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

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**NorthWestern Energy's Opposition Brief**

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## INTRODUCTION

On September 18, 2015, NorthWestern Corporation, d/b/a NorthWestern Energy (“NorthWestern”) filed its Prehearing Memorandum in accordance with the Commission’s July 14, 2015 Notice of Staff Action (“NSA”) entered in this docket. On September 25, 2015, the Montana Consumer Counsel (“MCC”) filed what it styled as a “Response” to NorthWestern’s Prehearing Memorandum. Briefly stated, the MCC’s unusual filing is a demand that NorthWestern’s witnesses who are testifying in rebuttal of the MCC’s case testify before the MCC witness they are rebutting. According to the MCC, due process demands that rebuttal witnesses testify before the witnesses they are rebutting. The MCC Response cites four cases in support of its unusual advocacy. None of them support the unreasonable position being taken by the MCC.

## FACTS

These consolidated dockets are the annual electric supply cost tracking adjustments filed by NorthWestern for the 12-month periods ending June 30, 2013 and June 30, 2014. The two dockets were instituted by applications filed by NorthWestern and supported by prefiled testimony. No contention was made by the parties to this proceeding, or the Commission itself, that the filings were deficient in any way. The dockets are now proceeding to a scheduled October 6, 2015 contested case hearing in accordance with Amended Procedural Order No. 7283f (“Procedural Order”). The Procedural Order and the NSA required the sequential disclosure of expert witnesses, and their testimony, as follows:

- 1) The Intervenors challenging the filings were required to prefile their expert testimony setting forth their cases by May 8, 2015.

- 2) NorthWestern's rebuttal to the Intervenor's witnesses was required to be prefiled by July 24, 2015.

The active Intervenor's in this case, the MCC together with the Montana Environmental Information Center and the Sierra Club ("MEIC/Sierra Club") have, through their prefiled testimonies, taken the following positions:

MEIC/Sierra Club. The MEIC/Sierra Club advocates, through the testimony of Mr. David Schlissel, that the cost of replacement power incurred because of a July 1, 2013 forced outage at Colstrip Unit 4 should be disallowed for imprudence. The imprudence alleged by Mr. Schlissel is twofold: (1) the failure to pursue a cause of action against Siemens, the company that performed the maintenance work that led to the forced outage; and (2) the failure to inquire about the purchase of outage insurance before the outage occurred.

MCC. The MCC advocates, through the testimony of Dr. John Wilson, that:

- 1) The cost of replacement power incurred because of a July 1, 2013 forced outage at Colstrip Unit 4 should be disallowed for imprudence. The imprudence alleged by Dr. Wilson is essentially the same as that alleged by Mr. Schlissel, except that he also suggests NorthWestern should pursue a cause of action against PPL Montana, and
- 2) Lost revenues under the Commission-approved Lost Revenue Adjustment Mechanism should be eliminated from the annual electricity supply tracking adjustments.

The MCC also advocates, through the testimony of Mr. George Donkin, that the Commission should require NorthWestern to terminate its off-system hedging program and should disallow any costs associated with new off-system hedge transactions undertaken after November 18, 2014, the date NorthWestern acquired its hydroelectric facilities from PPL Montana.

NorthWestern's rebuttal case will be presented by seven witnesses, six of whom will be testifying only in NorthWestern's rebuttal case. It is those six witnesses which the MCC unreasonably contends must testify in advance of the MCC witnesses they are rebutting.<sup>1</sup> Their testimony, as already set forth in their prefiled testimony, will be as follows:

Mr. Jim Goetz. Mr. Goetz, one of Montana's premier litigators, testifies that NorthWestern has no meaningful cause of action against either Siemens or PPL Montana, rebutting the positions taken by MCC witness Wilson and MEIC/Sierra Club witness Schlissel, that NorthWestern should file lawsuits to recover the cost of replacement power.

Mr. Fred Lyon. Mr. Lyon testifies that the contract clauses relied upon by Mr. Goetz in rendering his opinions are standard in the industry. His testimony rebuts the positions taken by MCC witness Wilson and MEIC/Sierra Club witness Schlissel, that NorthWestern should file lawsuits to recover the cost of replacement power. He also testifies that the purchase of outage insurance is not standard in the industry because it is expensive and not cost effective, rebutting the positions taken by MCC witness Wilson and MEIC/Sierra Club witness Schlissel, that NorthWestern was imprudent because it failed to inquire about the purchase of outage insurance before the outage occurred.

Mr. Ron Halpern and Mr. Robert Ward. Mr. Halpern and Mr. Ward are the joint authors of the Root Cause Analysis relied upon by MCC witness Wilson and MEIC/Sierra Club witness Schlissel, in rendering their opinions that NorthWestern should file lawsuits to recover the cost of replacement power. They rebut the factual assertions of MCC witness Wilson and MEIC

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<sup>1</sup> NorthWestern's Prehearing Memorandum indicates that it wants to present Kevin Markovich, who testifies both in NorthWestern's direct case and its rebuttal case, only one time, for the sake of convenience. If any party objects to that procedure, NorthWestern will call Mr. Markovich to the stand twice, once in its direct case, and once in rebuttal. Under that procedure, parties will be limited to cross examining Mr. Markovich on his direct the first time he is presented and on his rebuttal the second time he is presented.

Sierra Club witness Schlissel and their opinions that NorthWestern should have pursued causes of action against Siemens and PPL Montana.

Mr. Mike Barnes. Mr. Barnes testifies that outage insurance is not a wise purchase because it is expensive and not cost effective, rebutting the positions taken by MCC witness Wilson and MEIC/Sierra Club witness Schlissel, that NorthWestern was imprudent because it failed to inquire about the purchase of outage insurance before the outage occurred.

Mr. Pat Corcoran. Mr. Corcoran testifies that Dr. Wilson and Mr. Schlissel are wrong in asserting that the cost of replacement power is not properly included in the annual electricity supply cost tracking adjustments and explains why they are wrong. Mr. Corcoran also rebuts Dr. Wilson's contention that lost revenues under the Commission-approved Lost Revenue Adjustment Mechanism should be eliminated from the annual electricity supply tracking adjustments.

None of these six rebuttal witnesses would be testifying in this proceeding but for the positions taken by the Intervenors in the testimonies of their expert witnesses.

## **ARGUMENT**

I. NorthWestern's electricity supply costs were presumed to be prudent before they were challenged by the MCC and MEIC/Sierra Club.

The detailed presentations of the electricity supply costs incurred by NorthWestern in each of the annual electric supply cost tracking adjustments start out with a presumption of reasonableness. Under Montana's law of evidence, the following presumptions apply in every case:

- 1) Private transactions have been fair and regular. § 26-1-602(19), MCA.
- 2) The ordinary course of business has been followed. § 26-1-602(20), MCA.

3) The law has been obeyed. § 26-1-602(33), MCA.

The United States Supreme Court has held that, until challenged, the expenditures incurred by a public utility in providing regulated service are presumed reasonable. West Ohio Gas Company v. Public Utils. Comm'n, 294 U.S. 63, 72 (1935), and cases cited therein. See also: Potomac Elec. Power Co. v. Pub. Serv. Comm'n, 661 A. 2d 131, 140 (D.C. 1995).

Inherent in the argument of the MCC in its Response to NorthWestern's Prehearing Memorandum is that NorthWestern was required to anticipate a challenge by the MCC to the prudence of its expenditures for replacement power, or its opposition to lost revenue adjustments or hedging programs, and disprove the positions of the MCC before they were ever asserted or articulated by its witnesses. The unreasonable end result demanded by the MCC is avoided through the simple recognition that the expenditures incurred by NorthWestern in providing electric service to its customers were presumed reasonable until challenged by the MCC or the MEIC/Sierra Club.

II. The proper order of witnesses in this case is NorthWestern's Direct Testimony, followed by Intervenor Testimony, followed by NorthWestern's Rebuttal Testimony.

The undersigned counsel for NorthWestern has represented regulated public utilities before this Commission for more than 35 years. This is the first docket in which he has appeared that it has been suggested that due process requires rebuttal witnesses to testify before the witnesses they are rebutting. Undersigned counsel recently litigated a Montana-Dakota Utilities Co. rate case before the Commission, PSC Docket No. D2012.9.100, in which the MCC was represented by the legal counsel who prepared and filed the Response in this docket. As in this proceeding, Montana-Dakota's Prehearing Memo, attached as Exhibit 1, indicated that its rebuttal witnesses would be presented after the conclusion of the MCC's case in chief. No

response was filed by the MCC, and the matter proceeded through contested case hearing without fanfare.

The notion that rebuttal witnesses testify after the witnesses they are rebutting testify is hardly novel. It is a principle which has existed since the early days of English common law. (See e.g. § 25-7-310, MCA, governing jury trials.) Although the MCC now argues that due process requires rebuttal witnesses to testify in advance of the witnesses they are rebutting, the four cases it cites do not even remotely support its argument.

Keener v. United States of America, 181 F.R.D. 639 (2007) was a personal injury case in which the injured party was suing the United States for damages in United States District Court. Unlike the Procedural Order in this case, the Federal Rules of Civil Procedure (F. R. Civ. Pro.) do not require the parties to prefile the testimony of their expert witnesses. However, they do require parties to disclose the identities of experts which will be called at trial, including “a complete statement of all opinions the witness will express....” Rule 26(a)(2)(B)(i), F. R. Civ. Pro. Judge Molloy entered a scheduling order in the case which required the Plaintiff and Defendant to simultaneously disclose the expert opinions they would offer at trial. Both parties filed expert disclosures as required by the Montana District Court’s scheduling order. However, after seeing the Plaintiff’s expert disclosure, the Defendant United States attempted to “supplement” its expert disclosure by including a point-by-point rebuttal of the Plaintiff’s expert opinions. Judge Molloy held that the United States of America had intentionally refused to disclose its expert’s opinions as required by his order and refused to allow supplementation. The case had nothing to do with the proper order of witnesses at trial. Judge Molloy’s opinion is attached as Exhibit 2 for the convenience of the Commission.

Similarly, the three cases cited by the MCC at page 6 of its Response have nothing to do with the proper order of witnesses at trial. The MCC Response indicates on its face that the cases define what is or is not rebuttal evidence. The MCC has not filed a motion to strike NorthWestern's rebuttal testimony as improper rebuttal. It has no basis for doing so. It is arguing that NorthWestern's rebuttal witnesses must testify before the witnesses they are rebutting testify. The three cases cited by the MCC on page 6 of its Response have nothing to do with the proper order of witnesses at trial.

### CONCLUSION

The proper order of witnesses in this case is NorthWestern's Direct Testimony, followed by Intervenor Testimony, followed by NorthWestern's Rebuttal Testimony. The MCC position that NorthWestern's rebuttal witnesses must testify before the witnesses they are rebutting is without merit. As stated above, if either the MCC or MEIC/Sierra Club wish to object to NorthWestern's proposal to present Mr. Markovich once in its case in chief, on both his direct and rebuttal testimony, it will call him twice: once in its direct case for cross examination on his direct testimony and once in its rebuttal case for cross examination on his rebuttal testimony.

Respectfully submitted this 2<sup>nd</sup> day of October 2015.

NORTHWESTERN ENERGY

By: John Alke  
John Alke  
Attorney for NorthWestern Energy

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

IN THE MATTER OF THE APPLICATION	)	REGULATORY DIVISION
of MONTANA-DAKOTA UTILITIES CO.,	)	
a Division of MDU Resources Group, Inc.,	)	DOCKET NO. D2012.9.100
for Authority to Establish Increased Rates for	)	
Natural Gas Service	)	

**PRE-HEARING MEMORANDUM OF MONTANA-DAKOTA UTILITIES CO.**

Pursuant to Paragraph 16 of Procedural Order 7254 entered in this docket, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("Montana-Dakota"), the Applicant in this proceeding, submits this Pre-hearing Memorandum to the Commission.

**INTRODUCTION**

This docket is an application by Montana-Dakota for a general rate increase in the rates it is authorized to charge its customers for gas service in the State of Montana. There is one Intervener in this proceeding, the Montana Consumer Counsel ("MCC").

**ISSUES**

There are numerous issues in this case defined by the pre-filed testimony of the MCC and Montana-Dakota. The major issues, in terms of dollar impact on the revenue requirement in this case are:

- (1) Whether new depreciation rates should be authorized by the Commission;
- (2) Determining the cost of equity capital and capital structure;
- (3) The inclusion of the Billings Landfill Project in ratebase;
- (4) The reflection of the new Customer Care and Billing system in rates, and;
- (5) Other post test year plant additions

Rate design is also an important issue in this case.

### WITNESSES

All testimony in this docket has been pre-filed in accordance with Procedural Order

7254. Montana-Dakota intends to call its witnesses in the sequence described below.

Montana-Dakota will present its case in chief through the direct testimony of the following witness, who will be called in the sequence listed:

- (1) Frank Morehouse, adopting the direct testimony of David Goodin
- (2) Jay Skabo
- (3) Anne Jones
- (4) Garret Senger
- (5) Robert Mormon
- (6) J. Stephen Gaske
- (7) Michael Gardiner
- (8) Earl Robinson
- (9) Rita Mulkern
- (10) Tamie Aberle

After the MCC presents its case in chief, Montana-Dakota will present its rebuttal case through the rebuttal testimony of the following witness:

- (1) Garret Senger
- (2) Robert Mormon
- (3) J. Stephen Gaske
- (4) Michael Gardiner
- (5) Earl Robinson
- (6) Rita Mulkern
- (7) Tamie Aberle

## EXHIBITS

Montana-Dakota will pre-mark and introduce into evidence the following exhibits:

- MDU-01 Application and supporting documents (Testimony and witness exhibits excluded.)
- MDU-02 Direct Testimony of David Goodin (To be adopted by Frank Morehouse.)
- MDU-03 Direct Testimony of Jay Skabo
- MDU-04 Direct Testimony of Anne Jones
- MDU-05 Direct Testimony of Garret Senger
- MDU-06 Rebuttal Testimony of Garret Senger
- MDU-07 Direct Testimony of Robert Mormon
- MDU-08 Rebuttal Testimony of Robert Mormon
- MDU-09 Direct Testimony of J. Stephen Gaske
- MDU-10 Rebuttal Testimony of J. Stephen Gaske
- MDU-11 Direct Testimony of Michael Gardner
- MDU-12 Rebuttal Testimony of Michael Gardiner
- MDU-13 Direct Testimony of Earl Robinson
- MDU-14 Rebuttal testimony of Earl Robinson
- MDU-15 Direct Testimony of Rita Mulkern
- MDU-16 Rebuttal Testimony of Rita Mulkern
- MDU-17 Direct Testimony of Tamie Aberle
- MDU-18 Rebuttal Testimony of Tamie Aberle

Montana-Dakota reserves the right to introduce additional exhibits during the cross-examination of MCC witnesses.

**DATA RESPONSES**

The only time Montana-Dakota will introduce Data Responses into evidence will be during the cross-examination of MCC witness. Montana-Dakota will object to the introduction of data responses into evidence other than for purposes of cross-examination.

DATED this 30th day of July 2013.

**HUGHES, KELLNER, SULLIVAN & ALKE, PLLP**

By John Alke  
**John Alke**  
40 W. Lawrence, Suite A  
P.O. Box 1166  
Helena, MT 59624-1166

Attorneys for Montana-Dakota Utilities

**CERTIFICATE OF SERVICE BY MAIL**

I HEREBY CERTIFY that a copy of the foregoing **PRE-HEARING MEMORANDUM OF MONTANA-DAKOTA UTILITIES Co.** was served upon the following by mailing a true and correct copy thereof on this 30th day of July 2013, addressed as follows:

**MONTANA CONSUMER COUNSEL  
PO BOX 201703  
HELENA MT 59620-1703**

John Alke  
John Alke

KeyCite Yellow Flag - Negative Treatment  
Distinguished by Rau v. State Farm Ins. Companies, D.Mont., August 14, 2007

181 F.R.D. 639  
United States District Court,  
D. Montana,  
Great Falls Division.

Luther L. KEENER and Cleta Keener, Plaintiffs,  
v.  
The UNITED STATES of America, Defendant.

No. CV 97-065-GF-DWM. | Sept. 9, 1998.

After deadline for filing expert disclosure statements, defendants moved for leave to file "supplemental" expert disclosure. The District Court, Molloy, J., held that: (1) regardless of whether second disclosure was supplemental or rebuttal, it was untimely, and (2) expert was precluded from testifying regarding second disclosure statement.

Motion denied.

West Headnotes (3)

[1] **Federal Civil Procedure** ⇌ Failure to respond; sanctions

170A Federal Civil Procedure  
170AX Depositions and Discovery  
170AX(A) In General  
170Ak1278 Failure to respond; sanctions

In determining whether to preclude expert from testifying for failure to comply with expert disclosure requirements, court must analyze: (1) public's interest in expeditious resolution of litigation; (2) court's need to manage its docket; (3) risk of prejudice to opposing party; (4) public policy favoring disposition of cases on their merits; and (5) availability of less drastic sanctions. Fed.Rules Civ.Proc.Rules 26(a), (e)(1), 37(c)(1), 28 U.S.C.A.

26 Cases that cite this headnote

[2] **Federal Civil Procedure** ⇌ Failure to respond; sanctions

170A Federal Civil Procedure  
170AX Depositions and Discovery  
170AX(A) In General  
170Ak1278 Failure to respond; sanctions

Regardless of whether second expert disclosure statement was supplemental or rebuttal, it was untimely, since, if rebuttal, it was filed after 30-day limitation period, and if supplemental, then first statement would be deemed to be inaccurate or incomplete, and thus, it would have failed to meet scheduling deadline; nature of second disclosure was so substantially different from first that it fell far outside any reasonable notion of correcting incomplete or inaccurate expert report. Fed.Rules Civ.Proc.Rule 26(a)(2)(C), (e)(1), 28 U.S.C.A.

102 Cases that cite this headnote

[3] **Federal Civil Procedure** Failure to respond; sanctions

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(A) In General

170Ak1278 Failure to respond; sanctions

Expert was precluded from testifying as to opinions expressed in his "supplemental" disclosure statement, and thus, was limited to testifying regarding his initial statement, considering that second statement was untimely, that it was dramatically more detailed than first, that it was prepared after opposing party submitted its expert disclosure statement, and that no request for extension of time to file disclosure was made. Fed.Rules Civ.Proc.Rules 26(a), (e) (1), 37(c)(1), 28 U.S.C.A.

54 Cases that cite this headnote

### Attorneys and Law Firms

\*639 Michael G. Barer, Barer Law Office, Great Falls, MT, Dennis P. Conner, Conner Law Office, Great Falls, MT, plaintiffs.

George F. Darragh, Jr., Office of the U.S. Attorney, Great Falls, MT, Janet Reno, Washington, DC, defendant.

## ORDER

MOLLOY, District Judge.

### I. INTRODUCTION

Pending before the court is the defendant's motion for leave to file supplemental expert disclosure. The defendant timely filed an initial expert disclosure statement of Dr. Patrick Lyden. Dr. Lyden's initial disclosure, dated May 7, 1998 is a summary of his general opinions. His opinions are based on medical records that the plaintiff provided, clinic notes and hospital records from 1991 to 1997.

Dr. Lyden's second disclosure, dated July 26, 1998, contains Dr. Lyden's opinions as to the plaintiff's medical condition after Dr. Lyden reviewed the opinions of three of the plaintiffs' experts, and the opinions of the plaintiff's therapists.

The plaintiff objects to the supplementation, claiming that Dr. Lyden failed to timely disclose his testimony in other cases in the last four years; and also that the substance of the second disclosure is not properly characterized as supplemental disclosure, and should have been included in the initial disclosure. On August 13, 1998, in response to \*640 the plaintiff's objection to Dr. Lyden's testimony based on failure to disclose prior testimony, the defendant submitted a supplement to the supplemental expert disclosure in which Dr. Lyden's testimony in prior cases is outlined.

Simultaneous disclosure of liability experts and disclosure of plaintiff's damages experts was due on May 20, 1998.

### II. DISCUSSION

The defendant's initial disclosure failed to satisfy the requirements of Rule 26(a)(2)(B) in two respects: Dr. Lyden did not list the cases in which he has testified in the last four years; and the disclosure does not comply with the requirements of Rule 26(a)(2)(B), imposed on the parties in this case in the court's scheduling order, that an expert witness disclosure "... contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; ..."

Although the defendant missed the disclosure deadline by three months with regard to providing other cases in which Dr. Lyden has testified, standing alone this would not be sufficient to prevent Dr. Lyden from testifying. This is so because the history of his prior testimony is available to the plaintiff in sufficient time to allow preparation for meaningful cross-examination perhaps using his prior testimony as a basis for impeachment.

#### A. Supplementation vs. Rebuttal

However, the defendant's failure to comply with Rule 26 in the initial disclosure is another matter. The defendant attempts to bring the second disclosure within the parameters of Rule 26 by styling it as a "supplement" to the disclosure that was submitted on May 7, 1998. This disingenuous effort does not comply with the intent of Rule 26 or of this court's scheduling order.

Supplemental opinions are required under Rule 26(e)(1) in only three situations: 1) upon court order; 2) when the party learns that the earlier information is inaccurate or incomplete; or 3) when answers to discovery requests are inaccurate or incomplete. The defendant argues the second report is supplementation of the initial disclosure by contending that the supplemental report "merely expands the opinions which Dr. Lyden will offer." Unless the defendant is conceding that the disclosure made on May 7, 1998 is inaccurate or incomplete, then the second disclosure is not a proper supplemental disclosure as allowed under Rule 26(e)(1). What is set forth in the second report is the information, reasoning and opinions that Rule 26 requires be disclosed in the critical initial disclosure.

#### B. Rebuttal vs. Supplementation

If the information in the second disclosure was supposed to be "rebuttal evidence," to comply with the Rules it had to be submitted within the bounds of Rule 26. Evidence is "rebuttal" evidence if it is "intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party." Rule 26(a)(2)(C).

The opinions contained in the letter dated July 26, 1998 are different from, rather than supplemental to, the information contained in the May 7, 1998 disclosure. Supplementation under the Rules means correcting inaccuracies, or filling the interstices of an incomplete report based on information that was not available at the time of the initial disclosure.

In Dr. Lyden's initial disclosure there are four sentences from which the plaintiff may glean the substance of Dr. Lyden's opinions. These sentences indicate that Dr. Lyden believes that "the transient worsening [the plaintiff] suffered on July 27 was probably related to a vasovagal event that occurred during the phlebotomy" for which four brief reasons are given. Dr. Lyden then states that "[I]t is quite doubtful that the normal INR (i.e. absent anticoagulation) had anything to do with the episode. Comparing the evaluations done serially over time, and comparing the patients evaluations on later admissions (7/96) it appears that this deficit was static following the stroke in April of 1995."

\*641 In contrast, the disclosure dated July 26, 1998 sets out extensive responses to each of the expert opinions that the plaintiff disclosed. Dr. Lyden tracks the plaintiff's medical history, drawing specific conclusions as to documented personality changes and to the plaintiff's ability to respond to commands and change of speech patterns. Dr. Lyden disputes the claim that "the event of July, 1995 was precipitated by the cessation of the patient's anticoagulant therapy." Precise reasons are given for the basis of this dispute. Dr. Lyden reviewed the plaintiff's brain images for the second disclosure and drew sophisticated conclusions as to the occlusion of the plaintiff's right internal carotid artery based on the scanning techniques that were used and the lesions and atrophy that were present in the brain images. He did none of these things in making his original disclosure. His failure was one of omission: the information was there to review. He didn't review it in detail before expressing his opinion.<sup>1</sup>

Dr. Lyden sums up his disclosure by stating that "I find absolutely no data in this sequence of brain images to suggest that the internal carotid artery occluded in July of 1995. All we know is that sometime between the carotid ultrasound of December, 1994 and October 1997 this artery occluded."

The difference between the two disclosures is dramatic. The second disclosure provides opinions that go to the heart of the case. The first is tantamount to a non-opinion. The initial disclosure does no more than provide a singular view that Dr. Lyden does not know when the patient's left internal carotid artery occluded. To countenance a dramatic, pointed variation of an expert's disclosure under the guise of Rule 26(e)(1) supplementation would be to invite the proverbial fox into the henhouse. The experienced expert could simply "lie in wait" so as to express his genuine opinions only after plaintiff discloses hers. While a variation of this practice is contemplated by the Rules, true rebuttal must occur within 30 days of the original expert disclosure. Otherwise, it fails as admissible proof because the late disclosure of rebuttal opinions is disallowed under the Rules. See Rule 26(a)(2)(C).

### C. The Use of Late Disclosed Opinions

A party "that without substantial justification fails to disclose information required by Rule 26(a) shall not, unless such failure is harmless, be permitted to use as evidence at a trial any information not so disclosed." Federal Rule of Civil Procedure 37(c) (1). If full compliance with Rule 26(a) and 26(e)(1) is not made, Rule 37(c)(1) mandates some sanction, the degree and severity of which are within the discretion of the trial judge.

[1] This circuit has previously considered the issue of expert preclusion as one possible remedy for failure to comply with Rule 26. In *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir.1990), the Ninth Circuit set out the test to determine the propriety of imposing the sanction of dismissal or default as a remedy for Rule 26 violations. The test requires a court to analyze 1) the public's interest in expeditious resolution of litigation; 2) a court's need to manage its docket; 3) risk of prejudice to the defendants; 4) public policy favoring disposition of cases on their merits; and 5) the availability of less drastic sanctions. In *Wendt v. Host Intern., Inc.*, 125 F.3d 806, 814 (9th Cir.1997), this test was extended to apply to a situation where exclusion of testimony had been imposed as a sanction for a violation of Rule 26.<sup>2</sup>

### D. Timeliness

[2] Regardless of whether the defendant's disclosure of Dr. Lyden's testimony dated July 26, 1998 is deemed to be rebuttal or supplemental evidence, it is untimely. If the second disclosure is deemed rebuttal evidence, \*642 the disclosure dated July 26, 1998 was not timely. The deadline for plaintiff's disclosure of experts was May 20, 1998; both the defendant and the plaintiff filed their expert disclosures on May 20, 1998. Any rebuttal evidence needed to be filed by June 20, 1998. See Rule 26(a)(2)(C) ("If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under (2)(B) within 30 days after the disclosure made by the other party.")

If the disclosure made on July 26, 1998 is supplemental evidence, then, of necessity, the defendant must concede the first disclosure did not comply with Rule 26 or with the scheduling order in this case. The nature of the second disclosure is so substantially different from the first that it falls far outside any reasonable notion of correcting an incomplete or inaccurate expert report. Under either characterization, the disclosure Dr. Lyden made on July 26, 1998 does not comply with Rule 26.

### E. The Determination in This Case

[3] Applying the five factors of *Wanderer v. Johnston*, 910 F.2d at 656 to the facts of this case, Dr. Lyden's testimony at trial shall be limited to the opinions expressed in the initial disclosure, dated May 7, 1998. The public and the parties have an interest in expeditious resolution of litigation. Requiring the parties to comply with the Rules of Civil Procedure and with the court's scheduling order promotes achieving such goals by eliminating the need for continuances. Setting forth deadlines allows a court to manage its docket; defendant did not request an extension within which expert disclosure could be submitted. There is no indication that the parties stipulated to an extension of time to file expert disclosures.

Public policy favors disposition of cases on their merits, but that policy has a procedural as well as a substantive component. To that end Dr. Lyden will be allowed to present his opinions as they were disclosed on May 7, 1998. Complete exclusion of Dr. Lyden's testimony is not warranted, and therefore the less drastic sanction of limiting Dr. Lyden's testimony to that which was initially disclosed is appropriate. Dr. Lyden will not be allowed to testify as a "rebuttal" expert, or to express an opinion about the validity of another witness' opinion.

### III. CONCLUSION

The defendant's disclosure of substantive evidence about its medical position in this case was provided two months after the deadline imposed by the scheduling order for this case. The disclosure of Dr. Lyden's prior testimony was three months after the scheduling order deadline. These two procedural errors cannot be overlooked if the pretrial order, or if the Federal Rules of Procedure, are to have any significant meaning.

THEREFORE IT IS ORDERED THAT:

The defendant's disclosure of expert testimony dated May 7, 1998 shall set the operative limit of expert evidence that the defendant may present at trial. Dr. Lyden's testimony shall be limited to those opinions that are disclosed in the letter dated May 7, 1998. Plaintiff will be allowed to explore, under oath, why Dr. Lyden said he was "unable" to provide a list of cases in which he had testified, and yet was able to produce a list at a later date.

Dr. Lyden's supplemental disclosure shall be made a part of the record so as to preserve any legal issues the United States may want to preserve but it cannot be referred to at the time of trial.

The clerk of court is directed to notify all parties of the making of this order.

### All Citations

181 F.R.D. 639, 42 Fed.R.Serv.3d 465

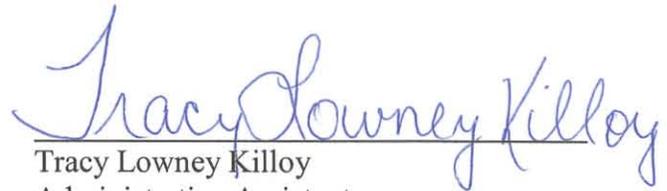
### Footnotes

- 1 Given Dr. Lyden's prominent academic position, there is an interesting contrast between the stationery the first disclosure is printed on, and the very formal stationery of the second.
- 2 In *Wendt*, the district court issued an order precluding the defendant's expert from testifying for failure to comply with Rule 26 disclosure requirements. However, the procedural status of the case changed due to an appeal and change of counsel, and on remand the initial preclusion order should not have been imposed against the defendant, because the remand of the case allowed the parties "to begin the expert disclosure procedure anew." *Wendt* at 814.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of NorthWestern Energy's Opposition Brief 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 has been 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: October 2, 2015

A handwritten signature in blue ink that reads "Tracy Lowney Killoy". The signature is written in a cursive style and is positioned above a horizontal line.

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