

July 20, 2017

Chairman Brad Johnson
Montana Public Service Commission
1701 Prospect Ave
P.O. Box 202601
Helena, MT 59620-2601

Dear Chairman Johnson:

Consistent with 5-5-230, MCA, and potentially pursuant to sections 2-4-402, MCA, the undersigned members of Energy and Telecommunications Interim Committee (ETIC) have reviewed the proposed decision of the Montana Public Service Commission (Commission) in Docket No. 2016.5.39 and Docket No. 2016.12.103 announced during the Commission's work sessions. As described below, we urge the Commission not to finalize key aspects of these decisions that are inconsistent with Montana statutory requirements.

On June 22, 2017, the Commission voted to replace long-term (25-year) standard contracts for small qualifying facilities with short-term contracts (10-year contracts with a pricing adjustment at the end of year five). On June 29, 2017, the Commission voted to extend a 10-year contract to an 80 megawatt qualifying facility. It is the opinion of the undersigned members of ETIC that if the decisions are finalized, they would violate section 69-3-604(2), MCA, which provides, "Long-term contracts for the purchase of electricity by the utility from a qualifying small power production facility must be encouraged in order to enhance the economic feasibility of qualifying small power production facilities." On its face, a five- or ten-year contract is not long-term. In addition, Montana law requires contract lengths that "enhance the economic feasibility of qualifying small power production facilities." Absent evidence that five- or ten-year contracts enhance or even maintain the economic feasibility of qualifying facility development in Montana the Commission's actions appear unlawful.

The decisions also appear to run counter to the Legislature's intent as expressed through its rejection of a less-drastic reduction in qualifying facility contract durations during the 2017 Legislative session. As the Commission knows, the Legislature is the policy making body for Montana. It is important that the Commission not attempt an "end-run" around the legislative process by adjudicating an outcome to a policy substantially debated and rejected by the Legislature.

Additionally, we are concerned that the Commission's decision on Docket No. 2016.5.39 appears to be a policy statement of general applicability adopted without observance of the rulemaking procedures required by the Montana Administrative Procedure Act (MAPA), section 2-4-301 *et seq.* Specifically, the draft decision adopted by vote on June 22 would, as we understand it, apply symmetrically to all new generation resources, including utility-owned resources, voluntary long-term power purchase agreements, and larger qualifying facilities. This proposal for symmetric treatment appears to be a "rule," which is defined in section 2-4-102(11), MCA, to include a "statement of general applicability that implements, interprets, or prescribes law or policy." Accordingly, the Commission should have complied with the notice and public

participation provisions of section 2-4-302, MCA, which are designed to ensure that parties potentially affected by a policy have a meaningful opportunity to participate in the Commission's decision-making. The Commission may not adopt a policy of general applicability that does not comply with these procedures.

To be clear, we, the signing members of ETIC, support the symmetric treatment of utility-owned and independently-owned resources. In order to simulate and promote market competition, small and large independent power producers should not be advantaged or disadvantaged through contract length or price when compared to utility-owned resources.

In recent years the Commission has approved the acquisition of electric generating resources with contract terms and depreciation schedules between 20 and 34 years. Therefore, until the Commission receives new policy guidance from the Legislature through legislation or undertakes an Administrative rulemaking process subject to ETIC review, we suggest the contract length for qualifying facilities should be no less than 20 years.

We appreciate your consideration of these issues in advance of any final written decision by the Commission. We also request that the Commission attend the upcoming ETIC meeting to provide the Committee with updated information about how these concerns will be addressed.

Sincerely,



Representative Laurie Bishop, HD 60



Senator Mary McNally, SD 24



Representative Zac Perry, HD 3



Senator Cynthia Wolken, SD 48



Representative Daniel Zolnikov, HD 45

cc: Montana Public Service Commissioners
ETIC Committee Members,
Trevor Graff, ETIC Lead Staff
Justin Kraske, Chief Legal Counsel, Montana Public Service Commission