IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 22-0436

MONTANA ENVIRONMENTAL INFORMATION CENTER,

Petitioner/Appellee,

vs.

THE MONTANA DEPARTMENT OF PUBLIC SERVICE REGULATION, PUBLIC SERVICE COMMISSION, and NORTHWESTERN CORPORATION d/b/a NORTHWESTERN ENERGY,

Respondents/Appellants.

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

APPELLANT NORTHWESTERN'S OPENING BRIEF

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STATEMENT OF ISSUES

1. Whether the express retroactivity provision of HB 576 rendered this matter moot.

2. Whether the District Court improperly entered a $2,519,800 judgment against NorthWestern.

STATEMENT OF THE CASE

The Montana Legislature enacted HB 576 during the prior appeal by NorthWestern and the Montana Public Service Commission ("Commission"). *See Order* (September 7, 2021) (DA 19-0565) ("*Remand Order*"). HB 576 repealed the Renewable Power Production and Rural Economic Development Act (the "Act") and contained a retroactivity provision which stated that it applies retroactively "to any application pending or commenced before the public service commission prior" to May 14, 2021.

This Court "determined it is appropriate to remand this matter to the District Court to address whether HB 576 affects the Commission's authority to assess administrative penalties for non-compliance with CREP obligations occurring prior to May 14, 2021." *Remand Order*. It "remanded to the District Court to determine the

effect of HB 576 on Petitioner's complaint" and dismissed the appeal without prejudice. *Id.* at 2.

On remand, the District Court (Judge Manley) addressed whether HB 576 "renders this Court's prior enforceable judgment moot." *Order Denying Defendants' Motion to Dismiss and Order Enforcing Judgment,* p. 1 (May 9, 2022) (Doc. 47) ("*Order Enforcing Judgment*"). It concluded HB 576 did not render "this action and the Court's prior judgment" moot and entered a monetary judgment against NorthWestern for $2,519,800. *Id.*

NorthWestern appeals from the *Order Enforcing Judgment*. NorthWestern also renews the arguments presented in briefing during the first appeal (*see Order* (October 4, 2022) (DA 22-0436)), which must be addressed if the Court determines HB 576 did not render this matter moot.

STATEMENT OF FACTS

I. BRIEF OVERVIEW OF THE ACT AND RELEVANT BACKGROUND.

A. The penalty provision.

The Act created a graduated renewable energy standard ("RPS") which required utilities to procure a specific amount of electrical energy

each year from eligible renewable resources. Section § 69-3-2004(2)(a), (3)(a) & (4)(a), MCA (2019). Beginning in 2015, the Act required utilities to procure 15% of their retail sales in Montana from eligible renewable resources. *Id.* at 2004(4)(a). The Act calculated the RPS standard based on the amount of energy delivered to customers. *Id.* at 2005(b), MCA.

The Act contained a secondary requirement that utilities purchase electricity from small renewable energy projects owned by Montanans known as "community resource energy projects" or CREPs. *See* §§ 69-3-2004(3)(b) & 4(b), MCA (2019). The CREP requirement did not obligate utilities to acquire more renewable energy. *Id.* It required utilities to purchase the output of CREP projects "[a]s part of their compliance with" the RPS standard. *Id.* The renewable energy also had to be cost effective. Section 69-3-2007, MCA (2019) (establishing "cost caps" for eligible renewable resources).

Compliance with the Act was measured by renewable energy credits ("RECs"). The penalty provision of the Act provided:

> if a public utility or competitive electricity supplier is unable to meet the standards established in subsections (2) through (4) in any compliance year, that public utility or competitive electricity supplier shall pay an administrative penalty, assessed by the Commission, of $10 for each megawatt hour

> of renewable energy credits that the public utility or competitive electricity supplier failed to procure.

Section 69-3-2004(10), MCA (2019). A REC was "a tradable certificate of proof of 1 megawatt hour of electricity and associated renewable energy credits produced" by an eligible renewable resource. Section 69-3-2003(14), MCA (2019).

The Act did not contain a method for calculating a penalty for failure to meet CREP obligations, which were stated in terms of "megawatts of nameplate capacity." *See* §§ 69-3-2004(3)(b), 4(b), & (10), MCA (2019). It did not provide any metric to convert "megawatts of nameplate capacity" to "megawatt hours of renewable energy credits." *See generally*, §§ 69-3-2001 to 2008, MCA (2019).

The Act also provided that a utility that exceeded the RPS in any compliance year "may carry forward the amount by which the standard was exceeded to comply with the standard in either or both of the subsequent compliance years." *Id.* at 2004(9), MCA. It allowed for compliance to be obtained by purchasing RECs from third parties and provided a three-month grace period following each compliance year to obtain RECs. *Id.* at 2004(6) & (7)(ii), MCA.

The Act permitted a utility to request waivers. It stated that a utility "may petition the commission for a short-term waiver from full compliance with the standards in subsections (2) through (4) and the penalties levied under subsection (10)." Section 69-3-2004(11), MCA (2019). It required the Commission to adopt rules to "define the process by which waivers from full compliance with this part may be granted." Section 69-3-2006 (2)(c), MCA (2019); *see* ARM § 38.5.8301 ARM.

B. NorthWestern filed applications for waivers.

NorthWestern always met and exceeded the RPS. It procured almost 22% of its retail sales in renewable energy in 2015.[1] Administrative Record ("AR") 4, pp. 2-3. NorthWestern had over 400,000 RECs more than required in 2015. *Id.*

NorthWestern petitioned the Commission for waivers from the CREP requirements for 2015 and 2016. AR 1 & 4. The 2015 petition included a request for a declaratory ruling that the Act's penalty provisions did not apply for failure to meet CREP obligations. AR 4.

[1] That amount did not include the significant amount of renewable energy generated by NorthWestern's hydroelectric facilities, which did not qualify as eligible renewable resources because they commenced commercial operation before January 1, 2005. Section 69-3-2003 (10), MCA.

NorthWestern withdrew that request at the hearing because the Commission had issued a ruling in a separate proceeding that the penalty provision could apply for failure to meet CREP obligations. *Final Order 7578b*, ¶ 5 (September 24, 2018) (AR 63) (NorthWestern Appendix pp. 1-11) (DA 19-0565).[2]

The 2015 and 2016 petitions were consolidated before the Commission. The subject of those proceedings was whether NorthWestern's applications for waivers should be granted, not the amount of any potential penalty. The proceedings did not address how to convert "megawatts of nameplate capacity" to "megawatt hours of renewable energy credits." *See generally*, AR & Hearing Tr. The Commission granted both petitions for waivers in *Final Order 7578b*.

The Commission has never adopted a method to calculate a penalty for failure to meet CREP obligations. If the Commission had

[2] "At the hearing on April 4, 2018, NorthWestern withdrew its request for a declaratory ruling on the administrative penalty, as Docket D2016.4.33 had been filed prior to the Commission's Declaratory Ruling issued January 5, 2017 in Docket D2015.3.27." *Final Order 7578b*, ¶ 5.

denied NorthWestern's petition, separate proceedings would have been necessary for the Commission to impose and calculate any penalty.[3]

In a memorandum prepared by commission staff following the hearing, however, staff provided a suggestion of how a penalty could be calculated in a footnote:

> Absent a method described in statute for calculating the quantity of procurable RECs upon which a penalty may be based, staff offered in Dkt. D2013.10.77 and Dkt. D2015.3.27 a method for calculating the penalty. If a utility's CREP shortfall is 40.4 MW, for example, that unmet capacity is converted to MWh/year, i.e. 40.4 MW x 8760 hr/yr = 353,904 MWh/yr. To account for the variability of a 25 MW wind farm, the unadjusted annual production is multiplied by a typical annual production capacity factor, i.e. 353,904 MWh/yr x 0.35 wind capacity factor = 123,866.4 MWh/yr. That adjusted production total is multiplied by the penalty rate to arrive at the CREP administrative penalty, i.e., 123,866.4 MWh/yr x $10/MWh = $1,238,644.

Memorandum, p. 2, fn. 5 (AR 61).

The REC shortfall calculated by staff was less than NorthWestern's excess RECs. NorthWestern had over 400,000 excess RECs in 2015, more than three times shortfall calculated by staff for 2015. *Compare* AR 4 & 61.

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[3] The rules promulgated by the Commission do not describe any procedure for assessing an administrative penalty. See ARM § 38.5.8301.

C. MEIC sought judicial review.

Intervenor Montana Environmental Information Center ("MEIC") requested judicial review of the Commission's decision to grant NorthWestern waivers. *Complaint and Petition for Judicial Review* (Doc 1) ("*Petition*"). It requested that the District Court reverse and:

> Direct the Commission to assess administrative penalties against NorthWestern based on NorthWestern's failure to comply with its CREP purchase obligation in 2015 and 2016.

Id. at p. 21. MEIC did not request that the District Court attempt to calculate or assess any administrative penalties against NorthWestern. *Id.*

MEIC sought the same relief in briefing. It requested that the District Court reverse and "direct the Commission to assess administrative penalties against NorthWestern based on NorthWestern's failure to comply with its CREP purchase obligation." *Montana Environmental Information Center's Opening Brief,* p. 29 (Doc. 9); *Montana Environmental Information Center's Opening Brief,* p. 10 (Doc. 15).

The District Court granted the relief MEIC requested. It reversed the Commission's decision. *Order Reversing Montana Public Service*

Commission Final Order 7578b (Doc. 21) ("*Order Reversing Commission*"). The District Court did not calculate or assess any penalty and did not enter a monetary judgment against NorthWestern. *Id.*

NorthWestern and the Commission appealed to this Court. On appeal, NorthWestern specifically noted the amount of any penalty had not been determined and:

> If the Montana Supreme Court affirms the District Court, there will need to be a separate proceeding at the Commission calculating the amount of the penalty.

Appellant NorthWestern's Opening Brief, pp. 10-11, fn. 3 (February 10, 2020) (DA 19-0565). Similarly, MEIC requested that this Court "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." *Montana Environmental Information Center Response Brief*, p. 46 (March 11, 2020) (DA 19-0565).

II. THE MONTANA LEGISLATURE REPEALED THE ACT.

The Legislature passed two bills during the 2021 session relevant to the CREP requirement. It passed Senate Bill 237 ("SB 237"), which repealed the CREP provisions of the Act. 2021 Montana Laws, Ch. 375.

The Legislature subsequently passed House Bill 576 ("HB 576"), which repealed the entire Act including the CREP provisions. 2021 Montana Laws, Ch. 542.

A. SB 237 repealed the CREP requirement.

SB 237 eliminated the CREP requirement from the Act. 2021 Montana Laws, Ch. 375. The bill had an immediate effective date and contained a retroactivity clause. It provided:

> **Section 9. Retroactive applicability:** [This act] applies retroactively, within the meaning of 1-2-109, to any application pending or commenced before the public service commission prior to [the effective date of the act].

Id. at § 9. SB 237 did not contain a savings clause.

B. HB 576 repealed the entire Act.

The Legislature subsequently enacted HB 576. That bill repealed the entire Act, including the CREP requirement. 2021 Montana Laws, Ch. 542. The initial version of HB 576 contained a limited retroactivity clause, which provided:

> **Section 8. Retroactive applicability.** [This act] applies retroactively, within the meaning of 1-2-109, to the compliance year beginning January 1, 2021.

Doc. 36, Exhibit 3, § 8. When introduced, HB 576 also contained general savings clause which stated:

> **Section 7. Savings clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

Id. at § 7.

The Legislature then amended HB 576 to include the more expansive retroactivity clause from SB 237. The Senate Energy and Telecommunications Committee held a hearing on HB 576 on March 23, 2021, to discuss the proposed amendment. *See* Doc. 36, Exhibit 4. A representative of MEIC testified at the hearing. He opposed the proposed amendment on the basis it would affect these proceedings:

> MEIC stands opposed to HB 576 for the reasons previously stated … . Further, MEIC does not support adding 237, Senate Bill 237, as an amendment to this bill. The retroactivity element within SB 237 would ensure that low income and tribal community energy assistant programs would not receive the $2.5 million that a district court judge has ordered that NorthWestern Energy is obligated to pay these communities. Therefore, we urge a do not pass and we urge you to not add that amendment to this bill.[4]

[4] The audio file for the relevant subcommittee meeting is available on the website of the Montana Legislature at https://bit.ly/3bIR7X1. The relevant statement is at 1:30:48 (16:55:24) on audio file.

The Legislature adopted the proposed amendment over MEIC's opposition.

The amendment specifically included any applications pending or commenced before the Commission prior to the effective date of the act. It stated:

> **Section 12. Retroactive applicability.** [This act] applies retroactively, within the meaning of 1-2-109, ~~to the compliance year beginning January 1, 2021~~ ANY APPLICATION PENDING OR COMMENCED BEFORE THE PUBLIC SERVICE COMMISSION PRIOR TO [THE EFFECTIVE DATE OF THIS ACT].

Doc. 36, Exhibit 4. The amendment also added coordination instructions which provided that if "both Senate Bill No. 237 and [this act] are passed and approved, then Senate Bill No. 237 is void." *Id.* at § 9. The Legislature did not remove the savings clause when it amended HB 576.

The Legislature then passed HB 576, with the amended retroactive provision on May 4, 2021. The Governor signed the bill on May 14, 2021. NorthWestern filed a *Notice of Supplemental Authority* with this Court on May 19, 2021.

III. THIS COURT REMANDED FOR A LIMITED PURPOSE.

This Court remanded for the District Court to "address whether

HB 576 affects the Commission's authority to assess administrative penalties for non-compliance with CREP obligations occurring prior to May 14, 2021." *Id.*

The District Court held a scheduling conference and issued an *Order Setting Briefing Schedule* (October 4, 2021) (Doc. 34). The scheduling order only provided for briefing on motions to dismiss. *Id.* NorthWestern and the Commission moved to dismiss based on the express retroactivity provision of HB 576. Docs. 37-38.

MEIC responded by filing a *Combined Motion to Enforce Judgment and Response to Motions to Dismiss*. Doc. 40. For the first time in these proceedings, MEIC requested that the District Court impose a penalty against NorthWestern, *See id.* MEIC contended that HB 576 did not render this matter moot because the *Order Reversing Commission* (Doc. 21) constituted an "enforceable judgment" against NorthWestern. *Id.*

The District Court did not address whether HB 576 affected the Commission's ability to assess administrative penalties. *See generally*, *Order Enforcing Judgment*. Instead, it adopted MEIC's position for a

second time.[5] It addressed whether HB 576 "renders this Court's prior enforceable judgment moot." *Id.* at 1. It denied the motions to dismiss because "HB 576 does not moot this case or this Court's prior judgment." *Id.* at 8. The District Court then concluded that "[r]emand to the Commission to assess appropriate penalties is not necessary" and entered judgment against NorthWestern for $2,519,800 based on a footnote in the staff memo. *Id.* at 10.

STANDARD OF REVIEW

The interpretation and construction of a statute is a matter of law. This Court reviews whether a district court interpreted and applied a statute correctly de novo. *State v. Jardee*, 2020 MT 81, ¶ 5, 399 Mont. 459, 461 P.3d 108. The Court's review of constitutional questions is plenary. *Williams v. Board of County Com'rs of Missoula County*, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 88.

SUMMARY OF ARGUMENT

The express retroactivity provision of HB 576 rendered this case moot. The Legislature clearly intended that HB 576 operate

[5] The *Order Reversing Commission* is the essentially the same as the proposed order submitted by MEIC, with the limited exceptions of formatting changes and minor alternations.

retrospectively and that intention in controlling. The Commission does not have authority to assess administrative penalties for non-compliance with CREP obligations that occurred prior to May 14, 2021.

Even if this matter is not moot, the Court must still reverse. The District Court did not have any legal authority to enter a $2,519,800 judgment against NorthWestern. The judgment was beyond the scope of the relief requested by MEIC in this matter and violated the Act, this Court's directive on remand, and NorthWestern's right to due process.

ARGUMENT

I. HB 576 RENDERED THIS MATTER MOOT.

A. The Legislature intended for HB 576 to be retroactive.

"Whether legislation is applied retroactively is a question of legislative intent." *U.S. v. Juvenile Male*, 2011 MT 104, ¶ 7, 360 Mont. 317, 255 P.3d 110. There is a presumption against applying statutes retroactively. *Neel v. First Fed. Sav. & Loan Assoc. of Great Falls*, 207 Mont. 376, 386, 675 P.2d 96 (1984); *see also* § 1-2-109, MCA ("No law contained in any of the statutes of Montana is retroactive unless expressly so declared."). The controlling principle regarding

retroactivity has been stated by this Court as follows: if an act is "unmistakably 'intended to operate retrospectively, that intention is controlling as to the interpretation of the statute, even though it is not expressly so stated.'" *State v. Hamilton*, 2007 MT 167, ¶ 9, 338 Mont. 142, 164 P.3d 884. (quoting *Neel,* 207 Mont. at 386, 675 P.2d at 102); *see also Juvenile Male*, ¶ 7.

This Court has found statutes to be retroactive even in the absence of an express statement of retroactivity. The "legislature, in providing a retroactive effect to its enactments, need not expressly state 'this act is retroactive.' Any language that shows a legislative intent to bring about that result is sufficient." *O'Shaughnessy v. Wolfe*, 212 Mont. 12, 14, 685 P.2d 361, 363 (1984). "If it is unmistakable that an act was intended to operate retrospectively, that intention is controlling in the interpretation of the statute, even though it is not therein expressly stated so." *Id.*; *see also Hamilton,* ¶¶ 13-15 (concluding statute retroactive even in the absence of a retroactivity provision); *Neel*, 207 Mont. at 387, 675 P.2d at 102 (concluding the intent of the Legislature was unmistakable "[d]espite the absence of an express declaration" of

retroactivity."). Conversely, this Court has not denied retrospective application when legislation expressly states it is retroactive.

HB 576 expressly states it is retroactive. The title of the bill states the bill provides "AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE." Doc. 36, Exhibit 1. HB 576 contains a retroactivity provision, which states it applies to "any application pending or commenced before" the Commission prior to its effective date.

NorthWestern petitioned for waivers in 2015 and 2016 before the effective date of HB 576. The legislation is "unmistakably" intended to operate retrospectively and "that intention is controlling as to the interpretation" of HB 576. *Hamilton*, ¶ 9, *Juvenile Male*, ¶ 7, *Neel,* 207 Mont. at 386, 675 P.2d at 102. This matter is moot and should be dismissed.

B. The savings clause does not alter the Legislature's unmistakable intent.

When interpreting a statute, the role of court is to "ascertain and carry out the Legislature's intent." *Mont. Fish Wildlife & Parks v. Trap Free Mont. Pub. Lands*, 2018 MT 120, ¶ 14, 391 Mont. 328, 417 P.3d 1100. Courts first look to the plain language enacted by the Legislature

and "interpret the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature." *Id.* at ¶ 13; *In the Matter of Interpretation of Senate Bill No. 23*, 168 Mont. 102, 105, 540 P.2d 975, 976 (1975).

The specific retroactivity clause in HB 576 controls over the general savings clause. The title of HB 576 states the bill provides an immediate effective date and retroactive applicability date. *Senate Bill No. 23*, 168 Mont. at 105, 540 P.2d at 976 ("A consideration of the title of the Act is a necessary first step in our search for purpose and meaning of this statute."). The title of the bill does not mention a savings clause.

The legislative history of HB 576 clearly demonstrates the Legislature intended for HB 576 to apply retrospectively. The Legislature first passed SB 237 which eliminated the CREP requirement from the Act and contained an express retroactivity clause. Doc. 36, Exhibit 2. It then considered HB 576. The initial version of HB 576 contained both a general savings clause and a limited retroactivity clause which provided:

> **Section 8. Retroactive applicability.** [This act] applies retroactively, within the meaning of 1-2-109, to the compliance year beginning January 1, 2021.

Doc. 36, Exhibit 3, p. 6.

The Legislature amended HB 576 for the specific purpose of incorporating the more expansive retroactivity clause in SB 237. MEIC opposed the amendment on the basis it would render this case moot. The Legislature adopted the proposed amendment over MEIC's opposition and amended the retroactively clause to state:

> **Section 12. Retroactive applicability.** [This act] applies retroactively, within the meaning of 1-2-109, ~~to the compliance year beginning January 1, 2021~~ ANY APPLICATION PENDING OR COMMENCED BEFORE THE PUBLIC SERVICE COMMISSION PRIOR TO [THE EFFECTIVE DATE OF THIS ACT].

Doc. 36, Exhibit 4, p. 12. That same amendment nullified SB 237 because it no longer served any purpose. *Id.* at § 9 ("If both Senate Bill No. 237 and [this act] are passed and approved, then Senate Bill No. 237 is void.).

The District Court found the legislative history "supports the reading that HB 576's retroactivity clause does not apply to this case or this Court's August 1, 2019 judgment." *Order Enforcing Judgment*, p. 7. It held "the Montana Legislature added a savings clause to HB 576 that

was absent in SB 237" and therefore the savings clause applies to this case.

SB 237 would have rendered this case moot. According to the District Court's reasoning, the Legislature amended HB 576 to nullify SB 237 to **prevent** this case from being rendered moot. That is the exact opposite of what the Legislature intended.

The District Court's reasoning simply cannot be squared with the legislative history. The Legislature passed SB 237 to retroactively repeal the CREP requirement. It amended HB 576 to incorporate the same retroactivity clause as SB 237. The same amendment voided SB 237. The Legislature clearly intended to amend HB 576 to make it congruent with SB 237 so that HB 576 applied to the waivers at issue in this case.

C. The District Court's "enforceable judgment" does not change the analysis.

This Court remanded for the express purpose of addressing whether HB 576 affects **the Commission's authority** to assess administrative penalties. *Remand Order*. The District Court did not address that question. Instead, the District Court addressed whether it had the authority to assess administrative penalties based on its

characterization of the *Order Reversing Commission* as an enforceable judgment. *See Order Enforcing Judgment*, p. 1 ("At issue now is whether HB 576, which repealed the statutory CREP-purchase obligation, renders this Court's prior enforceable judgment moot.").

The District Court incorrectly characterized the *Order Reversing Commission* as an enforceable judgment and then relied on that characterization to conclude HB 576 did not render this matter moot. *Order Enforcing Judgment*, p. 5. It held that the "savings clause applies to 'proceedings,' such as the instant litigation, as well as circumstances where administrative penalties have been incurred or rights and duties have matured, which also describe the posture of the instant litigation following this Court's August 1, 2019 judgment." *Id.* at 6-7.

But the *Order Reversing Commission* is irrelevant to the issue of whether HB 576 is retroactive. The order did not constitute an enforceable judgment against NorthWestern. It only reversed the Commission's decision to grant waivers. *See* § 2-4-704 (2), MCA ("The court may affirm the decision of the agency or remand the case for further proceedings.").

The District Court found that the "retroactivity clause applies to 'any application' and the savings clause applies to 'proceedings.'" *Order Enforcing Judgment*, p. 6. But any "application pending or commenced before the public service commission" necessarily means there is an active proceeding, either before the Commission or subsequent judicial proceedings.

The terms "application" and "petition" have been used interchangeably by the Commission and parties. *See e.g. Final Order 7578b*, p. 3 (the "Commission has jurisdiction over NorthWestern's CREP applications"); *MEIC's Opening Brief*, p. 7 (referring to "the Commission proceeding on NorthWestern's waiver applications for 2015 and 2016"); *Commission's Brief*, p. 19 (referring to NorthWestern's "2016 waiver application").

There is a straightforward way to reconcile the two provisions. The savings clause would apply to penalties that had actually been calculated and assessed upon NorthWestern by the Commission prior to the effective date of the Act. The retroactivity provision precludes any further proceedings already commenced by the filing of an application with the Commission.

HB 576 rendered this case moot. The Court should determine that HB 576 precludes the assessment of any penalty against NorthWestern and reverse the *Order Enforcing Judgment*.

II. THE DISTRICT COURT IMPROPERLY ENTERED JUDGMENT AGAINST NORTHWESTERN.

Even if the Court concludes HB 576 did not render this matter moot and the Commission unlawfully granted NorthWestern's application for waivers, the Court must still reverse the District Court's $2,519,800 judgment.

A. The District Court did not have authority to assess a penalty against NorthWestern.

The Act did not authorize the assessment of a penalty against a utility which met the RPS standard but failed to meet the CREP requirement.

NorthWestern always met and exceeded the RPS standard. The penalty provision provides that a utility "shall pay an administrative penalty, assessed by the commission, of $10 for each megawatt hour of renewable energy credits" that the utility failed to procure. Section 69-3-2004(10), MCA (2019). That provision did not authorize the imposition of a penalty solely for failure to meet the CREP requirement for several reasons.

- The CREP obligation did not require utilities to procure more renewable energy. It was "part of their compliance" with the RPS standard. *Id.* at 2004(3)(b) & 4(b).

- Compliance with the Act was measured in RECs based on delivered energy. *Id.* at 2004(5)(b).

- The CREP obligation was measured in capacity and not RECs or delivered energy. *Id.* at 2004(3)(b) & 4(b).

- The Act did not contain a method to calculate a penalty for failure to comply with CREP obligations. *See generally, id.*

- The Act permitted excess RECs to carry over to meet future obligations. *Id.* at 2004(9), MCA. A utility could also avoid penalties by purchasing RECs separately and had a three-month grace period at the end of each compliance year. *Id.* at 2004(6) & (7)(ii), MCA.

Even if the penalty provision could apply for failure to meet CREP obligations, the District Court did not have the authority to assess a penalty which was not contained in the Act and had never been calculated by the Commission. The Commission is invested with full power of supervision, regulation, and control of public utilities. Section 69-3-102, MCA. The Act granted the Commission the "authority to generally implement and enforce" the provisions of the Act. Section 69-3-2006(1), MCA (2019). The Act expressly provides that any penalty

must be "assessed by the commission." Section 69-3-2004(10), MCA (2019).

The District Court improperly penalized NorthWestern based on the incorrect premise it was enforcing the *Order Reversing Commission*. *See Order Enforcing Judgment*, p. 9 ("MEIC is entitled to enforcement of this Court's August 1, 2019 judgment, which was in its favor.") (citing *Smith v. Foss*, 177 Mont. 443, 447, 582 P.2d 329, 332 (1978)).

The cases relied upon by the District Court are wholly inapplicable. For example, *Smith* involved the enforcement of a prior judgment concerning peat moss. *Id.,* 177 Mont. 443, 582 P.2d 329. Following judgment, a dispute arose regarding the testing procedure to be used to determine the organic content of peat material. *Id.* This Court determined that the district court had the inherent authority to clarify its prior judgment to render it effective. *Id.* In comparison, it was not necessary to clarify the *Order Reversing Commission* to render it effective. The District Court simply reversed the Commission's decision to grant NorthWestern's waivers. No further action was necessary.

The District Court's "enforcement" of the *Order Reversing Commission* violated the Montana Rules of Civil Procedure. Rule 60(a)

permits a court to amend a judgment to correct a clerical mistake arising from an oversight or omission.[6] The "mere interpretation or clarification does not involve or effect a substantive alteration or amendment of the prior judgment—it merely involves interpreting or clarifying its original meaning or effect without material alteration or deviation." *Meine v. Hren*, 2020 MT 284, ¶ 19, 402 Mont. 92, 475 P.3d 748. "In other words, an interpretation or clarification merely 'explains or refines rights already given,' but 'neither grants new rights nor [expands] old ones.'" *Id.* (citing *Kemmer v. Keiski*, 116 Wash.App. 924, 68 P.3d 1138, 1143 (2003)); *see also Kottas v. Kottas*, 164 Mont. 155, 160, 551 P.2d 1014, 1017 (1976) (distinguishing further declaration or explanation of the original meaning or effect from an "actual modification" governed by M. R. Civ. P. 60(b)).

The imposition of a $2,519,800 penalty is a material alteration that affected NorthWestern's substantive rights. Such a change can only be made through a Rule 59 or 60 motion, within the time limits required by those rules. *See Thomas v. Thomas*, 189 Mont. 547, 551,

[6] Rule 60 also provides that "after an appeal has been docketed in the supreme court and while it is pending, such a mistake may be corrected only with the supreme court's leave." M.R.Civ.P 60(a).

617 P.2d 133, 136 (1980) (amendment cannot affect substantive rights); *see also McMahon v. Falls Mobile Home Center*, 173 Mont. 68, 71, 566 P.2d 75, 77 (1977) ("Money judgments must be stated in dollars and cents and the amount may not be left to a ministerial officer to be determined from data outside the record.).

Finally, the District Court incorrectly found that it "has separate statutory authority to assess penalties under MCA § 69-3-209, MCA." *Order Enforcing Judgment*, p. 10. That statute does not authorize the imposition of a $2,519,800 penalty for failure to comply with CREP obligations. *See* § 69-3-209, MCA. It only authorizes the imposition of "the penalty prescribed by 69-3-206, MCA" which is "a fine of not less than $100 or more than $1000."

B. The District Court violated NorthWestern's right to due process.

1. The District Court granted relief that MEIC did not request in its Petition.

The Fourteenth Amendment to the United States Constitution and the Montana Constitution (Article II, § 17) provide that no person shall be deprived of life, liberty, or property without due process. This Court has consistently held that due process "requires notice and the

opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *In re Marriage of Stevens*, 2011 MT 124, ¶ 18, 360 Mont. 494, 255 P.3d 154 (citing *Mont. Power Co. v. Public Serv. Commn.*, 206 Mont. 359, 368, 671 P.2d 604, 609 (1983)). "Notice must be 'reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests.'" *Id.* "It 'is well-settled that an appellant generally 'cannot recover beyond the case stated by him in his complaint' because 'fair notice to the other party remains essential.'" *Baston v. Baston*, 2010 MT 207, ¶ 18, 357 Mont. 470, 240 P.3d 643.

MEIC sought judicial review after the Commission granted NorthWestern's request for waivers. It requested that the District Court remand and "direct the Commission to assess administrative penalties" against NorthWestern. Doc. 1, p. 21. The District Court violated NorthWestern's due process rights by granting relief that MEIC never requested. *Baston*, ¶ 18.

This Court remanded "to address whether HB 576 affects the Commission's authority to assess administrative penalties for non-compliance with CREP obligations occurring prior to May 14, 2021."

Remand Order. It did not invite the District Court to fundamentally alter the nature of these proceedings. This Court and the parties all understood that additional proceedings before the Commission were necessary before any penalty could be assessed against NorthWestern.

2. NorthWestern was entitled to an opportunity to contest the amount of any penalty.

At a minimum, due process entitled NorthWestern to an opportunity to heard regarding the amount of any penalty and the application of the offset.

The District Court deprived NorthWestern of that opportunity. NorthWestern was entitled to an offset based on the plain language of § 69-3-2004(9), MCA (providing that a utility "may carry forward the amount by which the standard was exceeded to comply with the standard in either or both of the 2 subsequent compliance years."). NorthWestern had over 400,000 excess RECs in 2015. AR 4. Those RECs could have been used to offset the entire penalty imposed by the District Court.

To make matters worse, the District Court did not base the penalty on any admissible evidence. *Order Enforcing Judgment*, p. 10. It relied on a staff memo prepared **after** the hearing in violation of

MAPA. *Id.* Review of an agency decision "must be conducted by the court without a jury and must be confined to the record." Section 2-4-704, MCA. Only "staff memoranda…submitted to the hearings examiner or members of the agency as evidence in connection with their consideration of the case" are included in the record. Section 2-4-614(1)(g), MCA.

> Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed, **including any staff memoranda or data**. They shall be afforded an opportunity to contest the material so noticed.

See § 2-4-612, MCA (emphasis added); *see also* § 2-4-612(1), MCA ("Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved."); § 2-4-612(5), MCA ("party shall have the right to conduct cross-examinations required for a full and true disclosure of the facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence.").

The District Court's finding that "based on the record, this penalty was determined using a calculation method that has existed for nine years" is unsupported by any admissible evidence that is actually

contained in the record, let alone evidence which NorthWestern had an opportunity to contest. *See Order Enforcing Judgment*, p. 10.

The District Court's finding that "NorthWestern was aware of this calculation method and the calculated penalty yet failed to raise issue with the calculation method in this litigation or before the Commission" ignores the history of these proceedings and the requirements of MAPA. *Id.* NorthWestern could not respond to issues that were never raised or evidence that was never introduced. *See Montana-Dakota Utilities Co. v. Montana Dept. of Public Service Regulation*, 223 Mont. 191, 196, 725 P.2d 548 (1986) (citing *Burlington Truck Lines, Inc. v. U.S.,* 371 U.S. 156, 169, 83 S.Ct. 239, 246 (1962)) (the Commission's decision "must be judged on the grounds and reasons set forth in the order, and no other grounds should be considered.").

The District Court also overlooked that NorthWestern appealed the *Order Reversing Commission* because the District Court relied on that same staff memorandum. *Appellant NorthWestern's Opening Brief*, pp. 47-50. The District Court committed the same error by relying on staff memorandum again. The Commission is the body that has authority to act, not its staff. *See* § 69-1-103, MCA ("The commission

shall consist of five members ...."); § 69-3-102, MCA ("The commission is hereby invested ...."); § 69-3-330(2), MCA ("If the commission determines ...."). The District Court violated NorthWestern's rights to due process by relying on an internal staff memorandum which was not admitted into evidence to impose a $2,519,800 judgment.

CONCLUSION

The Court should reverse the District Court and conclude that HB 576 rendered this matter moot. If the Court concludes this matter is not moot, it should reverse the *Order Reversing Commission* for the reasons set forth in prior briefing. If the Court concludes this matter is not moot and affirms the *Order Reversing Commission*, the Court must still reverse the *Order Enforcing Judgment* and remand to the Commission for further proceedings to determine the appropriate penalty and apply the offset required by § 69-3-2004(9), MCA (2019).

RESPECTFULLY SUBMITTED this 14th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionally spaced Century text typeface of 14 points; is double spaced (except for footnotes and quoted and indented material which are single spaced); with left, right, top and bottom margins at one inch; and the word count as calculated by Microsoft Word does not exceed 10,000 words, excluding the Table of Contents, Table of Authorities and Certificate of Compliance.

DATED this 14th day of November, 2022.

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