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

IN THE MATTER OF NorthWestern Energy's Petition for a Short-Term Waiver from Full Compliance with the Community Renewable Energy Project Purchase Requirement	))))	REGULATORY DIVISION DOCKET NO. D2011.6.53 ORDER NO. 7177b

CONCURRING OPINION OF COMMISSIONER TRAVIS KAVULLA

This case requires us to apply a law that establishes a difficult standard of proof for any applicant to attain, much less prove in a regulatory filing: that the applicant has taken "all reasonable steps" to acquire or purchase electricity and renewable energy credits from projects sized 25 megawatts (MW) or less in order to comply with that part of Montana's Renewable Portfolio Standard (RPS) which mandates the purchase of electricity and its associated renewable attributes from Community Renewable Energy Projects (CREPs).

There certainly is an inclination on my part to soften the blow of this onerous law. The mandate for CREPs seems extraneous to most of the core purposes of sensible utility planning. But I will not attempt to second-guess the Legislature which, as is its prerogative, insisted on the inclusion of the CREP provision within the larger RPS. Indeed, just last year, the legislature defeated an effort to repeal this provision of the RPS. Mont. Senate, *Debate on Mont. HB 237 on the Floor of the Senate*, 62d Mont. Leg., Reg. Sess. (Mar. 25, 2011) (Motion to Concur failing 17-33). The law, so long as it continues to grace Title 69 of Montana Code, should be applied with all the vigor that the plain meaning of the words "all reasonable steps" deserves.

This case is fairly simple with respect to a request for a waiver for years 2013 and 2014. NorthWestern Energy (NorthWestern or NWE) seems simply to have stopped pursuing any steps at all to comply with the CREP provisions after filing its petition for a three-year waiver. If one accepts NorthWestern's own argument about the long planning timeline necessitated by the process of bringing a generation plant online, then steps that were not taken after March 2011—the time when the Spion Kop project mutated into something other than a CREP and

NorthWestern made a judgment that no CREPs would result from the 2009 request for information (RFI) process or from bilateral negotiations for opportunity resources—necessarily bear on a finding pertinent to 2013 and 2014, which are also the subject of NorthWestern's petition. NorthWestern seems to be arguing that there were simply no reasonable steps that could be taken after the petition's filing, which is absurd.

The dissenter, Commissioner Gallagher, argues that the Commission should not needlessly make findings relative to future years. There are three logical errors which undermine his argument. First, NorthWestern is requesting us to make findings on three years—none of which have passed. NorthWestern still could take steps to attempt to comply in 2012, just as it could take steps to comply in 2013 or 2014. An argument that the issue is not ripe to decide would apply to all three years. Second, the Commission is finding in its Order that the relevant reasonable step not taken, given the law's and our administrative rules' predilection for it, is a competitive solicitation process.[1] The Order essentially plots that process along a linear timeline beginning at the moment at which an RFI's issuance would have been reasonable, and uses that timeline to conclude that achieving a CREP-eligible project in 2012 would not be a reasonable expectation, but that it would be reasonable to expect a project's coming online by the end of 2013 resulting from such an RFI. It would be logically inconsistent to make a finding on only one year with respect to a step that is inherently a multi-year process, when three years of compliance are now before us. Third and finally, there are doubtless other steps that still could be taken with respect to 2013 and 2014, but that is not a relevant consideration because at least one reasonable step was not taken *at a point of time already past*. The question is therefore ripe and has already been answered. Further proceedings relative to the burden of whether NorthWestern met a standard of "all reasonable steps" would be duplicative and precluded. NorthWestern has asked us to decide the question concerning all three years, and we now have.

In addition to the Order's consideration of the potential RFI step, there is for me also the issue of whether taking steps in 2011 could have resulted in a project in 2012, and whether any such steps were reasonable. This is an uncertainty, given the planning horizon for generation projects. But not moving to take any of these steps at all made NorthWestern's noncompliance a certainty, and leaves as open questions whether certain steps, were they taken, could have

[1] As noted below, I build on this opinion, in that there seem to have been additional reasonable steps that offered NorthWestern flexibility to further engage with 2009 RFI respondents and possibly with qualifying facilities that have power purchase agreements with NorthWestern.

resulted in either compliance or in meeting a higher burden of having taken "all reasonable steps" in pursuit of compliance. Giving NorthWestern a waiver for compliance year 2012 constitutes a benefit-of-the-doubt approach that may not be warranted, given the paucity of follow-through on NorthWestern's part that is detailed below. If presented with the opportunity for a careful reconsideration of the matter, a denial of NorthWestern's petition for the 2012 compliance year may also appear appropriate.

Some of the steps relevant to the petition are listed below. They may not have been ultimately fruitful, but seem to be reasonable to have undertaken or to consider having undertaken. "Documentation and evidence" does not exist that serious efforts were made to undertake or consider undertaking them. Admin. R. Mont. 38.5.8301(4) (2012).

1. Treating others involved in the 2009 RFI process with the same flexibility that was the hallmark of the Spion Kop negotiation.

In addition to re-opening negotiations with Compass Wind Projects, LLC, which developed the Spion Kop project, NorthWestern could have re-opened negotiations with fellow semi-finalist National Wind, the developer of Greycliff Wind, LLC. National Wind submitted its bid in the RFI in late September 2009, and stated in its submittal a planned online date of September 30, 2011—a two-year horizon. Response to PSC-003(a), Attachment 1, p. 259 (Oct. 14, 2011). NorthWestern concedes that it did not follow up with Greycliff's developer after the Spion Kop project had grown to 40 MWs. NorthWestern claims that, were this project to have been resurrected following Spion Kop's scale-up to a non-CREP-sized project in about the second quarter of 2011, that this would not have resulted in the Greycliff project's coming online in 2012. Tr. pp. 76, 109-110 (Feb. 28, 2011). While NorthWestern may not have been able to obtain such a project in time for the 2012 compliance year, the request for a waiver in this case includes also 2013 and 2014, and the informational sheet from National Wind which is a part of this record indicates a timeline that is suggestive of the potential of an online project in time for compliance in 2013 and 2014. Response to PSC-003(a), Attachment 1 at pp. 245-47, 257-60.

NorthWestern could have conducted an avian study of its own to further vet one of the Sagebrush projects, Norris Hill, that was a finalist in the 2009 RFI process. NorthWestern presented no evidence or documentation, other than anecdotally, that this was a disqualifying aspect of the project. Notably, the project had been vetted for this very issue by other authorities. Tr. at pp. 72-74.

NorthWestern could have attempted to dialogue with local landowners in an effort to mitigate so-called "local opposition" issues that characterized 2009 RFI finalist Sagebrush's Mission Creek project. NorthWestern presents no evidence or documentation, other than anecdotally, that this was a disqualifying aspect of the project, and does not indicate that it attempted or could have attempted to mitigate the problem. Tr. at p. 75.

NorthWestern could have conducted a study of the mine discharge issues to determine if this was a valid reason not to move forward on 2009 RFI finalist Invenergy's Big Otter project. NorthWestern presents no evidence or documentation, other than anecdotally, that this was a disqualifying aspect of the project, and does not indicate that it attempted or could have attempted to mitigate the problem. Tr. at pp. 76-78.

2. Negotiating an acquisition arrangement with any of the multiple qualifying facilities (QFs) that already have power purchase agreements with NorthWestern, but which are not themselves poised to be CREPs.

NorthWestern did not pursue options that may have been open to it with respect to Horseshoe Bend. Tr. at pp. 35-36.

NorthWestern, rather than offering would-be QFs the possibility of a bilateral contract, communicated instead that the door was closed to them because of tariff language. Tr. at p. 103.

NorthWestern did not show that it had taken steps to acquire or consider acquiring a QF that held a power purchase agreement, but then sold it to another third party, indicating on that company's part a willingness to engage in transactions of a kind that would have allowed NorthWestern potentially to acquire a CREP-sized project.

> Q. (Commissioner Kavulla) So I'm curious. You've got Volks Wind, which based on what you just said, was a QF developer willing to sell one of its projects that it contracted for. And I wonder if NorthWestern ever approached them and said, hey, listen. We need to acquire CREPs, and we hear on the street that you might be willing to sell your project to another developer, and we might be interested in buying it?
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> A. (Dave E. Fine) If there was any communication to that effect, I'm not aware of it.

Q. Do you think that such an approach to Volks Wind, being in the position that you stated they were in, would have been a reasonable step to have taken?
A. Not knowing all of the circumstances, it may have been.

Tr. at pp. 106-107.

The post-hearing initial brief of NorthWestern comments on the reasonableness of this possibility, but contradicts itself and witness testimony. The brief asserts NorthWestern could "not have reasonably acquired either of these projects for utility ownership outside of a competitive solicitation process," NWE Initial Br. p. 12 (Apr. 6, 2012), but NorthWestern's witness Mr. Fine made clear that "negotiations [that] take place outside of a competitive solicitation," Tr. at p. 62, had been previously conducted by NorthWestern—presumably, they were not conducted in bad faith.

The Commission's precedent on this matter is unclear. Were a QF project ineligible for the standard offer, it would have to be bid competitively. Commn. Ord. 7068b p. 28 (June 22, 2010). But a QF that is 10 MW or under, and which already has a power purchase agreement, could be considered an opportunity resource acquirable outside of a competitive solicitation so long as the judgment used to evaluate and select such a resource is documented. Admin. R. Mont. 38.5.8212(3).

The post-hearing brief notes that Volkswind "would expect to sell the projects for an amount that represented the higher QF rates." NWE Initial Br. at p. 12. This is supposition, and there is no record evidence to back it, as there might otherwise have been had NorthWestern approached the developer. Moreover, the supposition's inference is contradicted by the logic of the brief's next representation which, truly enough, notes that construction risk inheres to the builder of a project. In shedding this risk, it follows that Volkswind would have been willing to settle for a lower price. The supposition is also counterintuitive more broadly because power purchase agreements incorporate a cost of risk that utilities' rate-basing the same assets do not bear, at least not to the full extent that an independent power producer does.

3. Maintaining contact pro-actively with the 106 unsolicited inquiries from project developers the company received in recent years.

NorthWestern conceded that, despite a requirement imposed on NorthWestern to acquire CREPs or purchase from CREPs, the utility allowed the process to be more "driven by the project developer rather than NorthWestern." Tr. at pp. 59-60. Under further examination, NorthWestern witness David Fine noted that for projects like CREPs, which have small capacities, it is unreasonable to expect a project developer to exist absent a power purchase agreement with a load-serving utility. He characterized the relationship between such parties as "symbiotic," requiring activity on the utility's part, not merely the developer's. Tr. at pp. 100-101.

4. Expressing an explicit preference for build-own-transfer arrangements.

Taking this step may have discouraged certain 2009 RFI respondents that may have resulted in CREP-eligible projects from seriously pursuing efforts relative to the RFI. Tr. at pp. 48-49.

5. Issuing a new competitive solicitation in 2011.

If, as NorthWestern testified, CREPs would not result from further efforts of the kind listed above to engage 2009 RFI respondents or QF owners—a position asserted but not convincingly evidenced—NorthWestern should have started over in 2011 by taking the reasonable step of beginning anew an RFI process to identify CREPs. This is the step recognized by statute (Mont. Code Ann. §§ 69-3-2005(1), 69-8-419(2) (2011)) Commission Rules (Admin. R. Mont. 38.5.2010(1), 38.5.8212(2)) NorthWestern's own practice as contemplated in the last two Electricity Supply Resource Procurement Plans (Plans), and the Commission's Order on the present Petition. The steps above flow from the 2009 RFI or bilateral negotiations (sometimes with QFs that already have PPAs that may eventually result in energy sales to NorthWestern). If a CREP could not plausibly arise from those steps, initiating an RFI was an obvious step to take. The 2011 Plan speaks of potentially acquiring "CREP-eligible resources that may bid into competitive processes," but notably does not contemplate the initiation of one, which is unreasonable.

The fact that NorthWestern simply seemed to dismiss the potential of any negotiation with third parties who were either 2009 RFI respondents or QF owners, and also did not issue an RFI, indicates a lack of seriousness with regard to fulfilling its obligations under the law. Again, the record shows that NorthWestern took no steps at all following its filing of a petition for a waiver—even though such steps would be admissible and should be considered in this record prior to the closing of the evidentiary hearing on this matter in February 2012. Tellingly, NorthWestern's 2011 Plan—the document that indicates what a utility's plans are with respect to acquisition of resources, including CREPs—contains no discussion of the steps NorthWestern is taking with regard to CREPs except a reference to the petition for a waiver from compliance. NWE 2011 Plan pp. 78-79 (Dec. 15, 2011). A petition for a waiver cannot plausibly be the one and only reasonable step to comply with this legal obligation. Yet, NorthWestern appears to have assumed merely that it would receive a waiver, and did not reasonably make attempts otherwise to comply with the law.

Finally, I am perplexed that the applicant made reference to the cost cap in the initial petition and in its post-hearing briefs, but represented at the hearing: "This docket is not about the cost caps. It's important to realize that if this docket was about cost caps, NorthWestern would [not] be asking for a waiver. It wouldn't need to ask for a waiver." Tr. at p. 17. NorthWestern offered no record evidence of what "an equivalent quantity of power over the equivalent contract term" (i.e., in this case, 25 or fewer MWs over a long period) would cost. Mont. Code Ann. § 69-3-2007(1). This is unfortunate, given that the Commission's administrative rules do contemplate a waiver's issuance in the event that a cost cap would be exceeded, but provides that a waiver may only be issued with respect to a project's potentially exceeding a cost cap if, in the first instance, "all reasonable steps" have been taken. Admin. R. Mont. 38.5.8301(4). The cost cap argument is an aspect of this law that it was not prudent to exclude from the present application.

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TRAVIS KAVULLA, Chairman (concurring)