

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

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

**RESPONSE OF THE MONTANA CONSUMER COUNSEL TO  
NORTHWESTERN ENERGY'S MOTION TO STRIKE TESTIMONY**

**Overview**

NorthWestern Energy's (NWE) request to strike the testimony of John Wilson related to recovery of revenues attributed to the Lost Revenue Adjustment Mechanism (LRAM) and of George Donkin related to hedging should be rejected.

The fact that parallel proceedings have been opened regarding LRAM and hedging does not preclude the Commission from considering and disallowing costs related to those programs in this docket. If the Commission is precluded from considering LRAM and hedging as a matter of policy, then expenses related to those programs should not be recoverable as a matter of fact.

NWE's argument is tantamount to a motion for summary adjudication on its ability to recover expenses it claims that are related to LRAM and to hedging. Striking testimony and curtailing the presentation of facts and evidence would be

reversible error in this proceeding. MCC has presented an argument based on the facts as set out by NWE in its filing seeking recovery of certain expenses. If the issues (LRAM and hedging) related to those facts are not relevant, then expenses arising out of those claims should not be entertained in this docket. If they are relevant, then MCC is entitled to argue that the costs arising out of those issues should be disallowed.

### **Argument**

As NWE itself sets out in its Brief, recovery of revenues through LRAM was established in electric supply tracker dockets. Brief pp 4-5. NWE sets out the dockets in which the Commission allowed NWE to recover revenues attributable to LRAM. Those dockets were tracker dockets. See NWE Brief pp. 4-6. NWE's logic is that "policy changes on a going forward basis" (Brief p. 6) are not properly considered in a tracker proceeding. However, if this were true, then LRAM could never have been adopted in a tracker proceeding, as was done in the first instance. Applying this logic, nothing can ever change through a tracker proceeding, so LRAM's implementation in a tracker proceeding was illegal at the outset as its implementation changed the status quo, precisely what NWE argues against now. If NWE is correct, LRAM should never have begun in a tracker docket, and for that reason alone the LRAM mechanism should be dismantled.

The Commission, having instituted a mechanism by which certain costs may be recovered, is not frozen in time and precluded from ever reviewing or reconsidering that policy. This docket, an electric tracker docket, is the same

proceeding in which LRAM was initiated. NWE's argument in favor of stasis surely would not be advanced if the cost under consideration had been previously disallowed. Recovery of revenues through tracker proceedings is not a one-way street, obligating the Commission to continue forever down a path of allowing recovery of all costs that were allowed in a prior proceeding. It is simply not the case that the Commission's allowance of recovery of revenues in a particular proceeding binds it for all time to allow recovery of those costs however or whenever incurred and regardless of all other circumstances.

Further, if expenses attributed to LRAM are not relevant in a tracker proceeding, then NWE should be precluded from seeking recovery of such costs in its annual tracker. NWE cannot have it both ways. If these costs belong in a tracker for the purpose of seeking recovery of such costs, then they are fair game for disallowance if circumstances so warrant. Trackers do not have a "no-exit" policy, where once an expense is allowed it must be forever so regardless of changing facts and circumstances. By NWE's logic, if a cost recovery mechanism cannot be considered as a matter of policy in a tracker docket, then there must be a "no entrance" approach as well. Where there is no escape by virtue of "policy" then there should be no admittance as a matter of "policy." LRAM was initiated in a tracker docket and it may end in a tracker docket. It is specious for NWE to argue otherwise.

Tellingly, NWE states that Dr. Wilson's testimony regarding LRAM is "appropriate, relevant testimony in the LRAM docket" which requires a

conclusion that the testimony is relevant to LRAM. Relevance is not the question, by NWE's own statements. The question is whether the Commission should allow expenses attributed to LRAM in this proceeding. That question is a factual question, and should only be decided after the Commission considers what costs are being submitted for recovery. If no evidence is to be allowed to rebut the request for recovery of those expenses, the Commission will deny ratepayers an opportunity to be heard, which is reversible error. The facts should be considered, and a decision rendered only after development of a full factual record.

Finally, NWE's argument that consideration of LRAM and hedging in this docket is a "waste of time" does not address the reality that it is here in this tracker proceeding where there is a real case and controversy. That is, real dollars and expenses to ratepayers are under consideration. Rates are being collected now that include both past period and forecast claimed lost revenues, and NWE seeks to make these rates permanent. If the Commission considers MCC's argument regarding LRAM, and discontinues the policy as applied here, then on a going forward basis recovery of these costs will not be allowed. This proceeding already consolidates two tracker periods; and a third has been filed while this is pending.

NWE claims that the Commission considered and rejected MCC's argument regarding hedging, but at the same time acknowledges that the Commission expressed concerns about NWE's hedging program. The fact that the Commission did not order NWE to stop its hedging practices in the prior tracker docket does not foreclose the Commission from ordering it to stop its hedging

practices in this docket. To the contrary, the Commission's explicitly stated concerns confirm the fact that hedging issues have not been resolved.

NWE's collateral estoppel argument fails the first necessary element, acknowledged by the Company as the "most crucial" step. The "issue decided in the prior adjudication" is not identical to the issue being raised in this proceeding. Collateral estoppel does not preclude consideration of a unique factual record and a conclusion that differs from a prior decision. If this were not the case, NWE could argue, for example, that ROEs cannot be revisited once set. By the same logic, NWE could not file a "decoupling" proposal as it states it intends, because decoupling proposals were made and ultimately rejected in a prior docket. In this case, Mr. Donkin's testimony clearly describes changed circumstances that have occurred. There is now a longer track record, additional losses have been incurred, and significant changes have been made in physical hedges undertaken by NWE such as the Hydros acquisition.

Tracker dockets are annual filings. The Commission has initiated parallel proceedings regarding LRAM and hedging, but this does not preclude consideration of issues that have been submitted to it in the tracker docket.<sup>1</sup> This docket represents a specific request for cost recovery and revenue requirement increases. Aside from NWE's burden to establish the reasonableness of these requests, these elements are not present in the generic proceedings to which the

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<sup>1</sup> With respect to the hedging issues, NWE appears to set up a "Catch-22." It says first that the issue "should be addressed in N2011.1.1." [sic] It then argues that "the matter has been decided." NWE Brief, p. 8.

Company would defer these issues. The testimony in these dockets is therefore also different.<sup>2</sup> As NWE argues, each tracker period presents a discrete set of factual circumstances for which recovery of certain costs is requested. If the thread of NWE's argument is run out, then all that can happen is that a filing be made, and the Commission must simply accept the request as filed. Because costs were allowed in a prior docket, according to NWE, they must be allowed always. This is not how the doctrine of collateral estoppel works. Each tracker filing is to be reviewed and decided on its merits, and the Commission must review the factual record to determine the propriety of allowing recovery of costs based upon the factual record before it. If the Commission were simply relegated to rubber stamping the annual tracker filings made by a company, no recovery for expenses related to LRAM would have been allowed in the first instance.

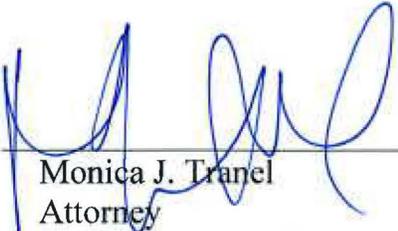
### **Conclusion**

NWE asks the Commission handcuff itself to a policy decision favorable to the Company and apply that to all dockets regardless of the fact scenario present in each individual proceeding. The Commission should reject this approach. The Commission should consider all the facts after a full and fair hearing on the entire record. Only then should a decision be rendered as to whether expenses presented for recovery in this docket should be allowed as prudently incurred.

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<sup>2</sup> NWE argues that Dr. Wilson's testimony should be stricken because it would be more efficient to address in the generic LRAM docket. This is hardly a basis for striking testimony and NWE didn't go this far in the recent gas tracker where it only requested the issues be reserved. It then, however, goes on to assert that the "same rationale applies to the Donkin Testimony." The analogy is turned on its head. In the case of hedging issues, the generic proceeding has not begun, and no testimony has been filed. If the Commission is to be concerned only with efficiency, then it must proceed with the issue in this Docket where discovery has been conducted, testimony has been filed, and a hearing date is set.

DATED this 9<sup>th</sup> day of June, 2015.

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