

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

IN THE MATTER OF THE APPLICATION) REGULATORY DIVISION
of MONTANA-DAKOTA UTILITIES CO.,)
a Division of MDU Resources Group, Inc.,) DOCKET NO. D2012.9.100
for Authority to Establish Increased Rates for)
Natural Gas Service)

**RESPONSE OF MONTANA-DAKOTA UTILITIES CO.
TO MONTANA CONSUMER COUNSEL OBJECTION
AND MOTIONS TO COMPEL AND STRIKE**

INTRODUCTION

On February 7, 2013, the Montana Consumer Counsel ("MCC") filed an objection to the answer of Montana-Dakota Utilities Co. ("Montana-Dakota") to MCC Data Request MCC-150. It moved to compel a different answer to its question, and has moved to strike the pre-filed testimony of Montana-Dakota's depreciation witness, Earl Robinson. As explained in this response, the MCC objection to Montana-Dakota's answer to MCC Data Request 150 is not well taken, and there is no legal foundation for the MCC's Motion to Strike.

FACTS

MCC Data Request 150, and Montana-Dakota's answer, is attached to this response as Exhibit 1. In MCC-150, MCC requested a narrative explaining how the "life-curve combination" was selected for certain accounts relating to MDU's depreciation recommendations. MCC also requested, to the extent that MDU's expert relied on the Simulated Plant Record Method (SPR) of analysis, MDU production of the rankings of the various selected curves and justification for which band analysis was relied upon. In response, MDU provided the requested narrative, cross referenced its response to MCC 135 as the depreciation data upon which its witness, Mr. Robinson, based his analysis, and indicated it did not have the SPR studies the MCC requested.

The MCC submitted an affidavit prepared by its expert witness on depreciation, Mr. Jacob Pous. His arrogant and grandiose statements, untested by discovery or cross-examination, attempt to declare what he contends are the standards Montana-Dakota witness Robinson must follow in conducting a depreciation study:

[B]ased on my extensive experience relating to analyzing depreciation proposals by utilities for approximately the last four decades, I conclude the AUS Consultants did not act properly when it knowingly elected not to retain critical workpapers supporting its analysis as part of what constitutes an appropriate average service life and corresponding dispersion pattern that should be utilized for depreciation purposes.

Pous Aff. at p 3, ¶ 14.

Worth noting is that MDU responded to similar data requests in its 2010 general rate case for its electric operations - a case which involved the same depreciation witnesses for each party. Montana-Dakota's witness, Mr. Robinson, utilized the same depreciation study methods in the previous electric case as in this gas case. There were no objections or motions to strike by the MCC in the electric case.

THE MCC MOTION TO COMPEL

If the MCC objection to Montana-Dakota's answer to Data Request MCC-150 is not well taken, there is no basis for a motion to compel. The MCC's motion to compel should be rejected because MDU does not have the "SPR workpapers" and MDU is under no obligation to produce documents that do not exist. *Peterman v. Herbalife Int'l, Inc.*, 2010 MT 142, ¶ 22, 356 Mont. 542, 234 P.3d 898 (holding that parties are not required to produce nonexistent documents). The MCC recognized as much when it admitted that a motion to compel "would likely be fruitless." MCC Objection at p. 2.

The MCC cites no legal authority supporting its objection and motion to compel. It must be denied.

THE MCC MOTION TO STRIKE

The admissibility of Mr. Robinson's expert testimony on depreciation is governed by Rule 702 of the Montana Rules of Evidence, not the grossly self serving declarations in the Pous affidavit. An expert is qualified to testify if his "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," and he is "qualified as an expert by knowledge, skill, experience, training." M. R. Evid. 702. The expert must "possess knowledge and experience in areas testified to not within the common knowledge or experience of people of ordinary education." *Baldauf v. Arrow Tank & Eng'g Co.*, 1999 MT 81, ¶ 29, 294 Mont. 107, 979 P.2d 176.

MCC does not contend that Mr. Robinson lacks the training, education and experience to render him competent as an expert. There is no dispute that Mr. Robinson's testimony would aid the Commission in understanding how MDU developed its depreciation rates. The MCC appears to be arguing that Mr. Robinson's testimony should be stricken because Montana-Dakota failed to respond to discovery. MCC Objection at 2, citing paragraph 12 of the Commission's Procedural Order 7254 in this docket. That paragraph has no application here because, as discussed above, the information produced in MDU's response to MCC-150 is responsive to the request. In other words, MDU has not "fail[ed] to answer written discovery," and the Commission has no authority to strike the depreciation study and related testimony as a penalty for failure to respond to discovery.

The MCC is seeking an evidentiary ruling on the admissibility of expert testimony in the discovery phase of this case. In essence, the MCC is asking the Commission to strike Mr. Robinson's study and testimony because its expert, Mr. Pous, doesn't agree with his methods or analysis. Incredibly, the MCC is asking this Commission to treat the self serving affidavit of Mr. Pous as irrefutable truth.

The MCC and Mr. Pous are certainly entitled to claim at hearing that the depreciation study conducted by Mr. Robinson for Montana-Dakota is flawed. However, the asserted inadequacy of an expert's methods goes to the weight and credibility of the expert's testimony, not his competence to testify. *Nelson v. Nelson*, 2005 MT 263, ¶¶ 31, 329 Mont. 85, 122 P.3d 1196.

The MCC cites no legal authority supporting its motion to strike. It must be denied.

CONCLUSION

The MCC's Objection, Motion to Compel, and Motion to Strike must be denied. They lack factual basis and legal merit.

DATED this 19th day of February 2013.

HUGHES, KELLNER, SULLIVAN & ALKE, PLLP

By



John Alke

40 W. Lawrence, Suite A

P.O. Box 1166

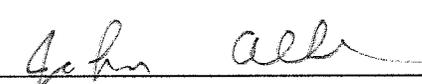
Helena, MT 59624-1166

Attorneys for Montana-Dakota Utilities

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that a copy of the foregoing RESPONSE OF MONTANA-DAKOTA UTILITIES CO. TO MONTANA CONSUMER COUNSEL OBJECTION AND MOTIONS TO COMPEL AND STRIKE was served upon the following by mailing a true and correct copy thereof on this 19th day of February 2013, addressed as follows:

MONTANA CONSUMER COUNSEL
PO BOX 201703
HELENA MT 59620-1703



John Alke

**MONTANA-DAKOTA UTILITIES CO.
MONTANA CONSUMER COUNSEL
DATA REQUEST
DATED JANUARY 11, 2013
DOCKET NO. D2012.9.100**

**MCC-150 RE: ACCOUNT 376
 WITNESS: ROBINSON**

Please provide a detailed narrative explaining specifically how the 47R4 life-curve combination was selected for Accounts 376.1 and 376.2 – Mains Steel and Plastic, respectively. To the extent SPR results were relied upon, provide all ranking criteria for selected curves, as well as full justification for which band analysis was relied upon, and why the results of other bands were not relied on.

Response:

Please see Attachment A for a general ranking of statistical best fit curve for varying experience bands. The output of the SPR analysis is not maintained in paper copy or other format. The databases and study software are electronic and the analysis was utilized to run numerous band analysis in real time during the course of completing the study. Plot outputs are provided in the depreciation study report for the service life parameters that were estimated for each of the property groups.

Please see Response No. MCC-135 for a complete copy of the historic depreciation database. The SPR is one additional tool of various items that are reviewed to identify the applicable service life for each of the applicable property groups.