

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

* * * * *

IN THE MATTER OF the Petition of
Montana-Dakota Utilities Co., a Division of
MDU Resources Group, Inc., for Certification
of Eligible Renewable Resources and
Community Renewable Energy Resources

UTILITY DIVISION
DOCKET NO. D2012.3.24

**CONSOLIDATED MOTIONS FOR
RECONSIDERATION AND REHEARING**

Pursuant to Commission rule ARM 38.2.4806, Montana-Dakota Utilities Co. a Division of MDU Resources Group, Inc. ("Montana-Dakota") respectfully moves the Commission for reconsideration of its Order 7221 entered in this docket. Alternatively, pursuant to Commission rule ARM 38.2.4805, Montana-Dakota respectfully moves the Commission for rehearing in this docket. Montana-Dakota integrates with its motions its brief in support of the motions.

INTRODUCTION

This docket was an unopposed petition by Montana-Dakota for a Commission order certifying that the Company's Diamond Willow 2 and Cedar Hills wind farms are eligible renewable resources as defined by Montana's Renewable Power Production and Rural Economic Development Act, §§ 69-3-2001 *et seq* of the Montana Code Annotated (the "Act").¹ It was also an unopposed petition by Montana-Dakota for an order certifying that the Company's Diamond Willow 1, Diamond Willow 2, and Cedar Hills wind farms are all community renewable energy projects (CREPs) as defined by the Act. The Commission's professional staff

¹ Diamond Willow 1, a 19.5 MW wind farm, has already been certified by the Commission as a 19.5 MW eligible renewable resource. Notice of Commission Action dated March 7, 2007, entered in PSC Docket D2007.2.23.

recommended that the requested certifications be granted, and prepared draft Commission orders granting the requested certifications.

On July 10, 2012, the Commission issued its Order 7221 in this docket. Despite the lack of any opposition to Montana-Dakota's application for certification of Diamond Willow 1 and Diamond Willow 2 as CREPs, the Commission denied certification of those two wind farms as CREPs. The order also neglected to certify that Diamond Willow 2 was an eligible renewable resource.²

Montana-Dakota moves the Commission for reconsideration of its Order 7221, and upon such reconsideration, the entry of a final order certifying that Diamond Willow 2 is an eligible renewable resource, and certifying that Diamond Willow 1 and Diamond Willow 2 are both CREPs. Alternatively, Montana-Dakota requests a rehearing.

FACTS

Diamond Willow 1 was Montana-Dakota's first wind farm. It is a 19.5 MW project which went into commercial operation in February of 2008. Order 7221 at FOF 4. Cedar Hills was Montana-Dakota's second wind farm. It is a 19.5 MW project which went into commercial operation on June 6, 2010. Order 7221 at FOF 15. Diamond Willow 2 was Montana-Dakota's third wind farm. It is a 10.5 MW project which went into commercial operation on June 28, 2010. The construction of Diamond Willow 2 began nearly two years after Diamond Willow 1 commenced commercial operation. Order 7221 at FOF 11.

Diamond Willow 1 has already been certified by the Commission as a 19.5 MW eligible renewable resource. Notice of Commission Action dated March 7, 2007, entered in PSC Docket D2007.2.23. For purposes of cost minimization, Diamond Willow 2 was constructed next to Diamond Willow 1. The two projects were not only separately constructed, almost two years

² Order 7221 did certify that Cedar Hills was both an eligible renewable resource and a CREP.

apart, they are separately interconnected to Montana-Dakota's transmission system, using separate step up transformers, breakers, relays, and meters. Petition at ¶ IV; Montana-Dakota Responses to PSC Data Requests 001(a), including Attachment A.

Since 2009, a CREP has been defined by the Act as an eligible renewable resource which is less than 25 MW in size, and is owned either by a utility or "local owners" as defined in the Act. Section 69-3-2003(4), MCA. The Act specifies that for purposes of calculating the 25 MW CREP size limitation, all renewable resources owned by the same owners that were constructed within a single 12 month period within a five mile radius of each other are to be added together. Section 69-3-2003(18), MCA. It is uncontested in this proceeding that Diamond Willow 1 and 2 are not to be added together under that subsection of the Act, because they were constructed more than 12 months apart.

The Commission's Order 7221 inexplicably holds that:

- (1) The Commission is not bound by the definition of a CREP set forth in the Act, specifically Section 69-3-2003(18), MCA;
- (2) The Commission is free to apply any standard of its choosing in determining whether Diamond Willow 1 and 2 are two wind farms or one;
- (3) Diamond Willow 1 and 2 are one wind farm, and not a CREP.

At no time during the proceedings in this docket did any party, including the Commission's own professional staff, advocate or take the positions taken by the Commission in its final order. As a result, Montana-Dakota has been denied an opportunity to address the legal and factual errors in the Commission's reasoning. Accordingly, it seeks reconsideration of Commission Order 7221 or, alternatively, rehearing of its petition for certification.³

³ Montana-Dakota was not even given a hearing in this proceeding before the Commission ruled adversely against it, although one was required by Montana law before denial of the requested certifications. Section 2-4-602(4), MCA.

ARGUMENT

I. The Commission entered Order 7221 in violation of Montana-Dakota's fair hearing rights under the Montana Administrative Procedures Act.

The Commission entered Order 7221 in violation of Montana-Dakota's fair hearing rights under the Montana Administrative Procedures Act. Sections 2-4-601 *et seq* MCA ("MAPA").⁴ It entered a decision adverse to Montana-Dakota upon "issues" which were never identified by the Commission, and noticed to Montana-Dakota, as required by MAPA.

Order 7221 held that the Commission was not bound by the definition of a CREP contained in the Act, which was a mistake of law. It held that Montana-Dakota's petition was governed by the Commission's *Kenfield* decision in its PSC Docket D2010.2.18, despite the fact that *Kenfield* had absolutely nothing to do with CREP certification. It entered findings of fact (without holding any hearing) which purported to determine that Diamond Willow 1 and Diamond Willow 2 were one wind farm, despite the fact they were constructed almost two years apart, and are separately interconnected to Montana-Dakota's transmission system. Until the Commission issued its final order, Montana-Dakota had no idea that such matters were at issue in this proceeding, and was provided no opportunity to address what the Commission incorrectly determined to be the controlling considerations.

The Commission entered Order 7221 in clear violation of the mandatory notice and hearing provisions in MAPA, which require the Commission to advise Montana-Dakota of the issues in the proceeding, before it decided them adversely to the Company. Section 2-4-

⁴ The Commission's entry of Order 7221 also violated Montana-Dakota's right to due process of law guaranteed by both the United States Constitution (14th Amendment) and the Montana Constitution (Art. II, sec. 17). However, it is not necessary to reach the constitutional questions, as the order was clearly entered in violation of the statutory fair hearing procedures specified in MAPA.

601(2)(d), MCA. The mandatory notice requirements must be read in conjunction with the core fair hearing requirement at the heart of MAPA's contested case hearing provisions:

Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

Section 2-4-612(1), MCA (emphasis supplied). The Montana-Dakota petition for certification was unopposed. It was supported by the Commission's professional staff. The Commission denied the petition, without even holding a hearing, based upon legal theories and factual findings on "issues" which no one, including the Commission's own staff, knew existed until the final decision was rendered. The Commission's actions deprived Montana-Dakota of any opportunity to present evidence or argument on issues raised for the first time by the Commission *sua sponte* in its final order.

The Commission's Order 7221 was entered in violation of the mandatory fair hearing requirements which MAPA imposes upon the Commission. Moreover, if the Commission wants to act as an advocate in the cases it decides, it must appoint an advocacy staff, so that the parties before it have an opportunity to respond to Commission advocacy in a meaningful and timely manner.

II. The Commission's Order 7221 was based upon a mistake of law.

The Commission's Order 7221 was based upon a mistake of law. Integral to its decision was its determination that it was not bound by the statutory definition of a CREP contained in the Act.⁵ Its decision stands basic principles of statutory interpretation on their head, notwithstanding the Commission's citation in Order 7221, ¶ 26, to a recent Montana Supreme Court opinion

⁵ If the Commission corrects its mistake of law upon reconsideration, the remaining "issues" decided adversely to Montana-Dakota evaporate.

rejecting another of the Commission's statutory interpretations, *Williamson v. Mont. Pub. Serv. Comm'n*, 2012 MT 32, ¶ 36.⁶

No one principle of statutory construction is paramount, other than it is the responsibility of the courts to determine the intent of the legislature when interpreting a statute. *Williamson*, supra. Indeed, the various canons of statutory construction are merely guides to discerning legislative intent. *Blackfoot Tribe v. Montana*, 729 F. 2d 1192 (9th Cir. 1984). Statutes are not to be construed by taking a single word out of context, as the Commission has done in this case. *City of Missoula v. Robertson*, 2000 MT 52, ¶ 14, 298 Mont. 419; *State of Montana v. Nye*, 283 Mont. 505, 510, 943 P. 2d 96 (1997). Statutory interpretation has been described by the Montana Supreme Court as a "holistic" endeavor. *Flieher v. Uninsured Employers Fund*, 2002 MT 125, ¶ 13, 310 Mont. 99; *S.L.H. v. State Fund*, 2000 MT 362, ¶ 16, 303 Mont. 363. Statutory schemes such as the Act are to be construed as a whole. *State v. Ross*, 269 Mont 347, 352, 889 P. 2d 161 (1995).

Effectively, the statutory definition of a CREP is contained in two subsections of the Act, Sections 69-3-2003(4) and 2003(18), MCA. Section 69-3-2003(4), MCA, since 2009, reads in its entirety as follows:

- (4) "Community renewable energy project" means an eligible renewable resource that:
 - (a) is interconnected on the utility side of the meter in which local owners have a controlling interest and that is less than or equal to 25 megawatts in total calculated nameplate capacity;
 - or
 - (b) is owned by a public utility and has less than or equal to 25 megawatts in total nameplate capacity.

⁶ The Montana Supreme Court has increasingly resisted the Commission's strained interpretations of its enabling legislation. It also recently rejected the Commission's interpretation of its enabling legislation in *City of Great Falls v. Montana Department of Public Service Regulation*, 2011 MT 144, 361 Mont 69.

Section 69–3-2003(18), MCA, reads in its entirety as follows:

(18) “Total calculated nameplate capacity” means the calculation of total nameplate capacity of the community renewable energy project and other eligible renewable resources that are:

- (a) located within 5 miles of the project;
- (b) constructed within the same 12-month period; and
- (c) under common ownership.

A straightforward reading of the two subsections indicates that the Montana Legislature decided in 2009 that:

- (1) CREPs can be as large as 25 MW;
- (2) CREPs can be owned either by “local owners” as defined in Section 69-3-2003(11), MCA, or by utilities, and;
- (3) To determine conformity with the size limitation, all eligible renewable resources constructed within a single twelve month period by the same owner, and within a five mile radius of each other, have to be added together.

In Order 7221, the Commission seized upon one word, “calculated,” in the phrase “total calculated nameplate capacity” in subsection 69-3-2003(4)(a), MCA, and its exclusion from the phrase “total nameplate capacity” in 69-3-2003(4)(b), MCA. According to the Commission, the exclusion of the word “calculated” from Section 69-3-2003(4)(b) allows it to ignore that part of the legislative definition of a CREP which is contained in Section 69-3-2003(18), MCA, and independently chart its own course in this case. Its holding violates basic principle of statutory construction, ignores legislative intent and history, and produces a patently unreasonable end result.

Since the very beginnings of the Act, it has been understood that the most common form of commercially available renewable energy, under current technology, is a wind farm. No wind farm is a single generator. Wind farms don’t have name plate capacities. Generators have name plate capacities. The very name - wind farm - connotes multiple generating units, in this

case wind turbines. The Commission should rely upon its own experience and expertise and recognize that wind farms consist of multiple wind turbines, where the name plate capacity of each turbine is likely between 1.1 and 1.4 MW. Regardless of whether a wind farm is owned by a utility or a local owner as defined by the Act, the total generating capacity of the wind farm must be determined by adding together the name plate generating capacity of each individual wind turbine within the wind farm. Irrespective of wind farm ownership, the total generating capacity of a wind farm can only be determined through a calculation (addition) of the total name plate capacity of all the wind turbines in the wind farm. There is no meaningful distinction between the phrase “total calculated name plate capacity” and the phrase “total name plate capacity,” as one cannot arrive at a total without a calculation. The two phrases mean the same thing, just as “premises” and “property” mean the same thing, *Tongue River Electric Cooperative, Inc. v. Montana Power*, 195 Mont. 511, 636 P. 2d (1981); or “lands” and “real estate” mean the same thing, *Clark v. Clark*, 126 Mont. 9, 242 P. 2d 992 (1952).

The legislative history behind the 2009 amendments to the Act make it abundantly clear that the Montana Legislature intended that utility owned and locally owned CREPs be treated on the same footing. Prior to the 2009 amendments, CREPs were supposed to be small, locally owned facilities - no more than 5 MW in size, and not owned by utilities. Section 69-3-2003(4), MCA [2005]. In 2009, NorthWestern Energy persuaded the Legislature to significantly alter the original concept of a CREP. It successfully advocated the passage of House Bill 343, which was enacted into law as Chapter 232, 2009 Session Laws. (A copy is attached as Appendix 1.) House Bill 343 not only established utility owned CREPS, it created an asymmetrical standard under which a locally owned CREP could not be greater than 5 MW, but a utility owned CREP could be as big as 25 MW. Although the 2009 Legislature enacted House Bill 343 into law, it also enacted House Bill 207 into law, which was enacted as Chapter 30, 2009 Session Laws.

(A copy is attached as Appendix 2.) House Bill 207 raised the 5 MW size limitation for locally owned CREPs to the same 25 MW size limitation for a utility owned CREP, so that all CREPs would be treated equally, regardless of ownership.

Statutes are to be interpreted in a fashion which will avoid an unreasonable end result. *Rausch v. State Fund*, 2002 MT 203, ¶¶ 29, 311 Mont. 210; *Johnson v. Marias River Elec. Co-op*, 211 Mont. 518, 524, 687 P. 2d 668 (1984). The Commission's interpretation of the Act in this proceeding produces a highly unreasonable end result, both for Montana-Dakota, and for its Montana customers.

If Montana-Dakota had been properly notified of what the Commission perceived to be the issues in this proceeding, it would have adduced evidence of the unreasonable nature of the Commission's interpretation of the Act, and its adverse effect on Montana-Dakota and its Montana electric customers. Under the definition of a CREP in the Act, Montana-Dakota has approximately 12.4 MW of CREP generating capacity to meet its obligations under the Act, not only currently, but into the future. Under Order 7221, Montana-Dakota has only 6 MW of CREP generating capacity to meet its obligations under the Act, and will have to acquire additional CREP generating capacity to meet its obligations under the Act by 2015. Those additional CREP resources would impose significant costs upon Montana-Dakota and its Montana customers.

Not only this Commission, but the commissions of North and South Dakota, allocate generation resources for multi-jurisdictional utilities in proportion to customer requirements, or load. On the Montana-Dakota integrated system, which serves parts of eastern Montana, and western North and South Dakota, the Montana customer load makes up about 25 per cent of the total integrated system load requirement. That means that only 25 per cent of both the investment cost and operating costs of Diamond Willow 1, Diamond Willow 2, and Cedar Hills

are allocated to Montana for rate making purposes, and included in the Montana customer's rates. A necessarily corollary of that cost allocation is that Montana-Dakota cannot allocate or assign the power or benefits which flow from those generating facilities in a fashion which conflicts with the underlying cost allocation. Phrased another way, Montana-Dakota cannot provide the benefits of CREP generated power from Cedar Hills to Montana, and charge the costs of generating the Montana required CREP power to its customers in North and South Dakota.

Diamond Willow 1, Diamond Willow 2, and Cedar Hills together provide 49.5 MW of renewable energy to Montana-Dakota's customers in Montana, North and South Dakota. If the Commission's decision in this proceeding had adhered to the Act, all three wind farms would have been certified as CREPS, and 25 per cent of their generating capacity, 12.4 MW, would be allocated to Montana and used by Montana-Dakota to satisfy its CREP obligation under the Act. When the Commission refused to certify Diamond Willow 1 and Diamond Willow 2 as CREPs in accordance with the Act, it reduced the total CREP capacity available to Montana-Dakota to the Montana allocated share of Cedar Hills, which is only 6 MW.

If it had been provided proper notice, Montana-Dakota would have shown that while 6 MW of CREP generating capacity will allow it to meet its obligations under the Act through 2014, it will likely need another 4 MW of CREP power in 2015 to meet its obligations under the Act. It would have further shown that the likely annual cost of acquiring that additional 4 MW of CREP power would approach a half million dollars. Phrased another way, the Commission's unfortunate Order 7221 would cost the Montana-Dakota customer in Montana close to half a million dollars a year in increased rates.⁷

⁷ It is difficult to discern what benefit accrues to anyone under Order 7221. In theory, Commission regulation of utilities is supposed to balance the sometimes competing interests of a utility and its ratepayers. In this case, both Montana-Dakota and its ratepayers are adversely affected by the Commission's Order 7221.

The Commission's interpretation of the Act also creates unreasonable and unwarranted discrimination between utility owned and locally owned CREPs. Under the Commission's analysis, if Diamond Willow 1 and Diamond Willow 2 were locally owned, they would both be CREPs. But, according to the Commission, since they are owned by Montana-Dakota, neither is a CREP. Under the Commission's analysis, if Montana-Dakota had not built Diamond Willow 2, Diamond Willow 1 is a CREP. But, according to the Commission, since Montana-Dakota built Diamond Willow 2, Diamond Willow 1 is not a CREP. The attempted distinctions border on the absurd.

The Commission's Order 7221 was based upon a mistake of law. Its interpretation of the Act is unreasonable, and flies in the face of the clear intent of the Montana Legislature when it enacted the 2009 amendments to the Act.

III. The Commission's *Kenfield* decision has no relevance to this proceeding.

The Commission's *Kenfield* decision has no relevance to this proceeding. Yet, the Commission cites its *Kenfield* decision, PSC Order 7068b entered in PSC Docket D2010.2.18, as the basis for its ruling in this proceeding. Order 7221, ¶ 25-27.

Kenfield was a Commission decision interpreting its own administrative rules governing qualifying facilities (QFs). The Commission's administrative rules provided preferential contract terms to QFs of 10 MW or less. The QF developer in *Kenfield* proposed a 20 MW QF project, but demanded the preferential contract terms which were only available to a QF of 10 MW or less under the Commission's rules. In the apparent belief that sleight of hand works at the Commission, the QF developer claimed his 20 MW proposal was really two side by side 10 MW projects, each of which was entitled to the preferential contract terms applicable to QFs of 10 MW or less. The Commission reasonably held that its administrative rules could not be gamed

so easily, relying upon an anti-gaming standard developed by the Federal Energy Regulatory Commission to prevent QF gaming of federal QF rules at the federal level.

Kenfield has no relevance to this proceeding. That case had nothing to do with the Act, or with CREPs as defined in the Act. This proceeding has nothing to do with QF gaming at the expense of regulated utilities and their customers. This proceeding does not involve QFs. Moreover, Montana-Dakota cannot game itself. The Commission was clearly entitled to interpret its own QF rules in *Kenfield*. This case does not involve an interpretation of the Commission's own rules. This proceeding involves CREPs as defined in the Act, and the Commission's refusal to adhere to the statutory definition of a CREP set forth in the Act.

The Commission's *Kenfield* decision has no relevance to this proceeding.

CONCLUSION

The Commission's Order 7221 in this docket is unsustainable. It was entered in violation of the fair hearing requirements of MAPA, and was based upon a significant mistake of law. The Commission should grant reconsideration of its order, and upon reconsideration, should enter an order which certifies that Diamond Willow 2 is a 10.5 eligible renewable resource, and which certifies that Diamond Willow 1 and 2 are both CREPs. Alternatively, it should grant rehearing.⁸

⁸ It would be unfortunate if the Commission granted rehearing instead of issuing a new order which certifies that Diamond Willow 2 is an eligible renewable resource, and which certifies that Diamond Willow 1 and Diamond Willow 2 are CREPs. Montana-Dakota's petition for certification in this proceeding was unopposed, and it is uncontroverted that Diamond Willow 1 and 2 are CREPs under the statutory criteria (Section 69-3-2003(18), MCA) which the Commission wrongly held it was not obliged to follow.

Dated this 19th day of July, 2012.

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CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that a copy of the foregoing **CONSOLIDATED MOTIONS FOR RECONSIDERATION AND REHEARING** was served upon the following by mailing a true and correct copy thereof on this 19th day of July, 2012, addressed as follows:

**MONTANA CONSUMER COUNSEL
PO BOX 201703
HELENA MT 59620-1703**


John Alke

exceeding 3,000 barrels of petroleum or the products thereof in any one day from any person, firm, corporation, or association of persons."

Approved April 16, 2009

CHAPTER NO. 232

[HB 343]

AN ACT REVISING DEFINITIONS FOR THE ADMINISTRATION OF THE RENEWABLE RESOURCE STANDARD FOR PUBLIC UTILITIES AND ELECTRICITY SUPPLIERS; ALLOWING ELIGIBLE RENEWABLE RESOURCES OWNED BY A PUBLIC UTILITY TO BE USED TO COMPLY WITH THE COMMUNITY RENEWABLE ENERGY PROJECT REQUIREMENTS IN THE RENEWABLE RESOURCE STANDARD; REQUIRING A UTILITY TO CONSIDER DISPATCH ABILITY AND SEASONALITY IN MEETING THE RENEWABLE RESOURCE STANDARD; AMENDING SECTIONS 69-3-2003, 69-3-2005, 90-3-1003, AND 90-4-1202, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 69-3-2003, MCA, is amended to read:

"69-3-2003. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

(1) "Ancillary services" means services or tariff provisions related to generation and delivery of electric power other than simple generation, transmission, or distribution. Ancillary services related to transmission services include energy losses, energy imbalances, scheduling and dispatching, load following, system protection, *spinning reserves and nonspinning reserves*, and reactive power.

(2) "*Balancing authority*" means a transmission system control operator who balances electricity supply and load at all times to meet transmission system operating criteria and to provide reliable electric service to customers.

(2)(3) "Common ownership" means the same or substantially similar persons or entities that maintain a controlling interest in more than one community renewable energy project even if the ownership shares differ between two community renewable energy projects. Two community renewable energy projects may not be considered to be under common ownership simply because the same entity provided debt or equity or both debt and equity to both projects.

(3)(4) "Community renewable energy project" means an eligible renewable resource that:

(a) is interconnected on the utility side of the meter in which local owners have a controlling interest and that is less than or equal to 5 megawatts in total calculated nameplate capacity; or

(b) is owned by a public utility and has less than or equal to 25 megawatts in total nameplate capacity.

(4)(5) "Competitive electricity supplier" means any person, corporation, or governmental entity that is selling electricity to small customers at retail rates cooperative.

~~(5)~~(6) "Compliance year" means each calendar year beginning January 1 and ending December 31, starting in 2008, for which compliance with this part must be demonstrated.

~~(6)~~(7) "Cooperative utility" means:

(a) a utility qualifying as an electric cooperative pursuant to Title 35, chapter 18; or

(b) an existing municipal electric utility as of May 2, 1997.

(8) "*Dispatch ability*" means the ability of either a balancing authority or the owner of an electric generating resource to rapidly start, stop, increase, or decrease electricity production from that generating resource in order to respond to the balancing authority's need to match supply resources to loads on the transmission system.

(9) "*Electric generating resource*" means any plant or equipment used to generate electricity by any means.

~~(7)~~(10) "Eligible renewable resource" means 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 one or more of the following sources:

(a) wind;

(b) solar;

(c) geothermal;

(d) water power, in the case of a hydroelectric project that:

(i) does not require a new appropriation, diversion, or impoundment of water and that has a nameplate rating of 10 megawatts or less; or

(ii) is installed at an existing reservoir or on an existing irrigation system that does not have hydroelectric generation as of [the effective date of this act] and has a nameplate capacity of 15 megawatts or less;

(e) landfill or farm-based methane gas;

(f) gas produced during the treatment of wastewater;

(g) low-emission, nontoxic biomass based on dedicated energy crops, animal wastes, or solid organic fuels from wood, forest, or field residues, except that the term does not include wood pieces that have been treated with chemical preservatives such as creosote, pentachlorophenol, or copper-chroma-arsenic;

(h) hydrogen derived from any of the sources in this subsection ~~(7)~~ (10) for use in fuel cells; and

(i) the renewable energy fraction from the sources identified in subsections ~~(7)(a) through (7)(h)~~ (10)(a) through (10)(j) of electricity production from a multiple-fuel process with fossil fuels; and

(j) compressed air derived from any of the sources in this subsection (10) that is forced into an underground storage reservoir and later released, heated, and passed through a turbine generator.

~~(8)~~(11) "Local owners" means:

(a) Montana residents or entities composed of Montana residents;

(b) Montana small businesses;

(c) Montana nonprofit organizations;

(d) Montana-based tribal councils;

- (e) Montana political subdivisions or local governments;
- (f) Montana-based cooperatives other than cooperative utilities; or
- (g) any combination of the individuals or entities listed in subsections ~~(8)(a)~~ through ~~(8)(f)~~ (11)(a) through (11)(f).

(12) "Nonspinning reserve" means offline generation that can be ramped up to capacity and synchronized to the grid within 10 minutes and that is needed to maintain system frequency stability during emergency conditions, unforeseen load swings, and generation disruptions.

~~(9)~~(13) "Public utility" means any electric utility regulated by the commission pursuant to Title 69, chapter 3, on January 1, 2005, including the public utility's successors or assignees.

~~(10)~~(14) "Renewable energy credit" means a tradable certificate of proof of 1 megawatt hour of electricity generated by an eligible renewable resource that is tracked and verified by the commission and includes all of the environmental attributes associated with that 1 megawatt-hour unit of electricity production.

(15) "Seasonality" means the degree to which an electric generating resource is capable of producing electricity in each of the seasons of the year.

~~(11)~~(16) "Small customer" means a retail customer that has an individual load with an average monthly demand of less than 5,000 kilowatts.

(17) "Spinning reserve" means the online reserve capacity that is synchronized to the grid system and immediately responsive to frequency control and that is needed to maintain system frequency stability during emergency conditions, unforeseen load swings, and generation disruptions.

~~(12)~~(18) "Total calculated nameplate capacity" means the calculation of total nameplate capacity of the community renewable energy project and other eligible renewable resources that are:

- (a) located within 5 miles of the project;
- (b) constructed within the same 12-month period; and
- (c) under common ownership."

Section 2. Section 69-3-2005, MCA, is amended to read:

"69-3-2005. Procurement — cost recovery — reporting. (1) In meeting the requirements of this part, a public utility shall:

(a) ~~conduct~~ *conduct* renewable energy solicitations under which the public utility offers to purchase renewable energy credits, either with or without the associated electricity, under contracts of at least 10 years in duration; and

(b) consider the importance of geographically diverse rural economic development when procuring renewable energy credits; and

(c) *consider the importance of dispatch ability, seasonality, and other attributes of the eligible renewable resource contained in the commission's supply procurement rules when considering the procurement of renewable energy or renewable energy credits.*

(2) A public utility that intends to enter into contracts of less than 10 years in duration shall demonstrate to the commission that these contracts will provide a lower long-term cost of meeting the standard established in 69-3-2004.

(3) (a) Contracts signed for projects located in Montana must require all contractors to give preference to the employment of bona fide Montana residents, as defined in 18-2-401, in the performance of the work on the projects

if the Montana residents have substantially equal qualifications to those of nonresidents.

(b) Contracts signed for projects located in Montana must require all contractors to pay the standard prevailing rate of wages for heavy construction, as provided in 18-2-401(13)(a), during the construction phase of the project.

(4) All contracts signed by a public utility to meet the requirements of this part are eligible for advanced approval under procedures established by the commission. Upon advanced approval by the commission, these contracts are eligible for cost recovery from ratepayers, except that nothing in this part limits the commission's ability to subsequently, in any future cost-recovery proceeding, inquire into the manner in which the public utility has managed the contract and to disallow cost recovery if the contract was not reasonably administered.

(5) A public utility or competitive electricity supplier shall submit renewable energy procurement plans to the commission in accordance with rules adopted by the commission. The plans must be submitted to the commission on or before:

~~(a) January 1, 2007, for the standard required in 69-3-2004(2);~~

~~(b) June 1, 2008, for the standard required in 69-3-2004(3);~~

~~(c)(a) June 1, 2013, for the standard required in 69-3-2004(4); and~~

~~(d)(b) any additional future dates as required by the commission.~~

(6) A public utility or competitive electricity supplier shall submit annual reports, in a format to be determined by the commission, demonstrating compliance with this part for each compliance year. The reports must be filed by March 1 of the year following the compliance year.

(7) For the purpose of implementing this part, the commission has regulatory authority over competitive electricity suppliers."

Section 3. Section 90-3-1003, MCA, is amended to read:

"90-3-1003. Research and commercialization account — use. (1) The research and commercialization account provided for in 90-3-1002 is statutorily appropriated, as provided in 17-7-502, to the board of research and commercialization technology, provided for in 2-15-1819, for the purposes provided in this section.

(2) The establishment of the account in 90-3-1002 is intended to enhance the economic growth opportunities for Montana and constitute a public purpose.

(3) The account may be used only for:

(a) loans that are to be used for research and commercialization projects to be conducted at research and commercialization centers located in Montana;

(b) grants that are to be used for production agriculture research and commercialization projects, clean coal research and development projects, or renewable resource research and development projects to be conducted at research and commercialization centers located in Montana;

(c) matching funds for grants from nonstate sources that are to be used for research and commercialization projects to be conducted at research and commercialization centers located in Montana; or

(d) administrative costs that are incurred by the board in carrying out the provisions of this part.

(4) At least 20% of the account funds approved for research and commercialization projects must be directed toward projects that enhance production agriculture.

(5) (a) At least 30% of the account funds approved for research and commercialization projects must be directed toward projects that enhance clean coal research and development or renewable resource research and development.

(b) If the board is not in receipt of a qualified application for a project to enhance clean coal research and development or renewable resource research and development, subsection (5)(a) does not apply.

(6) An applicant for a grant shall provide matching funds from nonstate sources equal to 25% of total project costs. The requirement to provide matching funds is a qualifier, but not a criterion, for approval of a grant.

(7) The board shall establish policies, procedures, and criteria that achieve the objectives in its research and commercialization strategic plan for the awarding of grants and loans. The criteria must include:

(a) the project's potential to diversify or add value to a traditional basic industry of the state's economy;

(b) whether the project shows promise for enhancing technology-based sectors of Montana's economy or promise for commercial development of discoveries;

(c) whether the project employs or otherwise takes advantage of existing research and commercialization strengths within the state's public university and private research establishment;

(d) whether the project involves a realistic and achievable research project design;

(e) whether the project develops or employs an innovative technology;

(f) verification that the project activity is located within the state;

(g) whether the project's research team possesses sufficient expertise in the appropriate technology area to complete the research objective of the project;

(h) verification that the project was awarded based on its scientific merits, following review by a recognized federal agency, philanthropic foundation, or other private funding source; and

(i) whether the project includes research opportunities for students.

(8) The board shall direct the state treasurer to distribute funds for approved projects. Unallocated interest and earnings from the account must be retained in the account. Repayments of loans and any agreements authorizing the board to take a financial right to licensing or royalty fees paid in connection with the transfer of technology from a research and commercialization center to another nonstate organization or ownership of corporate stock in a private sector organization must be deposited in the account.

(9) The board shall refer grant applications to external peer review groups. The board shall compile a list of persons willing to serve on peer review groups for purposes of this section. The peer review group shall review the application and make a recommendation to the board as to whether the application for a grant should be approved. The board shall review the recommendation of the peer review group and either approve or deny a grant application.

(10) The board shall identify whether a grant or loan is to be used for basic research, applied research, or some combination of both. For the purposes of this section, "applied research" means research that is conducted to attain a specific benefit or solve a practical problem and "basic research" means research that is conducted to uncover the basic function or mechanism of a scientific question.

(11) For the purposes of this section:

(a) "clean coal research and development" means research and development of projects that would advance the efficiency, environmental performance, and cost-competitiveness of using coal as an energy source well beyond the current level of technology used in commercial service;

(b) "renewable resource research and development" means research and development that would advance:

(i) the use of any of the sources of energy listed in ~~69-3-2003(6)~~ 69-3-2003(10) to produce electricity; and

(ii) the efficiency, environmental performance, and cost-competitiveness of using renewable resources as an energy source well beyond the current level of technology used in commercial service."

Section 4. Section 90-4-1202, MCA, is amended to read:

"90-4-1202. Definitions. Unless the context requires otherwise, in this part, the following definitions apply:

(1) "Ancillary services" has the meaning provided in 69-3-2003.

(2) "Bond" means bond, note, or other obligation.

(3) "Clean renewable energy bonds" means one or more bonds issued by a governmental body pursuant to section 54 of the Internal Revenue Code, 26 U.S.C. 54, and this part.

(4) "Commission" means the public service commission provided for in 69-1-102.

(5) "Governing authority" means a council, board, or other body governing the affairs of the governmental body.

(6) "Governmental body" means a city, town, county, school district, consolidated city-county, Indian tribal government, or any other political subdivision of the state, however organized.

(7) "Intermittent generation resource" means a generator that operates on a limited and irregular basis due to the inconsistent nature of its fuel supply, which is primarily wind or solar power.

(8) "Internal Revenue Code" has the meaning provided in 15-30-101.

(9) "Project" means:

(a) a facility qualifying as a "qualified project" within the meaning of section 54(d)(2) of the Internal Revenue Code, 26 U.S.C. 54(d)(2);

(b) a community renewable energy project as defined in ~~69-3-2003~~ 69-3-2003(4)(a); or

(c) an alternative renewable energy source as defined in 15-6-225."

Section 5. Effective date. [This act] is effective on passage and approval.

Section 6. Retroactive applicability. [This act] applies retroactively, within the meaning of 1-2-109, to the compliance year beginning January 1, 2009.

Approved April 16, 2009

(7) "Project" means any construction or any improvement of the land, a building, or another improvement that is suitable for use as a state or local governmental facility.

(8) "Publish" means publication of notice as provided for in 7-1-2121, 7-1-4127, 18-2-301, and 20-9-204.

(9) "State agency" has the meaning provided in 2-2-102, except that the department of transportation, provided for in 2-15-2501, is not considered a state agency."

Section 2. Effective date. [This act] is effective on passage and approval.

Approved March 20, 2009

CHAPTER NO. 30

[HB 207]

AN ACT AMENDING THE DEFINITION OF "COMMUNITY RENEWABLE ENERGY PROJECT" UNDER THE MONTANA RENEWABLE POWER PRODUCTION AND RURAL ECONOMIC DEVELOPMENT ACT TO INCLUDE AN ELIGIBLE RENEWABLE RESOURCE THAT IS LESS THAN OR EQUAL TO 25 MEGAWATTS; AMENDING SECTIONS 69-3-2003 AND 90-3-1003, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 69-3-2003, MCA, is amended to read:

"69-3-2003. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

(1) "Ancillary services" means services or tariff provisions related to generation and delivery of electric power other than simple generation, transmission, or distribution. Ancillary services related to transmission services include energy losses, energy imbalances, scheduling and dispatching, load following, system protection, and reactive power.

(2) "Common ownership" means the same or substantially similar persons or entities that maintain a controlling interest in more than one community renewable energy project even if the ownership shares differ between two community renewable energy projects. Two community renewable energy projects may not be considered to be under common ownership simply because the same entity provided debt or equity or both debt and equity to both projects.

(3) "Community renewable energy project" means an eligible renewable resource that is interconnected on the utility side of the meter in which local owners have a controlling interest and that is less than or equal to 25 megawatts in total calculated nameplate capacity.

(4) "Competitive electricity supplier" means any person, corporation, or governmental entity that is selling electricity to small customers at retail rates in the state of Montana and that is not a public utility or cooperative.

(5) "Compliance year" means each calendar year beginning January 1 and ending December 31, starting in 2008, for which compliance with this part must be demonstrated.

(6) "Cooperative utility" means:

(a) a utility qualifying as an electric cooperative pursuant to Title 35, chapter 18; or

(b) an existing municipal electric utility as of May 2, 1997.

(7) "Eligible renewable resource" means 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 one or more of the following sources:

(a) wind;

(b) solar;

(c) geothermal;

(d) water power, in the case of a hydroelectric project that does not require a new appropriation, diversion, or impoundment of water and that has a nameplate rating of 10 megawatts or less;

(e) landfill or farm-based methane gas;

(f) gas produced during the treatment of wastewater;

(g) low-emission, nontoxic biomass based on dedicated energy crops, animal wastes, or solid organic fuels from wood, forest, or field residues, except that the term does not include wood pieces that have been treated with chemical preservatives such as creosote, pentachlorophenol, or copper-chroma-arsenic;

(h) hydrogen derived from any of the sources in this subsection (7) for use in fuel cells; and

(i) the renewable energy fraction from the sources identified in subsections (7)(a) through (7)(h) of electricity production from a multiple-fuel process with fossil fuels.

(8) "Local owners" means:

(a) Montana residents or entities composed of Montana residents;

(b) Montana small businesses;

(c) Montana nonprofit organizations;

(d) Montana-based tribal councils;

(e) Montana political subdivisions or local governments;

(f) Montana-based cooperatives other than cooperative utilities; or

(g) any combination of the individuals or entities listed in subsections (8)(a) through (8)(f).

(9) "Public utility" means any electric utility regulated by the commission pursuant to Title 69, chapter 3, on January 1, 2005, including the public utility's successors or assignees.

(10) "Renewable energy credit" means a tradable certificate of proof of 1 megawatt hour of electricity generated by an eligible renewable resource that is tracked and verified by the commission and includes all of the environmental attributes associated with that 1 megawatt-hour unit of electricity production.

(11) "Small customer" means a retail customer that has an individual load with an average monthly demand of less than 5,000 kilowatts.

(12) "Total calculated nameplate capacity" means the calculation of total nameplate capacity of the community renewable energy project and other eligible renewable resources that are:

(a) located within 5 miles of the project;

(b) constructed within the same 12-month period; and

(c) under common ownership."

Section 2. Section 90-3-1003, MCA, is amended to read:

“90-3-1003. Research and commercialization account — use. (1) The research and commercialization account provided for in 90-3-1002 is statutorily appropriated, as provided in 17-7-502, to the board of research and commercialization technology, provided for in 2-15-1819, for the purposes provided in this section.

(2) The establishment of the account in 90-3-1002 is intended to enhance the economic growth opportunities for Montana and constitute a public purpose.

(3) The account may be used only for:

(a) loans that are to be used for research and commercialization projects to be conducted at research and commercialization centers located in Montana;

(b) grants that are to be used for production agriculture research and commercialization projects, clean coal research and development projects, or renewable resource research and development projects to be conducted at research and commercialization centers located in Montana;

(c) matching funds for grants from nonstate sources that are to be used for research and commercialization projects to be conducted at research and commercialization centers located in Montana; or

(d) administrative costs that are incurred by the board in carrying out the provisions of this part.

(4) At least 20% of the account funds approved for research and commercialization projects must be directed toward projects that enhance production agriculture.

(5) (a) At least 30% of the account funds approved for research and commercialization projects must be directed toward projects that enhance clean coal research and development or renewable resource research and development.

(b) If the board is not in receipt of a qualified application for a project to enhance clean coal research and development or renewable resource research and development, subsection (5)(a) does not apply.

(6) An applicant for a grant shall provide matching funds from nonstate sources equal to 25% of total project costs. The requirement to provide matching funds is a qualifier, but not a criterion, for approval of a grant.

(7) The board shall establish policies, procedures, and criteria that achieve the objectives in its research and commercialization strategic plan for the awarding of grants and loans. The criteria must include:

(a) the project's potential to diversify or add value to a traditional basic industry of the state's economy;

(b) whether the project shows promise for enhancing technology-based sectors of Montana's economy or promise for commercial development of discoveries;

(c) whether the project employs or otherwise takes advantage of existing research and commercialization strengths within the state's public university and private research establishment;

(d) whether the project involves a realistic and achievable research project design;

(e) whether the project develops or employs an innovative technology;

(f) verification that the project activity is located within the state;

(g) whether the project's research team possesses sufficient expertise in the appropriate technology area to complete the research objective of the project;

(h) verification that the project was awarded based on its scientific merits, following review by a recognized federal agency, philanthropic foundation, or other private funding source; and

(i) whether the project includes research opportunities for students.

(8) The board shall direct the state treasurer to distribute funds for approved projects. Unallocated interest and earnings from the account must be retained in the account. Repayments of loans and any agreements authorizing the board to take a financial right to licensing or royalty fees paid in connection with the transfer of technology from a research and commercialization center to another nonstate organization or ownership of corporate stock in a private sector organization must be deposited in the account.

(9) The board shall refer grant applications to external peer review groups. The board shall compile a list of persons willing to serve on peer review groups for purposes of this section. The peer review group shall review the application and make a recommendation to the board as to whether the application for a grant should be approved. The board shall review the recommendation of the peer review group and either approve or deny a grant application.

(10) The board shall identify whether a grant or loan is to be used for basic research, applied research, or some combination of both. For the purposes of this section, "applied research" means research that is conducted to attain a specific benefit or solve a practical problem and "basic research" means research that is conducted to uncover the basic function or mechanism of a scientific question.

(11) For the purposes of this section:

(a) "clean coal research and development" means research and development of projects that would advance the efficiency, environmental performance, and cost-competitiveness of using coal as an energy source well beyond the current level of technology used in commercial service;

(b) "renewable resource research and development" means research and development that would advance:

(i) the use of any of the sources of energy listed in ~~69-3-2003(6)~~ *69-3-2003(7)* to produce electricity; and

(ii) the efficiency, environmental performance, and cost-competitiveness of using renewable resources as an energy source well beyond the current level of technology used in commercial service."

Section 3. Effective date. [This act] is effective on passage and approval.

Approved March 20, 2009

CHAPTER NO. 31

[HB 208]

AN ACT EXTENDING A DEADLINE FOR PUBLIC UTILITIES TO COMPLY WITH THE COMMUNITY RENEWABLE ENERGY REQUIREMENTS OF THE RENEWABLE PORTFOLIO STANDARD; AND AMENDING SECTION 69-3-2004, MCA.

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 69-3-2004, MCA, is amended to read: