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

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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** **BRIEF**

INTRODUCTION

This docket is 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 is also an unopposed petition by Montana-Dakota for a Commission 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 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] The order denied Montana-Dakota the relief it requested in its unopposed motion,

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[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.

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

and was entered in violation of the Montana Administrative Procedures Act ("MAPA"), Section 2-4-101 *et seq* of the Montana Code Annotated.

Montana-Dakota, on July 19, 2012, moved the Commission for reconsideration of its Order 7221, and upon reconsideration, for 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 requested that the Commission vacate its Order 7221 and provide Montana-Dakota with the contested case procedures to which it is entitled under MAPA. Section 2-4-601, MCA *et seq*.

The Commission, on August 8, 2012, issued a Notice of Commission action in which it granted Montana-Dakota's motion for reconsideration. It stayed its Order 7221 pending the completion of contested case proceedings in this docket. It issued a notice of Montana-Dakota's filing in the docket, and set August 24, 2012, as the deadline for intervention by interested parties. The Montana Consumer Counsel ("MCC") intervened, but did not actively participate.

The Commission issued Procedural Order 7221a in the docket , setting forth deadlines for the pre-filing of testimony in support of the Petition, and for the pre-filing of testimony in opposition to the Petition. Montana-Dakota pre-filed the testimony of Mr. Darcy Neigum and Ms. Theresa Addison in support of the Petition. No testimony opposing the Petition was pre-filed, and it remains an unopposed Petition.

Given the lack of any opposition to its Petition, Montana-Dakota filed, on November 7, 2012, a Motion in *Limine* in which it asked for entry of a Commission order that:

(A) Established that the record in this case, for purposes of a contested case decision, is the pre-filed testimony of Mr. Neigum and Ms. Addison, together with Montana-Dakota's responses to the data requests submitted to it by the Commission's Staff;

(B) Permanently vacated the scheduled public hearing in the docket, and;

(C) Provided for the filing of this Brief.

The Commission granted the Motion in *Limine* by Notice of Commission Action dated November 23, 2012.

THE ISSUE

If the Commission's Order 7221 in this docket is used as the reference point, the issue in this docket would seem to be whether Diamond Willow 1 and 2 are CREPs as defined in the Act, specifically, subsections 69-3-2003(4) and (18), MCA. Since Montana-Dakota believes that Order 7221 was entered upon a clear mistake of law,[3] it does not agree there really is any issue in this proceeding, and that it is entitled, as a matter of law, to a Commission order certifying both Diamond Willow 1 and 2 as CREPs.[4]

THE UNCONTESTED 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. Neigum at 4. Diamond Willow 1 was specifically 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.

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. Neigum at 4-5. 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. Neigum at 5.

For purposes of cost minimization, Diamond Willow 2 was constructed next to Diamond Willow 1. Neigum at 6-7. The two projects were not only separately constructed, two years

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[3] Montana-Dakota Petition for Reconsideration at pp. 5-11.

[4] Montana-Dakota believes the Commission's failure to certify Diamond Willow 2 as an eligible renewable resource was an offshoot of its decision to treat Diamond Willow 2 as being part of Diamond Willow 1.

apart, they are separately interconnected to Montana-Dakota's transmission system, using separate step up transformers, breakers, relays, and meters. Neigum at 7.

When Montana-Dakota acquired the Diamond Willow wind site in 2007, it had been planned as a 30 MW project by its original developer. Neigum at 6. However, that was too large a wind project for Montana-Dakota's needs, and it down sized it to 19.5 MW, the level at which the Commission certified it as an eligible renewable resource under the Act. Neigum at 6-7. To minimize the cost of obtaining the required MISO approvals for transmission interconnections, Montana-Dakota submitted a single large generator interconnection agreement for the entire site. Neigum at 6-7. Accordingly, MISO established a single Commercial Pricing Node (CPNode) for the entire site. Neigum at 7.

The Commission requires Montana-Dakota to use the M-RETS tracking system for purposes of tracking renewable energy credits under the Act. ARM 38.5.8301(2). Because both Diamond Willow 1 and 2 are covered by a single generator interconnection agreement, and are behind a single CPNode, M-RETS requires Montana-Dakota to register both Diamond Willow 1 and Diamond Willow 2 as a single location on the MISO grid. Addison at 3. M-RETS protocols specifically state that it is the CPNode that must be specified for both Diamond Willow 1 and Diamond Willow 2 in the M-RETS tracking system. Addison at 4.

THE CONTROLLING LEGAL STANDARD

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 an incontestable fact in this proceeding that Diamond Willow 1 and 2 were <u>not</u> constructed within a single 12 month period.

ARGUMENT

I. The Commission does not have the power to craft its own standards for determining whether Diamond Willow 1 and 2 are CREPs.

The Commission does not have the power to craft its own standards for determining whether Diamond Willow 1 and 2 are CREPs. The Commission's Order 7221 inexplicably held that:

(1) The Commission is not bound in this proceeding by the definition of a CREP set forth in the Act, specifically Section 69-3-2003(18), MCA;

(2) The Commission is free to craft a 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 CREPs.

Contrary to the Commission's belief, it is bound by the definition of a CREP set forth in subsections 69-3-2002(4) and (18), MCA.

The PSC has only those powers conferred upon it by the legislature, and the actual words of the legislature define the scope and extent of those powers, *City of Polson v. Public Service Commission*, 155 Mont. 464, 469, 473 P.2d 508 (1970):

> It is a basic rule of law that the Commission, as an administrative agency, has only those powers specifically conferred upon it by the legislature and in determining those statutory powers this Court must give effect to every word, phrase, clause or sentence therein, if it is possible to do so.

Id.; see also *Gwynn v. Town of Eureka*, 178 Mont. 191, 193-94, 582 P.2d 1262 (1970). If there is any doubt as to the existence of a particular power in the PSC, the doubt is to be resolved against the existence of the power, *State ex rel Thatcher v. Boyle*, 62 Mont. 97, 102, 204 P. 378 (1921):

> The commission is a mere administrative agency created to carry into effect the legislative will. It has only limited powers, to be ascertained by reference to the statute creating it, <u>and any reasonable doubt as to the grant of a particular power will be resolved against the existence of the power</u>. . . .

Id. (emphasis added); see also *Montana Power Company v. Public Service Commission*, 206 Mont. 359, 671 P.2d 604, 611 (1983).

The Commission does not have the power to chart its own course in determining whether Diamond Willow 1 and 2 are two wind farms for purposes of CREP certification. It must adhere to the definition of a CREP set forth in the Act. Because Diamond Willow 1 and 2 were constructed more than 12 months apart, they are both CREPs as defined in the Act.

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

The Commission's rationale in Order 7221 was based upon a mistake of law. 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 rejecting another of the Commission's statutory interpretations, *Willamson v. Mont. Pub. Serv. Comm'n*, 2012 MT 32, ¶ 36.[5]

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.*

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[5] 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.

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.

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;
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> (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 its Order 7221 produced a highly unreasonable end result, both for Montana-Dakota, and for its Montana customers.

Under the definition of a CREP in the Act, Montana-Dakota has approximately 13.6 MW of CREP generating capacity to meet is obligations under the Act, not only currently, but into the

future.[6] Under Order 7221, Montana-Dakota has only 5.3 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. Neigum at 8-9. 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 27.4 per cent of the total integrated system load requirement. Neigum at 8-9. That means that only 27.4 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 adheres to the Act, all three wind farms will be certified as CREPS, and 27.4 per cent of their generating capacity will be allocated to Montana and used by Montana-Dakota to satisfy its CREP obligation under the Act. If the Commission refuses to certify Diamond Willow 1 and Diamond Willow 2 as CREPs in accordance with the

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[6] Montana-Dakota used rounded numbers for the calculation in its Motion for Reconsideration. Mr. Neigum presented the exact numbers in his testimony.

Act, it will reduce the total CREP capacity available to Montana-Dakota to the Montana allocated share of Cedar Hills, which is only 5.3 MW. Under that scenario, Montana-Dakota's Montana customers would be burdened with the cost of additional CREP power required under the Commission's flawed legal analysis.[7]

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 no longer a CREP. The attempted distinctions border on the absurd.

The Commission's rational in 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. <u>The Commission's *Kenfield* decision has no relevance to this proceeding.</u>

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

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[7] It is difficult to discern what benefit accrued 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.

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

As a matter of law, Montana-Dakota is entitled to an order of the Commission certifying Diamond Willow 1 and Diamond Willow 2 as CREPs.

Dated this 13th day of December, 2012.

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By _____

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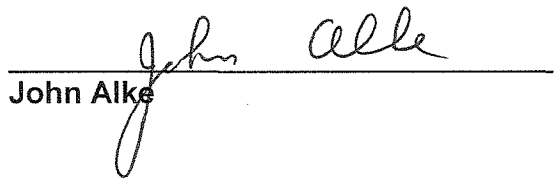
CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that a copy of the foregoing **BRIEF** was served upon the following by mailing a true and correct copy thereof on this 13th day of December, 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 ~~5~~ *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;

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(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: