

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

IN THE MATTER OF the Petition of) REGULATORY DIVISION
Greycliff Wind Prime, LLC for)
Declaratory Ruling) DOCKET NO. D2014.1.9

DECLARATORY RULING

BACKGROUND

1. On January 21, 2014, Greycliff Wind Prime, LLC (Greycliff) filed a *Petition for Declaratory Ruling* (Petition) with the Montana Public Service Commission (Commission). On February 13, 2014, Greycliff filed an *Amendment to the Petition*.

2. On February 18, 2014, the Commission issued a *Notice of Petition for Declaratory Ruling and Opportunity to Comment*. The Commission received *Comments* from the following entities: Diana's Great Idea, LLC; Engwis Investment Company, Ltd. and R. F. Building Company, LLP; NorthWestern Corporation; and Rock Creek Ranch, Ltd. Greycliff filed *Response Comments* on March 18, 2014.

3. Greycliff is planning construction of a wind project in Sweet Grass County, Montana. In its Petition, Greycliff presents a legal question pertaining to Section 69-3-2003 of the Montana Code Annotated, which defines a "community renewable energy project" (CREP) in part as "an eligible renewable resource . . . in which local owners have a controlling interest." Pet. p. 10 (Jan. 21, 2014).

4. According to Greycliff, a local owner will have "a controlling interest" in its project because the local owner "will manage the project." Response Comments p. 7 (Mar. 18, 2014) ("the organizational documents for Greycliff will empower [the local owner] . . . to control the policy and management of the project."); see also Pet. at pp. 4, 7 (asserting the local owner will be "in control" and have "management control").

5. Although "Greycliff expects to admit a second member which. . . . may not be a Montana resident," it asserts that "control of the project [will be] firmly rooted in the Montana community, regardless of the allocation of equity, income, or voting interests at the project level." Response Comments at p. 7. The second member may have as much as a 99% ownership interest in the project. See Amend. Pet. Ex. B (Feb. 13, 2014).

6. According to Greycliff, the rights of the second member "are best described as a 'check' or 'brake' on the management rights of the [local owner]." Pet. pp. 6-7. These rights include "the right . . . to consent to (1) certain major

actions like a sale or refinance of the project, (2) changing major project vendors, or (3) dissolving Greycliff," as well as "a right to remove the [local owner] in the case of wrongful misconduct." *Id.*; Response Comments at p. 2.

7. On December 20, 2011, the Commission certified a project owned by Gordon Butte Wind, LLC as a CREP because Montana residents had "a controlling interest" in the project, albeit indirectly. Or. 7192, Dkt. D2011.11.93, ¶¶ 5-9, 18.

8. On February 25, 2014, the Commission declared that "an eligible renewable resource does not qualify as a CREP unless 'local owners have a controlling interest' at the time of its interconnection and at any point thereafter." Declaratory Rul., Dkt. D2014.1.7, ¶ 8 (Feb. 25, 2014). Under the ownership structure described by Greycliff, the only interest that local owners will control at the time of interconnection will be a management interest in the day-to-day operations of the project.

CONCLUSIONS OF LAW

9. The Commission "shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision. . . ." Mont. Code Ann. § 2-4-501 (2013). "A declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases." *Id.*; Admin. R. Mont. 1.3.229(2) (2014).

10. The Commission has adopted the Attorney General's Model Procedural Rules governing declaratory rulings. Admin. R. Mont. 38.2.101. "A party may seek a declaratory ruling from the agency when doubt exists as to how a statute or rule administered by an agency affects the party's legal rights." *Id.* at 1.3.226.

11. A "community renewable energy project" is, in relevant part, "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." Mont. Code Ann. § 69-3-2003(4)(a).

12. In order for "business entities" to qualify as "local owners" under the Renewable Power Production and Rural Economic Development Act (Act), "at least 50% of the equity interests, income interests, and voting interests [must be] owned by Montana residents." *Id.* at § 69-3-2003(11)(c)(iii). This language was added to the Act at the request of the Commission, which was concerned that the prior definition was so vague that it allowed CREPs to exist with very little representation by Montanans. Mont. H. Energy & Telecomm. Interim Comm., Hrg. on H. 78, 62d Legis., Reg. Sess. (Mar. 10, 2011). The Commission agrees that "it [was] important to the Montana Legislature . . . to have Montanans own the [projects] seeking certification under the Act, not just receive the benefit of a management salary." Comments of Rock Creek Ranch, Ltd. p. 9 (Mar. 11, 2014). In light of its past

concerns about local ownership, the Commission considers equity, income, and voting interests to be relevant in determining whether "local owners have a controlling interest" in a project.

13. Black's Law Dictionary defines "interest," in relevant part, as "[a] legal share in something; all or part of a legal or equitable claim to or right in property." Black's Law Dictionary 672 (Byran A. Garner ed., 8th ed. 2005). It defines "controlling interest" as "[s]ufficient ownership of stock in a company to control policy and management; esp., a greater-than-50% ownership interest in an enterprise." *Id.* The Commission agrees that "there would have been no reason to insert the word 'interest'" into the definition of CREP if the Legislature had merely intended local owners to have "management control." Comments of Rock Creek Ranch at p. 9; Pet. at p. 7.

14. In dealing with leakage from underground storage tanks, the Montana Department of Environmental Quality defines "controlling interest" as "direct ownership of at least 50% of the voting stock of another entity." Admin. R. Mont. 17.56.803.

15. Under the Montana Business and Industrial Development Corporation Act, "'Hold control' means to directly or indirectly own, of record or beneficially, 50% or more of a business's outstanding voting equity interests." Mont. Code Ann. § 32-11-102.

16. According to Black's Law Dictionary, "control" is "[t]he direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contact, or otherwise," and to have "control" means, in part, "[t]o have a controlling interest in." Black's at pp. 279-280. A number of Montana statutes define "control" in a similar manner. See Mont. Code Ann. §§ 32-11-102 (Business and Industrial Development Corporation Act); 30-14-2501(3) (unfair trade practices by a "motorsports manufacturer"); 39-8-102(3) (Professional Employer Organizations and Groups Licensing Act); 33-19-104(6) (Insurance Information and Privacy Protection Act); 32-9-103(11)(a) (Mortgage Act). Since Greycliff's second member would have the right to consent to major decisions, change project vendors, dissolve Greycliff, and remove the local owner under certain conditions, the Commission is not persuaded that the local owner would have "the power to direct the management or policies" – and thereby "control" the project – by virtue of its limited management interest.

17. The Commission declines to issue the declaratory ruling sought by Greycliff; instead, the Commission declares that under Section 69-3-2003 of the Montana Code Annotated, "local owners have a controlling interest" in a project only if they own, directly or indirectly, more than half of the equity, income and voting interests in the project.

DONE AND DATED this 27th day of March, 2014, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

/s/ W.A. (BILL) GALLAGHER
W.A. (BILL) GALLAGHER
Chairman

/s/ BOB LAKE
BOB LAKE
Vice Chair

/s/ KIRK BUSHMAN
KIRK BUSHMAN
Commissioner

/s/ TRAVIS KAVULLA
TRAVIS KAVULLA
Commissioner

/s/ ROGER KOOPMAN
ROGER KOOPMAN
Commissioner

ATTEST:

Aleisha Solem
Commission Secretary

(SEAL)

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 31st day of March 2014, a true and correct copy of the foregoing has been serviced by placing the same in the United States Mail, postage prepaid, to the service list in the PSC's master file which can be viewed at 1701 Prospect Avenue, Helena, MT 59601:

/s/ Aleisha Solem
PSC Paralegal-Commission Secretary