

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

**REPLY IN SUPPORT OF
MOTION TO COMPEL RESPONSES TO DATA REQUESTS**

Montana Consumer Counsel [MCC] moves the Commission for an Order compelling NorthWestern Energy's [NWE] to fully answer and respond to certain data requests. MCC also requests additional time to prepare initial testimony after full and complete responses have been provided.

NWE objected to the following data requests: MCC 004, 005, 006, 007, 030, 068, 069, 070, 072 and 088.

NWE did not object, but did not fully and completely respond, to the following: MCC 016, 018, 025, 027, 052, 057, 078, and 087.

The MCC requested full and complete responses to all of the above data requests. In its response filed on November 26, 2014 NWE stated it would provide the requested information in MCC-027 and in MCC-052 when necessary personnel were available [Brief p. 11-12]. Updated responses were filed on December 3, 2014. MCC requests that NWE be directed to provide full and complete answers to MCC's data requests.

DATA REQUESTS MCC 004, 005, 006 AND 007 [off-system purchases]

NWE argues that any information outside of the June 2012 to June 2014 tracker period is not relevant to the issues to be decided in this docket. Brief p. 4. The predicate of NWE's argument is that costs must have been prudently incurred within the tracker period, and therefore, any information from pre June of 2012 is simply not relevant.

This argument conflates the prudence standard and the discovery process. Section 69-8-210 MCA allows NWE to recover prudently incurred electricity supply costs. The Commission determines which costs were prudently incurred by reviewing what NWE knew or reasonably should have known at the time it incurred the costs. NWE asks the Commission to look only at the June 2012 to June 2014 period to make that assessment, without any context or historical data to illuminate NWE's actions.

What NWE knew, or should have known, in June of 2012 NWE necessarily encompasses information from prior to June of 2012. What NWE knew, or should have known, about the costs and benefits of off-system transactions may well have been learned, or should have been learned, prior to June of 2012. Discovery is intended to allow investigation that might lead to admissible evidence, and it is reasonable to inquire as to whether NWE had the information to establish a knowledge base that would enable it to mitigate or avoid millions of dollars of expenses in off-system transactions.

The Company presents the tautology that "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." [Brief p. 4] Discovery is allowed where it is reasonably designed to lead

to information that may be admissible. These questions, directed toward NWE's off-system transactions, are inquiring as to the Company's experience, what supply options have been pursued or are available, and the context surrounding the decisions the Company made regarding these transactions. Past performance of a potential investment would not likely be ignored when making determinations about future expectations. All decisions are made in context and history and experience should inform those decisions. The question before the Commission is how NWE exercised its discretion, and that is at least in part a function of historical data, which is relevant and discoverable.

NWE's unilateral conclusion that information is not relevant before any party, and the Commission itself, has even seen such information, is an unacceptable method of controlling information. The MCC's advocacy should not be constrained at the outset by an improper narrowing of information.

NWE opposes MCC's request for full and complete responses with the troubling argument that "[h]istorical information does not necessarily lead to relevant admissible evidence." [Brief p. 7, emphasis added.] The corollary of this statement is that historical information *may* lead to relevant admissible evidence, which is the standard by which discovery is allowed. It is reasonable and necessary to ask for actual historic data to determine whether decisions made by NWE, which presumably are based upon more than one year's worth of information, constitute prudently incurred electricity supply costs. In the absence of historical data, it is simply impossible to analyze the prudence of NWE's costs and expenses.

NWE's arguments address not the discoverability of the information but the merits of recovery of requested costs. For example, NWE argues that it "was required to transact in the market in order to supply its customers with energy." Brief p. 5. But this has nothing to do with whether the MCC should be able to review NWE's decisions regarding off-system transactions. To date, MCC has not advanced any argument regarding recoverability of costs incurred in off-system transactions. Nor can such an argument be advanced if the Commission precludes review of information before initial testimony is due. The Commission should not constrain a party from being able to argue evidence by foregoing any chance to review such evidence at the outset.

Most troubling is NWE's attempt to limit the discovery process from the start of the case. NWE concedes that "if NWE projected the prices of energy at market were going to go down, why did it enter into a 15-year off-system contract" is a relevant question. However, what NWE projected is not the only relevant data point. Information regarding market prices, parties contracted with, available sources of supply, NWE's other obligations in 2013, and contract and market rates, are all relevant to resource purchase decisions. NWE's projections, as it says, are relevant – and it is critical to view its projections in light of historic information, cost trends, costs of hedging, and other supply issues.

Full and complete responses to MCC data requests 004, 005, 006 and 007 should be ordered.

DATA REQUEST MCC 016 [Root Cause Analysis, Colstrip outage]

NWE defers a response to this data request to a third party and refers to a protective order that has not yet been filed. The Procedural Order governing this docket provides:

10. If a data request asks for trade secret information, the responding party must file a motion for a protective order as soon as practicable, **but no later than the deadline to respond to the data request.** [Emphasis added.]

This directive is supported by case law. See, *USA Screen Printing & Embroidery, Inc. v. Jacobs (In re Jacobs)*, 2003 Bankr. LEXIS 2278, 22-23 (Bankr. N.D. Tex. May 13, 2003)(a party must seek a protective order if it desires not to appear or respond to a discovery request). NWE cannot simply claim that a protective order is pending, and sit back and wait for a motion to compel. See *In re Jacobs, id.*, citing *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 413 (M.D.N.C. 1991) [permitting a party to merely note its objections and then sit back and wait for a motion to compel can only serve to prolong and exacerbate discovery disputes](internal citations and quotations omitted).

Further, NWE did not object to this data request. Failure to object to a discovery request constitutes a waiver of any objection. *In re Jacobs, id.*, citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992). The *Richmark* Court found that "It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection." *Id.*

NWE failed to object and to file a request for a protective order. It should be compelled to produce the requested information.

DATA REQUEST MCC – 018 [*Outage costs, privilege log*]

As set forth above, NWE’s failure to file a motion seeking a protective order should result in an Order compelling production of the requested information. NWE ’s claims related to evaluating the outage and advice given on calculating replacement power amounts for the CU4 outage contradict its assertions in response to MCC – 025 that there is no way to distinguish between replacement power and other purchases.

The MCC is entitled to review the Company’s calculations and the documents should be produced.

DATA REQUEST MCC – 025 [*Replacement power costs*]

If NWE intends to stand by its request for recovery of costs for replacement power incurred as a result of the outage, then MCC’s request for a full accounting of those costs must be fulfilled. 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 and the Commission are 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 [*Insurance related to outage*]

NWE argues that it does not have in its possession, custody or control a copy of the insurance policy that PPLM purchased on behalf of the owners of CU4. Setting aside the questions raised by NWE’s failure to even have a copy of the insurance policy PPLM

acquired on NWE's behalf relating to Colstrip 4 in its possession, this argument is without merit.¹

Rule 34 of the Montana Rules of Civil Procedure, adopted by Commission Administrative Rule of Montana 38.2.3301, allows discovery of documents "which are in the possession, custody or control of the party upon whom the request is served." M.R.Civ.P. 34(a). "Control" is defined as the legal right, authority, or ability to obtain documents upon demand. See, e.g., *United States International Trade Commission v. ASAT, Inc.*, 411 F.3d 245, 254, 366 U.S. App. D.C. 269 (D.C. Cir. 2005). PPLM is the successor in interest to Montana Power, as the operator of Colstrip 4. In *Camden Iron & Metal, Inc. v. Marubeni America Corp.*, 138 F.R.D. 438 (D.N.J. 1991), the Court set out the applicable grounds for finding control of documents. In determining whether a litigating corporation has control over another corporation's documents a court will consider whether the two entities operate as one with respect to the transaction giving rise to the litigation, and whether the litigating party has demonstrated access to documents in the ordinary course of business. *Camden Iron, id.*, 138 F.R.D. at 442. Here NWE freely admits that the document exists and was procured for the owners of CU4, but simply denies having it in its control, custody or possession. NWE has legal control of the insurance policy, and its failure to have it "in its possession" is no excuse to fail to produce it upon request.

¹ If NWE doesn't have the document, or legal access to it, it is difficult to understand how NWE reviewed this insurance coverage to determine whether there was another source of recovery for outage costs other than its ratepayers.

Finally, NWE did not object to this data request, which asks NWE to provide not just a copy of PPLM's insurance for NWE, but also:

“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.” [MCC 027]

Mont. R.Civ.Pro. 26(b)(1) provides:

Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense -- including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. The information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. [Emphasis added.]

All insurance, memos, correspondence and any documentation that NWE has or obtained in relation to PPLM's operator insurance has been requested and must be provided, as no objection was made to this data request. See, *In re Jacobs, id.*

DATA REQUEST MCC -030 [USB historical data]

NWE argues that this information is not relevant because it is not at issue. Initial testimony by intervenors has not yet been filed so what is at issue remains to be determined. Certainly if the company has its way and defines what information can be had by intervenors right out of the gate, then what will be at issue will in fact be only what the Company puts at issue. This is not what the Montana constitution and statutes guiding utility operations in the state require, however. This approach significantly restricts the Commission's ability to “supervise and regulate” public utilities. See §69-1-102, MCA. The information requested should be produced.

DATA REQUEST MCC - 052

In its response dated December 3, 2014 NWE indicates it will file an updated response with the requested information. MCC will supplement its position on this request after reviewing the updated response.

DATA REQUEST MCC - 057

NWE refers to its argument addressing MCC 016. For the reasons set forth above the information requested should be ordered to be produced.

DATA REQUESTS MCC 068, 069 070 and 072

NWE argues that this evidence is “more appropriately handled in a separate Commission docket.” Brief p. 7. However, it is not for NWE to decide what issues may be raised in any specific docket.

There is no reasonable dispute that the information sought is relevant, and for the reasons set forth above, this information should be produced in this discovery phase. With regard to the time frame for which information is requested, for the reasons set forth above, recovery of lost revenues historically is discoverable information. MCC requests full and complete responses to this data request and additional time to prepare initial testimony.

DATA REQUEST MCC - 078

In its response dated December 3, 2014 NWE indicates it filed an updated response with the requested information. MCC will supplement its position on this request after reviewing the updated response.

DATA REQUEST MCC -087

As set forth above, the costs requested for recovery in this docket combine actual and projected costs and expenses. 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

NWE's objection based on a temporal limitation to the tracker period alone should be rejected for the arguments set out above. 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.

Conclusion

For the foregoing reasons, NWE 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.

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DATED this _____ day of December, 2014.

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