

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

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IN THE MATTER OF NorthWestern Energy's	)	REGULATORY DIVISION
2012-2013 Electricity Supply Tracker	)	
	)	DOCKET NO. D2013.5.33
IN THE MATTER OF NorthWestern Energy's	)	
2013-2014 Electricity Supply Tracker	)	DOCKET NO. D2014.5.46

**MOTION TO COMPEL RESPONSES TO DATA REQUESTS OR  
ALTERNATIVELY, TO DISALLOW CERTAIN COSTS  
AND BRIEF IN SUPPORT**

Intervenor Montana Consumer Counsel [MCC] moves the Commission for an Order compelling NorthWestern Energy's [NW] to fully answer and respond to certain data requests as set forth more fully below. Finally, MCC requests additional time to prepare initial testimony after full responses have been provided.

NW did not object to all of the data requests that are the subject of this motion to compel, but did not provide full and complete responses to the data requests addressed by this motion. MCC requests the procedural schedule be modified to allow MCC time reasonably necessary to respond or obtain information for purposes of preparing initial testimony.

**Overview**

NW's only objection to MCC data requests is that the information sought is not relevant, and therefore, not discoverable. NW's objection is legally unsupported and factually incorrect.

NW relies on a sole case, *Henrickson v. State*, to support its assertion that information is not relevant and therefore not discoverable if it is outside the two year period of time for which it seeks recovery of electricity supply costs. The Commission, evaluating a utility's claim for recovery of electricity supply costs, should absolutely reject this approach toward discovery in an administrative agency proceeding to determine whether ratepayers of Montana should be compelled to pay certain costs incurred by a utility. In *Henricksen v. State*, 2004 MT 20, 310 Mont. 307, 84 P.3d 38, the Montana Supreme Court addressed the issue of discovery of medical records in personal injury litigation. In *Henricksen*, the mother of a three-year-old filed suit alleging emotional distress following the child's fall through the balusters of a staircase in the Montana State University Library. The district court conducted an *in camera* review of Henricksen's medical records. The district court denied the State's motion to compel production of all the mother's health care records (including medical and counseling records) from before and after her child's fall. The court granted a protective order on the basis that the mother's records were constitutionally protected, irrelevant to scope of the child's injuries, and therefore, were not discoverable.

On review, the Montana Supreme Court noted that a defendant is not allowed unfettered access to all medical records that the defendant claims may help his defense. The court cited *State v. Mix* (1989), to support its decision that there must be some temporal relationship for the mother's medical records in *Henricksen* to be relevant. *Id.* at ¶ 38, citing *State v. Mix* (1989), 239 Mont. 351, 360, 781 P.2d 751, 756. The Supreme Court found that evidence was discoverable where it related to prior physical and mental

conditions that may relate to current claimed damages, but was not entitled to discover matters that would unnecessarily invade the plaintiff's privacy. *Henricksen, id.* at ¶ 41.

The decision in *Henricksen* does not support NW's allegation that information related to NW's electricity supply costs, for which it seeks recovery from ratepayers, is not discoverable simply because it lies outside the two year period for which recovery of costs is being sought. The Commission should categorically reject NW's claim that this information is not relevant. At a very minimum, even if the Commission were persuaded by NW's argument, the Commission needs to review the material to determine relevance prior to excluding it from discovery outright.

The Commission should reject NW's objections based on relevance grounds. Relevance in the context of discovery has been interpreted to mean "any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue **that is or may be** in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978)(emphasis added). Courts have repeatedly followed the principle that the discovery rules are to be accorded a "broad and liberal treatment . . . mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor* (1947), 329 U.S. 495, 507, 91 L. Ed. 451.

The United States and Montana Supreme Courts adhere to such principles in the discovery process. See *Owen v. F. A. Buttrey Co.* (1981), 192 Mont. 274, 627 P.2d 1233. NW's opinion about relevance completely ignores the liberal construction of the rules of discovery as well as the process of discovery, especially before the Commission as an administrative agency. Administrative agencies are required to provide for discovery.

Section 2-4-602, MCA. The Commission has done so by adopting Administrative Rule of Montana 38.2.3301, which states that nothing in the rule shall limit the free use of data requests among the parties. The rule provides that “the exchange of information among parties pursuant to data requests **is the primary method of discovery** in proceedings before the commission.” ARM 38.2.3301(2). An administrative agency must follow its own administrative rules. See *Williamson v. Montana Public Service Commission*, 2012 MT 32 ¶ 53, 364 Mont. 128, 272 P.3d 71.

Combining the liberal approach to discovery that courts have adopted with the Commission’s rule establishing data requests as the primary method of discovery, MCC’s requests for information to determine the propriety of passing on electricity supply costs to ratepayers should be answered by NW. Any other result inappropriately limits the discovery process in contravention of Montana law, and unfairly narrows MCC’s ability to analyze and review the evidence upon which NW will make its case.

With regard to NW’s factual argument, the information MCC seeks pertains to the basis upon which NW seeks recovery from ratepayers for electricity supply costs. The fixed costs of CU4 are obviously relevant as consumers are being asked to pay all of those costs in addition to replacement costs even though the plant has been out of service. Further, information regarding NW’s expenses prior to the current electric tracker period is relevant both to evaluate current costs by making cost comparisons over time and to examine how the Company tracks and accounts for its expenses and the nature of its supply portfolio over time. NW’s request for recovery in this case is significantly high, representing an increase in costs of more than \$30 million. A tracker

proceeding is intended to be something along the lines of a true-up of costs that were unexpected in the preceding year. This imbalance requires context and historical information in order to determine why it is so great and what, if any, of these costs are rightfully passed on to ratepayers. NW seeks to force MCC and the Commission to review its filing in a vacuum. The Commission must not allow such an unreasonable result.

NW's efforts to constrain the discovery process should be rejected, and all objections over-ruled. NW should be directed to immediately produce all information sought in MCC's data requests. MCC requests an Order from the Commission compelling NW to fully respond. MCC requests additional time to prepare initial testimony after full responses have been provided.

### **Specific MCC data requests**

MCC seeks full and complete responses to the following data requests. NW did not object to all of these data requests, but did not provide full responses.

#### **DATA REQUESTS MCC 004, 005, 006 AND 007**

**MCC-004** Regarding: NWE's Supply Portfolio  
Witness: Kevin J. Markovich/Frank V. Bennett

Please provide a list of all off-system fixed price purchases NWE made during the last four tracker periods (2010/11, 2011/12, 2012/13 and 2013/2014), stating the name of the supplier, the month(s) of the purchases, monthly quantities in MWhs, average price paid each month, and period of the contract.

**MCC-005** Regarding: NWE's Supply Portfolio  
Witness: Kevin J. Markovich/Frank V. Bennett

For each purchase identified and included in your response to MCC-4 above, please provide a list of all related off-system sales at market prices NWE made during the last

four tracker periods (2010/11, 2011/12, 2012/13 and 2013/2014), stating the name of the purchaser, the month(s) of the sales, monthly quantities in MWhs, average market price(s) received each month, and period of the contract.

**MCC-006** Regarding: NWE's Supply Portfolio  
Witness: Kevin J. Markovich/Frank V. Bennett

Please provide a list of all off-system fixed price sales NWE made during the last four tracker periods (2010/11, 2011/12, 2012/13 and 2013/2014), stating the name of the purchaser, the month(s) of the sales, monthly quantities in MWhs, average price received each month, and period of the contract.

**MCC-007** Regarding: NWE's Supply Portfolio  
Witness: Kevin J. Markovich/Frank V. Bennett

For each purchase identified and included in your response to MCC-6 above, please provide a list of all related off-system purchases at market prices NWE made during the last four tracker periods (2010/11, 2011/12, 2012/13 and 2013/2014), stating the name of the seller, the month(s) of the purchases, monthly quantities in MWhs, average price paid each month, and period of the contract.

NW OBJECTION: The information sought is not relevant.

MCC RESPONSE:

MCC 004, 005, 006 and 007 asked for data from four tracker periods 2010/2011 to 2013-2014. NWE only provided data for the current trackers under review (2012/2013 and 2013/2014). NW objects to responding with information to the previous years as irrelevant to the present case.

NW asks the Commission to put on blinders and evaluate only what NW places before it in this proceeding for recovery, which would deny any comparison of prior costs, trends that NW is experiencing, or any kind of analysis that requires judgment and experience.

As argued above, a temporal limitation to two year period is legally unsupported and should be rejected by the Commission. While the present case does not involve recovering earlier year costs, it is necessary to compare earlier year costs in evaluating current costs. In order to develop information about what costs were prudently incurred by the Company, it is important to understand, for example, the context of NW's hedging practices, which necessarily require information regarding past years, costs incurred, and decisions made in light of the historical information the Company had. This information should be ordered to be produced.

**DATA REQUEST MCC 016**

**MCC-016** Regarding: Colstrip Unit 4 Outage  
Witness: Kevin J. Markovich

Please provide all communications, memos and any documentation where NWE requested from PPL (as the operator of CU4) an explanation of the outage (and PPL's responses thereto) and any communications regarding the cost implications of the outage. Also, please provide all communications or notes or documents related to or memorializing communications between NWE and PPLM regarding the evaluation of the outage and the responsibility for cost recovery.

NW RESPONSE: NW did not object but responded as follows.

RESPONSE (November 14, 2014):

Please see the response to Data Request MCC-015. See also the response to Data Request MEIC-9 for a copy of the Root Cause Analysis, which will be provided once the Commission acts on a forthcoming Motion for Protective Order from Siemens.

MCC RESPONSE:

The "Root Cause Analysis," which NWE says will be provided but has not yet been, and the other Siemens-related material, is necessary for the MCC to prepare its

analysis and prepare testimony. No objection has been made to providing the material, it has simply not been provided.

The MCC requests an Order compelling production of the information within a specified time. Additionally, the MCC requests a modification to the schedule to allow the MCC sufficient time to analyze the information once it is actually produced.

MCC is entitled to know the approach that NW will take and the data on which it is basing its judgment. See *Sunburst School District No. 2 v. Texaco, Inc.*, 2007 MT 183 ¶ 72. MCC's data requests are targeted to elicit the data on which NW claims it relied in making certain determinations regarding the outage. MCC has no way of knowing whether the Root Cause Analysis is based on facts and data reasonably relied upon in the field if MCC doesn't have the information the Company used.

Accordingly, the Commission should follow its own rules and compel NW to produce the requested data.

### **DATA REQUEST MCC - 018**

**MCC-018** Regarding: Colstrip Unit 4 Outage  
Witness: Kevin J. Markovich

Please provide all NWE internal memos, correspondence, and any documentation discussing the evaluation of the outage, including the alternatives to minimize the cost to ratepayers, the potential recovery of costs from PPLM, or any possible litigation or alternative actions NWE could pursue against PPLM for cost recovery.

NW RESPONSE: NW did not object but claimed that a number of documents were privileged, produced a privilege log, and redacted certain other material, and also claimed that information was not produced based upon Siemens' forthcoming motion for a protective order.

MCC RESPONSE:

NWE's refusal to produce information that may be subject to a protective order that has yet to be filed should not shield it from producing information to which it has filed no objection. The Siemens-related material is necessary for the MCC to conduct its review and analysis and to prepare testimony. Especially telling is the claim of privilege for documents related to evaluating the outage and advice given on calculating replacement power amounts for the CU4 outage, in the context of NW's response to MCC – 025 in which the Company claims that there is no way to distinguish between replacement power and other purchases. Clearly the Company must do just that and MCC is entitled to review those calculations in assessing the merits of the Company's claim for recovery from ratepayers of these supposedly incalculable costs.

DATA REQUEST MCC – 025

**MCC-025** Regarding: Colstrip Unit 4 Outage  
Witness: Kevin J. Markovich

Please provide a schedule showing all short-term purchases from July 1, 2013 to the last day of the outage, indicating whether the purchases are replacement power due to Colstrip Unit 4 outage or normal short-term/tracker default supply purchases unrelated to the CU4 outage.

NW RESPONSE (November 7, 2014):

Short-term purchases are included in the exhibits to the Prefiled Direct Testimony of Frank V. Bennett in this docket. See also the response to Data Request MEIC-19. NorthWestern has no way to distinguish what purchases are replacement power due to the Colstrip Unit 4 outage or what purchases are normal short-term/tracker default supply purchases unrelated to the CU4 outage.

MCC RESPONSE:

MCC asked for a schedule of all short term purchases during the outage that were replacement power. NWE response states that it has no way to distinguish purchases for replacement power from “normal” short term default supply. The Company simultaneously claims privilege for documents pertaining to the determination of these very same replacement power costs. [See MCC response pertaining to MCC – 018, above.] If the replacement power costs related to CU4 are inextricably intertwined with all of NW’s electricity supply costs, those costs are not, *ipso facto*, privileged information. If NW intends to stand by its claims of privilege, then the separated costs should be identified and produced, as requested.

MCC requests a full accounting of all costs that are claimed for replacement power from the outage. At a minimum, having the burden of showing that the costs it requests the ratepayers to bear here are prudent, the Company must make an allocation and defend it. MCC requests the Commission direct the Company to produce an accounting of costs related to the outage. MCC is entitled to get detailed, specific information about costs claimed for recovery, specifically related to the CU4 outage, and why they were incurred.

**DATA REQUEST MCC 027**

**MCC-027**    Regarding:    Colstrip Unit 4 Outage  
                  Witness:        Kevin J. Markovich

Please provide all memos, correspondence, and any documentation NWE possesses or has obtained in relation to insurance purchased by PPLM, as operator of CU4, regarding coverage of an event such as the outage.

NW RESPONSE: NW did not object, but its response failed to provide the requested information.

MCC RESPONSE:

The MCC requested documents related to PPLM insurance regarding the outage. In its response, NW simply refers to the operation agreement provided as an attachment to MCC-019. The insurance section of the operation agreement (Item c on the second page of the Attachment) states that all owners shall be provided with copies of the insurance policies PPLM acquires. No document was produced by NW in response to the data request. NW clearly has the policy requested, but has not produced it.

For the reasons set forth above, MCC requests an Order from the Commission directing NW to fully respond to this request and produce the requested information.

**DATA REQUEST MCC -030**

**MCC-030** Regarding: USB Budget and Spending  
Witness: William M. Thomas

Please provide a table showing the nine years Annual Budget and Expenditures for USB Programs.

NW RESPONSE:

NW Objection: Relevance

MCC RESPONSE:

The tables in the two tracker filings (“Table 1” at WMT-4 in the 2013 filing and “Table 1” at WMT-5 in the 2014 filing) contain certain USB data from 2004 forward. MCC is requesting annual budgets and expenditures for USB programs for each year

shown in these tables. These are the years that were designated by the Company in its own filings.

For the reasons set forth above, MCC requests an Order from the Commission directing NW to fully respond to this request and produce the requested information.

**DATA REQUEST MCC - 052**

**MCC – 052** Regarding: Basin Creek Operating Protocol  
Witness: Kevin J. Markovich

In reference to your 2014 testimony at page KJM-6, lines 1-6:

- a) Please provide in electronic format with all links intact Basin Creek's economic dispatch for the most recent 36 months available.
- b) Please provide all documents produced by or produced for Northwestern relating to the analysis of Basin Creek generation resource operating protocol ordered by Commission's Order No. 7219h.

NW RESPONSE: NW did not object, but its response failed to provide the requested information.

MCC RESPONSE:

Part (a) asked NWE to provide in electronic format Basin Creek's economic dispatch for the most recent 36 months available. NW did not provide an electronic file with the dispatch. Rather, the response directs MCC to information included in Bennet's exhibits. This shows the monthly Kwh, but contains no reference as to how Basin Creek is dispatched (which should show hours and Kwh).

The Company did not object to this request. For the reasons set out above MCC requests an Order directing the Company to answer and produce the information.

**DATA REQUEST MCC - 057**

**MCC – 057** Regarding: Colstrip Unit 4 Outage  
Witness: Kevin J. Markovich

Has NorthWestern been able to identify whose responsibility the CU4 outage is, and whether NorthWestern can pursue any actions to recover all or part of the cost incurred by the outage? If Northwestern has not explored the possibility of identifying responsibility for the outage, please explain in detail why not. Also if NWE has in its possession any reports, analysis or documents performed by other parties that have looked at responsibility for the outage, please provide them.

NW RESPONSE: NW did not object, but its response failed to provide the requested information and referred to the Root Cause Analysis and the Siemens report.

MCC RESPONSE:

NW’s response here, without any objection to the information sought, is the same as the responses above that defer to a protective order that has not yet been filed. For the reasons set forth above, MCC requests a full and complete answer to this data request and additional time to prepare initial testimony after full and complete responses are provided.

**DATA REQUESTS MCC 068, 069 and 070**

**MCC - 068** Regarding: Electric DSM Lost Revenues  
Witness: William M. Thomas

In reference to your 2014 testimony at page WMT-31, lines 4-12, please provide for each tracker year from 2004-2014 the following information:

- a) MWhs throughput and total dollar amount that were used to set T&D rates.
- b) The actual dollar amount collected from T&D rates.
- c) MWhs used in calculating Electric DSM Lost Revenues associated with T&D.
- d) The actual dollar amount collected as DSM Lost Revenues for T&D.

**MCC – 069** Regarding: Electric DSM Lost Revenues  
Witness: William M. Thomas

In reference to your 2014 testimony at pages WMT-31, lines 16-22 please provide a comparative table for each tracker year from 2009-2014 showing:

- a) MWhs throughput and total dollar amount that were used to set CU4 rates.
- b) The actual dollar amount collected from CU4 rates.
- c) MWhs used in calculating Electric DSM Lost Revenues associated with CU4.
- d) The actual dollar amount collected as DSM Lost Revenues for CU4.

**MCC – 070** Regarding: Electric DSM Lost Revenues  
Witness: William M. Thomas

In reference to your 2014 testimony at page WMT 32, lines 3-10, please provide a comparative table for each tracker year from 2012-2014 showing:

- a) MWhs throughput and total dollar amount that were used to set DGGS rates.
- b) The actual dollar amount collected from DGGS rates.
- c) MWhs used in calculating Electric DSM Lost Revenues associated with DGGS.
- d) The actual dollar amount collected as DSM Lost Revenues for DGGS.

NW RESPONSE: NW Objection: Relevance

MCC RESPONSE:

MCC requests data related to approved revenues and collected Lost Revenues related to several years. NW's objection limits the Commission to consideration of only the information placed before it by the Company, which is an inappropriate temporal narrowing of the evidence, as argued above. The data for the years requested is important to develop an analysis that includes comparisons over time and review of

continuity of how the programs are implemented and the costs that are recovered. Without the full track record it will not be possible to fully evaluate the “lost revenues” that NW is claiming for the current years.

MCC requests full and complete responses to this data request and additional time to prepare initial testimony.

### **DATA REQUEST MCC 072**

**MCC – 072** Regarding: Electric DSM Lost Revenues  
Witness: William M. Thomas

The most recent T&D rates were established on January 1, 2011 in Docket D2009.9.129, using annual base revenues for T&D of about \$228.6 million. From January 1, 2011, DSM Lost Revenues associated with T&D have been \$0.866 million from January to June 2011, \$2.307 million for the 2011-2012 tracker period, \$4.08 million for the 2012-2013 tracker period, and currently \$5.949 million for 2013-2014 tracker period; resulting in a total of about \$13.2 million in 42 months.

- a) Please provide the actual dollar amount that NWE has collected as T&D revenues during these 42 months.
- b) Also provide a complete explanation and justification for claiming that NWE has lost about \$13.2 million in T&D revenues due solely to DSM and that none of this reduction has been attributable to other factors such as behavioral changes over time that are not directly the result of the Company’s DSM activities (e.g., behavioral changes such as those noted in MCC-37), or from reduced loads from non-active customers.

NW RESPONSE: NW Objections: Relevance

MCC RESPONSE:

MCC requests data related to approved revenues and collected Lost Revenues related to several years. NW’s objection limits the Commission to consideration of only the information placed before it by the Company, which is an inappropriate temporal narrowing of the evidence. The data for the years requested is important to develop an

analysis that includes comparisons over time and review of continuity of how the programs are implemented and the costs that are recovered. Without the full track record it will not be possible to fully evaluate the “lost revenues” that NW is claiming for the current years.

MCC requests full and complete responses to this data request and additional time to prepare initial testimony.

### **DATA REQUEST MCC - 078**

**MCC – 078** Regarding: 2013/2014 Off-System Transactions  
Witness: Frank V. Bennett

In your 2014 testimony at page FVB-8, lines 12-13, you state “Most of these transactions [off-system] are at the Mid-Columbia trading hub and are used for hedging purposes.” Please identify each of these transactions that are used for hedging purposes, including quantity, price, period and supplier.

NW RESPONSE: NW did not object but provided the following response:

RESPONSE (November 7, 2014):

The statement should have read: "All of these transactions [off-system] are at the MidColumbia trading hub and are used for hedging purposes."

MCC RESPONSE:

MCC asked to identify each transaction used for hedging purposes (price, period and supplier), but NWE limited its response to say that instead of using the word “Most,” it should have read “All” transactions are used for hedging purposes. This is not a response. Rather than responding and providing the list of quantity, price and supplier for these transactions, NW simply expanded the transactions that are at issue.

Further, NW’s claim that all (each and every) transactions are for hedging purposes cannot be taken seriously. If the Commission were to ban NW’s hedging

practices, the Company would still make purchases. In the past the Company has had no problem identifying hedging transactions.

The Commission should reject NW's attempt to evade a full and complete answer and direct a response to the information requested by MCC. MCC should be allowed additional time to respond and file initial testimony.

**DATA REQUEST MCC -087**

**MCC – 087** Regarding: Table At FVB-15  
Witness: Frank V. Bennett

Please update the table at page FVB-15 of your 2014 testimony to reflect actual results for 2013/2014 through the most recent month for which actual data are available.

NW RESPONSE: NW did not object to this data request but did not fully respond.

RESPONSE:

The table for 12 months of actual values for the 2013/2014 tracking period has not been prepared for this docket. Values within the table can be updated to actuals through June 2014 by using Exhibit\_(FVB-1) 13-14. Updated specifically the categories within pages 3 and 4.

MCC RESPONSE:

MCC asked NWE to update the summary table in Bennett's testimony. NW's response that MCC can update the table itself inappropriately shifts the burden to intervenors to develop information in this docket. It is the Company's burden to come forward with adequate evidence to support its claim for recovery of costs incurred. The Company requested consolidation of the last two tracker dockets. Providing updates to exhibits is customary and should be required where the Company is seeking recovery for an extended period based on a request for consolidation.

MCC requests an Order compelling a full and complete answer and additional time to prepare initial testimony once full answers are provided.

**DATA REQUEST MCC 088**

**MCC – 088** Regarding: Table At FVB-15  
Witness: Frank V. Bennett

Please provide versions of the table at FVB-15 reflecting actual results for each of the NorthWestern tracker periods 2010/2011, 2011/2012 and 2012/2013.

NW RESPONSE: Objection based on relevance.

MCC RESPONSE:

MCC requested historic tables throughout the data requests, and NW's objection based on some temporal limitation should be rejected. For the reasons stated above, continuity is important and MCC should be allowed to use comparisons over time to evaluate the current tracker request.

**Conclusion**

For the foregoing reasons, NW should be compelled to provide full and complete responses to the data requests as set forth above. Once full and complete responses are provided, MCC should have additional time to prepare its testimony in this case.

DATED this \_\_\_\_\_ day of November, 2014.

By: \_\_\_\_\_

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