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 RESPONSE TO NORTHWESTERN ENERGY'S OBJECTIONS

INTRODUCTION

Montana Environmental Information Center and Sierra Club (collectively, "MEIC"), by and through their legal counsel, hereby respond to NorthWestern Energy's ("NorthWestern") objections to MEIC's data requests MEIC-12, MEIC-13, MEIC-14, MEIC-17, MEIC-24, MEIC-25, MEIC-26, MEIC-27, MEIC-28, MEIC-30, MEIC-31, and MEIC-32. Theses data requests seek information reasonably likely to assist MEIC, other parties, and the Montana Public Service Commission ("Commission") in determining whether NorthWestern prudently incurred the replacement power costs it seeks to recover in this docket. For the reasons set forth herein, the Commission should overrule NorthWestern's objections to these data requests and order NorthWestern's prompt response.

LEGAL STANDARD

The Montana Rules of Civil Procedure govern discovery practice in proceedings before the Commission. Admin. R. Mont. 38.2.3301. As a result, "parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." Mont. R. Civ. P. 26(b)(1). The "information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* "The

underlying policies of Rule 26, M. R. Civ. P., are to eliminate surprise and to promote effective cross-examination of expert witnesses." *Henricksen v. State*, 2004 MT 20, ¶ 57, 319 Mont. 307, 84 P.3d 38, quoting *Hawkins v. Harney*, 2003 MT 58, ¶ 21, 314 Mont. 384, 66 P.3d 305. Given the importance of discovery to determining the truth of contested matters, "the spirit of our rules of civil procedure requires liberal disclosure on the part of all parties." *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 70, 338 Mont. 259, 165 P.3d 1079.

A recent Commission decision provides guidance on the scope of a prudence review of replacement power costs attributable to an outage. In an electricity supply tracker proceeding, a utility bears the burden of proving that its costs were prudently incurred. *In re NorthWestern Energy's 2011-2012 Electricity Supply Tracker*, Docket No. D2012.5.49, ¶ 102 (Oct. 22, 2013). To prudently manage a portfolio of supply resources and incur electric costs, a utility is expected to "identify and cost-effectively manage and mitigate risks related to its obligation to provide electricity supply service." *Id.* at ¶ 103 (citing Mont. Code Ann. § 69-8-419).

In the 2011-2012 tracker, NorthWestern sought replacement power costs it had incurred during an outage at the Dave Gates Station. The Commission found that information regarding the risk of the outage was relevant, as was information regarding the causes of the outage. *Id.* at ¶¶ 18-19, 33. Moreover, the Commission found that it was relevant that NorthWestern had not evaluated alternatives, such as obtaining outage insurance, that could have mitigated the costs of the outage. *Id.* at ¶¶ 33-34. Finally, the Commission noted that NorthWestern is expected to have a "situational awareness" of the particular possibilities of an outage occurring and the consequences of an outage at the plants it owns. *Id.* at ¶ 35. In light of this guidance, MEIC's data requests are all calculated to lead to evidence relevant to this prudence review and should be allowed.

ARGUMENT

This docket concerns whether NorthWestern's "electricity supply costs"—and particularly costs due to a nearly 7-month outage at Colstrip Unit 4—were "prudently incurred." Mont. Code Ann. § 69-8-210(1). Yet while this Commission instructed NorthWestern that it would "conduct rigorous examinations in annual supply trackers of the prudence of NWE's expenses related to [Colstrip Unit 4]," Dkt. D2008.6.69, Order 6925f, ¶ 227 (Nov. 13, 2008), NorthWestern has not provided the Commission with the most basic information to justify the costs it seeks to recover from Montana ratepayers. NorthWestern's application omitted essential information concerning the cause of the unplanned outage, the reasons it took 7 months to bring the unit back online, the costs attributable to the outage, as well as information about whether the outage might have been anticipated or prevented.

To remedy this gap in the record, MEIC requested, on September 29, 2014, basic information concerning what caused the outage and what steps were taken to fix the problem that caused the outage. NorthWestern still has not provided responsive documents because NorthWestern's third-party contractor, Siemens, apparently intends to file a motion for a protective order concerning certain information contained in the responsive documents. MEIC understands the need to safeguard trade secrets and other forms of confidential information. But more than six weeks after MEIC served its initial data requests, Siemens has still not filed any motion for a protective order and NorthWestern has not provided this fundamental information. This delay significantly limits MEIC's ability to understand the causes of the outage and the repair plan, and significantly hinders MEIC's ability to issue follow-up data requests.

In addition to delaying the production of responsive documents, NorthWestern has objected to eight of MEIC's data requests filed on October 6, 2014. While the particulars differ, the basic thrust of NorthWestern's objections is that the prudence review of replacement power

purchases must be limited to only data on Colstrip Unit 4 during the two years covered by this tracker docket. But this argument is fundamentally flawed: it excludes all information that would place the challenged action in context and provide a benchmark for evaluating the prudence of the actions in question. This context is essential for evaluating the prudence of NorthWestern's expenditures. More fundamentally, such information satisfies the liberal discovery standard because it is reasonably calculated to lead to relevant evidence. *See* Mont. R. Civ. P. 26(b)(1).

NorthWestern's flawed approach is analogous to claiming that in reviewing the prudence of its fuel costs, the cost of fuel at units not covered by this tracker, or the cost in years before the tracker, are irrelevant. But if NorthWestern sought to recover the cost of coal at Colstrip Unit 4 at $50 per ton, evidence that it had procured coal in prior years at a much lower cost would be relevant. Similarly, evidence that coal had been procured at other units for much less would be relevant. Information from other units or other time periods may be relevant even if the actions at those other units or during those other time periods are not directly at issue.

Similarly, information regarding the operation of Colstrip Unit 4 prior to the outage and the operation of other units is calculated to lead to evidence relevant to this proceeding because it will enable the parties and the Commission to: estimate the costs of the replacement power; evaluate whether NorthWestern should have taken additional steps to prevent an outage; and evaluate whether NorthWestern should have taken steps prior to the outage to secure alternative power supplies or otherwise mitigate the costs from an outage, if there was a substantial risk of the outage occurring or if studies suggest Colstrip Unit 4 has a short remaining useful life. All of this evidence is relevant to the operative question of whether costs related to the outage were prudently incurred, including whether NorthWestern took appropriate actions to "identify and

cost-effectively manage and mitigate risks related to its obligation to provide electricity supply service." *In re NorthWestern Energy's 2011-2012 Electricity Supply Tracker*, Docket No. D2012.5.49, ¶ 103 (citing Mont. Code Ann. § 69-8-419). Indeed, information regarding whether NorthWestern understood the risk of an outage and took appropriate steps to mitigate the consequences of an outage is precisely the kind of information the Commission relied upon in resolving NorthWestern's request to recover costs associated with an outage at the Dave Gates Station. *Id.* at ¶¶ 18-19, 33, 35. Accordingly, the Commission should overrule NorthWestern's objections to MEIC's data requests that seek information essential to evaluating the prudency of NorthWestern's replacement power costs during the extended outage.

I. MEIC-12, MEIC-13, MEIC-14, AND MEIC-17 SEEK INFORMATION THAT IS LIKELY TO LEAD TO EVIDENCE RELEVANT TO THE PRUDENCY OF NORTHWESTERN'S REPLACEMENT POWER COSTS.

In this docket, NorthWestern "includes a request to recover certain replacement power costs resulting from an outage at CU4 that occurred in the second half of 2013." NorthWestern Response to MEIC-24. The Commission is called upon to review the prudency of the costs for which NorthWestern seeks recovery. Because the replacement power was necessary only because of the outage, whether the costs of such power were prudently incurred depends in part on whether the cause or extent of the outage was the result of negligence. If the outage could reasonably have been avoided or shortened, ratepayers should not be forced to pay replacement power costs that exceed what they would have paid if Colstrip Unit 4 were online or promptly returned to service. *See In re NorthWestern Energy's 2011-2012 Electricity Supply Tracker*, ¶ 38 ("To require customers to pay an additional $1.4 million would relieve NorthWestern from bearing any cost responsibility whatsoever for an outage that it was in the best position to prevent (or prove unpreventable), and would not be a fair or equitable outcome.").

To that end, MEIC-12, 13, 14, and 17 request basic information regarding how Colstrip Unit 4 was returned to service and why the outage lasted as long as it did, from July 1, 2013 until January 23, 2014. Specifically, MEIC-12 seeks information regarding steps taken to bring Colstrip 4 online after the July 1, 2013 outage; MEIC-13 seeks repair schedules and projections of the return-to-service date for Colstrip 4 after the outage; MEIC-14 seeks the repair plan and communications regarding the repair plan at Colstrip 4 after the outage; and MEIC-17 requests shift reports regarding the repair work done on Colstrip 4 during the outage to return the unit to service. NorthWestern has not objected to these requests. However, NorthWestern failed to provide documents it identified as responsive on the grounds that the documents contain information that Siemens claims as confidential. However, Siemens is not a party to this proceeding, and Siemens has filed neither a motion to intervene nor a motion for a protective order. MEIC filed these data requests on September 29, 2014 and October 6, 2014, giving Siemens ample time to intervene and move for a protective order.

These data requests seek information that is relevant, and NorthWestern has filed no objection to these requests. Therefore, the Commission should order NorthWestern to answer MEIC-12, 13, 14 and 17 by November 14, 2014 unless Siemens files a motion for a protective order.

II. MEIC-24 AND 25 REQUEST INFORMATION LIKELY TO LEAD TO EVIDENCE RELEVANT TO THE PRUDENCY OF THE REPLACEMENT POWER COSTS.

The Commission should overrule NorthWestern's objections to MEIC-24 and MEIC-25, which seek information necessary to estimate the cost of the replacement power. In its application and direct testimony, NorthWestern made no effort to estimate the costs of the replacement power, despite the fact that those costs are part of the costs it seeks to recover in this docket. Indeed, NorthWestern's witness claimed that it would be virtually impossible to

calculate the costs of the replacement power purchased as a result of the outage. Direct Testimony of Kevin Markovich at 10. To the contrary, as Commissioner Kavulla noted in his June 8, 2014 dissenting opinion, the costs of the replacement power can be calculated as the difference between expected power supply costs with Colstrip Unit 4 in operation and the actual power supply costs during the outage. MEIC-24 and 25 request information necessary to perform this estimate.

MEIC seeks recent data on the costs at Colstrip Units 1-4 in order to estimate what costs at Colstrip Unit 4 would have been if the outage had not occurred, and then compare that to the power supply costs incurred during the outage. Specifically, MEIC-24 requests the variable, fixed, and fuel costs, capacity factor, and MWh generation for Colstrip Units 1-3 for the last five years. MEIC-25 requests the variable, fixed, and fuel costs, capacity factor, and MWh generation for Colstrip Unit 4 for the last five years. Estimated costs for Colstrip Units 1-4 are required in order to develop an estimate of what it would have cost to run Colstrip Unit 4 during the outage. By including data from the time period during the outage, one can take the costs at Colstrip Units 1-3 and then develop an estimate of the costs at Unit 4 had it been operational during the outage. By going back five years, the data provide a better understanding of the relationship between costs at Unit 4 and costs at Units 1-3 (i.e., of whether one should assume the costs at Colstrip Unit 4 would have been equal to the costs at Unit 3, or would have been some percentage of the costs at Units 1-3). Particularly in the absence of NorthWestern's own accounting, such information is critical to this prudence review.

NorthWestern objects to MEIC-24 and 25 on the mistaken belief that the information is unrelated to the issues in this docket and seeks information from before the time period covered by the tracker. To the contrary, where such information is calculated to lead to relevant

information—here, replacement power costs incurred solely as a result of the Colstrip Unit 4 outage—discovery of the information must be allowed. *See generally* Mont. R. Civ. P. 26(b)(1). As the information sought by MEIC-24 and 25 is relevant to the prudency of the replacement power costs, the Commission should overrule NorthWestern's objections to MEIC-24 and MEIC-25.

III. MEIC-26, 27, AND 28 SEEK INFORMATION LIKELY TO LEAD TO EVIDENCE RELEVANT TO THE PRUDENCY OF THE REPLACEMENT POWER COSTS.

NorthWestern's objections to MEIC-26, 27, and 28 also should be overruled, as they seek to prevent access to information about whether NorthWestern should have anticipated the Colstrip Unit 4 outage and taken steps to avoid or minimize the replacement power costs the Company seeks to recover. MEIC-26 seeks basic information such as the duration and cost of planned and unplanned outages at Colstrip Units 1-4 since 2002. MEIC-27 seeks similar information regarding the cost and duration of planned and unplanned outages at other coal-fired units owned by NorthWestern. MEIC-28 seeks the forced outage rate at all units owned by NorthWestern.

The requested information would enable a comparison between the cost and frequency of outages at Colstrip Unit 4 and the cost and frequency of outages at similar coal-fired units (both other units at Colstrip and other units owned by NorthWestern). This information would indicate whether Colstrip Unit 4 had a track record of reliability prior to the extended outage in 2013-2014. If the data show that Colstrip Unit 4 had an abnormally high outage rate, that is relevant to whether NorthWestern should have taken extra precautions to prevent the outage that occurred in 2013-2014 and whether, prior to the outage, NorthWestern should have pursued other supply resources that would be available if Colstrip Unit 4 went offline.

NorthWestern objects on the grounds that NorthWestern does not have an interest in certain of these units, the information does not pertain to issues at stake in this proceeding, and the time period covered by the request does not match the time period covered by the tracker. NorthWestern's overly narrow view of prudence review defies both common sense and established law, as explained below. First, NorthWestern's objections fail to grasp that information about how Colstrip Unit 4 compares to other, similar coal-fired units may lead to relevant information about whether NorthWestern has taken prudent actions at Colstrip Unit 4. As Commissioner Kavulla noted in his dissent, the 2013-2014 outage was not the first significant, forced outage at Colstrip Unit 4 since 2002. If the history of outages at Colstrip Unit 4 relative to other units suggests that NorthWestern was, or should have been, aware of aging equipment or consistent maintenance problems, then it might have been prudent for NorthWestern to ensure that the operator took extra steps to prevent the outage or to line up alternative energy supplies in the likely event that Colstrip Unit 4 went offline again. If on the other hand Colstrip Unit 4 is not inherently less reliable than other units, then such steps may not have been reasonably necessary.

In short, NorthWestern's responses to MEIC-26, 27, and 28 may or may not show that Colstrip 4 has a history of unreliability that should have put NorthWestern on notice that an event such as the 2013-2014 outage was likely to occur. But such information may be discovered because it may lead to evidence that is relevant to the prudency of the costs of replacement power incurred as a result of the outage, namely whether NorthWestern understood the risks of an outage occurring at Colstrip 4. This information will lead to evidence of NorthWestern's "situational awareness" of the particular risks of an outage occurring at Colstrip 4, similar to the evidence the Commission considered of NorthWestern's situational awareness

of the risk of an outage at Dave Gates Station. *See In re NorthWestern Energy's 2011-2012 Electricity Supply Tracker*, ¶¶ 18-19, 33-35.

For these reasons, the Commission should overrule NorthWestern's objections to MEIC-26, 27 and 28.

IV. MEIC-30 SEEKS INFORMATION LIKELY TO LEAD TO EVIDENCE RELEVANT TO THE PRUDENCY OF THE REPLACEMENT POWER COSTS.

Similarly, NorthWestern's objection to MEIC-30, which requests engineering assessments of the long-term prospects of operating Colstrip Unit 4 reliably, is without legitimate foundation. Such studies would show what NorthWestern knew about the reliability of Colstrip Unit 4 prior to and during the outage. If engineering assessments conducted prior to the 2013-2014 outage had raised concerns with operating Colstrip Unit 4 reliably, that information should have put NorthWestern on notice that extra steps should have been taken to prevent major outages and to take extra steps to mitigate the consequences of an outage. Accordingly, prior knowledge of the likelihood of needing to procure replacement power during a major outage is relevant to the prudence of the replacement power costs.

NorthWestern misinterprets the request as concerning "[t]he operation of CU4 in the future," and claims this has no "legitimate bearing on the [] outage at CU4." NorthWestern Response to MEIC-30. NorthWestern's argument wrongly assumes that MEIC seeks only studies conducted after the outage concluded. But that is not what the data request states. MEIC-30 was intended to cover the period prior to the outage.[1] To the extent that

[1] As drafted, MEIC-30 was not expressly limited to the time period before the outage. However, that was the intent of the data request and Montana Environmental Information Center and Sierra Club will promptly clarify that intent by serving a modified data request. In any event, NorthWestern did not provide any of the requested engineering assessments, even those that may have been prepared before the outage, and NorthWestern's objection to MEIC-30 was not based on the relevancy of assessments that may have been prepared after the outage commenced. Accordingly, it is appropriate for the Commission to make a determination on NorthWestern's

NorthWestern's objection is limited to studies prepared after the outage, then NorthWestern should immediately provide studies that were prepared before the outage. But to the extent that NorthWestern refuses to provide engineering assessments that may have been prepared before the outage occurred, NorthWestern's objection should be overruled.

The prudence of costs incurred to replace generation from Colstrip Unit 4 during the 2013-2014 outage depends in part on what NorthWestern knew about how likely a major outage was, and what steps NorthWestern took to mitigate the costs of an outage, such as considering outage insurance and low-cost options for securing replacement power in the event of a major outage. *See In re NorthWestern Energy's 2011-2012 Electricity Supply Tracker*, ¶¶ 18-19, 33-35 (denying NorthWestern's request to recover replacement costs for an outage because NorthWestern should have understood the unique risks of an outage at the Dave Gates Station and should have considered actions, such as obtaining outage insurance, that could have mitigated the costs of an outage).

MEIC-30 seeks information relevant to this key component of evaluating the prudency of the replacement power costs, and such discovery should be permitted.

V. MEIC-31 SEEKS INFORMATION LIKELY TO LEAD TO EVIDENCE RELEVANT TO THE PRUDENCY OF THE REPLACEMENT POWER COSTS.

Consistent with NorthWestern's other attempts to constrain this prudency review, NorthWestern refuses to provide information requested in MEIC-31 about the remaining useful life of Colstrip Unit 4. Contrary to NorthWestern's claims, information regarding the remaining useful life is relevant to the prudence of the replacement power costs and capital costs, if any,

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objection to the extent it applies to engineering assessments prepared before the outage, which are relevant to this proceeding.

NorthWestern seeks to recover in this docket.[2] If NorthWestern assumes that the remaining useful life of Colstrip Unit 4 is short, then NorthWestern should have been winding down capital spending at the unit and considering how to replace Colstrip Unit 4 on a long-term basis, such as alternative supply resources that could supply the generation currently provided by Colstrip Unit 4. Such alternative power supplies may be lower cost than the spot market purchases made during the extended outage.

The risk of an outage depends in part on the age of the unit and its remaining useful life. What NorthWestern knew about the remaining useful life of Colstrip 4 prior to the outage is part of determining what NorthWestern knew, or should have known, about the risks of an outage at Colstrip Unit 4. Thus, the remaining useful life of Colstrip 4 is part of the "situational awareness" of the particular risks of an outage at a plant and the consequences of an outage that the Commission has previously found that a utility should have. *See In re NorthWestern Energy's 2011-2012 Electricity Supply Tracker*, ¶¶ 18-19, 33-35. Accordingly, the Commission should overrule NorthWestern's objection to MEIC-31.

VI. MEIC-32 SEEKS INFORMATION LIKELY TO LEAD TO EVIDENCE RELEVANT TO THE PRUDENCY OF THE REPLACEMENT POWER COSTS.

The information requested in MEIC-32 also should be allowed. MEIC-32 seeks information regarding studies of the economics of converting Colstrip Unit 4 to burn natural gas versus continuing to operate the unit as a coal-fired unit. NorthWestern claims that such "hypothetical situations" are not relevant to a tracker docket concerning the prudency of costs that were actually incurred. NorthWestern seems to imply the parties cannot probe the prudence of the need to make replacement power purchases in the first place, and instead must assume that

[2] Because NorthWestern has not attempted to breakdown its variable costs associated with Colstrip Unit 4, it is unclear whether any capital costs, including for example NorthWestern's property insurance deductible, are included in NorthWestern's proposed cost recovery.

it was prudent to purchase some amount of replacement power, because the outage was unpreventable.

Contrary to NorthWestern's position, there is no presumption that the outage, including the length of the outage, was prudent—and thus there is no presumption that making replacement power purchases was prudent. Prudence review entails determining whether an action was reasonable given what was known at the time of the decision and the options available at the time of the action. If, prior to the outage, NorthWestern knew that there were lower-cost options than operating Colstrip Unit 4, then NorthWestern should have pursued those options, which would have avoided the outage and the replacement power costs. Of course, the evidence may not show that, prior to the outage, NorthWestern was not in possession of any studies evaluating alternatives to operating Colstrip Unit 4 as a coal-fired unit. But if NorthWestern did possess such studies, they are relevant to whether the replacement power purchases were prudent, because such studies bear on whether the outage and the replacement power purchases could have been avoided through lower-cost alternatives.

For these reasons, the Commission should overrule NorthWestern's objection to MEIC-32.

CONCLUSION

For the foregoing reasons, MEIC respectfully requests that the Commission direct NorthWestern to respond to MEIC's data requests 12-14 and 17, and overrule NorthWestern's objections to MEIC's data requests 24-28, and 30-31.

Respectfully submitted this 12th day of November, 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 12th day of November, 2014, I served the foregoing "Response to NorthWestern Energy's Objections" by first-class mail, postage prepaid, to the following:

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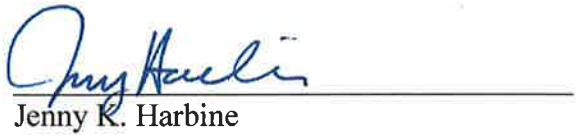

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