

STATEMENT OF DISSENT BY COMMISSIONER ROGER KOOPMAN

1. In the almost six years that I have been privileged to serve on the Montana Public Service Commission, I have joined with the majority—albeit with hesitation—each time commissioners were petitioned by NorthWestern Energy to waive its annual Community Renewable Resource Project acquisitions requirements. Applying as broadly as possible the statutory allowance for such waivers, I believe that, until now, the commission has acted both wisely and legally in ordering those CREP waivers.

2. From this commissioner's perspective, the CREP portion of the Renewable Portfolio Standard law, while no doubt well-intentioned, was hastily conceived and poorly crafted. Legislators did not anticipate the extreme difficulty that utilities like NorthWestern would face in their sincere attempts to secure (either through PPAs or build-transfer) CREP certifiable resources.

3. There are numerous reasons for this, not the least of which is the dependence by renewable energy investors on Renewable Energy Investment Tax Credits. It is no exaggeration to state that these federal tax credits are the largest single source of profit for most project investors, precisely because those investors have very large, high-bracket tax exposures. CREP certification requires that these projects be at least 50 percent Montana-owned. And yet, investors with that level of tax exposure are scarce indeed in a small populated state like ours, particularly where public policy is putting the brakes on much of our wealth-creating, natural resource-based industries.

4. Given these and other major flaws in the law, it would be easy to rationalize that, since compliance is almost impossible, the Commission should not penalize NorthWestern for non-compliance with an unreasonable law. Yet this would be wrongful thinking on the Commissions part, since we are charged with the responsibility of executing the law. We are not lawmakers or policy changers.

5. In an advisory capacity, we can and often do make recommendations to the state legislature in our areas of expertise and public trust. But in the dockets that come before us, the Commission does not have the authority to amend or overturn existing state law. I am confident that in our past CREP waiver decisions, commissioners were guided by the limits of their legal authority and acted justly and within the law. However, that cannot be said of its most recent decision.

6. The one saving grace of the CREP (RPS) statute is that, while its compliance expectations are myopic and unreasonable, its waiver provisions are not. The law provides a reasonable

avenue for waiver relief when the considerable efforts of the utility prove fruitless. The legal criteria for waiver that the Commission must apply are satisfaction of “all reasonable steps” taken by the utility to secure sufficient CREP resources, and any frustration of those efforts being “beyond the utility’s control.” Since “reasonable steps” is not clearly defined in law, PSC staff correctly concludes that reasonableness must be viewed through the lens of practicality, i.e., the utility’s obligation to take all steps that could reasonably produce tangible outcomes.

7. Unlike past waiver dockets, where all reasonable steps were demonstrably taken, and where other obstacles were clearly beyond company control, the 2015 CREP waiver docket before us fell far short of establishing these requirements. It appeared that the Commission majority plowed forward in their approval, based on past precedent more than on current evidence. The Commission’s desire to mitigate the effects of bad law appeared to trump a factual record that required commissioners to vote this petition down.

8. Specifically, NorthWestern failed the “all reasonable steps” criteria in two important ways. First, the company failed—despite prior Commission encouragement—to provide a Request for Proposal (RFP) that would allow favorable proposals to extend into a second compliance year if the party was unable to meet a commercial operating date within the first year of their proposal. (This is frequently the case where Commission CREP certification is necessary, or where Commission approval of a build-transfer project is required.) Inexplicably, NorthWestern’s 2015 RFP did not allow for such a reasonable step in the process.

9. Secondly, NorthWestern’s assertion that the short-listed Tiger Butte project was later rejected by NorthWestern for environmental reasons was a position without evidentiary merit. NorthWestern maintained at hearing that Tiger Butte was located over an abandoned mine and Superfund site and was therefore disqualified. This conflicted with earlier representations of the project, i.e., that no environmental challenges existed on the site (buttressed by a high score of 78.8 by Lands Energy). NorthWestern provided no authoritative evidence to the Commission to support its claims of environmental risk.

10. Consequently, NorthWestern Energy’s failure to take all reasonable steps in 2015 is beyond question and, accordingly, the Commission was required to deny its waiver petition on fundamental legal and evidentiary grounds. So what happened?

11. This commissioner only wishes he could logically explain the reasons for the majority's bizarre action in approving the 2015 CREP waiver. I will refrain from speculating as to what transpired here. But in at least one commissioner's case, serious confusion was apparently the cause for his approving vote. This confusion may have extended to other commissioners as well.

12. The referenced commissioner argued at work session that since the CREP portion of the RPS statute was "unreasonable" compliance-wise, it would be therefore unreasonable for the Commission to penalize the utility for non-compliance. This argument altogether misses the point. That the CREP law is a short-sighted and unreasonable burden on public utilities like NorthWestern is a given. Its amendment or outright repeal would be favored by this commissioner. But as I tried, unsuccessfully, to argue, that does not empower the Commission to simply flout the law, when the public record virtually screams "non-compliance."

13. Although the requirements of the law itself may be unworkable and unreasonable, the waiver component of that law is altogether reasonable, as demonstrated by the Commission's previous CREP waiver approval decisions. Based on the reasonable standard for waiver, NorthWestern failed the test in this case, and the Commission needed to honor the law by applying it fairly, accurately, and justly.

14. This we absolutely did not do.



Commissioner Koopman, Dissenting