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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  
2012-2013 Electricity Supply Tracker

IN THE MATTER OF NorthWestern Energy's  
2013-2014 Electricity Supply Tracker

REGULATORY DIVISION

Docket Nos. D2013.5.33, D2014.5.46

**MONTANA ENVIRONMENTAL INFORMATION CENTER AND SIERRA CLUB'S  
REPLY IN SUPPORT OF PETITION FOR GENERAL INTERVENTION**

NorthWestern's objection to Montana Environmental Information Center ("MEIC") and Sierra Club's Petition for General Intervention ("Petition") ignores both the rules governing intervention in Public Service Commission proceedings and the Petition's detailed description of the position of MEIC and Sierra Club (collectively, "Petitioners") in this proceeding. The objection instead relies improperly on an invented legal standard and Petitioners' statements about their organizational missions and advocacy in other proceedings taken out of context.

NorthWestern’s contention that Petitioners seek to broaden the issues in this proceeding improperly conflates the interests that Petitioners seek to protect with the substantive issues they intend to raise. The Petition identified the issues which the Petitioners seek to raise, and those issues fall within the scope of the prudence review that NorthWestern acknowledges should be undertaken in these dockets.

NorthWestern objects to the Petition on the separate ground that the Montana Consumer Counsel (“MCC”) adequately represents the interests of the Petitioners. But unlike other legal standards for intervention that are inapplicable here, regulations governing Public Service Commission proceedings contain no requirement that a potential intervenor prove that existing parties do not adequately represent its interests. Mont. Admin. R. 38.2.2403, 38.2.2405. Even if such a requirement were in force, Petitioners have more specific interests than MCC and there is no evidence that MCC will make the same arguments as Petitioners in this case. Accordingly, the MCC cannot adequately represent Petitioners’ interests.

Finally, there is no basis for NorthWestern’s suggestion that the Commission should restrict intervention by the Petitioners. Mont. Admin. R. 38.2.2406 authorizes the Commission to restrict intervention only if the “interests and positions” of two or more parties are “substantially similar.” NorthWestern has not shown that any party has substantially similar interests or positions as the Petitioners, and thus no restrictions on Petitioners’ intervention are warranted.

**I. PETITIONERS WILL NOT BROADEN THE ISSUES IN THIS PROCEEDING.**

NorthWestern’s argument that Petitioners seek to broaden the issues in this proceeding improperly conflates Petitioners’ interests with the substantive issues they seek to raise.

NorthWestern quotes selectively from statements in the Petition regarding the mission of MEIC

and Sierra Club and the interests of the members that they seek to protect in this case— statements designed to satisfy the administrative requirement to show a “direct and substantial interest” in the proceeding. Mont. Admin. R. 38.2.2403. Having quoted these statements out of context, NorthWestern then ignores the very section in the Petition containing the substantive issues Petitioners intend to raise, which were listed to satisfy the separate requirement to describe an intervenor’s “position in regard to the matter in controversy.” Id. Once NorthWestern’s confusion between an intervenor’s interests and position is corrected, it is apparent that Petitioners will not broaden the issues in the proceeding.

NorthWestern contends that Petitioners’ Motion to Intervene should be denied because the Petitioners allegedly seek to broaden the issues to include consideration of the proper generation mix in NorthWestern’s portfolio, whether NorthWestern should have acquired an interest in Colstrip unit 4, and other policy issues regarding clean energy. NorthWestern Energy’s Objection to MEIC/SC’s Petition for General Intervention at 4-7 (“Objection”). NorthWestern supports this argument by citing extensively to Petitioners’ description of the organizational mission of MEIC and the Sierra Club as well as the interests of MEIC and Sierra Club’s members. Objection at 4-5 (citing Petition at 1-2); id. at 5-6 (citing Petition at 3-4). NorthWestern’s citations to the Petition to Intervene reflect a fundamental misunderstanding of both the administrative regulation governing general intervention and the contents of the Petition to Intervene.

Mont. Admin. R. 38.2.2403 requires a “clear and concise statement of the direct and substantial interest of the petitioner in the proceeding.” Pages one and two of the Petition include summaries of the mission of MEIC and Sierra Club in order to provide background on the interests of their members. The Petition then describes the direct and substantial interests of

MEIC and Sierra Club members who are customers of NorthWestern. Petition at 2-3 (“MEIC, Sierra Club, and their members who are residential electric customers in NorthWestern Energy’s service territory have a direct and substantial interest in this proceeding because the proposed rate increase will have economic and environmental consequences for NorthWestern Energy ratepayers.”). Petitioners described the mission of MEIC and Sierra Club and the interests of their members to fulfill the requirement in Mont. Admin. R. 38.2.2403 that the Petitioners have a “direct and substantial interest in the proceeding.”

NorthWestern mistakenly assumes that the direct and substantial interests of Petitioners are the same as the substantive issues Petitioners intend to raise.<sup>1</sup> But the regulation itself recognizes the difference between a petitioner’s interests in a case and the issues the petitioner will raise by requiring both a “clear and concise statement of the direct and substantial interest of the petitioner in the proceeding” and the petitioner’s “position in regard to the matter in controversy.” Mont. Admin. R. 38.2.2403. The Petition mirrored the regulation by first describing the interests of the Petitioners and then explaining Petitioners’ positions on the issues in controversy.<sup>2</sup>

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<sup>1</sup> The intervention by Human Resource Council (“HRC”) in this proceeding is an example of the difference between the interests an intervenor seeks to protect and the interests it seeks to raise. HRC’s mission is to alleviate poverty by advocating for low-income electric customers. HRC’s interest in alleviating poverty does not mean that HRC will broaden the issues to include general discussions of poverty in Montana.

<sup>2</sup> NorthWestern uses its Objection to speculate on the motives of MEIC and the Sierra Club and “the goal of its intervention in this docket.” Objection at 6. But the “goal of [MEIC and Sierra Club] in this docket” is not a factor the Commission considers under Mont. Admin. R. 38.2.2403. In their Petition, MEIC and Sierra Club explained the positions they will take in this docket, and the issues they intend to raise, and it is those statements—not NorthWestern’s speculation as to MEIC and Sierra Club’s “goal”—that the Commission properly considers under Mont. Admin. R. 38.2.2403.

Remarkably, in an Objection that alleges Petitioners will broaden the issues, NorthWestern fails to mention Petitioners' detailed statement of the issues Petitioners actually intend to raise, all of which pertain to the operative question of whether NorthWestern's costs associated with Colstrip Unit 4 were "prudently incurred." Mont. Code Ann. § 69-5-210(1); see also Objection at 4 ("[T]he question to be decided by the Commission in the consolidated dockets is: Were the electricity supply costs incurred by NorthWestern to serve customers prudently incurred?"). Specifically, Petitioners stated:

MEIC and Sierra Club intend to present expert testimony in this proceeding to demonstrate that NorthWestern Energy has not established that it prudently incurred the costs associated with Colstrip Unit 4 for which it now seeks customer reimbursement. Specifically, Petitioners believe that costs associated with Colstrip Unit 4, particularly costs associated with the unit's extended outage in 2013-14, may have been imprudently incurred because Colstrip does not provide adequate and reliable electricity supply service at the lowest long-term total cost. To the extent that NorthWestern Energy purchased replacement power from other coal-fired generating units (including other Colstrip units) during the period of the Colstrip Unit 4 outage, such power may not have represented the lowest cost option, where renewable sources of energy such as wind, solar, and hydropower may have lower costs. Further, Petitioners believe the Colstrip Unit 4 outage may have been avoided through proper maintenance and upkeep. Upon review of NorthWestern Energy's testimony and additional evidence, Petitioners will consider raising through expert testimony these and other issues relevant to the question of whether NorthWestern Energy's costs associated with Colstrip Unit 4 were prudently incurred.

Petition at 3.

Contrary to NorthWestern's argument, testimony on these issues will not "broaden the scope of this docket far beyond a prudence review." Objection at 6. Instead, it will ensure that the Commission has a record that enables it to fulfill its commitment to "conduct rigorous examinations in annual supply trackers of the prudence of NWE's expenses related to CU4." Dkt. D2008.6.69, Order 6925f, ¶ 227 (Nov. 13, 2008) (addressing the risk that "cost uncertainties related to CU4, such as coal cost increases, a future carbon tax, potential market price decreases,

or CU4 maintenance and operation costs that exceed NWE’s estimates, will increase the cost to ratepayers of CU4 power over and above what NWE has projected”). Answering whether NorthWestern prudently incurred costs at Colstrip Unit 4 during the extended outage requires knowing whether the outage itself could have been avoided through proper maintenance; whether the replacement power was improperly procured, for example if it was not the least-cost option; and whether Colstrip Unit 4 is providing reliable and reasonably priced energy. See Petition at 3. Given that these are precisely the issues that should be examined regarding recovery of the costs incurred at Colstrip 4, Petitioners do not seek to broaden the issues beyond the prudence review that NorthWestern acknowledges is appropriate in this case.

**II. PETITIONERS ARE NOT REQUIRED TO DEMONSTRATE THAT EXISTING PARTIES INADEQUATELY REPRESENT THEIR INTERESTS, BUT EVEN IF THEY WERE, THEY HAVE DONE SO.**

NorthWestern opposes Petitioners’ intervention on the separate ground that the MCC adequately represents Petitioners’ interests. Objection at 7. But the legal standard for general intervention specified by Mont. Admin. R. 38.2.2403 and 38.2.2405 does not require an intervenor to demonstrate that existing parties inadequately represent a potential intervenor’s interests. NorthWestern’s argument must fail as an attempt to invent a heightened legal standard. Even if Petitioners were required to make such a showing—which they are not—the Petitioners have demonstrated that existing parties, including MCC, cannot adequately represent their member customers’ interests in low-cost, clean energy.

**A. Montana Rules Do Not Require Petitioners to Demonstrate that their Interests are Not Adequately Represented by Existing Parties.**

The rules governing intervention in Public Service Commission proceedings contain no requirement that a potential intervenor prove that its interests are not adequately represented by existing parties. See Mont. Admin. R. 38.2.2403, 38.2.2405; see also Objection at 7 (conceding

that Mont. Admin. R. 38.2.2403 provides the legal standard for general intervention). Indeed, NorthWestern cites no authority allowing the Commission to deny intervention on this basis. Having failed to cite any statute or regulation in support of its argument, NorthWestern's argument can succeed only if the Commission departs from the plain language of the existing regulation and creates a heightened legal standard applicable to only MEIC and Sierra Club in this proceeding. The Commission should reject NorthWestern's invitation to depart from the requirements of Mont. Admin. R. 38.2.2403 and 38.2.2405.

**B. MCC Cannot Adequately Represent Petitioners' Interests.**

Even if the Petitioners were required to demonstrate that existing parties do not adequately represent their interests, the Petitioners made such a showing. NorthWestern contends that because the MCC represents consumer interests, the MCC adequately represents the consumer interests of MEIC and Sierra Club's members. The MCC has a "duty of representing consumer interests"—all consumer interests—in proceedings before the Commission. Mont. Const., Art. XIII, § 2. By contrast, Petitioners MEIC and Sierra Club represent members who have a particular interest in ensuring that NorthWestern provides low-cost, clean energy. As the Petition to Intervene explained, "MEIC, Sierra Club, and their members who are residential electric customers in NorthWestern Energy's service territory have a direct and substantial interest in this proceeding because the proposed rate increase will have economic and environmental consequences for NorthWestern Energy ratepayers." Petition at 2-3. Petitioners' interests are not the same as, and are more specific than, the broad consumer interests that the MCC is charged with representing. There is no indication that MCC will proffer testimony specific to the costs of replacement power during the Colstrip Unit 4 outage,

the operation and maintenance of Colstrip Unit 4, or any of the other issues that Petitioners specifically identified in their intervention petition.<sup>3</sup>

Moreover, on August 2, 2013, the Commission granted general intervention to other organizations in this docket—the Natural Resources Defense Council (“NRDC”) and the Human Resources Council, District XI (“HRC”)—that represent customers with particular interests. Just as participation of the MCC did not foreclose intervention by NRDC and HRC, the presence of the MCC in this case does not diminish the need for MEIC and Sierra Club to appear on behalf of their members whose interests as NorthWestern customers interested in low-cost, clean energy are directly affected by this proceeding.

### **III. THERE IS NO BASIS FOR LIMITING THE PARTICIPATION OF MEIC AND SIERRA CLUB.**

NorthWestern’s suggestion that the Commission restrict Petitioners’ intervention is contrary to the Commission’s regulation, which provides that intervention may be limited only “[w]hen two or more intervenors have substantially similar interests and positions.” Mont. Admin. R. 38.2.2406. NorthWestern has not demonstrated that Petitioners have “similar interests and positions” to those of any other intervenor, and thus no limitation on Petitioners’

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<sup>3</sup> In contrast with Admin. R. Mont. 38.2.2403 and 38.2.2405, the intervention standard applicable to intervention as of right in state court civil litigation does include consideration of the adequacy of representation by existing parties. Mont. R. Civ. P. 24(a). In that context, “[t]he requirement of inadequacy of representation is satisfied if an applicant shows that representation of its interests ‘may be’ inadequate and the burden of making this showing is minimal.” Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist. Court, Sheridan Cnty., 2002 MT 18, ¶ 14, 308 Mont. 189, 40 P.3d 400 (quoting Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983)). In assessing the adequacy of representation, courts “consider several factors, including whether [existing parties] will undoubtedly make all of the intervenor’s arguments, whether [existing parties are] capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected.” Sagebrush Rebellion, Inc., 713 F.2d at 528 (citation omitted); see also id. (granting intervention as of right where “the intervenor offers a perspective which differs materially from that of the present parties to this litigation”). Each of those factors favors Petitioners’ intervention here.

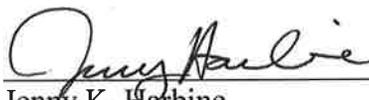
intervention is warranted under Mont. Admin. R. 38.2.2406. First, as described above, NorthWestern failed to show that any other party has “substantially similar interests” as the Petitioners, who have direct interests in NorthWestern procuring low-cost, clean energy. Second, NorthWestern submitted no evidence that any other party shares the Petitioners’ specific position that NorthWestern may not be entitled to recover the full amount of the requested costs incurred during the extended outage at Colstrip Unit 4.

NorthWestern failed to show that the Petitioners and another party “have substantially similar interests and positions” and therefore Mont. Admin. R. 38.2.2406 has no application to the Petitioners’ request to intervene.

#### CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission grant the Petitioners general intervention in these consolidated dockets.

Respectfully submitted on this 6th day of August, 2014,



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*On behalf of Petitioners Montana Environmental  
Information Center and Sierra Club*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6<sup>th</sup> day of August, 2014, I served the foregoing Reply in Support of Petition for General Intervention by first-class mail, postage prepaid, to the following:

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