

AL BROGAN
NorthWestern Energy
208 N. Montana, Suite 205
Helena, Montana 59601
Tel. (406) 443-8903
Fax (406) 443-8979
al.brogan@northwestern.com

SARAH NORCOTT
NorthWestern Energy
208 N. Montana, Suite 205
Helena, Montana 59601
Tel. (406) 443-8996
Fax (406) 443-8979
sarah.norcott@northwestern.com

Attorneys for NorthWestern Energy

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

In the Matter of NorthWestern Energy’s Application For:)
(1) Approval of Deferred Cost Account Balances for)
Electricity Supply, CU4 Variable Costs/Credits, and) Regulatory Division
DGGs Variable Costs/Credits; and (2) Projected)
Electricity Supply Cost Rates, CU4 Variable Rates,) Docket No. D2012.5.49
and DGGs Variable Rates)

**NorthWestern Energy’s Motion for and Brief in Support
of Reconsideration of Order No. 7219b, or in the Alternative,
Motion for More Time**

Pursuant to the ARM 38.2.4806, NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern”) submits this timely *Motion for and Brief in Support of Reconsideration of Order No. 7219b, or in the Alternative, Motion for More Time* (“*Motion*”) in the above-captioned Docket. Specifically, NorthWestern moves the Public Service Commission (“Commission”) to

reconsider and reverse the time limits in *Order No. 7219b* (“*Order*”), ¶ 10. This paragraph creates an undue burden for NorthWestern, establishes an unreasonable time period in which to respond given the nature of the data requests received in this docket, and denies NorthWestern any opportunity to object to data requests served on it prior to the issuance of the *Order*. In the alternative, NorthWestern moves the Commission to grant it until the time it responds to data requests identified as PSC-006 through PSC-013 to file objections and motions for protective orders related to NorthWestern’s responses.

I. INTRODUCTION

On June 1, 2012, NorthWestern filed its *Application for Interim and Final Electricity Rate Adjustment* (“*Application*”). On July 13, 2012, the Commission staff served data requests identified as PSC-006 through PSC-013. On August 1, 2012, the Commission issued the *Order*. The *Order* sets forth the procedural processes the parties and the Commission must follow in this Docket. The pertinent part of Paragraph 10 in the *Order* requires a party to file an objection to discovery requests or a motion for a protective order within seven calendar days of service of said requests and provides that if nothing is filed, the party waives its right to object to the requests thereafter.

II. ARGUMENT

The deadlines established in Paragraph 10 are unreasonably short given the review of internal records necessary to respond properly to data requests received by NorthWestern in this docket. Additionally, in the current docket, the Commission staff issued data requests to NorthWestern prior to the issuance of the *Order*. Paragraph 10 precludes NorthWestern from objecting and/or filing a motion for a protective order to any of those data requests as the seven-day period had expired before the *Order* was issued. Finally, this time period coupled with the

nature of certain data requests creates an undue burden on NorthWestern and defeats the purpose of discovery. Therefore, the Commission should reconsider and reverse Paragraph 10 of the *Order* as it relates to the deadline of seven calendar days for filing an objection and/or motion for protective order.

A. Paragraph 10 places an undue burden on NorthWestern and is unreasonable.

The seven calendar day deadline currently imposed by Paragraph 10 places an unreasonable burden on NorthWestern and other parties to the docket. The Commission has adopted certain discovery rules from the Montana Rules of Civil Procedure. Specifically, the Commission's ARM 38.2.3303 adopts Rules 26 and 28 through 37, except for 37(b)(1) and 37(b)(2)(d), for proceedings before the Commission. Both Rules 33 and 34 of the Montana Rules of Civil Procedure provide a party thirty (30) days to respond to discovery requests. Both Rules 33 and 34 provide a party thirty days to object to discovery requests. Given the time constraints placed on the Commission in certain cases to issue a decision, it has usually ordered a shorter period, fourteen days, for responding to data requests. This shortened period, from thirty to fourteen days, can already be an issue when responding to many data requests. By further shortening the time – to just seven calendar days for filing objections and motions for protective order – the Commission is imposing an undue and oppressive burden on NorthWestern under the facts of this case. Rule 26(g) provides that discovery shall not be unreasonable or unduly burdensome. The deadlines in Paragraph 10 are exactly that – unreasonable and unduly burdensome for NorthWestern.

The Commission served Data Requests PSC-006 through PSC-013 on Friday, July 13. NorthWestern received them on Monday, July 16. Had the *Order* been issued, NorthWestern would have been required to file an objection or motion by Friday, July 20. In just four working

days, NorthWestern would have needed to (1) design electronic records searches, (2) sequester any necessary documents not previously sequestered, (3) search and compile substantial amounts of data, (4) manually review each document for relevance, privilege, and confidential information; and (5) if necessary, draft and file objections and a privilege log and a motion for a protective order and supporting affidavits with the Commission. This would have been impossible. Just the first three steps, which are just the beginning of the process, take substantial time and resources.

The first search for documents responsive to Data Request PSC-006c, which is just one subpart of one data request, resulted in approximately 22,000 possibly responsive documents.¹² NorthWestern's staff must review each document³ for relevance, privilege, or confidentiality. If a responsive document contains privileged information, NorthWestern must file an objection and produce a privilege log; if it contains confidential information, NorthWestern must file a motion for a protective order. NorthWestern will not know if it needs to file an objection or motion until it has identified and reviewed each document. It is unreasonable to expect that NorthWestern could review that many documents to determine if anything contained therein is privileged or confidential and then draft the appropriate pleading in seven calendar days, particularly with this set of data requests for which an electronic search for just one subpart of one data request produced over 22,000 documents.

¹ See the Affidavit of Roberta Stauffer ("*Stauffer Affidavit*") filed contemporaneously with this *Motion*.

² Document includes emails and attachments to emails. If an email contains a search term, it counts a document. If an attachment to an email contains a search term, it counts as a document. If an email and several attachments each contain a search term, together they count as one document.

³ Review of one document may require the review of multiple separate files due to the method of counting explained above.

NorthWestern intends to comply with any order of the Commission;⁴ however, given the large number of documents potentially responsive to the discovery requests, despite NorthWestern's best efforts, it will not be able to comply with the deadlines as there are not enough working hours in the day to complete a search of all records, review the records, and draft and file necessary objections and motions with the Commission.⁵ NorthWestern, however, understands the need for such a deadline so it would recommend that the deadline for filing an objection and/or motion for a protective order be the same as the deadline for when responses are due.⁶

Finally, the seven-day deadline found in Paragraph 10 prevents NorthWestern from filing objections and motions for protective orders for those data requests issued to NorthWestern by Commission staff prior to the issuance of the *Order*. On July 13, Commission staff served data requests on NorthWestern.⁷ Paragraph 10, as retroactively applied to these data requests, would have required NorthWestern to file its objections and/or a motion for a protective order with the Commission by July 20. Paragraph 10 further states that the Commission will consider those requests not timely objected to by a party to be accepted. As NorthWestern was not aware of this seven-day deadline prior to its expiration, it should not be penalized for this and should be

⁴ The Commission has adopted Rule 37(d) of the Rules of Civil Procedure. Rule 37(d) allows the Commission to sanction a party that fails to respond to discovery requests. The type of sanctions the Commission could impose include but are not limited to staying a proceeding or dismissing the proceeding in its entirety. This would also be a violation of Rule 26(g) that provides in pertinent part that responses are "**complete** and correct as of the time it was made." (emphasis added)

⁵ See *Stauffer Affidavit*.

⁶ In many of the recent dockets, including this one, Parties and Commission staff have used data requests to seek all documents in NorthWestern's possession. These requests typically require a search of email archives and a manual review of what is often thousands of documents to identify privileged, confidential, and non-responsive material. This process is very time consuming, and in many instances, NWE has found that fourteen days is simply not enough time. For these types of requests, NorthWestern believes that thirty days is a more appropriate response time.

⁷ NorthWestern is currently working on responses to these requests and has indicated to Commission staff that the filing of responses is going to take longer than originally requested since several of the requests require NorthWestern to search records, including emails. As already noted, one search has returned approximately 22,000 possible documents/emails. All of these documents/emails are in the process of being reviewed to determine if anything contained therein is non-responsive, confidential, or privileged.

allowed to file objections and/or a motion for protective order for these requests. To penalize NorthWestern based on the *Order* that had not been issued would be unreasonable, fundamentally unfair, and would violate NorthWestern's right to due process.

B. Paragraph 10 of the *Order* defeats the purpose of discovery.

As in civil cases, discovery prior to a hearing is an important tool for the Commission and the parties. "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 the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation." *Massaro v. Dunham*, 184 Mont. 400, 405, 603 P.2d 249 (1979) (citing *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)). However, if the time period in which to respond to discovery requests is unreasonably short, the reason for conducting discovery is lost. If the parties do not have enough time to search their records and provide those documents responsive to the requests, the other parties as well as the Commission will not be able to ascertain the relevant facts to the case and will not be able to properly prepare their case or have a fully developed record in which to make a decision. A deadline that is unreasonably short harms everyone involved in the case. The parties need sufficient time to compile data and respond to discovery. Otherwise, the important policy interests served by discovery cannot be achieved.

III. CONCLUSION

Based on the foregoing, the Commission should grant NorthWestern's motion for reconsideration by reversing Paragraph 10 as it relates to the deadline established for the filing of objections and motions for protective order in discovery matters. NorthWestern suggests that the Commission revise the deadline in Paragraph 10 to be the same as the deadline established for when responses are due. In the alternative, the Commission should grant NorthWestern's motion

for time and allow NorthWestern to file objections and motions for protective orders up to the time that it responds to Data Requests PSC-006 through PSC-013.

RESPECTFULLY SUBMITTED this 10th day of August 2012.

NorthWestern Energy

By:  _____
Al Brogan
Sarah Norcott
Attorneys for NorthWestern Energy

AL BROGAN
NorthWestern Energy
208 N. Montana, Suite 205
Helena, Montana 59601
Tel. (406) 443-8903
Fax (406) 443-8979
al.brogan@northwestern.com

SARAH NORCOTT
NorthWestern Energy
208 N. Montana, Suite 205
Helena, Montana 59601
Tel. (406) 443-8996
Fax (406) 443-8979
sarah.norcott@northwestern.com

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Affidavit of Roberta Stauffer

STATE OF MONTANA)
: ss.
County of Silver Bow)

Roberta Stauffer, being first sworn upon oath, deposes and says:

1. I am the Manager of Regulatory Process in the Regulatory Affairs Department of NorthWestern Energy ("NorthWestern"). In this role, I assist in preparing NorthWestern's

responses to discovery in regulatory proceedings before the Montana Public Service Commission.

2. I am familiar with and actively participate in the process that NorthWestern uses to respond to data requests that seek copies of all documents or communications related to a given issue or topic. Normally, this involves a search of email archives for both emails and attachments to emails. First, I work with the appropriate group at NorthWestern to determine the time period during which potentially responsive documents would have been created. Next, we identify the potential custodians or email users of the documents. Then we identify the search terms to be used to identify potentially responsive documents.

Once the search framework is complete, we send the search parameters to NorthWestern's Records Management. If the period end date assures us that all potentially responsive documents would be located in long-term storage or projects folders in the Enterprise Vault, Records Management proceeds with the search.¹ If the end of the relevant period is more recent, Records Management sequesters the more recent emails from the custodians' inboxes, sent items folders, long-term retention folders, and projects folders. After sequestering these emails, Records Management proceeds with the search.

Once the search is completed and potentially responsive documents are identified, either I or another experienced Regulatory Affairs employee manually reviews each document to determine if it is non-responsive. When non-responsive documents have been eliminated, the responsive documents are sent to Print Services for printing. Once they are printed, they undergo further review for potentially confidential material. If confidential material is identified within the documents, the attorney drafts a motion for a protective order, identifies the

¹ NWE emails that have been placed in long-term retention and projects folders are archived nightly in the Enterprise Vault once they become 90 days old. NWE emails stored in active inboxes and sent folders are automatically deleted quarterly once they are 90 days or older.

individual who is best able to provide a supporting affidavit, and requests that the individual prepare an affidavit. I then prepare a public version of the document by redacting the confidential information.

Records Management segregates all potentially privileged documents (emails either to or from an attorney) and they undergo a similar review process in which an attorney reviews them all. If privileged material is identified, it is returned to me to use in preparing a privilege log, and the attorney prepares an objection to the data request to the extent that it asks for privileged material. Finally, NorthWestern assembles all of the documents and provides them as a response to the data request.

3. In this docket, to prepare a response to Data Request PSC-006c, we identified the relevant period as January 1, 2011 through January 31, 2012; the key words to be (Dave Gates Generating Station or DGGG or Mill Creek Generating Station or MCGG) **and** (problem or failure or repair or outage or bearings or inspection or teardown or blades or unavailable); and the custodians to be Mike Cashell, Bill Rhoads, Jim Williams, John Hines, Bill Thompson, Casey Johnston, Mike McGowan, Mike Voeller, Mike Terry, Andrew McLain, Heather Grahame, and Al Brogan. Because the period ended months ago, Records Management was able to conduct the search relying only on archived documents. The search, which was completed on August 7th, returned 22,388 documents. Of the 22,388 documents, approximately 2300 were either from or to an attorney. An attorney will do the initial review of these. I have conducted initial review of approximately 2,400 documents in about 12 hours. Of these, 115 will be sent to Print Services and then further reviewed.

4. Neither I, nor any other person that I know, could possibly review all of the documents returned by the search within seven calendar days.

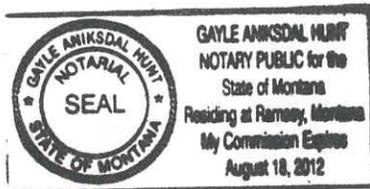
5. We have identified and sent to Records Management the relevant period, search terms, and custodians for the searches necessary to respond to Data Requests PSC-006d, PSC-007e, and PSC-008c. Because the end date of the relevant period for each is relatively recent, Records Management is working with the custodians to sequester the documents before it conducts the searches.

DATED this 10th day of August 2012.



Roberta Stauffer

SUBSCRIBED AND SWORN TO BEFORE me this 10th day of August 2012.





Print or Type Name: Gayle Anksdal Hunt
Notary Public for the State of Montana

Residing at Ramsay, Montana

My Commission Expires: August 18, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's ("NWE") Motion for and Brief in Support of Reconsideration of Order No. 7219b, or in the Alternative, Motion for More Time has been hand delivered to the PSC and MCC and it has been efiled with the PSC and mailed to service list on this date.

Date: August 10, 2012



Nedra Chase
Administrative Assistant
Regulatory Affairs

**A. Service List
D2012.5.49**

**Al Brogan
NorthWestern Energy
208 N. Montana Ave Ste 205
Helena MT 59601**

**Nedra Chase
NorthWestern Energy
40 E. Broadway
Butte MT 59701**

**Charles Magraw
501 8th Ave.
Helena MT 59601**

**Robert Nelson
Montana Consumer Counsel
111 N. Last Chance Gulch
Suite 1B
Helena MT 59620-1703**

**Sarah Norcott
NorthWestern Energy
208 N. Montana Ave Ste 205
Helena MT 59601**

**Dr. Thomas M. Power
920 Evans Ave.
Missoula MT 59801**

**Joe Schwartzenberger
NorthWestern Energy
40 E. Broadway
Butte MT 59701**

**Kate Whitney
Public Service Commission
1701 Prospect Ave.
P O Box 202601
Helena MT 59620-2601**