

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  
PREHEARING MEMORANDUM**

**Introduction**

The Montana Consumer Counsel (MCC) objects to NorthWestern Energy's (NWE) identification of witness order as set out in NWE's prehearing memorandum, specifically, that NWE intends to "call its rebuttal witnesses after intervenors have presented their case in chief."

NWE's attempt to present its case in chief as "rebuttal" testimony, after the intervenors put on their cases, has two flaws: 1) it inappropriately shifts the burden of proof to the intervenors on issues that NWE has the burden to carry; and 2) it denies the intervenors due process rights to challenge NWE's testimony.

**Discussion**

NWE has the burden of proof to show that the costs in this proceeding for which it seeks recovery were prudently and actually incurred. In support of its

Application, NWE presented four witnesses, one of whom did not actually file Prefiled Testimony but is adopting testimony filed by another witness; and one of whom did not file Prefiled Testimony in the 2013 tracker but is adopting testimony filed by another witness. NWE Prehearing Memo p. 4-5.

In glaring contrast, NWE's rebuttal testimony is presented by seven witnesses. Ronald Halpern and Robert Ward are experts retained by PPLM immediately after the CU4 outage in 2013 and who joint authored the Root Cause Analysis analyzing the cause of the outage.<sup>1</sup> The information they have to provide in this docket relates to the Root Cause Analysis, which they prepared, and was available to NorthWestern to present in its case in chief. When NWE made the decision to seek recovery for costs related to the outage, it should have presented Halpern and Ward's testimony in support of that case. NWE should certainly not be allowed to call these witnesses at the hearing after the intervenors have no chance to respond.

James Goetz and Fred Lyon are both attorneys. Their testimony purports to explain why NWE is justified in failing to undertake any risk analysis prior to the CU4 outage that would have explored sources of recovery other than the ratepayers. They rely on information that was available to NWE prior to the outage and certainly prior to filing its Application seeking cost recovery in this docket, and NWE should have introduced that testimony in its initial Application.

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<sup>1</sup> See Rebuttal Testimony of Ronald Halpern pp. 2-3, 5-6; Rebuttal Testimony of Robert Ward pp. 1-2.

The contrast between the explanations provided for the outage in the rebuttal testimony and Kevin Markovich's Direct Testimony could not be more stark. Markovich does not provide any explanation for the cause of the outage, or even state that NWE had done an analysis of what caused the outage.<sup>2</sup> The Root Cause Analysis, which explains the outage and the cause of it, is dated November 18, 2013, and NWE filed its Application in May of 2014. There is no justification for NWE's failure to introduce its evidence in support of its request for recovery of costs in its case in chief.

Markovich's explanation of the costs related to CU4 are presented in exactly one sentence:

While NorthWestern had to purchase replacement power due to the CU4 outage, attempting to identify the amount and/or cost would require NorthWestern to make scores of assumptions and interpretations regarding what might have happened absent the outage that, in the end, may or may not be valid or even yield meaningful results.<sup>3</sup>

Hearings are not intended to be an ambush, and NWE may not lie in wait with its key evidence until such time as the opposing parties have no further chance to introduce contradictory evidence challenging the applicant's claims. When faced with similar circumstances, one Court excluded evidence that was styled as "rebuttal" as improperly disclosed. See e.g., *Keener v. United States*, 181 F.R.D. 639 \*7 - \*8, (U.S. Dist. Ct. Mont. 1998). In *Keener*, the Court dealt with a situation where the moving party waited to disclose its key evidence until after the

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<sup>2</sup> See Markovich Direct Testimony p. 9:9-14.

<sup>3</sup> Prefiled Direct Testimony of Kevin Markovich, p. 10:19-23.

opposing party had presented its case. As here, the Court noted that the difference between the initial evidence and the rebuttal evidence was “dramatic. The second disclosure provides opinions that go to the heart of the case. The first is tantamount to a non-opinion.” The Court limited the evidence to that which was produced in the initial disclosure, finding that procedural errors “cannot be overlooked if [the rules of procedure] are to have any significant meaning.” *Keener, id.* at \*\*10. The MCC requests that NWE be required to put on its case in chief at the hearing prior to the MCC offering its evidence in response. To do otherwise would do damage to meaningful due process and deny the MCC the opportunity to address the issues raised by NWE in rebuttal that should have first been raised in its initial Application.

The MCC submitted data requests on the CU4 outage raised but not explained by NWE in its Application. Dr. John Wilson filed testimony requesting that the replacement power costs be disallowed, among other things. Dr. Wilson testified that:

The Company is requesting in this docket the authority to recover between \$8 and \$11 million (depending on which of the Company’s estimates is selected) of increased costs for the purchase of replacement power related to that outage.<sup>4</sup>

Responses to data requests made clear that NWE knew that the “CU4 generating plant was taken out of service for overhaul by its operator, PPLM, from May 5, through June 7, 2013, during which time the rotor was taken out for inspection and what was apparently expected to be routine maintenance. The plant was

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<sup>4</sup> Prefiled Direct Testimony of Dr. John Wilson, p. 5: 7-10.

eventually returned to service on June 27, 2013 but major problems were encountered almost immediately thereafter. According to the “Root Cause Analysis” performed for PPLM after the outage by outside consultants, initial “core melting” began prior to June 29 and continued thereafter until severe core failure occurred on July 1, 2013. (See response to MCC-015, Attachment 4)”<sup>5</sup>

NWE knew, six months prior to filing its Application seeking recovery for costs related to the outage, that “the extended forced outage event for CU4 “was caused in part or in whole by the work performed on the generator during the May/June, 2013 planned overhaul.” (See response to MEIC-45).<sup>6</sup>

Rather than using the information provided in the Root Cause Analysis to determine whether the parties who were responsible for maintaining and operating CU4 could be a source of recovery for NWE, NWE came first to its ratepayers. In doing so, NWE failed to explain what justified the amount of its request, saying only that such an explanation would require “*scores of assumptions and interpretations regarding what might have happened absent the outage.*”<sup>7</sup> When the intervenors through data requests asked NWE to identify CU4 costs of repairs and replacement power, NWE in its responses provided information that it clearly had and could easily have included in its initial Application.<sup>8</sup> NWE chose not to do so, and it should not now be allowed to put on its case in chief at a time when the intervenors cannot respond.

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<sup>5</sup> Prefiled Testimony of John Wilson, p. 5-6, citations in original.

<sup>6</sup> Id., p. 6:5-7.

<sup>7</sup> Prefiled Direct Testimony of Markovich, *supra*.

<sup>8</sup> See NWE responses to MCC 020, 015 and 017 and to MEIC -5 and 6.

Once NWE's request for recovery of costs was challenged, NWE retained experts to conduct analyses of whether there were other sources of recovery besides its ratepayers. NWE filed lengthy "rebuttal" testimony in which it sets out, for the first time, analyses and argument supporting cost recovery that it raised but did not support through evidence and argument in its initial Application. The intervenors have no opportunity to respond to this new tactic with argument and evidence of their own. NWE's strategy shifts the burden of proof to the intervenors and denies the intervenors fundamental due process rights, and should be rejected.

Rebuttal evidence is that which explains, repels, contradicts, or disproves evidence introduced by a defendant during his case in chief. See *Billings Clinic v. Peat Marwick Main & Co.*, 244 Mont. 324, 343 (Mont. 1990). The general rule for determining whether certain rebuttal evidence is proper is "whether it tends to counteract new matters by the adverse party." *McGee v. Burlington Northern, Inc.* 571 P.2d 784 (Mont. 1977). Rebuttal testimony is limited to matters first raised by an opposing party. See e.g., *State v. Hocevar*, 2000 MT 157 ¶ 79. NWE raised the issue of cost recovery for the CU4 outage in its Application, it simply failed to support its request with any evidence. Therefore, NWE must be limited to the evidence that it presented in its initial application, and may not, through rebuttal, put on its case in chief.

The MCC is prejudiced if NWE is allowed to put its case in chief on through rebuttal. First, there is no chance to counter the evidence introduced by

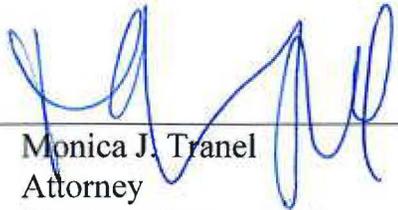
NWE for the first time in rebuttal. Second, the MCC has no chance to respond to this new information with evidence and argument of its own. If NWE had introduced these arguments in its initial case, the MCC may have evaluated the case differently, for example, by hiring different or additional expert witnesses to address the claims made.

### **Conclusion**

The MCC requests that NWE call all of its witnesses in its case in chief and subject them each to cross-examination prior to the MCC calling its witnesses. Alternatively, the MCC requests the Commission dismiss or disallow all costs related to hedging, CU4, and lost revenues as NWE's rebuttal evidence is a *de facto* admission that its initial case was inadequate to support recovery of those costs. Finally, the MCC should be allowed an opportunity to respond to any evidence put on by NWE after MCC's witnesses have testified.

DATED this 25<sup>th</sup> day of September, 2015.

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

  
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