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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

DA 22-0436

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 56

MONTANA ENVIRONMENTAL INFORMATION CENTER,

Plaintiff and Appellee,

v.

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

Defendants and Appellants.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. DDV 18-0640
Honorable James A. Manley, Presiding Judge

COUNSEL OF RECORD:

For Appellant Montana Public Service Commission:

Lucas Hamilton, Montana Public Service Commission, Helena, Montana

For Appellant Northwestern Energy:

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Shannon Heim, Sarah Norcott, Northwestern Energy, Helena, Montana

For Appellee:

Jenny Kay Harbine, Emily T. Qiu, Earthjustice, Bozeman, Montana

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Submitted on Briefs: March 22, 2023

Decided: March 19, 2024

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 The Montana Department of Public Service Regulation, Montana Public Service Commission (Commission), and NorthWestern Corporation d/b/a NorthWestern Energy (NorthWestern) appeal two orders[1] from the Eighth Judicial District Court, Cascade County: (1) the August 1, 2019 Order reversing the Commission's September 24, 2018 administrative order (Final Order) which waived NorthWestern's legal obligations to purchase energy from Community Renewable Energy Project (CREP) resources in the years 2015 and 2016; and (2) the May 9, 2022 Order denying the Commission's motion to dismiss because HB 576 did not moot the case and assessing a $2,519,800 penalty against NorthWestern.

¶2 We restate and address the following issues:

> *Issue One: Whether the District Court correctly interpreted the savings and retroactivity clauses of HB 576 when it concluded that HB 576 did not apply to NorthWestern Energy's 2015 and 2016 applications for CREP waivers.*
>
> *Issue Two: Whether the District Court correctly held that the Commission's decision to waive NorthWestern's 2015 CREP obligation pursuant to § 69-3-2004(11)(a), MCA, was clearly erroneous under § 2-4-702(a)(v), MCA, and arbitrary under § 2-4-702(a)(vi), MCA.*
>
> *Issue Three: Whether the District Court correctly held that the Commission's decision to waive NorthWestern's 2016 CREP obligation was based on an incorrect interpretation of § 69-3-2007(1), MCA.*
>
> *Issue Four: Whether the District Court improperly assessed the penalty against NorthWestern.*

[1] On October 4, 2022, this Court granted NorthWestern's "Motion to Reopen, Consolidate and Re Briefing." We consolidated Cause No. DA 19-0565 into Cause No. DA 22-0436.

¶3 We affirm the District Court as to Issues One and Two. We vacate and remand for further proceedings consistent with this Opinion as to Issues Three and Four.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 The Renewable Power Production and Rural Economic Development Act (the Act) requires public utilities to purchase a certain amount of electricity output from CREP resources.[2] Section 69-3-2004(3)(b), (4)(b), MCA. The Act defines a CREP resource as an eligible renewable resource that has no greater than 25 megawatts in total generating capacity. Section 69-3-2003(4), MCA. Additionally, a CREP resource must be either (1) locally owned[3] or (2) owned by a public utility. Section 69-3-2003(4), MCA. The Act requires the Commission to impose an administrative penalty on a public utility that fails to meet its statutory obligation to acquire CREP resources each year. Section 69-3-2004(10), MCA. The Commission may grant a short-term waiver from the CREP purchase and penalty provisions if the utility demonstrates that it "has undertaken all reasonable steps" to comply, "but full compliance cannot be achieved . . . for other

[2] The Act was repealed in 2021, specifically §§ 69-3-2001,-2008 MCA. Throughout this opinion, we refer to the repealed version of the Act as necessary for our analysis of the issues.

[3] "Local owners" means (a) Montana residents; (b) general partnerships of which all partners are Montana residents; (c) business entities organized under the laws of Montana that have less than $50 million of gross revenue, have less than $100 million of assets, and have at least 50% of the interests owned by Montana residents; (d) Montana nonprofit organizations; (e) Montana-based tribal councils; (f) Montana political subdivisions or local governments; (g) Montana-based cooperatives other than cooperative utilities; or any combination of the individuals or entities listed in (a) through (g). Section 69-3-2003(11), MCA.

legitimate reasons that are outside the control of the public utility." Section 69-3-2004(11)(a), MCA.

¶5 For 2015, the Act required NorthWestern to procure 65.4 megawatts of energy from CREP resources. NorthWestern initiated a Request for Proposals (RFP) in an attempt to procure CREP resources.[4] NorthWestern limited the RFP to solicitation for CREP proposals, noting that it was not accepting proposals for non-CREP renewable resources, unbundled energy credits, or non-renewable resources. The RFP required all projects to be operational by the end of 2015. NorthWestern received 15 proposals in response to the RFP. It selected four finalists: Greycliff, New Colony, Tiger Butte, and Judith Gap II. Greycliff and New Colony offered bids for power-purchase agreements (PPA), while Tiger Butte and Judith Gap II offered bids for build-transfer projects.[5]

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[4] The RFP is NorthWestern's "preferred process" for soliciting bids from potential renewable energy projects. RFPs are conducted pursuant to § 69-3-2005, MCA, which provides that utilities shall "conduct renewable energy solicitations" for procurement of eligible renewable resources such as CREPs. *See also* Admin. R. M. 38.5.8212(2) (2008) ("[A] utility should use competitive solicitations with short-list negotiations as a preferred procurement method. A utility should design requests for proposals based on its resource needs assessment.").

[5] Under a PPA structure, the respondent retains ownership of the project and delivers all electrical output of the project to NorthWestern. To satisfy CREP requirements, a project that delivers energy pursuant to a PPA must be locally owned. Section 69-3-2003(4)(a), MCA. In contrast, under a build-transfer structure, the respondent acquires all necessary equipment, constructs the project, and then conveys ownership, permits, equipment, and properties to NorthWestern at the date of commercial operation. Assuming the build-transfer project is an eligible renewable resource with generating capacity less than or equal to 25 megawatts, procurement under a build-transfer will satisfy CREP requirements because the project is owned by a public utility. Section 69-3-2003(4)(b), MCA.

¶6 Both build-transfer project finalists had higher viability scores than the PPA finalists, and the Tiger Butte build-transfer project was the least-cost proposal. However, Northwestern rejected both build-transfer projects and signed PPAs with Greycliff and New Colony. Prior to signing these contracts, NorthWestern did not investigate whether those projects satisfied the statutory CREP requirement of being locally owned. After the PPAs were signed, NorthWestern filed a petition with the Commission for advanced approval of the contract with Greycliff pursuant to Admin. R. M. 38.5.8301(6). The Commission denied the petition, determining that NorthWestern failed to provide "testimony and supporting work papers demonstrating the calculation of the utility's avoided costs and associated cost caps." *In the Matter of NorthWestern Energy's Application for Approval of a Purchase Power Agreement with Greycliff Wind Prime, LLC*, Order No. 7395d, ¶ 30, Dkt. D2015.2.18 (Apr. 24, 2015) (citing Admin. R. M. 38.5.8310(6)(h)).

¶7 At the same time as NorthWestern's pre-approval application, Greycliff requested the Commission to issue a declaratory ruling that it satisfied the local ownership requirement and qualified as a CREP. The Commission declined to issue the ruling because it was skeptical of Greycliff's ownership structure and reliance on out-of-state financing. *In Re Greycliff Declaratory Ruling*, Dkt. D2015.3.23 Mont. Admin. Reg. 11-6/11/15 (May 18, 2015). After the Commission's decisions, Greycliff and New Colony, which had a similar ownership structure to Greycliff, terminated their PPAs. NorthWestern did not pursue negotiations with other finalists from the RFP, did not meet its obligation to

procure CREP resources in 2015, and petitioned the Commission for waiver from compliance with the 2015 CREP obligation pursuant to § 69-3-2004(11)(a), MCA.

¶8 In July 2015, NorthWestern issued another RFP relative to its 2016 CREP obligation. The RFP again was limited to solicitation for CREP proposals and required that projects be operational by the end of the 2016 compliance year. Eleven proposals were submitted in response to the RFP, but NorthWestern rejected all proposals based on its claim that none of the projects were "cost-competitive." NorthWestern did not comply with the CREP purchase obligation for 2016 and petitioned the Commission for another waiver.

¶9 In October 2017, the dockets for the 2015 and 2016 waivers were consolidated. Throughout the administrative proceedings, NorthWestern argued that it took all reasonable steps to procure energy from CREP resources, but factors beyond its control prevented compliance.

¶10 Following an evidentiary hearing on April 4, 2018, Commission staff submitted a memorandum recommending the Commission deny NorthWestern's request for a CREP-compliance waiver for 2015 but grant its request for a CREP-compliance waiver for 2016. The staff concluded that NorthWestern failed to take reasonable steps to procure CREP resources in 2015 because it (1) unreasonably disqualified projects that could not become operational by the end of the compliance year and, (2) unreasonably rejected the Tiger-Butte build-transfer proposal. The staff also determined that NorthWestern was not prevented from compliance by factors beyond its control because NorthWestern "had the

control to conduct marginal due diligence to ensure that a finding of compliance was plausible." For the 2016 compliance year, staff recommended that the Commission grant a waiver based on NorthWestern's contention that none of the projects were cost-effective.

¶11 During a work session on September 11, 2018, the Commission granted waivers to NorthWestern for its CREP obligations in 2015 and 2016 by a 3-2 vote. Commissioners on both sides of the vote expressed frustration with the "nearly impossible" requirements of the CREP provisions. Commissioners in favor of granting NorthWestern's waiver asserted that it was unfair to expect NorthWestern's compliance with an "unreasonable law" and stated that they wished to "send a message" to the Montana Legislature. Commissioners who dissented noted they were required to "apply the law as written," and asserted NorthWestern had not taken reasonable steps to comply because there were other viable alternatives from the 2015 RFP. In particular, Commissioner Koopman noted:

> That the CREP law is a short-sighted and unreasonable burden on public utilities like NorthWestern is a given. Its amendment or outright repeal would be favored by this commissioner. But as I tried, unsuccessfully, to argue, that does not empower the Commission to simply flout the law, when the public record virtually screams "non-compliance."

¶12 Granting NorthWestern's petition for waiver, the Commission's Final Order concluded that "NorthWestern took all reasonable steps to procure CREP resources for 2015 and 2016, yet documented factors beyond its control prevented NorthWestern from achieving full compliance." In support of its conclusion, the Commission's factual findings identified only three steps taken by NorthWestern to achieve compliance in 2015: (1) NorthWestern issued an RFP to locate potential CREPs for its 2015 obligation;

(2) NorthWestern hired a consultant, who narrowed the proposals down to four finalists; and (3) NorthWestern signed PPAs with Greycliff and New Colony. The Commission also found that NorthWestern was prevented from complying based on a factor outside its control because the PPAs' ownership structure did not meet the local-ownership criterion for CREP resources. With respect to 2016, the Commission found only that: (1) NorthWestern issued another RFP to meet its 2016 CREP obligation; (2) the RFP generated six finalists; and (3) NorthWestern conducted a portfolio analysis of the projects and determined that none of the projects were cost-competitive. The Final Order did not address issues raised by Commission staff regarding reasonable steps that NorthWestern failed to take to achieve compliance.

¶13 Montana Environmental Information Center (MEIC) sought judicial review of the Final Order. MEIC requested the District Court to direct the Commission to assess administrative penalties against NorthWestern pursuant to § 69-3-2004(10), MCA, based on NorthWestern's failure to comply with CREP purchase obligations.

¶14 The District Court reversed the Final Order, concluding the Commission's factual finding that "NorthWestern took all reasonable steps to procure CREP resources for 2015 and 2016" was both clearly erroneous under § 2-5-704(2)(a)(v), MCA, and arbitrary under § 2-4-704(2)(a)(vi), MCA, and that the Commission misinterpreted § 69-3-2007(1), MCA, when it concluded that NorthWestern complied with the statutory cost-cap provision for 2016. In September of 2019, the Commission and NorthWestern appealed the Final Order.

¶15 In 2021, while still on appeal before the Montana Supreme Court, the Legislature enacted HB 576. HB 576 repealed the Act and contained two pertinent clauses: a retroactivity clause and a saving clause. The retroactivity clause stated that the bill applied "retroactively, within the meaning of 1-2-109 to any application pending or commenced before the public service commission prior to [May 14, 2021]," and the saving clause stated that the bill "does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [May 14, 2021]." 2021 Mont. Laws ch. 542, §§ 7, 12.

¶16 On September 7, 2021, this Court remanded the appeal to the District Court with instructions 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."

¶17 On remand, the District Court concluded that the retroactivity clause did not moot the litigation because the retroactivity clause applied to "any application" such as "pending applications for waiver of CREP requirements at the time of HB 576's enactment" and "each of HB 576's saving clause exceptions shields this case from retroactive application of HB 576." The District Court also determined that "NorthWestern was obligated to pay administrative penalties for its violation of its 2015 and 2016 CREP-purchase obligations," and assessed a penalty totaling $2,519,800 to be paid into the Universal Low-Income Energy Assistance Fund.

STANDARDS OF REVIEW

¶18 In contested cases, administrative decisions are reviewed pursuant to § 2-4-704, MCA, of the Montana Administrative Procedure Act (MAPA). *McGree Corp. v. Mont. Pub. Serv. Comm'n*, 2019 MT 75, ¶ 6, 395 Mont. 229, 438 P.3d 326. A contested case is "a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing." Section 2-4-102(4), MCA.

¶19 A district court may modify or reverse an agency's decision if the appellant's substantial rights were prejudiced because the administrative findings, inferences, conclusions, or decisions are: (i) in violation of statutory provisions; (ii) in excess of the agency's statutory authority; (iii) made upon unlawful procedure; (iv) affected by other error of law; (v) clearly erroneous in view of substantial evidence on the whole record; or (vi) "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 2-4-704(2)(a), MCA.

¶20 While the district court does not act as the trier of fact and "may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact," § 2-4-704(2), MCA, the court should review an agency's decision to determine whether its findings of fact are clearly erroneous and whether its conclusions of law are correct. *Greenwood v. Mont. Dep't of Revenue,* 2020 MT 149, ¶ 9, 400 Mont. 229, 465 P.3d 205. A finding of fact is clearly erroneous if it is not supported by substantial record evidence, the agency misapprehended the effect of the evidence, or the court is left with a definite

and firm conviction that a mistake has been made. *Greenwood*, ¶ 9. Further, an agency's decision must not be arbitrary, but articulate its findings of fact with "a satisfactory explanation" for its actions and provide a "rational connection between facts found and the choice made." *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2019 MT 213, ¶ 26, 397 Mont. 161, 451 P.3d 493 (citation omitted).

¶21 A district court's review must afford "great weight" to an agency's interpretation of its own regulation, and the court should defer to the interpretation unless "it is plainly inconsistent with the spirit of the rule." *Clark Fork Coal. v. Mont. Dep't of Envtl. Quality* ("*Clark Fork Coal. I*"), 2008 MT 407, ¶ 20, 347 Mont. 197, 197 P.3d 482. However, an agency's interpretation will not be sustained if it does not lie "within the range of reasonable interpretation permitted by the wording." *Kirchner v. Mont. Dep't Pub. Health & Human Servs.*, 2005 MT 202, ¶ 18, 328 Mont. 203, 119 P.3d 82. When reviewing a district court's decision regarding an administrative appeal, this Court applies the same standards of review as the district court. *Greenwood*, ¶ 10; *McGree Corp.* ¶ 6.

¶22 This Court reviews de novo a district court's interpretation of a statute and determines whether a district court's interpretation is correct. *State v. Christensen*, 2020 MT 237, ¶ 13, 401 Mont. 247, 472 P.3d 622.

DISCUSSION

¶23 *Issue One: Whether the District Court correctly interpreted the saving and retroactivity clauses of HB 576 when it concluded that HB 576 did not apply to NorthWestern Energy's 2015 and 2016 applications for CREP waivers.*

¶24 Statutory interpretation requires courts to pursue the intent of the legislature if possible. Section 1-2-102, MCA. This Court first reviews the "[statute's] plain language, and if the language is clear and unambiguous, no further interpretation is required." *Goble v. Montana State Fund*, 2014 MT 99, ¶ 21, 374 Mont. 453, 325 P.3d 1211 (internal quotation omitted). This plain language review "must account for the statute's text, language, structure, and object." *City of Missoula v. Pope*, 2021 MT 4, ¶ 9, 402 Mont. 416, 478 P.3d 815 (quoting *State v. Heath*, 2004 MT 126, ¶ 24, 321 Mont. 280, 90 P.3d 426). "Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all," § 1-2-101, MCA, such that "[w]hen the Legislature does not use identical language in different provisions of a statute, it is proper for us to assume that a different statutory meaning was intended," *Shepherd v. State ex rel. Dep't of Corr*., 2021 MT 70, ¶ 17, 403 Mont. 425, 483 P.3d 518 (internal citations omitted). If, after analyzing the plain language, it remains subject to more than one reasonable interpretation, we may review legislative history to aid our analysis. *Pope*, ¶ 10.

¶25 The Commission contends that the plain language of the retroactivity clause moots this case because NorthWestern submitted applications for CREP waivers for 2015 and 2016, well before HB 576's effective date of May 14, 2021. By its plain language, the Commission argues, the retroactivity clause applies to NorthWestern's 2015 and 2016

CREP waiver applications because the applications were "pending or commenced" before the Commission years before May 14, 2021.

¶26 The retroactivity clause "applies retroactively . . . to any application pending *or* commenced before the public service commission prior to [May 4, 2021]." 2021 Mont. Laws ch. 542 § 12 (emphasis added). Although the words appear closely related, we assume that the Legislature intended different words to have different meanings and applications. *Shepherd*, ¶ 17. Since the terms are set forth in the disjunctive, an application that is either "pending" or "commenced" will implicate application of the retroactivity clause. We need not consider whether NorthWestern's applications were "pending" because a plain language interpretation of the term "commenced" leads to the conclusion that the applications had been commenced before May 4, 2021.

¶27 "Commenced" is not defined within the chapter or used elsewhere in HB 576 to provide context; therefore, we turn first to the dictionary definitions of the term "commenced" to aid in our interpretation. *See State v. Alpine Aviation, Inc.*, 2016 MT 283, ¶ 12, 385 Mont. 282, 384 P.3d 1035. The dictionary definition of the term "commenced" is "to enter upon" or "to have or make a beginning." *Commence, Merriam-Webster's Collegiate Dictionary*, 249 (11th ed. 2011). *See also Solberg v. Sunburst Oil & Gas Co*., 73 Mont. 94, 102-03, 235 P. 761, 763 (1925) (holding that the definition of the word "commence" as "to enter upon" or "to begin" has been judicially approved (citing *Bridges v. Koppelman*, 63 Misc. 27, 117 N.Y.S. 306, 312)); M. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court").

¶28 Within the context of the retroactivity clause, an application that has "commenced before the Commission" is an application that has begun. By the plain text of the retroactivity clause, both of NorthWestern's applications were "commenced" before the Commission prior to May 14, 2021. The applications "began"—that is, "commenced"—when NorthWestern filed them in 2015 and 2016, respectively. The retroactivity clause therefore applies to NorthWestern's waiver applications.

¶29 The Commission also contends that the saving clause does not apply to this case. It spends a significant amount of time arguing that the District Court's interpretation of the saving clause "render[ed] the retroactivity clause meaningless" because "almost every contested case proceeding," begins with an application, including the proceeding that is necessary to obtain a CREP requirement waiver. Thus, by reconciling the retroactivity and saving clause, every "'proceeding' preserved by the savings clause would apply equally to every 'application pending or commenced' before the Commission."

¶30 The Commission and NorthWestern also argue that no "rights and duties have matured" because MEIC does not have a "right" to the proceeds of the penalty. Section 69-3-2004(10), MCA. And no additional "rights and duties" matured because the Commission's decision was stayed on appeal and, pending the outcome, could not create "new rights and duties contrary to the Commission's Order."

¶31 The saving clause prevents HB 576 from affecting "rights and duties that matured, penalties that were incurred, or proceedings that were begun before [May 14, 2021]." 2021 Mont. laws ch. 542, § 7. As with the retroactivity clause, the saving clause's conditions

are disjunctive, meaning only one condition needs to be satisfied for the saving clause to apply. *Fisher v. First Citizens Bank*, 2000 MT 314, ¶¶ 15, 18, 302 Mont. 473, 14 P.3d 1228 ("By phrasing the savings clause in the disjunctive . . . "'[o]nly one [prong] is necessary to invoke the savings clause.'"). We need not address the Commission's argument regarding the correct reconciliation of the terms "applications" or "proceedings" because this case satisfies the "rights and duties that matured" condition of the saving clause. The Commission's argument that rights or duties did not and cannot mature from a stayed Commission decision confuses the relevant inquiry in this case. We do not examine whether this litigation created new rights or duties for either party; rather, the relevant inquiry is whether NorthWestern had duties prior to this case which matured before May 14, 2021.

¶32 The Court's analysis in *Fisher* is instructive to determine whether NorthWestern had a duty that matured prior to the effective date of the repeal of the Act. The Commission argues that *Fisher* is inapposite because in *Fisher,* the UCC provided definitions of the terms "rights" and "remedies" and the remedy could be sought without adjudication, whereas in this case only the Commission can assess a penalty. *Fisher*, ¶¶ 16, 18. These distinctions are immaterial to determine whether a duty has matured. A duty matures when an entity must complete a legal obligation or requirement, and the ability to enforce the duty vests, regardless of whether the duty is actually enforced. *See Fisher*, ¶ 20. For example, in *Fisher*, Fisher had an obligation to make payments on the note of his loan. *Fisher*, ¶ 6. He was required to complete loan payments based on a rotating payment

schedule, but no later than March 1, 1991—the latest date on which the Bank could enforce non-payment of the loan. *Fisher*, ¶ 5. The Court concluded that March 1, 1991, was the latest date Fisher's duty could mature. *Fisher*, ¶ 18.

¶33 Similarly, NorthWestern had an obligation to purchase power from CREP resources. Section 69-3-2004(3)(b), (4)(b), MCA. NorthWestern was required to complete that obligation every compliance year, but no later than December 31st of each year. Section 69-3-2004(2)-(4) MCA. Like the duty which matured in *Fisher*, NorthWestern's duty matured by, at the very latest, December 31 of each compliance year—the latest the Commission could penalize NorthWestern for noncompliance. Section 69-3-2004(10), MCA; *Fisher*, ¶ 18. NorthWestern's duty to purchase power from CREP resources by December 31 of 2015 and 2016 matured well before HB 576's effective date of May 14, 2021. Therefore, the saving clause applies to protect this case from the repeal of the Act.

¶34 *Issue Two: Whether the District Court correctly held that the Commission's decision to waive NorthWestern's 2015 CREP obligation pursuant to § 69-3-2004(11)(a), MCA, was clearly erroneous under § 2-4-704(2)(a)(v), MCA, and arbitrary under § 2-4-704(2)(a)(vi), MCA.*

¶35 The Act, §§ 69-3-2001, et seq., MCA, requires public utilities to purchase a specific amount of electricity output from a CREP resource 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." Sections 69-3-2004(2)- (4), -2007(1), MCA. In conducting any RFP for energy resource acquisition, the utility is obligated to conform to specified regulations, including that the

"utility should establish a shortlist of offers from bidders with which the utility will pursue contract negotiations. A utility should complete due diligence regarding bid qualification, bidder credit worthiness and experience and project feasibility before selecting an offer from the shortlist . . . ." Admin. R. M. 38.5.8212(2)(d) (2008).

¶36 If a public utility is unable to meet the CREP purchase requirement, the Act requires the delinquent utility to pay a penalty, assessed by the Commission. Section 69-3-2004(10), MCA. The Commission may grant a short-term waiver upon petition from a noncomplying utility. Section 69-3-2004(11), MCA. A successful petition must include evidence and documentation that:

> The public utility or competitive electricity supplier has undertaken *all reasonable steps* to procure renewable energy credits under long-term contract, *but full compliance cannot be achieved* either because renewable energy credit cannot be procured or *for other legitimate reasons that are outside the control of the public utility* or competitive electricity supplier.

Section 69-3-2004(11)(a), MCA (emphasis added).

¶37 NorthWestern argues that the District Court erred in reversing the Commission's decision to waive the CREP purchase requirement in 2015. Specifically, NorthWestern contends the District Court "substituted its judgment for the Commission" in reversing the Commission's finding that Northwestern took "all reasonable steps" to comply with the CREP purchase requirement; applied an improper standard of review; and erroneously relied on the findings contained in the staff memorandum and work session transcripts, which NorthWestern asserts should not be included in the administrative record for purposes of review.

¶38 Under MAPA, a party seeking judicial review of an agency decision is "entitled to have the court's decision based on a review of the *complete* administrative record." *Owens v. Mont. Dep't of Revenue,* 2006 MT 36, ¶ 14, 331 Mont. 166, 130 P.3d 1256 (emphasis added). The administrative record under MAPA includes "all evidence received or considered, including a stenographic record of oral proceedings when demanded by a party," and "all staff memoranda or data submitted to the hearings examiner or members of the agency as evidence in connection with their consideration of the case." Section 2-4-614(1)(b), (g), MCA. The District Court correctly determined that the staff memorandum and work session transcripts should be included and considered in the administrative record pursuant to § 2-4-614(1)(b) and (g), MCA. Although NorthWestern argues that the District Court erroneously considered the staff memorandum and work session transcripts because they were "submitted" to the court as opposed to admitted into evidence, pursuant to our review of the record in administrative cases, this is a distinction without a difference. The administrative record, and its contents, is the evidence in the case. The Commission appropriately submitted these documents for the court's review in the filed certified copy of the administrative record. The District Court appropriately reviewed and considered the complete administrative record filed by the Commission itself. Section 2-4-614(1)(b), (g), MCA.

¶39 After reviewing the entire administrative record, the District Court correctly determined that the Commission failed to reasonably evaluate whether NorthWestern took "all reasonable steps" to achieve compliance under § 69-3-2004(11)(a), MCA. In issuing

its administrative decisions, the Commission generally has an obligation to make clear findings on material issues raised in the proceedings. *Montana-Dakota Utils. Co. v. Mont. Dep't of Pub. Serv. Regulation*, 223 Mont 191, 196, 725 P.2d 548, 551 (1986). "The findings must be sufficient to permit thorough judicial review, and the findings on material issues should be sufficient to permit a reviewing court to follow the reasoning process of the agency and determine whether the process conforms to law." *Montana-Dakota Utils. Co.*, 223 Mont. at 196, 725 P.2d at 551 (internal citation omitted).

¶40 The District Court did not substitute its judgment for the Commission when it found the Commission's determination was clearly erroneous. A district court must defer to the agency's determinations *only* when substantial record evidence supports its findings and conclusions. *Mercer v. McGee*¸ 2008 MT 374, ¶ 22, 346 Mont. 484, 197 P.3d 961. After examining the entire administrative record, the District Court found the Commission's decision "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Section 2-4-704(2)(a)(v), MCA. The District Court correctly applied § 2-4-704(2)(a)(v), MCA, the proper standard of review in this matter.

¶41 The Commission failed to adequately evaluate whether NorthWestern took all reasonable steps to achieve compliance with its CREP obligations and failed to identify sufficient evidence that NorthWestern was prevented from compliance by factors beyond its control. The Commission's factual findings are sparse, at best, and fail to provide a sufficient basis to support its conclusions. What the record evidence does show is that NorthWestern did not take all reasonable steps to meet its CREP obligations by

(a) confining CREPs to unrealistic time constraints; (b) failing to conduct negotiations with other viable CREPs; and (c) failing to perform basic due diligence to confirm the ownership structure of CREP finalists.

¶42 In its 2015 RFP, NorthWestern unreasonably required projects to be operational by the end of the year, while it had previously acknowledged that no CREP project has ever been newly constructed in less than two years. The record demonstrates that NorthWestern's determination to set a short time frame for project completion was unreasonable as it needlessly inhibited NorthWestern from examining longer term opportunities to obtain future CREP compliance.

¶43 NorthWestern failed to engage in reasonable negotiations for the Tiger Butte project, which had attained the highest viability score. NorthWestern contends that it had environmental concerns about the Tiger Butte project, but no such concerns were documented or evidenced. The Commission did not address these oversights in its Final Order.

¶44 The Final Order did not sufficiently address the concerns raised by the evidence that NorthWestern failed to reasonably investigate Greycliff's and New Colony's CREP eligibility before selecting those projects from the 2015 RFP finalists, even though that had been a previous reason for denying NorthWestern's prior waiver applications. To be eligible for a short-term waiver, a utility must demonstrate to the Commission that it took all reasonable steps to comply with CREP requirements or that "legitimate reasons" outside of its control prevented compliance. Section 69-3-2004(11)(a), MCA. The Commission

also requires each utility, as part of reasonable steps towards compliance, to perform "due diligence regarding bid qualification, bidder credit worthiness, and experience and project feasibility before selecting an offer for the shortlist . . . ." Admin. R. M. 38.5.8212(2)(d) (2008). In this case, the Commission based its decision that NorthWestern "could not achieve full compliance for documented reasons beyond its control" only upon its finding that "the Commission declined to issue a declaratory ruling stating that Greycliff's organizational structure satisfied the statutory definition of a CREP." The Final Order did not address the fact that, regardless of the Commission's approval, NorthWestern did not comply with Admin. R. M. 38.5.8212(2)(d) (2008) by failing to exercise due diligence to determine whether the projects would satisfy CREP requirements before entering into the PPAs.

¶45 The record evidence demonstrates that NorthWestern was not prevented from compliance by "legitimate reasons" beyond its control. Although the Commission declined to approve Greycliff as a locally owned CREP resource, which caused Greycliff and New Colony to terminate their PPAs, NorthWestern did have control over the process, as indicated by their "initial screening," and obtaining assurances from Greycliff and New Colony that the Commission would likely approve them. The relevant regulation requires NorthWestern to conduct reasonable due diligence to ensure that the projects complied with CREP requirements. Admin. R. M. 38.5.8212(2)(d) (2008). An initial screening and self-serving assurances do not amount to even the most marginal due diligence NorthWestern could have conducted. The Commission itself recently indicated that

"NorthWestern does very little itself to ensure that a project is indeed a CREP before entering into a PPA . . . . Such reliance on parties that are not NorthWestern, and which do not have obligations to procure CREPs under the law, may be contributing to NorthWestern's failure to meet its CREP obligation." This Court, while affording the agency "great weight" in its interpretation of what constitutes "due diligence" in its regulations, cannot hold that these cursory investigations into the PPAs' ownership structure is consistent with the "spirit of the rule" and would result in an interpretation beyond the "range of reasonable." *Clark Fork Coal. I*, ¶ 20; *Kirchner*, ¶ 18.

¶46 There is substantial evidence in the record either disregarded or mischaracterized by the Commission which indicates NorthWestern failed to take all reasonable steps to comply with the CREP requirement, rendering it ineligible for a waiver in 2015. Thus, the Commission's decision to grant a waiver was clearly erroneous.

¶47 Although the District Court's finding under § 2-4-704(2)(a)(v), MCA, is sufficient to affirm, evidence in the record establishes the Commission's decision was also arbitrary under § 2-4-704(2)(a)(vi), MCA. Transcripts from the work session indicate that at least part of the Commission's motivation for granting NorthWestern's waiver requests was to "send a message" to the Legislature about its belief that CREP requirements were unreasonable. This rationale is not grounded in the authority granted to the Commission by the Legislature, and we are not satisfied that the Commission "made a reasoned decision" based on a "rational connection between the facts found and the choice made." *Mont. Envtl. Info. Ctr.*, ¶ 26 (internal quotations omitted). Thus, in addition to being clearly

erroneous, the Commission's decision to grant a waiver was also arbitrary. The District Court correctly reversed the Commission's Final Order with respect to the 2015 waiver.

¶48 *Issue Three: Whether the District Court correctly held that the Commission's decision to waive NorthWestern's 2016 CREP obligation was based on an incorrect interpretation of § 69-3-2007(1), MCA.*

¶49 A CREP-compliance waiver may be granted if a public utility provides evidence that it took all reasonable steps to comply but could not achieve full compliance because "full compliance would cause the public utility to exceed the cost caps in § 69-3-2007, MCA." Admin. R. M. 38.5.8301 (2006). The cost-cap provision in § 69-3-2007(1), MCA provides, in relevant part, as follows:

> A public utility . . . 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, including the associated cost of ancillary services necessary to manage the transmission grid and firm the resource, is less than or equal *to bids* for the equivalent quantity of power over the equivalent contract term *from other electricity suppliers*.

Section 69-3-2007(1), MCA (emphasis added).

¶50 At the center of this dispute is the parties' different interpretations of the phrase "other electricity suppliers," which is not statutorily defined. NorthWestern and the Commission assert that the phrase refers to all other non-CREP electricity suppliers, including fossil fuel and large-scale renewable resources already existing in a utility's supply portfolio. Under this avoided-cost interpretation, NorthWestern is required to select a CREP proposal only if the cost of electricity from the CREP is less than or equal to the cost of electricity from a non-CREP resource that the CREP would replace in NorthWestern's current supply portfolio.

¶51 The Commission contends that the administrative regulations implementing § 69-3-2007(1), MCA, require an avoided-cost analysis to evaluate CREP proposals. The relevant regulations provide as follows:

> An application by a public utility for advanced approval [of a contract for the purchase of renewable energy credits] must include . . . testimony and supporting work papers demonstrating the calculation of the utility's avoided costs and associated cost caps provided for in § 69-3-2007, MCA.

Admin. R. M. 38.5.8301(6)(h) (2008).

> If a public utility determines in its ongoing long-term planning process . . . that the cost of complying with the renewable resource standards will likely exceed the cost caps in § 69-3-2007, MCA, the public utility must submit an application to the commission . . . . The application must thoroughly document the public utility's efforts to procure the required renewable energy credits, the calculated cost of compliance, work papers showing the most current calculation of the cost caps, an explanation of the methodology that underlies the calculation of the cost caps, and the amount by which the cost cap would be exceeded if the public utility were to comply with the renewable resource standards.

Admin. R. M. 38.5.8301(8) (2008).

The Commission asserts that an avoided-cost analysis reasonably implements the cost-cap provision's requirement for CREP bids to be less than bids from other electricity suppliers. The Commission contends that its approach ties CREP procurement to the Commission's bedrock principles of economic ratemaking, which rely on avoided costs to ensure that customer rates are reasonable and that NorthWestern provides services at the lowest long-term total cost. Sections 69-3-201, 69-8-419(2)(a), MCA (2017).

¶52 Pursuant to the regulations interpreting § 69-3-2007(1), MCA, during the 2015 CREP proposal process, the Commission directed NorthWestern to analyze long-term

portfolio costs and risks in renewable energy acquisitions. *In the Matter of NorthWestern Energy's Application for Approval of a Purchase Power Agreement with Greycliff Wind Prime, LLC*, Order No. 7395d, ¶ 30, Dkt. D2015.2.18 (Apr. 24, 2015) ("When making resource acquisition decisions, CREP or otherwise, and regardless of whether it applies a 'reasonable and in the public interest' standard or a 'cost-effectiveness' standard, NorthWestern must analyze long-term total portfolio costs and risks."). In Order 7395d, the Commission denied NorthWestern's application for advanced approval of a PPA with Greycliff because NorthWestern had failed to provide documentation assessing the long-term cost-effectiveness and "associated cost caps" of the project as required by Admin. R. M. 38.5.8301(6)(h) (2008). In an effort to comply with the Commission's directive from Order 7395d, NorthWestern conducted a portfolio-oriented avoided-cost analysis for the 2016 CREP proposals.[6]

¶53 Rather than conducting an all-resource competitive bidding process, NorthWestern limited its RFP to CREP proposals, consistent with the Commission's resource procurement regulations. Admin. R. M. 38.5.8212(2) (2008) ("A utility should design

[6] Avoided-cost analyses are used in other types of renewable energy procurement processes, such as determining contract rates for Qualifying Facilities under § 69-3-601-604, MCA. *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 213A, ¶ 41, 401 Mont. 85, 473 P.3d 963 ("[A] utility purchasing electricity must compensate the QF at a rate equal to the utility's full avoided cost—that is, 'the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.'" (Citing 18 C.F.R. § 292.304(b)(2); 16 U.S.C. § 824a-3(d); *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 406, 103 S. Ct. 1921, 1924 (1983); 18 C.F.R. § 292.101(b)(6); Admin. R. M. 38.5.1901(2)(a)).

requests for proposals based on its resource needs assessment."). NorthWestern asserted during proceedings that it does not routinely issue all-resource RFPs, and its sole purpose for issuing the RFP for 2016 was to augment the CREP portion of its supply portfolio to comply with its statutory "need" to procure CREPs.

¶54 Absent an all-resource bidding process, NorthWestern evaluated the CREP proposals based on a "cost-effectiveness test," an avoided-cost analysis. NorthWestern's analysis involved a comparison of the cost of each proposed project to the value such project would provide to NorthWestern's energy supply portfolio. For this analysis, Northwestern used modeling software to calculate a 25-year levelized portfolio value, measured in dollars per megawatt-hour, for each shortlisted CREP resource from the RFP. The portfolio value was calculated by performing various simulations, in which different values were assigned to CREPs based on whether NorthWestern's supply portfolio was short (generation is less than load) or long (generation is greater than load). During proceedings, NorthWestern's expert witness explained the process as follows:

> [T]he net position of NorthWestern's current supply portfolio is compared to the net position with the [CREP resource] added to determine the effect of the [CREP resource's] generation on the supply portfolio. For example, if the [CREP resource] delivers energy to NorthWestern when NorthWestern's supply portfolio is short . . . the value of the [CREP resource] is the market purchase price of electricity that NorthWestern would otherwise purchase. Alternatively, if the [CREP resource] delivers energy to NorthWestern when NorthWestern's supply portfolio is long . . . and the market price is higher than the variable cost of Colstrip Unit 4 . . . the value of the [CREP resource] is the variable cost of Colstrip. Finally, if the [CREP resource] delivers energy to NorthWestern when NorthWestern's supply portfolio is long and the market price is lower than the variable cost of Colstrip, the [CREP resource] is valued at the market sales price.

These values were levelized over a 25-year term to derive a portfolio value for each CREP resource on the shortlist. The portfolio value for each CREP was then compared against its bid price. Because each project's bid price exceeded its portfolio value, NorthWestern rejected all proposals.

¶55 In its petition to the Commission for a waiver in 2016, NorthWestern explained how this avoided-cost analysis complied with § 69-3-2007(1), MCA, as follows:

> In order to determine whether the shortlisted RFP proposals were "less than or equal to bids for equivalent quantity of power over the equivalent contract terms," NorthWestern conducted modeling to determine how each shortlisted project would impact NorthWestern's long-term portfolio costs and risks compared to alternatives and the status quo. In particular, the modeling NorthWestern performed using the PowerSimm[] software generated a value for each shortlisted project, which was then compared to NorthWestern's current portfolio of resources. This analysis demonstrated that none of the values for the shortlisted projects resulted in cost-effective projects that meet Montana law and Commission administrative rules.

¶56 The Commission granted NorthWestern's waiver request for 2016 based on the following findings: (1) NorthWestern issued an RFP for its 2016 CREP obligation; (2) the RFP generated six finalists; (3) NorthWestern conducted a portfolio analysis of the projects and determined that none of the projects were cost-effective; and (4) the cost analysis performed by NorthWestern sufficiently determined how the CREP proposals would impact portfolio costs and risks. In its Final Order, the Commission accepted NorthWestern's cost analysis because it "sufficiently determines how the CREP proposals would impact portfolio costs and risks." The Commission determined that NorthWestern's 2016 cost analysis complied with § 69-3-2007(1), MCA. The Commission concluded that NorthWestern took all reasonable steps to comply in 2016, but it was prevented from full

compliance because none of the 2016 CREP proposals were cost-effective based on NorthWestern's avoided-cost analysis.

¶57 The District Court held that the Commission's determination that NorthWestern reasonably rejected projects that were not cost-effective was based on an incorrect interpretation of the § 69-3-2007, MCA, cost-cap provision. The District Court interprets "other electricity suppliers" as other project proposals that placed bids in the same RFP. Under this interpretation, NorthWestern is required to take electricity from the lowest-bidding CREP resource as compared to other bids in the RFP competitive bidding process. Because NorthWestern limits its RFP to CREP proposals, the practical effect of this interpretation would require NorthWestern to compare CREP RFP bids exclusively to other CREP RFP bids and select the lowest bid, without considering the cost of electricity from other generation resources. Reversing the Commission's decision, the District Court found NorthWestern's cost analysis to be inconsistent with § 69-3-2007(1), MCA, and held:

> By its unambiguous terms, [the cost-cap provision] required NorthWestern to purchase power from the CREP project demonstrated to have the lowest total cost, compared with other "bids" in the RFP. Contrary to this clear statutory requirement, NorthWestern did not compare CREP proposals to other "bids for the equivalent quantity of power" in its RFP for 2016 [] and instead rejected CREP proposals that it deemed too costly compared with existing, large generating resources already in NorthWestern's portfolio. The Defendants' arguments that this approach complied with Mont. Code Ann. § 69-3-2007(1), fail to afford any meaning to the statutory terms "competitive bidding process" and "bids."[] Their interpretation impermissibly renders that statutory language "a nullity" and must be rejected.

¶58 Our role in statutory construction is to simply "ascertain and declare what is in terms or in substance contained therein," not "insert what has been omitted" or "omit what has been inserted." Section 1-2-101, MCA. We construe a statutory term or phrase in accordance with the "plain meaning of its express language, in context of the statute as a whole, and in furtherance of the manifest purpose of the statutory provision and the larger statutory scheme in which it is included." *Clark Fork Coal*. (*Clark Fork Coal. II) v. Mont. Dep't of Natural Res. & Conservation*, 2021 MT 44, ¶ 36, 403 Mont. 225, 481 P.3d 198 (citations omitted).

¶59 Turning first to the meaning of "other electricity suppliers," we agree with NorthWestern's and the Commission's interpretation that, within the context of this statute, "other electricity suppliers" can only logically be interpreted as electricity suppliers *other than* CREPs. We have consistently held that when the legislature does not use identical language in different parts or provisions of a statute, it is proper for us to assume that a different statutory meaning was intended. *Shepherd*, ¶ 17 (citations omitted). Section 69-3-2007(1), MCA, specifically addresses when a public utility is obligated to obtain electricity from an "eligible renewable resource." Throughout this provision, the term "eligible renewable resource" or "eligible resource" is repeatedly used *except* to describe "*other* electricity suppliers." Section 69-3-2007(1), MCA (emphasis added). "Eligible renewable resources" is defined in § 69-3-2003(10), MCA, and refers to typical renewable resources including CREPs, while the legislature did not define "other electricity suppliers." Considering the plain and ordinary meaning of the term, we presume the

legislature used "other" to denote "electricity suppliers" distinct from or additional to "eligible renewable resources." Thus, we agree with the Commission and NorthWestern to the extent that "other electricity suppliers" includes non-CREP electricity suppliers.

¶60 Where the Commission's and NorthWestern's interpretation falls short is interpreting the terms used in the statute in isolation, thus failing to account for the clear statutory requirement of a competitive bidding process. A statute must be construed "by reading and interpreting the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature." *MC, Inc. v. Cascade City-County Bd. of Health*, 2015 MT 52, ¶ 14, 378 Mont. 267, 343 P.3d 1208 (internal quotations and citations omitted). Again, the statute provides that NorthWestern is not obligated to take electricity from an eligible renewable resource unless the resource demonstrates "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*." Section 69-3-2007(1), MCA (emphasis added). Although "other electricity suppliers" includes all other non-CREP resources, the provision as a whole unambiguously contemplates a competitive bidding process in which Northwestern evaluates bids from CREPs and non-CREPs, and then selects the proposal offering the lowest total cost for the equivalent quantity of power over the equivalent contract term. In other words, a CREP proposal satisfies the "cost cap" if its total cost of electricity is less than or equal to the cost of electricity from other resources *competing in the bidding process* offering an equivalent power quantity and contract term.

¶61 We agree with the District Court to the extent the plain language of the provision requires a bid-to-bid comparison between electricity suppliers offering equivalent quantities of power over equivalent contract terms. However, the District Court's interpretation fails to give effect to the statutory requirement for a cost comparison between CREP bids and bids from "other electricity suppliers," which may include bids from non-CREP resources. Section 69-3-2007(1), MCA. Relatedly, the District Court fails to account for the facts that NorthWestern's RFP was limited to CREP proposals consistent with Admin. R. M. 38.5.8212(2) (2008), and that the Commission had directed NorthWestern to evaluate portfolio costs in CREP acquisitions. The practical effect of the District Court's interpretation would require NorthWestern to simply select the lowest-bidding CREP resource from the RFP without considering potentially less expensive bids from non-CREP resources. To the extent the District Court fails to afford meaning to "other electricity suppliers," its interpretation is inconsistent with the provision's plain language.

¶62 Raising due process concerns, NorthWestern argues that even if the Commission's interpretation of the provision is incorrect, NorthWestern cannot be penalized for following the Commission's directives and regulations regarding resource procurement. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 574, 116 S. Ct. 1589, 1598 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a State may impose."). NorthWestern contends that it must comply with

the Commission's directives because the Commission is the regulatory body charged with supervision of public utilities and implementation of the Act. Sections 69-3-102 and 69-3-2006, MCA. Because the Commission directed NorthWestern to analyze portfolio costs in future CREP acquisitions in Order No. 7395d, and NorthWestern complied with this directive for the 2016 CREP proposals, NorthWestern asserts that imposing an administrative penalty for non-compliance would be patently unfair.

¶63 While we agree that NorthWestern should not be faulted for following the regulatory agency's directives and promulgated regulations regarding resource procurement, the record is lacking as to whether the Commission adequately evaluated if NorthWestern's 2016 cost analysis complied with the plain language of § 69-3-2007(1), MCA. Even if NorthWestern's analysis takes into account long-term portfolio costs as directed by the Commission, the cost analysis still must comply with § 69-3-2007(1), MCA, before the provision can serve as the basis for a CREP-compliance waiver. Section 69-3-2007(1), MCA, unambiguously requires NorthWestern to purchase electricity from a CREP if the CREP satisfies the cost cap, meaning the total cost of the CREP is less than or equal to the cost offered from other electricity suppliers competing in the bidding process. The provision clearly contemplates a bid-to-bid cost comparison between CREP and non-CREP electricity suppliers. However, in light of the Commission's directive to consider "long-term portfolio costs and risks," and considering the fact that NorthWestern did not conduct an all-resource competitive bidding process, the dispositive question on remand should be whether NorthWestern's portfolio cost analysis at least *approximated*

"bids for the equivalent quantity of power over the equivalent contract term from other electricity suppliers" as required by § 69-3-2007(1), MCA.

¶64 The record demonstrates the Commission insufficiently considered whether the portfolio analysis actually complied with the plain statutory requirements for a competitive bidding process and evaluation of bids from other electricity suppliers. The Final Order merely concludes that NorthWestern's cost analysis "sufficiently determines how the CREP proposals would impact portfolio costs and risks," offering no explanation or analysis as to how NorthWestern's methodology at least approximated *bids* from other electricity suppliers as required by § 69-3-2007(1), MCA. This Court does not defer to an agency's "conclusory legal statements" or "unexplained assertions." *Mont. Envtl. Info. Ctr.*, ¶¶ 97–98. The Commission's findings and conclusions are insufficient to justify a grant of waiver for 2016 on the basis that the CREP proposals would cause Northwestern to exceed the cost cap in § 69-3-2007(1), MCA.

¶65 Accordingly, we vacate the order as to this issue and remand to the District Court with instructions to remand to the Commission for the purpose of evaluating whether NorthWestern's cost analysis complied with the plain language of § 69-3-2007(1), MCA.

¶66 *Issue Four: Whether the District Court improperly assessed the penalty against NorthWestern.*

¶67 We agree with the Commission and NorthWestern that the District Court improperly assessed the penalty against NorthWestern. When the case requires it, this Court may remand a case to the district court with further instructions to carry out its order. M. R. App. P. 19(1)(c). On remand, the district court is "free to make any order or decision

in further progress of the case, not inconsistent with the decision of the appellate court." *Brown v. State*, 2002 MT 58, ¶ 15, 309 Mont 106, 46 P.3d 42. But its "duty [is] to comply with the mandate of [this Court] and to obey the directions therein." *State ex rel. Olson v. District Court*, 184 Mont. 346, 349, 602 P.2d 1002, 1004 (1979) (internal quotations and citation omitted). The district court errs if it fails to follow the remand directions. *State ex rel. Olson*, 184 Mont at 349, 602 P.2d at 1004.

¶68 The District Court erred when it assessed the penalty against NorthWestern without directions to do so from this Court. After the Legislature passed amendments which called into question the viability of this case, we remanded with instructions to the District Court to specifically "address whether HB 576 affects the Commission's authority to assess administrative penalties for non-compliance with CREP obligations." Our order did not direct the District Court to assess or apply a penalty, nor was assessing a penalty necessary to comply with the order. To the contrary, our remand order explicitly recognized that HB 576 might affect *the Commission's authority* to assess administrative penalties, not the District Court's. *See Brown*, ¶ 15.

¶69 The District Court erroneously relied on *Smith v. Foss*, 177 Mont. 443, 447, 582 P.2d 329, 332 (1978) and *Alpine Buffalo, Elk & Llama Ranch, Inc. v. Andersen*, 2001 MT 307, ¶ 12, 307 Mont. 509, 38 P.3d 815 to support its conclusion that "MEIC is entitled to enforcement of this [c]ourt's August 1, 2019 judgment" and therefore it "possess[ed] jurisdiction to enter any necessary orders to enforce" that judgment. These cases are inapposite to the circumstances of this case. The district courts in both *Smith* and *Alpine*

Buffalo had plenary authority to issue orders to render their own judgments effective. *Smith*, 177 Mont. at 446, 582 P.2d at 331; *Alpine Buffalo*, ¶ 12; their authority was not constrained by a specific remand order from this Court.

¶70 The District Court also relied on § 69-3-209, MCA, in support of its conclusion that it had the authority to assess the penalty. MEIC likewise asserts that § 69-3-209, MCA, vests the courts with "omnibus authority to issue penalties for violations of public utility laws."

¶71 Section 69-3-209, MCA, states that a public utility that "refuses to obey any lawful requirement or order made by the commission or any court . . . is subject to the penalty prescribed by 69-3-206." Section 69-3-206, MCA, states that "[a]ny officer, agent, or person in charge of the books, accounts, records, and papers or any of them of any public utility who shall refuse or fail for a period of 30 days to furnish the commission with any report required by the provisions of this chapter . . . shall be subject to a fine." The plain language of these statutes only provides a penalty; it does not dictate what entity shall assess or even impose the penalty, let alone support the MEIC's contention that a district court has "omnibus authority" to assess the penalty itself, especially when the text of § 69-3-2004(10), MCA, vests the authority to assess penalties for noncompliance with the Commission.

¶72 The plain language of § 69-3-2004(10), MCA, requires the Commission, not the District Court, to assess any penalty for noncompliance. See, *Goble*, ¶ 21. Relying on *Califano v. Yamasaki*, 442 U.S. 682, 704-05, 99 S. Ct. 2545, 2559 (1979), MEIC argues

that § 69-3-2004(10), MCA, does not preclude the District Court from "exercising its broad authority to fashion an appropriate remedy" without "the clearest command in statutory language." But § 69-3-2004(10), MCA, does provide the "clearest command" as to the entity with whom the authority to assess a penalty is vested in this circumstance. Section 69-3-2004(10), MCA, states, in relevant part, "if a public utility or competitive electricity supplier is unable to meet the standards . . . that public utility or competitive electricity supplier shall pay an administrative penalty, *assessed by the commission* . . . ." (emphasis added). The plain text of the statute is not ambiguous; it unequivocally states that the Commission is the entity that assesses penalties against public utilities for noncompliance with the Act. The District Court erred when it concluded otherwise and assessed a penalty against NorthWestern.

CONCLUSION

¶73 The retroactivity clause does not apply to moot this case because this case is not an application "pending or commenced" before the Commission. The saving clause applies to protect this case from the effects of the legislative repeal of the Act because NorthWestern's duty to purchase power from CREP resources matured prior to the May 14, 2021, effective date.

¶74 The District Court did not err in reversing the Commission's Final Order waiving the requirements of § 69-3-2004(4)(b), MCA for NorthWestern to purchase electricity from CREP resources in 2015. The Commission's decision that NorthWestern took all reasonable steps to procure CREP resources in 2015 and documented factors beyond its

control, preventing compliance was clearly erroneous in light of the complete administrative record. The Commission also arbitrarily granted the waiver without rationally connecting its reasoning to the facts in the record.

¶75 Although the District Court erroneously interpreted § 69-3-2007(1), MCA, as requiring NorthWestern to accept the lowest bid submitted in response to the RFP, the Commission's findings and conclusions are insufficient to justify a grant of waiver for 2016 on the basis that the CREP proposals would cause Northwestern to exceed the cost cap in § 69-3-2007(1), MCA. We therefore vacate and remand to the District Court with instructions to remand to the Commission for the purpose of making thorough findings of fact and conclusions of law regarding NorthWestern's compliance or non-compliance with its CREP obligations in 2016.

¶76 The District Court erroneously assessed a penalty against NorthWestern for noncompliance with its CREP obligations in direct opposition to its limited jurisdiction on remand and the plain language of § 69-3-2004(10), MCA. We vacate and remand to the District Court with instructions to remand to the Commission to assess the penalty against NorthWestern for noncompliance of its CREP obligations for the year 2015 and, if applicable, following further proceedings on remand, for the year 2016.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR