

Service Date: February 5, 2013

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. 7221b

**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) pursuant to the Montana Renewable Power Production and Economic Development Act, also known as the Renewable Portfolio Standard (RPS). In its Petition, MDU requested that the Public Service Commission (Commission or PSC) certify: (1) The Diamond Willow 2 and Cedar Hills wind generation facilities as eligible renewable resources; and (2) 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*. The Commission has received no public comments in this proceeding.
3. On May 4, 2012, the Commission issued *Data Requests PSC-001 through PSC-004*, to which MDU responded on May 21, 2012.
4. On July 3, 2012, the Commission issued *Order 7221*, which certified Cedar Hills as an eligible renewable resource and a CREP. Because the Commission found that Diamond Willow is a “singular facility,” it certified Diamond Willow as a 30 megawatt (MW) eligible renewable resource, and denied certification of Diamond Willow 2 as a distinct resource.
5. On July 19, 2012, MDU filed *Consolidated Motions for Reconsideration and Rehearing*. On July 26, 2012, the Commission granted MDU’s *Motion for Reconsideration and*

stayed *Order 7221* pending a contested case proceeding. *See* Not. of Commn. Action p. 2 (Aug. 8, 2012).

6. On August 10, 2012, the Commission issued a *Notice of Petition and Intervention Deadline*, noticing this proceeding as a contested case and setting an intervention deadline of August 24. The Commission granted intervention to the Montana Consumer Counsel on August 28, 2012.

7. On September 10, 2012, the Commission issued *Procedural Order 7221a*, which established a discovery schedule, a deadline for pre-hearing memoranda, and a hearing date.

8. On October 2, 2012, MDU filed the *Direct Testimony of T. Addison and D. Neigum*. On October 15, 2012, the Commission issued *Data Requests PSC-005 through PSC-024*, to which MDU responded on October 26, 2012.

9. On November 7, 2012, MDU filed a *Motion in Limine* seeking the following relief: (1) That the record in this case consist of the *Direct Testimony of T. Addison and D. Neigum* and the Data Responses previously submitted by MDU; (2) that the hearing be permanently vacated; and (3) that MDU be permitted to submit a final brief in support of its position. The Commission granted MDU's *Motion in Limine* on November 20, 2012. *See* Not. of Commn. Action ¶ 5 (Nov. 23, 2012).

### FINDINGS OF FACT

10. MDU owns the Diamond Willow 1 and Diamond Willow 2 wind generation facilities. Pet. p. 2 (Mar. 13, 2012).

11. Diamond Willow 1 is a 19.5 megawatt (MW) wind facility that the Commission previously certified as an eligible renewable resource. *See* Not. of Commn. Action, Docket D2007.2.23 (Mar. 7, 2007).

12. Diamond Willow 2 is a 10.5 MW wind facility located in Fallon County, Montana. Pet. at pp. 2-3.

13. Diamond Willow 1 was fully operational in February 2008. *Direct Test. of D. Neigum* p. 4 (Oct. 2, 2012). MDU signed a construction services contract for the construction of Diamond Willow 2 on March 22, 2009, and the facility achieved commercial operation on June 28, 2010. *Data Response to PSC-008, Attachment A* (Oct. 26, 2012). Therefore, Diamond Willow 1 and Diamond Willow 2 were not constructed within the same 12-month period.

### CONCLUSIONS OF LAW

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

15. MDU is a public utility. *See id.* at § 69-3-101.

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

17. MDU must petition the Commission to certify that renewable energy credits used to comply with the RPS were produced by an eligible renewable resource. Admin. R. Mont. 38.5.8301(3) (2012).

18. An “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).

19. A CREP is an eligible renewable resource that “is owned by a public utility and has less than or equal to 25 megawatts in total nameplate capacity.” *Id.* at § 69-3-2003(4)(b).

20. In order to calculate the nameplate capacity of a CREP, the Commission must add the nameplate capacity of the CREP to that of any other eligible renewable resources located within five miles, constructed within the same twelve-month period, and under common ownership. *Id.* at § 69-3-2003(18).

21. Because Diamond Willow 1 and Diamond Willow 2 were not constructed within the same twelve-month period, the Commission must calculate the nameplate capacity of each facility separately. *Id.*; *supra* ¶ 13.

22. As a wind facility located in Montana that commenced commercial operation after January 1, 2005, Diamond Willow 2 is an eligible renewable resource. *Supra* ¶¶ 12-13.

23. As eligible renewable resources owned by a public utility and each having less than 25 MW in total nameplate capacity, Diamond Willow 1 and Diamond Willow 2 are CREPs. *Supra* ¶¶ 10-13, 22.

24. Because MDU did not seek reconsideration of the portions of *Order 7221* related to Cedar Hills, the Commission’s certification of Cedar Hills as an eligible renewable resource and CREP remains in effect. *See* Commn. Ord. 7221 pp. 3-4, 6 (July 3, 2012).

**ORDER**

IT IS HEREBY ORDERED THAT:

25. Diamond Willow 1 is certified as a CREP;
26. Diamond Willow 2 is certified as an eligible renewable resource; and
27. Diamond Willow 2 is certified as a CREP.

DONE AND DATED this 29<sup>th</sup> day of January 2013 by a vote of 4 to 1. Commissioner Kavulla dissenting.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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W. A. GALLAGHER, Chairman

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BOB LAKE, Vice Chairman

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KIRK BUSHMAN, Commissioner

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TRAVIS KAVULLA, Commissioner (dissenting)

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ROGER KOOPMAN, Commissioner

ATTEST:

Aleisha Solem  
Commission Secretary

(SEAL)

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

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**DISSENTING OPINION OF COMMISSIONER TRAVIS KAVULLA**

The principal question in this docket is whether a generating facility which Montana Dakota Utilities employees refer to as “Diamond Willow Generating Facility” is, in fact, one, 30-megawatt wind farm, or, instead, two separate facilities.

Why this matters at all is an inheritance of Montana’s Renewable Power Production and Rural Economic Development Act, more frequently referred to as the renewable portfolio standard. The standard establishes that utilities must acquire community renewable energy projects (CREPs), sized 25 megawatts or less, that are interconnected to Montana and delivering electricity to the subject utility, and be owned either by a local owner or a public utility.

In drafting an amendment to the law that allowed public utilities to own CREPs, the legislature expressly did not define a CREP that was owned by a public utility in the same way that a CREP owned by a local owner was defined. 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).

In the instance of a CREP owned by a local owner (but not a public utility), a contrived legislative definition, “total calculated nameplate capacity,” is used, which 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.”

When a CREP is owned by a public utility, “total nameplate capacity” is used, which is not legislatively defined although it is routinely used in the electric generating industry.

It is a maxim of law that its interpreters should not omit what has been included, or include what has been omitted. The Commission’s decision in this docket, reversing a unanimous decision made just last year, violates the second part of that maxim: It pretends that the legislatively defined concept of “total *calculated* nameplate capacity”—which has little to do with how a professional working in the electric generating industry would define nameplate capacity—should be applied to projects like Diamond Willow.

In my view, the Commission should have relied on the plain meaning of the undefined term “total nameplate capacity.” In the lingo of electric generating facilities, nameplate capacity is that value of rated generating capacity that typically will appear stamped on a manufacturer’s label of a particular generator. The total energy generated from a generator is the total nameplate capacity multiplied by its capacity factor (the duration of time and magnitude of total potential output that the generator runs). The total nameplate capacity of a wind farm is derived by adding up the nameplate capacity of the units.

In the case of the Diamond Willow Generating Facility, I am convinced that a person with casual knowledge of the utility industry would identify the project as one, 30-megawatt facility, not two separate CREP-sized wind farms. The farm has a single interconnection to the grid, it sits on a piece of land that is subject to a single lease, it has one commercial pricing node on the Midwest Independent System Operator (MISO) market. In the record is a telling piece of correspondence from one MDU employee which communicated to the administrator of the Midwest’s renewable energy credit certifying platform, MRETS, the following: “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].” This, in my view, conclusively demonstrates that when using the language commonly employed in the utility industry, the Diamond Willow Generating Facility is just that—one facility, and not two. Further proceedings in this matter could have adduced evidence that MDU had referred to the wind farm as a single entity in its lobbyist’s presentations to the legislature, and in press releases.

MDU raises in its Dec. 13, 2012, brief on this matter what, in my view, are some important questions, but ones that are fundamentally not relevant to the only question in this

proceeding, which revolves around statutory construction. Nonetheless, I will address them briefly. MDU contends that its allocation to Montana of the capacity of various wind farms is not large enough, without a CREP designation for Diamond Willow, to allow it to comply with the portfolio standard's mandates. Brief at p. 9. It should be noted that the Commission has not approved any such allocation. The related issue, about whether MDU would have to procure additional CREPs to meet the standard at a cost to consumers, is likewise an important issue. However, if CREPs were significantly more costly, then MDU is well aware that another provision of law allows the company to apply for a waiver from the standard on the basis that its cost cap would be exceeded. Such a proceeding, in my view, would be an appropriate and welcome place to consider the true cost of CREPs. It should be remembered that the renewable portfolio standard does not give license for limitless costs to be imposed on consumers, and utilities should avail themselves of cost-cap treatment when projects exceed the caps established in law. Mont. Code Ann. § 69-3-2007.

While I sympathize for MDU's peculiar situation, aggravated by a law that is frequently nonsensical, it is the Commission's job merely to enforce the law, not to remake it anew. I believe a reasonable reading of the law would have led the Commission to reaffirm the decision made in our Order No. 7221, issued on July 3, 2012, in this matter.

I, therefore, respectfully DISSENT.

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TRAVIS KAVULLA, Commissioner (dissenting)