

**IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 19-0565**

MONTANA ENVIRONMENTAL INFORMATION CENTER,

Petitioner/Appellee,

v.

**MONTANA DEPARTMENT OF PUBLIC SERVICE REGULATION,
MONTANA PUBLIC SERVICE COMMISSION**

and

NORTHWESTERN CORPORATION d/b/a NORTHWESTERN ENERGY,

Respondents/Appellants.

Appeal from the Montana Eighth Judicial District Court, Cascade County
Hon. James A. Manley, Presiding
Cause No. DDV 18-0640

**MONTANA ENVIRONMENTAL INFORMATION CENTER
RESPONSE BRIEF**

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STATEMENT OF ISSUES

This case is the latest example of the Montana Public Service Commission (“Commission”) asking this Court to defer to its obstruction of statutory mandates to procure renewable energy resources for our state. This time, the issues are:

1. Whether the District Court correctly held that the Commission’s decision to waive NorthWestern Energy’s (“NorthWestern”) obligation to purchase community renewable energy projects (“CREP resources”) for 2015 was unlawful because the record demonstrates that NorthWestern failed to take “all reasonable steps” to achieve compliance, as the law requires. MCA § 69-3-2004(11)(a);

2. Whether the District Court correctly held that the Commission’s similar waiver decision for 2016 was unlawful because it was based on an interpretation of MCA § 69-3-2007(1) that contradicts the plain statutory language; and

3. Whether the District Court correctly held that the Commission exceeded its statutory authority in basing its 2015 and 2016 waiver decisions on the Commissioners’ disagreement with statutory requirements.

STATEMENT OF THE FACTS

I. NORTHWESTERN’S FAILURE TO COMPLY WITH ITS STATUTORY OBLIGATION TO PURCHASE CREP RESOURCES

This case presents a key test of a Montana legislative mandate to spur renewable energy development while boosting local economies. In 2005, the

Montana Legislature passed the Renewable Power Production and Rural Economic Development Act (“Act” or “CREP Act”), MCA § 69-3-2001 et seq., emphasizing the importance of renewable energy production to “promote[] sustainable rural economic development by creating new jobs and stimulating business and economic activity in local communities across Montana.” Id. § 69-3-2002(2). Starting in 2012, the Act required public utilities, including NorthWestern, to purchase a specified amount of electricity output from CREP resources. Id. § 69-3-2004(3)(b). The Act defines a CREP resource as an eligible renewable resource that has no greater than 25 megawatts in total generating capacity, and either “local owners have a controlling interest” or it is “owned by a public utility.” Id. § 69-3-2003(4).

The Act obligates NorthWestern to purchase electricity from CREP resources if it is “demonstrated through a competitive bidding process that the total cost of electricity from that [CREP resource] ... is less than or equal to bids for the equivalent quantity of power over the equivalent contract term from other electricity suppliers.” Id. § 69-3-2007(1). From 2012 to 2014, the law required NorthWestern to obtain 44 megawatts of energy from CREP resources, see id. § 69-3-2004(3)(b)-(c), which amounts to at least two CREP resources because any single CREP resource must be 25 megawatts or less. Beginning in January 2015, the amount of energy NorthWestern must acquire from CREP resources rose to

65.4 megawatts. See id.; see also NWE Br. 18 (table depicting NorthWestern’s CREP obligation). The Act’s purchase requirements are incremental, affording NorthWestern four years to meet its total obligation of 65.4 megawatts.¹

To ensure compliance, the Act penalizes a public utility that fails to meet its statutory obligation to acquire CREP resources in a given year. MCA § 69-3-2004(10). Assessed penalties may not be passed on to ratepayers and must be deposited in the universal low-income energy assistance fund, which finances low-income bill assistance and weatherization programs in Montana. Id.

A public utility may avoid the administrative penalty by obtaining from the Commission a “short-term waiver” that exempts the utility from full compliance with the CREP-purchase obligation, but only if it first demonstrates that it “has undertaken all reasonable steps” to comply, “but full compliance cannot be achieved ... for other legitimate reasons that are outside the control of the public utility.” Id. § 69-3-2004(11)(a); see also ARM 38.5.8301(4) (waiver provision). As applicable to this case, no other circumstance may excuse NorthWestern’s noncompliance.

Since the CREP-purchase requirement went into effect in 2012, NorthWestern has never met its statutory obligation to purchase CREP resources.

¹ By way of comparison, the Judith Gap wind farm in Central Montana has a total generating capacity of 135 megawatts.

See NWE_App 42-47.² Instead, the Commission granted NorthWestern compliance waivers for 2012, 2013, and 2014. MEIC_App. 96 (Commission staff memorandum summarizing history). Importantly, however, the Commission in its 2014 waiver decision cautioned NorthWestern that, going forward, it “ought to carefully consider” certain factors concerning the viability of CREPs. MEIC_App. 120 (Order 7416b ¶ 16, Dkt. No. D2015.3.27). First, the Commission admonished NorthWestern to fully consider both power purchase agreements (“PPAs”), in which the project developer operates the project and sells the electricity it generates to NorthWestern, and “build-transfer” options, in which a developer sells the CREP resource to NorthWestern to own and operate. Id. The Commission observed that “build-transfer options circumvent the difficulty in finding projects that clearly qualify as CREPs under the law,” because the utility’s ownership of the resource satisfies the local-ownership criterion under MCA § 69-3-2003(4). Id. The Commission also critiqued NorthWestern’s failure to take responsibility for the qualification of CREP proposals under the local-ownership requirement by deferring that responsibility to CREP developers. Id. ¶ 18. “Such reliance on parties that are not NorthWestern, and which do not have obligations to procure

² All record citations are to NorthWestern’s Appendix filed with its opening brief (“NWE_App.”) or Montana Environmental Information Center’s Supplemental Appendix (“MEIC_App.”), which are consecutively paginated.

CREPs under the law, may be contributing to NorthWestern’s failure to meet its CREP obligations.” Id. In sum, the Commission in 2014 identified reasonable actions that NorthWestern should take to help foster future CREP development, as the law requires.

Nevertheless, when it came to addressing compliance with the Act in 2015 and 2016, NorthWestern repeated its past failures and again requested waivers from its CREP purchase obligation.

For the 2015 compliance year, NorthWestern conducted a Request for Proposals (“2015 RFP”) that generated four finalists—two proposals for PPAs (Greycliff and New Colony) and two proposals for build-transfer projects (Tiger Butte and Judith Gap II). NWE_App. 78. NorthWestern’s criteria for the 2015 RFP required, among other things, that all projects must be operational by the end of 2015, MEIC_App. 19 (2015 RFP), refusing to accommodate longer development timeframes that are typically required to plan, permit, and develop energy projects, including CREP resources. See MEIC_App. 101-02 (Commission staff memorandum summarizing evidence).

Although NorthWestern’s consultant assigned both build-transfer finalists higher viability scores than the two PPA finalists, and one (Tiger Butte) was the least-cost proposal, NorthWestern declined to pursue either of the two build-transfer proposals. See MEIC_App. 65-66 (Rivas testimony summarizing

NorthWestern consultant memorandums). Instead, NorthWestern negotiated and signed PPAs for the Greycliff and New Colony proposals. NWE_App. 46. Before doing so, NorthWestern did not investigate whether the proposals satisfied the statutory requirement that CREP resources be locally owned, NWE_App. 113-15; MEIC_App. 53, despite the Commission’s prior admonition that this approach “may be contributing to NorthWestern’s failure to meet its CREP obligations,” Order 7416b ¶ 18 (MEIC_App. 120-21). Subsequently, on May 18, 2015, the Commission found that Greycliff did not satisfy the Act’s local-ownership requirement. NWE_App. 47. The developer of Greycliff, as well as New Colony, which had a similar ownership structure to Greycliff, therefore terminated the PPAs. Id.

After the Commission determined the PPAs to be ineligible, NorthWestern did not pursue further negotiations with either of the two build-transfer project finalists, MEIC_App. 84 (hearing testimony), 102 (staff memorandum), both of which would have satisfied CREP-ownership requirements because they would be sold to NorthWestern, MCA § 69-3-2003(4)(b).

With the ineligibility of the two PPA proposals and NorthWestern’s failure to pursue build-transfer projects, NorthWestern purchased no electricity from CREP resources in 2015. NWE_App. 39 (Table 1).

For the 2016 compliance year, NorthWestern again issued an RFP, requiring previously short-listed projects to start the bidding process anew and again requiring that projects be operational by the end of the compliance year.

MEIC_App. 19. Ultimately, NorthWestern rejected all proposals—including the resubmitted Tiger Butte proposal—based solely on its claim that none of the projects was “cost-effective” as compared against NorthWestern’s existing large, fossil-fuel resources and market purchases. NWE_App. 49. NorthWestern thus failed to comply with its CREP-purchase obligation again in 2016.

II. THE COMMISSION’S DECISION TO WAIVE NORTHWESTERN’S CREP-COMPLIANCE OBLIGATIONS

In the Commission proceeding on NorthWestern’s waiver applications for 2015 and 2016, NorthWestern argued that it took all reasonable steps to procure energy from CREP resources, but reasons beyond NorthWestern’s control prevented its compliance. See MEIC_App. 14; NWE_App. 52-53.

Following an evidentiary hearing on April 4, 2018 and post-hearing briefing, the Commission’s staff issued a memorandum in which it recommended that the Commission deny NorthWestern’s request for a CREP waiver for compliance year 2015. As explained in the August 30, 2018 memorandum, staff found that NorthWestern failed to take all reasonable steps to acquire CREP resources because it: 1) unreasonably disqualified projects that could not become operational by the end of the compliance year, which particularly impeded the success of

build-transfer projects for which NorthWestern also insisted on a potentially time-consuming “pre-approval” process; and 2) unreasonably rejected the Tiger Butte proposal. MEIC_App. 99-103, 108. Additionally, staff found that the failure of the PPAs to satisfy the local-ownership criterion was not a factor “outside the control of” NorthWestern, MCA § 69-3-2004(11)(a), and NorthWestern’s failure to conduct “marginal due diligence to ensure that a finding of compliance was plausible” was “questionable.” MEIC_App. 109. Based on its recommendation to deny the 2015 waiver, staff recommended that the Commission assess an administrative penalty of \$1,259,000 against NorthWestern for that compliance year. MEIC_App. 110.

Regarding NorthWestern’s 2016 compliance, Commission staff recommended granting the CREP-compliance waiver based on NorthWestern’s cost rationale. Id.

Despite the recommendation of its staff to deny NorthWestern’s waiver request for 2015, the Commission ultimately granted it. The Commission held a work session on September 11, 2018, during which the Commissioners voted 3-2 to grant NorthWestern’s CREP-compliance waivers for 2015 and 2016. See MEIC_App. 113-117 (work session transcript). In the course of their deliberation, the Commissioners did not make any findings regarding the reasonable steps identified by Commission staff that NorthWestern failed to take. See generally id.

Instead, the Commissioners voting to grant the waivers were transparent in asserting that there could not have been any circumstances that would have caused them to reject the waiver requests, because they deemed the CREP law itself unreasonable. Commissioner Lake, who also carried the proxy vote of Chairman Johnson, commented, “I believe if we were to exercise the penalties that come with it, it would become punitive in nature ... because there is absolutely no way that any company, and—I’m going to say in any circumstance—could reach the all reasonable [steps] ... standard....” MEIC_App. 114, at 7:12-17. Commissioner O’Donnell echoed, “It’s [an] unreasonable law; okay? And to hold somebody to the standard of attempting to have—to reasonably accommodate an unreasonable requirement is ... an impossible situation.” Id. at 8:16-19. These Commissioners explained that they were casting their votes to “send the message” to the Legislature, not because they evaluated the evidence and believed that NorthWestern took all reasonable steps to comply. See id. at 7:20-21 (Commissioner Lake stating, “I believe we would send the message back to the Legislature, you guys have go to do something about this.”); MEIC_App. 115, at 9:9-15 (Commissioner O’Donnell stating, “I agree with Commissioner Lake that this would send a message to the Legislature ... to find a way to make it more reasonable and less impossible.”).

Two dissenting Commissioners rejected this rationale. Commissioner Koopman admonished his colleagues, “[w]e cannot flout the law. We do not have the authority to nullify law because we think it’s bad law. ... And in this case, we have to apply the law clearly and by the clear language of the law ... they have been out of compliance.” MEIC_App. 116, at 13:25-14:11.

The Commission’s Order—amounting to one page of factual findings and one page of legal conclusions—was almost entirely devoid of rationale for the decision to grant the 2015 and 2016 waiver petitions. See NWE_App. 1-4. (“Comm’n Order”). As justification for the Commission’s 2015 waiver decision, the Commission made three factual findings identifying steps that NorthWestern took to achieve compliance:

- 1) “NorthWestern issued a request for proposals (“RFP”),” id. ¶ 8;
- 2) “NorthWestern hired a third party consultant” to administer the RFP, id.; and
- 3) “NorthWestern signed PPAs with two finalists, Greycliff and New Colony”; however the Commission found that Greycliff (and by implication, New Colony), did not satisfy the statute’s local-ownership criterion, id.

With respect to the 2016 waiver decision, the Commission found only that:

- 1) “NorthWestern issued another RFP,” id. ¶ 9; and
- 2) “NorthWestern ... determined that none of the projects were cost competitive,” id.

Additionally, without elaboration, the Order concluded that “the cost analysis performed ... sufficiently determines how the CREP proposals would impact

portfolio costs and risks.” Id. ¶ 20. Based on these sparse findings, the Commission concluded that “NorthWestern took all reasonable steps to procure CREP resources in 2015 and 2016, yet documented factors beyond its control prevented NorthWestern from achieving full compliance.” Id. ¶ 17.

Thus, consistent with the Commission’s prior vote, the Order granted NorthWestern’s petitions for CREP-compliance waivers for 2015 and 2016. Id. ¶¶ 18-19.

III. DISTRICT COURT DECISION

MEIC appealed the Commission’s Order on November 19, 2018. On August 1, 2019, the District Court reversed the Commission’s waiver determinations for both 2015 and 2016. NWE_App. 12-25 (“Dist. Ct. Order”).

STANDARD OF REVIEW

The Commission’s decision is reviewed under MCA §§ 69-3-402 and 2-4-704. See Williamson v. Mont. Pub. Serv. Comm’n, 2012 MT 32, ¶ 31, 364 Mont. 128, 272 P.3d 71; Whitehall Wind, LLC v. Mont. Pub. Serv. Comm’n, 2015 MT 119, ¶ 7, 379 Mont. 119, 347 P.3d 1273 (“Whitehall Wind II”). Under Section 69-3-402, this Court may reverse or modify the Commission’s decision if it is “unlawful or unreasonable.” MCA § 69-3-402(1). In addition, under Section 2-4-704 of the Montana Administrative Procedure Act (“MAPA”) the court “may reverse or modify [the Commission’s] decision” if it is, among other things:

- “in violation of ... statutory provisions,”

- “in excess of the statutory authority of the agency,”
- “clearly erroneous,” or
- “arbitrary or capricious.”

Id. § 2-4-704(2)(a)(i), (ii), (v), (vi).

Agency action is arbitrary if the agency fails to consider relevant factors, including the standards and purposes of the statutes the agency administers. Clark Fork Coal. v. Mont. Dep’t of Env’tl. Quality (“Clark Fork Coal. I”), 2008 MT 407, ¶ 21, 347 Mont. 197, 197 P.3d 482 (quoting North Fork Preservation Ass’n v. Dep’t of State Lands, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989)); accord Clark Fork Coal. v. Mont. Dep’t of Env’tl. Quality (“Clark Fork Coal. II”), 2012 MT 240, ¶ 29, 366 Mont. 427, 288 P.3d 183.

“A finding of fact is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the court with a definite and firm conviction that a mistake has been made.” Whitehall Wind II, ¶ 8 (quoting Williamson, ¶ 25). Moreover, courts should not “automatically defer to the agency ‘without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision.’” Clark Fork Coal. I, ¶ 21 (quoting Friends of the Wild Swan v. DNRC, 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972).

The Commission wrongly claims that the administrative law principle requiring agencies to consider all relevant factors in their decisionmaking is

inapplicable to this Court’s review of the Commission’s decision under MAPA. PSC Br. 22-24. Contrary to the Commission’s implicit suggestion that it could reach a rational decision while ignoring relevant factors, this standard is part-and-parcel of arbitrary and capricious review that applies to both MAPA and non-MAPA appeals from agency decisions. Compare Clark Fork Coal. I, ¶ 21 with MCA § 2-4-704(2)(a)(vi). The “relevant factors” standard in Montana law derives from federal cases arising under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. See Clark Fork Coal. I, ¶ 21 (quoting Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 378, 109 S. Ct. 1851, 1861, 104 L. Ed. 2d 377 (1989)). This Court has applied such federal case law “in [its] own jurisprudence, both in Montana Administrative Procedure Act (MAPA) and non-MAPA cases” and “looked to MAPA principles for non-MAPA cases.” Aspen Trails Ranch, LLC v. Simmons, 2010 MT 79, ¶¶ 65-66, 356 Mont. 41, 230 P.3d 808 (Rice, J., concurring); see also Cmty. Ass’n for N. Shore Conservation, Inc. v. Flathead Cty., 2019 MT 147, ¶ 27, 396 Mont. 194, 445 P.3d 1195, reh’g denied (Aug. 20, 2019) (explaining that the Court “applie[s] MAPA’s arbitrary and capricious standard of review to [non-MAPA] local government decisions”).

Further, as a corollary to the requirement to consider all relevant factors, it is “the duty of PSC to make explicit findings on material issues raised in the administrative proceedings. The findings ... should be sufficient to permit a

reviewing court to follow the reasoning process of the agency and determine whether that process conforms to law.” Montana-Dakota Utilities Co. v. Mont. Dep’t of Pub. Serv. Regulation, 223 Mont. 191, 196, 725 P.2d 548, 551 (1986) (citing N. Plains Res. Council v. Bd. of Natural Res., 181 Mont. 500, 522-23, 594 P.2d 297, 310 (1979)); see also State ex rel. Dep’t of Pub. Serv. Regulation v. Mont. Irrigators, Inc., 209 Mont. 375, 383, 680 P.2d 963, 967 (1984) (stating that the Commission’s decision may be upheld only if “[t]he basis for this [decision] is readily ascertainable from the findings, reasonings and conclusions in the PSC order”).

SUMMARY OF ARGUMENT

This case challenges a Commission decision that, if not reversed, would effectively nullify the Montana Legislature’s intent to boost rural economic development by promoting community renewable energy projects. MCA §§ 69-3-2001, et seq. Similar to the Commission’s approach to other legal mandates to purchase renewable energy, the Commission’s continuing waiver decisions have negated the CREP Act’s requirement that NorthWestern obtain approximately 65 megawatts of energy from CREP resources—small, Montana-owned renewable energy projects. The Commission’s waiver decisions for 2015 and 2016 marked the latest chapter in this troubling trend. NorthWestern has never met its CREP-purchase obligation, yet the Commission again waived compliance and declined to

assess administrative penalties against NorthWestern under the Act, thus failing to achieve the Legislature’s policy objectives and eliminating incentives for future compliance.

The District Court correctly invalidated the Commission’s decisions to waive NorthWestern’s CREP-purchase obligation for 2015 and 2016. The Commission may waive compliance with the CREP-purchase obligation only if a utility demonstrates that it took “all reasonable steps” to meet that obligation. MCA § 69-3-2004(11)(a) (emphasis added). While Appellants point to steps taken by NorthWestern to procure CREPs that Appellants say are “reasonable,” the glaring omission in Appellants’ briefs—just like the Commission’s Order in the underlying proceeding—is any discussion of the steps that NorthWestern failed to take.

Specifically, for 2015, NorthWestern could have undertaken a reasonable investigation of the ownership structure of the two PPA projects NorthWestern decided to pursue, extended its timeframe for CREP resources to commence operation, and entertained reasonable negotiations with the low-cost Tiger Butte project. NorthWestern’s failure to take such steps that both expert testimony and the Commission’s own staff identified as reasonable required the Commission to deny NorthWestern’s requests for compliance waivers in 2015, and its contrary decision was unlawful.

For 2016, the sole reason NorthWestern asserted for its failure to comply with its CREP-purchase obligation was that the project bids were “too expensive.” NWE_App. 049. The Commission’s acceptance of this rationale as a reason for waiving NorthWestern’s 2016 compliance obligation was based on a legal interpretation of the Act’s “cost cap” provision, MCA § 69-3-2007(1), that is contrary to the statute’s plain language and the purpose of the Act. Thus, as with the Commission’s 2015 waiver decision, its 2016 waiver decision was unlawful and clearly erroneous.

As an independent reason to reverse the Commission’s decision, the District Court correctly held that the Commission did not evaluate NorthWestern’s conduct under the mandatory “all reasonable steps” standard, MCA § 69-3-2004(11)(a), but instead improperly granted NorthWestern’s waiver requests to “send a message” to the Legislature that the CREP-purchase requirement is unreasonable. See MEIC_App. 114, at 7:7-21, 8:13-9:16; see also supra Background, Part II. Because the Commission was required to base its decision on the statutory criteria and evidentiary record, rather than a policy disagreement with the Legislature, the Commission’s decision was “in excess of the statutory authority of the agency.” MCA § 2-4-704(2)(a)(ii).

For these reasons, the Commission’s 2015 and 2016 waiver decisions should be reversed. MCA §§ 2-4-704(2).

ARGUMENT

I. THE COMMISSION’S FINDING THAT NORTHWESTERN TOOK “ALL REASONABLE STEPS” TO COMPLY WITH ITS CREP-PURCHASE OBLIGATION IN 2015 WAS ARBITRARY AND UNREASONABLE

The Commission’s decision to waive NorthWestern’s compliance with its CREP-purchase obligation in 2015 was arbitrary, unlawful, and clearly erroneous, and should be reversed. MCA § 2-4-704(2)(a)(i), (v), (vi).

The only defense the Commission asserts in its brief for the 2015 waiver finding is that the Commission’s finding that the two CREP projects that NorthWestern advanced in the 2015 RFP did not satisfy the CREP law’s local ownership requirement was “an event outside of NorthWestern’s control, which prevented full CREP compliance for 2015.” PSC Br. 15. Not only is this argument wrong, see infra Part I.A, it fails to address the other reasonable steps that record evidence demonstrates NorthWestern should have taken to ensure CREP compliance in 2015. Specifically, NorthWestern should have adopted commercial operation deadlines that match CREP-development timeframes and pursued appropriate negotiations with the low-cost Tiger Butte project. See infra Parts I.B, I.C. Either step would have given low-cost, high-viability build-transfer projects—which do not pose the same “exceedingly difficult” local ownership challenges that the Greycliff and New Colony projects faced, PSC Br. 13—a reasonable opportunity to become CREP resources. Yet the Commission failed in

its Order (as well as its brief on appeal) even to mention these steps.

NorthWestern’s failure to pursue any one of these reasonable steps made it ineligible for a compliance waiver, which requires a finding that NorthWestern took “all reasonable steps” to achieve compliance. MCA § 69-3-2004(11)(a) (emphasis added).

NorthWestern erroneously suggests that the law did not require the Commission to specifically address the reasonable steps identified in expert testimony and the parties’ briefing—not to mention the Commission’s own staff memorandum—and explain why they were rejected. NWE Br. 40-41. However, “[i]t is, of course, the duty of PSC to make explicit findings on material issues raised in the administrative proceedings.” Montana-Dakota Utilities Co., 223 Mont. at 196 (citation omitted). This requirement is particularly important in the context of a statutory requirement that NorthWestern take “all reasonable steps” to procure CREP resources, MCA § 69-3-2004(11)(a) (emphasis added), which necessarily required the Commission to address evidence and arguments that specific reasonable steps were disregarded.

As described below, the District Court was correct that the Commission’s 2015 waiver decision was arbitrary, unlawful, and “clearly erroneous ... in view of the reliable, probative, and substantial evidence on the whole record.” Whitehall

Wind, LLC v. Montana Pub. Serv. Comm'n (“Whitehall Wind I”), 2010 MT 2, ¶ 22, 355 Mont. 15, 223 P.3d 907.

A. NorthWestern Failed to Reasonably Investigate the CREP Eligibility of the Greycliff and New Colony Projects

The District Court correctly found that the Commission’s decision to grant NorthWestern’s 2015 waiver request was arbitrary and clearly erroneous because NorthWestern failed to undertake a reasonable investigation of Greycliff’s and New Colony’s eligibility as CREP resources despite the Commission’s prior contrary admonition on this very issue. Dist. Ct. Order ¶ 19; see MEIC_App. 120-21 (Order 7416b ¶ 18, stating that NorthWestern’s failure to investigate CREP ownership structures “may be contributing to NorthWestern’s failure to meet its CREP obligations”). Instead of conducting its own due diligence, NorthWestern claimed that “it is not NorthWestern’s responsibility to ensure that projects submitted to it by developers meet the CREP ownership status,” MEIC_App. 53, and simply accepted developer representations that they could meet the local-ownership requirement. As a result, NorthWestern advanced these PPAs in the 2015 RFP to the exclusion of more viable build-transfer projects that necessarily meet the ownership requirements of MCA § 69-3-2004(4)(b) and could have helped satisfy NorthWestern’s CREP-purchase obligation in 2015.

NorthWestern’s failure to investigate the Greycliff and New Colony ownership structure was not reasonable in light of the company’s acknowledgment

of the challenges such projects have in meeting the CREP local-ownership requirement. NWE_App. 41-42, 45; see also NWE Br. 16 (describing challenges). In particular, NorthWestern was aware that the Commission determined that Greycliff did not satisfy the local-ownership requirement for the 2014 compliance year. See MEIC_App. 8 (LaFave testimony); see also MEIC_App. 60-64 (Rivas testimony). Only a few months after that ruling, in discussing the 2015 RFP, NorthWestern’s consultant noted that Greycliff’s “CREP eligibility requires sale of equity to Montana residents,” MEIC_App. 39 (project 4)—a novel and “creative” approach to attempting to meet the CREP-eligibility requirement, MEIC_App 46. Greycliff’s failure to meet the local-ownership requirement in the past and its untested strategy for meeting that requirement in 2015 translated to significant uncertainty regarding the ability of Greycliff—and New Colony, given its similar ownership structure—to meet CREP-eligibility requirements. See MEIC_App. 60-64.

Indeed, the Legislature sought to address such challenges in meeting CREP-purchase requirement with PPAs by amending the Act to allow NorthWestern to purchase build-transfer projects, see NWE_App. 042; MEIC_App 120 (Order 7416b ¶ 16), yet NorthWestern’s approach in the underlying proceeding was to exclude build-transfer projects without taking proactive steps to investigate whether the PPAs it selected instead were eligible for certification as CREP

resources.

The Commission erroneously claims in both its brief and Order that its own finding that Greycliff and New Colony do not satisfy the CREP local-ownership criterion was a factor beyond NorthWestern’s control. PSC Br. 14-15; Comm’n Order ¶¶ 8, 10. On the contrary, under the Commission’s rules, the utility is obligated in any RFP to “complete due diligence regarding bid qualifications ... and project feasibility before selecting an offer for the shortlist.” ARM 38.5.8212(2)(d). Thus, as a matter of law, Appellants are incorrect that the Commission, rather than NorthWestern, had responsibility to address the local-ownership issue, and reasonable due diligence could have precluded the necessity for the Commission’s negative finding on this issue. Further, as a factual matter, Commission staff observed that NorthWestern “had the control to conduct marginal due diligence to ensure that a finding of compliance was plausible,” yet failed to do so. MEIC_App. 109 (emphasis added).

For this reason, the Commission’s decision to grant NorthWestern’s petition for a waiver of its 2015 CREP-purchase obligation was arbitrary, unlawful, and clearly erroneous. MCA § 2-4-704(2)(a)(i), (v), (vi).

B. NorthWestern Rejected CREP Bids Based on an Unreasonable Commercial Operation Deadline

Moreover, even if the Commission’s CREP-eligibility decision had been outside of NorthWestern’s control—and as discussed, it was not—it could not

justify the Commission’s waiver decision because record evidence demonstrates other reasonable steps that NorthWestern could have taken, but did not, to achieve CREP compliance in 2015. First, NorthWestern did not take the reasonable step of affording CREP resources an opportunity to compete in a multi-year process that matches the development timeframe for such projects. MEIC_App. 19 (2015 RFP establishing commercial operation deadline). The Commission previously critiqued NorthWestern’s unreasonable deadline for CREP resources to become operational, and based on the record in the underlying proceeding, the Commission staff determined that NorthWestern’s failure to accommodate realistic CREP-development timeframes in the 2015 CREP RFP was unreasonable. MEIC_App. 100-01 (summarizing evidence and prior Commission decisions). Yet the Commission in its Order arbitrarily failed to “make explicit findings” on this material issue, Montana-Dakota Utilities Co., 223 Mont. at 196, or to “examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made,” Mont. Env’tl. Info. Ctr. v. DEQ, 2019 MT 213, ¶ 26, 397 Mont. 161, 451 P.3d 493 (citation omitted). Moreover, even if the Commission had made an explicit finding that NorthWestern’s commercial operation deadline was reasonable, as discussed below, it would be clearly erroneous based on the administrative record. MCA § 2-4-704(2)(a)(v).

NorthWestern's requirement that CREP projects complete necessary contract negotiations, permitting, Commission approvals, construction, and interconnection within approximately 17 months of the RFP bid deadline was demonstrably unrealistic. NWE_App. 77; MEIC_App. 19; MEIC_App. 68-69 (Rivas testimony). NorthWestern has previously conceded that "moving from competitive resource solicitation to production requires at least 24 months, even without the processing of a petition for Commission approval before entering into a contract." MEIC_App. 101 (quoting NorthWestern's statement in separate docket). In his dissent to the Commission's Order in this case, Commissioner Kavulla observed that, "[n]o CREP project has ever been newly constructed in less than two years, much less the 18 months that NorthWestern provided from the issuance of the request for proposals to its self-imposed commercial-operation-date requirement." Comm'n Order, Kavulla Dissent, ¶ 2. Thus, NorthWestern's 2015 RFP required CREP projects to commit to becoming operational before those projects could reasonably be expected to complete construction. By imposing this

requirement, NorthWestern rejected otherwise competitive CREP proposals and diminished its compliance opportunities. MEIC_App. 71-72.³

NorthWestern’s unreasonable operation deadline was particularly problematic for build-transfer projects such as Tiger Butte and Judith Gap II, for which NorthWestern also decided to require a lengthy Commission pre-approval process that would further delay permitting and construction. MEIC_App. 36 (2015 RFP stating, “[a] successful advance approval from the [Commission] will be condition precedent for moving forward with a Build-Transfer Agreement”).⁴ As NorthWestern’s consultant conceded, “[b]ecause the advanced-approval filing could take up to nine months for approval, a [build-transfer] project sponsor would have little time available after receipt of an order to construct a project and meet a December 31, 2015 commercial operation date.” MEIC_App. 38; see also

³ NorthWestern’s bullet-point assertion that it “did consider projects that had a [commercial operation] date after the end of 2015,” referencing a discussion of Tiger Butte, NWE Br. 38, is impermissibly post hoc. Montana-Dakota Utilities Co., 223 Mont. at 196. It is also not supported by the record, which shows that Tiger Butte was required to begin the bid process from scratch in the 2016 RFP, was again among the shortlisted projects, but again faced trouble meeting an end-of-year operation deadline. MEIC_App. 45-46.

⁴ A utility may elect to seek Commission “preapproval” for resource acquisitions to ensure that the Commission will not later prohibit the utility from recovering the costs of that resource from ratepayers because it is not in the public interest. See MCA § 69-8-421. As the Montana Consumer Counsel has observed, “preapproval shifts risks from shareholders and investors to ratepayers” by guaranteeing that a utility can recover the costs of owning and operating a resource even if it underperforms. Order 7323k ¶ 124, Dkt. No. D2013.12.85 (Sept. 26, 2014).

MEIC_App. 71-72 (Rivas testimony). The Commission previously acknowledged this timing conundrum, finding that “NorthWestern’s preapproval requirement and its failure to adhere to the bid evaluation and selection schedule it specified in its RFP made it almost impossible for [build-transfer] offers to meaningfully compete.” NWE_App. 86 (Order 7395d ¶ 28, Dkt. No. D2015.2.18). In other words, requiring both pre-approval and an end-of-2015 completion date effectively made disqualification of build-transfer projects a *fait accompli*.

Commission staff agreed. Staff found that NorthWestern’s failure to “adjust its time frame to take advantage of any longer-term opportunities for CREP compliance” amounted to a failure to take all reasonable steps, and recommended that the Commission deny NorthWestern’s 2015 waiver request on this basis. MEIC_App. 108. However, contrary to Appellants’ suggestion, MEIC’s position is not that the Commission is bound to follow its staff recommendations, nor does MEIC claim that staff memorandums are, themselves, “evidence.” See PSC Br. 25; NWE Br. 48-49. Instead, staff recommendations reflect staff’s application of expertise to the evidentiary record and legal issues before the Commission. The Commission should consider and account for such recommendations as a “relevant factor” in the Commission’s decisionmaking. Clark Fork Coal. I, ¶ 21; see also Mont. Trout Unlimited v. Mont. Dep’t of Nat. Res. & Conservation, 2006 MT 72, ¶¶ 41-42, 331 Mont. 483, 133 P.3d 224 (finding agency’s implementation of a law

it administered was unlawful in part because it “failed to account for” the expert opinion of its staff hydrologist). Far from meeting this standard, the Commission in its Order did not even acknowledge the recommendations and findings of its own staff regarding NorthWestern’s failure to accommodate reasonable CREP-development timeframes.⁵

Even setting aside the Commission’s failure to address its staff’s recommendation, the Commission’s failure to address the record evidence, summarized in the staff memorandum and in this brief, was arbitrary. MCA § 2-4-704(2)(a)(vi); Clark Fork Coal. I, ¶ 21. And because that record evidence precluded any legitimate finding that NorthWestern took “all reasonable steps” to achieve compliance with its CREP-purchase obligation in 2015, MCA § 69-3-2004(11)(a), the Commission’s decision to grant NorthWestern a CREP-compliance waiver for 2015 was unlawful and clearly erroneous. MCA § 2-4-704(2)(a)(i), (v).

⁵ Appellants’ claim that the staff memorandum is outside the record is wrong. NWE Br. 47-50; PSC Br. 25. Such memorandums are routinely placed in the Commission’s official docket, as was the staff memorandum in this case, and the Commission itself filed the staff memorandum with the District Court as part of its “certified copy of the administrative record.” NWE_App. 28-33, Not. of Filing Admin. Record (Dec. 10, 2018).

C. NorthWestern Failed to Pursue Reasonable Negotiations for the Tiger Butte Project

While NorthWestern's omissions discussed above each provide a sufficient basis for reversing the Commission's decision for 2015, the decision also should be reversed because NorthWestern failed to pursue reasonable negotiations regarding the Tiger Butte build-transfer project. NorthWestern's own consultant assigned the Tiger Butte project the highest viability score and projected its costs as the lowest of the short-listed proposals. See also MEIC_App. 65-67 (Rivas testimony summarizing NorthWestern consultant memos, MEIC_App 39, 43). By contrast, the two PPAs for which NorthWestern did pursue negotiations had lower viability and higher costs: NorthWestern's consultant ranked the Greycliff PPA as the seventh most viable project, well-behind Tiger Butte. Id. (summarizing MEIC_App. 38-40 (project 4), MEIC_App. 51 (final column)). In sum, NorthWestern's consultant determined that the Tiger Butte build-transfer project was superior to both the Greycliff and New Colony PPAs.

The Commission failed altogether in its Order and its brief to address NorthWestern's disregard of the Tiger Butte project. NorthWestern ineffectively attempts to fill this gap by asserting its approach to Tiger Butte was reasonable due to alleged environmental concerns with the project. NWE Br. 27, 38. Because the Commission did not rely on an environmental rationale in its Order, NorthWestern's post-hoc argument is irrelevant. Montana-Dakota Utilities Co.,

223 Mont. at 196. But in addition, environmental concerns could not legitimately support the Commission’s waiver decision because they are unsupported. To obtain a waiver, NorthWestern must provide “documentation and evidence showing that the public utility has undertaken all reasonable steps,” yet was unable to comply with its purchase obligation because of “documented reasons beyond the public utility’s control.” ARM 38.5.8301(4), (4)(d) (emphases added). Far from documenting environmental concerns, NorthWestern did not even mention them in its direct testimony and waiver petition, and instead identified those concerns for the first time in response to discovery requests. NWE_App. 124 (Response to PSC-011(b)). At that point, NorthWestern stated only that the project was above an abandoned mine and “[d]ue to the possible environmental risks associated with this project, NorthWestern would not consider owning this project.” Id. At the hearing before the Commission, NorthWestern’s witness acknowledged that there is nothing in the evidentiary record documenting the environmental concerns NorthWestern belatedly raised. MEIC_App. 86 at 46:3-19; MEIC_App. 88, at 57:1-7. Thus, as Commission staff concluded, “NorthWestern presented no evidence or documentation of the abandoned mine at Tiger Butte.” MEIC_App. 103.

Moreover, NorthWestern provided no explanation for why the Tiger Butte project was short-listed in the 2014 and 2015 RFPs, and again in 2016,

MEIC_App. 94, if, as NorthWestern claimed, it “would not consider owning” Tiger Butte, NWE_App. 124. Since NorthWestern first claimed it was aware of environmental problems with the Tiger Butte project,

it has continued to accept Tiger Butte as a finalist from its CREP RFPs and has entered into negotiations with [Tiger Butte’s developer] Invenergy despite NorthWestern’s claims that environmental risks associated with the projects are strong enough to disqualify them from consideration. If, indeed, those environmental concerns cannot be mitigated, NorthWestern should be able to provide evidence of the claim.

MEIC_App. 108 (staff memorandum, summarizing evidence).

Because NorthWestern’s own witness conceded that the company did not “document[]” any environmental rationale for rejecting the Tiger Butte project, MEIC_App. 88, at 57:1-7, NorthWestern’s asserted concerns could not have justified its failure to pursue reasonable negotiations for the project. ARM 38.5.8301(4)(d). Staff recommended denying NorthWestern’s 2015 waiver request on this basis. Id. In the Commission’s work session, the two dissenting commissioners agreed with the staff’s recommendation on this issue. See MEIC_App. 115, at 11:15-20 (Commissioner Kavulla); id. at 12:18-24 (Commissioner Koopman); see also Comm’n Order, Koopman Dissent, ¶¶ 9-10. But once again, the Commission majority failed altogether to mention it, either during the work session or in the Final Order.

In sum, the Commission’s failure to address this significant issue with “explicit findings ... sufficient to permit a reviewing court to follow the reasoning process of the agency,” rendered the Commission’s 2015 waiver decision arbitrary. Montana-Dakota Utilities Co., 223 Mont. at 196. And in addition, because under the Commission’s rules, NorthWestern’s undocumented rationale could not justify its failure to undertake reasonable negotiations for the lowest-cost and highest-viability CREP bid, ARM 38.5.8301(4)(d), it would not support the Commission’s 2015 waiver decision even if the Commission had addressed it. Accordingly, in addition to being arbitrary, the Commission’s finding that NorthWestern took all reasonable steps to comply with its 2015 CREP-purchase obligation despite NorthWestern’s failure to reasonably pursue negotiations with Tiger Butte was clearly erroneous. See MCA § 2-4-704(2)(a)(v), (vi). For this reason, too, the Commission’s 2015 waiver decision should be reversed.

II. THE COMMISSION ERRONEOUSLY BASED ITS 2016 WAIVER DECISION ON A LEGAL INTERPRETATION THAT CONTRADICTS THE CLEAR STATUTORY LANGUAGE OF THE COST-CAP PROVISION

The Commission’s decision to grant NorthWestern’s request for a CREP-compliance waiver for 2016 was equally invalid. The sole justification NorthWestern and the Commission offered for NorthWestern’s non-compliance in 2016 was the company’s finding that no CREP projects were “cost competitive.” See Comm’n Order ¶ 9; NWE Br. 24. However, the Commission misinterpreted

the CREP statute’s cost-cap provision, MCA § 69-3-2007(1), in determining that NorthWestern’s cost justification excused its compliance with the CREP-purchase mandate.

As the District Court correctly held, Appellants’ interpretation of MCA § 69-3-2007(1) must be rejected because it is contrary to the statute’s plain language. Dist. Ct. Order ¶¶ 28-29; see Hines v. Topher Realty, LLC, 2018 MT 44, ¶ 15, 390 Mont. 352, 413 P.3d 813 (“We ... will not interpret a statute beyond its plain language if the language is clear and unambiguous.”) (citation omitted). The provision states that NorthWestern:

is not obligated to take electricity from an eligible renewable resource unless the eligible renewable resource has demonstrated through a competitive bidding process that the total cost of electricity from that eligible resource ... is less than or equal to bids for the equivalent quantity of power over the equivalent contract term from other electricity suppliers.

MCA § 69-3-2007(1) (emphases added). Stated in the affirmative, NorthWestern is “obligated to take electricity from” a CREP resource if, “through a competitive bidding process,” it is demonstrated to have the lowest total cost, compared with other “bids for the equivalent quantity of power.”⁶

⁶ The “total cost” of CREP resources “include[s] the associated cost of ancillary services necessary to manage the transmission grid and firm the resource.” MCA § 69-3-2007(1).

NorthWestern’s analysis did not comply with the unambiguous statutory requirement to compare CREP resource costs to other project “bids” received in the competitive bidding process, MCA § 69-3-2007(1), and instead used a particular avoided cost analysis where CREP costs were compared to the operating costs the CREP would allow NorthWestern to avoid for one of its existing large fossil fuel resources, Colstrip, and market costs. See NWE_App. 65-66 (Hansen testimony). Importantly, Colstrip operating costs consist primarily of fuel costs and do not reflect the full costs of that resource, which also included capital and fixed costs, to NorthWestern’s customers. Based on NorthWestern’s avoided-cost analysis, NorthWestern concluded “that none of the projects modeled would benefit NorthWestern’s portfolio because they are too expensive,” and rejected them all. NWE_App. 49.

Appellants do not even attempt to reconcile NorthWestern’s avoided cost analysis with the statutory language requiring a cost-comparison between “bids” for “the equivalent quantity of power over the equivalent contract term from other electricity suppliers.” MCA § 69-3-2007(1). Indeed, Appellants fail altogether to afford any meaning to the terms “competitive bidding process,” “bids,” and “equivalent quantity of power,” id., impermissibly rendering that statutory language “a nullity.” Lund v. State Comp. Mut. Ins. Fund/Garden City Plumbing & Heating, Inc., 263 Mont. 346, 350, 868 P.2d 611, 613 (1994); Mont. Trout

Unlimited, ¶ 23 (citation omitted) (courts “must endeavor to avoid a statutory construction that renders any section of the statute superfluous or fails to give effect to all of the words used”).

Instead, Appellants focus exclusively on the term “other electricity suppliers,” which they claim is ambiguous and could support either Appellants’ interpretation or MEIC’s. PSC Br. 16-17; NWE Br. 42. However, there is only one interpretation of this term that is consistent with the statutory context in which this phrase appears. See MC, Inc. v. Cascade City-Cty. Bd. of Health, 2015 MT 52, ¶ 14, 378 Mont. 267, 343 P.3d 1208 (courts “construe a statute by reading and interpreting the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature.”) (quotation and citation omitted). Properly read in context, “other electricity suppliers” must mean other suppliers that have submitted “bids” in a “competitive bidding process.” MCA § 69-3-2007(1). In contrast, Appellants’ suggestion that “other” in the statute must mean non-CREPs is illogical, where the competitive bidding process contemplated by MCA § 69-3-2007(1) is a CREP RFP.

Appellants’ position that the cost-cap provision requires an “avoided cost” analysis must be rejected for the additional reason that the Legislature chose not to use that term. PSC Br. 21; NWE Br. 43. It is not the Court’s role in interpreting a statute “to insert what has been omitted or to omit what has been inserted.” Hines,

¶ 15 (citations and quotation omitted). The Montana Legislature has shown that it knows how to refer to “avoided cost” where it so intends, as it has long required the Commission to establish rates for qualifying facilities under the federal Public Utilities Regulatory Policy Act (“PURPA”) that reflect the utility’s “avoided cost.” MCA § 69-3-604(4). The omission of “avoided cost” from the cost-cap provision weighs strongly against the Commission’s interpretation. See McPhail v. Mont. Bd. of Psychologists, 196 Mont. 514, 517, 640 P.2d 906, 908 (1982) (rejecting agency rule that imposed certain psychologist licensing requirements because authorizing statutory provision did not impose the requirement and Legislature demonstrated that it “knew how” to impose such a requirement by doing so in separate statutory provision); Zinvest, LLC v. Gunnersfield Enters., Inc., 2017 MT 284, ¶ 26, 389 Mont. 334, 405 P.3d 1270 (“Because the enacting Legislature did not use identical language in the two provisions, it is proper for us to assume that a different statutory meaning was intended ...”).

Moreover, comparing the cost of CREP bids against other CREP bids is consistent with an avoided cost analysis where, as here, a utility must satisfy a statutory requirement to purchase a certain type of resource. In a similar context involving the appropriate measure of avoided cost to meet a state legal requirement to purchase renewable energy, the Federal Energy Regulatory Commission

(“FERC”) found that it would not be appropriate to calculate avoided cost based on the costs of non-renewable energy resources:

[I]f a state required a utility to purchase 10 percent of its energy needs from renewable resources, then a natural gas-fired unit, for example, would not be a source ‘able to sell’ to that utility for the specified renewable resources segment of the utility’s energy needs, and thus would not be relevant to determining avoided costs for that segment of the utility’s energy needs.

Cal. Pub. Utils. Comm’n, 133 FERC ¶ 61,059, ¶ 27 (2010) (citation omitted).

Similarly, here, it is nonsensical to compare the cost of CREP resources to non-CREP resources that could never satisfy NorthWestern’s statutory CREP-purchase obligation.

The Commission observes that if the cost-cap language is read literally to require NorthWestern to select the lowest overall bid from each CREP RFP, then “NorthWestern would have satisfied its CREP mandate years ago.” PSC Br. 18. But this is exactly the point. The Legislature designed the statute to require a limited overall commitment of 65.4 MW, to be achieved incrementally over four years, through the addition of three or more CREP resources. MCA § 69-3-2004(3)(b)-(c); id. § 69-3-2003(4) (limiting CREPs to 25 MW each). Consistent with the CREP Act, NorthWestern should have satisfied its CREP mandate years ago. Instead, through a series of waiver requests approved by the Commission,

NorthWestern has effectively nullified that mandate and deprived Montana communities of the benefits the CREP Act was designed to create.

Although Appellants suggest this Court should defer to the Commission, the Commission's Order did not give the Court anything to defer to. In its totality, the Commission's discussion of this issue stated:

The Commission previously directed North Western to demonstrate its calculation of the cost cap in Mont. Code Ann. § 69-3-207 [sic] for CREP resources. Order 7395d, Dkt. 2015.2.18 ¶ 21. The Commission agrees that the cost analysis performed in Docket D2017.8.65 sufficiently determines how the CREP proposals would impact portfolio costs and risks.

Comm'n Order ¶ 20. The Order's statement that NorthWestern sufficiently determined "portfolio costs and risks" does not offer any legal analysis and therefore does not offer any statutory interpretation worthy of deference. See Lyman Creek, LLC v. City of Bozeman, 2019 MT 243, ¶ 23, 397 Mont. 365, 450 P.3d 872 (finding no statutory construction to which Court might defer where DNRC publication cited no authority to justify its legal assertion); Mont. Env'tl. Info. Ctr., ¶¶ 97-98 (Court does not defer to an agency's "conclusory legal statements" or "unexplained assertions."). And even if the Commission had set forth a statutory interpretation, this Court would afford it "only respectful consideration," not complete deference, as NorthWestern asserts. Mont. Env'tl. Info. Ctr., ¶ 24 n.9 (quotations and citation omitted). In any event, the Act's plain language unambiguously requires NorthWestern to accept the CREP bid with the

lowest total costs compared against “bids for the equivalent quantity of power,” and thus forecloses deference to the Commission’s contrary position. Clark Fork Coal. v. Tubbs (“Clark Fork Coal. III”), 2016 MT 229, ¶ 28, 384 Mont. 503, 380 P.3d 771 (rejecting agency interpretation that was “inconsistent with the plain language of” the statute).

In the absence of a Commission interpretation of the cost-cap statute, Appellants advance the meritless position in their briefs that this Court should defer to the Commission’s interpretation of administrative rules, ARM 38.5.8301(6) and (8), that establish filing requirements for utility requests for preapproval of a CREP resource or forbearance from renewable portfolio standards. PSC Br. 15-16; NWE Br. 43. However, Appellants are wrong in their suggestion that the rules offer any interpretation of the cost-cap provision, or that the Commission’s 2016 waiver decision was based on an interpretation of the rules themselves. ARM 38.5.8301(6) and (8) simply require a utility to calculate cost caps and explain their methodology, and the rules neither establish nor endorse any particular methodology. Indeed, the Commission has previously declined to “provide guidance on how to determine CREP cost effectiveness,” observing that ARM 38.5.8301 places that responsibility with NorthWestern. NWE_App. 85

(Order 7395d, ¶¶ 20-21).⁷ And in any event, Appellants’ position for purposes of this litigation that ARM 38.5.8301(6) and (8) establish an avoided cost methodology for calculating cost caps is illegitimate because it conflicts with the statute the rules purport to implement. See Clark Fork Coal. III, ¶ 25 (invalidating administrative rule that conflicted with plain statutory language).

Because MCA § 69-5-2007(1) is unambiguous, this Court’s interpretation begins and ends with the statutory language. Clarke v. Massey, 271 Mont. 412, 416, 897 P.2d 1085, 1088 (1995). However, even if this Court turns to legislative history, as Appellants urge, the result is the same because it supports MEIC’s plain-language interpretation. NorthWestern points to comments of Representative Noenning during a House hearing that the Act does not require NorthWestern to purchase CREP resources “unless it’s less than or equal to bids for equivalent quantity of power. You have to match the market.” NWE Br. 44 (quoting Tr. of Mont. H. of Reps. Floor Sess., Second Reading of SB 415, Apr. 15, 2005). Representative Noenning’s statement shows his clear understanding that the cost-cap provision uses “bids” in order to determine “the market” for CREP resources. The letter from Governor Schweitzer expressing his vague support for waivers

⁷ The Commission did, however, suggest that NorthWestern should evaluate portfolio costs and risks as a means of comparing a CREP bid with other CREP bids. NWE App. 87 (Order 7395d, ¶ 31 & n.1).

from the CREP-purchase mandate “when renewable energy is too expensive,” NWE_App. 60, says nothing about the Legislature’s intent. However, what is instructive about the Legislature’s intent is their rejection of the Governor’s proposed cost-cap language that would have required the Commission to establish cost caps based on consideration of, among other things, “the costs of alternatives available to the utility.” NWE_App. 62. Appellants cannot achieve through judicial review what the Legislature specifically rejected in enacting the CREP Act. See Pengra v. State, 2000 MT 291, ¶ 11, 302 Mont. 276, 14 P.3d 499 (rejecting interpretation of statute that would effectively insert language into the statute that was discussed in the legislative history, but never enacted).

Rejecting Appellants’ erroneous interpretation of the statutory cost-cap language would not, as Appellants suggest, expose customers to rate increases. PSC Br. 9; NWE Br. 44. Instead, the Montana Legislature imposed a number of safeguards against such rate impacts. First, the cost-cap provision provides that NorthWestern must purchase the least-costly CREP resource. MCA § 69-3-2007(1). Second, NorthWestern’s total purchase obligation is limited to approximately 65 megawatts—less than the capacity of three full-sized CREP projects—that NorthWestern was supposed to acquire incrementally over a period of several years. See NWE Br. 18 (table depicting CREP obligation).

Accordingly, meeting NorthWestern’s CREP-purchase obligation would not expose customers to measurable increases in electric costs.⁸

Moreover, the Legislature recognized the countervailing customer benefits from CREP-resource development. In passing the Act, the Legislature found, “renewable energy production promotes sustainable rural economic development by creating new jobs and stimulating business and economic activity in local communities across Montana.” MCA § 69-3-2002(2). And further, “fuel diversity, economic, and environmental benefits from renewable energy production accrue to the public at large, and therefore, all consumers and utilities should support expanded development of these resources to meet the state’s electricity demand and stabilize electricity prices.” *Id.* § 69-3-2002(4). Thus, the explicit purpose of the Act is to help ensure that local communities across Montana benefit from the positive economic and environmental outcomes of renewable energy development. NorthWestern’s interpretation of the Act would impermissibly nullify these Legislative policies by disqualifying most if not all potential CREP

⁸ For NorthWestern’s much more substantial investment in 633 megawatts of hydroelectric assets—at thirty-year levelized costs of \$64.92 per megawatt-hour—the Commission projected a rate increase of 5.63 percent, or \$4.63 per month. Order 7323k, ¶ 141, Dkt. No. D2013.12.85 (Sept. 26, 2014). The purchase of 65 megawatts of CREP-generated electricity (approximately one-tenth the capacity of NorthWestern’s dam acquisition) at significantly lower projected costs would have a small fraction of this rate impact, if any at all.

resources—as NorthWestern’s testimony admitted. MEIC_App. 7, 14-15 (LaFave testimony). This Court should not adopt an interpretation of the Act that would “defeat its evident object or purpose.” Howell v. State, 263 Mont. 275, 286-87, 868 P.2d 568, 575 (1994) (citation omitted).

Accordingly, the Commission and NorthWestern’s interpretation of the statutory cost-cap provision, MCA § 69-3-2007(1), is contrary to the language and purposes of the Act, and could not legitimately justify NorthWestern’s failure to acquire CREP resources in 2016. Because the cost cap was NorthWestern’s only asserted justification for its non-compliance with its CREP-purchase obligation in 2016, the Commission’s waiver decision for 2016 should be reversed.

III. THE COMMISSION’S DECISION WAS IMPERMISSIBLY BASED ON COMMISSIONERS’ DISAGREEMENT WITH STATUTORY MANDATES

Finally, the Commission adopted a fundamentally unlawful rationale for the challenged decision by relying on disagreement with the Legislature. The Commission is statutorily authorized to waive compliance with the CREP-purchase obligation only if a utility demonstrates that it took “all reasonable steps” to meet that obligation. MCA § 69-3-2004(11)(a). Because the Commission’s conclusion that NorthWestern’s conduct met this standard was arbitrary and clearly erroneous, this Court need look no further and should reverse the Order. However, as an additional and independent ground for reversal, this Court should find that the

Commission's decision was not based on relevant factors and "in excess of the statutory authority of the agency," MCA § 2-4-704(2)(a)(ii), because the decision was based on the Commissioners' dissatisfaction with the governing statutory standard.

The Commission may only exercise the power the Legislature delegated to it. Mont. Power Co. v. Pub. Serv. Comm'n, 206 Mont. 359, 371, 671 P.2d 604, 611 (1983) (citations omitted). Under the CREP Act, the Commission may waive a utility's purchase obligation only if it rationally determines that the utility satisfied the "all reasonable steps" standard. MCA § 69-3-2004(11)(a). However, in the course of their only deliberation in the underlying proceeding, the Commissioners did not make any factual findings regarding the reasonable steps NorthWestern failed to take or discuss NorthWestern's legal interpretation of the statutory cost-cap provision. See generally MEIC_App. 113-117 (work session transcript). Instead, the only reason the Commissioners offered for granting NorthWestern's waiver requests was the Commissioners' intent to "send a message" to the legislature reflecting their belief that the CREP-purchase requirement is unreasonable. See MEIC_App. 114-15, at 7:7-21, 8:13-9:16; see also supra Background, Part II. Because the Commission was required to base its decision on the statutory criteria and evidentiary record, rather than a policy

disagreement with the Legislature, the Commission’s decision was “in excess of the statutory authority of the agency.” MCA § 2-4-704(2)(a)(ii).

The Commission and NorthWestern attempt to preclude the Court’s review of the Commissioners’ deliberations in the underlying contested case, illegitimately claiming in this appeal as they did in a similar case now pending before this Court that Commissioner statements outside of final written orders are irrelevant. First, the Commissioners’ statements are part of the administrative record, which under MCA § 2-4-704, “must include,” when a party requests it, as MEIC did here, “a stenographic record of oral proceedings.” MCA § 2-4-614(1)(b) (emphasis added). Therefore, the Commission properly filed with the District Court “a certified copy of the administrative record of the proceeding under review” that included a transcript of the Commission’s deliberations. NWE_App. 28-33 (Not. of Filing Admin. Record (Dec. 10, 2018)).⁹

To be sure, as NorthWestern observes, the Commission must make written findings to support its decision. NWE Br. 50. Nevertheless, in reviewing that

⁹ Furthermore, Montana law requires that the Commission’s deliberations be conducted openly specifically to allow the public to understand the basis for Commission decisions regarding “the peoples’ business.” Schoof v. Nesbit, 2014 MT 6, ¶ 18, 373 Mont. 226, 316 P.3d 831 (discussing open meeting law, MCA § 2-3-201). It would be a strange result, indeed, to require the Commission to hold its deliberations open to the public if the public could not then hold the Commission accountable for those deliberations.

decision, the Court reviews the whole record—which in this case includes the transcript of Commission deliberations—to “satisfy[] [itself] that the agency has made a reasoned decision.” Mont. Env’tl. Info. Ctr., ¶ 26 (quoting Clark Fork Coal. I, ¶ 21). Such review is necessary to determine whether the Commission’s decision was based on “relevant factors.” Clark Fork Coal. I, ¶ 21. And indeed, this Court may even consider evidence outside the record “to determine whether the agency properly considered all relevant factors in reaching its decision.” Hobble Diamond Ranch, LLC v. State, ex rel. Montana Dep’t of Transp., 2012 MT 10, ¶ 28, 363 Mont. 310, 268 P.3d 31.

In sum, this Court is entitled to consider the Commissioners’ stated intent to flout the law. Because that rationale is not grounded in the authority granted to the Commission by the Legislature or a consideration of the relevant factors, it provides an independent reason for reversing the Commission’s 2015 and 2016 waiver decisions. MCA § 2-4-704(2)(a)(ii).

IV. THIS COURT SHOULD REVERSE THE COMMISSION’S UNLAWFUL WAIVER DECISIONS

To ensure that the Legislature’s intent to “promote[] sustainable rural economic development” is not thwarted, MCA § 69-3-2002(2), MEIC respectfully requests that this Court reverse the Commission’s 2015 and 2016 waiver decision, thus requiring NorthWestern to pay an administrative penalty of \$2.53 million, as calculated by the Commission. PSC Br. 8. Contrary to NorthWestern’s suggestion

that the Court is limited to the remedy of remand to redress CREP Act violations, NWE Br. 41 n.9, MAPA provides that the Court “may reverse or modify [a] decision” that, as here, is arbitrary, unlawful, in excess of an agency’s statutory authority, or clearly erroneous. MCA § 2-4-704(2); see also id. § 69-3-402(1) (court may “vacate and set aside” unreasonable or unlawful Commission action).

Reversal is particularly warranted because, as the District Court held, the Commission not only failed to explain its decisions, but also based its decisions on factual findings that were clearly erroneous in light of the whole record and legal findings that contradict the plain language of the statute. See Whitehall Wind II, ¶ 7 (“The court may reverse or modify an agency’s decision if substantial rights of the appellant have been prejudiced because, among other factors, the agency’s decision exceeds its statutory authority, is affected by legal error, or is clearly erroneous in light of the record.”) (quotations and citations omitted). Given the nature of the Commission’s errors, “remand would be futile” because the Commission “could not possibly” grant NorthWestern’s waiver requests on remand. See Cmty. Ass’n for N. Shore Conservation, ¶¶ 40-41 (upholding district court’s finding that remand to county commission for consideration of whether to approve a bridge project in a lakeshore protection zone would be futile, because the law “clearly prohibit[s]” such construction).

This Court should also reject NorthWestern’s claim that it should not be penalized for the Commission’s arbitrary and unlawful decisionmaking. NWE Br. 45-46. Administrative penalties, such as those mandated by the CREP Act, MCA § 69-3-2004(10), “do more than promote immediate compliance by limiting the [regulated party’s] economic incentive to delay [compliance]; they also deter future violations.” Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs., 528 U.S. 167, 185, 120 S. Ct. 693, 706, 145 L. Ed. 2d 610 (2000). Such deterrence is particularly important for NorthWestern Energy, which has never complied with its CREP-purchase obligation. See NWE Br. 18. In addition, because NorthWestern did not satisfy the statutory standard for waiver, neither the Court nor the Commission can override the Legislature’s direction that NorthWestern “shall pay an administrative penalty.” MCA § 69-3-2004(10). Such penalties are paid by the company’s shareholders, not its customers, and are deposited in the universal low-income energy assistance fund to help finance low-income bill assistance and weatherization programs in Montana. Id.

In conclusion, this Court should reverse the Commission’s 2015 and 2016 waiver decisions and remand this matter to the Commission for the limited purpose of assessing the penalties mandated by law.

Respectfully submitted this 11th day of March, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(e), I certify that this response brief is printed with a proportionately spaced Times New Roman typeface of 14 points; is double-spaced; and contains 9,950 words, as counted by Microsoft Word for Windows.

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CERTIFICATE OF SERVICE

I, Jenny Kay Harbine, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-11-2020:

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