

April 26, 2024

**STAFF MEMORANDUM**

TO: The Public Service Commission  
FROM: Legal and Regulatory Staff  
SUBJECT: Draft Notice of Extended Opportunity to Comment – Docket 2024.03.028

**BACKGROUND**

Attached to this memorandum is a draft Notice of Extended Opportunity to Comment (“Notice”), which will be the subject of a Commission work session at its April 30, 2024 business meeting. The Notice concerns the Petition for Rulemaking (“Petition”) in Docket 2024.03.028, which asked the Commission to adopt a proposed new rule requiring the Commission to consider the impacts of its decisions on the environment and human health, including impacts on climate change. Commission staff recommends issuing the draft Notice to obtain additional information, advice, and viewpoints from the Petitioners and any other interested parties.

**ANALYSIS**

The Commission held a hearing on April 8, 2024, where the Petitioners presented their Petition and proponents and opponents were given an opportunity to comment. To maximize the opportunity for public input, the Commission and its staff did not ask questions at the April 8 hearing. The Commission further allowed the Petitioners and the public to provide written comments on the Petition by April 12, 2024. The Commission has received over 500 comments in this proceeding.

After reviewing the Petition, the Petitioners’ presentation, the Petitioners’ comments, and public comments, staff has substantive questions for the Petitioners about their proposed rule. Staff believes that the Commission’s ultimate decision in this matter would benefit from any answers the Petitioners may have for these questions. In fairness, it would be appropriate to reopen the public comment period to allow other interested parties to respond to the questions, or provide other information, advice, and viewpoints.

**RECOMMENDATION**

Staff recommends that the Commission approve the draft Notice of Extended Opportunity to Comment and authorize staff to make non-substantive changes as necessary.

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

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In re the Petition for Adoption of New Rule I and Declarations Pertaining to the Commission’s Consideration of the Adverse Climate Impacts of Greenhouse Gas Emissions	Docket 2023.  April __, 2024
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**Draft Notice of Extended Opportunity to Comment**

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1. On February 28, 2024, various interested groups (“Petitioners”) filed with the Montana Public Service Commission (“Commission”) a Petition for Rulemaking (“Petition”) asking the Commission to adopt a proposed new rule requiring the Commission to consider the impacts of its decisions on the environment and human health, including impacts on climate change.

2. The Commission held a hearing in the above-captioned proceeding on April 8, 2024, where the Petitioners presented their Petition and proponents and opponents were given an opportunity to comment. To maximize the opportunity for public input, the Commission and its staff did not ask questions at the April 8 hearing. The Commission further allowed the Petitioners and the public to provide written comments on the Petition by April 12, 2024. The Commission has received over 500 comments in this proceeding.

3. The Commission has considered the Petition, the Petitioners’ presentation, the Petitioners’ comments, and public comments, and is left with several unanswered questions about the proposed rule. The Commission therefore invites the Petitioners and any other interested parties to respond to the following questions about the effect and implications of the proposed rule. As described below, the Commission will also reopen the public comment period to allow any other

interested parties to share their viewpoints and advice with respect to the proposed rule. Mont. Code Ann. § 2-4-304(1) (2023).

### **Commission Questions**

4. The proposed rule would require the Commission to consider “quantitative and qualitative impacts of its decisions on the environment and human health, including impacts on climate change.” The proposed rule then provides a quantitative method of measuring of the social cost of greenhouse gas emissions (“SC-GHG”). Are any qualitative impacts of greenhouse gas emissions effectively quantified in the proposed sources of the SC-GHG? If not, how would specific qualitative impacts be accounted for in Commission decisions, if the proposed rule was adopted as written?

5. To the extent that the sources specified in the proposed rule for estimates of the SC-GHG (i.e., the U.S. EPA, the federal Interagency Working Group) provide calculations using a range of social discount rates, why does the proposed rule specify a particular discount rate of 2%? To the extent the sources identified in the rule acknowledge uncertainty regarding the true social discount rate, would it be reasonable for any consideration of quantitative impacts inclusive of the SC-GHG to consider a range of potential discount rates?

6. The Petition asserts that the Commission must always use “the best and most up-to-date quantitative and qualitative methods.” Petition 23. As written, does subpart 1 of the proposed rule establish a floor on the SC-GHG of \$190 per ton, in 2023 dollars, regardless of future updates by the U.S. Environmental Protection Agency and the federal Interagency Working Group on the Social Cost of Greenhouse Gas Emissions? If so, why is adopting a floor reasonable?

7. What sources could the Commission and parties in contested cases use to identify communities that are disproportionately affected by the impacts of greenhouse gas emissions? What sources could the Commission and parties in contested cases use to identify communities that are subject to historical inequalities?

8. If the consideration of communities that are disproportionately affected by the impacts of greenhouse gas emissions and/or historical inequalities weighs against the selection of a least-cost resource, would the rule require the selection of a more expensive resource?

9. As written, the rule requires the Commission to “apply” the SC-GHG when making determinations of prudence. In economic terms, is it the intention of the proposed rule to require the Commission to internalize the SC-GHG, either in whole or in part, when setting utility rates?

10. The last sentence of the rule requires creates a cost-benefit standard for the Commission to apply in decisions regarding electric utilities:

In making determinations regarding electric utilities . . . the Commission must determine that short-term costs or direct costs of renewable energy generation that are higher than the short-term costs or direct costs of alternatives relying more heavily on fossil fuels are reasonable, just, prudent, in the public interest, or otherwise approvable, if the adverse impacts resulting from the use of fossil fuels are larger than those from renewable energy generation.

Petition 25–26.

- a. Does this sentence require the Commission to conduct cost-benefit analyses of utility actions that maintain and operate currently rate-based electric generating plants when setting rates? If so, would the cost of replacement energy and capacity be among the “adverse impacts” that the Commission must consider in the cost-benefit analysis of existing operations?
- b. By its terms, the proposed standard applies only to determinations regarding electric utilities. When the Commission makes decisions regarding natural gas service, is it the intent of the proposed rule to require a cost-benefit test similar to the standard used in electric cases? If so, how would the Commission and parties in contested cases quantify the benefits of the natural gas delivery infrastructure and supply?

- c. The standard would require a comparison of the adverse impacts of two categories of resources, renewable energy generation and “alternatives relying more heavily on fossil fuels.” If the proposed rule requires the Commission to apply a similar test in natural gas cases, what alternative(s) to natural gas infrastructure and supply would the test consider? Would the alternative analysis need to assume and account for a conversion of appliances and infrastructure from natural gas to another resource, like electricity or propane?
- d. Standard uses the terms “short-term” and “direct” to describe the costs considered in the analysis. Should the rule define those terms and, if so, how should the terms be defined?
- e. If, after applying the standard, the Commission was required to find a renewable energy generating resource prudent, would the Commission also be required to find a competing fossil-fuel resource imprudent?
- f. If, after applying the standard, the Commission found that costs associated with a fossil-fuel resource were imprudent, would the rule require the Commission to use the SC-GHG to calculate a disallowance?
- g. If, after applying the standard, the Commission found that costs associated with a renewable energy generating resource were prudent, would a utility be entitled to recover the full cost of the resource, even if the resource was not the least-cost resource?
- h. This standard appears to require the Commission to make a specific prudence finding, without regard to other factors relevant to resource selection decisions, like the availability of the resource to serve peak load, accredited capacity, proximity to load, and other considerations. Is that the intent of the proposed rule?

11. In cases concerning natural gas service, does the proposed rule require the Commission to disallow rate recovery of actual test-year costs of service if those costs plus the SC-GHG exceed the benefits natural gas service? If so, would the

Commission need to adopt or establish a method of valuing the benefits of natural gas service at times when heat is required to prevent loss of life?

12. The Petitioners' comments state that:

[t]he Rule would only require the Commission to consider long-term societal costs it is constitutionally *required* to consider and constitutionally *prohibited* from ignoring. Such Consideration is not even outcome determinative—i.e. use of the SC-GHG does not require the Commission to take action based on that consideration, to pick one alternative over another, or to decide whether or not to allocate costs to Montana ratepayers based on such considerations. It would simply prevent the Commission from proceeding in ignorance of the true costs of a utility's planning and resource acquisition activities and would prohibit the *uninformed* allocation of those costs to Montana ratepayers.

Petitioners' Comments 4 (emphasis in original).

- a. If the rule as drafted requires the Commission to make a finding of prudence or imprudence based on the SC-GHG, would that also require the Commission to take certain action “to pick one alternative over another, or to decide whether or not to allocate costs to Montana ratepayers based on such considerations”?
- b. In the Petition, Petitioners asserted that “[i]t is well-settled that the environmental protections in Montana’s Constitution compel state agencies to take action to realize those protections.” Petition 15. Is it the Petitioners’ position that being *informed* of environmental impacts satisfies the Commission’s constitutional obligations? Or is it the Petitioners’ position that the Constitution compels the Commission to “pick one alternative over another, or . . . allocate costs to Montana ratepayers based on” environmental impacts?
- c. If the purpose of the rule is to avoid “uninformed” ratemaking decisions and the rule is not “outcome determinative” as asserted on page 4 of Petitioners’ comments, why is the standard set in the last sentence of the proposed rule reasonably necessary?

- d. Intervenors in contested cases before the Commission routinely raise additional issues, including the impacts of greenhouse gas emissions. *See, e.g., In re NorthWestern Energy's Application for Authority to Increase Rates*, Dkt. 2022.07.078, 350 Montana Motion for Intervention (Aug. 31, 2022). Given that intervenors can already present arguments and information about greenhouse gas emissions in Commission proceedings, how is the rule reasonably necessary to avoid uninformed ratemaking decisions?

13. Administrative rules are “out of harmony” with legislative guidelines if they “(1) engraft additional and contradictory requirements on the statute (citations omitted); or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature.” *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 25, 384 Mont. 503, 380 P.3d 771 (quotations and citations omitted). Is there any legislative history that supports the Petition’s assertion that the requirements of the proposed rule were envisioned by the Legislature when it granted the Commission the rulemaking authority cited in the Petition?

14. Mont. Code Ann. § 69-8-421(7) limits the Commission’s ability to disallow costs related to certain approved electricity supply resources. The Petition asserts that “[c]ompensating utilities for capital expenses to maintain aging power plants for increasingly expensive coal or gas that is burned at such plants may create incentives—effectively subsidies—to continue operating climate-polluting facilities that would otherwise retire.” Petition 21. If the last sentence of the proposed rule requires the Commission to conduct a cost-benefit analysis of operating and maintenance costs for assets approved under Mont. Code Ann. § 69-8-421, and to potentially disallow costs, does the rule conflict with Mont. Code Ann. § 69-8-421(7)?

15. The Petitioners intend for the Commission to apply the proposed rule in cases where a utility seeks Commission approval to issue securities and bonds for purposes of acquiring property and constructing or improving facilities. Title 69, Chapter 3, Part 5 of Montana Code Annotated governs certain securities issuances.

- a. Applications in these cases typically do not include a detailed explanation of planned acquisitions, construction, or improvements. Is it the intention of the proposed rule to create a heightened filing standard for these cases, so that the Commission and parties can apply the proposed rule's cost-benefit test? If so, does the application of the cost-benefit test in these cases create a type of pre-approval of planned acquisitions, construction, or improvements?
- b. Absent good cause for an extension, Mont. Code Ann. § 69-3-503 requires the Commission to decide the application within 30 days of filing. Is it reasonable to expect that the Commission and any intervening parties would be able to adequately investigate and apply the proposed rule within the 30-day deadline?
- c. Mont. Code Ann. § 69-3-504 provides three grounds for denying an application to issue securities. How can the proposed rule be applied to these cases without engrafting new grounds for denying an application that the Legislature did not envision?

16. The Petitioners intend for the Commission to apply the proposed rule in integrated resource planning, which is governed by Integrated Least-Cost Resource Planning and Acquisition Act, Title 69, Chapter 3, Part 12 of Montana Code Annotated, and Mont. Admin. Rs. 38.5.2020–2025 (2024). Current rules on resource planning provide that “[t]he cost-effectiveness of all resource acquisitions will be evaluated with respect to long-term total costs, including scenarios based on societal costs.” Mont. Admin. R. 38.5.2020(2). “Societal costs” are defined as “all costs to a utility plus externalities.” Mont. Admin. R. 38.5.2021(14). Given the requirements of current rules, why is the proposed rule reasonably necessary to effectuate the purpose of the Integrated Least-Cost Resource Planning and Acquisition Act?

17. Footnote 44 of the Petition refers to a website with a list of states that use the SC-GHG.



- a. Of the states that use the SC-GHG, what discount rate does each state apply to the SC-GHG?
- b. Of the states that use the SC-GHG, which states have rules similar to the proposed rule?
- c. Of the states that use the SC-GHG in utility proceedings, is the use of SC-GHG required by a legislative act?
- d. Of the states that use the SC-GHG in utility proceedings, is it used in all regulatory decisions, or just in select categories of cases, like resource planning and procurement proceedings?

### **Comment Deadline**

18. Further written comment on the proposed rule, including but not limited to responses to the questions stated above, must be submitted to the Commission no later than **May 24, 2024**. Written public comments on this matter may be submitted to the Commission at 1701 Prospect Ave., PO Box 202601, Helena, MT 59620, or by email to [pschelp@mt.gov](mailto:pschelp@mt.gov). Public comments may also be submitted online in REDDI. Instructions for submitting public comments in REDDI are available at [psc.mt.gov/reddi-help](http://psc.mt.gov/reddi-help) (select “Submit a Public Comment”).

19. The Commission’s jurisdiction over this matter is provided in Title 69 and Title 2, Chapter 4 of the Montana Code Annotated; Title 38, Chapters 2 and 5 of the Montana Administrative Rules; and any prior order of the Commission relevant to the issues presented.

DONE and DATED \_\_\_\_\_, 2024, by the Montana Public Service Commission by a vote of \_\_ to \_\_.

JAMES BROWN, President  
JENNIFER FIELDER, Vice President  
TONY O’DONNELL, Commissioner  
RANDALL PINOCCI, Commissioner  
Dr. ANNIE BUKACEK, Commissioner