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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 2013 and 2014 Applications for (1) Approval of Deferred Cost Account Balances for Electricity Supply, CU4 Variable Costs/Credits, DGGS Variable Costs/Credits, Spion Variable Costs; and (2) Projected Electricity Supply Cost Rates, CU4 Variable Rates, DGGS Variable Rates, and Spion Variable Rates	)	REGULATORY DIVISION DOCKET NO. D2013.5.33 DOCKET NO. D2014.5.46

NORTHWESTERN ENERGY'S RESPONSE TO THE MONTANA CONSUMER COUNSEL'S MOTION TO COMPEL

NorthWestern Corporation doing business as NorthWestern Energy ("NorthWestern") submits this *Response to the Montana Consumer Counsel's Motion to Compel Responses to Data Requests or Alternatively to Disallow Certain Costs and Brief in Support* ("Response"). On November 7, 2014, NorthWestern objected to ten data requests ("Objections") promulgated by the Montana Consumer Counsel ("MCC"). On November 21, 2014, the MCC filed a *Motion to*

Compel Responses to Data Requests or Alternatively to Disallow Certain Costs[1] *and Brief in Support* ("Motion"). In its Motion, the MCC responded to NorthWestern's Objections, but it also asserted that NorthWestern had not fully responded to several of the MCC's data requests. Specifically, the MCC identified eight data requests to which it argues NorthWestern did not fully respond. The following discussion rebuts the MCC's position regarding the objected-to data requests and the data requests to which the MCC believes NorthWestern did not fully respond.

1. **Despite the MCC's arguments, NorthWestern's objection to certain MCC data requests is not an attempt "to put blinders" on the Commission's review of this matter, but is an attempt to ensure that discovery has limits and is not abused.**

NorthWestern objected to MCC-004, MCC-005, MCC-006, MCC-007, MCC-030, MCC-068, MCC-069, MCC-070, MCC-072 and MCC-088 on the grounds that the information sought was irrelevant and would not lead to admissible evidence in this docket. As provided for in NorthWestern's Objection, Rule 26(b)(1) of the Montana Rules of Civil Procedure ("M. R. Civ. P.") provides that a party may only obtain discovery "relevant to any party's claim or defense" and "appears reasonably calculated to lead to the discovery of admissible evidence." NorthWestern cited to *Henricksen v. State*, 2004 MT 20, 319 Mont. 307, 84 P.3d 38, for the holding that discovery is irrelevant if it has no legitimate bearing on the issues that are before the tribunal for decision.

In *Henricksen*, the mother of a child who was injured on State property bought suit against the State alleging emotional distress, loss of consortium, and post-traumatic stress disorder. *Id.*, at ¶ 13. During the district court proceeding, the State moved to compel discovery of certain medical records of the mother as well as the mother's financial documents, school transcript, and personnel records. The district court denied the State's motion to compel the

[1] MCC's counsel advised NorthWestern's counsel that the MCC's Motion does not contain a request to disallow certain costs and that inclusion of this verbiage in the title to the Motion was an error.

mother to produce the requested information. *Id.*, at ¶ 15. The Supreme Court reversed the district court's decision with respect to the motion to compel production of the mother's medical records finding that the State had a right to discover this information because the mother's commencement of the action and the specific issues alleged placed her medical history at issue. *Id.*, at ¶¶ 39 and 42. As for the financial documents, school transcript, and personnel records, the Supreme Court agreed with the district court's decision to deny the State's motion to compel. The Supreme Court found that the mother's claims against the State did not involve lost earnings capacity or any lost earnings, and therefore, the requested information was not discoverable because it had no legitimate bearing on the issues in the case, i.e., emotional distress, loss of consortium and post-traumatic stress disorder. *Id.*, at ¶ 44.

The basis of NorthWestern's Objections is that the MCC requested information outside the relevant time period. Therefore, the requested information has no legitimate bearing on the issue on which the Commission must decide in this case. The Commission, in this case, is tasked with deciding whether NorthWestern should be permitted to recover certain electricity supply costs incurred during a tracker year. Pursuant to § 69-8-210, MCA, the Commission must determine if the costs were prudently incurred. In prior electricity supply tracker dockets, the Commission noted the following standard for prudence: "the standard by which the [Commission] judges the prudence and reasonableness of actual electricity supply costs is what [NorthWestern] knew, or should reasonably have known, **at the time it incurred the cost obligations**." *In re NorthWestern Energy*, Order No. 6836c, ¶ 155, Docket Nos. D2006.5.66 and D2007.5.46 (June 24, 2008) (emphasis added). Thus, the Commission must look to what NorthWestern knew or reasonably should have known during the tracker periods at issue as this was when the costs were incurred. Given this standard and the issues that the Commission must

decide, discovery of information outside of this period will not lead to the discovery of admissible evidence in this docket.

The MCC cites to two United States Supreme Court cases, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S.Ct. 2380 (1978) and *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947), for the proposition that discovery is treated broadly and liberally.[2] MCC Response, p. 3. NorthWestern agrees that discovery rules regarding relevancy are broader in scope than the rules for admissibility of evidence in the record; however this does not mean that a party has unlimited access to information. *Oppenheimer*, 437 U.S. at 351 ("discovery, like all matters of procedure, has ultimate and necessary boundaries.") (citing to *Hickman*, 329 U.S. at 507). Thus, "it is proper to deny discovery of...events that occurred before an applicable limitations period, unless the information sought is otherwise relevant to the issues in the case." *Oppenheimer*, 437 U.S. at 352. As described below in more detail, the information that NorthWestern has objected to as irrelevant is outside the scope of this docket, and therefore, the Commission must put limits on discovery as information that is not relevant is not discoverable.

a. MCC-004, MCC-005, MCC-006, and MCC-007

NorthWestern objected to these data requests as they sought information for two tracker periods prior to the tracker years involved in this docket. Specifically, they seek detailed information about NorthWestern's off-system sales or purchases from July 2010 to June 2012. These details will not lead to admissible evidence as to whether NorthWestern's off-system purchases and sales from July 2012 to June 2014 were prudent. The MCC argues that the information requested from July 2010 to June 2012 could show trends and be a comparison to

[2] The MCC indicates that the Montana Supreme Court has adhered to this proposition and cites to *Owen v. F.A. Buttrey Co.*, 192 Mont. 274, 627 P.2d 1233 (1981). In *Owen,* the Montana Supreme Court does not discuss discovery of relevant information and whether discovery should be treated broadly and liberally. Instead, the case deals with the issue of sanctions and whether the district court abused its discretion when imposing sanctions on the defendant for failure to comply with discovery orders. *Owen*, 192 Mont. at 276.

prior costs. MCC Response, p. 6. This argument should be rejected. Given NorthWestern's energy supply portfolio at the time involved in this docket, NorthWestern was required to transact in the market in order to supply its customers with energy. Unfortunately, this means that Northwestern is subject to energy prices set by the market. Therefore, trends in energy prices and comparisons to prior costs will not lead to admissible evidence as to whether the current costs were prudently incurred because NorthWestern does not set the market prices. Instead, questions about what NorthWestern knew or should have known about the market at the time the costs were incurred should be asked. For example,[3] if NorthWestern projected the prices of energy at market were going to go down, why did it enter into a 15-year off-system contract? This would be a relevant question. Information outside the tracker periods in this docket has no legitimate bearing on the issue in this docket. For these reasons and those found in NorthWestern's Objections, NorthWestern requests that the Commission sustain its objections to MCC-004, MCC-005, MCC-006 and MCC-007.

b. MCC-030

NorthWestern objected to MCC-030 on the grounds that the information requested by the MCC was irrelevant because it is not at issue in an electricity supply tracker. *See* NorthWestern's Objections, p. 7. Alternatively, NorthWestern objected that if the Commission disagreed with that argument, NorthWestern's objection to MCC-030 should nonetheless be sustained because it seeks information outside of the applicable tracker periods. The MCC argues that NorthWestern put the requested information at issue. First, it asserts that two tables contained in one of NorthWestern's witness's testimony "contain certain USB data." MCC Response, p. 11. This is true; however, the information in the tables regarding USB is not the USB information that the MCC has requested. The tables contain data on reported program savings for USB programs.

[3] This is simply a hypothetical situation used for illustrative purposes.

Yet, the MCC has requested information regarding USB budgets and expenditures. However, as argued by NorthWestern in its Objections, these costs are not considered "electricity supply costs" that are reviewed by the Commission in this docket. NorthWestern's Objections, p. 7. Lost revenues associated with USB activities are not recovered in this docket.

Additionally, the MCC asserts that it requested the information going back to 2004 because that is the date found in the aforementioned tables. MCC Response, p. 12. NorthWestern included this table going back to 2004 as that was the point in time that NorthWestern was first permitted to seek recovery of lost revenues and it was simply provided for purposes of education. This purpose does not make information dating back to 2004 regarding USB budgets and expenses, which is not being asked to be recovered in this docket, relevant for discovery purposes; it will not lead to admissible evidence regarding demand-side management lost revenues and whether NorthWestern should be permitted to recover such revenues in rates in this docket for the two-year period at issue. For these reasons and those found in NorthWestern's Objections, NorthWestern requests that the Commission sustain its objection to MCC-030.

c. MCC-068, MCC-069, MCC-070, and MCC-072

NorthWestern objected to MCC-068, MCC-069, MCC-070 and MCC-072 on the grounds that each sought information beyond the tracker periods involved in this docket. As with NorthWestern's objections to MCC-004 through MCC-007, the MCC argues that NorthWestern's objections if sustained would be a "temporal narrowing of evidence." MCC Response, p. 15. The MCC asserts that the information going back, in one case, to 2004 "is important to develop an analysis that includes comparisons over time and review of continuity of how the programs are implemented." *Id.*, pp. 15-16. As NorthWestern argues in its Objections, the information sought, which is outside the applicable tracker periods, is irrelevant because

those costs and the related information have already been reviewed and litigated before this Commission in prior dockets, and lost revenues incurred in prior tracker years under different circumstances will not lead to admissible evidence regarding lost revenues sought to be recovered in this docket. Notwithstanding NorthWestern's position on these data requests, it would appear that the MCC's response as to why this information is relevant in this docket is a discussion more appropriately handled in a separate Commission docket. The Commission opened Docket No. D2014.6.53 to address NorthWestern's recovery of lost revenues. This docket is pending with initial testimony due on December 19, 2014. For these reasons and those found in NorthWestern's Objections, NorthWestern requests that the Commission sustain its objections to MCC-068, MCC-069, MCC-070 and MCC-072.

d. MCC-088

As with the objections to MCC-004 through MCC-007, MCC-068 through MCC-070, and MCC-072, NorthWestern objected to MCC-088 on the grounds that it sought information from tracker periods not at issue in this docket and was irrelevant because it would not lead to the discovery of admissible evidence. NorthWestern does not believe updating the table found in Frank Bennett's testimony for actual results for tracker periods other than those at issue in this docket will lead to relevant admissible evidence because that information has already been litigated and reviewed by the Commission. Again, the MCC's only argument against NorthWestern's objection is that the information is historical and provides continuity that is important. MCC Response, p. 18. Historical information does not necessarily lead to relevant admissible evidence. For those reasons discussed above and those found in NorthWestern's Objections, NorthWestern requests that the Commission sustain its objection to MCC-088.

Notwithstanding the above, the information requested by the MCC is already publicly available as NorthWestern filed this information in prior electricity supply tracker dockets. If the MCC believes that this information is relevant to the proceeding, it can address these figures in its testimony.

2. To the extent it can, NorthWestern has fully responded to all data requests that were not objected to.

The MCC's Response discusses eight data requests to which it believes NorthWestern has not fully responded. NorthWestern disagrees and provides the following responses to each of those data requests that the MCC argues were not fully responded to by NorthWestern.

a. MCC-016

MCC-016 requested documents regarding NorthWestern's communications with PPL Montana ("PPLM") where NorthWestern sought an explanation for the outage from PPLM, the operator of Colstrip Unit 4 ("CU4"). NorthWestern responded to this data request by directing the MCC to correspondence provided in the response to Data Request MCC-015 and to the Root Cause Analysis ("RCA"). In response to MCC-016, NorthWestern has provided all documents that are not subject to a forthcoming protective order. As NorthWestern has already stated, the RCA contains information that Siemens believes is protected, trade secret information. NorthWestern cannot produce this document until Siemens has filed a motion for protective order and the Commission acts on the motion. As already noted, NorthWestern will provide a copy of the RCA as soon as the Commission has acted on the motion. Given the Commission's status as an open and public governmental body, if NorthWestern were to provide the document now, it would waive any right for Siemens to claim protection of the information in the future.

The MCC asserts that it needs the RCA in order to assess NorthWestern's request for recovery of replacement power costs related to the outage. As noted above, the MCC will be provided a copy of this document once a protective order is granted. The MCC also requests a modification to the schedule to allow it time to analyze the information once it is received. MCC Response, p. 8. On November 17, 2014, the Commission issued a Notice of Staff Action that suspended certain dates in Procedural Order No. 7283b, including the date on which intervenors must file their testimony. Therefore, Siemens delay in filing a motion for protective order will not harm the MCC. For the foregoing reasons, the Commission should find that, except for protected materials, NorthWestern has responded to MCC-016 and deny the MCC's Motion with respect to MCC-016.

b. MCC-018

As with the response to MCC-016, the MCC asserts that not producing information that may be subject to a protective order "should not shield it from producing information to which it has filed no objection." MCC Response, p. 9. NorthWestern has fully responded to this data request at this point. The only documents that were not produced are those that contain information which Siemens believes is trade secret information. As discussed above in the response to MCC-016, this information cannot be produced until a motion for protective order is filed and acted on by the Commission.

The MCC also takes issue with the privilege log filed by NorthWestern in response to MCC-018. MCC Response, p. 9. The MCC fails, however, to provide any legal basis as to why the documents listed are not privileged communications. It simply asserts that the MCC is entitled to review replacement power calculations prepared by NorthWestern. *Id.* The privilege log indicates that the email chain listed as privileged simply sought legal advice on the approach

to calculating replacement power costs.[4] These documents, given the advice sought and the recipient clearly, are attorney/client-privileged communications. *American Zurich Insurance Co. v. Montana Thirteenth Judicial Dist. Court*, 2012 MT 61, ¶ 9, 364 Mont. 299, 280 P.3d 240 ("The attorney-client privilege protects communications between attorney and client during the course of professional relationship."). The "privilege is held by the client and may be waived by voluntary disclosure." *American Zurich*, 2012 MT at ¶ 20. At this point, NorthWestern is not willing to waive said privilege. Based on the foregoing, the Commission should find that, except for protected materials, NorthWestern has fully responded to MCC-018 and deny the MCC's Motion with respect to MCC-018.

c. MCC-025

MCC-025 sought information regarding the short-term purchases from a specific period and whether said purchases resulted from the outage at CU4. In its response to MCC-025, NorthWestern directed the MCC to the exhibits in Frank Bennett's testimony; however, it provided that it could not distinguish between the purchases made due to the outage and those that would have occurred despite the outage. The MCC asserts that it is "entitled to detailed, specific information about the costs claimed for recovery." MCC Response, p. 10. NorthWestern has provided these details by directing the MCC to the exhibits in Mr. Bennett's testimony. The MCC, however, takes issue with the fact that NorthWestern cannot specifically point to purchases made as a result of the outage. To the extent it can, NorthWestern has responded as fully as it can to this data request.

[4] The subject matter of this email chain could have been more specific. The undersigned counsel apologizes for not being more specific earlier when it filed the privilege log. The subject matter should have read "Email with attachment seeking advice regarding Commissioner Kavulla's approach to calculating replacement power costs needed due to CU4 outage."

The MCC argues that because NorthWestern claims that the replacement power costs are intertwined with all of its electricity supply costs; this negates the privilege claimed in response to MCC-018 as to certain communications. MCC Response, p. 10. This assumption is false. As noted above and in footnote 4 *supra*, the email chain that NorthWestern identified as privileged sought legal advice on Commissioner Kavulla's calculations concerning replacement power costs. Simply seeking advice does not mean that the email contains detailed numbers which NorthWestern has failed to produce in response to MCC-025. Based on the foregoing, the Commission should find that NorthWestern has fully responded to MCC-025 and deny the MCC's Motion with respect to MCC-025.

d. MCC-027

MCC-027 sought documentation, memos or correspondence in NorthWestern's possession or control regarding insurance purchased by PPLM that would have covered the event in question at CU4. In response to MCC-027, NorthWestern provided a copy of the operating agreement between the owners of CU4 and PPLM. MCC asserts that the operating agreement provides that a copy of all insurance policies will be provided to each owner. MCC Response, p. 11. NorthWestern agrees that the operating agreement signed in 1981 contains such a provision; however, this does not mean that NorthWestern still has a copy of such insurance policies in its possession. Notwithstanding that fact, the individual who manages CU4 on behalf of NorthWestern is out of the office this week given the holiday, and if in fact NorthWestern does have a copy of said policy, it will be provided next week.

e. MCC-052

MCC-052(a) asked NorthWestern to produce in electronic format with all links intact the economic dispatch for Basin Creek. NorthWestern responded by directing the MCC to the

exhibits attached to Mr. Bennett's testimony. The MCC argues that (1) NorthWestern did not provide the information in electronic form; and (2) the exhibits in Mr. Bennett's testimony do not contain all necessary information for economic dispatch. MCC Response, p. 12. NorthWestern has provided copies of Mr. Bennett's exhibits in electronic format. *See* response to PSC-001(a) and MCC-076. Due to the holiday this week, many key personnel are on vacation and so NorthWestern's counsel is unable to confirm whether the MCC's assertions as to this data request are accurate. NorthWestern will update this response on Monday, December 1, 2014, after consultation with the necessary individuals.

It should be noted, however, that if NorthWestern does need to further respond to this data request, it only has to provide information that it has in its possession, custody and control. M. R. Civ. P. 26. If NorthWestern does not have said information in electronic format, it does not have to create documents simply to comply with the MCC's request.

f. MCC-057

NorthWestern's response to MCC-057 was a reference to the RCA. As discussed above in MCC-016, this document cannot be produced yet due to Siemens' indication that a motion for protective order will be filed. For the reasons noted above in MCC-016, the Commission should find that, except for protected materials, NorthWestern has fully responded to MCC-057 and deny the MCC's Motion with respect to MCC-057.

g. MCC-078

MCC-078 asked for details about NorthWestern's transactions at Mid-Columbia for hedging purposes. The MCC claims NorthWestern has not responded, but only expanded the scope of the question with its response. MCC Response, p. 16. Given the change to NorthWestern's testimony with the response to MCC-078, the details that are requested are

found in the attachments provided in response to Date Request MCC-090. NorthWestern inadvertently failed to include this reference in its original response to MCC-078.

h. MCC-087

MCC-087 asked NorthWestern to update a table in Mr. Bennett's testimony for actual results. In response, NorthWestern directed the MCC to the information necessary to update the table. The MCC alleges that this response "inappropriately shifts the burden to intervenors to develop information in this docket." MCC Response, p. 17. This allegation is incorrect. The information is already in the docket. The MCC wants NorthWestern to produce the information in a specific format. There is no rule of civil procedure that requires a party responding to discovery to produce information in a certain format. Based on the foregoing, the Commission should find that NorthWestern has fully responded to MCC-087 and deny the MCC's Motion with respect to MCC-087.

Respectfully submitted this 26th day of November, 2014.

NORTHWESTERN ENERGY

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CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's Response to The Montana Consumer Counsel's Motion to Compel in Docket Nos. D2013.5.33/D2014.5.46 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, emailed to counsel of record, and served on the most recent service list by mailing a copy thereof by first class mail, postage prepaid.

Date: November 26, 2014

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Docket No. D2013.5.33/D2014.6.46
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