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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 the Notice of Commission Action
dated May 31, 2013**

Pursuant to ARM 38.2.4806, NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern”) submits this timely *Motion for and Brief in Support of Reconsideration of the Notice of Commission Action* (“*Motion*”) in the above-captioned Docket that the Montana Public Service Commission (“Commission”) served on Friday, May 31, 2013. Specifically,

NorthWestern moves the Commission to reconsider and reverse the following in the *Notice of Commission Action* (“*NCA*”):

1. The direction to counsel of record to address certain issues that have not been adequately addressed;
2. The direction that the issues should be addressed by introducing into evidence filings admitted in previous Commission proceedings, data responses filed in this proceeding, and live testimony at the public hearing beginning June 11, 2013;
3. The identification of three specific issues as requiring the introduction of additional evidence to create a record that is sufficient and adequate;
4. The observation that the evidentiary record would not be adequate or sufficient without the introduction of data requests and responses related to any issue addressed in the pre-filed testimony; and
5. The request that counsel introduce at hearing data requests and responses filed in this proceeding that relate to any issue addressed by a party in pre-filed testimony.

These directions, identifications, observations, and requests are arbitrary and capricious, violate the Commission’s procedures, violate the parties’ right to due process, and exceed the Commission’s statutory authority. Moreover, they undercut the Commission’s ability to resolve these issues thoroughly, thoughtfully, and efficiently. NorthWestern respectfully requests that the Commission reconsider the *NCA* on an expedited basis, within two days of this filing, and grant the relief requested herein.

As stated below, NorthWestern requests that the Commission reconsider the *NCA* and:

1. Rescind the *NCA* and proceed to hold the hearing according to the Modified Procedural Order No. 7219e;
2. Continue the hearing to a later date pursuant to ARM 38.2.3907 to allow the parties to consider and take the appropriate actions in response to the *NCA*; or
3. Cancel the hearing and consolidate this matter with Docket No. D2013.5.33, the 2013 Electric Tracker that was filed on May 31, 2013.

I. INTRODUCTION

On June 1, 2012, NorthWestern filed its *Application for Interim and Final Electricity Rate Adjustment* (“*Application*”). Since it filed the Application with its Pre-filed Direct Testimony, NorthWestern has responded to numerous data requests of the Commission and the parties, filed Supplemental Testimony, and filed Rebuttal Testimony. Intervenors, the Montana Consumer Counsel (“MCC”) and Natural Resources Defense Council/Human Resource Council-District XI (“NRDC/HRC”) have filed testimony and responded to data requests. On May 31, 2013, the Commission, contrary to the restrictions placed on it by § 69-2-102, MCA, issued the *NCA*. The Commission should reconsider and rescind or modify the *NCA*.

II. ARGUMENT

The Commission is an administrative agency that has only the authority and powers granted to it by the Legislature. It cannot exercise authority that it does not have. The Commission exceeded its statutory authority in the *NCA*. The Commission acted arbitrarily and capriciously in issuing the *NCA*. The Commission must not take arbitrary and capricious actions. The Commission must respect and protect the parties’ due process rights. The Commission must follow its own procedures and orders. The Commission did not do so. The Commission’s *NCA* violates the parties’ due process rights.

A. The Commission exceeded its statutory authority in the NCA.

The Legislature created the Commission. § 69-1-102, MCA. As an administrative agency created by the Legislature, the Commission has only limited powers granted to it by the Legislature. *Montana Power Co. v. Public Service Comm'n*, 206 Mont. 359, 371, 671 P.2d 604, 611 (1983) (quoting *State v. Boyle*, 62 Mont. 97, 102, 204 P. 378, 379 (1921)). If there is any reasonable doubt as to a particular power, then the Commission does not have that particular power. *Id.* At times, the Commission has asserted that it has broad authority.

Disagreeing with the Commission's assertion, the courts have consistently ruled that the Commission's authority is limited. *See, e.g., Basin Electric Power Cooperative v. Department of Public Service Regulation*, 608 F.Supp 772 (D. Mont. 1985) (Commission does not have authority to enforce environmental laws or standing to seek judicial review.); *Montana Power Co.*, 206 Mont. at 376, 671 P.2d at 613-614 (Commission does not have authority to prohibit corporate reorganization by its own order.); *Montana-Dakota Utilities Company v. Montana Department of Public Service Commission*, 50 P.U.R.4th 481 (Mont. Dist. Ct. 1982) (Commission does not have authority to award attorney fees to consumers who participate in rate-making hearings.); *Petition of Montana Power Co. for Increased Rates and Charges in Gas and Electric Services*, 180 Mont. 385, 400, 590 P.2d 1140, 1149 (1979) (Commission does not have authority to order a utility to employ an independent auditor.).

In the *NCA*, the Commission tells NorthWestern what evidence it must introduce at the hearing. Nothing in Title 69, MCA, allows the Commission to direct NorthWestern's presentation of its case. While the Commission may request NorthWestern to provide testimony on a particular topic, it may not mandate the method by which NorthWestern provides evidence. *C.f. Petition of Montana Power Co.*, 180 Mont. at 400. Nothing in Title 69, MCA, authorizes the Commission to require filings made in other cases to be admitted into the current docket.

NorthWestern, not the Commission, controls the evidence and testimony that it presents in a contested case. The Commission may not, under the guise of rate regulation, take over or unreasonably interfere with the management of NorthWestern. *14 Fletcher Cyc. Corp. § 6684* (2012).

Furthermore, the Commission's direction in the *NCA* violates § 2-4-612, MCA which provides that the Commission shall be bound by the rules of evidence and that all testimony shall be given under oath or affirmation. The rules of evidence provide that relevant evidence is generally admissible and irrelevant evidence is not admissible. M.R. Evid. 402. Relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence more or less probable than it would be without the evidence. M.R. Evid. 401. Many of the data responses do not meet the test of relevance and are inadmissible. Requiring NorthWestern to introduce evidence that is not admissible is beyond the Commission's authority.

Data responses, to be admissible, must be testimonial. However, data responses are not answered under oath or affirmation. Therefore, in addition to violating the rules of evidence, admission of them violates § 2-4-612(4), MCA. The Commission does not have any statutory authority to require NorthWestern to violate the statute or to forego the protections afforded by the statute.

B. The Commission acted arbitrarily and capriciously in issuing the NCA.

Statutes prohibit the Commission from acting arbitrarily and capriciously. *See* § 2-4-704, MCA. An agency action is arbitrary or capricious if the agency relies on improper factors, fails to consider any important aspect, offers an explanation that runs counter to the evidence, or "is so implausible that it could not be ascribed to a difference in view or the product of agency

expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission’s action adopting the *NCA* conflicts with this standard.

First, in issuing the *NCA*, the Commission determined “that the evidentiary record would not be adequate or sufficient without the introduction of data requests and responses related to any issue addressed in the pre-filed testimony (including testimony filed with the initial application and supplemental testimony).” However, it is implausible that the Commission has already determined that the record is incomplete when the hearing has not even commenced. It is at the hearing that the parties create the record. Pre-filed testimony is not admitted until a witness takes the stand, is sworn, identifies the pre-filed testimony, and adopts the answers under oath. From an evidentiary and legal perspective, the record includes all evidence received or considered, including a stenographic record of oral proceedings. § 2-4-614(1)(b), MCA. The evidentiary record also includes responses to cross-examination and questions. Thus, the Commission cannot reach a decision at this time that the record is incomplete; the “record” will not be established until the hearing is concluded. As a result, in concluding at this time that the record is not sufficient and not adequate, the Commission has made a determination that it is arbitrary and capricious.

Second, the Commission has determined that every issue addressed in the pre-filed testimony, whether contested by a party, requires the admission of data responses. In this determination, the Commission is going beyond its role as a decision maker and stepping into the role of an advocate. The Commission is not and cannot be an advocate in this docket. § 69-2-102, MCA. In functioning as an advocate, the Commission is taking an arbitrary and capricious action.

Third, by requiring the admission of all data responses, the Commission is presuming that all data responses are admissible. This is an incorrect presumption. The parties are free to object to the admission of any evidence when a party seeks to introduce it. By ordering the record to include all data responses related to any issue, the Commission is taking away the ability of a party to object on evidentiary grounds to the admission of evidence. This is also arbitrary and capricious.

The arbitrariness and capriciousness of the Commission's action in adopting the *NCA* requires that the action be set aside.

C. The Commission did not follow its own procedures and orders.

An administrative agency must comply with its own administrative rules. *Whitehall Wind, LLC v. Montana Public Service Comm'n*, 2010 MT 2, ¶ 24, 355 Mont. 15, 223 P.3d 907 (citing *Montana Solid Waste Contractors, Inc. v. Montana Department of Public Service Regulation*, 2007 MT 154, ¶ 18, 338 Mont. 1, 161 P.3d 837). Just as an agency must follow its own rules, it must follow its own procedures and orders. In this case, the Commission did not follow its own rules, procedures, and orders.

ARM 38.2.3901 provides in part, "An effort will be made to set all hearings sufficiently in advance so that all parties will have a reasonable time to prepare their cases." In this case, despite the fact that rebuttal testimony was filed on May 3, 2013, the Commission did not identify additional issues or request additional evidence until May 31, 2013, a mere eleven days before the hearing. Eleven days is not a reasonable time to prepare a case that addresses these newly identified issues and contains this new evidence that the Commission has requested. The Commission did not make any effort to notify the parties sufficiently in advance of the hearing to allow a reasonable time to prepare.

Modified Procedural Order No. 7219e, ¶ 25 requires, “If a party intends to introduce a discovery response, it must identify the number of the request, the responding witness, and the issue addressed.” As discussed below, this requirement is consistent with the Commission’s resolution of Docket No. 90.7.44 (“*Due Process Docket*”), and the procedure established therein. Rather than following its prior decisions and procedures, the Commission has short-circuited the process and required the parties to introduce data request and responses.

Additionally, the resolution of the *Due Process Docket* established procedures for identifying additional issues. The Commission’s identification of additional issues upon which it requires additional evidence at this late date violates that procedure. Modified Procedural Order No. 7219e, ¶ 26 provides in part, “the Commission may not allow a party to raise an issue at a hearing unless it is reasonably related to an issue previously identified in the proceeding.” The Commission’s invitation to the parties to provide live testimony on issues not contested previously by the parties or timely identified as additional issues by the Commission violates this provision.

The Commission has violated its own rules, orders, and procedure by issuing the *NCA* at this late stage in the proceedings.

D. The Commission’s *NCA* violates the parties’ due process rights.

The Commission must protect the due process rights of the parties. The Commission must zealously guard against even the appearance of unfairness in the conduct of its hearings. *Cascade County Consumers Ass’n v. Public Service Comm’n*, 144 Mont. 169, 186, 394 P.2d 856, 865 (1964). The Commission has not only failed to protect the parties’ due process rights; the *NCA* has violated them.

At the work session on the *NCA*, one Commissioner asserted that NorthWestern had embarked on a novel legal strategy to prevent the introduction of data responses. Unfortunately, as Edmund Burke stated, “Those who don’t know history are doomed to repeat it.” Rather than being a novel strategy, NorthWestern is making the same arguments that many utilities made over 20 years ago and that were resolved in part by the Commission’s decision in the *Due Process Docket*. However, the Commission has departed from the procedures that it established in that docket. NorthWestern rightly complains that the Commission is violating its due process rights.

In the *Due Process Docket*, the Commission considered and adopted changes to its decision-making process. This Commission initiated the *Due Process Docket* in response to a series of strenuous complaints by utilities that the Commission was violating statute and due process rights. See Docket No. 88.6.15, Order No. 5360e (December 7, 1989); Docket No. 88.11.53, Order No. 5399b; Docket Nos. 88.1.2, 88.9.13, 88.8.44, Order No. 5354 e (December 26, 1989). In a Memorandum to the Commissioners, the then-chief legal counsel, Robin McHugh, noted the problems with the Commission’s process. “The Commission staff, with the acquiescence and encouragement of the Commission (and/or certain Commissioners), has often investigated and attempted to shape the record on behalf of specific interests.” Docket No. 90.7.44, McHugh Memorandum dated November 25, 1992, p. 4 (attached as Exhibit A).

To address these concerns, the Commission issued a Notice of Commission Action on December 31, 1992 (attached as Exhibit B). The Commission stated that it would:

[I]mplement a new additional issues procedure to eliminate the potential due process, or fairness, problem arising from inadequate issue identification. In general, the new additional issues procedure will require that all participants, particularly the PSC, will have identified all issues to be decided in the case within 12 weeks after the rate case filing, which will be about 3 weeks after the intervenor initial testimony. At this point the PSC will issue a notice of additional

issues. After that time, in approximate two week intervals there will be applicant additional issue testimony, discovery responses to discovery, intervenor testimony on additional issues, discovery, responses to discovery and applicant rebuttal testimony on additional issues. With this schedule, additional issue testimony will have been completed about seven days prior to hearing.

Docket No. 90.7.44, Notice of Commission Action, pp. 1-2 (December 31, 1992).

The Commission established this policy in 1992 and has never altered the policy since then. However, the *NCA*'s terms violate this policy. Even using the most liberal interpretation of the deadline for the identification of additional issues (3 weeks after intervenor testimony), the Commission was required to issue a notice of additional issues no later than April 12, 2013. The *NCA* is inexcusably late.

In the same Notice of Commission Action, the Commission adopted a new procedure regarding the introduction of data responses:

The PSC will also implement a new procedure to eliminate the due process, fairness, or Rules of Evidence problems surrounding mass introduction of data responses into the evidentiary record. In general, the procedure will require that each rate case participant, including staff, will specifically identify in a prehearing memorandum or similar notice: (a) each data response that it intends to offer as evidence; (b) the witness through which it will be offered; and (c) the issue to which the response relates. At the beginning of the hearing all participants will be required to state whether it is their intention to permit any identified data responses to be entered into the record, without required formalities or objection, or whether they intend to require that any identified data response be offered only through a witness, subject to further objection and cross-examination.

Id. at pp. 2-3.

In adopting this procedure, the Commission recognized that the policy was necessary to guard against due process violations. The Commission has never altered or changed this policy.

Due process is guaranteed by the Montana Constitution. Const. Art 2, § 17. Due process includes both procedural and substantive rights. *Englin v. Board of County Comm'rs*, 2002 MT 115, ¶ 14, 310 Mont. 1, 48 P.3d 39. This bars arbitrary Commission actions regardless of the

procedures used. *Id.* The Commission’s arbitrary action, as discussed above, violates the substantive due process rights of the parties that appear before it.

While procedural due process requirements are flexible, they require fundamental fairness. Procedural due process requirements generally include, at a minimum, timely and adequate notice, opportunity to be heard at a meaningful time, the ability to confront and cross-examine witnesses offering opposing views, decision by a fair and impartial tribunal, and compliance with statutes including the rules of evidence.

In addition to the previously mentioned particular concerns, the *NCA* violates the requirement for timely and adequate notice, impairs the ability to confront and cross-examine witnesses as it pertains to data responses, and is not compliant with statutes. These infirmities not only hurt the parties, but also hurt the Commission’s ability to thoughtfully and efficiently consider these issues based on a complete record. Adding issues at such a late date, and inviting new testimony at the hearing, undercuts the Commission’s ability to reach a decision on a complete record.

Also, the *NCA* raises substantial questions about the proceeding’s fairness. In the *NCA*, the Commission stated that the issue of “*Whether the lost revenue adjustment mechanism (LRAM) should be discontinued, maintained in its current form, or somehow modified*” requires additional evidence. In making this statement, in light of NorthWestern’s pre-filed testimony that assumes the LRAM’s continuation, the testimony of NRDC/HRC supporting the LRAM’s continuation, and the absence of any testimony from the MCC suggesting that it should be eliminated or changed, the Commission seems to be inviting testimony to support some action that no party has advocated. The Commission approved the establishment of the LRAM many years ago in a thorough process in which there was full participation by the affected

stakeholders. To now suggest at this late stage in this proceeding, , that the LRAM should not be continued or maintained in its current form, is fundamentally unfair to all of the parties, and particularly to NorthWestern, as it has a material financial impact on the company. The Commission’s request for additional evidence at this late date as to a mechanism that was established many years ago with a full public process is fundamentally unfair. In any event, the Commission’s process, imposed by the *NCA*, impairs the Commission’s ability to fully understand the issues and to make a thoughtful decision based on a complete record.

Similarly, the Commission stated that “*Whether the net-to-gross adjustment factor of 1.0 to account for the effects of free-ridership and spillover of demand-side management programming should be accepted or in some way modified*” and “*Whether the Commission should offer policy direction on the continued incentivization of energy-efficient lighting, in light of federal mandates regarding the availability of incandescent bulbs and the advancement of market availability and saturation of energy-efficient light bulbs; and, if the Commission does offer guidance, what that should be*” are issues that require additional evidence. NorthWestern has offered significant, substantial testimony on these issues. NRDC/HRC has offered testimony supporting the net-to-gross adjustment factor of 1.0 and NorthWestern’s current programs. The MCC has not offered opposing evidence. The process mandated by the *NCA* impairs the parties from a full and impartial hearing on these issues and undermines the Commission’s ability to consider the issues thoughtfully, efficiently, and based on a complete record.

III. RELIEF REQUESTED

NorthWestern requests that the Commission act on this *Motion* on an expedited basis, and render a decision within two days. The hearing is scheduled to begin in seven days. In order to

consider options and responses to the *NCA*, NorthWestern and the other parties need to know the Commission's disposition of this *Motion*.

NorthWestern requests that the Commission reconsider the *NCA* and:

1. Rescind the *NCA* and proceed to hold the hearing according to the Modified Procedural Order No. 7219e;
2. Continue the hearing to a later date pursuant to ARM 38.2.3907 to allow the parties to consider and take the appropriate actions in response to the *NCA*; or
3. Cancel the hearing and consolidate this matter with Docket No. D2013.5.33, the 2013 Electric Tracker that was filed on May 31, 2013.

Some of the procedural defects in the Commission's process may be remedied by more time and additional procedure before the hearing. However, other defects may not be so easily remedied and may require additional legal action by the parties or other remedy by the Commission. The Commission should not construe request for alternative relief as acquiescence in those matters that cannot be remedied merely by providing more time.

However, above all, the *NCA* jeopardizes the Commission's ability to resolve these issues thoughtfully and based on a complete, legally-defensible record. NorthWestern fully understands that the Commission's desire is to issue decisions that are based on a complete record with the thorough vetting of issues and evidence. At the end of the day, in addition to violating NorthWestern's rights as set forth in this *Motion*, the entity that is most harmed the *NCA* is the Commission itself. The processes implemented by the *NCA* will lead to an incomplete, confusing, and inefficient record that is not legally defensible.

IV. CONCLUSION

Based on the foregoing, the Commission should grant NorthWestern's motion for reconsideration and provide one of the alternative requested reliefs within two days of this filing.

RESPECTFULLY SUBMITTED this 4th day of June 2013.

NorthWestern Energy

By:  _____
Al Brogan
Sarah Norcott
Attorneys for NorthWestern Energy

CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's ("NWE") Motion for and Brief in Support of Reconsideration of the Notice of Commission Action dated May 31, 2013 in Docket No. D2012.5.49 has been hand delivered to the Montana Public Service Commission ("PSC") and has been e-filed electronically on the PSC website. It will also be hand delivered to The Montana Consumer Counsel ("MCC") and has been served by mailing a copy thereof by first class mail, postage prepaid to the service list in this Docket.

Date: June 4, 2013

A handwritten signature in cursive script that reads "Nedra Chase". The signature is written in black ink and is positioned above a horizontal line.

Nedra Chase
Administrative Assistant
Regulatory Affairs

A. Docket D2012.5.49
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MEMORANDUM

TO: Commissioners
CC: Dan, Eric, Mike, Legal Division
FROM: Robin 
DATE: November 25, 1992
RE: Due Process (Docket No. 90.7.44)

INTRODUCTION

Other work has prevented my taking the two to three weeks (at least) necessary to do a thorough analysis of this subject. (Could I take a sabbatical?) I do not, however, recommend postponing further your consideration of due process. My thoughts, in summary fashion, follow. I have attached my March 13, 1991 memo which should be helpful to review. That memo was circulated originally to each Commissioner and certain staff in a binder containing the comments, relevant parts of Commission orders and other relevant documents. That binder will be on the "due process" shelf of the reference shelves -- immediately to the right as you enter the library. (If you want a new binder made for individual use let me, or Debbie, know.) Other due process staff memos and miscellaneous material will also be on the "due process" shelf and, I presume, additional staff comment will circulate prior to the work session. In short, there will be a surfeit of reading material for you to consider.

L-92.11.25.00-MM

BACKGROUND TO THE PROBLEM

In my view the due process problem arose because insufficient attention was paid to the nature of the Commission and the role of its staff in contested case proceedings. I think it is time for some hard thought to be given to this subject and that, where necessary, your conclusions be set forth in rule or policy statement.¹

It is the nature of a contested case proceeding to create a record for a decision-maker on the issues to be decided. In the case of ratemaking, the general issue is what constitutes a just and reasonable revenue requirement, which forms the basis for just and reasonable rates. A utility files an application in which it argues that current rates are unjust and unreasonable, and intervenors respond. These parties (the utility and the intervenors) attempt to paint the record canvass so that it will be viewed by the decision-maker in a manner favorable to their interests. There is nothing unusual or surprising about this, but, with ratemaking, as opposed to certain other kinds of decision-making, the story does not end here.

The Commission is, of course, the decision-maker -- but it is more. By law and by practice the Commission has an independent obligation to the citizens of Montana to set just and reasonable rates. That means (if you will pardon the metaphors)

1 Recall that the NOI was limited to utility contested case proceedings.

that the Commission is not a potted plant in the ratemaking process and it may not be, and often is not, satisfied with the record canvass painted by the parties. Therefore, the role of staff is not only to advise on the record painted by the parties, but to independently investigate and touch up the record so that it supports a range of decisions. Staff's investigation and advice should be made on behalf of the public interest -- not on behalf of one of the particular interests that, together, make up the public interest.

As noted, a contested case record should support a range of reasonable decisions on the issues. (Some issues are black and white, but most contested issues invite a variety of reasoned opinions.) In simple terms, I like to think of a good record as supporting a range of decisions -- a continuum -- running from "pro-utility" to "pro-consumer." Where on this continuum the Commission decides an issue depends on the make-up of the Commission at a particular time. The proclivities and philosophical orientation of the Commission are determined by the voters, and in my view, are not the business of staff. The parties advocate their individual interests; the staff investigates, analyzes, helps shape the record and advises based on its expertise; the Commission determines what is in the public interest.

I think the model just described is a good one. It has also been described in Commission orders. (See MPC Order No. 5360e and MDU Order No. 5399b.) So, what is the problem?

The first problem is that Commission practice has not matched the model. The Commission staff, with the acquiescence and encouragement of the Commission (and/or certain Commissioners), has often investigated and attempted to shape the record on behalf of specific interests, as opposed to the public interest. Specifically, the staff has sometimes seen itself as "batting cleanup" for a Consumer Counsel that is perceived as not always adequately representing consumer interests. The utilities are aware of this and, in my opinion, are understandably frustrated by it. It is the primary, if not the exclusive reason for due process complaints. The Consumer Counsel is also aware of it and, naturally, has no objection.

I do not attribute consumer advocacy at the Commission to venal motives. On the contrary, I think it is an understandable trap. Ask the man on the street what the PSC does and he will almost always say that it protects consumers from monopoly utilities. (Almost surely, he does not know the Consumer Counsel exists.) He is, of course, in large part correct because consumer interests make up a good piece of the public interest. Commissioners run as consumer advocates -- the public interest being a too ethereal concept for a political campaign. It is, therefore, natural that Commission consumer advocacy should seep into the contested case process; but I believe that fair process,

real and perceived, requires that, to the extent possible, it be rooted out.²

It should not require footnotes and extensive legal authority to convince that it is simply wrong for a decision-maker to be advised by a staff (and have the record shaped by a staff) that is pursuing the interests of one party over another. To borrow a phrase from your former chairman, walk a mile in the moccasins of a party facing such a decisionmaker and ask yourself whether your reaction would differ from the major parties: in the case of Consumer Counsel -- a calculated silence; in the case of a utility -- a charge of a violation of due process.

Recognizing the problem will, I think, go a considerable distance toward solving it. I will recommend certain mechanical changes below, but first I want to reemphasize language I quoted in my March 13, 1991 memo:

Insofar as predispositions may exist in the more highly charged fields in which administrative agencies operate, they are mainly the product of many factors of mind and experience, and have comparatively little relation to the administrative machinery. There is no simple way of eliminating them by mere change

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- 2 I hasten to make clear that when I say that Commission consumer advocacy needs to be rooted out, I do not mean that your political proclivities and philosophies need to change. Every regulatory body will have a particular orientation -- and I assume that in Montana the Commission will most often be "consumer" oriented, and will view a contested case record through a "consumer" lens. (That is fine with me and in any event, as I said, is none of my business.) What I do mean is that consumer advocacy should not be part of staff's role in contested case proceedings.

in the administrative structure. They can only be exorcised by wise and self-controlled men. The problem is inherently one of personnel and the traditions in which it is trained.³

Recognizing that mechanical changes may not be sufficient, I suggest the Commission should begin the process of exorcising the problem by drafting a clear statement of its role in utility contested cases and the role and behavior it expects from its staff. Drafting a statement is, of course, different from adhering to it; but it is a start.

PROCEDURAL REFORM AND SUBSTANTIVE DECISIONS

Procedure does not necessarily affect substance, though it may do so. Assume I am accused of killing my neighbor in Helena on the night of November 17, 1992. It is a matter of procedure that I am given the right to confront my accuser (the State) and prove that I was in Los Angeles attending Phantom of the Opera on that night. That procedure will crucially affect the substantive outcome, and I assume all would agree that it is a good thing to provide a process whereby persons can prove their innocence. If an accused person is guilty, however, all the process in the world may not change the ultimate (substantive) verdict.

3 Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedures, Appointed by the Attorney General, at the Request of the President, to Investigate the Need for Procedural Reform in Various Administrative Tribunals and to Suggest Improvements Therein, 1941.

In the context of a rate case, allowing parties procedural opportunities to make their case, offer evidence and rebuttal may not affect the substantive outcome. If, however, the opportunity to confront does affect the substantive decision, then I presume you would agree that, like proving innocence, that is a good thing. Ratemaking should not be a game of hide-the-ball. The more light shed on utility operations, the more evidence and argument, the better the record from which to devise just and reasonable rates.

I make these obvious points because I perceive that some fear the substantive consequences of due process reform. I believe that fear is groundless; the Commission will remain free to apply its particular decision-making orientation to the record, regardless of the process that produces the record. Procedure should facilitate the search for truth, not stifle it.

STAFF ADVICE AND WHAT THE UTILITIES WANT

Some staff have expressed concern that the utilities want to confront staff advice. I think utility comments are clear that this is not what they want and, in any event, there is no legal support for a due process right to confront staff advice. See the Davis discussion at §§11.09, 11.10 and 11.11 of volume 2 of his Administrative Law Treatise, 1st ed. ("due process" shelf). If staff were merely advisory, and not advisory/investigatory, then confrontation of staff positions would not be an issue.

There is no more a right to confront the staff advice of an administrative decision-maker than there is to confront the advice of a judicial law clerk.

What the utilities want can best be described by example. Suppose utility X applies for a \$10 million increase in its revenue requirement. Intervenors identify ten issues and argue that utility X is only entitled to a \$6 million increase. Each of the ten issues has a dollar component that, added together, equals a \$4 million adjustment to utility X's application. These ten issues are, by virtue of the fact that they have been engaged by the intervenors, litigated issues. Utility X has the opportunity to respond, discover, cross-examine and either challenge or concede each issue. The Commission will ultimately decide each issue. So far in this simple example there is no basis for a due process objection.

Now, however, Commission staff has, along with the intervenors, investigated the application of utility X and, while agreeing with the ten issues identified by intervenors, identifies two additional issues, the total dollar value of which is \$1 million. The hearing is held and the Commission finds a revenue requirement increase of \$7 million is justified. Of the \$3 million that was disallowed, two were identified by the intervenors (the Commission finds for the utility on the other two) and one was identified by staff communications after the hearing based on the two issues that were never litigated. Utility X

feels ambushed and cries that due process has been violated. I think utility X's frustration is understandable and it may be correct on the due process question.

WHAT TO DO?

The objective in reforming the current process should be to devise a system whereby the parties know the arguments and positions of the Commissioners and staff and have an opportunity to confront them. (Confrontation need not imply hostility; it may be that a party will concede an argument, once it is known.) I recommend that the Commission adopt the Wisconsin model (attached), modified slightly to fit the circumstances in Montana. Adopting a modified Wisconsin model would require staff testimony in certain situations and it would require that the Commission front-end load the decision-making process -- as opposed to the back-end loading that is characteristic of the current process.

A modified Wisconsin model would work as follows: 1) The utility files its application; 2) Intervenors, Commissioners and Commission staff begin a thorough review of the application; 3) Intervenors begin discovery; Commission does not do discovery at this point but begins to identify possible issues and monitors the discovery of intervenors; 4) Intervenors file answer testimony engaging the application and identifying certain issues (either revenue requirement or COS/RD issues); 5) Commission staff reviews the answer testimony to see whether other issues

should be identified, and whether those that have been identified have been discussed satisfactorily; included in this last point would be intervenor arguments that staff disagrees with; 4) Staff conducts discovery on the utility and intervenors as necessary pursuant to issues raised in 5; 5) Staff files testimony on new issues, on issues not satisfactorily addressed and on positions taken by intervenors with which it disagrees; and 6) Staff advises Commission on final order as it does now.

WOULD THE NINE MONTH DEADLINE BE A PROBLEM?

Maybe; but I do not think a greater problem than it is presently. The additional issues format that has recently been grafted onto procedural schedules makes it practically impossible to meet the nine month deadline. There are some things that can be done to ease the pressure of the nine month schedule. For example: 1) revise minimum filing requirements to require the initial filing of much information that routinely is produced in response to discovery, 2) require a 30 day pre-filing so that an application would not be deemed filed for purposes of the nine month statute until the Commission certifies that it meets minimum filing requirements, 3) encourage more pre-hearing briefing and less post-hearing briefing, 4) separate revenue requirement from COS/RD -- placing COS/RD on a longer schedule if that

4 It may be that staff thinks an issue needs further discussion and/or an adjustment proposed should be changed (increased, decreased or eliminated).

is arguably consistent with statute. Consider the following schedule that leaves over two months from time of hearing to final order.

Application
 Discovery - 45 days
 Response - 30 days
 Answer Testimony - 30 days
 Discovery (including staff discovery) - 20 days
 Response - 20 days
 Rebuttal Testimony - 30 days
 Staff Testimony
 Cross Answer Testimony
 Discovery - 10 days
 Response - 10 days
 Hearing - 10 days
 Total - 205 days

I think a modified Wisconsin model has several important advantages over the current process.⁵ First, it addresses in large measure the utilities' due process concerns. The utilities may make a separation of functions argument based on the fact that the same staff that testifies also advises, but I think the Commission could argue successfully that such a combination of functions is acceptable. Even if the Commission were to lose on the issue, or were to voluntarily separate the functions, I do not see a significant burden on staff. There typically would not be a large number of issues neglected by the intervenors. I anticipate that staff would discover and testify on only a few

5 I have labelled it a "modified" model because there is no consumer advocate in Wisconsin. Therefore, the Wisconsin staff is responsible for investigation and testimony on all issues, not just "neglected" issues.

issues; on most issues it would remain purely advisory based on the litigation of the parties.

Second, this process would front-load the analysis of a rate case. Typically the Commission engages in 11th hour issue analysis and even identification. A modified Wisconsin model would move that process forward. The Commission would begin in-depth analysis along with the intervenors and continue that analysis through answer and rebuttal testimony. The hearing would not be the beginning of the educational process, as it sometimes is now, but toward the end. The hearing would be more focused and the period after the hearing could be more focused on finding the answer, not understanding the question. There could be greater emphasis on pre-hearing briefs than post-hearing briefs. Commissioners could have their concerns vented through staff discovery and testimony and fully explored at hearing. This last is in contrast to raising an issue long after the hearing, only to find that the time has passed to explore the issue on the record (not an uncommon occurrence at the Commission).

Third, I think this model would sharpen the staff performance. By actually exercising the rights and responsibilities of parties (which your rules impose on staff now), while not actually a party, the staff should feel a greater ownership interest in the process; the blood should flow a little quicker as the staff

mixes it up with the parties, always mindful of its special role, but helping to sharpen and develop the record.

I know that most persons in the utility division are strongly opposed to staff testimony. Their opinions should be carefully considered. I hope, however, that the Commission will not make this, or any other, decision based merely on staff preference. In informal conversation I have not heard an argument that convinces me that staff testimony is unwise and/or unworkable. Most commission staffs routinely present testimony. See A Profile of State Regulatory Commissions, attached.

DOES STAFF TESTIMONY VIOLATE §69-2-102, MCA?

Not in my opinion. The most thorough analysis of §69-2-102, MCA, is at Order No. 5399b, Docket No. 88.11.53, ¶¶16-23, located in the binder containing my earlier memo. The Commission concluded there that §69-2-102, MCA, is not an obstacle to the introduction of evidence by staff (which testimony would be). Of course, to the extent that §69-2-102, MCA, is interpreted as an obstacle to staff testimony, the utilities have indicated they would support changing it.

AN ALTERNATIVE TO STAFF TESTIMONY

An alternative to staff testimony is to issue proposed orders. This would work just as the process described above, with the exception that staff positions would be identified as

such and made part of a proposed order. The parties would have the opportunity to challenge the staff positions, as well as the Commission decisions, on exception to the proposed order. If they thought it necessary parties could ask that the hearing be reopened solely for the purpose of putting on evidence in response to the staff positions. This process would obviously not afford parties the opportunity to cross-examine the staff (although some limited discovery on the staff might be permitted). But a good case can be made that confrontation does not require cross-examination when a party is not adverse. The staff is not a party, it is not adverse in theory, and it need not be adverse in practice -- even though it may at times take positions that the parties view as contrary to their interests.

COMMISSION STATEMENT ON THE ROLE OF ITS STAFF
IN UTILITY CONTESTED CASES

As I stated earlier, in order for the Commission to effectively address due process/fairness concerns I think it is vital to make a Shermansesque policy statement (by rule if that is appropriate) on the proper role of staff. This would begin to exorcise partisan demons, real or perceived. I volunteer the following hastily written draft.

The Role of Staff In Utility Contested Case
Proceedings When Consumer Counsel Intervenes.
When a utility files a rate case it is the role of staff to investigate and analyze the application of the utility and the positions of the intervenors and to advise the Commission. If it is necessary to the development

of a complete and thorough record, it is the role of staff to introduce evidence and to develop positions independent of the parties. Though the object of the advice and positions of the staff may be adverse to or supportive of the interests of parties, the staff does not act on behalf of the interests of any party. At all times throughout a proceeding the staff shall conduct its activities on behalf of the public interest, in pursuit of just and reasonable rates, and its advice and positions shall reflect the application of its expertise without regard to the interests of the parties. The conduct of staff shall at all times reflect the letter and spirit of this rule.

MISCELLANEOUS POINTS

Additional Issues

It has recently become the practice for the Commission to identify additional issues and require the utilities to respond. Some may think this solves the due process problem; I do not.⁶ Assume that the Commission spots an issue that has not been litigated that may result in a downward (usually) revenue requirement adjustment. The utility responds with additional testimony and argues (naturally) that no adjustment is warranted. The intervenors may or may not engage the issue -- they may have spotted it before and concluded it was not worth pursuing. If they do not then the Commission is in exactly the same position it is now. Staff can attempt to develop the issue on cross, and

6 In addition to not solving the due process problem, additional issues are procedurally extremely cumbersome, making living within the nine month deadline virtually impossible.

the Commission can make an adjustment, and the utilities will cry "due process." Ah, the Commission will say, you were notified of this issue, we can scrutinize your entire operation in a rate case, you should have known an adjustment might be made. Yes, respond the utilities, but we cannot know what adjustment will be made, and why, and we should be able to challenge the adjustment and show the decision-maker why the adjustment should not be made. We should be given the chance to prove that we were at the Phantom of the Opera on the night in question.

And so, using the additional issues format the Commission may be back where it started. Of course, if the intervenors fully litigate the additional issues then there is no due process problem. Additional issues are really aimed at the intervenors, not the utilities. Whether the intervenors fully engage the additional issues is up to them. I think it is far more preferable for the Commission, through its staff, to take on these issues itself. The parties will litigate the case as they see fit, in their own interest. How the parties litigate a case should not concern the Commission. If the Commission perceives gaps in the record it should fill them independently, in the public interest.

SUBSTANTIAL EVIDENCE

Some argue that the only thing required is that a Commission decision be based on substantial evidence. I think that misses

the point of the due process challenge. The issue is the opportunity to confront, explain, respond to the evidence, not the evidence itself. Testimony that I was seen walking into my neighbor's house with an ax the night of November 17, 1992 might be substantial, but it does not make my conviction valid absent certain due process protections.

SUMMARY

I think fairness/due process requires the Commission to do two things: 1) make certain mechanical changes to Commission procedure, described above (perhaps there are others), 2) insist on behavior consistent with the legal requirements and spirit of fair contested case proceedings. (We who insist on right behavior in others should not resist imposing it on ourselves).

Thankfully, the sermon is over. I look forward to reading other comments and discussing this with you on the 17th.

READING MATERIAL

The following reading material will be on the due process shelf in the library. Other material may be added.

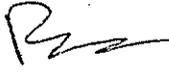
1. Robin McHugh memo, March 13, 1991, bound with the NOI, the comments and relevant parts of Order Nos. 5360e, 5399b and 5354e.
2. "Administrative Procedure in Government Agencies," pp. 55-60, passim; pp. 203-208, passim.

3. "The Decline of Separation of Functions in Regulatory Agencies," passim.
4. "Separation of Functions in Administrative Agencies," part 1, passim, this article is especially on point I think.
5. "Separation of Functions in Administrative Agencies," part 2, pp. 612-625, 649-653, and passim.
6. Cascade County Consumers Association vs. PSC, pp. 185-195. I think this Montana Supreme Court case would be extremely important in any court case where PSC due process is at issue.
7. Two briefs filed by the New Mexico PSC before the New Mexico Supreme Court. These are entertaining briefs on the New Mexico process and make good background reading for the due process question in Montana.
8. Administrative Law Treatise (green book), "Institutional Decisions," pp. 70-93, passim.
9. Administrative Law Treatise (red book), "Role of Staff" and "Separation of Functions," pp. 277-369, passim.
10. Tapes of the NOI due process roundtable. These may not be in the library, but are floating around. I encourage you to listen to the roundtable again (as I need to do). Let me know and I will set it up for you.
11. Miscellaneous documents -- memos, articles, etc.

MEMORANDUM

TO: Commissioners

CC: Dan, Eric, Mike, Legal

FROM: Robin McHugh 

DATE: March 13, 1991

RE: Docket No. 90.7.44

Introduction and Background

On August 7, 1990 the Commission issued a Notice of Inquiry (NOI) in this Docket requesting comments on its decision making process (Attachment A). The Commission issued the NOI pursuant to a commitment it made in Order No. 5360e, Docket No. 88.6.15: "Therefore, the Commission will institute a proceeding to solicit comments and suggestions regarding its decision making process." Order No. 5360e (MPC), Order No. 5399b (MDU), and Order No. 5354e (USWC) were orders on reconsideration issued in the late fall of 1989 that responded to strenuous due process objections from the utilities.¹

The Commission received comments in response to the NOI from MPC, MDU, USWC, Northwestern Telephone Systems (NWTS), Stone Container, Gerald Mueller, Conoco Pipe Line Company, MCC, and Great Falls Gas (GFG). MPC, MDU and USWC filed joint comments and will be referred to as the "utilities." MPC filed reply comments to the initial comments of Stone Container.

¹ The relevant parts of each order are attached as Attachment B (MPC), Attachment C (MDU), and Attachment D (USWC).

Telephone Exchange Carriers of Montana (TECOM) also filed reply comments.² This memo will focus primarily on the comments that address the concern that gave rise to the NOI: that parties to contested case proceedings do not have a meaningful opportunity to confront the positions of the Commission staff. Some comments address other procedural concerns. GFG addresses certain areas of substantive reform. Denise will address the concerns of Conoco Pipe Line Company separately.

I know that some Commissioners and staff members are skeptical of this Docket. There is the notion that due process is the last refuge of the person who doesn't prevail on the merits. In the case of a utility there is the suspicion that sufficient earnings would eliminate due process objections. This may be true, but I think it is also irrelevant. The evolution of criminal due process has not been driven by persons who have been acquitted of criminal charges, and refinements in administrative due process have not been driven by parties who are satisfied on the merits. I think that the Commission should consider this Docket both an obligation and an opportunity. It is an obligation because the law requires that administrative agencies should provide fair process, and it follows that agencies should

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Utilities -- Attachment E.
NWTS -- Attachment F.
Stone Container -- Attachment G.
Gerald Mueller -- Attachment H.
Conoco Pipe Line -- Attachment I.
MCC -- Attachment J.
Great Falls Gas -- Attachment K.
TECOM -- Attachment L.
MPC Reply -- Attachment M.

inquire whether their process meets that standard. It is an opportunity because the Commission has been plagued by procedural objections for many years. Being on unsure procedural footing has in my judgment detracted from the effectiveness of regulation. This Docket should be part of a larger Commission objective to resolve various procedural questions, thereby enabling the Commission to concentrate on the substance of regulation.

The Montana Model

The Commission uses what might be described as an investigatory/advisory model in typical contested case proceedings. This model has been discussed most thoroughly by the Commission at Order Nos. 5360e and 5399b. I encourage you to read carefully paragraphs 72-82 of Order No. 5360e and paragraphs 8-26 of Order No. 5399b (attached). In summary, the Montana model has the following components: 1) The staff is not a party; 2) The staff investigates toward the end of advising the Commission on just and reasonable rates; 3) The staff does not investigate on behalf of any constituency interest, either utility or consumer, it investigates on behalf of the public interest; and 4) The staff, through cross-examination and introduction of evidence seeks to ensure that the record will support a range of reasoned decisions. Some parties appearing before the Commission are convinced that the Commission staff practice often deviates from the model. This is indicated by formal procedural objections that have been made, as well as by some of the comments in response to the NOI.

Summary of Comments³

Utilities

1. Argue that the current procedure does not provide sufficient notice that certain issues and adjustments are being considered by the Commission staff -- and denies their right of confrontation of those issues and adjustments;
2. Recommend that all positions, including staff "advocacy," be advanced through testimony and subject to cross-examination;
3. Advisory role would be preserved, except on those issues on which staff testified. On those issues, other staff would advise.

Gerald Mueller

1. Legal, technical and policy advisory role of the staff should be maintained;
2. Effectiveness of staff advice is diminished "by isolating that advice from any scrutiny by parties to the proceeding."
3. Staff analysis comes as a surprise in Commission orders; reconsideration not a sufficient remedy;
4. The "isolation" of staff from parties should be corrected by allowing parties the opportunity to question members of the staff on their recommendations and to then supplement party testimony if necessary;

³ This summary will include due process comments only. Other comments will be addressed in another section.

5. After hearing staff would advise the Commission as it does now.

Great Falls Gas

1. Commission procedure in violation of 69-2-102, MCA (see paragraph 17, Attachment C).
2. Staff should not submit data requests and should limit its advice to the evidence presented by parties.
3. Staff could cross-examine to clarify issues.
4. If positions are not advocated by parties, no adjustment should be made based on a staff recommendation.
5. Commission role should be as a tribunal.

MCC

MCC did not propose any change in the Commission's decision making process.

Stone Container

1. Due Process important to ratepayer intervenors if they are to impact the ratemaking process.
2. Accepts advisory staff model -- but notes that other states use Commission staff as party subject to cross.
3. Objects to reliance on evidence not subject to cross-examination.
4. Not adequate notice of evidence relied upon from other dockets.

5. Objects to data requests moved into record at hearing and suggests no data response should be moved into record unless sponsored by a witness available for cross.

NWTS

1. For the most part finds Commission procedure fair and reasonable.
2. Agrees that utilities can be surprised by staff positions.
3. Believes 69-2-102, MCA, precludes the presentation of a case by the staff.
4. Recommends a staff written report be prepared and served on all parties prior to work sessions; the parties would respond and this would take the place of the present briefing procedure.

As noted, the essence of the due process complaints against the Commission is that parties are denied a meaningful opportunity to confront adverse positions of the Commission staff and to explain, submit rebuttal evidence, and cross-examine. The right of confrontation is fundamental to the judicial system, and it has been imposed on a sometimes recalcitrant administrative system by the courts. President Eisenhower described the right of confrontation as the code of Wild Bill Hickock and said that "in this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind ..." See

K.C. Davis, Volume 2, p. 444. In the administrative setting the frustration of inadequate confrontation was perhaps most colorfully expressed by Dean Acheson. (Many of you have read this but I think it bears a second look.)

The agency is one great obscure organization with which the citizen has to deal. It is absolutely amorphous. He pokes it in one place and it comes out another. No one seems to have specific authority. There is someone called the commission, the authority; a metaphysical omniscient brooding thing which sort of floats around the air and is not a human being. This is what is baffling There is [an] idea that Mr. A heard the case and then it goes into this great building and mills around and comes out with a commissioner's name on it but what happens in between is a mystery. That is what bothers people I myself have felt baffled in presenting cases because I knew that the man who was listening to me argue was not the man who was going to decide the case and what I wanted to do was get my hooks into the fellow who was going to decide the case.

Davis, Volume 3, p. 311. Similar frustrations over the perceived denial of adequate confrontation in administrative settings is expressed frequently in the literature on administrative law: "As Professor Wigmore has put it, a special danger of infraction of the 'fundamental rule' requiring disclosure to a party of what is to be the basis of an order affecting him 'is found in proceedings before administrative officials.'" Pound, Administrative Law, p. 70. Montana law recognizes the right of confrontation in administrative, contested case proceedings. See 2-4-612, MCA (Attachment N). Arguably, however, a right of confrontation does not apply to the positions of a nonadversarial staff.

Options

After considering the written and oral comments of those who responded to the NOI, my comments, and comments from other staff and Commissioners, the Commission will be faced with one of the following options: 1) Make no change, indicate that no modifications to current procedure will be made in response to due process objections; 2) Designate staff as advisory only: investigation and cross-examination is for purposes of clarification only; staff does not introduce evidence; 3) Direct staff to present testimony and be subject to cross-examination; 4) Direct staff to prepare some sort of document (proposed order, staff report) that gives notice of staff positions and allows a written response by parties and an opportunity to present additional evidence.

No Change

Based on my reading of relevant Montana law, and a small portion of the literature, I think there is a significant chance that the Commission would lose a due process challenge. I would put the odds at no better than 50/50. In defense of the Commission it can be pointed out that staff is not a party, is not adverse to any party, and therefore should not be subject to the same forms of confrontation that parties must submit to.⁴ Par-

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The success of this argument may hinge on whether or not staff practice conforms consistently with the staff model described in Commission orders. The utilities would argue that, despite what the Commission says, its staff practices as an adversary. In any event, they would say that, adversary or not, staff is taking positions based on extensive

ties should have no more right to confront the advisory staff than a party in court would have the right to confront the judge's law clerk. Further, whatever confrontation of staff positions is required by due process is already being provided by reconsideration and rehearing. The utilities response, much of which I think is persuasive, is contained at pp. 10-17 of their written comments (Attachment E).

The Commission has quoted the Montana Supreme Court that "all administrative boards and tribunals should zealously guard against any appearance of unfairness in the conduct of their hearings." Cascade County v. PSC, 144 Mont. 169, 394 P.2d 856 (1964). (Clearly, Commission process appears unfair -- to utilities as well as other parties that come before the Commission.) The Commission has said that it agrees with the Supreme Court and "that it should be generous with the process it affords all parties that appear before it" See Order No. 5360e and NOI. In reaching a decision in this Docket I think each Commissioner should consider not only the law, and the odds of defeating a court challenge, but whether current process is generous to parties under Commission jurisdiction. I think the following is an astute and relevant observation:

So long as detached and informed opinions differ as to what is justice, one objective in a democratic society is to appear to do justice. That ideal remains unrealized so long as significant groups, whether or not misled, firmly believe that justice is de-

nied. Furthermore, a regulatory program is not likely to be successful without a prevailing attitude of confidence and co-operation on the part of the regulated parties.

K.C. Davis, 61 Harv. L.R. 409 (1948).

Advisory Staff Only

GFG suggests in its comments that the Commission should be a tribunal only, and that staff's role should be limited to offering advice on the evidence submitted by parties. Others have urged this procedure on the Commission in the past. While such a model is plausible, and used in a number of other jurisdictions, it has been specifically rejected by the Commission as contrary to the tradition of staff involvement in contested cases and as not required by Montana law. See Order No. 5399b, Attachment C. I assume this is still the Commission's position, so that the issue is not whether an advisory/investigatory staff function, but rather what form that function should take. If this is not correct then we can discuss it.

Confrontation of Staff Positions

If the Commission decides to change current procedure to allow for confrontation of staff positions then the question is what form should that confrontation take. The utilities argue that testimony and cross-examination are required. NWTS suggests a staff written report.

Staff Testimony

There is no question that the best way to dispose of the primary procedural objection raised in Commission contested case proceedings would be to implement the recommendations of the utilities. That said, there are practical and legal questions to consider before making such a change. First, the Commission utility staff is adamantly opposed to staff testimony. If there are sound reasons for that opposition, having to do with staff resources, workload, the nine month statute, etc., then that opposition should certainly be considered. Staff testimony would be a major change (and a significant change for the legal division) and I recommend that the Commission understand what the effects of that change would be before making a decision. Second, it is arguable that 69-2-102, MCA, precludes staff testimony. (NWTS apparently thinks so.) I believe that the Commission's interpretation of 69-2-102, as expressed at Order No. 5399b (attached), would allow for staff testimony. However, that legal question would have to be considered further. Finally, if due process requires confrontation of staff positions, does confrontation require testimony and cross-examination? Based on my reading of Montana law, the answer may depend on whether or not the Commission is credible when it asserts that its staff is not adversarial. MAPA does not give a right to cross-examine nonadversarial positions. See Northern Plains Resource Council, 181 Mont. 500, 533. Northern Plains is not dead on point, however, and the utilities would probably argue 1) that staff has an adversarial mind set, Commission claims to

the contrary notwithstanding, and 2) even if not adversarial, staff takes positions on the issues that the utilities should have the opportunity to challenge through cross, and explain on rebuttal.

Staff Report/Proposed Order

NWTS suggested a form of confrontation other than staff testimony. A staff written report or staff proposed order would be much less disruptive of present procedure than staff testimony, although the nine month deadline may be a problem. A staff proposed order would contain staff recommendations on issues clearly litigated by the parties. It would also clearly identify and make recommendations on staff issues. Parties would have the opportunity to challenge the litigated issues (as they do now on reconsideration) and also the opportunity to challenge the staff issues -- through briefing if sufficient, or through additional evidence if necessary. A variety of models could be considered, but the point would be to afford parties an opportunity, other than cross-examination, to confront staff positions prior to the final order.

Recommendations

I recommend that the Commission change its procedure to allow for some form of confrontation of staff positions. In order to determine what sort of change to make I recommend that the Commission consider the advantages and disadvantages of staff testimony, as well as other forms of confrontation. I recommend

that a committee be formed, composed of staff members and Commissioners, to study the matter and report back by a certain date.

Conclusion

Unless the legislature or the courts speak directly to the issue, we are not going to know for sure what confrontation is necessary, at a minimum, to meet due process requirements. In my opinion, if the Commission wants an active, aggressive investigatory/advisory staff, as opposed to an advisory/review staff, then some form of confrontation of the staff should be implemented. I say this, not because I know that if the Commission does not allow for confrontation the courts will impose it, but because I think some form of confrontation is reasonable and fair.

Fifty years ago a committee on federal administrative procedure made some comments that I think are relevant to the procedural challenge the Commission faces today:

Since positions [in formal administrative proceedings] are strongly held, interests clash, and issues are often difficult and technical, the cases have an importance far greater than their number indicates. More than in any other administrative activity, the element of controversy plays a major part, and there must be, therefore, an even greater insistence on impartiality in decision.

Procedure at this stage must be framed to require that the special methods of the administrative process operate in such a way as to give convincing assurance, not that the deciding body is indifferent to the result, because it is usually charged with responsibility for continuous protection and advancement of a particular public interest or policy, but that its decision is not moti-

vated by any desire to deal with the parties or their interest otherwise than in the manner which an objective appraisal of the facts and the furtherance of the public duty imposed upon the agency require.

The same committee also made the following point:

Insofar as predispositions may exist in the more highly charged fields in which administrative agencies operate, they are mainly the product of many factors of mind and experience, and have comparatively little relation to the administrative machinery. There is no simple way of eliminating them by mere change in the administrative structure. They can only be exorcised by wise and self-controlled men. The problem is inherently one of personnel and the traditions in which it is trained.

Finally, mine is not the last word on administrative due process. The comments submitted were written by persons with considerable experience in administrative and Commission procedure. In addition, the other Commission attorneys all have at least some familiarity with this issue, and may have opinions different from mine. Tim especially has given considerable thought to the issue, including some inquiry into procedure used in other jurisdictions. I encourage you to seek second and third opinions from all involved with this issue, including the utility staff.

Other Issues

Certain other suggestions relating to Commission procedure were made in response to the NOI:

1. Commission action on certain matters is unnecessarily dilatory;

2. The Commission should encourage stipulated settlements;
3. The Commission should work with utilities to accomplish legitimate business objectives;
4. The Commission should not grant waivers of minimum filing requirements absent notice and opportunity to comment;
5. The Commission should not grant interims in cases in which rate design is also an issue;
6. The Commission should allow a public review of compliance filings.

The reply comments of TECOM and MPC address a couple of these suggestions. Some of these suggestions/comments may come up at the oral presentation. I believe they need to be addressed as part of a larger procedural review.

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NATIONAL CONFERENCE OF REGULATORY ATTORNEYS

May 10, 1989

St. Paul, Minnesota

A NONADVOCACY ROLE FOR COMMISSION STAFF

By

Steven M. Schur

Chief Counsel

Public Service Commission of Wisconsin

I. THE WISCONSIN MODEL

In Wisconsin, the role of staff in commission proceedings is required by administrative rule to be a nonadvocacy role. The purpose of this presentation is to briefly describe that role, discuss the legal underpinnings for the practice, and then to spend a little time discussing its practical benefits.

To many of you the staff role I'm about to describe will sound anachronistic--the way they did things in the old days, before modern improvements such as "fully separated staffs" were grafted onto the hoary tree of regulation. In Wisconsin, commission staff still performs the daily administrative tasks of the agency, conducts the initial investigations, appears at hearings, advises the commission during their deliberations, writes the orders, and defends them in court. The most controversial aspect of this diversified role is that the same staff who appear at hearings usually are available to advise the

commission in their deliberations, which, by the way, are done at open meetings where only the commission and staff are permitted to speak.

The staff role at hearings is defined by administrative rule, in sec. PSC 2.32 (4), Wisconsin Administrative Code which states simply that

Members of the commission staff appear neither in support of nor in opposition to any cause, but solely to discover and present, if necessary, facts pertinent to the issues.

While the original reasoning of the commission for adopting this rule is obscured in the mists of time, the commission had an opportunity to revisit the rule in the early '70's when a consumer group petitioned the commission for a rule change that would have required the staff to perform an "adversary" role. The commission rejected the proposed change in the staff role, stating:

The staff is an extension of and subordinate to the commission itself. Since the commission's function, under the statutes, is that of unbiased fact-finding and decision-making, the staff's position must be consistent with that function and, again, this is a matter of law which the commission has no power to change by rule.

The suggestion that the staff take an "adversary" role in proceedings before the commission overlooks the fact that many of such proceedings involve the diverse interest of several individuals or groups. Only through the functioning of a truly impartial staff can all of such diverse interests receive a fair and unbiased hearing and decision.

51 PSCW 498, 502. See also partially dissenting opinion of Chairman William F. Eich, who stated he would welcome "vigorous advocacy of consumer and other interest-group positions" by a consumer advocate or people's counsel, but that staff "as an extension of and adviser to the commission, should remain impartial and unbiased in the discharge of its professional duties." 51 PSCW at 504.

A similar view of the staff role is espoused by Prof. Kenneth Culp Davis in his Administrative Law Treatise, 2d Edition. In the introduction to Chapter 17, a chapter devoted to discussing the role of staff, he states:

The role of an agency's staff is usually a vital part of the administrative process. It is a source of special strength of the administrative process, and it also introduces elements of special weakness. The strength springs from the superiority of group work--from internal checks and balances, from cooperation among specialists in various disciplines, from assignment of relatively menial tasks to low-paid personnel, and from capacity of the system to handle huge volumes of business and at the same time maintain a reasonable degree of uniformity of policy determinations. The weakness stems from reliance on extrarecord advice, from frustration of parties' desire to confront those whose reactions are crucial in the decisionmaking, and from the failure to use opinion writing as a discipline for thinking out every facet of the decisionmaking.

Davis, Administrative Law Treatise, 2d Ed., Vol. 3, pp. 278-9 (1980).

II. HOW THE NONADVOCACY STAFF ROLE IS PERFORMED IN THE HEARING CONTEXT

Being a roomful of attorneys, you are probably puzzling about how a staff attorney behaves while performing in a nonadvocacy role. The simple answer is: not much differently than from normal. You still have the responsibility to coordinate the presentation of the staff evidence. This may include cross-examination of other parties' witnesses, both to elicit additional facts for the record, and also to test the creditability of the evidence presented by other witnesses. You may make objections to repetitive or irrelevant material in order to protect the record for decision-making and review. You may write briefs, and give oral argument explaining the staff evidence, and the staff analysis of issues in the case.

What then is different about how a staff attorney performs in a nonadvocacy role? One fundamental difference is that you avoid using trial advocacy skills and tricks to advance the staff position, or to cut down witnesses whose testimony is inconsistent with staff views. You do not use procedural ploys to gain advantage. Your overall goal is the fair presentation of all reasonable viewpoints on the record, not just the staff position. This means that, at times, you may find yourself advising or assisting members of the public and inexperienced intervenors in getting

their viewpoints across, even if they are quite different from those of the staff.

The second major difference is, when there is a diversity of views on an issue among staff, you facilitate the presentation of the differing viewpoints on the record. You do not seek to arrive at a "unified" staff position to advocate at the hearing, even if you personally believe one position has the greater merit. You help opposing staff members prepare testimony that counters one another. You may even find yourself preparing or doing cross-examination of one staff member on behalf of another. In such situations, it is an absolute must for the staff attorney to apprise the staff witness in advance that questions will be forthcoming on certain subjects on behalf of other staff members.

As nonadvocacy staff attorney, you have a multiplicity of clients, not the least of whom are the commissioners themselves. Your primary duty to them is the development of a record for decision-making that permits a range of reasonable choices. You do not seek to create a record which will support only the choice favored by the staff. Where one or more of the commissioners wants to have a particular alternative explored on the record, your task would be to aid in the development of testimony by staff or outside consultants regarding that alternative, regardless of whether the staff favors that alternative.

III. LEGAL BASIS FOR NONADVOCACY STAFF ROLE

Can commission staff perform the role of advising the commission and also appearing in commission hearings without running afoul of legal requirements embodied in the doctrines of due process and fundamental fairness? The answer is "Yes, usually." The legal underpinnings have much to do with the nature of the proceedings, and the questions that the commission must decide.

At the outset, there is one major exception. In proceedings of a prosecutorial nature, where the question is whether the commission should impose a sanction or penalty on regulated entity, I believe that separation between staff involved in prosecuting the case and the decision-makers must be maintained. SEC v. Chenery Corp., 332 U.S. 194 (1947).

But the usual commission proceeding is of a very different nature. The determination of "just and reasonable rates", "the public interest", and the "public convenience and necessity" have generally been held to be "quasi-legislative" in nature. Indeed there is a considerable body of cases that says that such determinations cannot be delegated to courts without violating the constitutional separation of powers requirement. Two examples of typical separation of powers cases, from the Wisconsin jurisdiction, are Town of Pleasant Prairie v.

Department of Local Affairs & Development, 113 Wis.2d 327, 342-346, 334 N.W. 893 (1983) and Westring v. James, 71 Wis.2d 462, 467-8, 238 N.W.2d 695 (1976). See also 69 ALR 257; Am. Jur. 2d Constitutional Law Secs. 324, 339; Am. Jur. 2d Administrative Law Secs. 550, 579, 581.

As you know, fundamental fairness and due process requirements are not nearly as strict for quasi-legislative proceedings and quasi-legislative determinations. The decision-maker has a much greater degree of discretion. The decision-maker is usually expected to utilize special expertise in exercising that discretion. The decision-maker may go outside the record to look at "legislative facts." See e.g., Westring v. James, supra. Davis, supra., Chapter 15, "Judicial and Official Notice." Indeed, a trial-type hearing may not be required at all in the absence of dispute as to adjudicative facts. Davis, supra., Chapter 12, "Requirement of Opportunity for Trial-type Hearing."

An example of the difference in legal requirements may be found in the most recent revision of the Wisconsin Administrative Procedure Act, Chapter 227, Wis. Stats. The revision committee found it necessary to recognize the differences in due process requirements based on the nature of the matter under consideration. They created three classes of "contested case" hearings. Although the revisors

consciously avoided using the term "quasi-legislative," one can readily discern that that is what is described in the definition of a "Class 1 contested case":

A "class 1 proceeding" is a proceeding in which an agency acts under standards conferring substantial discretionary authority upon the agency. Class 1 proceedings include, but are not restricted to: rate making; price setting; granting of certificates of convenience and necessity; the making, review or equalization of tax assessments; and the grant or denial of licenses.

Sec. 227.01 (2), Wis. Stats.

The Wisconsin APA goes on to set differing requirements for depending on which class of contested case proceeding is involved. An example of particular interest is the ex parte communications provision, sec. 227.13, Wis. Stats. The revision committee expressly exempted communications by agency employees in a Class 1 proceeding from the prohibition against ex parte communications. The genesis of this exemption was a remark by former Wisconsin Chairman Richard D. Cudahy, now a Justice on the Seventh Circuit Court of Appeals, who said that if key staff people would not be permitted to both testify and advise the commission in rate cases, then the staff would no longer testify. The committee (which included intervenor lawyers) thought, on balance, that it would be better to permit staff to do both in Class 1 legislative-type proceedings.

IV. FAIRNESS AND EFFECTIVENESS OF THE NONADVOCACY STAFF ROLE

Which brings me to the last point: even if nonseparated, nonadvocacy staff is permitted under law, is it fair to parties at commission proceedings? I recognize that there is nothing harder on a lawyer than to sit at an open commission deliberation of his or her case without being permitted to speak, while staff (including staff counsel) are participating in the discussion right in front of them. The critical fact is, however, that regulatory agencies such as ours will always have advisory staff who will participate in open meetings and otherwise in the decision-making process. The staff will always be giving their advice and stating their positions on the issues in important cases. As noted by Professor Davis, such staff participation is an essential ingredient to the effective operation of an agency.

The fairness of the nonadvocacy staff role is that interested parties do get a chance to hear and test the staff advice at the hearings, and to counter it through rebuttal testimony. Thus, one of the weaknesses of the process mentioned by Professor Davis, the offering of advice and giving of extrarecord facts with no opportunity for parties to correct or rebut, is alleviated simply by having nonadvocacy staff present their views at the hearing without having to give up their advisory role.

There are several important advantages to the agency for utilizing the nonadvocacy staff role. First of all, it saves the expense of creating and maintaining a duplicate staff, thereby allowing for a smaller, less compartmentalized staff. Secondly, it increases the decision-making of the commission, because the entire regulatory staff is available to advise the commission. Thirdly, it increases the power of staff and the commission vis-a-vis the utilities, because staff remains in close contact with the commission. Therefore, outside of the context of contested cases, it opens up a whole range of informal actions that the commission can take through the staff.

In conclusion, I submit that the nonadvocacy staff role makes staff more effective in protecting the public interest than they would be in a separated, advocacy role, and at a lesser cost to the public.

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A PROFILE OF
STATE REGULATORY COMMISSIONS

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A PROFILE OF STATE REGULATORY COMMISSIONS

The Texas legislature recently established a Task Force to study and recommend changes in the Texas Public Utility Commission. The Task Force requested specific information relating to other state public utility commissions (PUCs) from industrial electricity consumers through the Texas Industrial Energy Consumers (TIEC).¹

TIEC retained the consulting firm of FINCAP² to help prepare responses to the requests from the Task Force. FINCAP first reviewed data on state PUCs published by the National Association of Regulatory Utility Commissioners (NARUC).³ Although the NARUC data are very comprehensive (indeed, the 1988 Annual Report is 952 pages in length), they did not provide information sufficient to respond to the Task Force.

FINCAP thus initiated a survey of state PUCs to determine how PUCs exercise their regulatory responsibilities over public utilities. Of particular interest were the organization and operations of PUCs, and the role of PUCs' staffs and Attorneys General in rate cases.

The survey was conducted in September 1989. In-depth telephone conversations were held with knowledgeable persons at the 51 PUCs in each state and the District of Columbia that regulate electric utilities. Questions included:

¹The Texas Industrial Energy Consumers (TIEC) is an association of industrial energy consumers which own and operate large facilities in Texas. TIEC was organized to respond to and address issues relating to the provision of adequate, reliable, and cost-effective electric utility service in Texas.

²Financial Concepts and Applications, Inc. (FINCAP) is an economic and financial consulting firm located in Austin, Texas. Adrien M. McKenzie was principally responsible for conducting this survey.

³See for example the: 1988 Annual Report on Utility and Carrier Regulation, National Association of Regulatory Utility Commissioners, Washington, D.C.

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Commissioners

- Number of Commissioners?
- Method of Selection?
- Confirmation Requirements?
- Length of Term?
- Selection Criteria?
- Method of Chairman Selection?
- Term of Chairman?

Staff and Intervention

- Does staff present testimony?
- Is there a separate office of public advocate?
- What is the role of the Attorney General?

The responses to the survey are summarized in Tables I and II. They show that:

- 31 PUCs are comprised of 3 commissioners;
- 16 PUCs are comprised of 5 commissioners; and
- 4 PUCs are comprised of 7 commissioners.

Commissioners are appointed in 38 jurisdictions and elected in the other 13. All but 3 states stagger commissioner's terms, with the length of commissioner terms being distributed as follows:

- 14 have 4-year terms;
- 5 have 5-year terms;
- 31 have 6-year terms; and
- 1 has 8-year terms.

Nearly 80 percent (38 of 51) of the PUCs' staffs routinely present testimony in rate cases. PUC staffs in nine states do not present testimony and the staffs in four states only rarely present testimony. One-half the states have no public advocate, with the Attorneys General assuming that role in 14 states. In another 19 states, however, the Attorneys General do not, or only

infrequently, participate in rate cases. PUC staffs generally have very broad representation -- either the "public" or "ratepayer" interests, or presenting "impartial advice." In three cases, PUC staffs typically represent smaller consumers, while Attorneys General in ten states represent "small" consumers.

The data presented in this profile were obtained from sources believed to be reliable and reflect conditions at the time collected, but they were not independently verified and do not reflect subsequent changes. ELCON presents the results in the hope that they serve as a

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COMMISSIONERS

No.	Method of Selection	Confirmation	Term in Years	Selection Criteria
ALABAMA	Elected Statewide	None	4 staggered	Broad Nominating Committee
ALASKA	Appointed by Gov	Both Houses	6 staggered	1 Engineer, 1 Legal, 1 Business, 2 Open
ARIZONA	Elected Statewide	None	6 staggered	None
ARKANSAS	Appointed by Gov	Senate	6 staggered	One must be an Attorney
CALIFORNIA	Appointed by Gov	Senate	6 staggered	None
COLORADO	Appointed by Gov	Senate	4 staggered	None
CONNECTICUT	Appointed by Gov	Both Houses	4 staggered	3 experienced in law, econ. acct, eng; min 2 professions
DELAWARE	Appointed by Gov	Senate	5 staggered	District Representation Requirements
D.C.	Appointed by Mayor	DC Council	4 staggered	None
FLORIDA	Appointed	Senate	4 staggered	PSC Nominating Council presents 5 candidates to Gov
GEORGIA	Elected Statewide	None	6 staggered	None
HAWAII	Appointed by Gov	Senate	6 staggered	Background in engineering, law, accounting or gov't
IDAHO	Appointed	Senate	6 staggered	None
ILLINOIS	Appointed by Gov	Senate	5 staggered	None
INDIANA	Appointed by Gov	None	4 staggered	Nominating Committee selects 3 for Gov's choice; 1 must be attorney
IOWA	Appointed by Gov	Senate	6 staggered	None
KANSAS	Appointed by Gov	Senate	4 staggered	None
KENTUCKY	Appointed by Gov	Senate	4 staggered	No more than 2 of same profession
LOUISIANA	Elected by District	None	4 staggered	None
MAINE	Appointed by Gov	House & Senate	6 staggered	None
MARYLAND	Appointed by Gov	Senate	5 staggered	None
MASSACHUSETTS	Appointed by Gov	None	Coterminous with Governor	None
MICHIGAN	Appointed by Gov	Senate	6 staggered	None
MINNESOTA	Appointed by Gov	Senate	6 staggered	1 outside 7 county metro area
MISSISSIPPI	Appointed by Gov	None	4 concurrent	None
MISSOURI	Appointed by Gov	Senate	6 staggered	None

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COMMISSIONERS

No.	Method of Selection	Confirmation	Term in Years	Selection Criteria	
5	Elected by District	None	4 staggered	None	MONTANA
5	Elected by District	None	6 staggered	None	NEBRASKA
5	Appointed by Gov	Executive Council	4 staggered	1 finance, 1 engineer, 1 at large	NEVADA
3	Appointed by Gov	Senate	6 staggered	1 attorney, 1 econ/business, 1 at large	NEW HAMPSHIRE
3	Appointed by Gov	Senate	6 staggered	None	NEW JERSEY
3	Appointed by Gov	Senate	6 staggered	None	NEW MEXICO
7	Appointed By Gov	Senate	6 staggered	None	NEW YORK
7	Appointed by Gov	Both Houses	8 staggered	None	NORTH CAROLINA
3	Elected Statewide	None	6 staggered	None	NORTH DAKOTA
5	Appointed by Gov	Senate	5 staggered	Nominating Council submits 4 names to Governor	OHIO
3	Elected Statewide	None	6 staggered	None	OKLAHOMA
3	Appointed by Gov	Senate	4 staggered	None	OREGON
5	Appointed by Gov	Senate	5 staggered	None	PENNSYLVANIA
3	Appointed by Gov	Senate	6 staggered	None	RHODE ISLAND
7	Elected by Assembly	None	4 concurrent	Candidates apply to Merit Selection Panel	SOUTH CAROLINA
3	Elected Statewide	None	6 staggered	Nominated by District	SOUTH DAKOTA
3	Elected Statewide	None	6 staggered	None	TENNESSEE
3	Appointed by Gov	Senate	6 staggered	None	TEXAS
3	Appointed by Gov	Senate	6 staggered	None	UTAH
3	Appointed by Gov	Senate	6 staggered	Judicial Process Committee submits names to Governor	VERMONT
3	Elected by Assembly	None	6 staggered	One must have law degree	VIRGINIA
3	Appointed by Gov	Senate	6 staggered	Notice of Vacancy sent to all constituents	WASHINGTON
3	Appointed by Gov	Senate	6 staggered	1 lawyer with 10 yrsexperience	WEST VIRGINIA
3	Appointed by Gov	Senate	6 staggered	None	WISCONSIN
3	Appointed by Gov	Senate	6 staggered	None	WYOMING

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	Selection of Chair By	Term in Years	Open Meeting Required	Staff Present Testimony	Separate Public Advocate	Role of Attorney General
ALABAMA	Elected	Commissioner Term	Yes	No, Rpts Only	No	Consumer Advocate
ALASKA	Governor.	2	Closed Deliberations	Yes	No	May Represent State Agencies
ARIZONA	Commission	Commission Discretion	Yes	Yes	Yes	May Represent State Agencies
ARKANSAS	Governor	Gov. Discretion	Yes	Yes	See A.G.	Consumer Advocate
CALIFORNIA	Commission	1	Less than a quorum can meet	Yes	No	Infrequent Participation
COLORADO	Governor	Gov. Discretion	Yes	Yes	See A.G.	Consumer Advocate
CONNECTICUT	Commission	1	Yes	No	Yes	Infrequent Participation
DELAWARE	Gov. with Senate Confirmation	Gov. Discretion	Closed Discussions.	Yes	Yes	Assigned as Legal Counsel
D.C.	Mayor	Commissioner Term	Closed Discussions	Yes	Yes	Represents District Interests
FLORIDA	Commission	2	Yes	Yes	Yes	No Participation
GEORGIA	Commission	2	Yes	Yes	Yes	Infrequent Participation
HAWAII	Governor	Commissioner Term	Contested cases closed	No	Yes	Legal Counsel to Public Advocate
IDAHO	Commission	2	Yes	Yes	No	Infrequent Participation
ILLINOIS	Governor	Gov. Discretion	Yes	Yes	Yes	Regular Participation
INDIANA	Governor	Commissioner Term	Yes, when 3 or more meet	Yes	Yes	Infrequent Participation
IOWA	Gov. with Senate Confirmation	2	Yes, except non-contested cases	No	See A.G.	Represents General Public
KANSAS	Commission	Commissioner Term	Yes	Yes	Yes	Infrequent Participation
KENTUCKY	Governor	Commissioner Term	Deliberations with staff closed	Rarely	See A.G.	Intervenes for General Public
LOUISIANA	Commission	1	Yes, except when only 2 meet	Rarely	See A.G.	Represents consumers
MAINE	Governor	Gov. Discretion	Yes, except non-contested cases	Yes	Yes	No Participation
MARYLAND	Governor	Commissioner Term	Closed Deliberations	Yes	Yes	Infrequent Participation
MASSACHUSETTS	Governor	Coterminus with Governor	No	No	See A.G.	Represents small consumers
MICHIGAN	Governor	Gov. Discretion	Closed Deliberations	Yes	No	Intervenes for General Public
MINNESOTA	Governor	Coterminus with Governor	Yes, except when only 2 meet	No	See A.G.	Represents small consumers
MISSISSIPPI	Commission	2	Yes	Yes	See A.G.	Represents small consumers
MISSOURI	Governor	Commissioner Term	Yes, except when only 2 meet	Yes	Yes	Represents State Agencies

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Selection of Chair By	Term in Years	Open Meeting Required	Staff Present Testimony	Separate Public Advocate	Role of Attorney General	
Commission	2	Yes, except when only 2 meet	No	Yes	Infrequent Participation	MONTANA
Commission	Commission Discretion	Yes	Rarely	No	Infrequent Participation	NEBRASKA
Governor	Gov. Discretion	Yes, except when only 2 meet	Yes	See A.G.	Represents Small Consumers	NEVADA
Gov., Council Confirms Governor	Commissioner Term	Closed Deliberations	Yes	Yes	Infrequent Participation	NEW HAMPSHIRE
Governor	1	Yes	Rarely	Yes	Represents Staff Before ALJ & Courts	NEW JERSEY
Commission Tenure Governor	Commissioner Term Gov. Discretion	Closed Deliberations Yes, if Quorum	Yes	See A.G. Yes	Represents Small Consumers Represents Small Consumers	NEW MEXICO
Governor	4	Closed Deliberations	Yes	See A.G.	Represents Small Consumers	NEW YORK
Commission	2	Closed Deliberations	Yes	No	Infrequent Participation	NORTH CAROLINA
Governor	Gov. Discretion	Yes	Yes	Yes	Represents Staff	NORTH DAKOTA
Commission	2	Yes	Yes	See A.G.	Represents Small Consumers	OHIO
Commission	2	Yes	Yes	Yes	Represents Staff	OKLAHOMA
Governor	Commissioner Term	Yes	Yes	See A.G.	Represents Small Consumers	OREGON
Governor	Commissioner Term	Yes	Yes	Yes.	Represents Staff	PENNSYLVANIA
Commission	2	Yes	Yes	Yes	No Participation	RHODE ISLAND
Commission	2	Yes	Yes	No	Represents Staff	SOUTH CAROLINA
Commission	2	Yes	Yes	No	Infrequent Participation	SOUTH DAKOTA
Commission	2	Yes	Yes	Yes	Represents State Agencies	TENNESSEE
Governor	Gov. Discretion	May Hold Closed Session	No	Yes	Represents Staff and State Agencies	TEXAS
Gov. with Senate Confirmation	Commissioner Term	Closed Deliberations	No	Yes	Infrequent Participation	UTAH
Commission	1	Closed Deliberations	Yes	See A.G.	Represents Small Consumers	VERMONT
Gov with Senate Confirmation	Commissioner Term	Yes	Yes	Yes	Represents State Agencies	VIRGINIA
Governor	Gov. Discretion	May Hold Closed Session	Yes	Yes	Infrequent Participation	WASHINGTON
Governor	2	Yes	Yes	No	Infrequent Participation	WEST VIRGINIA
Commission	2	May Discuss Position or Case Closed	Yes	No	Infrequent Participation	WISCONSIN
						WYOMING

Service Date: December 31, 1992

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

* * * * *

IN THE MATTER OF the Montana Public)
Service Commission's Solicitation of)
Comments and Suggestions Regarding)
its Decision Making Process.)

UTILITY DIVISION

✓ DOCKET NO. 90.7-443

92-47 ✓

NOTICE OF COMMISSION ACTION

The Montana Public Service Commission (PSC) has determined that the changes to be implemented by the PSC as a result of its consideration of the comments and suggestions received in the above-entitled inquiry should be conveyed to interested persons. The changes, as explained here, are general descriptions of what the PSC determines might be of immediate interest. The changes, as more formally implemented, will be detailed as procedures develop and procedural orders are issued.

The PSC will implement a new additional issues procedure to eliminate the potential due process, or fairness, problem arising from inadequate issue identification. In general, the new additional issue procedure will require that all participants, particularly the PSC, will have identified all issues to be decided in the case within 12 weeks after the rate case filing, which will be about 3 weeks after intervenor initial testimony. At about this point the PSC will issue a notice of additional issues. After that time, in approximate two week intervals there will be applicant additional issue testimony, discovery, responses to discovery, intervenor testimony on additional issues,

discovery, responses to discovery, and applicant rebuttal testimony on additional issues. With this schedule, additional issue testimony will have been completed about seven days prior to hearing.

In order to facilitate the operation of the new additional issue procedure, primarily to accommodate apparent fairness requirements for intervenors and the PSC itself in the initial stages of a rate case, the PSC will soon be proposing an administrative rule requiring a prefiling notification of rate case filings. It is presently proposed that this rule provide for a 30 day notification. The details and rationale for this rule will be included in the applicable rulemaking notice. If adopted, the rule will effectively permit a more liberal time for notice, intervention, and intervenor and PSC review of the filing in the initial stages of a rate case. It will also permit some flexibility in scheduling throughout the rate case proceeding.

The PSC will also implement a new procedure to eliminate the due process, fairness, or Rules of Evidence problems surrounding mass introduction of data responses into the evidentiary record. In general, the procedure will require that each rate case participant, including staff, will specifically identify, in a prehearing memorandum or similar notice: (a) each data response that it intends to offer as evidence; (b) the witness through which it will be offered; and (c) the issue to which the response relates. At the beginning of the hearing all participants will

be required to state whether it is their intention to permit any identified data responses to be entered into the record, without required formalities or objection, or whether they intend to require that any identified data response be offered only through a witness, subject to further objection and cross-examination.

BY THE MONTANA PUBLIC SERVICE COMMISSION

DANNY OBERG, Chairman
WALLACE W. "WALLY" MERCER, Vice Chairman
BOB ANDERSON, Commissioner
JOHN B. DRISCOLL, Commissioner
TED C. MACY, Commissioner