

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

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IN THE MATTER OF NorthWestern Energy’s) REGULATORY DIVISION
Application for Approval to Purchase and)
Operate PPL Montana’s Hydroelectric Facilities,) DOCKET NO. D2013.12.85
for Approval of Inclusion of Generation Asset)
Cost of Service in Electricity Supply Rates, for)
Approval of Issuance of Securities to Complete)
the Purchase, and for Related Relief)

MONTANA CONSUMER COUNSEL BRIEF IN RESPONSE TO NCA

Montana Consumer Counsel (MCC) files this brief regarding the relevance and propriety of discovery directed to potential non-hydroelectric facility resource acquisitions, specifically PPLM’s existing Montana coal plants. MCC also addresses NWE’s ongoing objection to data requests based on the argument that it should not be required to undertake “additional analysis” to produce requested information.

Coal Resource Issues

NorthWestern Energy (NWE) seeks preapproval of its \$900 million purchase of PPLM’s hydroelectric generation facilities, which would have the impact of including the costs and risks of that purchase in its rates. Despite the magnitude of potential impacts associated with such preapproval, NWE objects to the Commission and the parties acquiring information relating to other assets NWE considered, or could have considered, in making its decision and seeking to place these assets in rate base through preapproval.

The timing is important. This is the discovery phase. At this juncture, MCC seeks to obtain the information requested in data requests directed to the coal assets to inform its position in this proceeding.¹ Data Request MCC-011, for example, requested copies of communications regarding potential purchase discussions related to non-hydroelectric facilities. Although MCC subsequently withdrew this request, NWE requested oral argument to effectively obtain an advisory opinion regarding future potential objections to data requests that might relate to coal generation resources. MCC opposed this request, which was granted by the Commission.

NWE's attempt to control and limit the evidence available to the Commission and the MCC should be rejected.

Section 69-8-421, MCA, allows utilities that restructured (i.e., only NWE), to request Commission preapproval of resource acquisitions. Preapproval is not required; the Commission may approve or deny, in whole or in part, an application for approval of an electricity supply resource. Section 69-8-421(6)(a), MCA. The Commission may consider all relevant information known up to the time that the administrative record in the proceeding is closed in the evaluation of an application for approval. *Id.*, 421(6)(b). Preapproval must include findings that the approval is in the public interest and that procurement of the resource is consistent with the requirements of §69-3-201, MCA, the objectives of §69-8-419, MCA, and Commission rules.

¹ A significant number of data requests were propounded by the PSC related to coal assets prior to the time when MCC issued its data requests. The MCC did not duplicate the PSC's data requests, which has no bearing on the import of this issue.

Section 69-8-419(2), MCA imposes a mandatory duty on NWE to pursue the following objectives:

- Provide adequate and reliable service at the lowest long-term cost;
- Conduct an efficient procurement process **that evaluates the full range of cost-effective options;**
- Identify, manage and mitigate risks related to providing service;
- Use open and fair procurement processes; and
- Provide service at just and reasonable rates.

NWE's obligation to comply with these criteria is non-negotiable. The Commission's obligation to make a determination regarding NWE's acquisition of PPLM's Hydro must include findings as to whether NWE has satisfied these criteria. Information regarding the coal assets is essential to allow the Commission to follow its governing statutory framework.

If NWE's efforts to hamstring the Commission and to limit the information available in reaching a decision in this docket are successful, then any decision will necessarily violate the statutory framework the Commission and NWE are compelled to follow.

It is also worthwhile to remember that neither is NWE required to *request* preapproval of resources. Indeed, prior to adoption of the preapproval statute in 2003, the Commission did not allow preapproval due to the risk-shifting to ratepayers involved. The Commission has previously observed that "the concept of preapproval – more accurately the presumption against preapproval of utility cost recovery – is fundamental

to utility regulation.” *Montana Power Company, Docket No. D2001.10.144, Order No. 6382d, p. 12.* In that Order, the Commission cited with approval an earlier discussion of the topic.

In utility ratemaking, the concept of preapproval is generally the outgrowth of a desire to reduce the risk associated with a certain action. Extensive preapproval undoubtedly shifts risks from shareholders to ratepayers. There is also a definite connection between the management function performed by the utility and preapproval. The basic concept of regulation entails independent management running the utility, with the Commission stepping in to protect the public if management’s actions are deemed imprudent. Preapproval places the Commission in the position of actually protecting management from imprudent actions, thus seriously compromising management independence, and the arm’s length relationship between the management and the Commission. The Commission sets rates, it is not responsible for management decisions. MPC Docket No. 88.6.15, Order No 5360d.

The criteria set forth above are the statutory *quid pro quo* to protect the ratepayers if preapproval is granted, replacing the built-in market protections that existed when, without preapproval, the utility was exposed to business risks. These statutory protections were put in place in an attempt to address concerns about preapproval. They cannot be ignored in any acquisition.

Section 69-3-201, MCA, the bedrock principle of Montana utility regulation, requires that rates be just and reasonable. It should go without saying that rates will *not* be just and reasonable if the utility is acquiring resources that are not the most cost effective available. This determination – of prudence (indeed, a “used and useful” standard would sometimes otherwise be applied to utility decisions) - was traditionally made when rate cases were filed and recovery of expenses, including capital investments, was considered.

Prior to preapproval, the utility bore the risks, and that fact alone helped discipline the utility decision-making process to the benefit of ratepayers. Of course, the Commission retained the authority to disallow imprudent and even improvident expenditures. Now, under the preapproval scheme, the Commission itself must take on these former utility responsibilities and the risks are shifted to ratepayers.

The Commission, in its rules and prior decisions concerning this responsibility, has rationally and wisely concluded that requested preapproval of resources must require consideration of all alternatives that might be available, whether they were actually considered, or *should* have been considered. It is not enough to say that “the deal is the deal” and to exclude consideration of alternatives that could better satisfy consumer demand. Specific statutory criteria in §§ 69-8-421 and 419, MCA, protect ratepayers from this attitude that the Commission cannot go outside the four corners of the contract, and mandate that the deal is not simply the deal.

On the contrary, the deal must be in a context that includes, among other things, an evaluation of the full range of cost-effective options. It is telling that NWE is not saying that it did not evaluate other options. In fact, it did, as it readily acknowledges. It is simply telling the Commission that its evaluation is not relevant to preapproval of the asset that it did choose to purchase. The Commission cannot simply accept on faith that NWE’s decision was prudent, that its evaluation comports with its legal obligations, and thereby abdicate its own duty under § 69-8-421, MCA. It is factually impossible for a defensible decision to be issued preapproving this acquisition absent information that is statutorily required.

Nor should it be simply accepted, given the difficult position in which the Commission is put in the context of regulatory preapproval, that the utility simply “gets to make its own case.” No rational business making a \$900 million decision regarding what plant it should use to produce its product would take the first offer that was presented or fail to evaluate every possibility. Put in the shoes of NWE by the preapproval process, neither should the Commission.

The Commission’s procurement planning rules, adopted to implement the above statutory obligations, also make clear that NWE is obligated to consider all resource alternatives. ARM 38.5.8301 *et seq.* For example, ARM 38.5.8228(2) provides in part that NWE include the following information when seeking preapproval:

- (c) testimony and supporting work papers describing the resource and stating the facts (not conclusory statements) that show that acquiring the resource is in the public interest and is consistent with the requirements in 69-3-201 and 69-8-419, MCA, the utility's most recent long-term resource plan (as modified by (2)(a)), and these rules;
- (d) testimony and supporting work papers demonstrating the utility's estimates of the cost of the resource compared to the cost of each alternative resource the utility considered and all relevant functional differences between each alternative;

NWE files detailed resource procurement plans pursuant to these rules, and has implemented a rigorous planning process, which was one of the primary objectives of the rules. NWE’s position regarding coal assets in this docket directly contravenes the obligations of both the utility and the Commission as set out in the statutes and the administrative rules.

Given this backdrop of statutory and common sense requirements, it is beyond all reason, and legally unsustainable, to suggest that questions aimed at consideration of coal

resources as an alternative to, or component of, a \$900 million resource acquisition are irrelevant. Indeed, this is less speculative than studying combustion turbines, biomass, etc., because we know that PPLM has existing coal plants in Montana that were for sale (plants that were once owned by NWE's predecessor, MPC), and that NWE actually included these plants in a bid.

It was relatively recently that NWE successfully argued to this Commission that Colstrip 4, part of the Colstrip project and a twin of Colstrip 3, is worth a multiple of its book value. It is not at all unreasonable to inquire as to the availability of these plants today, how NWE valued them, and how that value compares to the purchase it is asking the Commission to approve and make ratepayers responsible for.

Relevant evidence tends to make the existence of any fact of consequence to the determination of the action more probable than it would be without the evidence. Rule 401, M.R.Evid. The Montana Supreme Court held that the "purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring mutual knowledge of all relevant facts that are essential to a fair decision." *Richardson v. State*, 2006 MT 43 ¶ 22. As noted in *Richardson*, a case should not be a game of blindman's bluff but a fair contest with the basic issues and facts disclosed as fully as practicable. *Id.* The Commission is bound by the constitutional restraints of due process requirements. See, *Montana Power Co. v. Public Service Comm.* (1983), 206 Mont. 359, 368, 671 P.2d 604, 609. An administrative hearing must be conducted in accordance with fundamental

principles of fair play and applicable procedural standards established by law. See *Connell v. Department of Social & Rehab. Svcs.* (1997), 280 Mont. 491, 495-496.

If NWE refuses to produce information regarding its evaluation of PPLM's coal assets, then it will be unable to prove, at hearing, that it met the statutory obligations set out above. See e.g., *Montana Rail Link v. Byard* (1993), 260 Mont. 331, 860 P.2d 121 (information not produced in discovery cannot be offered at hearing). If NWE does not produce information in the discovery process related to its evaluation of other alternatives, any evidence that it evaluated other alternatives cannot be allowed at hearing, and its Application must be denied.

Additional Analysis

NWE's ongoing objection to producing information based upon the argument that it did not create it and does not have it in its possession is legally wrong.

NWE misapprehends its obligations under M.R.Civ.Pro. 34(a). Documents requested must be produced whenever a party has the practical ability to obtain the documents. See *Van Cleave v. Travelers Property Cas. Co.*, 2005 ML 2035, p. 6, citing cases. Rule 34(a)(1)(A) requires production of any designated documents or electronically stored information, including graphs, charts, data or data compilations, stored in any medium from which information can be obtained either directly, or if necessary, after translation by the responding party into a reasonably usable form.

As the Montana Supreme Court has found, discovery rules cannot possibly be written with the precision necessary to specify what information is discoverable in every type of case. *Richardson, id.* at ¶ 52. This is even more the case at the administrative

agency level, where technical information is often necessary to reach a reasoned and fair decision. The discovery rules contained in the Montana rules of civil procedure are written in general terms, imposing a broad duty of disclosure. *Richardson, id.* The rules require a good faith effort in serving discovery responses. *Id.*, citing See Rules 11 and 26(g), M.R.Civ.P.

NWE's obligations to produce information requested should be enforced. It is no objection to say that NWE cannot run a different set of numbers than those it has run previously. For the Commission to allow NWE to hide behind the argument that it doesn't "have" the information is to encourage the filing of applications predicated upon data that cannot be tested, questioned or have any meaningful comparison. NWE is clearly in the best position to provide this information. To say that the parties have the raw data and can run these analyses themselves invites NWE to shirk its obligations, knowing that the requesting party likely will not have necessary resources to do so and that its information and its information alone will be the basis for the Commission's analysis and decision. This is unreasonable in the context of the Commission's regulatory authority and obligations.

Respectfully submitted February 12, 2014.

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