

Service Date: July 10, 2012

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

IN THE MATTER of the Petition of Montana-) REGULATORY DIVISION
Dakota Utilities Co. for Certification of Eligible)
Renewable Resources and Community Renewable) DOCKET NO. D2012.3.24
Energy Resources) ORDER NO. 7221

FINAL ORDER

PROCEDURAL HISTORY

1. On March 13, 2012, Montana-Dakota Utilities Co. (MDU) filed a Petition for Certification of Eligible Renewable Resources and Community Renewable Energy Resources (Petition) with the Public Service Commission (Commission) pursuant to the Montana Renewable Portfolio Standard (RPS). MDU requested that the Commission certify the Diamond Willow 2 and Cedar Hills wind generation facilities as eligible renewable resources, and certify the Diamond Willow 1, Diamond Willow 2, and Cedar Hills wind generation facilities as community renewable energy projects (CREPs).

2. On March 30, 2012, the Commission issued a Notice of Petition and Opportunity to Comment, which set a deadline of April 30, 2012, for submission of public comments or to request a contested case proceeding. The Commission received no public comment or request for a contested case proceeding.

FINDINGS OF FACT

3. On March 7, 2007, the Commission certified as an eligible renewable resource a 19.5 megawatt (MW) Fallon County wind project, known here as the Diamond Willow 1 wind generation facility, as an eligible renewable resource. *See* Not. of Commn. Action, Docket D2007.2.23.

4. The construction of Diamond Willow 1 began in August 2007 and ended with commercial operation in February 2008. *See* Response to PSC-002(b), Attachment B (May 21, 2012).

5. MDU represents that Diamond Willow 2 is a separate and distinct 10.5 MW wind generation facility owned by MDU and located in Fallon County, Montana. *Id.*; *see also* Pet. pp. 2-3 (Mar. 13, 2012). Diamond Willow 2 commenced commercial operation on June 28, 2010. Pet. at p. 2.

6. MDU owns both Diamond Willow 1 and Diamond Willow 2.

7. MDU did not seek distinct and separate financing for Diamond Willow 1 and Diamond Willow 2, instead using on an undifferentiated basis the company's mix of internally generated funds, the utilization of its short-term line of credit, and the issuance of additional debt and equity. *See* Response to PSC-001(c).

8. MDU obtained control over the land on which Diamond Willow 1 and Diamond Willow 2 both sit at the same time, through a single lease, with the anticipation of building a 30 MW project. *See* Response to PSC-004(a).

9. Diamond Willow 1 and Diamond Willow 2 are in close proximity to one another. *See* Response to PSC-001(a), Attachment A.

10. MDU submitted an interconnection request for a 30 MW project, not a CREP-sized project, in order to furnish service to both Diamond Willow 1 and Diamond Willow 2. *See* Response to PSC-004(a).

11. Construction of Diamond Willow 2 began at least 20 months after Diamond Willow 1, beginning about November 2009 and ending with commercial operation in June 2010. Response to PSC-002(b). Although the two facilities are in close proximity to one another and are both owned by MDU, they were not built within the same 12-month period. Pet. at p. 2.

12. The Midwest Renewable Energy Tracking System (MRETS) is the generally accepted renewable energy credit tracking service for the Midwestern region, and the body through which the Commission verifies companies' acquisition of RECs. *See* Admin. R. Mont. 38.5.8301(2) (2012).

13. MRETS designates Diamond Willow 1 and Diamond Willow 2 as one, 30 MW project. Response to PSC-004(b), Attachment A.

14. In an email to an MRETS administrator, MDU employee Theresa Addison writes: “I noticed in our Diamond Willow Generating Facility that the Nameplate Capacity is still 19.5 [MW]. However we expanded this windfarm [*sic*] and it was completed this summer. That nameplate capacity should now be 30.0 [MW].” MDU treats Diamond Willow 1 and Diamond Willow 2 for operational purposes (and frequently for colloquial designation) as one, consolidated facility, with a nameplate capacity of 30 MW.

15. Cedar Hills is a 19.5 MW wind generation facility owned by MDU and located in Bowman County, North Dakota, approximately 20 miles east of the Montana-North Dakota border. Pet. at p. 2. Cedar Hills commenced commercial operation on June 6, 2010. *Id.* The facility connects with MDU’s electric system on a transmission line between Bowman, North Dakota, and Baker, Montana, that is normally operated to direct the electricity produced by Cedar Hills to the Baker Junction substation in Montana. Response to PSC-003(a). From Baker Junction, the energy from Cedar Hills is used to serve MDU’s entire integrated system customer load in Montana, North Dakota, and South Dakota. Pet. at pp. 2-3. Cedar Hills is therefore delivering electricity from another state into Montana.

CONCLUSIONS OF LAW

16. The RPS requires MDU to “purchase both the renewable energy credits and the electricity output” from CREPs beginning in 2012. Mont. Code Ann. § 69-3-2004(3)(b) (2011).

17. The Commission “has full power of supervision, regulation, and control” of public utilities. Mont. Code Ann. § 69-3-102 (2011). The Commission “has the authority to generally implement and enforce” the RPS, and the Montana Legislature required it to adopt rules to “establish a system by which renewable resources become certified as eligible renewable resources.” *Id.* at § 69-3-2006.

18. According to the Commission’s Rules, “Before entering into a long-term contract to purchase renewable energy credits . . . a public utility must petition the Commission to certify that the renewable energy credits were produced by an eligible renewable resource.” Admin. R. Mont. 38.5.8301(3).

19. “Eligible renewable resource” includes a wind facility “either located within Montana or delivering electricity from another state into Montana that commences commercial operation after January 1, 2005.” Mont. Code Ann. § 69-3-2003(10).

20. As a wind facility delivering electricity into Montana that commenced commercial operation after January 1, 2005, the Cedar Hills facility is an “eligible renewable resources.” *Supra* ¶ 15.

21. A CREP is “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**.” Mont. Code Ann. § 69-3-2003(4)(b) (emphasis added). The Petition mistakenly identifies “total calculated nameplate capacity” as the lens of analysis for these projects. Pet. at p. 4. In fact, the Legislature explicitly used a similar but different term in the sub-part of code that applies to public utility ownership.

22. As an eligible renewable resource owned by a public utility and less than or equal to 25 MW in total nameplate capacity, the Cedar Hills facility is a “CREP.” *Supra* ¶ 15.

23. The statutorily defined term “total **calculated** nameplate capacity” includes the total nameplate capacity of any “other eligible renewable resources that are located within 5 miles of the project, constructed within the same 12-month period, **and** under common ownership.” Mont. Code Ann. § 69-3-2003(18) (emphasis added). In amending the law to permit public utilities to own CREPs, Mont. H. 343, 61st Leg., Reg. Sess. (Jan. 22, 2009), the Legislature created a distinction between the statutorily defined “total calculated nameplate capacity” and the term “total nameplate capacity,” which, while routinely used in the industry, is not defined in the law. The Commission cannot but assume that the difference in the terminology in the law must give rise to a distinction.

24. The use of the word “calculated” in the definition modifies the conventional understanding in the utility industry of the concept “total nameplate capacity” by adding a factor that is typically not germane to the consideration of nameplate capacity, specifically the 12 month parameter, outside of which two facilities on the same site can be considered separate CREPs. The term “total nameplate capacity,” since undefined, should be defined by its plain meaning in the utility industry, which typically involves a fact-driven consideration that revolves around whether the plant has common ownership, common financing, a common interconnection, common operational control, and is in other situations treated as a single unit. That plain meaning inheres in the present situation. As demonstrated by MDU employee

Theresa Addison's casual reference to "Diamond Willow Generating Facility" as a single project with a "nameplate capacity" of 30 MW, the wind farm is understood to be a singular facility, notwithstanding MDU's attempts to define them as two projects. *Supra* ¶¶ 13-14.

25. In the *Kenfield* Docket, the Commission determined whether two, purportedly separate 10 MW projects in fact constituted one 20 MW project. There, the Commission considered the "totality of the circumstances" as a better method than any bright line. Ord. 7068b, Docket D2010.2.18, ¶¶ 71-72 (June 22, 2010). Those circumstances included ownership, interconnection, operations, and financing of the project(s), and the Commission found on the basis of the latter three criteria's being commonly associated with both purported 10 MW facilities that they were in fact *one* facility. *Id.* at ¶ 73.

26. Were the *Kenfield* test applied in the current case, Diamond Willow 1 and Diamond Willow 2 would fail all four prongs of the test in determining separate project status. The application of the *Kenfield* precedent would lead to a determination that Diamond Willow Generating Facility is one project.

27. The statute as it applies to non-public utility owners here is suggestive, but is not controlling and ultimately not persuasive. In the definition that applies to non-public utility owners of "total **calculated** nameplate capacity," incremental capacity is considered part of a previously energized CREP if three factors are met in conjunction: the incremental addition is located within 5 miles of the project, is constructed within the same 12-month period, **and** is under common ownership. Mont. Code Ann. § 69-3-2003(18) (emphasis added). The projects here are under common ownership—MDU's—and are located within 5 miles of one another, but were not constructed in the same 12-month period. If owned by a "local owner," Diamond Willow 1 and Diamond Willow 2 would be considered separate CREPs. *Id.* at § 69-3-2003(4)(a), (18). Again, the statute offers no definitive guidance relative to a situation where a public utility owns the project. *See id.*

28. There are valid legal and public policy reasons to decline to treat "total calculated nameplate capacity" as synonymous with "total nameplate capacity." The plain meaning of "total nameplate capacity," as described above, militates toward identifying Diamond Willow as a 30 MW facility, not a CREP. *Supra* ¶¶ 6-10, 13-14. The plain meaning of a term controls when it is undefined. *See Klingman v. Mont. Pub. Serv. Commn.*, 2012 MT 32, ¶ 36; *see also* Mont. Code Ann. § 1-2-106. Additionally, were a non-standard meaning to be imputed to "total

nameplate capacity,” making it synonymous with the defined term “total calculated nameplate capacity,” it could have deleterious effects that undermine at least one purpose of the law, “creating new jobs and stimulating business and economic activity in **local communities across Montana.**” Mont. Code Ann. § 69-3-2002(2) (emphasis added). Conceivably, a public utility could simply add an expansion to an existing wind farm every 12 months, turning a 20 MW facility into a 45 MW facility, then a 60 MW facility, and then a 90 MW facility, even while labeling what, to the average utility observer is a sizable and undifferentiated wind farm, a series of “community renewable energy projects.” This cannot be what the Legislature intended by a law intended to promote the development of small projects by a diverse group of owners in diverse locations.

29. As a project with a 30 MW total nameplate capacity, the Diamond Willow Generating Facility is not a “CREP.”

30. Diamond Willow 2 is part of the facility previously approved as an eligible renewable resource by the Commission. *See* Not. of Commn. Action, Docket D2007.2.23.

ORDER

IT HEREBY ORDERED THAT:

1. The Cedar Hills wind generation facility is certified as eligible renewable resources; and
2. The Cedar Hills wind generation facility is certified as a CREP.
3. The Petition to separately certify Diamond Willow 2 as a distinct eligible renewable resource is denied.
4. The 19.5 MW Fallon County wind project, known here as Diamond Willow 1, approved in D2007.2.23, is certified on an amended basis as a 30 MW facility.
5. The Petition to certify Diamond Willow 1 and Diamond Willow 2 as distinct CREPs is denied.

DONE AND DATED this 3rd day of July 2012 by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

TRAVIS KAVULLA, Chairman

GAIL GUTSCHE, Vice Chair

W. A. GALLAGHER, Commissioner

BRAD MOLNAR, Commissioner

JOHN VINCENT, Commissioner

ATTEST:

Aleisha Solem
Commission Secretary

(SEAL)

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