGROUND

A. The Financial Incentive for Power Purchase Agreements

During the 67th Legislative Assembly, the North Dakota State Legislature enacted Senate Bill 2206, which amended N.D.C.C. § 49-06-02. One of the amendments enacted by S.B. 2206 was permitting public utilities to recover costs related to PPAs in rates, including a financial incentive. N.D.C.C. § 49-06-02(4). The amendments to N.D.C.C. § 49-06-02 became effective on August 1, 2021.

As explained in the legislative history of S.B. 2206, the Legislature recognized there was no financial reason for public utilities to enter into PPAs with existing lignite facilities which are already producing on-demand coal-fired electricity. Rather, public utilities would choose to invest in new brick and mortar generating facilities which would allow for a Commission-approved rate of return. Senate Bill 2206 was the Legislature's attempt to reward public utilities for purchasing electricity from North Dakota coal facilities, while also benefiting the operators of the coal facilities.

With the amendments made by S.B. 2206, the applicable statute now states:

The commission shall allow a public utility for those new or existing facilities utilizing lignite mined in this state as its primary fuel:

(4) To recover costs in rates, including a financial incentive set at a reasonable rate for power purchase agreements of a dispatchable on-demand generating unit, plant, or facility deemed to protect grid reliability.

N.D.C.C. § 49-06-02. The plain language of the statute provides that a public utility shall recover in rates the costs of a PPA, including a financial incentive, if: 1) the electricity is purchased from an existing facility utilizing North Dakota mined lignite as its primary fuel; 2) the electricity is purchased from a dispatchable, on-demand generating facility; and 3) the power purchase agreement is from a facility deemed to protect the reliability of the electricity grid.

B. Montana-Dakota's Power Purchase Agreements with Minnkota

Montana-Dakota entered into two PPAs with Minnkota for the purchase of capacity and energy. See MDU Hearing Exhibit 1. The Minnkota PPAs became effective on June 1, 2021, and will remain in effect until May 31, 2026. Id. The Minnkota PPAs will provide needed capacity to cover the time period between the retirement of three of Montana-Dakota's coal-fired units and the in-service date of a new gas turbine. In addition, the

Minnkota PPAs will provide additional capacity to cover a projected energy shortfall Montana-Dakota is forecasting through May 31, 2026. Id.

The energy that Montana-Dakota is purchasing from Minnkota is generated at the Milton R. Young Power Plant located near Center, North Dakota. Id. The Milton R. Young unit is coal-fired and utilizes North Dakota mined lignite for its energy generation. Id. By purchasing power from the Milton R. Young unit, Montana-Dakota is working to ensure regional grid reliability and resilience using North Dakota coal-fired energy generation. Additionally, the energy and capacity purchased by Montana-Dakota ensures the Milton R. Young unit will remain available to meet North Dakota's energy needs and support local and regional customers.

C. Montana-Dakota's Application for a Power Purchase Agreement Financial Incentive.

On August 17, 2021, Montana-Dakota submitted its application to the Commission seeking to recover in rates a financial incentive related to its two PPAs with Minnkota pursuant to N.D.C.C. § 49-06-02(4). See MDU Hearing Exhibit 1. In its Application, Montana-Dakota has proposed using the average weighted cost of capital associated with each PPA to calculate a reasonable rate for the financial incentive. Id. Montana-Dakota is requesting the weighted cost of capital, which would include the Company's current authorized return on equity, to calculate the financial incentive rate. Id. This rate would be reflected in Montana-Dakota's GRRR, which is updated annually. Id. Under the GRRR, Montana-Dakota's projected costs to be recovered total \$72,388 for 2021 and 2022. Id. With Montana-Dakota's proposed rates, the average customer would see an increase of \$0.04 monthly; an increase of \$0.48 annually. Id.

Applying N.D.C.C. § 49-06-02(4), Montana-Dakota respectfully requests the Commission approve its Application for the financial incentive and allow the company to include the financial incentive in its existing GRRR.

LAW AND ARGUMENT

I. Montana-Dakota's application for a financial incentive meets the requirements set forth by N.D.C.C. § 49-06-02(4).

Montana-Dakota's Application seeks to recover in rates the financial incentive related to its two Minnkota PPAs in accordance with N.D.C.C. § 49-06-02(4). Pursuant to N.D.C.C. § 49-06-02(4), the Commission shall allow Montana-Dakota to recover the costs for the Minnkota PPAs, including a financial incentive, if: 1) the electricity is purchased from an existing facility utilizing North Dakota mined lignite as its primary fuel; 2) the electricity is purchased from a dispatchable, on-demand generating facility; and 3) the power purchase agreement is deemed to protect the reliability of the electricity grid. Montana-Dakota's Minnkota PPAs meet all three requirements for recovery of costs in rates under N.D.C.C. § 49-06-02(4).

In interpreting the new amendments to N.D.C.C. § 49-06-02(4), it is important to consider the established rules of statutory interpretation. The North Dakota Supreme Court has explained the primary objective in interpreting a statute is to determine the Legislature's intent. Boldt v. Boldt, 2021 ND 213, ¶ 18, 966 N.W.2d 897. Administrative agencies are bound by the clearly expressed intent of the Legislative Assembly. State ex.rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, ¶ 11, 712 N.W.2d 828. When reading a statute, "it must be presumed the legislature intended all that is said, said all that it intended to say, and meant what it has plainly expressed." Wilkinson v. Board of University, 2020 ND 179, ¶ 34, 947 N.W.2d 910. Statutes are to be construed in a way

which does not render them meaningless because we presume the Legislature acts with purpose and does not perform idle acts. Meier v. N. Dakota Dep't of Hum. Servs., 2012 ND 134, ¶ 10, 818 N.W.2d 774.

A. The Minnkota PPAs purchase electricity from a facility utilizing North Dakota mined lignite as its primary fuel.

There was no disagreement at the hearing that Montana-Dakota's PPAs with Minnkota are for the purchase of electricity generated at the Milton R. Young unit located near Center, North Dakota. The Milton R. Young unit is coal-fired and utilizes North Dakota mined lignite for its energy generation. There is no dispute that Montana-Dakota meets the first requirement for recovery of costs for the Minnkota PPAs.

B. The Milton R. Young plant is a dispatchable, on-demand generating facility.

The second requirement that must be met to recover costs of a PPA in rates under N.D.C.C. § 49-06-02(4) is that the electricity is purchased from a dispatchable, on-demand generating facility. The testimony at the hearing from Montana-Dakota's witness, Darcy Neigum, established the Milton R. Young unit is a dispatchable, on demand generating facility. Mr. Neigum explained that the Milton R. Young coal plant's electricity supply is firm, not intermittent or non-dispatchable.

Advocacy Staff argued that Montana-Dakota has failed to meet the second requirement because its Minnkota PPAs are on a firm basis, making the energy non-dispatchable and not on-demand. See Advocacy Staff's Hearing Exhibit PSC-1. Advocacy Staff's argument is based upon an incorrect interpretation of N.D.C.C. § 49-06-02(4). In the statute, the adjectives "dispatchable on-demand" modify the nouns "generating unit, plant, or facility". See N.D.C.C. § 49-06-02(4). The terms "dispatchable

on-demand” do not modify the electricity in the PPAs as asserted in Advocacy Staff’s argument.

Because Montana-Dakota’s PPAs are for electricity from the Milton R. Young unit, which is a dispatchable, on demand generating facility, the second requirement for recovery of costs under N.D.C.C. § 49-06-02(4) has been met.

C. The Milton R. Young Plant helps protect grid reliability.

The third requirement that must be met is that the PPA is from a facility deemed to protect the reliability of the electricity grid. Montana-Dakota’s Minnkota PPAs from the Milton R. Young unit will assist in protecting grid reliability.

The Milton R. Young unit is a baseload coal-fired generating unit, making it capable of being able to deliver energy into the transmission system on a demand basis. See MDU Hearing Exhibit 2. Further, the Milton R. Young unit helps to control transmission system voltage. Id. The unit also provides ancillary services in the area which protect grid reliability. Id. The PPAs from the Milton R. Young unit ensure energy and capacity will remain available to support local customers across the state and region. For these reasons, the third requirement for recovery of costs under N.D.C.C. § 49-06-02(4) has been met.

Advocacy Staff argues that the third requirement has not been met because neither the Commission or any other regulatory body has deemed any particular lignite plant to protect grid reliability nor established guidelines to determine grid reliability. Under Advocacy Staff’s theory, no PPA would meet the third requirement of N.D.C.C. § 49-06-02(4), because there is no basis for determining grid reliability. Advocacy Staff’s argument would render N.D.C.C. § 49-06-02(4) meaningless and an idle act because

there is no way to meet the grid reliability requirement. See Meier, 2012 ND 134, at ¶ 10 (explaining statutes are to be construed in a way which does not render them meaningless because we presume the Legislature acts with purpose and does not perform idle acts).

Rather than adopt Advocacy Staff's interpretation that would render the statute meaningless, the Commission should interpret the statute consistent with the commonly understood definition of grid reliability. During the hearing, Advocacy Staff's witness referenced the North American Electrical Reliability Corporation ("NERC") when referencing grid reliability. NERC has defined a reliable grid¹ as:

[O]ne that is able to meet the electricity needs of end-use customers even when unexpected equipment failures or other factors reduce the amount of available electricity.

Similarly, the National Infrastructure Advisory Council to the President of the United States defined grid reliability² as:

The ability of the power system to deliver electricity in the quantity and with the quality demanded by users.

While the Legislature did not define grid reliability in the statute, it is reasonable to infer the term was used in its ordinarily understood meaning identified above. The Milton R. Young unit protects grid reliability because it provides electricity to Montana-Dakota through the two PPAs which assists Montana-Dakota to meet the electricity needs of its customers. Further, the energy and capacity purchased by Montana-Dakota through the PPAs protects grid reliability by helping ensure the Milton R. Young unit will remain

¹ North American Electrical Reliability Corporation, NERC Standards 101 (2010), https://www.nerc.com/files/NERC%20Standards%20101_for%20webinar%20posting%20%5BRead-Only%5D.pdf

² Clark-Ginsberg, Aaron, What's the Difference between Reliability and Resilience?, (2016) <file:///svr2016/Folder%20Redirection/rjoyce/Downloads/reliabilityandresilience.pdf>

available to meet North Dakota's energy needs and support local and regional customers. For the reasons set forth above, the third requirement for recovery of costs under N.D.C.C. § 49-06-02(4) has been met.

II. Montana-Dakota is not seeking retroactive application of N.D.C.C. § 49-06-02(4).

Advocacy Staff's chief opposition to Montana-Dakota's Application claims it would result in a retroactive application of N.D.C.C. § 49-06-02(4) because the Minnkota PPAs were entered into prior to the new statute going into effect, therefore, Montana-Dakota was not incentivized to enter into a PPA and should not be allowed recovery of the financial incentive. However, Montana-Dakota is not seeking any form of retroactive application. Rather, Montana-Dakota is only seeking to recover the financial incentive related to the two PPAs in rates prospectively, beginning August 1, 2021, the date which the statutory amendments were enacted.

The Legislature's enactment of N.D.C.C. § 49-06-02(4) created a benefit for public utilities who enter into PPAs with local lignite facilities. Under North Dakota law, statutes which confer benefits are often excepted from the general rule against retroactive application. See State v. Flatt, 2007 ND 98, ¶ 10, 733 N.W.2d 608; see also 2 Sutherland, Statutory Construction § 41.2 (6th ed.2001).

Advocacy Staff expressed concern over the term "incentive" used in N.D.C.C. § 49-06-02(4). Specifically, Staff's concern was that "incentive" was a prospective term which may only apply to PPAs which were entered into after the statute's enactment date of August 1, 2021. While Advocacy Staff's reading of the word "incentive" is not unreasonable, Montana-Dakota believes the term is better construed in the context of the entire statute which imposes no date restriction on the PPAs and the legislative history of

the amendments. If, as Advocacy Staff argues, the Legislature intended to limit the financial incentive to only those PPAs entered into after the enactment of the statute, they would have clearly said so. However, N.D.C.C. § 49-06-02(4) does not contain any such limiting language. Instead, the Legislature set forth three, and only three, requirements to receive the financial incentive as part of rates. Further, the legislative history of SB 2206 demonstrates the entire purpose of the amendments were to reward public utilities for entering into PPAs with local lignite facilities. To interpret § 49-06-02(4) as applying only to new agreements after the enactment of the statute ignores the plain language of the statute.

Other courts have rejected similar arguments that the word “incentive” only applies to actions occurring after the enactment of a statute. See e.g., Palmer v. Selectmen of Marblehead, 335 N.E.2d 349 (Mass. 1975). The issue in Palmer relating to the interpretation and application of the word “incentive” in a newly enacted statute is analogous to the arguments raised by Advocacy Staff in the present case. In Palmer, the Massachusetts Legislature enacted a statute establishing an “incentive” pay program offering salary increases to officers who obtained advanced educational credits and degrees. Id. at 351. The City adopted the statute on March 8, 1971, and Palmer was hired on April 7, 1971. Id. After his hire, Palmer applied for a salary increase under the statute because he had previously obtained a bachelor’s degree in June 1969, prior to his hire. Id. The City refused to pay his salary increase arguing the term “incentive” only applied to degrees obtained after the enactment of the statute. Id. Palmer appealed and the Supreme Court rejected the City’s interpretation of the word “incentive” to limit the officer’s pay raise to education degrees received after the enactment of the statute. Id. at

352. The Palmer Court dismissed the City's retroactive application argument finding that Palmer was not seeking incentive pay prior to the effective date of the statute. Id. at 353 (explaining construing the requirements of the statute to be satisfied by prior events does not result in retroactivity). The Palmer Court found the purpose of the statute was to improve the educational level of the police force and concluded the incentive pay applied to educational credits whenever earned. Id. at 355.

The rationale of the Palmer Court is applicable in the present case. The Legislature's enactment of N.D.C.C. § 49-06-02(4) on August 1, 2021, created a new benefit to public utilities to recover costs of PPAs in rates, including a financial incentive. Montana-Dakota's Application is not seeking a retroactive benefit, as the Company only seeks to recover costs and the financial incentive after the effective date of the statute. Section 49-06-02(4) places no date restriction on when a PPA was entered in order to receive the new benefit conferred to public utilities under the statute. Construing the requirements of § 49-06-02(4) to be met by the Minnkota PPAs does not result in a retractive application of the statute. See Palmer, 335 N.E.2d at 353. The legislative history demonstrates that S.B. 2206 was intended to reward public utilities for entering into PPAs with local lignite generating facilities, and Montana-Dakota's Application in the present case meets the intended purpose of the statute. See id.

III. Montana-Dakota's proposed rate for the financial incentive, based on the average weighted cost of capital, is reasonable.

Section 49-06-02(4), N.D.C.C., provides that any financial incentive granted by the Commission must be "set at a reasonable rate." Although the Legislative Assembly did not define what a reasonable rate would be, Montana-Dakota's proposed rate is and should be deemed reasonable by the Commission.

As stated, Montana-Dakota is proposing the recovery rate for a financial incentive be calculated using the average weighted cost of capital for the PPAs. See MDU Hearing Exhibit 1. Montana-Dakota's proposed rate would apply the weighted cost of capital, including the authorized ROE, which has previously been approved by the Commission. See Case No. PU-16-666. The legislative history of S.B. 2206 discusses the purpose of the statute is to encourage public utilities to enter into PPAs in lieu of building new brick and mortar generating facilities by providing a comparable rate of return recoverable in rates. If Montana-Dakota were to invest in a new facility to produce the required electricity, as opposed to entering into the two Minnkota PPAs, its rate of return would be the average weighted cost of capital. See MDU Hearing Exhibit 1. Because its PPAs with Minnkota are in lieu of investing in a new facility, applying a similar rate of return is reasonable and complies with the legislative intent of N.D.C.C. § 49-06-02(4).

Alternatively, Advocacy Staff argued weighted average cost of capital is used for rate base items like plant in service and that it is common for utilities to include a cash working capital adjustment. PPA costs would be included as cash working capital and, therefore, would be earn the same return as plant in service consistent with Montana-Dakota's proposal.

Under Montana-Dakota's proposal, the rates for the financial incentive would be included in its GRRR. See MDU Hearing Exhibit 1. The average customer would see an increase of \$0.04 monthly; an increase of \$0.48 annually. Id. This increase is reasonable in light of the improved grid reliability and resiliency Montana-Dakota's PPAs will provide for the region.

CONCLUSION

For the foregoing reasons, Montana-Dakota respectfully requests the Commission approve its application for a financial incentive pursuant to N.D.C.C. § 49-06-02. Additionally, Montana-Dakota proposes the reasonable rate for the financial incentive be calculated using the average weighted cost of capital and recovered in the Company's GRRR.

Dated this 4th day of February, 2022.

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Dated today, February 4, 2022.

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