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

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

## **NORTHWESTERN ENERGY'S BRIEF REGARDING DISCOVERY ISSUES**

NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") has been open, transparent and forthcoming in its response to data requests. It has timely responded to all requests. It has provided voluminous amounts of data in response to many data requests, including subparts. However, discovery must be reasonable, and two kinds of discovery requests are beyond the bounds of reasonable discovery and have the potential to derail this entire proceeding: (1) those that seek information relating to NorthWestern's valuation of PPL Montana's ("PPLM") coal (thermal) assets, together with all related communications and documents, and (2) those that require NorthWestern to produce new analyses. By this brief and the oral presentation to be made on February 13, 2014, NorthWestern asks the Montana Public Service Commission ("Commission") to decide that data requests seeking information regarding NorthWestern's valuation of PPLM's coal assets, including related communications and documents, are not relevant to this proceeding. Second, NorthWestern asks the Commission to decide that NorthWestern is not required to prepare new analyses.

In order to establish the framework for these issues, in **Section I** below, NorthWestern describes its approach to discovery in this proceeding and demonstrates that it has been, and will continue to be, open, transparent, and fully forthcoming. In **Section II**, NorthWestern describes why coal is not relevant to this proceeding and why the Commission should issue an Order concluding that coal is not relevant to this docket. In **Section III**, NorthWestern demonstrates that the Commission should issue an order concluding that, following longstanding precedent and the Montana Rules of Civil Procedure ("M.R. Civ. P."), NorthWestern cannot be forced to

prepare new analyses in response to data requests. In **Section IV**, NorthWestern provides its conclusion.

**I. Introduction.**

Discovery is an important component of most regulatory proceedings, and NorthWestern has sought to ensure that its production of documents and information is timely, thorough, and responsive to the parties. As of February 13, 2014, NorthWestern will have responded to 348 data requests, including subparts but not including multiple questions within a subpart, and produced numerous documents. NorthWestern has attached, as Exhibit A, a list of the documents that will have been produced by the end of February 13<sup>th</sup>. Production of this volume of documents has been time-consuming and expensive. Despite this burden, NorthWestern is committed to an open, transparent and timely discovery process in order to ensure that the Commission has the information it needs. NorthWestern's approach has been more than reasonable. This is demonstrated in numerous ways.

**First:** in order to ensure that the docket's timelines are maintained, and to ensure that data request answers are fully responsive, NorthWestern took steps in October 2013, long before it filed its application with the Commission, to facilitate the discovery process. NorthWestern recognized that specialized electronic discovery software, together with a team of attorneys to review and code the documents, would be required to respond to the anticipated hundreds of discovery requests in a highly abbreviated time frame (10-14 days) in a docket of this magnitude. As a result, NorthWestern solicited competitive bids and selected the law firm of Dorsey & Whitney ("Dorsey") to host and code its hydro-related documents. NorthWestern collected emails and documents relating to any component of the Project Mustang I or II from 87

NorthWestern employees, and sent hard drives containing this data to Dorsey, which then spent over two months reviewing and coding the documents and identifying them for relevance, subject matter and privilege. Dorsey also uploaded the documents from the PPLM Data Room<sup>1</sup> as well as documents presented to members of the NorthWestern Board of Directors. The total number of documents collected and uploaded to the Project Mustang database is 135,950. The total page count is 1,486,309.

At the peak of the review process, Dorsey employed 50 contract attorneys for this project. As of February 10, 2014, approximately 8,420 hours of contract attorney time had been spent reviewing documents, redacting them, and preparing the privilege logs. If NorthWestern had not done this, and had been forced to collect and review the documents manually, it would have been impossible to respond to data requests fully or timely. NorthWestern engaged Dorsey for this work in order to provide full responses to relevant data requests on a timely basis.

**Second:** During the January 13, 2014 scheduling conference, NorthWestern offered to host informal discovery meetings, to make its witnesses available for discussions, and to answer

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<sup>1</sup> To accommodate NorthWestern's due diligence efforts, PLLM has maintained a secure Data Room to provide business records relating to the hydroelectric properties. The business records cover a wide range of topics including corporate and organizational structure, finance and accounting, tax, environmental, regulatory (including FERC), human resources, insurance, litigation, marketing and trading, material contracts, real property, and facility operations and maintenance. In addition to the documents selected by PPLM, many documents were added to the Data Room in response to specific document requests by NorthWestern. PPLM provided NorthWestern access to the Data Room conditioned on a confidentiality agreement, with which NorthWestern must comply. PPLM is not a party to this proceeding and is not a regulated utility in Montana, but has been cooperative, while protecting its other commercial interests.

questions. NorthWestern held a telephonic discovery meeting on February 12<sup>th</sup> for a consultant for the Montana Consumer Counsel (“MCC”).

**Third:** NorthWestern has had one telephonic meeting with Essex Partnership, the Commission’s due diligence consultant and three telephonic meetings with Evergreen Economics, the Commission’s resource plan consultant.

**Fourth:** NorthWestern has also facilitated access to documents in the PPLM Data Room concerning PPLM’s hydro assets, and some mixed hydro/coal documents that contain information about both hydro and coal assets. The Commission’s representatives signed the required Nondisclosure Agreement and have had access to the PPLM Data Room since February 5, 2014.<sup>2</sup> All parties have had access to the list of documents in the PPLM Data Room since January 24, 2014, when NorthWestern provided its response to Data Request PSC-036(b).

**Fifth:** In an effort to be fully cooperative and to ensure that the parties have the requested, relevant information, NorthWestern has responded more fully than required to various data requests. For example, MCC-009 asked NorthWestern to “provide copies of all communications (and any attachments or documents related thereto) between PPLM (or any affiliate thereof), and NWE (or any affiliate or employee or advisor thereof) regarding NWE’s potential acquisition of PPLM’s hydroelectric properties.” As PPLM sought to keep a potential transaction confidential, most communications from PPLM were not from PPLM but from a PPLM outside advisor. Therefore, responding to this question as written would have produced very few documents because the question only asked for documents from or to PPLM or an affiliate and did not include advisors. Recognizing this, NorthWestern made a conscious

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<sup>2</sup> NorthWestern has offered the same access to the MCC. As of yet, the MCC’s representatives have not executed the required Nondisclosure Agreement.

decision to answer the question more broadly, as if it included PPLM's advisors, after calling the MCC to confirm what communications that the MCC really wanted.

II. **PPLM's coal assets are not relevant to this proceeding and it would be unduly burdensome to produce documents about those assets.**

Both the Commission and the MPC have asked numerous data requests regarding NorthWestern's consideration of PPLM's coal assets. Attached as Exhibit B is the list of questions asking about coal. They have nothing to do with NorthWestern's acquisition of PPLM's hydro assets and range far afield from the transaction at hand. The Application before the Commission concerns PPLM's hydro assets. They do not involve coal assets. NorthWestern is not attempting to purchase the coal assets. Data requests about PPLM's coal assets seek information related to a transaction that never happened. For this reason, data requests seeking information about PPLM's coal assets are not relevant; and unnecessarily cost NorthWestern significant amounts of time and money to find potentially responsive documents, review them for privilege, prepare a privilege log, and produce the non-privileged documents. Moreover, these requests have the potential of confusing the issues in this proceeding. Moreover, disclosure of irrelevant information about PPLM's coal assets will cause the need for numerous additional protective orders to be sought as much of the coal asset information contains confidential, protectable trade secret information of PPLM that NorthWestern has only been given access to under a confidentiality agreement. And, that information pertained to a completely separate potential transaction that never came to be and is not part of this Application.

While NorthWestern does not believe that coal is relevant to this docket, it has not refused to provide any information regarding coal. Critically, NorthWestern has provided to the

Commission and the parties the nonprivileged documents presented to the NorthWestern Board of Directors regarding both the Mustang I proceedings, which involved coal, and Mustang II. These were provided in response to MCC-006. The Commission and the parties can see NorthWestern's analysis of a potential coal acquisition. In addition, Brian Bird's testimony explains that the potential coal transaction fell apart in Mustang I when PPLM found NorthWestern's terms and conditions unacceptable. Additionally, NorthWestern has responded to data requests that arise directly out of Brian Bird's testimony concerning coal and Mustang I. See, for example, the response to PSC-003.

However, the undue burden of responding to additional coal questions, which continue to be asked, and particularly considering questions such as MCC-011, is extreme. Such questions about coal assets are both unduly burdensome and ultimately irrelevant, and could potentially derail the procedural schedule. As the Commission knows, MCC-011 is such an example, and while the MCC has withdrawn this request, another party may ask it. This request asked NorthWestern for copies of all communications between NorthWestern and PPLM regarding the potential acquisition of any generating properties from PPLM other than the hydro properties at issue in this docket (i.e. coal). NorthWestern has 40,000 potentially responsive documents to this request. In order to produce them, it would take NorthWestern 21 work days, 50 document reviewers, and over \$140,000. See *NorthWestern's Supplement to its Objection to Data Request MCC-011* filed on January 24, 2014, in this docket. Those calculations also do not count the time and cost of preparing and filing redacted versions of the documents and multiple protective orders regarding PPLM's trade secret information.

The MCC, in its opposition to NorthWestern's Motion for a Request for an Oral Reply and Presentation, argued that coal is relevant. The basis for the MCC's position is that:

PPLM was interested in selling all of its Montana resources, not just the hydros. NWE did, in fact, bid on these resources, albeit apparently assigning a negative value to some of them. *These were, therefore, resources potentially available to serve ratepayers and the Company is obligated to consider such alternatives in its resource planning.* The information requested can lead to evidence concerning how the Company conducted such evaluations, as well as the impact those considerations had on the purchase for which it is now requesting preapproval.<sup>3</sup> (Emphasis added)

Similarly, one Commissioner has asserted during a work session that coal is relevant. He stated:

I want to respond to the notion that this docket is not about coal, or isn't about anything other than Hydro. On the contrary, our statute and rules make it clear – very clear - that this docket is about comparing hydro to any other resource that Northwestern considered or may have considered.<sup>4</sup>

Both the MCC and the Commissioner misconstrue the applicable statutes and administrative rules. Section 69-8-419(1), MCA (2013), requires NorthWestern to:

- (a) plan for future electricity supply resource needs;
- (b) manage a portfolio of electricity supply resources; and
- (c) procure new electricity supply resources when needed.

Section 69-8-419(2), MCA (2013), requires NorthWestern to pursue five objectives in fulfilling these duties:

- (a) provide adequate and reliable electricity supply service at the lowest long-term total cost;
- (b) conduct an efficient electricity supply resource planning and procurement process that evaluates the full range of cost-effective electricity supply and demand-side management options;
- (c) identify and cost-effectively manage and mitigate risks related to its obligation to provide electricity supply service;
- (d) use open, fair, and competitive procurement processes whenever possible; and

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<sup>3</sup> See *MCC Response to Objections and Motion to Compel*, filed February 3, 2014, at p. 7.

<sup>4</sup> Work session on February 3, 2014 re: Adequacy of NorthWestern's Application.

(e) provide electricity supply service and related services at just and reasonable rates.

The statute requires NorthWestern to “manage a portfolio of electricity supply resources” and to evaluate “the full range of cost-effective” resources. The statute does not require NorthWestern to compare in minute detail every possible resource. NorthWestern’s Application, its witnesses’ prefiled testimony, and its responses to data requests to date, particularly MCC-006, demonstrate that NorthWestern has fulfilled these obligations. Brian Bird’s testimony with respect to the coal assets shows NorthWestern’s evaluation of a wide range of potential electricity supply resources.

The flaw in the MCC’s and the Commissioner’s positions is that they assume that there was an agreement between NorthWestern and PPLM for PPLM’s coal assets, and the Commission and the MCC can now contrast and compare the hydro acquisition with a coal acquisition. There was, however, no agreement for the purchase of PPLM’s coal assets. NorthWestern bid on PPLM’s coal resources and its bid was rejected. There was no agreement regarding terms, conditions or price regarding PPLM’s coal assets. PPLM’s coal resources are not available to NorthWestern as PPLM rejected NorthWestern’s offer. What is before the Commission for consideration is NorthWestern’s acquisition of PPLM’s hydro assets, not PPLM’s coal assets. Moreover, neither the MCC nor the Commissioner considered the burden of the requests upon NorthWestern and others of seeking what ultimately is irrelevant information.

The Commission also needs to consider the impact of § 69-8-426, MCA (2013). Section 69-8-426, MCA (2013), provides that any assets acquired by NorthWestern pursuant to Title 69, Chapter 8, “must be used by the public utility to serve and benefit customers with the public utility’s Montana service territory.” If NorthWestern were to acquire the coal and hydro assets,

it would have significantly more resources than needed to serve customers in its service territory, would have made NorthWestern a merchant generator, and would therefore violate the bankruptcy stipulation. Arguably, this section would preclude the Commission from approving any transaction that included the hydro and coal assets.

III. **Parties cannot use discovery to force NorthWestern to prepare documents that do not exist.**

In data requests, the MCC and the Commission staff have demanded that NorthWestern produce documents that do not exist.<sup>5</sup> The production of such documents would require NorthWestern to conduct analyses that it has not done and on which it did not rely in making its decision to acquire the Hydros. Of the 555 data requests, including subparts, served on NorthWestern to date, 122 have requested the production of documents. NorthWestern has provided copies of the requested documents, provided access to the requested documents, or provided public sources of the documents for the vast majority of the data requests whose response deadline has passed. However, NorthWestern has objected or will object to 26 data requests that require the creation of new documents or the preparation of new analysis. The Commission should sustain NorthWestern's objections to data requests that require the creation of new documents or new analysis.

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<sup>5</sup> See the data requests listed on Exhibit C attached to this Brief.

**A. The Discovery Rules, and Rule 34 in particular, do not require Northwestern to create new documents.**

Discovery is intended to eliminate surprise, promote the effective cross-examination of expert witnesses, and to assure mutual knowledge of all relevant facts gathered by all parties.<sup>6</sup> Discovery includes depositions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.<sup>7</sup> The Commission has adopted all of these methods<sup>8</sup> and an additional technique – data requests.<sup>9</sup> Data requests serve as written interrogatories, requests for production of documents, and requests for admission. The purpose of a data request determines the sideboards around it. If a data request asks for information it is akin to an interrogatory, and M.R.Civ.P. 33 establishes the sideboards; if a data request asks for

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<sup>6</sup> See *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶67, 337 Mont. 411, 102 P.3d 106; citing *Richardson v State*, 2006 MT 43, ¶ 22, 331 Mont. 231, 130 P.3d 634; quoting *Massaro v. Dunham*, 184 Mont. 400, 405, 603 P.2d 249, 252 (1979); citing *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 392, 91 L. Ed. 451 (1947); and *Henricksen v. State*, 2004 MT 20, ¶ 57, 310 Mont 307, 84 P.3d 98; quoting *Hawkins v. Harney*, 2003 MT 58, ¶ 21, 314 Mont. 384, 66 P.3d 305.

<sup>7</sup> M.R.Civ.P. 26a.

<sup>8</sup> “Techniques of prehearing discovery permitted in state civil actions may be employed in commission contested cases, and for this purpose the commission adopts rules 26, 28 through 37 (excepting rule 37(b)(1) and 37(b)(2)(d) of the Montana rules of civil procedure in effect on the date of the adoption of this rule, and any subsequent amendments thereto.” ARM 38.2.3301(1)

<sup>9</sup> “Nothing in (1) of this rule shall be construed to limit the free use of data requests among the parties. The exchange of information among parties pursuant to data request is the primary method of discovery in proceeding before the commission.” ARM 38.2.3301(2)

the production of documents M.R.Civ.P. 34 sets the limits; and if a data request asks for the admission of the truth of any matter, M.R.Civ.P. 35 applies.

Critically, here, M.R.Civ.P. 34 allows a party to request the production of documents, and is the rule which prohibits the Commission from requiring NorthWestern to prepare new documents.<sup>10</sup> By its very language, *M.R.Civ.P. 34 limits production to documents that are in existence*. The rule provides that a party may only require production of documents “in the responding party’s possession, custody, or control.” A document that has not been created is not within a party’s possession, custody, or control. The Montana Supreme Court has held that, “By its plain language, *Rule 34(a) does not require parties to produce nonexistent documents*.”<sup>11</sup> (emphasis added). For that reason, the Montana Supreme Court has stated that tax returns that had not been created were not within the “ambit of Rule 34(a).”<sup>12</sup>

Federal court decisions construing Federal Rule of Civil Procedure Rule 34 say the same. M.R.Civ.P. 34 is adopted from Rule 34 of the Federal Rules of Civil Procedure.<sup>13</sup> When a state

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<sup>10</sup> “A party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items **in the responding party’s possession, custody, or control**: (A) any designated documents or electronically-stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or (B) any designated tangible things.” M.R.Civ.P. 34(a) (emphasis added).

<sup>11</sup> *Peterman v. Herbalife Intern., Inc.*, 2010 MT 142, ¶ 22, 356 Mont. 542, 234 P.3d 898.

<sup>12</sup> *Id.*, ¶ 21.

<sup>13</sup> The current version of M.R.Civ.P. was adopted in 2011. The Committee Notes explaining its adoption provide, “Previous Rule 34 of the Montana Rules of Civil Procedure allowed 45 days for response by a defendant to requests served under Rule 34 following service of summons and complaint on that defendant. That provision is carried forward in Rule 33(b)(2)(A). In all other

rule is modeled after a federal rule, Montana courts look to interpretation of the federal rule for guidance interpreting the state rule.<sup>14</sup> Federal decisions have repeatedly held that Federal Rule of Civil Procedure 34 cannot be used to require a party to create new documents.<sup>15</sup> Just as the Montana Supreme Court and numerous federal courts have ruled, the Commission should find that a party cannot use a data request to force another party to create a new document.

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respects, the rule is identical to Rule 34 of the Federal Rules of Civil Procedure.”

<sup>14</sup> *Farmers Union Mut. Ins. Co. v. Bodell*, 2008 MT 363, ¶ 21, 346 Mont. 414, 197 P.3d 913, citing *Muri v. Frank*, 2001 MT 29, ¶ 12, 304 Mont. 171, 18 P.3d 1022.

<sup>15</sup> See e.g. *Harris v. Koenig*, 271 F.R.D. 356, 371 (D.D.C. 2010) (“parties are only required to produce documents that are *already* in existence”) (emphasis in original) (quoting *Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*, 267 F.R.D. 1, 8 (D.D.C. 2010); citing *Alexander v. Federal Bureau of Investigation*, 194 F.R.D. 305, 310 (D.D.C.2000) (“Rule 34 only requires a party to produce documents that *are already in existence*”; “a party is not required to prepare, or cause to be prepared, new documents solely for their production.”) (internal citation omitted)(emphasis added); *Insituform Technologies, Inc. v. Cat Contracting, Inc.*, 168 F.R.D. 630, 633 (N.D.Ill.1996) (“Rule 45 \* \* \* does not contemplate that a non-party will be forced to create documents that do not exist.”); *Rockwell Int’l Corp. v. H. Wolfe Iron & Metal Co.*, 576 F.Supp. 511, 513 (W.D.Pa.1983) (“Rule 34 cannot be used to require the adverse party to prepare, or cause to be prepared, a writing to be produced for inspection, but can be used only to require production of things in existence.”) (internal quotes omitted), quoting *Soetaert v. Kansas City Coca Cola Bottling Co.*, 16 F.R.D. 1, 2 (W.D.Mo.1954); *United States v. U.S. Alkali Export Ass’n*, 7 F.R.D. 256, 259 (S.D.N.Y.1946) (“Rule 34 is to be used to call for the production of documents already in existence \* \* \* and not to require an adverse party to prepare a written list to be produced for inspection.”); *Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D.Ind.1992) (“Of course, ‘[i]f a document or thing does not exist, it cannot be in the possession, custody, or control of a party and therefore cannot be produced for inspection.’”) (internal citation omitted). Similarly, one court found it inappropriate to impose upon a party the duty of “sorting or analysis of data” or the “task of culling relevant [data] from a long list.” *Sanders v. Levy*, 558 F.2d 636, 642 n. 7 (2d Cir.1976), *rev’d on other grounds, sub nom. Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).

**B. The Commission may not use its investigatory authority to require NorthWestern to create new documents.**

At times, parties and the Commission staff have asserted that the Commission's investigatory authority permit it to require a party to create new documents and undertake new analysis. This assertion is wrong. The Commission has authority to inquire into the management of a public utility, to inspect books and record, and to require the production of books, accounts, or records.<sup>16</sup> The Commission has the authority and obligation to inquire into neglect or violation of laws by a public utility.<sup>17</sup> However, the Commission's authority is not unlimited. The Commission, as an administrative agency has only the powers specifically conferred upon it by the legislature; if there is reasonable doubt about a particular power, the Commission does not have the power.<sup>18</sup> The Commission has the authority to request information from a public utility; it does not have the authority to specify the manner in which the utility provides the information.<sup>19</sup>

It follows from this limit on the Commission's authority that absent a clear statute authorizing the Commission to require the creation of new documents, the Commission does not have such authority.

**C. Discovery policies support NorthWestern's position.**

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<sup>16</sup> § 69-3-106, MCA (2013).

<sup>17</sup> § 69-3-110, MCA (2013).

<sup>18</sup> *Montana Power Co. v. Public Serv. Comm'n*, 206 Mont. 359, 371-372, 671 P.2d 604, 611 (1983); *City of Polson v. Public Serv. Comm'n*, 155 Mont. 464, 469, 473 P.2d 508, 511 (1970); *Great Northern Utilities v. Public Serv. Comm'n*, 88 Mont. 180, 203, 293 P. 294, 298 (1930) *State v. Boyle*, 62 Mont. 97, 204 P. 378, 379 (1921).

<sup>19</sup> *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).

As stated above, policies underlying discovery are to avoid surprise, support effective cross-examination of expert witnesses, and assure mutual knowledge of relevant facts. None of these policies support requiring a party to create new documents or perform new analysis to respond to data requests. First, surprise is avoided in Commission proceedings far more than in court proceedings by prefiled testimony. Opposing parties know not only the facts and opinions of another party, but also the very testimony that the party will offer. In this case, the Application included over 6,300 pages of testimony, exhibits and workpapers. This applies to expert witnesses too. Further, new documents and new analysis does not reflect mutual knowledge of relevant facts. What a utility knows when it files its application is reflected in the prefiled testimony and by existing documents, not by new documents or analysis. Further, the practice of providing working electronic models allows opposing parties to perform any new analysis that they desire. In this case, prior to any discovery, *NorthWestern provided electronic versions of exhibits, electronic data supporting tables and charts, and electronic supporting workpapers to the Commission and the MCCL*. After intervention, NorthWestern provided these same documents to all other intervenors. These electronic files permit any party or the Commission staff to perform the new analyses and to create the new documents that they have requested from NorthWestern.<sup>20</sup>

Based on discovery rules, the Commission's limited statutory authority, the policies underlying discovery, and the parties' ability to perform their own analyses and create their own

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<sup>20</sup> In the scheduling conference, NorthWestern made this point. One member of the Commission staff admitted that he had performed the analysis asked for in a data request, but asserted that NorthWestern should provide it so that it would be included in the evidentiary record. This is a misuse of discovery.

documents, the Commission should sustain NorthWestern objections to data requests that require new analyses and the creation of new documents.

IV. **Conclusion**

This transaction is extraordinarily important to Montana and to NorthWestern.

NorthWestern is committed to a fully transparent and open process in order for the Commission to reach a decision on a full record within the procedural schedule. NorthWestern has provided a massive amount of data for the Commission. It provided 6,310 pages in its application, prefiled testimony and exhibits. It provided working electronic copies of models on December 23, 2013. It has provided 6,612 pages of responses to the Commission's and the MCC's data requests. Now, NorthWestern is asking the Commission to take control of this docket and impose some reasonableness into the discovery process.

NorthWestern is merely asking the Commission to (1) limit the fishing expeditions into a potential transaction that never took place and (2) to uphold the Montana Civil Rules, and both state and federal court decisions on those same rules, which conclude unequivocally that a party need not produce new analyses in the discovery process.

Respectfully submitted this 12<sup>th</sup> day of February 2014.



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## Document Production Summary

- I. Overview
  - A. Data Request Responses  
(not counting subparts): 197
  - B. Document Production
    - 1. Total Number of Documents: 97<sup>1</sup>
    - 2. Total Number of Pages: 12,922<sup>2</sup>
- II. Topics:
  - A. Transaction
    - 1. Confidential Information Memorandum (June 2013)
    - 2. Question & Answer Logs (Mustang I and II) (will be produced this week in response to MCC-009)
    - 3. Purchase and Sale Agreement with Schedules
    - 4. Indicative Offer (Oct. 15, 2012)
    - 5. Colstrip Sale-Leaseback Transaction discussion documents
    - 6. Valuation/Purchase Price
      - (a) Preliminary Valuation, 2009-2012 (Table in response to PSC-002)
      - (b) Long-term Revenue Requirement Modeling
      - (c) Discounted Cash Flow Analysis Model
      - (d) Forward Price Curves
      - (e) Revenue Credits Calculation
      - (f) Blackstone Fairness Opinion
    - 7. Board Materials

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<sup>1</sup> This number does not include the Q&A logs that will be produced this week.

<sup>2</sup> See footnote 1 above.

- (a) Board Meeting Agendas (Oct. 2012-Sept. 2013)
- (b) Executive Team Memos and Presentations
  - (i) Fiduciary Duties
  - (ii) Procedural Background
  - (iii) Reasons for Acquisition
    - a. Supply
    - b. Risk Appetite
    - c. Pros and Cons
  - (iv) Financing
  - (v) Due Diligence
    - a. Environmental
    - b. Technical Review
    - c. Water Rights
    - d. Employment & Labor
- (c) Corporate Risk Appetite Statement (Mustang I)
- (d) Confirming Bid Pros/Cons (Mustang I)
- (e) Mustang Purchase Price Matrix (Mustang I)
- (f) Independent Engineer's Report – Hydros (Mustang I and II)
- (g) Independent Engineer's Report – Thermal Plants (Mustang I)
- (h) Board Resolution, Authority to Propose and Negotiate Purchase of Hydro Assets (June 2013)
- (i) Corporate Risk Appetite Statement (Mustang II)
- (j) Assets Bid Pros/Cons – Hydro Only (Mustang II)
- (k) Presentation, Post-Closing Structure
- (l) Presentation, Discounted Cash Flow Valuation (Sept. 2013)

- (m) Preliminary Valuation – Hydro (June 2013)
  - (n) Blackstone Presentation to NorthWestern Board
  - (o) Board Resolution, Approval to Submit Offer (Mustang II)
  - (p) Board Resolution to Enter Into and Consummate Purchase and Sale Agreement and Financing (Sept. 2013)
8. Corporate & Organizational Structure
- (a) NorthWestern’s Most Recent Form 10-Q [Date TBA]
  - (b) NorthWestern’s Most Recent Form 10-K [Date TBA]
  - (c) NorthWestern’s Credit Rating History
9. Financial & Accounting
- (a) Historical Reports
    - (i) Original plant cost—hydro facilities
    - (ii) Original plant cost—transmission facilities
    - (iii) 1995 MPC Depreciation Study (PSC-055)
  - (b) Hydro assets purchase summary
  - (c) Depreciation expense work paper
  - (d) Electric vs. Gas Return on Equity Schedule
  - (e) The Hydros Revenue Requirement
  - (f) Credit Rating Agency Views on Hydros
10. Engineering/Operations & Maintenance
- (a) Budgets
  - (b) Physical Condition of Assets
    - (i) Independent Engineer’s Final Report (1/3/13) (Shaw)
    - (ii) Addendum to Independent Engineer’s Final Report (6/25/13) (Shaw)

(iii) Due Diligence Report Supplementing the 1/3/13  
Independent Engineer's Final Report (9/6/13) (CB&I)

11. Rates/Supply Portfolio
  - (a) 2013 Electricity Supply Resource Plan
12. Tax
13. Environmental
14. FERC
  - (a) Annual FERC Dam Safety Inspections
  - (b) FERC orders issued to PPLM re Production Tax Credit (PSC-056)
  - (c) Part 12 Safety Inspections
  - (d) PPL Owner's Dam Safety Program
  - (e) Emergency Action Plan
15. NERC
16. Human Resources
  - (a) Numbers employees by job title expected to transfer to NorthWestern (see response to PSC-050)
  - (b) Labor
    - (i) IBEW-PPLM collective bargaining agreement (PSC-050)
    - (ii) Number of transferred employees covered by collective bargaining agreement (see response to PSC-050)
  - (c) Pension
  - (d) OSHA
17. Insurance
18. Litigation
19. Marketing & Trading
20. Contracts

(a) On Peak Transactions

(b) Off Peak Transactions

21. Real Property

22. IT

## COAL RELATED DATA REQUESTS

PSC-003      Regarding: Prior Bid for PPLM assets  
                 Witness: Bird

- c.      Please explain further the environmental concerns associated with the PPLM coal assets, and describe the process and amount of negative value that NWE quantified to be associated with those concerns, isolating each concern as an individual liability to the extent that NWE did so.
- d.      Please explain further the sale lease-back provision associated with the PPLM coal assets, and describe the process and amount of negative value that NWE quantified to be associated with that provision.

PSC-005      Regarding: Coal Asset Sale  
                 Witness: Bird

- a.      Provide a written copy of the “due diligence” referred to at 10:3.
- b.      Did NWE conduct a market valuation of the coal assets exclusively before making the determination not to bid in the process described at 9:15-10:7? Why or why not?
- c.      If NWE did conduct a market valuation of the type described in (b), please provide it.

PSC-040  
                 Regarding:      Carbon Regulation  
                 Witness:        Hines

NWE points to a Supreme Court decision “holding that EPA already has the authority under the Clean Air Act to regulate greenhouse gas emissions” (14:21-23). Has NWE analyzed more recent Supreme Court activity in respect to the legality of existing point-source regulation of greenhouse gas emissions and, if so, what are NWE’s conclusions regarding that activity?

PSC-066  
                 Regarding:      Evaluating Other PPLM Assets  
                 Witness:        Stimatz

Please provide the version of your Exhibit\_(JMS-1) that included analysis of other assets owned by PPLM referenced on JMS-4:9-10.

PSC-068

Regarding: Hydro Sales Process  
Witness: Bird

- b. Did PPL place a negative value on its coal assets in Montana?
- c. Please provide a copy of the communication referenced at 9:17-20.

PSC-084

Regarding: Combined Asset Valuation  
Witnesses: Stimatz, Meyer

- a. The date on the spreadsheet you provided in response to PSC-066 is June 24, 2013. Please confirm that the valuation of coal assets found in this spreadsheet reflects NorthWestern's understanding that the sale leaseback would be bought out prior to execution of the sale. (See Bird Direct Testimony, p. 10:1-2).
- b. Did you modify the conforming LT Rev Req model provided in PSC-003 to account for the removal of sale leaseback restrictions? If so, please provide the model.
- c. Did your analysis reveal that combining thermal assets with the Hydros hedged the NPV of the total package to some degree against uncertainty in the Carbon Adder? That is, did you find that although higher expected carbon costs would cause an increase in expected operating costs of the thermal assets, the increased costs would be offset to some degree by increased revenues to both types of assets; and that decreased thermal plant costs due to lower expected carbon costs would be accompanied by decreased revenues?
- d. How did NorthWestern value the potential of the combined thermal and hydro package to hedge net present value against changes in forecast carbon costs?
- e. Please explain why, in the "Dispatch" tab of the PSC-066 Mustang Valuation spreadsheet; Colstrip 1&2 and Corette power is assumed sold at Off-System prices, and Colstrip 3&4 and Hydros power is sold at On-System prices.

PSC-085

Regarding: Hydro and Thermal Assets  
Witness: Bird

- a. Did the net present value of \$736 million for the combined thermal and hydros assets, as shown in cell J:8 of the "Valuation" tab in the PSC-066 Mustang Valuation spreadsheet, or a similar value from a similar, previous spreadsheet, inform your non-conforming bid of \$740 million on January 7, 2013?

- b. On 9:1-3 you testify that “PPL noted that if NorthWestern increased the offer price on the all-asset bid and could resolve differences in NorthWestern’s and PPL’s positions on the terms of the PSA, a deal was possible.” Did PPL ever indicate to you or other NorthWestern agents that the non-conforming bid of \$740 million was acceptable or near-acceptable as bid for the combined assets, conditioned on resolution of the PSA differences?
- c. On 10:1-7 you state that NorthWestern was no longer interested in PPL’s thermal assets although PPL had removed the sale leaseback restriction. If so, then why the analysis dated June 24, 2013 provided in response to PSC-066?

PSC-086

Regarding: Hydro and Thermal Assets  
Witness: Bird

- a. On 7:1-4 you testify that “[NorthWestern’s] preference has always been to own just the Hydros. From NorthWestern’s perspective, it only needed about half the megawatts that PPL was selling, and the Hydros are a clean generation source that would provide diversity to NorthWestern’s fleet.” Please explain the consequence to NorthWestern of acquiring too much capacity.
- b. Would the expected consequence of acquiring over-capacity change if NorthWestern also acquired PPL’s Western Power Marketing Business, or “Book”, as described on p. 6 of the Confidential Information Memorandum?
- c. Regarding the “diversity” of NorthWestern’s fleet, do you agree that the primary objective of portfolio diversity is mitigating risks associated with unknown future values of important variables such as fuel and carbon costs?
- d. Do you agree that since all interested parties would be very aware of potential future carbon and other environmental costs associated with coal-fired electricity generation, that any bids for the Colstrip and Corette assets would be significantly discounted to account for environmental risk, and so NorthWestern could have bid competitively for those resources at a price that offset or neutralized that risk?
- e. How did NorthWestern value the potential of the combined thermal and hydro package to hedge net present value against the uncertainty of future environmental costs? That is, since the value of the thermal assets would be expected to decline with unexpected increases in environmental costs, and the value of the hydro assets would be expected to increase with unexpected increases in those costs, how did NorthWestern value the NPV stabilizing property of a combined package with respect to the uncertainty in future environmental costs?

PSC-087

Regarding: Quantifying Value of Coal Facilities' Liabilities  
Witness: Bird or Other

The responses to PSC-003(c) and (d) are appreciated but they lack detail as to how the concerns regarding the coal facilities were actually quantified in NWE's valuation and analysis leading to its 2013 bid that included the facilities.

- a. Please demonstrate how you quantified or assigned a dollar value to the environmental liabilities discussed in response to PSC-003(c).
- b. Provide any analytic work that supports the negative value described in Bird's testimony, and the zero rate base value shown in the LT Rev Req model attached in response to PSC-003(b)
- c. Please demonstrate how you quantified or assigned a dollar value to the lease-back provisions discussed in response to PSC-003(d).
- d. Were the environmental and lease-back liabilities described in response to PSC-003(c) and (d) captured as data in the LT Rev Req model produced in response to PSC-003(b)?

PSC-088

Regarding: LT Rev Req Model  
Witness: Bird, Meyer, or Other

- d. Further describe the model produced in response to PSC-003(b). What was its purpose?
- e. Were there subsequent LT Rev Req model iterations conducted after the model produced in response to PSC-003(b), but before NWE submitted its first bid to PPLM? If so, please describe how they differed from the model that has been produced in response to PSC-003(b).

PSC-089

Regarding: Destroyed Final Models  
Witness: Bird or Other

NWE notes that it destroyed the final models used to inform its first bid in response to a PPLM request in February 2013.

- a. Did NWE retain the inputs to or outputs of the final model produced in response to PSC-003(b)? Please clarify whether each of the following, which appear as lines of data in the

model, was retained in some format: cap-ex, depreciation, rate-base (ending balance), deferred taxes, market curve (\$ per Mwh), variable O&M, fixed O&M.

- b. Describe which of the lines of data would have changed between the LT Rev Req model produced in response to PSC-003(b) and subsequent models that were used to inform the Jan. 2013 bid.

PSC-090

Regarding: Cap-ex Estimates in LT Rev Req Model  
Witness: Bird, Meyer, or Other

- a. How were cap-ex estimates for the coal facilities in the LT Rev Req model produced in response to PSC-003(b) derived? If they were sourced from PPLM, please describe what, if any, adjustments NWE made to them.

PSC-092

Regarding: Thermal CapEx vs. Hydro CapEx  
Witness: Stimatz or Other

In the spreadsheet provided in response to PSC-066, NWE in the "Thermal CapEx" tab lists both an "Expected Case" and a "High Case" for the Colstrip units. There appears to be only one cap-ex estimate, with no "high case" for the Hydros.

- a. Where did the cap-ex data appearing for the Thermal and Hydros come from?
- b. What specifically drives the difference between the "Expected" and "High" cases for the Colstrip units? Provide a list of the upgrades assumed in the Colstrip cap-ex forecasts.
- d. Did NWE consult other Colstrip co-owners' publicly available information regarding cap-ex requirement estimates regarding Colstrip facilities (e.g., Puget Sound Energy) to check it against the cap-ex requirements assumed in the spreadsheet in response to PSC-066?

PSC-093

Regarding: Fuel & Carbon Inputs to O&M  
Witness: Stimatz or Other

- a. In the DCF model provided in response to PSC-066, the fuel cost increases dramatically for Colstrip Unit 3 in 2020. Explain this increase, and the footnote included in the spreadsheet.
- c. What tons/Mwh is assumed in the calculation of the carbon O&M price for the Colstrip 1 & 2 and Colstrip 3 plants?

PSC-094

Regarding: Environmental Risks in DCF Model  
Witness: Stimatz, Rhoads, or Other

Under the "G&A, Contingency Items" tab in the spreadsheet provided in response to PSC-066, several environmental liabilities are listed.

- b. Why are some rows, including "Sierra Club Litigation," "Kluver Case" and "Colstrip Coal Ash Ponds" listed, but blank of expected G&A expenditures?
- c. Is there any significance to the fact that "Sierra Club Litigation" is highlighted, and, if so, what is that significance?
- d. In the row "Colstrip Coal Ash Ponds," it is parenthetically noted that this is "included in Colstrip capital." Does this mean it is included in the CapEx forecast within this spreadsheet and, if so, is it included in the "Expected" or "High" case?
- e. Are the other liabilities that are not quantified in the "G&A, Contingency Items" tab, somehow elsewhere in this spreadsheet numerically quantified as risks?

PSC-099

Regarding: Carbon Regulation  
Witness: Hines

- a. With respect to the response to PSC-040, is it then reasonable to conclude that NWE is assuming that the greenhouse gas regulations scheduled for release this summer will not be reversed or substantially modified by Congress or a new administration, or modified or delayed by an adverse federal court order that undoes part of the "2007 Supreme Court decision" on which NWE assumptions about regulation rely?
- b. To what extent has NWE engaged in an analysis of the likelihood that these rules could be reversed, and has NWE assigned any probability to that potential outcome, whether formally or informally?

PSC-104

Regarding: Coal Asset Valuation  
Witness: Stimatz

- a. Please describe and provide sources for all costs shown in the Colstrip 1&2 O&M, Colstrip 3 O&M, and Corette O&M tabs of the Excel spreadsheet provided in response to PSC-066. If you employed models to estimate these costs, please describe in detail the inputs and calculations performed. If the costs were estimated by PPL, please provide the source documents.
- b. Please describe and provide sources for all capital expenditures shown in the Thermal CapEx tab of the Excel spreadsheet provided in response to PSC-066. If you employed models to estimate these expenditures, please describe in detail the inputs and calculations performed. If the costs were estimated by PPL, please provide the source documents.
- c. Please describe and provide sources for all expenditures shown in the G&A, Contingency Items tab of the Excel spreadsheet provided in response to PSC-066. If you employed models to estimate these expenditures, please describe in detail the inputs and calculations performed. If the costs were estimated by PPL, please provide the source documents.
- d. Please describe the derivation of the values found in cells D:4, D:5, and D:6 of the Valuation tab of the PSC-066 spreadsheet. Why are these values not linked (iteratively) to the net present values found in cells H:4-6 of the same sheet?
- e. Please provide evidence and reasoning to support NorthWestern's assumptions of service termination at Corette in 2016, and Colstrip 1&2 in 2032.

PSC-105

Regarding: Coal Asset Valuation  
Witness: Meyer

- a. Please describe and provide sources for all costs reflected in the NWE Energy Supply estimates of coal asset cost of sales; as found in rows 15, 25, 35, and 55 of the Thermal Var COS tab of the conforming bid Excel spreadsheet provided in response to PSC-003. If you employed models to estimate these costs, please describe in detail the inputs and calculations performed. If some of the costs were estimated by PPL, please provide the source documents.
- b. Why did NorthWestern choose to use its own estimates regarding the coal asset cost of sales rather than the "CIM" estimates displayed in rows 14, 24, 34, and 54 of the tab referenced in (a)?
- c. Please provide the source of the estimates referenced in (b).

PSC-106

Regarding: Coal Asset Valuation  
Witnesses: Meyer, Stimatz, Unknown

- a. Is the coal asset (Corette, Colstrip 1&2, Colstrip 3) cost and production information found in the conforming bid spreadsheet provided in response to PSC-003 consistent with the full information that NorthWestern had received prior to July 1, 2013? If not, please explain inconsistencies and deficiencies.
- b. Is the coal asset cost and production information found in the spreadsheet provided in response to PSC-066 consistent with the full information that NorthWestern had received prior to July 1, 2013? If not, please explain inconsistencies and deficiencies.
- c. Please remedy any inconsistencies and deficiencies in the PSC-003 and PSC-066 spreadsheets by providing data to support all relevant model inputs that are consistent with full information as of July 1, 2013.

MCC-002

Regarding: Bid Development  
Witness: All Relevant Witnesses

- b. Please provide a detailed explanation of how NorthWestern's January 2013 conforming bid of approximately \$400 million for the total package of assets including Colstrip 3, was developed.
- c. Please explain in detail the assumptions made about the costs, benefits and potential liabilities of non-hydro facilities that led to them having a net value of negative \$340 million to the package.
- d. Please provide a detailed comparison of each of those assumptions with the equivalent assumptions made in analyzing the value of Colstrip 4 to the utility when Northwestern asked the Commission to approve a price of approximately \$400 million for its purchase.

MCC-004

Regarding: Valuation  
Witness: All Relevant Witnesses

Does NWE believe that its owned interest in Colstrip Unit 4 has a negative value to the utility currently? Please explain in detail.

MCC-011 [WITHDRAWN]  
Regarding: Acquisition Analysis  
Witness: All Relevant Witnesses

Please provide copies of all communications (internal and external) concerning any aspect of NWE's potential acquisition of any generating properties from PPLM (or any affiliate thereof) other than the hydroelectric properties that are the subject of this filing.

MCC-044

Regarding: Restrictive Sale Leaseback  
Witness: Brian B. Bird

In reference to pages BBB-7 lines 20-21 and BBB-8 lines 1-2: Please fully describe and explain the restrictive sale leaseback structure and fully document your estimate of its negative value.

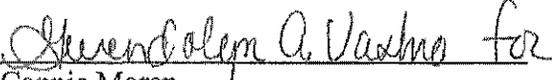
Data Request	Information Requested
PSC-015c	“Please evaluate your DCF model using a carbon price equal to zero in all periods.”
PSC-034	“Please provide electronic copies of Exhibit __ (PJD-3) reworked to compare expected charges with and without the PPL hydro assets in July 2014, January 2015, and July 2015. “
PSC-041	“Please provide a revised Graph 3 (p. 19) that does not include a forecast carbon price adder.”
PSC-047	“Please provide a revised Graph 3 (p. 19) that does not include a forecast carbon price adder.” PSC-047 – “Please provide PowerSimm model results for the following resource portfolios and carbon cost input assumptions: [8 portfolios and 5 carbon cost assumptions listed].”
PSC-055d	“What would levelized cost of the Hydros be if the plant was depreciated (with the same residual terminal value) over 30 years (i.e., using a 3.33% accrual factor?”
PSC-055e	“What would be the first-year bill impact of te scenario described in (d)?”
PSC-075b	“Please provide DCF analysis using the 0.6 carbon adder from the PowerSimm analysis in the 2013 Plan rather than a projected market heat rate carbon adder.”
PSC-106c	“Please remedy any inconsistencies and deficiencies in the PSC-003 and PSC-066 spreadsheets by providing data to support all relevant model inputs that are consistent with full information as of July 1, 2013”
PSC120	“Please provide the primary source document from the AEO, called GHG15 in the 2013 RPP (page 5-6), that supports your carbon price forecast.”
MCC-002d	
MCC-003a	“Please provide a year by year estimnate of the revenue requiremens of the utility with and without the purchase of the hydros, including a detailed explanation of all assumptions made”
MCC-003b	“Please provide an analysis of the effect of alternate assumptions in part a, above, on the date at which revenue requirements become lower in the “with” case than in the “without” case.”
MVV-005	“Please provide a year by year estimate of the average residential customer bill for NWE resource procurement planning cycle with and without the purchase of the hydros, including a detailed explanation of any assumptions not already described in response to MCC-003.”
MCC-080	“In your testimony starting at page TEM-15 you discuss differences between your Exhibit__ (TEM-1) and Mr. DiFronzo’s Cost of Service (COS) Model. One of the differences is that the COS Model calculates revenue credits during the period October 1, 2014 through September 30, 2015 instead of calendar year 2014. Please provide a run of the LT Rev Req Model utilizing the same revenue credits as in Mr. DiFronzo’s COS Model and all other

Data Request	Information Requested
	inputs adjusted accordingly”
MCC-091	“Exhibit __ (PJD-2), page 1 summarizes the estimated total electricity supply rates including the Hydros. Column D shows the Estimated Electric Supply Rates (excluding generation assets) for the period October 2014 thru September 2015 using Retail KWh sales for the period November 2013 thru October 2014. The same periods were used for the calculation of rates for Column R that shows the Hydro Assets’ Fixed Rates. Variable Rates for the other generation assets (Colstrip IV, Dave Gates, and Spion Kop) are estimates for the period November 2013 thru October 2014 using Retail KWh for the same period. Please provide an exhibit using the same time period as for the other Variable Rates for the calculation of Column D, Electric Supply Rates (excluding generation assets)”
MCC-152	“Please provide the table related to Exhibits TEM-1 and TEM-2, shown on page TEM-19 of your testimony, assuming a zero carbon price in all time periods. Please also include copies in MS Excel format of the exhibits showing the adjustment described above with all worksheets and links intact”
MCC-153	“Please provide the chart “Net Present Value of Portfolio Costs, 2015-2043,” shown at the bottom of page JMS-42 of your testimony, adjusted to reflect a zero carbon price (and no random uncertainty for this zero price) in all time periods”
MCC-159	“Please provide the yearly forward/forecast electricity market prices resulting from the stochastic simulation of Ascend’s modeling process, and used in the estimation of the Net Present Value of Portfolio Cost shown on the chart presented on page JMS-42 of your testimony. Do these prices incorporate the carbon adder and NWE system Basis adjustments in the same way as in Exhibit JMS-2? If so, please break down these components, if not, please explain why not and provide a breakdown of the components.”
MCC-175	“In reference to page 130 of Exhibit WTR-2.1, you report that it is likely that the Black Eagle Dam will be included in the final boundary definition of the Superfund site. Please provide a complete explanation of the potential range of costs and facilities impacts that may result from Black Eagle’s inclusion in the Superfund site.”

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of NorthWestern Energy's Brief Regarding Discovery Issues in Docket D2013.12.85, the PPLM Hydro Assets Purchase, has been hand delivered to the Montana Public Service Commission and to the Montana Consumer Counsel this date. It will be e-filed on the PSC website and served on the most recent service list by mailing a copy thereof by first class mail, postage prepaid. It will also be emailed to counsel of record.

Date: February 12, 2014

  
\_\_\_\_\_  
Connie Moran  
Administrative Assistant  
Regulatory Affairs

**Docket No D2013.12.85**  
**Hydro Assets Purchase**  
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