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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 )

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**NorthWestern Energy's Motion for and Brief in Support  
of Reconsideration of Final Order No. 7219h**

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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 Final Order 7219h* (“Motion”) in the above-captioned docket that the Montana Public Service Commission (“Commission”) issued on Monday, October 28, 2013. Specifically, NorthWestern moves the Commission to reconsider and reverse the following in Final Order 7219h (“Order”):

1. The decision to deny NorthWestern’s request to recover \$1,419,427 in incremental costs incurred as a result of the outage at the Dave Gates Generating Station (“DGGS”) in early 2012;
2. The decision to establish a new burden for recovery of incremental Lost Revenues in future proceedings;
3. The decision to adjust the net-to-gross (“NTG”) ratio from 1.0; and
4. The decision to adjust the burn hours of compact fluorescent lights (“CFLs”).

These decisions are arbitrary and capricious, violate the Commission’s procedures, violate NorthWestern’s constitutional right to due process, are clearly erroneous in light of the whole record, are not based on substantial credible evidence, include errors of law, and exceed the Commission’s statutory authority. Each decision for which NorthWestern seeks reconsideration is addressed below.

## **I. Procedural Background**

On June 1, 2012, NorthWestern filed its *Application for Interim and Final Electricity Rate Adjustment* (“Application”). On June 15, 2012, the Commission issued a Notice of Application and Intervention Deadline. Human Resource Council District XI/Natural Resources Defense Council (“HRC/NRDC”) and the Montana Consumer Counsel (“MCC”) (collectively referred to as “Intervenors”) petitioned for and were granted intervention. On November 16,

2012, the Commission issued a Notice of Commission Action and Limited Intervention Deadline (“Notice”). The Notice directed NorthWestern to supplement its original filing with testimony on (1) the comprehensive demand-side management (“DSM”) program evaluation performed by SBW Consulting, Inc. (“SBW”), and (2) the efficient scheduling and dispatching of electricity supply resources. After extensive discovery on the Application and NorthWestern’s supplemental testimony, Intervenors filed testimony, and NorthWestern filed rebuttal testimony. Additional discovery was conducted on these testimonies. On May 21, 2013, the Commission issued a Notice of Public Hearing setting the date of the hearing for June 11, 2013. As noticed, a hearing commenced on June 11<sup>th</sup> and concluded on June 14<sup>th</sup>. After the hearing, the parties filed post-hearing briefs with the Commission. After extensive discussions in work sessions and several draft final orders, the Commission issued the Order on October 28, 2013.

The parties contested only (1) the recovery of the DGGS incremental outage regulation costs; and (2) NorthWestern’s electricity hedging practices. In this docket, no intervenor offered any testimony regarding (1) NorthWestern’s maintenance and operation of DGGS, (2) recovery of future incremental lost revenues, or (3) the true-up of previous lost revenues resulting from the SBW Report.

The Order approved NorthWestern’s electricity supply costs for the tracker year July 2011 through June 2012 except for \$1,419,427 in incremental costs incurred as a result of the DGGS outage. Order, ¶¶ 122-123. The Order further directed NorthWestern to make several adjustments to the true-up of its lost revenues for all tracker periods dating back to the 2006/2007 tracker year. *Id.*, ¶ 124. Also, the Order held that incremental lost revenues incurred after the issuance date of the Order are recoverable, if and only if, the utility can demonstrate that recovery is reasonable and in the public interest. *Id.*, ¶ 78. Finally, the Commission directed

NorthWestern to address the issue concerning dispatch of the Basin Creek facility in its next electricity Resource Procurement Plan, if possible. *Id.*, ¶ 126.

## II. Argument

### A. Legal Standards

The Commission must issue final orders containing findings of fact and legal conclusions. § 2-4-623, MCA. The findings of fact must be based exclusively on the evidence in the case; legal conclusions must be supported by authority or reasoned opinion. *Id.*

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). Decisions by administrative agencies are arbitrary and capricious if the agency fails to “present a ‘rational connection between the facts found and the conclusions made.’” *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 960 (9th Cir. 2005) (internal citation omitted). In addition, decisions by administrative agencies are considered arbitrary and capricious if they appear “to be random, unreasonable, or seemingly unmotivated, based on the existing record.” *Silva v. City of Columbia Falls*, 258 Mont. 329, 335, 852 P.2d 671, 675 (1993). Additionally, an agency must follow its own precedent or provide a reasoned analysis explaining its failure to do so. *Waste Management Partners of Bozeman, Ltd. v. Department of Pub. Serv. Regulation*, 284, Mont. 245, 257, 944 P.2d 210, 217 (1997) (citing *Atchison Topeka and Santa Fe Railroad Co v. Board of Trade*, 412 U.S. 800, 808, 93 S.Ct. 2367, 2375, 37 L.Ed.2d 350 (1973)). Failure to follow precedent or provide a reasoned analysis is arbitrary and capricious.

The four Commission decisions delineated above are arbitrary and capricious because they are, as described in the *Silva* case, random, unreasonable, and seemingly unmotivated when reviewing the record in this docket. In addition, they fail to follow the Commission's own precedent without a reasoned analysis. Moreover, the findings of facts used to support the decisions are not supported by substantial credible evidence.

**B. DGGS – Recovery of the Incremental Costs Incurred as a Result of the Outage**

1. *The Commission's decision on this issue is erroneous because it is based on an error of law and fails to consider all of the relevant facts.*

The Order, at paragraph 99, correctly states that under Montana law, a public utility shall be allowed “to fully recover **prudently incurred** electricity supply costs, subject to the provisions of [§§] 69-8-419, 69-8-420, and commission rules.” § 69-8-210(1), MCA (emphasis added). However, the Order also incorrectly states that NorthWestern has the burden to prove that its rate increases or decreases result in just and reasonable rates, citing ARM 38.5.182. Order, ¶ 102. ARM 38.5.182 is not applicable in that it is for general rate cases, not statutorily required recovery of electricity supply costs. *See*, § 69-8-210, MCA. Furthermore, the Commission misstates the law in that it ignores the well-established principle that to disallow costs, the Commission must find both an imprudent act and that the imprudent act caused the expense. *See e.g. Atmos Energy Corp. v. Office of Public Counsel*, 389 S.W. 3rd 224, 228 (Mo. App. 2012) and cases cited in NorthWestern's post-hearing briefs.

In its Order, the Commission fails to define or set forth the law or standard regarding prudence. Despite the lack of defining a standard, the Commission repeatedly states that the incremental costs incurred by NorthWestern were imprudently incurred. *See* Order, ¶¶ 113, 33-34. The Commission found that NorthWestern's “failure to evaluate the availability, price and terms of outage insurance” was imprudent. *Id.*, ¶ 34.

Thus, the Commission has taken certain facts from the record and reached a decision based on those facts without ever enunciating the appropriate authority or reasoning that justifies its decision. Due to its failure to define the prudence standard, the Commission's decision on imprudence is improper and a violation of § 2-4-623, MCA. First, § 2-4-623, MCA, provides in pertinent part that "[a] final decision must include findings of fact and conclusions of law." The Commission's decision in this case includes findings of fact on prudence, but fails to include conclusions of law on prudence. In addition, this lack of definition puts the parties at a disadvantage in the future as they are not sure what the standard is by which they will be judged. Furthermore, a district court upon review of the decision, if appealed, will be unable to determine if the administrative agency has correctly applied the law to the facts. *See Stewart v. Region II Child and Family Services*, 242 Mont. 88, 94, 788 P.2d 913, 917 (1990) (finding that "[t]he reviewing court has the duty to determine whether the agency applied the appropriate law.") This is plain reversible error.

NorthWestern provided the Commission ample guidance on the prudence standard. NorthWestern, in both its Opening Brief and Reply Brief, provided the relevant law on prudence. *See, e.g.*, NorthWestern's Post-Hearing Brief, p. 28 and NorthWestern's Reply Brief, p. 8. The Commission defined prudence as "marked by wisdom or judiciousness[,] circumspect or judicious in one's dealings; cautious." *In re Montana Power Co.*, 218 P.U.R.4th 227, 287, Order No. 6382d, Docket No. D2001.10.144 (July 21, 2002). Also, prudence is determined by looking at what the utility knew at the time a decision was made. *See, e.g. Re Southern California Edison Co.*, 116 P.U.R.4th 365, 374 (Cal. PUC Sept. 25, 1990) ("Namely, the event or contract is to be reviewed based on facts that are known or should be known by utility management at the time. This standard is used to avoid the application of hindsight in reviewing the reasonableness of a

utility decision.”); *Re Wisconsin Public Service Corp.*, 86 P.U.R.4th 357, 375 (Wis. PSC July 9, 1987) (“Hindsight may not be relied on by the commission in answering the prudence question.”); and *Re Long Island Lighting Co.*, 71 P.U.R.4th 262, 267 (N.Y. PSC November 16, 1985) (“Thus, in evaluating prudence, we must ask whether the company acted reasonably under all the circumstances at the time.”). Finally, in a recent electricity supply tracker docket, the Commission noted the following on prudence: “the standard by which the [Commission] judges the prudence and reasonableness of actual electricity supply costs is what [NorthWestern] knew, or should reasonably have known, at the time it incurred the cost obligations. *In re NorthWestern Energy*, Order No. 6836c, ¶ 155, Docket Nos. D2006.5.66 and D2007.5.46 (June 24, 2008).

Pursuant to § 2-4-704(2)(a)(v), MCA, a decision from an administrative agency can be overturned by the court if it is “clearly erroneous in view of the reliable, probative, and substantial evidence on the **whole** record.” (Emphasis added). When applying the applicable law of prudence to all the facts in this case, the Commission should have determined that NorthWestern’s actions were prudent. Considering the Commission’s previous declaration on the prudency standard, it should have asked “what did NorthWestern know or what should it have known at the time the costs were incurred?” The answer is NorthWestern knew that it needed regulation service (Exhibit NWE-4, p. 5 (admitted Tr., p. 280)) and was subject to severe financial penalties if it did not meet federal reliability standards, specifically Control Performance Standards (“CPS”) (Tr., pp. 343-345). NorthWestern knew it must achieve a 90% level of compliance with CPS2 criteria each month or be subject to a penalty of up to \$1 million per period of noncompliance. *Id.* NorthWestern had recently issued an RFP, pursuant to a Commission order, for replacement power, and thus, had relatively current information on such costs. Tr., p. 305. When the outage occurred, NorthWestern went back to the RFP respondents

and was able to secure contracts at the previously submitted bid prices. *Id.* NorthWestern was also able to execute contracts for regulation service on terms that were very favorable to customers, i.e. NorthWestern was permitted to reduce regulation service taken under the contract as DGGs units came back online. *Id.*, at p. 305-306. At the time the regulation costs were incurred, NorthWestern had an unambiguous legal obligation to regulate loads within its Balancing Authority. As a result, it entered into regulation contracts for service and did so with entities with which it had established relationships at costs comparable to those resulting from a recent competitive solicitation. The contracts included provisions that allowed NorthWestern to reduce the amount of regulation service needed as DGGs units became available. When these reliable, probative, and substantial facts are viewed as a whole, the Commission should have determined that NorthWestern's actions at the time the costs were incurred were prudent. Instead, it found the costs to be imprudent. This finding is reversible error under § 2-4-704, MCA.

The Commission found imprudence based on one fact. The Commission faults NorthWestern for not making a phone call to determine if replacement regulation insurance was available at the time DGGs was being developed. Order, ¶ 34. This finding amounts to a determination by the Commission that the costs incurred for the incremental replacement of regulation service obtained during the outage were imprudent. *Id.* However, even in making this finding, the Commission recognized the lack of causation. "Although it may not have been cost-effective to procure replacement insurance – and may not be cost effective in the future . . ." *Id.* Certainly, without a showing that procuring replacement insurance would have been cost-effective, there can be no causation that the alleged imprudent act caused the expense. *Violet v.*

*FERC*, 800 F.2d 280 (1<sup>st</sup> Cir. 1986) (there must be a causal link between the allegedly imprudent decision and the costs at issue).

An agency's findings must be supported by substantial evidence, which is defined as "more than a scintilla of evidence." *Reynolds v. Pacific Telecom, Inc.*, 259 Mont. 309, 314, 856 P.2d 1365, 1368 (1993). The only "evidence" that the Commission cites for its decision is that NorthWestern did not investigate the availability and cost of outage insurance. Even if this amounted to a "scintilla of evidence," which it does not, it would be insufficient on its own on which to base a finding because an agency's finding must be supported by substantial evidence. Moreover, this fact – the failure to investigate the cost of outage insurance – is particularly inadequate here to be the basis of an agency's finding because there is no causal link between this "evidence" and the costs at issue. For these reasons, the Commission's finding is plainly arbitrary and capricious, and erroneous.

The Commission further states that NorthWestern failed to properly identify a risk. *Id.*, ¶ 33. Thus, pursuant to § 69-8-419(2)(c), MCA, the Commission held that it does not have to permit recovery of the costs through customers' rates. *Id.*, ¶ 114. This finding is incorrect. Considering **all the facts, and not just a single fact** in the record on this issue, the evidence shows that NorthWestern did identify the risk and properly evaluated the risk even though it did not make a phone call to obtain a quote for outage insurance.

NorthWestern knew that DGGS was going to be the first ever power plant of its kind. *Tr.*, p. 52. Knowing this fact, NorthWestern did the following to mitigate risk: It selected a well-known, reputable manufacturer for the turbine construction and purchased a two-year warranty, double the length of the warranty that Pratt and Whitney Power Systems offered. As Mr. Rhoads testified, "you might say it was an insurance policy..." *Tr.*, pp. 184 and 256. In addition,

NorthWestern reduced the risk by constructing a third unit to function as a backup, or an operational spare. NorthWestern knew that it only needed two units to meet its needs, but nevertheless constructed a third unit to reduce the risk in the event of an outage. Exhibit NWE-2, p. 16 (admitted Tr., p. 41). NorthWestern also reduced risk by negotiating for and obtaining a spare engine at the plant. Tr., p. 210.

Moreover, the evidence in the proceeding demonstrated that it is common industry knowledge that outage insurance is not economical. Mr. Rhoads testified that neither NorthWestern nor the former utility, The Montana Power Company, had ever purchased replacement power insurance for any of its other generation plants.<sup>1</sup> Tr., p. 138. He also testified that other utilities do not obtain outage insurance as it is not economical to do so and for that reason, the prudence of obtaining such insurance would be questioned. Tr., pp. 224-225. Mr. Rhoads' opinion is entitled to great weight as he has spent 25 years in the hydro and thermal industries. NorthWestern's expert, Mr. Lyon, also testified that it is common industry knowledge that outage insurance is too expensive for the risk. He testified that in his over 35 years of experience, he had never seen, except for the nuclear industry, a power plant operator that obtained replacement power insurance. Tr., p. 274.

Moreover, this is no different from the situation in which the Commission previously approved additional power purchases necessitated by an outage at Colstrip Unit 4 ("CU4"). In early 2009, CU4 experienced an extended outage due to a cracked rotor blade. This extended outage required NorthWestern to incur additional costs from purchasing power that CU4 would

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<sup>1</sup> During the September 5<sup>th</sup> work session, Commissioner Koopman commented on this point by saying "[o]ne thing I would note is that they have consistently, apparently, according to the record, that NorthWestern Energy has consistently not secured incremental or replacement cost insurance...in other cases. ...So, you know, we can't sort of have it both ways. We've consistently watched them not have that insurance, and then the one time that it comes back and apparently bites them, you know, we're kind of picking on them with, 'Well, they didn't go out and get a quote this time.'"

have otherwise provided to serve load. *See In re NorthWestern Energy*, Docket Nos. D2008.5.45 and D2009.5.62, Order No. 6921c, ¶ 62 (May 20, 2010). These additional power purchases resulting from the CU4 outage were included in the annual electricity tracker docket and found to be prudently incurred by the Commission. *Id.* The Commission's decision approving these additional power purchase costs was the appropriate decision then. The Commission has not articulated a reason why this decision is different. It is patently arbitrary for the Commission to fail to follow its own precedent without sound reasons and substantial evidence.

Taking all this into consideration, one must ask the question: Why would NorthWestern call to obtain a quote for replacement power insurance when: (1) NorthWestern knew, based on its years of experience, that outage insurance was not cost effective; (2) NorthWestern understood the risks associated with construction of DGGS and believed it had properly addressed them in the most cost-effective way for customers; and (3) had adequate measures available to address any potential outage? The answer is that a reasonable utility manager would not make such a call. When viewing the facts in the record as a whole, NorthWestern did what a reasonable utility manager should have done at the time. Because it did, NorthWestern should be permitted to recover the incremental regulation costs incurred during the DGGS outage. The Commission latched onto one fact and failed to view the record as a whole in violation of § 2-4-702, MCA. The Commission's decision is arbitrary and capricious because there is no causal link between this one fact and the costs incurred, and because the Commission ignored the substantial credible, reliable, and undisputed facts, which demonstrate that NorthWestern acted prudently. The Commission's decision is unreasonable, seemingly unmotivated and runs counter to the evidence in the docket. For these reasons, the decision must be reconsidered and reversed.

2. *The Commission's reliance on facts relating to the maintenance of the facility to support its decision to deny recovery of the incremental costs is improper.*

The Commission found that NorthWestern failed to reasonably manage the plant and thus, pursuant to statute, it may disallow recovery of the incremental costs incurred by NorthWestern. Order, ¶ 115. This finding is not supported by substantial credible evidence and is improper for three reasons. The first reason is due process. No party in this docket argued that NorthWestern's operation of the plant was unreasonable. Since no party raised this as an issue, NorthWestern was unaware that the operation of the plant was in question.<sup>2</sup> Thus, the Commission's discussion and decision regarding operation of the plant is a violation of NorthWestern's due process rights because NorthWestern did not have an opportunity to respond to testimony and cross examine witnesses on this issue.

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 Commissioners*, 2002 MT 115, ¶ 14, 310 Mont. 1, 48 P.3d 39. This bars arbitrary Commission actions regardless of the procedures used. *Id.* 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. *See, e.g.*, §§ 2-4-601 and -612, MCA. NorthWestern was not provided these rights on the findings of fact dealing with the maintenance/operation issue.

The Order cites to § 69-8-421(9), MCA, as authority to disallow costs as a result of unreasonable management or operation of an electricity supply resource. Order, ¶ 115. Section

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<sup>2</sup> NorthWestern recognizes that during the hearing in this matter there were several questions regarding the operation of the plant aimed at trying to determine possible reasons for the outage. However, these questions were mainly from staff and Commissioners, not parties. For more discussion on this point, see the additional argument below in the body of this section.

69-8-421(9), MCA, provides in pertinent part that nothing limits the Commission in the future from questioning such maintenance and determining if costs should be disallowed. However, despite the fact that the statute provides the Commission with such authority, the Commission must still comply with due process. *See Montana Power Co. v. Public Service Commission*, 206 Mont. 359, 368, 671 P.2d 604, 609 (1983) (“Administrative agencies are not exempt from the constitutional restraints of due process requirements.”).

Second, there is no evidence in the case that NorthWestern failed to reasonably manage and operate DGGS. The reasonable operation of a natural gas generation resource that is used to provide regulation of the electric grid is beyond the knowledge of an average person. Without testimony of a witness qualified in such matters, there is no basis for concluding that NorthWestern failed to comply with industry standards. In the absence of evidence, the Commission is taking on the role of an advocate. This it may not do. Notwithstanding this fact, it has implemented a process allowing it to raise issues if it believes the parties should address certain matters. In fact, the Commission utilized this additional issues procedure in this docket. *See Notice of Commission Action* dated November 16, 2012. The additional issues procedure used by the Commission properly allows for due process. However, in this docket, the Commission did not identify the issue of maintenance and operation of the facility as an additional issue. This issue was not raised until the Commission’s first work session discussing the draft final order on September 5<sup>th</sup>. (In response to Commissioner Lake, staff attorney Jason Brown states as follows: “...if the Dave Gates plant wasn’t operated reasonably, if they didn’t maintain it reasonably, if it wasn’t administered or managed reasonably, that could justify a disallowance at this point.”).

NorthWestern surmises that this issue arose at this late stage because the Commission was predisposed to an outcome<sup>3</sup> regarding these costs, but the evidentiary record did not support its predisposition. For example, at the September 5<sup>th</sup> work session, Chairman Gallagher stated “it’s a bit of a challenge to really pin a hard-and-strong fault on NorthWestern Energy with regard to this outage.”<sup>4</sup> As a result of this statement the Chairman suggested that the focus also be on the question of remedy and principles of indemnification.<sup>5</sup> The Commission was searching for other reasons to support its decision because it knew the failure to look into insurance as the main reason to find imprudence was tenuous.

The bottom line is that NorthWestern was not able to rebut any allegations that the plant was being operated and maintained unreasonably because the issue was not raised by intervenors during the docket. Rather, the Commission raised the matter after the record was closed. This is a violation of NorthWestern’s due process rights and therefore is reversible error pursuant to § 2-4-702(2)(a)(i) and (iii), MCA. Additionally, this Commission decision relies on findings of fact that are not supported by substantial credible evidence. Section 2-4-623(2), MCA, requires that “[f]indings of fact must be based exclusively on the evidence **and on matters officially noticed.**” (Emphasis added). As already noted, NorthWestern could not have known in advance that the operation of the plant was going to be identified by the Commission as a reason to disallow the incremental regulation costs as no party argued that NorthWestern’s operation was unreasonable.

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<sup>3</sup> During the September 5<sup>th</sup> work session, Commissioner Lake when discussing the insurance question stated that “...I’m wondering if maybe that decision early on may have been premature, which then could, at least in my mind, **possibly come to the imprudency that we’re looking for.**” (Emphasis added).

<sup>4</sup> Other Commissioners during the September 5<sup>th</sup> work session made similar comments. For example, Commissioner Koopman opined that “...in a perfect world – you know, and we are not perfect people – but in a perfect world, we would have liked to have seen that quote be gotten. But yet whether it, you know, reaches to the point of breaching, you know, prudence/imprudence, I really don’t know.”

<sup>5</sup> These improper conclusions of law are discussed in more detail below.

Finally, the Commission has misstated the evidence in the record. Paragraph 36 of the Order cites to page 100 in the hearing transcript and states that “cycling individual units frequently may not have been the most reasonable way to dispatch DGGs.” NorthWestern reviewed page 100 of the hearing transcript, and this statement is never made. Mr. Rhoads, on behalf of NorthWestern, does respond to questions from Commissioner Kavulla about cycling; however, Mr. Rhoads indicates that NorthWestern’s operation of the plant was well within the limits prescribed by the turbine manufacturer, and that since the outage NorthWestern has been operating two engines more frequently. The Commission also puts fault on NorthWestern for “[u]sing software that allowed the ramp rate of each unit at DGGs to exceed 30 MW per minute.” Order, ¶ 36. Again, the Commission has misstated or misunderstands the evidence. First, NorthWestern did not design the software, the turbine manufacturer did. NorthWestern should not be faulted for something it did not design. Second, NorthWestern, per the purchase order<sup>6</sup>, required that **at a minimum** each unit ramp at 30 MW per minute. The fact that the software allowed a unit ramp rate to exceed 30 MW per minute was never identified as an issue and is not NorthWestern’s responsibility. NorthWestern’s concern was that a minimum 30 MW per minute ramp rate could be achieved. The Commission’s own consultant, who required that NorthWestern establish in-service test criteria to assure that minimum standards were met, never questioned the possibility or advisability of exceeding the minimums. Again, the Commission’s decision on this issue is error because it violates NorthWestern’s due process rights and is clearly erroneous in light of the substantial and credible facts in the entire record.

3. *The Commission reliance on statutes outside of its jurisdiction is inappropriate and error.*

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<sup>6</sup> The Commission approved the purchase order in Docket No. D2008.8.95.

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 Commission*, 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.4<sup>th</sup> 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.). The Commission's jurisdiction, therefore, "is limited to the regulation of rates and service as provided by the Montana statutes." *City of Billings v. Public Service Commission of Montana*, 193 Mont. 358, 370, 631 P.2d 1295, 1303 (1981). The Commission's authority is to supervise, regulate, and control public utilities "**subject to the provisions of [Title 69, chapter 3].**" § 69-3-102, MCA (emphasis added).

Montana statutes provide that the Commission has no judicial powers. *See* § 69-3-103, MCA. As a result, the Commission has no jurisdiction over interpretation of contracts. *City of Billings*, 193 Mont. at 370. Similarly, the Commission has no jurisdiction to decide constitutional matters. *Mitchell v. Town of West Yellowstone*, 235 Mont. 104, 765 P.2d 745, (1988). Thus, legal disputes are properly decided by a court of law and not the Commission. Given these prohibitions, legal remedies, such as awarding money damages or injunctive relief, are also not remedies available to the Commission. Nonetheless, starting at paragraph 110 of the Order, the Commission’s Conclusions of Law discuss the implied warranty of habitability, the Uniform Commercial Code, product safety and strict liability, and joint liability under negligence claims. Each of these Conclusions of Law discuss areas of the law over which the Commission has no jurisdiction and thus are a violation of § 2-4-702(2)(a)(ii), MCA, as the Commission is acting “in excess of [its] statutory authority.” *See, e.g., Cascade County Consumers Ass’n v. Public Service Comm’n*, 144 Mont. 169, 192, 394 P.2d 856, 868 (1964) (“there will be no interference with the orders of the Commission unless: (1) they go beyond the power constitutionally given; (2) beyond their statutory power; or (3) they are based upon a mistake of law.”) Therefore, this part of the Order is beyond the jurisdiction of the Commission. The Commission should reconsider these paragraphs and remove them from the Order.

### **C. Lost Revenues Policy Decision**

The Order briefly addresses the Lost Revenue Adjustment Mechanism (“LRAM”) at paragraphs 78 and 79. The Commission first approved the establishment of the LRAM many years ago in a thorough contested rate case process in which there was full participation by the affected stakeholders. *See* Order No. 6496f in Docket No. D2003.6.77 and Order No. 6574e in Docket No. D2004.6.90, ¶¶ 145 – 161 (December 16, 2005). As stated above, it is well-

established principle or agency law that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure. *Waste Management Partners of Bozeman, Ltd. v. Department of Pub. Serv. Regulation*, 284, Mont. 245, 257, 944 P.2d 210, 217 (1997). The Commission has violated this principle. In this docket, no party contested NorthWestern’s lost revenue recovery request nor the LRAM in general. Nevertheless, approximately ten days before the start of the hearing in this docket, the Commission issued a Notice of Commission action that suggested the LRAM should not be continued or maintained in its current form and that the Commission needed additional evidence on the topic. After NorthWestern filed a Motion for Reconsideration arguing that such request at this stage was a violation of its due process rights, the Commission rescinded its request for additional evidence on the LRAM.

Notwithstanding these facts, the Commission, in the Order, decided to establish a new burden for recovery of lost revenues in future proceedings. The Commission found that “as of the service date of this Order, NorthWestern bears the burden of demonstrating why any request for incremental lost revenues resulting from the acquisition of additional USB or DSM savings is reasonable and in the public interest.” Order, ¶ 78.

This decision to change the burden necessary to recover lost revenues is improper as it violates NorthWestern’s due process rights. By establishing a new burden without allowing the affected parties to provide evidence on the issue is arbitrary and capricious. As already discussed, the Commission must afford all parties certain constitutional rights, including due process protections. NorthWestern will be affected by the Commission’s decision on this matter. The United States Supreme Court held in *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976), “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a

meaningful time and in a meaningful manner” (internal citation omitted). Again, no party in this docket suggested that the burden for recovery of lost revenues needed to be changed or that there was an issue with the LRAM. Thus, NorthWestern did not address the issue and did not have an opportunity be heard on the issue prior to the Commission making its decision. It was reversible error for the Commission to pronounce a new standard without allowing due process and receiving evidence and argument on the matter from the affected parties. Thus, the Commission should reconsider and reverse this decision. It should be noted that nothing precludes the Commission from raising this matter properly in a subsequent tracker docket.

#### **D. Adjustments to NorthWestern’s Lost Revenues in this Docket**

The Commission promulgated additional issues in this docket, including the SBW Report, which discussed the evaluation performed on NorthWestern’s DSM program. In response to this request, NorthWestern provided the SBW Report as well as supplemental testimony on this topic. The SBW Report measured and verified electricity savings achieved through NorthWestern’s DSM programs from July 2006 through June 2011. Exhibit NWE-17. Based on the results of the SBW Report, NorthWestern recalculated its lost revenues for this period. Again, as was the case with the other issues discussed above, no party contested the results of the SBW Report and thus, did not provide any conflicting testimony on the issue. Additionally, no party contested the veracity of NorthWestern’s SBW witnesses.

Notwithstanding that fact, the Commission still took issue with findings made by the SBW Report. NorthWestern believes that the Commission’s decision with regard to several of these findings constitute reversible error as the decisions are arbitrary and capricious. Specifically, NorthWestern argues that the Commission’s decisions to adjust the NTG factor and burn-hour rate for CFLs were improper.

### 1. NTG adjustments

Part of the SBW Report discussed free ridership and spillover effects. SBW Report, pp. 873-874. These factors are a consideration in determining that the lost revenue adjustments account for only the energy savings actually attributable to DSM programs. After considerable research, the SBW Report found that any spillover effects were offset by free ridership and thus, the appropriate NTG adjustment was 1.0. *Id.* The Commission rejected this finding and instead decided that free-ridership and spillover did not offset each other and thus the NTG adjustment had to be modified and based its findings on a draft report that SBW did not support. Order, ¶ 59. The Commission reasoned that it is implausible that a NTG of 1.0 is the null hypothesis as suggested by the SBW Report. *Id.*, ¶ 56.

This decision was made despite the credible, uncontested evidence on this issue. Dr. Marjorie McRae testified that there was no basis for rejecting the null hypothesis and that a majority of jurisdictions have accepted a NTG of 1.0. Tr., pp. 668-675. The Commission, however, faults the null hypothesis because SBW did not independently test it. Order, ¶ 56. The Commission, however, does not have any evidence to support the theory that testing the null hypothesis was the appropriate way in which to determine if the null hypothesis was correct. Dr. McRae relied on her experience and expertise in this field to derive her conclusions about the null hypothesis. She provided the only testimony on this subject. There was no conflicting testimony. The Commission is not an expert on NTG ratios or associated null hypothesis. With the Commission's decision on this issue, it has decided that Dr. McRae was not a credible witness and has rejected her findings regarding the null hypothesis. Nonetheless, the Commission has decided to accept Dr. McRae's theories and position as an expert on other findings within the SBW Report. The Commission's inconsistency in this regard and its finding

that the null hypothesis should not be accepted is arbitrary and capricious because there is not a “rational connection between the facts found and choice made.” *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245-246 (1962). Given this reversible error, the Commission should reconsider its decision to reject the SBW Report’s finding that the NTG adjustment is 1.0.

## 2. *Burn-hour adjustments*

The SBW Report also discussed the average number of burn hours for CFLs. SBW Report, p. 566-69. After extensive research and surveys, SBW determined that the appropriate burn hours for installed CFLs ranged from 2.70 hours/day in 2006 to 2.02 hours/day in 2012. *Id.* In Docket No. D2007.5.46, Order No. 6836c, ¶ 177, the Commission considered and approved lost revenue based on Nexant’s finding that the CFL burn hours/day were 3.7. This is substantially higher than SBW’s finding. There is no credible evidence that the burn hours/day fell off a cliff and decreased from 3.7 to 2.02 hours/day in one year. There is not credible evidence that SBW’s professional judgment is incorrect. (If SBW is not credible, then the 2.02 hours/day is not credible and lost revenue should be calculated using Nexant’s finding that was approved by the Commission.) The Commission should reconsider and reverse its unsupported decision that 2.02 hours is the correct burn hours/day figure for every year from 2006 to 2012.

### III. RELIEF REQUESTED

NorthWestern requests that the Commission reconsider the Order and:

1. Remove the following paragraphs from the Order: 35 – 36, 78 – 79, 110 – 112, and 114 – 115;
2. Find that prudence is defined as “what a utility knew, or should reasonably have known, at the time it incurred the cost obligations;”

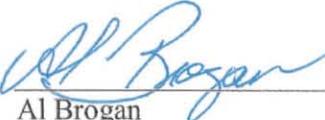
3. Find that based on the above prudence standard, NorthWestern's actions with regard to the DGGs outage were prudent and therefore it is permitted to recover the incremental costs that resulted from the outage; and
4. Find that the appropriate NTG adjustment to be applied to lost revenues is 1.0 and that the burn-hours for CFLs should be as found by SBW.

#### IV. CONCLUSION

Based on the foregoing, the Commission should grant NorthWestern's motion for reconsideration and provide the relief requested above.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of November 2013.

NORTHWESTERN ENERGY

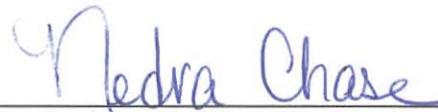
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of NorthWestern Energy's ("NWE") Motion for and Brief in Support of Reconsideration of Final Order No. 7219h 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: November 7, 2013



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