

SARAH NORCOTT
NorthWestern Energy
208 N. Montana, Suite 205
Helena, Montana 59601
Tel. (406) 443-8996
Fax (406) 443-8979
sarah.norcott@northwestern.com

JOHN ALKE
NorthWestern Energy
208 N. Montana, Suite 205
Helena, Montana 59601
Tel. (406) 444-8183
Fax (406) 443-8979
john.alke@northwestern.com

AL BROGAN
NorthWestern Energy
208 N. Montana, Suite 205
Helena, Montana 59601
Tel. (406) 443-8903
Fax (406) 443-8979
al.brogan@northwestern.com

Attorneys for NorthWestern Energy

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, DGGGS)	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, DGGGS Variable)	
Rates, and Spion Variable Rates)	

**NORTHWESTERN ENERGY'S MOTION FOR AND BRIEF IN SUPPORT OF
RECONSIDERATION OF FINAL ORDER No. 7283H**

Pursuant to ARM 38.2.4806, NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern”) submits this timely *Motion for and Brief in Support of Reconsideration of Final Order 7283h* (“Motion”) in the above-captioned dockets. The Montana Public Service Commission (“Commission”) issued Final Order No. 7283h (“Order”) on Friday, May 13, 2016. Specifically, NorthWestern moves the Commission to reconsider and reverse the following in the Order:

1. The decision to deny NorthWestern’s request to recover \$8,243,000 in replacement power costs incurred as a result of the outage at the Colstrip Unit 4 (“Colstrip”) in 2013; and
2. The decision to deny recovery of \$282,527 in modeling costs.

These decisions are arbitrary and capricious, incorrectly interpret the law, violate the Commission’s procedures, violate the parties’ right to due process, improperly ignore the uncontroverted evidence, and in light of the whole record are clearly erroneous. Each of these decisions is addressed in turn below.

ARGUMENT

I. COLSTRIP REPLACEMENT POWER COSTS

On July 1, 2013, an unforeseeable series of events resulted in an outage at Colstrip; it was off-line for nearly seven months. Due to this forced outage, NorthWestern had to purchase additional power in the market to meet its obligation as a public utility to serve its customers’ needs. These additional power purchases are electricity supply costs under the law. The Commission acknowledges this fact in the Order. *See* Order, ¶ 95. Unless imprudently incurred, recovery of electricity supply costs in rates through the electricity supply cost tracking adjustment is statutorily mandated. § 69-8-210(1), MCA. If a question of prudence does arise, the prudence standard requires an examination of what the utility knew, or should have known,

at the time the costs were incurred. The Commission's decision correctly identifies this standard. Order, ¶ 45. Unfortunately, this decision loses focus on this standard and on the Commission's role in this case – that it must allow prudently incurred costs even if rates are increased. The Commission's job is to balance the interests of the utility and its customers, not to be an advocate for the utility's customers.^{1 2}

A. The Commission's decision improperly discredits or ignores substantial evidence despite no evidence to the contrary.

The Commission's decision fails to recognize substantial evidence that NorthWestern acted prudently in this case. The Commission must properly recognize and not discredit or ignore this evidence; nothing in the record contradicts NorthWestern's case. Arbitrary and capricious actions ignoring the record must be reconsidered and reversed.

Administrative agency decisions cannot be arbitrary and capricious. The arbitrary and capricious standard requires a Court to determine whether the agency considered all of the relevant factors and whether the agency made a clear error in judgment. *Clark Fork Coalition v. Montana Dept. of Environmental Quality*, 2008 MT 407, ¶ 21, 347 Mont. 197, 197 P.3d 482. Decisions by administrative agencies are considered arbitrary and capricious if they appear “to be random, unreasonable or seemingly unmotivated, based on the existing record.” *Silva v. City of Columbia Falls*, 258 Mont. 329, 335, 852 P.2d 671, 675 (1993). Such agency decisions must be rational; otherwise they are arbitrary and capricious and agency deference is no longer considered by a reviewing court. *Puerto Rico Sun Oil Co. v. US EPA*, 8 F.3d 73, 77 (1st Cir. 1993).

¹ The Commission's website recognizes this unquestionable maxim of utility regulation. See <http://www.psc.mt.gov/Commission/workings.asp>

² Comments by Commissioners in concurring opinions attached to the Order as well as comments made in the public work sessions discussing the Order illustrate the Commission's awareness of this issue.

Ignoring uncontroverted evidence, as the Commission has done in this case, is a violation of the arbitrary and capricious standard. The law provides that the trier of fact may not disregard uncontroverted credible evidence. *Faith Lutheran Retirement Home v. Veis*, 156 Mont. 38, 46, 473 P.2d 503, 507 (1970) (“Following the fundamental rule that the trial court may not disregard uncontradicted credible evidence, we must accept the circumstances related by [the witness].”). This same rule applies to an administrative agency when it is acting as a trier of fact. In *Goodwin v. Elm Orlu Mining Co.*, 83 Mont. 152, 269 P. 403, 406 (1928), the Montana Supreme Court held that

the [Industrial Accident Board], as a trier of fact, may not disregard uncontroverted credible evidence in making its findings [citation omitted], and, where such evidence appears in the record, this court must consider it in conjunction with all other evidence in the case in determining whether the findings made are justified by the evidence as a whole.

See also Peitz v. Industrial Accident Board, 127 Mont. 316, 321, 264 P.2d 709, 711 (1953).

Similarly, the Montana Supreme Court rejected a Commission decision that applied a different method for determining coal expenses of a utility without any evidence to support rejection of the method advocated for by the utility. *Montana-Dakota Utilities Co. v. Bollinger*, 193 Mont. 508, 519, 632 P.2d 1086, 1092 (1981).

In this case, on several key points in the decision, the Commission attempts to discredit testimony from NorthWestern witnesses despite no evidence to the contrary that the testimony was incorrect. For example, the Commission discredits testimony from NorthWestern’s expert witness, Fred Lyon, that investor-owned utilities (“IOUs”) do not purchase outage insurance based on the fact that NorthWestern did not evaluate outage insurance availability and costs prior to the outage. Order, ¶ 62. First, this finding is illogical. Whether or not NorthWestern evaluated outage insurance before the outage has no bearing on this expert’s testimony. Second, no party

presented evidence that Mr. Lyon's testimony was incorrect – that in fact, IOUs do purchase outage insurance. The Commission's decision to discredit this testimony despite no evidence to support such contention is arbitrary and capricious.

Another example is the Commission's rejection of NorthWestern's testimony that other co-owners of Colstrip did not have outage insurance at the time of the outage. Order, ¶ 39. The Commission discredits this testimony because NorthWestern "did not provide affidavits or other documentation to this effect." *Id.* Besides being legally incorrect, as discussed below in Section E, no party provided evidence showing that NorthWestern's testimony was incorrect and that other Colstrip co-owners did have outage insurance at the time of the outage.

The Commission ignores other key NorthWestern evidence that was not contradicted by any party. First, the Commission acknowledges testimony from NorthWestern regarding the good performance of Colstrip over the years. Order, ¶ 39. However, the Commission fails to address this testimony later in the Order and fails to address NorthWestern's position that the plant's good performance was an indicator that Colstrip was not a risky plant that required an investigation of outage insurance. Similarly, the Commission ignores testimony from NorthWestern's witnesses that the cause of the 2013 outage had never before occurred in Colstrip's almost 30 years of operation, let alone in the industry. Tr., p. 181: 11-21 and 195: 24 - 196: 2. Ignoring this uncontroverted evidence was legally unjustified.

The Commission did not properly consider strong, uncontroverted evidence that NorthWestern's actions were prudent. The substantial evidence showed NorthWestern knew that:

- Colstrip had performed well in comparison to other similarly-sized coal-fired facilities;
- Outage insurance was not cost-effective over time;

- At the time of the outage, no other owner of Colstrip had outage insurance;
- Very few insurance companies provided this one-off type of insurance given the risk involved for the insurance companies;
- Because of that risk, premiums were very expensive; and
- Rates paid by utility customers must be just and reasonable, and if insurance premiums were excessive, rates would not meet this standard.

Mr. Lyon's testimony that public utilities do not purchase outage insurance or inquire about such insurance given that it is known to be uneconomical clearly supported NorthWestern's knowledge. Mr. Lyon's testimony substantiated the fact that IOUs, like NorthWestern, do not need to evaluate outage insurance because it is common industry knowledge that it is not economical. This was what a reasonable utility would have known. Thus, the fact that NorthWestern did not evaluate outage insurance prior to the outage was not an imprudent decision. The Commission improperly ignored/discredited evidence that supported the prudence of NorthWestern's actions with no legal basis. This is an error that the Commission must reconsider and reverse.

B. The Commission's decision is arbitrary and capricious in light of prior Colstrip outages.

The Commission's decision found that NorthWestern was imprudent because it failed to mitigate a risk. Order, ¶¶ 58-64. The Commission further found that failure to evaluate outage insurance was the culprit for this imprudence. *Id.* at ¶ 63. This decision is arbitrary and capricious in light of prior Commission actions. As held by the First Circuit of the United States Court of Appeals, arbitrary and capricious decisions are decisions that are inconsistent with past practices or contain unexplained discrimination. *Puerto Rico Sun Oil Co. v. US EPA.*, 8 F.3d 73, 77 (1st Cir. 1993) ("The 'arbitrary and capricious' concept, needless to say, is not easy to encapsulate in a single list of rubrics because it embraces a myriad of possible faults and depends

heavily upon the circumstances of that case. Still there are rules of thumb, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.* [citation omitted]. In addressing individual aspects of EPA's decision, we cite to those requirements – discussion of relevant issues, consistency with past practice, avoidance of unexplained discrimination – that are pertinent to EPA's decision in this case.”). When an agency changes course from a prior line of reasoning, it must provide “reasoned analysis” for that change; otherwise the decision is arbitrary and capricious. *Motor Vehicle Mfrs.*, 463 U.S. 29, 42 (1983).

Here, in light of the Commission's prior actions regarding an outage at Colstrip and recovery of replacement power costs, NorthWestern was unaware that failure to evaluate outage insurance would be cause to find that it had failed to mitigate a risk. In 2009, there was an outage at Colstrip. NorthWestern included replacement power costs associated with that outage in the 2009 electric tracker docket and the Commission permitted recovery of these costs. *See* Order No. 6921c, ¶¶ 62-64 and ¶ 1 on page 35 in Docket Nos. D2008.5.45 and D2009.5.62. This prior outage would not cause a reasonable utility manager to expect the 2013 outage or to consider the facility a risky plant that needed to be managed. NorthWestern's witness, Robert Ward testified that the 2009 outage concerned “turbine rotor problems [which] had nothing to do with the stator core or any other component of the generator.” *Id.*, p. 8: 6-7. In that previous docket, no party, nor the Commission, suggested that NorthWestern was imprudent because it had not considered or evaluated outage insurance and therefore failed to mitigate a risk. To now find in this docket that NorthWestern failed to mitigate a risk because it did not evaluate insurance is asking NorthWestern to hit a moving target that it has no reasonable opportunity to hit given its prior experiences with outages at Colstrip and recovery of such costs as well as what it knew about outage insurance (see discussion above). The Commission's sudden change in practice and what

it considers prudent actions for recovery of replacement power costs is arbitrary and capricious for which a court will not provide deference to the agency's decision. For these reasons, the Commission must reverse its finding that NorthWestern was imprudent.

C. The Commission's findings of fact are clearly erroneous.

Section 2-4-623(1), MCA, requires that administrative agency decisions must include findings of fact "accompanied by a concise and explicit statement of the underlying facts supporting the findings." An agency's findings of fact must be supported by substantial evidence on the whole record. *Montana Power Co. v. Environmental Protection Agency*, 429 F. Supp. 683, 695 (D. Mont. 1977). Pursuant to § 2-4-704(2)(a)(v), MCA, a decision from an administrative agency can be overturned by the court if it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the **whole** record." (Emphasis added). Montana courts apply a three-part test to determine if findings of fact are clearly erroneous:

(1) the record will be reviewed to see if the findings are supported by substantial evidence; (2) if the findings are supported by substantial evidence, it will be determined whether the [agency] misapprehended the effect of evidence; and (3) if substantial evidence has not been misapprehended, the [court] may still decide that a finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed.

Munn v. Montana Bd. of Medical Examiners, 2005 MT 303, ¶ 15, 329 Mont. 401, 124 P. 3d 1123.

In this case, the Commission's decision to deny recovery of the replacement power costs associated with the Colstrip outage is not supported by substantial evidence. Instead, the Commission's decision relies on unsubstantiated or illogical conclusions. As discussed above, the Commission rejected several key points supporting NorthWestern's case despite having no

contradictory evidence. None of these conclusions and findings are supported with evidence in the record.

The Commission similarly found that NorthWestern's failure to insist that PPL Montana, now Talen Energy ("Talen"), or Siemens Corporation ("Siemens") perform an El Cid test after the rotor was reinserted in the generator was an imprudent action, and therefore, NorthWestern failed to properly manage and operate the facility. Order, ¶ 57. The evidence in the case, which stated that such test was not industry standard, contradicts this finding. The Commission nevertheless found that it "is not convinced that the failure to conduct another El Cid test conformed to industry standards." *Id.* The Commission's support for this finding is supposedly "a preponderance of evidence in this case and its own expertise." *Id.* The Commission fails to point to any evidence that contradicts the industry standard evidence presented by NorthWestern. Instead, the Commission attempts to discredit this evidence by saying NorthWestern failed to provide documentation from the industry to support its expert's opinions. As discussed below, this is legally incorrect. Additionally, the Commission's reliance on its own expertise in this case is not sufficient to support its position. With all due respect to the Commission staff, no member of the Commission staff has any experience in industry standard testing procedures for a coal-fired generator. Like the Commission staff, no Commissioner has such experience. NorthWestern's experts on this issue have a combined 100-plus years of experience in this field. For the Commission to rely on "its own expertise" to support its finding is clearly erroneous and unsupported.

D. The Commission's decision incorrectly applies the law regarding the burden of proof.

The Commission's decision fails to recognize the well-established legal principle that prudence is presumed until challenged. In the Order, the Commission held that a utility seeking

recovery of electricity supply costs has the burden of proof regarding the prudence of its actions and that NorthWestern failed to meet this burden in part because its “initial application contained few details of the outage.” Order, ¶ 73. This criticism and the supposed requirement that a utility must justify every electricity supply cost for which it seeks recovery in its initial application is an error in law.

As previously argued in NorthWestern’s post-hearing briefs, the burden of proof in a prudency challenge is on the utility only after an opposing party has made a prima facie showing of a lack of prudence. Costs incurred by a utility are presumed to be prudently incurred until challenged. *West Ohio Gas Company v. Public Utility Commission*, 294 U.S. 63, 72 (1935) (“Good faith is to be presumed on the part of the managers of a business.”) (citing to *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 288 (1923)). The Court of Appeals for the District of Columbia described this holding from *West Ohio Gas* “as a so-called ‘busting bubble’ presumption that vanishes once opponents of the expenditure make a showing of improvidence.” *Potomac Electric Power Co. v. Public Service Commission of District of Columbia*, 661 A.2d 131, 140 (D.C. Cir. 1995). As was aptly noted by Justice Brandeis, in his concurring opinion in *State of Missouri ex rel. Southwestern Bell Telephone Co.*,

[t]he term ‘prudent investment’ is not used in a critical sense....The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. **Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.**

262 U.S. at 289, n.1 (1923) (Emphasis added).

The Federal Energy Regulatory Commission (“FERC”) and other state commissions have recognized this presumption when determining whether a utility’s expenditures were prudently

incurred. In *Minnesota Power & Light Company*, 11 FERC ¶ 61,312 at 61,645 (1980), FERC stated that “where some other participant in the proceeding creates serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.” The Vermont Public Service Board (“VPSB”) also provides for the presumption in prudence cases. In *Re: Central Vermont Public Service Corporation*, 83 PUR4th 532, 566 (Vt. P.S.B. 1987), the VPSB stated that

a utility seeking a rate increase bears the burden of persuasion on the question of whether expenditures claimed to support the rates were reasonable and prudent [citation omitted]. We further noted that a utility enjoys a presumption that its expenditures were, in fact, reasonable and prudent, and that the presumption alone is sufficient to satisfy its burden. The presumption is rebuttable, however, and it is rebutted if an adverse party adduces evidence sufficient to support a finding contrary to the effect of the presumption. Once such evidence is introduced, the presumption entirely disappears and has no further effect. The utility is then left with the task of persuading the [VPSB], as the trier of fact, of the reasonableness of its expenditures through the presentation of evidence of the ordinary sort.

See also Long Island Lighting Co. v. Public Service Commission of New York, 134 A.D.2d 135, 144 (3rd Dept. 1987) (“Historically, utility expenditures initially have been assumed to be exercises of reasonable managerial judgment.”); *Gulf States Utilities Co. v. Louisiana Public Service Commission*, 578 So.2d 71, 85 (1991). Given the Commission’s failure to recognize this legal standard, the Commission must reconsider and reverse its decision concerning the burden of proof in prudence determinations.

E. The Commission improperly rejected expert testimony.

At several points in the Order, the Commission rejects testimony from NorthWestern’s experts because NorthWestern did not provide documentation to support those opinions, not because other evidence controverted it.³ This is a reversible error. Witness testimony is presumed

³ It should be noted that the Commission did not apply this same standard to the expert testimony provided by the Montana Consumer Counsel (“MCC”) and Sierra Club/Montana Environmental Information Center (“Sierra

by law to be truthful. The presumption is rebuttable. However, there is nothing in law that the presumption is rebutted unless it is collaborated with documentation. Such a situation would be judicially inefficient.

In Montana, “[a] witness is presumed to speak the truth.” Section 26-1-302, MCA. This presumption is a statutory evidentiary standard. In contested case proceedings, such as this case, the law binds the Commission to follow the common law and statutory rules of evidence. Section 2-4-612(2), MCA. Here, the Commission’s rejection of certain testimony from NorthWestern’s witnesses because NorthWestern did not provide other evidence to substantiate the expert’s testimony fails to recognize this legal presumption. For example, the Commission rejected expert testimony from Ronald Halpern that an El Cid test after a rotor is reinserted in the generator was not standard industry practice because his testimony was “not supported with evidence from industry technical manuals.” Order, ¶ 54. There is no evidence in the docket that states such a test is industry standard; Mr. Halpern’s testimony must be considered truthful. The Commission also dismissed evidence from NorthWestern’s witness, Michael Barnes, that no other co-owner of Colstrip had outage insurance at the time of the outage because NorthWestern did not present affidavits from those entities collaborating Mr. Barnes’ testimony. Order, ¶ 39. Similar to the prior example, there is no evidence in the docket to contradict Mr. Barnes’ testimony; it must be considered truthful. Essentially, the Commission’s findings on these facts translates into “we don’t believe your expert even though there is no evidence that he is wrong.” These findings by the Commission blatantly disregard the law establishing the presumption that a witness is telling the truth.

Club/MEIC”) notwithstanding the fact that the Commission never relies on this testimony for support for any of its positions in this case.

There are nine matters that disprove such truthfulness; unless one of them controverts the presumption, the Commission is required to recognize the presumption of truthfulness. Section 26-1-302, MCA, further provides that

This presumption may be controverted and overcome by any matter that has a tendency to disprove the truthfulness of a witness's testimony. The matters include but are not limited to:

- (1) the demeanor or manner of the witness while testifying;
- (2) the character of the witness's testimony;
- (3) bias of the witness for or against any party involved in the case;
- (4) interest of the witness in the outcome of the litigation or other motive to testify falsely;
- (5) the witness's character for truth, honesty, or integrity;
- (6) the extent of the witness's capacity and opportunity to perceive or capacity to recollect or to communicate any matter about which the witness testifies;
- (7) inconsistent statements of the witness;
- (8) an admission of untruthfulness by the witness;
- (9) other evidence contradicting the witness's testimony.

In this situation, the Commission did not present any findings to suggest that the presumption was lawfully rebutted based on this list. In fact, in other areas of the case, the Commission accepted the testimony of these witnesses without any documentation supporting their testimony. For example, the Commission accepted Mr. Halpern's opinions about the issues with the Alkophos lamination without requiring separate documentation from the industry. This is a legal error, and the Commission must reconsider its decision to disregard this testimony and reverse its decision to deny recovery of the replacement power costs.

F. The Commission's finding that NorthWestern failed to meet its burden of proof because it failed to evaluate alternative recovery mechanisms is an error.

The Commission faults NorthWestern for not considering a lawsuit as an alternative recovery mechanism prior to asking for recovery of the replacement power costs in rates. Order, ¶ 72. In light of that fault, the Commission holds that NorthWestern did not meet its burden of proof. *Id.* The Commission relies on ARM 38.5.8201(3) for support of this conclusion. Reliance

on this rule, however, does not support the Commission's conclusion. This rule does not provide that a utility must consider all possible recovery mechanisms prior to asking for recovery of electricity supply costs in rates. Instead, the rule provides that

[a] utility should thoroughly document its portfolio planning processes, resource procurement processes, and management decision-making so that it can fully demonstrate to the commission and stakeholders the prudence of supply-related costs and/or justify requests for approval of electricity supply resources.

ARM 38.5.8201(3). This rule pertains to NorthWestern's practices for supply planning and generation resource procurement. It does not control consideration of alternative recovery mechanisms. The Commission stretches the interpretation of the rule by suggesting that a utility must consider alternative recovery mechanisms prior to filing for recovery via the electricity supply tracker.

The recovery of prudently incurred electricity supply costs does not rest in the discretion of the Commission. It is statutorily mandated: "The commission shall establish an electricity cost recovery mechanism that allows a public utility to fully recover prudently incurred electricity supply costs..." § 69-8-210, MCA. Unless the Commission has an evidentiary basis for determining that the replacement power costs were imprudently incurred, it is legally obligated to allow NorthWestern to fully recover them in the Order. As indicated by Mr. Patrick Corcoran, the possibility of a lawsuit does not magically render an electricity supply cost, for which there is mandatory recovery under Montana law, into something else. Ex. NWE-35 at p. 6. The Commission does not have the power or authority to ignore a clear statutory mandate based upon a misguided belief that NorthWestern should have considered whether recovery was possible from another source prior to seeking recovery in this docket.

G. The Commission's reliance on Texas case law to support its conclusions is inappropriate and incorrect.

The Commission found that NorthWestern did not meet its burden of proof in this case because it did not present a witness from either Talen or Siemens regarding the operation of the plant. Order, ¶ 67. The Commission further states that “[w]hen Talen, as an operator of the Colstrip facilities, fails to reasonably operate and maintain the plant, any failures that may result can then rest on the regulated utility owner of that plant. *Id.* at ¶ 100. The Commission relies on a Texas court of appeals decision, *AEP Texas Cent. Co. v. PUC*, 286 S.W.3d 450 (Tex. App. 2008), to support this finding. *Id.*

First, reliance on this case is improper. There is no binding case law that provides a third-party vendor's imprudence can or should be imputed to a utility. Moreover, the Texas case is distinguishable from the facts of this case. In Texas, there was prior binding precedent that if a vendor was found to be imprudent, the Texas Public Utility Commission (“PUC”) imputed the vendor's imprudence to the utility. *See Application of Gulf States Utilities Co. for Authority to Change Rates*, Docket Nos. 7195 and 6755, 14 P.U.C. BULL 1943 (May 16, 1988). However, in a subsequent docket, the Texas PUC held that there needed to be a connection between the vendor's conduct and the utility's conduct in order to impute imprudent conduct of a vendor to the utility. *See Application of Texas Utilities Elec. Co.*, 1991 WL 790285, p. 91-92 (Tex. PUC 1991). Similar to the subsequent Texas PUC case, a Michigan Public Service Commission decision found that a utility was not imprudent even though the vendor may have made a mistake. *Re Consumers Power Co.*, 84 PUR 4th 389, 399 (June 16, 1987).

Specifically, in *AEP Texas*, the Texas PUC imputed Westinghouse's, the third-party vendor, imprudence to the utility. *AEP Texas*, 286 S.W.3d at 467. The PUC explicitly found that “Westinghouse's sale of highly defective critical equipment that did not achieve a reasonable

level of performance, coupled with what [the utility] asserts were knowing or reckless misrepresentations, constituted imprudence.” *Id.*, 286 S.W.3d at 467-68. In this case, there is no evidence that Talen’s operation of the facility was imprudent. In fact, the Root Cause Analysis (“RCA”), which the Commission relies on in other parts of the Order to support its findings, clearly and unequivocally states that Talen, as the operator, was not imprudent and could not have done anything to prevent this outage.

Second, the Commission’s finding that NorthWestern failed to meet its burden because it did not present a witness from Talen or Siemens is incorrect. NorthWestern presented sufficient evidence via the RCA and testimony from Mr. Halpern and Mr. Ward that clearly shows Talen properly operated the plant. There is nothing in the law that requires a party to present certain witnesses to establish certain facts. Instead, the law provides that one witness’s testimony is sufficient to establish a fact. Section 26-1-301, MCA. As long as a witness is qualified to testify on the subject, such evidence is permissible and appropriate and must be given the appropriate consideration by the Commission. Based on the above arguments, the Commission must reconsider its reliance on the Texas case and its position that NorthWestern failed to meet its burden because it did not present a witness from Talen or Siemens.

II. MODELING COSTS

In the Order, the Commission determined that NorthWestern failed to show that certain modeling costs were “reasonable and in the public interest.” Order, ¶ 85. Specifically, the Commission held that \$282,527 of modeling costs did not meet the definition of “electricity supply costs” as defined by statute. *Id.* The Commission justified this determination by holding that NorthWestern failed to meet its burden of proof with respect to these costs. *Id.* at ¶ 104. No party took issue with these costs during the pendency of the proceeding. The Commission

acknowledges that these costs only became an issue because of its decision in the 2014/2015 electric tracker docket in Docket No. D2014.7.58. *Id.* at ¶ 78.

The Order is premised upon several fundamental mistakes of law. If the Commission had applied Montana law correctly, it would have issued a final order finding that all NorthWestern's modeling costs in tracker years 2012/2013 and 2013/2014 were fully recoverable in rates as prudently incurred electricity supply costs. Specifically, this decision is incorrect for the following reasons: (1) the Commission applied the wrong burden of proof; (2) the Commission's decision violates NorthWestern's constitutionally protected due process rights, the Montana Administrative Procedure Act ("MAPA"), and statute; (3) the Commission incorrectly interpreted § 69-8-210, MCA; and (4) the Commission violated its own Procedural Order.

A. The Commission's decision applies the wrong legal standard.

With respect to the first reason, the Commission failed to recognize the well-established legal presumption of prudence discussed above. NorthWestern does not restate the arguments made above again here, but incorporates those arguments as they apply to this issue. If the Commission had applied the appropriate burden of proof to these costs, NorthWestern's modeling costs were presumed prudent under the law unless challenged by a party. No party challenged these costs during the pendency of this case. As such, the Commission was required to permit the recovery of such costs in rates under § 69-8-210(1), MCA. The Commission must correct this error on reconsideration.

B. The Commission's disallowance of the modeling costs violates due process, MAPA, and § 69-2-102, MCA.

The Commission improperly raised an issue concerning certain costs in NorthWestern's applications without notice to NorthWestern and then denied recovery of these costs in its final decision. Due process is guaranteed by the Montana Constitution. MT Const. art II, § 17. Due

process includes both procedural and substantive rights. *Montanans for Justice v. State ex rel. McGrath*, 2006 MT 277, ¶ 29, 334 Mont. 237, 146 P.3d 759 (citing to *Englin v. Board of County Commissioners*, 2002 MT 115, ¶ 14, 310 Mont. 1, 48 P.3d 39). The guarantee of due process bars arbitrary Commission actions regardless of the procedures used. *Id.* While procedural due process requirements are flexible, they require fundamental fairness. *Billings Gazette v. State ex rel. Commission on Practice*, 2008 MT 287, ¶ 12, 345 Mont. 385, 190 P.3d 1126 (internal citations omitted). Procedural due process requirements generally include, at a minimum, timely and adequate notice, opportunity to be heard at a meaningful time, the ability to confront and cross-examine witnesses offering opposing views, decision by a fair and impartial tribunal, and compliance with statutes including the rules of evidence. *See, e.g.*, §§ 2-4-601 and -612, MCA.

Additionally, the Commissioners do not sit as advocates or the representative of the consuming public. That is the role of the MCC. Section 69-2-102, MCA. The Commissioners sit as quasi-judicial officers charged with fairly balancing the interests of regulated utilities and their customers. The Commission's actions in this case are actions typical of a party and not actions of a fair and impartial tribunal. The actions of this Commission were improper because the Commission acted as a party to a contested case proceeding thereby engaging in unlawful procedure.

The context surrounding this issue, in this case, is significant. This case is a contested case proceeding conducted under a procedural order issued by the Commission, Procedural Order 7283f. There are only three active parties in the case, NorthWestern, the MCC, and the Sierra Club/MEIC. The Commission's Procedural Order in the docket required the Commission to advise the parties, by May 20, 2015, of any additional issues not raised by the parties in their testimony. The Commission determined there were no additional issues, and May 20 passed

uneventfully. After the matter was deemed submitted, the Commission's own professional staff issued a memorandum that did not address the modeling costs that the Commission subsequently disallowed in the Order. *See* Memorandum from Neil Templeton and Will Rosquist issued on March 16, 2016.

As noted in the Order, these costs only became an issue when similar costs became an issue in a subsequent docket decided approximately one month before issuance of the Order and more than six months after the hearing. In that docket, Docket No. D2014.7.58, the costs were similarly not an issue in the case, but only became an issue when a Commissioner declared at a work session that the Commission's own professional staff had made a mistake. At that point, the Commissioners themselves were acting as advocates instead of quasi-judicial officers. Until the Commission issued its Order, there was no way for anyone, outside of the Commissioners themselves, to determine why, for the first time, there was an issue over the inclusion of modeling costs in NorthWestern's electric supply cost tracking adjustment. The Commission's position, as stated in Order, that NorthWestern was required to first secure Commission approval before including certain modeling costs, did not exist until well after the contested case hearing and post-hearing briefing in this matter. Moreover, the Commission's Order is at odds with the Commission's own actions over the prior decade. It is ludicrous to suggest that NorthWestern should have known the Commission's position before it was expressed in either Order No. 7418d in Docket No. D2014.7.58 issued on April 13, 2016 or the Order issued in this case.

NorthWestern could not meaningfully address the Commission's concerns over the inclusion of modeling costs in the electric supply cost tracking adjustment without first understanding the basis for those concerns. The Commission had already issued seven final orders in seven consecutive dockets which approved NorthWestern electricity supply cost

tracking adjustments containing modeling costs on a non-differentiated basis. NorthWestern cannot be expected to divine the Commission's position and prepare testimony to address it. Indeed, MAPA gives the parties in administrative proceedings in Montana the right to confront their opposition before hearing through discovery. Section 2-4-602, MCA. The Commission should have afforded NorthWestern such right before being directed to address the Commission's unstated position.

The Commission cannot blithely skip over the requirements and safeguards found in the United States and Montana Constitutions, MAPA, and § 69-2-102, MCA. The Commission must properly raise issues providing notice and an opportunity for hearing on that issue before making a final determination. In failing to do so, the Commission violates NorthWestern's rights and statute. If the Commission is going to assume the role of advocate in its contested case hearings, it must actually play the part. This case provides a sterling example of why basic and well-understood principles of due process and fair play, as well as § 69-2-102, MCA, prohibit what the Commission is attempting to do. Given these violations, the Commission must reconsider its decision regarding the modeling costs and should permit full recovery of such costs on reconsideration.

C. The Commission's application of § 69-8-210(1), MCA, is a fundamental mistake of law.

Although labeled as a finding of fact, the Commission concludes that modeling costs associated with Company-owned resources must be included in a general rate case: "... costs such as modeling electric generation plants must instead be recovered through a general rate case." Order, ¶ 79. That simply is not true. The Commission has been approving the inclusion of NorthWestern's modeling costs for all power supply resources, whether purchased or owned,

since NorthWestern filed its 2006 Electric Supply Cost Tracking Adjustment.⁴ The Commission correctly states the rule of law in the very next finding of fact in its order: “The Commission, if it determines it is reasonable and in the public interest to do so, may also allow other utility costs to be recovered in the electricity tracker mechanism. Mont. Code Ann §69-8-210(1).” Order, ¶ 80.

Under § 69-8-210(1), MCA, there are two categories of costs. The first, electricity supply costs as defined in § 69-8-103(8), MCA, must be included in the electricity supply cost tracking adjustment. The inclusion of such costs is not a matter of Commission discretion. For the second category, “other utility costs and expenses,” inclusion in the tracker is a matter of Commission discretion. The Commission’s administrative rules governing NorthWestern’s electric planning and resource acquisition require modeling of all resources on a non-differentiated basis. The

⁴ As stated in NorthWestern’s Motion for Reconsideration filed on May 6, 2016 in Docket No. D2014.7.58, modeling costs were first included in the electric supply tracker as “real time and modeling costs,” in Docket No. D2006.5.66. Beginning in Docket No. D2011.5.38, NorthWestern modified the spreadsheet category to read “modeling” and the identified annual expense dropped significantly. Table 1 below sets forth, by docket number, the annual expense reflected in these two spreadsheet categories over the last decade, as set forth each year in Mr. Bennett’s Exhibit (FVB-1) accompanying the Applications. In each of these dockets between 2006 and 2012, the Commission permitted NorthWestern to recover the identified costs in Table 1. Not a single final order from 2006 to 2012 indicated that NorthWestern’s modeling costs should not be included in the electricity supply tracker, or required special affirmative action by the Commission for inclusion in rates.

Table 1

Designation	Docket No.	Schedule	Dollar Amount
Real Time & Modeling	D2006.5.66	FVB-1, pg. 2	\$386,532.00
Real Time & Modeling	D2007.5.46	FVB-1, pg. 1	\$689,879.00
Real Time & Modeling	D2008.5.45	FVB-1, pg. 1	\$889,700.00
Real Time & Modeling	D2009.5.62	FVB-1, pg. 1	\$926,711.00
Real Time & Modeling	D2010.5.50	FVB-1, pg. 1	\$831,099.00
Modeling	D2011.5.38	FVB-1, pg. 1	\$510,984.00
Modeling	D2012.5.49	FVB-1, pg. 1	\$446,737.00
Modeling	D2013.5.33	FVB-1, pg. 1	\$488,010.00
Modeling	D2014.5.46	FVB-1, pg. 1	\$513,940.00
Modeling	D2014.7.58	FVB-1, pg. 1	\$450,988.00

Commission requires NorthWestern to use sophisticated modeling not only to prepare its biennial Electricity Supply Resource Procurement Plan, but to guide all of its resource acquisition.

38.5.8213 MODELING AND ANALYSIS

- (1) A utility's electricity supply resource planning, procurement, and decision-making processes should incorporate proven, cost-effective computer modeling and rigorous analyses. A utility should use modeling and analyses to:
- (a) evaluate and quantify probable load characteristics, including trends in load shapes, load growth, and price elasticity of demand;
 - (b) evaluate the potential effect of various rate designs and demand-side management methods on future loads and resource needs;
 - (c) evaluate and quantify projected electricity supply resource requirements over the planning horizon;
 - (d) develop competitive resource solicitations, including associated bid evaluation and selection criteria, and/or develop alternative candidate resources for utility construction and ownership;
 - (e) develop methods for weighting resource attributes and ranking bid offers and alternative candidate owned resources. Resource attributes may include, but are not necessarily limited to:
 - (i) underlying fuel source and associated price volatility and risk, including risks related to future regulatory constraints on environmental impacts such as emissions of carbon dioxide, sulfur dioxide, nitrogen oxides and mercury;
 - (ii) contributions to achieving the lowest, long-term portfolio cost;
 - (iii) total life cycle resource costs;
 - (iv) contributions to achieving optimal resource diversity;
 - (v) external costs related to environmental emissions and intrusions;
 - (vi) direct or indirect transmission costs and/or benefits;
 - (vii) project feasibility, including engineering, development and financing;
 - (viii) resource availability, reliability and dispatchability;
 - (ix) supplier/developer creditworthiness; and
 - (x) supplier/developer experience;
 - (f) evaluate the performance of alternative resources under various loads and resource combinations through:
 - (i) scenario analyses;
 - (ii) portfolio analyses;
 - (iii) sensitivity analyses; and
 - (iv) risk analyses;
 - (g) help the utility, with input from an advisory committee, inject prudent and informed judgments into the electricity supply resource planning and acquisition process;

(h) optimize the mix of electricity supply resources in the context of the goals and objectives of these guidelines; and

(i) meet the utility's burden of proof in prudence and cost recovery filings before the commission.

(Emphasis supplied.) Accordingly, NorthWestern has included in its electricity supply cost tracking adjustments, on a non-differentiated basis, all of its modeling costs. Until the Commission's recent decision in Docket No. D2014.7.58 and this case, the Commission routinely approved that approach.

In this case, the Commission asserts that NorthWestern was required to first seek the permission of the Commission before including certain modeling costs in the electric supply cost tracking adjustment. Order, ¶ 80. In the recently decided 2015 electric tracker docket, for the first time in the history of the implementation of § 69-8-210(1), MCA, the Commission made such an assertion. No such requirement exists, either in statute or the Commission's administrative rules. Moreover, the Commission's own prior actions are completely at odds with its newly minted filing requirement. If the Commission wants to prescribe filing requirements for electricity supply tracking adjustments, it needs to do so in a rulemaking proceeding, to be applied to filings made after the rule has been duly promulgated. This application of the statute is arbitrary and capricious.

D. The Commission violated its own Procedural Order 7283f.

The Commission issued Procedural Order 7283f to control the proceedings in this case. Its own Procedural Order required the Commission, by May 20, 2015, to advise the parties of any additional issues in the case not adequately addressed by the parties' prefiled testimony. Procedural Order 7283f, ¶ 5(d). To comport with obvious due process requirements, the Commission's own Procedural Order required the notice of additional issues five months before the scheduled October 6, 2016, contested case hearing. The Commission violated its own

Procedural Order when it did not identify any additional issues but then raised an issue well after the case was deemed submitted.⁵ Similar to the due process and statutory violations discussed above, this violation necessitates that the Commission reconsider and reverse its decision on the modeling costs denied in this case.

CONCLUSION

The Commission must reverse its findings regarding replacement power and modeling costs. The Commission's decision is not supported with evidence. It incorrectly applies well-established case law on prudence and ignores or discredits substantial evidence proving NorthWestern's prudence. Instead of considering the plethora of evidence that supports NorthWestern's prudence, the Commission finds that NorthWestern is imprudent for not conducting another El Cid test after the rotor was reinserted into the generator and for not evaluating outage insurance. These findings are not supported with evidence, stray from prior Commission decisions and would seemingly appear to unreasonably discriminate against NorthWestern. This is arbitrary and capricious decision-making by the Commission. These errors must be corrected on reconsideration. Given these reasons as discussed above, NorthWestern requests that the Commission reconsider its decision and reverse its findings on these two issues.

Respectfully submitted this 23rd day of May 2016.

NORTHWESTERN ENERGY

By: 
Sarah Norcott

Attorney for NorthWestern Energy

⁵ The Commission held that this case was deemed submitted on January 15, 2016. Order, ¶ 16.

CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's Motion for and Brief in Support of Reconsideration of Final Order No. 7283h 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. This has been e-filed on the PSC website, e-mailed to counsel of record, and served on the most recent service list by mailing a copy thereof by first class mail, postage prepaid.

Date: May 23, 2016

A handwritten signature in cursive script that reads "Tracy Lowney Killoy". The signature is written in black ink and is positioned above the printed name and title.

Tracy Lowney Killoy
Administrative Assistant
Regulatory Affairs

Docket Nos.
D2013.5.33/D2014.5.46
Service List

Al Brogan
NorthWestern Energy
208 N. Montana Ave Suite 205
Helena MT 59601

Charles Magraw
501 8th Ave
Helena MT 59601

Dr. Thomas M. Power
920 Evans Ave.
Missoula MT 59801

Joe Schwartzenberger
NorthWestern Energy
40 E Broadway
Butte MT 59701

Tracy Lowney Killoy
NorthWestern Energy
40 E Broadway
Butte MT 59701

Sarah Norcott
NorthWestern Energy
208 N Montana Ave Suite 205
Helena MT 59601

Will Rosquist
Public Service Commission
1701 Prospect Ave
P O Box 202601
Helena MT 59620-2601

Robert A Nelson
Montana Consumer Counsel
111N Last Chance Gulch Ste 1B
P O Box 201703
Helena MT 59620-1703

Matthew Gerhart
Earthjustice
705 Second Ave. Suite 203
Seattle WA 98014

Jenny Harbine
Earthjustice
313 E. Main St.
Bozeman MT 59715

John W. Wilson
JW Wilson & Associates
1601 N. Kent Ste 1104
Arlington VA 22209

John Alke
NorthWestern Energy
208 N Montana Ave Suite 205
Helena MT 59601

William W. Mercer
Holland & Hart
P O Box 639
Billings MT 59103--0639

David A Schlissel
Schlissel Technical Consulting
45 Horace Road
Belmont MA 02478