

~ Memorandum ~

TO: Montana Public Service Commission (Commission)
FROM: Jason T. Brown
DATE: December 13, 2011
RE: NorthWestern Energy's Petition for Certification of a Community Renewable Energy Project, Docket D2011.11.93

QUESTION PRESENTED

Is the Gordon Butte Wind I Project (Gordon Butte) a "community renewable energy project" (CREP)?

SHORT ANSWER

Probably yes. A CREP is an eligible renewable resource "in which local owners have a controlling interest." Mont. Code Ann. § 69-3-2003(4)(a) (2011). Indirectly, Montana residents have "a controlling interest" in Gordon Butte (through two layers of corporate ownership). If the Commission concludes that "a controlling interest" can be indirect, then it should certify Gordon Butte as a CREP.

If "a controlling interest" must be direct, however, then Gordon Butte is probably not a CREP. For a business entity to be a local owner, it must be at least 50% "owned by Montana residents." *Id.* at § 69-3-2003(11)(c). To be a Montana resident, one must be a natural person. *Id.* at § 15-30-2101(28); *see also* Commn. Turnbull Declaratory Rul., Docket D2009.11.151, ¶ 17 (January 21, 2010). The sole owner of Gordon Butte is Gordon Butte Wind, LLC (GB Wind). Because GB Wind is not "owned by Montana residents," it is probably not a local owner. Mont. Code Ann. § 69-3-2003(11)(c).

STATEMENT OF FACTS

Due to uncertainty about the meaning of "Montana small businesses" in the previous definition of "local owners," the Commission requested a bill during the 2011 Legislative session "to clarify" which business entities could qualify. Commn. Work Session Part 3, 1:10:00 – 1:12:00 (July 8, 2010). To clarify the meaning, Commission Attorney Al Brogan initially suggested replacing "Montana small businesses" with

"business entities organized under the laws of Montana . . . and at least 50% owned by Montana residents." Commn. Work Session, 34:00 – 44:30 (Sept. 9, 2010). On January 11, 2011, Mr. Brogan recommended increasing the ownership requirement to 100% because "some of the Commissioners had suggested [50%] was a loophole:"

There was concern that the 'are at least 50% owned by Montana residents could be subject to interpretation and ambiguous, and staff was directed to come up with some sort of alternative. Legal staff would suggest that instead of 'are at least 50% owned by Montana residents,' that (3) read, 'have 100% of the equity interests, income interests, and voting interests owned by Montana residents.' It is of course an amendment that would need to be presented at committee. We believe that that would eliminate any ambiguity and would ensure local control of projects. It would not prohibit out-of-state entities from invest[ing] in the [CREPs] because the statute doesn't require that they be totally owned by local owners; it requires that the local owners have the controlling interest, so this would only define what is a local owner.

Commn. Work Session Part 1, 2:17:30 – 2:23:30 (Jan. 11, 2011). After Commissioner Gail Gutsche noted, "100% is a much higher bar," and Commissioner Bill Gallagher expressed his intention to allow participation by non-residents, the Commission voted unanimously to support the original version of House Bill (HB) 78 requiring only 50% ownership by Montana residents. *Id.*

In the Montana House of Representatives, HB 78 was described as "a simple housekeeping measure" and "a cleanup bill." Mont. H. 78, 62d Leg., H. Hrg. (Jan. 12, 2011); *Id.* at 2d H. Reading (Jan. 22, 2011). In the Senate, however, Regulatory Administrator Kate Whitney testified that the Commission requested HB 78 because "'Montana small businesses' are so undefined and broad that it's possible for entities and business to meet this definition with very little representation of Montanans in the entity or the business." *Id.* at Sen. Hrg. (Mar. 10, 2011). At the final Senate hearing, Senator Llew Jones explained, "ownership is defined, I believe, such, if you look in the bill, that at least 50% must be Montanan." *Id.* at 2d Sen. Reading (Mar. 14, 2011).

On November 21, 2011, NorthWestern filed a Petition for Certification of Gordon Butte as a CREP pursuant to Montana's Renewable Portfolio Standard (RPS), which requires NorthWestern to "purchase both the renewable energy credits and the electricity output" from CREPs beginning in 2012. Mont. Code Ann. § 69-3-2004(3)(b). Gordon Butte is a 9.6 megawatt wind facility in Meagher County owned by GB Wind.

Aff. Bryan Rogan ¶¶ 2, 7 (Nov. 21, 2011). GB Wind is a business entity owned in equal thirds by three other business entities: Oversight Resources, LLC (Oversight), 71 Ranch, LP (71 Ranch), and DA Wind Investors, LLC (DA Wind). *Id.* at ¶ 6. All of the members and partners of Oversight, 71 Ranch and DA Wind are Montana residents. *Id.*

DISCUSSION

I. Is Gordon Butte a CREP?

Whether Gordon Butte is a CREP hinges on whether local owners control the project. Mont. Code Ann. § 69-3-2003(4)(a). A CREP is an eligible renewable resource¹ no larger than 25 megawatts² "in which local owners have a controlling interest." *Id.* at § 69-3-2003(4)(a) (emphasis added). "Local owners" may be Montana residents or certain business entities. *Id.* at § 69-3-2003(11).

In this case, Montana residents have "a controlling interest" in Gordon Butte, but indirectly. Gordon Butte is owned by a business entity – GB Wind – which is owned by three other business entities whose members and partners are all Montana residents. Aff. Rogan at ¶ 6. Assuming a "controlling interest" may be indirect, Gordon Butte is probably a CREP because Montana residents ultimately control the project.

II. Is GB Wind a local owner?

If the Commission interprets "CREP" to require direct control by "local owners," however, then GB Wind must be a "local owner." To be a "local owner," a business entity must be organized in Montana, have less than \$50 million in gross revenue and \$100 million in assets, and "have at least 50% of the equity interests, income interests, and voting interests owned by Montana residents." *Id.* at § 69-3-2003(11)(c).

A. "Owned by" means direct ownership by Montana residents.

In addition to the plain language of "owned by," the fact that the Legislature identified two levels of ownership indicates that ownership of business entities by Montanans must be direct. First, it required "local owners" to have a controlling interest in the project itself. *Id.* at § 69-3-2003(4)(a). Second, it required "Montana residents" to own at least a 50% of the business entity for it to be a "local owner." *Id.* at

¹ A new facility that produces electricity from wind in Montana is an "eligible renewable resource." Mont. Code Ann. § 69-3-2003(10).

² A CREP must be no larger than 25 megawatts when counted with other eligible renewable resources within five miles, built within twelve-months, and under common ownership. *Id.* at § 69-3-2003(18).

§ 69-3-2003(11)(c)(iii). By addressing both layers, the Legislature defined a permissible hierarchy of ownership in the case of business entities. Had it intended indirect ownership of business entities, there would have been no need to use language other than "a controlling interest;" by inclusion of the term "owned by," the Legislature must have meant something other than "controlling." The plain meaning of the term and the structure of the statute both indicate direct ownership.

B. Oversight, 71 Ranch and DA Wind are not Montana residents.

A business entity organized in Montana is almost certainly not a Montana resident. The one time this Commission addressed whether a project qualified as a CREP, it specifically held that a limited liability company organized under the laws of Montana was not a Montana resident. Turnbull Declaratory Rul. at ¶ 17. "The Commission has not found any reported Montana case that establishes an artificial entity can be a resident of a state." Furthermore, in Montana's tax code the term "resident" applies only to natural persons." Mont. Code Ann. § 15-30-2101(28).

In this case, the income, equity and voting interests of GB wind are owned in equal thirds by Oversight, 71 Ranch and DA Wind. Because these are artificial entities and not natural persons, they are almost certainly not Montana residents.

C. GB Wind is probably not a local owner.

Because it is not owned by Montana residents, GB Wind is almost certainly not a "local owner." Specifically, Montana residents do not own any of the income, equity or voting interests of GB Wind. Rather, they own interests in the owners of GB Wind. Because GB Wind is not owned by Montana residents, it is probably not a "local owner."

CONCLUSION

Although GB Wind is probably not a "local owner," Gordon Butte is probably a CREP because Montana residents indirectly "have a controlling interest" in the project. If the Commission agrees that "a controlling interest" may be indirect, then it should certify the project as a CREP. If it interprets the definition of CREP to require a direct "controlling interest," however, then it should probably deny certification.

CREP?

Gordon Butte Wind Project

Is a "CREP" if "local owners" **[directly or indirectly?]** have "a controlling interest"



LOCAL OWNER?

Gordon Butte Wind, LLC

Is a "local owner" if "at least 50% of equity, income & voting interests are **[directly or indirectly?]** owned by **Montana residents**"



MONTANA RESIDENTS?

Oversight Resources, LLC

71 Ranch, LP

D. A. Wind Investors, LLC



Erroll Galt Sharrie Galt Bryan Rogan

Erroll, Sharrie, Wylie, Brick, Jocelyn, & Galt Mgmt., LLC

[All Montana residents]