

Service Date: June 13, 2012

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

IN THE MATTER OF NorthWestern Energy's	)	REGULATORY DIVISION
Petition for a Short-Term Waiver from Full	)	
Compliance with the Community Renewable	)	DOCKET NO. D2011.6.53
Energy Project Purchase Requirement	)	ORDER NO. 7177b

**FINAL ORDER**

**PROCEDURAL HISTORY**

1. On June 30, 2011, NorthWestern Corporation, d/b/a NorthWestern Energy (NorthWestern or NWE) filed a *Petition for a Waiver from Full Compliance with the Community Renewable Energy Project Purchase Requirement* (Petition) with the Montana Public Service Commission (Commission). In support of its Petition, NorthWestern included the written testimonies of David E. Fine, its Director of Energy Supply Planning (Ex. NWE-1), and Steven E. Lewis, Principal of Lands Energy Consulting (Ex. NWE-2).

2. The Commission issued a *Notice of Petition and Intervention Deadline* on July 25, 2011. The Montana Consumer Counsel (MCC) filed a *Petition for Intervention* on August 10, 2011, and the Natural Resources Defense Council (NRDC) filed a *Petition to Intervene* on August 12, 2011. The Commission granted intervention to MCC and NRDC on August 16, 2011. The Commission issued a *Procedural Order* on September 16, 2011.

3. The Commission and the MCC submitted data requests to NorthWestern on September 30, 2011. NorthWestern responded to these data requests on October 14, 2011. NorthWestern filed an updated response to MCC-001 on December 6, 2011, and an updated response to PSC-003 on January 5, 2012.

4. Invenergy Wind Development Montana, LLC (Invenergy) filed a *Motion for Protective Order* and the supporting *Affidavit of Michael Baird* on October 17, 2011. The Commission granted Invenergy's *Motion for Protective Order* on November 8, 2011. Commn. Ord. 7177a ¶ 19.

5. The MCC filed the *Direct Testimony of Larry Nordell* on November 4, 2011.

The NRDC did not provide testimony.

6. The Commission issued a Notice of Public Hearing on January 25, 2012. The MCC, NRDC and NorthWestern filed prehearing memoranda on February 7, 2012. The Commission conducted a public hearing on February 15, 2012.

7. The MCC, NRDC and NorthWestern filed initial post-hearing briefs on April 6, 2012. NorthWestern filed a *Response Brief* on April 20, 2012.

8. At a regularly scheduled public work session on May 31, 2012, the Commission voted 4 to 1 to grant NorthWestern's Petition with respect to compliance year 2012, but deny NorthWestern's Petition with respect to compliance years 2013 and 2014.

### FINDINGS OF FACT

9. In its Petition, NorthWestern asked the Commission to waive: (1) Full compliance with the Community Renewable Energy Project (CREP) requirement for compliance years 2012, 2013, and 2014; and (2) any penalties that may be imposed for failure to achieve full compliance during those years. Pet. p. 6 (June 30, 2011). Citing circumstances beyond its control, NorthWestern asserted that it undertook all reasonable steps to comply with the CREP requirement, but "that sufficient CREPs do not exist to enable NorthWestern to achieve full compliance with the CREP Purchase Obligation, and the cost of any of the proposed CREPs, other than those acquired by NorthWestern, would have exceeded the cost caps." *Id.* at pp. 6-8.

10. The MCC recommended that the Commission grant NorthWestern's Petition in its entirety because NorthWestern "made a good faith effort" and undertook all reasonable steps to meet the CREP requirements for compliance years 2012, 2013 and 2014. Ex. MCC-1 p. 3 (Nov. 4, 2011).

11. At the hearing and in its post-hearing brief, NRDC urged the Commission to grant the Petition for compliance year 2012, but to deny it for compliance years 2013 and 2014:

Absent evidence that demonstrates that the "reasonable steps" that were undertaken somehow apply to subsequent years, the Commission cannot make the finding that NWE is asking it to make. Here no such evidence has been adduced. Rather, NWE has only demonstrated why its failure to meet the standard for 2012 – arising from actions and events in 2010 and 2011 – should be countenanced. In other words, the Commission has no basis on which to find for 2013 and 2014 that NWE has taken all "reasonable steps" to meet the standard.

NRDC Opening Br. p. 2 (Apr. 6, 2012).

12. After proportionately allocating the 50 megawatt (MW) CREP requirement based on its retail sales of electrical energy in Montana in 2011, NorthWestern is responsible for approximately 44 MW of the total requirement. Pet. at p. 4.

13. NorthWestern conducted two competitive solicitations to acquire CREPs: (1) A Request for Proposals issued on June 23, 2008 (2008 RFP); and (2) a Request for Information issued on August 17, 2009 (2009 RFI). Ex. NWE-1 p. 6 (June 30, 2011). NorthWestern contracted with Lands Energy Consulting to administer the 2008 RFP and 2009 RFI processes, as well as with DNV Renewables to assist in the 2009 RFI process. *Id.*

14. NorthWestern issued the 2008 RFP exclusively for CREPs, in response to which six developers submitted proposals. Ex. NWE-2 p. 8 (June 30, 2011). The 2008 RFP process ultimately resulted in a long-term purchase power agreement between NorthWestern and Turnbull Hydro, LLC (Turnbull). Ex. NWE-1 at p. 7. As a 13 MW facility, the Turnbull project did not initially qualify as a CREP. Pet. at p. 4.

15. The Turnbull project qualified after the Legislature amended the CREP definition in 2009 to include projects up to 25 MW in size, and the Commission certified the Turnbull project as a CREP on January 21, 2010. *Id.*; *see also* Commn. Decl. Ruling, D2009.11.151, p. 4. Delivery of energy from Turnbull began in June 2011. *See* NWE Elec. Supply Resource Procurement Plan, N2011.12.96, p. 61 (Dec. 15, 2011). The time elapsed from June 2008, the RFP issuance date, and June 2011, the commercial operation date of the Turnbull project was about three years, including the period during which the project did not qualify as a CREP.

16. NorthWestern's 2009 RFI sought 25 to 75 MW of renewable resource capacity and included a request for CREP projects. Ex. NWE-2 at p. 11. The 2009 RFI stated that NorthWestern preferred to own the projects through outright purchase, but proposals for both equity purchases and long-term power purchase agreements would be considered. *Id.*

17. The 2009 RFI produced 40 proposals, of which 19 identified themselves as CREPs. Ex. NWE-2 at p. 12; *see also* Ex. NWE-1 at p. 6 ("In the 2009 RFI a more robust set of responses were submitted").

18. From the initial 40 submittals, Lands Energy selected four as semifinalists: Invenergy, Sagebrush Energy (Sagebrush), Compass Wind Projects, LLC (Compass), and Greycliff Wind, LLC (Greycliff). Tr. pp. 63-64.

19. NorthWestern invited each of the four semifinalists to make in-person

presentations where they “provided NWE and Lands with high quality, well organized presentations of their projects and were prepared, if selected, to move to the next stage of the process.” Ex. NWE-1 at pp. 8-9. NorthWestern and Lands selected the Invenergy and Sagebrush proposals as finalists, and “moved forward with each of them to more in-depth analysis and evaluation of their respective projects.” *Id.* at p. 9.

20. NorthWestern discontinued negotiations with Sagebrush due to risks that NorthWestern was not willing to assume. Response to PSC-003(d) (Oct. 14, 2011). Specifically, NorthWestern was concerned about avian issues at Sagebrush’s Norris Hill project, and local opposition to the Mission Creek project. Tr. at p. 74. Although Madison County had approved the Norris Hill project in a zoning decision and Sagebrush’s application showed no adverse impacts an avian resources, NorthWestern remained concerned about oversight by Montana Fish, Wildlife and Parks and the U.S. Fish and Wildlife Service. *Id.* at p. 73 (“the fact that Madison County approved the project did not give it *carte blanche* with respect to all of the issues that might impact this project.”); see Response to PSC-003(a), Attachment 2 at p. 262. At the Mission Creek project, a number of local landowners voiced opposition directly to executives at NorthWestern. Tr. at p. 75.

21. After NorthWestern dropped negotiations with Sagebrush, it re-engaged negotiations with Compass:

Compass remained in contact with NWE even after it had been notified that other projects had been selected ahead of Spion Kop. Following the re-engagement . . . Compass and NWE entered into an asset purchase agreement for the 40 MW Spion Kop project to be . . . owned by NorthWestern through a build and transfer agreement.

Ex. NWE-1 at pp. 10-11 (“the 40 MW project size was determined to be the size that best met the objectives of both parties,” which included “the best possible project pricing, . . . the best opportunity for approval and subsequent rate basing,” and “reduc[ing] the risk of not meeting the [15% ] RPS requirement.”). NorthWestern subsequently applied for and received approval to purchase the 40 MW Spion Kop project. See Commn. Ord. 71591, D2011.5.41, pp. 40-41 (Feb. 14, 2012).

22. After ceasing negotiations with Sagebrush and re-engaging Compass, NorthWestern discontinued negotiations with Invenergy because it “was determined to have risks and uncertainties associated with environmental issues that NWE was not willing to assume

especially in the timeframe available.” Response to PSC-003(d). The concern was an abandoned underground coal mine in proximity to the project that NorthWestern first became aware of in January or February of 2011. Tr. at pp. 76-77. The risks and uncertainties associated with the Invenergy and Sagebrush projects were circumstances beyond NorthWestern’s control with respect to compliance year 2012. See Response to PSC-005(c).

23. Gordon Butte Wind, LLC (Gordon Butte) submitted one of the responses to the 2009 RFI. Response to PSC-003(a), Attachment 1 at p. 258. Although NorthWestern did not select Gordon Butte as a finalist in the 2009 RFI process, Gordon Butte subsequently negotiated with NorthWestern as a 9.6 MW Qualifying Facility (QF), entered into a long-term purchase power agreement, and commenced commercial operation on January 4, 2012. Tr. at pp. 36-38. The time elapsed between the 2009 RFI issuance date, August 2009, and commencement of commercial operation of Gordon Butte, January 2012, was approximately two and a half years. The Commission certified the Gordon Butte project as a CREP on December 20, 2011. Commn. Ord. 7192, D2011.11.93, ¶ 19.

24. The amount of time required for a new project to achieve commercial operation was a critical factor in NorthWestern’s negotiations:

The timing of the Invenergy project being dropped was one of the reasons other [2009] RFI respondents were not re-engaged in the process in a similar fashion to Compass. . . . Following re-engagement with Compass, NWE was in the position of moving forward with a project that it understood to have a low likelihood of meeting the January 1, 2012 compliance date because of a projected commercial operation date in the fourth quarter of 2012.

Ex. NWE-1 at pp. 10-11. Similarly, NorthWestern did not re-engage one bidder because “it was far too late to negotiate a memorandum of understanding, perform due diligence, enter into a contract, prepare an advanced approval filing, and obtain a Commission ruling to allow construction to be completed **in 2012.**” NWE Initial Br. p. 13 (Apr. 6, 2012) (emphasis added). The record contains no indication that negotiations with projects were conducted with a goal of completing them in 2013 or 2014, in the event that completion by the end of 2012 was infeasible.

There’s a lot of activities involved in bringing a project to fruition. I would guess . . . **two or three years.** . . . you need minimally a year’s worth of data from your anemometers. . . . you have to go out and prospect for sites, secure options, or leases at a minimum. And I think we realized that construction of a wind project . . . can occur within a calendar year, but the planning for the construction certainly predates. So in my opinion, two or three years, **probably closer to three years.**

Tr. at pp. 109-112 (emphasis added). At hearing, NorthWestern's witness Dave Fine declined to characterize as "unreasonable" a hypothetical situation in which the utility did not seek pre-approval of an asset, instead saying it merely was "risky." *Id.* at p. 110.

25. Where anemometer data has been on site for a relatively long time, a project can potentially be developed in a year and a half. *Id.* at pp. 111, 113; *see* Response to PSC-003(a) (showing that many of the proposed projects had anemometer data available).

26. During negotiations with Compass, NorthWestern was also working with developers of QFs to determine their CREP eligibility. Ex. NWE-1 at p. 11; *see also* Pet. at pp. 5-7; Ex. NWE-2 at p. 13; Responses to PSC-005(a) & PSC-006(b).

27. NorthWestern continued to negotiate with potential CREP developers after filing its Petition. As of October 2011, NorthWestern was investigating whether the 9.5 MW Fairfield Wind, LLC project would qualify as a CREP. Response to PSC-004(a). Furthermore:

NorthWestern has entered into contracts with Flint Creek Hydroelectric, LLC, 2 MW, and Lower South Fork, LLC, 0.455 MW, both of which have represented that they qualify as CREPs and which are to be operational before December 31, 2012. Therefore, NorthWestern is currently purchasing RECs and the electricity output from CREPs with a total nameplate capacity of approximately 22.6 MW and expects to be purchasing RECs and the electricity output from CREPs with a nameplate capacity of roughly 25.055 MW by December 31, 2012.

NWE Initial Br. at p. 10.

28. NorthWestern asserted that it "could not have reasonably acquired [certain] projects for utility ownership outside of a competitive solicitation process." NWE Initial Br. at p. 12; *see also* Ex. NWE-1 at p. 5 ("NorthWestern therefore uses competitive solicitations to identify prospective projects.").

29. Due to the limited time available between the first quarter of 2011, when NorthWestern terminated negotiations with the 2009 RFI finalists, and compliance year 2012, NorthWestern could not achieve full CREP compliance in 2012.

30. In 2011 – after NorthWestern determined that it was unlikely to fulfill its CREP obligation in 2012 – it did not initiate another competitive bidding process, a step that had twice before resulted in the acquisition of a CREP resource. Had such a competitive solicitation process been initiated, NorthWestern would have had up to two and a half years to procure resources to comply with the CREP requirement in 2013 and up to three and a half years to achieve compliance in 2014.

31. NorthWestern presented conflicting evidence regarding the cost of alternative resources. According to Mr. Lewis, NorthWestern “wished to benchmark the costs against the then-current QF rates.” Ex. NWE-2 at p. 9; *see also* Response to MCC-003(a) (“During the evaluation phase, the prices from the respondents were compared against the QF-1 rates proposed by NWE in Docket D2008.12.146.”); Tr. at p. 65 (NorthWestern “was cognizant of avoided cost and the then-present QF-1 tariff, and we used that as guidance.”). However, Mr. Lewis testified at the hearing, “I don’t recall actually using the QF-1 tariff rates as a benchmark specifically within the 2009 RFI process.” *Id.* at pp. 141, 65.

32. Other than referring to the QF-1 rates generally as a “benchmark,” NorthWestern presented little evidence of the cost of alternative resources, or how the cost of alternative resources should be calculated. Specifically, the record contains no documentation from NorthWestern of the cost of an equivalent quantity of power over an equivalent contract term, or how the cost of CREPs was a limitation. The MCC’s witness Dr. Larry Nordell asserted that the Spion Kop application represented an equivalent quantity of power with an equivalent contract term, despite the fact that Spion Kop’s total nameplate capacity is 15 MW larger than the statutory maximum threshold for a CREP. Dr. Nordell reasoned that the relevant comparison is a derivation of the per-unit costs of a megawatt-hour generated or expected to be generated from two or more facilities, regardless of their capacity. *Id.* at pp. 148-150, 154. NorthWestern’s witness Mr. Fine disagreed and said his impression of the law’s purpose was to compare small, CREP-sized projects with similarly sized acquisitions or purchases from the market. *Id.* at p. 116.

### CONCLUSIONS OF LAW

33. Beginning January 1, 2012, as part of their compliance with the 10% RPS standard, public utilities must “purchase both the renewable energy credits and the electricity output from [CREPs] that total at least 50 megawatts in nameplate capacity.” Mont. Code Ann. § 69-3-2004(3) (2011).

34. Public utilities must “proportionately allocate” the initial CREP purchase requirement based on their 2011 retail sales in Montana. *Id.* at § 69-3-2004(3)(c).

35. A public utility may petition the Commission for a short-term waiver from full compliance with the CREP requirement. *Id.* at § 69-3-2004(11)(a).

36. Except as provided through a waiver, a public utility that is unable to meet the CREP requirement in any compliance year “shall pay an administrative penalty, assessed by the [C]ommission, of \$10 for each megawatt hour of renewable energy credits that [it] failed to procure.” *Id.* at § 69-3-2004(10).

37. A “community renewable energy project” is an eligible renewable resource that is less than or equal to 25 MW and either: (1) Controlled by “local owners” and interconnected on the utility side of the meter; or (2) owned by a public utility. *Id.* at § 69-3-2003(4)(b).

38. An “eligible renewable resource” is “a facility either located within Montana or delivering electricity from another state into Montana that commences commercial operation after January 1, 2005, and that produces electricity from any combination of wind, solar, geothermal,” or certain sources of water power, methane gas, biomass, hydrogen, or compressed air storage. *Id.* at § 69-3-2003(10).

39. The Commission “has full power of supervision, regulation, and control” of public utilities. *Id.* at § 69-3-102. “The [C]ommission has the authority to generally implement and enforce” the RPS, and the Montana Legislature required it to adopt rules to “generally implement and enforce” the RPS. *Id.* at § 69-3-2006.

40. The Montana legislature specifically required the Commission to adopt rules to define the process for granting a waiver. *Id.* at § 69-3-2006(2)(c). The Commission’s rules defining the process for granting a waiver require the petition to include “documentation and evidence” showing that the petitioner undertook “all reasonable steps” to comply with the applicable standards and could not achieve full compliance due to one or more of the following:

- (a) the unavailability of sufficient renewable energy credits; . . .
- (c) full compliance would cause the public utility to exceed the cost caps; [or]
- (d) other documented reasons beyond the public utility's control.

Admin. R. Mont. § 38.5.8301(4) (2012); *see also* Mont. Code Ann. §§ 69-3-2004(11)(a), 69-3-2007(1) (“A public utility that has restructured . . . is not obligated to take electricity from an eligible renewable resource unless . . . the total cost of electricity from that eligible resource . . . is less than or equal to bids for the equivalent quantity of power over the equivalent contract term”).

41. The Commission’s rules require the Commission to rule on a waiver petition “after noticing the petition and allowing an opportunity for a public hearing.” Admin. R. Mont. 38.5.8301(5).

42. According to the Montana Code, Commission Rules, and NorthWestern's own assertions, issuing a competitive solicitation for CREPs is a reasonable step. The RPS requires competitive solicitations, although it does not preclude subsequent bilateral negotiations. In meeting the CREP requirement, "a public utility **shall conduct** renewable energy solicitations. . . ." Mont. Code Ann. § 69-3-2005(1)(a) (emphasis added). The cost cap statute contemplates "a competitive bidding process," and the Electric Utility Industry Generation Reintegration Act requires NorthWestern to pursue the objective of using "open, fair, and competitive procurement processes whenever possible." *Id.* at §§ 69-3-2007(1); 69-8-419(2)(d). Similarly, "a utility should use competitive solicitations with short-list negotiations as a preferred procurement method," and "thoroughly test the market for cost effective resource alternatives" before acquiring any new resources. Admin. R. Mont. 38.5.8212(2); 38.5.2010(1)(a); *see also supra* ¶ 28.

43. NorthWestern's 2008 RFP and 2009 RFI were reasonable steps toward acquiring CREPs in compliance year 2012, and each solicitation led to the procurement of the electricity and RECs from a CREP resource. *Supra* ¶¶ 13-19, 23-25, & 28.

44. Reviewing QF resources "to determine their eligibility for CREP status" was a reasonable step with respect to compliance year 2012. *Supra* ¶¶ 23-27; Ex. NWE-2 at p. 6.

45. NorthWestern failed to demonstrate that CREPs are not available. *Supra* ¶¶ 14-15, 17, 23 & 26-27.

46. NorthWestern did not demonstrate that the cost of CREPs exceeded the cost of "the equivalent quantity of power over the equivalent contract term." *Supra* ¶¶ 31-32, 40.

47. NorthWestern took "all reasonable steps" to procure CREP resources in 2012, and sufficiently documented factors beyond its control for not achieving full compliance in 2012. *Supra* ¶¶ 13-29.

48. By failing to issue a competitive solicitation in 2011, NorthWestern failed to take a reasonable step with respect to compliance years 2013 and 2014. *Supra* ¶¶ 30, 43.

## ORDER

IT IS HEREBY ORDERED THAT:

49. NorthWestern's Petition is GRANTED for compliance year 2012 and DENIED for compliance years 2013 and 2014.

50. The administrative penalty for failing to procure both the RECs and the electricity output from CREPs in 2012 is waived.

DONE IN OPEN SESSION at Helena, Montana, on the 31<sup>st</sup> day of May 2012 by a vote of 4 to 1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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TRAVIS KAVULLA, Chairman

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GAIL GUTSCHE, Vice Chair

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W. A. GALLAGHER, Commissioner (dissenting)

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BRAD MOLNAR, Commissioner

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JOHN VINCENT, Commissioner

ATTEST:

Aleisha Solem  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision.  
A motion to reconsider must be filed within ten (10) days. *See* Admin. R. Mont.  
38.2.4806.

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Petition for a Short-Term Waiver from Full	)	
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**CONCURRING OPINION OF COMMISSIONER TRAVIS KAVULLA**

This case requires us to apply a law that establishes a difficult standard of proof for any applicant to attain, much less prove in a regulatory filing: that the applicant has taken “all reasonable steps” to acquire or purchase electricity and renewable energy credits from projects sized 25 megawatts (MW) or less in order to comply with that part of Montana’s Renewable Portfolio Standard (RPS) which mandates the purchase of electricity and its associated renewable attributes from Community Renewable Energy Projects (CREPs).

There certainly is an inclination on my part to soften the blow of this onerous law. The mandate for CREPs seems extraneous to most of the core purposes of sensible utility planning. But I will not attempt to second-guess the Legislature which, as is its prerogative, insisted on the inclusion of the CREP provision within the larger RPS. Indeed, just last year, the legislature defeated an effort to repeal this provision of the RPS. Mont. Senate, *Debate on Mont. HB 237 on the Floor of the Senate*, 62d Mont. Leg., Reg. Sess. (Mar. 25, 2011) (Motion to Concur failing 17-33). The law, so long as it continues to grace Title 69 of Montana Code, should be applied with all the vigor that the plain meaning of the words “all reasonable steps” deserves.

This case is fairly simple with respect to a request for a waiver for years 2013 and 2014. NorthWestern Energy (NorthWestern or NWE) seems simply to have stopped pursuing any steps at all to comply with the CREP provisions after filing its petition for a three-year waiver. If one accepts NorthWestern’s own argument about the long planning timeline necessitated by the process of bringing a generation plant online, then steps that were not taken after March 2011—the time when the Spion Kop project mutated into something other than a CREP and

NorthWestern made a judgment that no CREPs would result from the 2009 request for information (RFI) process or from bilateral negotiations for opportunity resources—necessarily bear on a finding pertinent to 2013 and 2014, which are also the subject of NorthWestern’s petition. NorthWestern seems to be arguing that there were simply no reasonable steps that could be taken after the petition’s filing, which is absurd.

The dissenter, Commissioner Gallagher, argues that the Commission should not needlessly make findings relative to future years. There are three logical errors which undermine his argument. First, NorthWestern is requesting us to make findings on three years—none of which have passed. NorthWestern still could take steps to attempt to comply in 2012, just as it could take steps to comply in 2013 or 2014. An argument that the issue is not ripe to decide would apply to all three years. Second, the Commission is finding in its Order that the relevant reasonable step not taken, given the law’s and our administrative rules’ predilection for it, is a competitive solicitation process.<sup>1</sup> The Order essentially plots that process along a linear timeline beginning at the moment at which an RFI’s issuance would have been reasonable, and uses that timeline to conclude that achieving a CREP-eligible project in 2012 would not be a reasonable expectation, but that it would be reasonable to expect a project’s coming online by the end of 2013 resulting from such an RFI. It would be logically inconsistent to make a finding on only one year with respect to a step that is inherently a multi-year process, when three years of compliance are now before us. Third and finally, there are doubtless other steps that still could be taken with respect to 2013 and 2014, but that is not a relevant consideration because at least one reasonable step was not taken *at a point of time already past*. The question is therefore ripe and has already been answered. Further proceedings relative to the burden of whether NorthWestern met a standard of “all reasonable steps” would be duplicative and precluded. NorthWestern has asked us to decide the question concerning all three years, and we now have.

In addition to the Order’s consideration of the potential RFI step, there is for me also the issue of whether taking steps in 2011 could have resulted in a project in 2012, and whether any such steps were reasonable. This is an uncertainty, given the planning horizon for generation projects. But not moving to take any of these steps at all made NorthWestern’s noncompliance a certainty, and leaves as open questions whether certain steps, were they taken, could have

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<sup>1</sup> As noted below, I build on this opinion, in that there seem to have been additional reasonable steps that offered NorthWestern flexibility to further engage with 2009 RFI respondents and possibly with qualifying facilities that have power purchase agreements with NorthWestern.

resulted in either compliance or in meeting a higher burden of having taken “all reasonable steps” in pursuit of compliance. Giving NorthWestern a waiver for compliance year 2012 constitutes a benefit-of-the-doubt approach that may not be warranted, given the paucity of follow-through on NorthWestern’s part that is detailed below. If presented with the opportunity for a careful reconsideration of the matter, a denial of NorthWestern’s petition for the 2012 compliance year may also appear appropriate.

Some of the steps relevant to the petition are listed below. They may not have been ultimately fruitful, but seem to be reasonable to have undertaken or to consider having undertaken. “Documentation and evidence” does not exist that serious efforts were made to undertake or consider undertaking them. Admin. R. Mont. 38.5.8301(4) (2012).

**1. Treating others involved in the 2009 RFI process with the same flexibility that was the hallmark of the Spion Kop negotiation.**

In addition to re-opening negotiations with Compass Wind Projects, LLC, which developed the Spion Kop project, NorthWestern could have re-opened negotiations with fellow semi-finalist National Wind, the developer of Greycliff Wind, LLC. National Wind submitted its bid in the RFI in late September 2009, and stated in its submittal a planned online date of September 30, 2011—a two-year horizon. Response to PSC-003(a), Attachment 1, p. 259 (Oct. 14, 2011). NorthWestern concedes that it did not follow up with Greycliff’s developer after the Spion Kop project had grown to 40 MWs. NorthWestern claims that, were this project to have been resurrected following Spion Kop’s scale-up to a non-CREP-sized project in about the second quarter of 2011, that this would not have resulted in the Greycliff project’s coming online in 2012. Tr. pp. 76, 109-110 (Feb. 28, 2011). While NorthWestern may not have been able to obtain such a project in time for the 2012 compliance year, the request for a waiver in this case includes also 2013 and 2014, and the informational sheet from National Wind which is a part of this record indicates a timeline that is suggestive of the potential of an online project in time for compliance in 2013 and 2014. Response to PSC-003(a), Attachment 1 at pp. 245-47, 257-60.

NorthWestern could have conducted an avian study of its own to further vet one of the Sagebrush projects, Norris Hill, that was a finalist in the 2009 RFI process. NorthWestern presented no evidence or documentation, other than anecdotally, that this was a disqualifying

aspect of the project. Notably, the project had been vetted for this very issue by other authorities. Tr. at pp. 72-74.

NorthWestern could have attempted to dialogue with local landowners in an effort to mitigate so-called “local opposition” issues that characterized 2009 RFI finalist Sagebrush’s Mission Creek project. NorthWestern presents no evidence or documentation, other than anecdotally, that this was a disqualifying aspect of the project, and does not indicate that it attempted or could have attempted to mitigate the problem. Tr. at p. 75.

NorthWestern could have conducted a study of the mine discharge issues to determine if this was a valid reason not to move forward on 2009 RFI finalist Invenergy’s Big Otter project. NorthWestern presents no evidence or documentation, other than anecdotally, that this was a disqualifying aspect of the project, and does not indicate that it attempted or could have attempted to mitigate the problem. Tr. at pp. 76-78.

**2. Negotiating an acquisition arrangement with any of the multiple qualifying facilities (QFs) that already have power purchase agreements with NorthWestern, but which are not themselves poised to be CREPs.**

NorthWestern did not pursue options that may have been open to it with respect to Horseshoe Bend. Tr. at pp. 35-36.

NorthWestern, rather than offering would-be QFs the possibility of a bilateral contract, communicated instead that the door was closed to them because of tariff language. Tr. at p. 103.

NorthWestern did not show that it had taken steps to acquire or consider acquiring a QF that held a power purchase agreement, but then sold it to another third party, indicating on that company’s part a willingness to engage in transactions of a kind that would have allowed NorthWestern potentially to acquire a CREP-sized project.

Q. (Commissioner Kavulla) So I’m curious. You’ve got Volks Wind, which based on what you just said, was a QF developer willing to sell one of its projects that it contracted for. And I wonder if NorthWestern ever approached them and said, hey, listen. We need to acquire CREPs, and we hear on the street that you might be willing to sell your project to another developer, and we might be interested in buying it?

A. (Dave E. Fine) If there was any communication to that effect, I’m not aware of it.

Q. Do you think that such an approach to Volks Wind, being in the position that you stated they were in, would have been a reasonable step to have taken?

A. Not knowing all of the circumstances, it may have been.

Tr. at pp. 106-107.

The post-hearing initial brief of NorthWestern comments on the reasonableness of this possibility, but contradicts itself and witness testimony. The brief asserts NorthWestern could “not have reasonably acquired either of these projects for utility ownership outside of a competitive solicitation process,” NWE Initial Br. p. 12 (Apr. 6, 2012), but NorthWestern’s witness Mr. Fine made clear that “negotiations [that] take place outside of a competitive solicitation,” Tr. at p. 62, had been previously conducted by NorthWestern—presumably, they were not conducted in bad faith.

The Commission’s precedent on this matter is unclear. Were a QF project ineligible for the standard offer, it would have to be bid competitively. Commn. Ord. 7068b p. 28 (June 22, 2010). But a QF that is 10 MW or under, and which already has a power purchase agreement, could be considered an opportunity resource acquirable outside of a competitive solicitation so long as the judgment used to evaluate and select such a resource is documented. Admin. R. Mont. 38.5.8212(3).

The post-hearing brief notes that Volkswind “would expect to sell the projects for an amount that represented the higher QF rates.” NWE Initial Br. at p. 12. This is supposition, and there is no record evidence to back it, as there might otherwise have been had NorthWestern approached the developer. Moreover, the supposition’s inference is contradicted by the logic of the brief’s next representation which, truly enough, notes that construction risk inheres to the builder of a project. In shedding this risk, it follows that Volkswind would have been willing to settle for a lower price. The supposition is also counterintuitive more broadly because power purchase agreements incorporate a cost of risk that utilities’ rate-basing the same assets do not bear, at least not to the full extent that an independent power producer does.

### **3. Maintaining contact pro-actively with the 106 unsolicited inquiries from project developers the company received in recent years.**

NorthWestern conceded that, despite a requirement imposed on NorthWestern to acquire CREPs or purchase from CREPs, the utility allowed the process to be more “driven by the project developer rather than NorthWestern.” Tr. at pp. 59-60. Under further examination,

NorthWestern witness David Fine noted that for projects like CREPs, which have small capacities, it is unreasonable to expect a project developer to exist absent a power purchase agreement with a load-serving utility. He characterized the relationship between such parties as “symbiotic,” requiring activity on the utility’s part, not merely the developer’s. Tr. at pp. 100-101.

**4. Expressing an explicit preference for build-own-transfer arrangements.**

Taking this step may have discouraged certain 2009 RFI respondents that may have resulted in CREP-eligible projects from seriously pursuing efforts relative to the RFI. Tr. at pp. 48-49.

**5. Issuing a new competitive solicitation in 2011.**

If, as NorthWestern testified, CREPs would not result from further efforts of the kind listed above to engage 2009 RFI respondents or QF owners—a position asserted but not convincingly evidenced—NorthWestern should have started over in 2011 by taking the reasonable step of beginning anew an RFI process to identify CREPs. This is the step recognized by statute (Mont. Code Ann. §§ 69-3-2005(1), 69-8-419(2) (2011)) Commission Rules (Admin. R. Mont. 38.5.2010(1), 38.5.8212(2)) NorthWestern’s own practice as contemplated in the last two Electricity Supply Resource Procurement Plans (Plans), and the Commission’s Order on the present Petition. The steps above flow from the 2009 RFI or bilateral negotiations (sometimes with QFs that already have PPAs that may eventually result in energy sales to NorthWestern). If a CREP could not plausibly arise from those steps, initiating an RFI was an obvious step to take. The 2011 Plan speaks of potentially acquiring “CREP-eligible resources that may bid into competitive processes,” but notably does not contemplate the initiation of one, which is unreasonable.

The fact that NorthWestern simply seemed to dismiss the potential of any negotiation with third parties who were either 2009 RFI respondents or QF owners, and also did not issue an RFI, indicates a lack of seriousness with regard to fulfilling its obligations under the law. Again, the record shows that NorthWestern took no steps at all following its filing of a petition for a waiver—even though such steps would be admissible and should be considered in this record prior to the closing of the evidentiary hearing on this matter in February 2012. Tellingly,

NorthWestern's 2011 Plan—the document that indicates what a utility's plans are with respect to acquisition of resources, including CREPs—contains no discussion of the steps NorthWestern is taking with regard to CREPs except a reference to the petition for a waiver from compliance. NWE 2011 Plan pp. 78-79 (Dec. 15, 2011). A petition for a waiver cannot plausibly be the one and only reasonable step to comply with this legal obligation. Yet, NorthWestern appears to have assumed merely that it would receive a waiver, and did not reasonably make attempts otherwise to comply with the law.

Finally, I am perplexed that the applicant made reference to the cost cap in the initial petition and in its post-hearing briefs, but represented at the hearing: “This docket is not about the cost caps. It's important to realize that if this docket was about cost caps, NorthWestern would [not] be asking for a waiver. It wouldn't need to ask for a waiver.” Tr. at p. 17. NorthWestern offered no record evidence of what “an equivalent quantity of power over the equivalent contract term” (i.e., in this case, 25 or fewer MWs over a long period) would cost. Mont. Code Ann. § 69-3-2007(1). This is unfortunate, given that the Commission's administrative rules do contemplate a waiver's issuance in the event that a cost cap would be exceeded, but provides that a waiver may only be issued with respect to a project's potentially exceeding a cost cap if, in the first instance, “all reasonable steps” have been taken. Admin. R. Mont. 38.5.8301(4). The cost cap argument is an aspect of this law that it was not prudent to exclude from the present application.

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TRAVIS KAVULLA, Chairman (concurring)

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

IN THE MATTER OF NorthWestern Energy's	)	REGULATORY DIVISION
Petition for a Short-Term Waiver from Full	)	
Compliance with the Community Renewable	)	DOCKET NO. D2011.6.53
Energy Project Purchase Requirement	)	ORDER NO. 7177b

**CONCURRENCE AND DISSENT OF COMMISSIONER GALLAGHER**

On June 30, 2011, NorthWestern Corporation, d/b/a NorthWestern Energy (NorthWestern), filed a request for a waiver from full compliance with the community renewable energy project (CREP) purchase requirement for the years 2012, 2013, and 2014.

At a regularly scheduled public work session on May 31, 2012, the Commission voted 4 to 1 to grant NorthWestern's request for waiver with respect to compliance year 2012, but denied NorthWestern's petition with respect to compliance years 2013 and 2014 because Northwestern failed to issue a competitive solicitation in 2011. Regrettably, no "proposed" Order was proffered at the work session and, despite the fact that a "last" page of the yet to be written Order was signed in advance by four of the five Commissioners, I chose to wait until a draft Order was circulated on June 8, 2012, to review, add this concurrence/dissent and sign.

The CREP waiver is authorized under Section 69-3-2004(11)(a) of the Montana Code Annotated (MCA) and requires the utility to prove that it has "undertaken **all** reasonable steps" to achieve compliance with the CREP requirement. The legislature's inclusion of "ALL" sets an inordinately high burden of proof for an applicant to be sure. The burden of proof was further elevated and complicated by NorthWestern's decision to make their application in advance (June 2011) for the years 2012, 2013 and 2014.

**CREP WAIVERS: ASK FOR FORGIVENESS AND NOT PERMISSION**

The message of this particular Order should have been: You jumped the gun. Do your best to comply, finish the race, and then, if you come up short, ask for a waiver.

Now, the 2011 request for a waiver applicable to compliance year 2012 might be easily explained due to: (1) The question of whether their CREP compliance was due at the beginning versus the end of 2012; (2) concern about regulatory lag (a June 2011 application produces a February 2012 hearing and a May 2012 decision); or (3) solicitation to production lag, that by the application date June 2011, no reasonable step remained available whereby NorthWestern might have achieved compliance at the beginning or end of 2012. What exactly motivated NorthWestern's premature application is not entirely clear from the record. But, it certainly elevated the burden on the applicant and made the Commission's decision far more challenging.

### **WHEN COMPLIANCE IS DUE**

The Commission's Order fails to clarify once and for all that CREP requirements are due at the end of the "compliance year." While compliance year is not expressly defined in Section 69-3-2003, a reading of Section 69-3-2004(1) thru (4) of the MCA makes it clear that the Legislature contemplated compliance years ending on December 31<sup>st</sup>. Therefore, NorthWestern's CREP obligation was not due until the end of 2012. By consequence, the grant of a waiver for 2012 defers their CREP requirement until end of year 2013.

### **DISCOURAGING PROSPECTIVE (IN ADVANCE) CREP WAIVER REQUESTS WHILE GRANTING A PREMATURE CREP WAIVER REQUEST**

Regardless of why NorthWestern "jumped the gun" with an 18 month premature petition, based on the timelines of the 2008 RFP and the 2009 RFI, each of which required more than two years to produce a functional project, NorthWestern convinced the interveners, Montana Consumer Counsel (MCC) and the Natural Resources Defense Council (NRDC) and, by the slimmest of margins, PSC staff and Commissioners, including myself, that by the time of the hearing in February 2012, NorthWestern had undertaken taken ALL reasonable steps and that it could not achieve full compliance by the end of 2012 due to reasons beyond the public utility's control.

But, with regard to NorthWestern's request for a waiver applicable to the compliance years 2013 (42 months in advance of compliance day December 31, 2014) and 2014 (54 months in advance of compliance day December 31, 2015), the Commission missed its opportunity to deny and to discourage such "in advance" requests for a CREP and other waivers. It should have

cited the past tense retrospective statutory and administrative rule language regarding such waiver requests and simply denied the 2013 and 2014 waivers as beyond the contemplation of the statute and the scope of authority of the Commission.

### **INSTEAD WE MADE MATTERS WORSE**

Instead, perhaps conflicted about the time frames associated with granting the 2012 waiver, the majority felt it necessary to deny the waiver request for 2013 and 2014 based on facts (occurring in 2011) rather than a general denial or a denial based upon the law. Regrettably, the majority's Order not only fails to discourage prospective waiver requests, but the inclusion of language amended into the Order by Commissioner Kavulla implies Commission affirmation of prospective "waiver in advance" requests. The majority chose to include in Finding of Fact at ¶ 30 and in Conclusion of Law at ¶ 48, an explanation of what reasonable step ("issue a competitive solicitation in 2011") NorthWestern could have done to qualify for a waiver as much as 54 months in advance.

Consider for a moment all the "back to the future" permutations of an as yet unwritten future set of circumstances that might well render such a conclusion invalid 54 months from now. That is exactly why utilities should not ask and we, the Commission, should not render decisions on advance requests for waiver.

Still, the decision has been made and the choice has at least two and probably three negative consequences. First, it leaves open the door for such advance requests for waivers. That door should be closed. Issuance of advance waivers is not a circumstance the Legislature contemplated nor should the Commission promote. The difficulty experienced by the parties and the Commission as they wrestled with applying pre-June 2011 facts to an unfinished compliance year, is this Commissioner's Exhibit-1. All of us wrestled with the challenge of establishing the "bookends" of time relating to the RFP and RFI, and subsequent events beyond NorthWestern's control and their respective relationship to the "all reasonable steps" of a mostly "still on the calendar" 2012 compliance year.

Second, including such a finding and conclusion in this Order unfairly disqualifies NorthWestern from opportunity to make a subsequent request for a CREP compliance waiver for the years 2013 and 2014. If, at the end of either future compliance year, NorthWestern deems it

necessary, they should be able to make their request and case for a waiver based on the facts and circumstances preceding that particular compliance year *en toto*.

The inclusion of the Finding of Fact stated in ¶ 32 and particularly adding as a conclusion of law in ¶ 48 that “By failing to issue a competitive solicitation in 2011, NorthWestern failed to take a reasonable step with respect to compliance years 2013 and 2014” renders NorthWestern impotent to request a waiver at the end of those compliance years. Granted, should such an application be made, there might well be that exact same finding. But, let that future Commission make that determination. Let them make it in the context of, and with the benefit of, the hindsight of the totality and entirety of ALL of the evidence, facts and circumstances which have yet to occur between this Order and then.

This Order puts NorthWestern’s back to the wall when it comes to CREP acquisition. It will force NorthWestern to make CREP acquisition decisions in 2013 and 2014 that it might not make otherwise with the fallback of a waiver request. Regrettably, that circumstance will not likely end well for ratepayers.

Perhaps it will be argued that such is the price for NorthWestern’s asking for a waiver in advance for more years than it should have. But, if it was foolhardy for NorthWestern to ask the Commission in 2011 to say in their mid-2012 decision that, based upon what NorthWestern did and did not do in 2008 through 2011, it is entitled to a future waiver from CREP compliance in 2013 and 2014, it is equally foolhardy for the majority to say that, based upon what NorthWestern did NOT do in 2011, it is NOT entitled to a future waiver from compliance in 2013 and 2014.

### **CONCLUSION**

The Commission should have granted the waiver for 2012 with encouragement, in the future, to “finish the race” before requesting such a waiver. It should have simply declined the waiver for the future years and use as justification either: (1) Technical difficulties with our state-issued crystal ball and time machine; (2) the statutes do not contemplate and therefore we do not have authority to grant prospective future waivers; (3) a general “the applicant has the burden of proof and failed to offer evidence adequate to merit a waiver for 2013 and 2014”; or (4) my favorite, “we cannot know whether all reasonable step have been taken until the time for

compliance has passed and the benefit of hindsight allows us enough clarity to evaluate the reasonableness of all possible steps in the light of all the facts and circumstances.”

**THEREFORE**, I concur with the decision to grant NorthWestern’s request for a short term waiver from CREP requirements for the compliance year 2012 and to deny the waiver for compliance years 2013 and 2014. I disagree with the majority’s decision to deny the waiver in 2013 and 2014 based upon NorthWestern’s failure to issue a competitive solicitation in 2011.

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W. A. GALLAGHER, Commissioner (concurring in part and dissenting in part.)