

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

IN THE MATTER OF NorthWestern Energy’s
2012-2013 Electricity Supply Tracker

REGULATORY DIVISION

Docket Nos. D2013.5.33, D2014.5.46

IN THE MATTER OF NorthWestern Energy’s
2013-2014 Electricity Supply Tracker

**RESPONSE OF MONTANA ENVIRONMENTAL INFORMATION CENTER
AND SIERRA CLUB TO NORTHWESTERN ENERGY’S MOTION FOR
RECONSIDERATION**

Intervenors Montana Environmental Information Center and Sierra Club urge the Commission to reject NorthWestern Energy’s Motion for Reconsideration of Final Order 7283h in the above-captioned dockets. Pursuant to Admin. Rule Mont. 38.2.4806, the Commission may grant a motion for reconsideration if the movant demonstrates that an order or decision of the Commission is “unlawful, unjust or unreasonable.” As described below, NorthWestern’s motion cannot meet this standard because, based on the evidence in the record, the Commission lawfully and properly denied NorthWestern’s request to recover replacement power costs incurred as a result of the Colstrip Unit 4 outage in 2013.

At the outset, NorthWestern appears to misunderstand the legal standards governing this docket. NorthWestern asserts that “[t]he Commission’s job is to balance the interests of the utility and its customers, not to be an advocate for the utility’s customers.” NorthWestern Br. at 3. Not so. The Commission’s “job” is to ascertain whether NorthWestern took appropriate steps to “provide adequate and reliable electricity supply service at the lowest long-term total cost” and to “identify and cost-effectively manage and mitigate risks related to its obligation to provide electricity supply service[.]” MCA § 69-8-419(2)(a), (c). The Commission properly scrutinized

the evidence provided by the parties, and determined that NorthWestern failed to meet this prudence standard. Because the Commission’s decision with respect to the Colstrip Unit 4 outage was not “unlawful, unjust or unreasonable,” Admin. R. Mont. 38.2.4806, NorthWestern’s motion for reconsideration should be denied.

I. THE COMMISSION APPLIED THE PROPER BURDEN OF PROOF

NorthWestern rehashes arguments from its post-hearing brief that NorthWestern is entitled to a presumption that it acted prudently. *See* NorthWestern Br. at 9-11. In so doing, NorthWestern continues to ignore governing legal authority placing the burden of proof to demonstrate that its rates are just and reasonable squarely on the shoulders of the utility. MCA § 26-1-402 (“a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense the party is asserting.”); ARM 38.5.8213 (requiring modeling and analysis to meet the “burden of proof in prudence and cost recovery filings”); ARM 38.5.8220 (discussing how a utility may “satisfy its burden of proof.”); ARM 38.5.8226(2) (“a utility’s periodic electricity supply cost tracking filings should include the information, analyses, and documentation recommended in [procurement planning] guidelines to support its request for cost recovery related to electricity supply cost additions or changes”); *see also In the Matter of Nw. Energy’s 2011-2012 Elec. Supply Tracker*, Dkt. D2012.5.49, Order 7219H ¶ 102 (Oct. 22, 2013).¹

Finally, NorthWestern’s claims that it need not “justify every electricity supply cost for which it seeks recovery in its initial application” must be rejected here, because it minimizes the

¹ NorthWestern’s citation to proceedings before FERC and other state commissions remains unavailing, where the burden of proof in FERC proceedings does not differ from the standard in Montana law that governs in this case. *See* 16 U.S.C. § 824d (2013) (“At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility.”).

extraordinary circumstances of this tracker docket and applicable law. NorthWestern Br. at 10. This docket is not about “every electricity supply cost”; it is about an extraordinary expense of \$8.2 million for replacement power costs incurred as a result of a seven-month outage of Colstrip Unit 4. Far from justifying this expense, NorthWestern made only a passing mention of the outage in its application, did not estimate the replacement power costs, and failed even to disclose the cause of the outage. NorthWestern’s entire 271-page tracker filing in 2014 included a mere two pages discussing the Colstrip Unit 4 outage. *See* Direct Testimony of Kevin J. Markovich, at KJM-9 to KJM-11. Regarding the cause of the outage, although a Root Cause Analysis already had been performed, NorthWestern stated only that, “[o]n July 1, 2013, CU4 tripped off line on generator protection relaying. The relay action indicated a stator ground fault in the generator.” *Id.* at KJM-9:9-10. And rather than identifying the cost of the outage, NorthWestern claimed that doing so “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.” *Id.* at KJM-10:20-23. NorthWestern’s suggestion that no greater justification was required for the extraordinary replacement power costs at issue in this proceeding should be rejected.²

II. THE COMMISSION IS NOT BOUND BY PRIOR DECISIONS BASED ON DIFFERENT RECORDS

NorthWestern erroneously suggests that, because the Commission did not disallow replacement power costs resulting from Colstrip’s extended outage in 2009, it may not disallow such costs here. *See* NorthWestern Br. at 6-8. On the contrary, the Commission is required to base its decisions regarding the prudence of a utility’s expenditures on the facts and evidence

² As discussed in MEIC’s post-hearing brief, NorthWestern’s additional legal authorities cited on page 10 of its motion for reconsideration do not support NorthWestern’s argument. *See* Montana Environmental Information Center’s and Sierra Club’s Response Brief, at 12-13.

presented by the parties in the proceeding related to those expenditures. *See* MCA § 2-4-623(2) (Under Montana Administrative Procedures Act, “[f]indings of fact must be based exclusively on the evidence and on matters officially noticed”). On judicial review, the Commission’s decisions are upheld unless they are “random, unreasonable, or seemingly unmotivated, *based on the existing record.*” *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 31, 356 Mont. 41, 230 P.3d 808 (citation omitted; emphasis added). The Commission does not act arbitrarily for reaching one decision based on the facts in the record for that case, and a different decision based on a different record in another case.

In fact, the Commission’s 2010 Order finding that power supply expenses in 2008-2009 were prudently incurred scarcely mentioned the extended outage of Colstrip Unit 4 in 2009. *See In the Matter of NorthWestern Energy’s Application for Electric Supply Deferred Cost Account Balance and Projected Electric Supply Cost*, Docket Nos. D2008.5.45, D2009.5.62, Order No. 6921c (May 20, 2010). No party to that proceeding apparently argued that NorthWestern imprudently failed to avoid or mitigate the risk of the outage, let alone that NorthWestern should have evaluated outage insurance prior to the outage. Accordingly, there was no record upon which the Commission could have made a specific finding regarding whether the replacement power costs were prudently incurred.

Contrary to NorthWestern’s suggestion, an agency does not act arbitrarily and capriciously simply by changing course. Instead, under the line of authority upon which NorthWestern relies, NorthWestern Br. at 6-7, “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516, 129 S. Ct. 1800, 1811, 173 L. Ed. 2d 738 (2009). Here, the Commission did not adopt any policy in its 2010 decision that a utility’s

failure to evaluate insurance options has no bearing on the question of whether replacement power costs are prudently incurred. The Commission made no factual findings or legal conclusions on that point. Accordingly, in the present docket, the Commission did not “disregard[] facts and circumstances that underlay” the 2010 decision. *Id.* And even if it had, the Commission provided a reasoned explanation for its decision in this case that NorthWestern failed to mitigate risks by failing to evaluate the cost and availability of outage insurance prior to the Colstrip Unit 4 extended outage in 2013. Order ¶¶ 58-64. Accordingly, the Commission should reject NorthWestern’s use of the Commission’s 2010 determination to shield itself from the consequences of its imprudence at issue in the present docket.

III. THE COMMISSION PROPERLY CONSIDERED EVIDENCE IN THE RECORD

A. The Commission Did Not Ignore NorthWestern’s Evidence.

Contrary to NorthWestern’s arguments, the Commission properly considered all of the evidence in the record, including evidence submitted by NorthWestern. NorthWestern argues that the Commission unlawfully “disregarded uncontroverted credible evidence.” NorthWestern Br. at 4. NorthWestern’s argument fails because NorthWestern misstates the law and mischaracterizes the Commission’s Order.

When presented with uncontroverted credible evidence, the Commission “must consider it in conjunction with all other evidence in the case.” *Goodwin v. Elm Orlu Mining Co.*, 83 Mont. 152, 269 P.403, 406 (Mont. 1928). The Commission need only *consider* uncontroverted credible evidence. *Id.* To consider evidence does not mean that an agency must find the evidence more persuasive than other evidence in the record. Similarly, to consider evidence submitted by a party does not mean that an agency must accept a party’s conclusions about the legal implications of such evidence, such as whether the evidence indicates prudence. “In passing upon issues of fact the trier, whether jury, board or judge, passes upon the credibility of

the witnesses and the weight to be given to their testimony. Where, as here, the evidence is conflicting, the resolution of such conflicts is for the trier of the facts and where there is evidence to sustain its determination it will not be disturbed on appeal.” *Weakley v. Cook*, 126 Mont. 332, 249 P.2d 926, 928 (Mont. 1952).

NorthWestern makes the meritless claim that no party presented evidence of the inaccuracy of Fred Lyon’s statement that “investor-owned utilities (‘IOUs’) do not purchase outage insurance.” NorthWestern Br. at 4. NorthWestern misrepresents its own witness’s testimony. Mr. Lyons testified that IOUs who own nuclear plants typically do purchase outage insurance. Rebuttal Testimony of Fred Lyons at 15. Even with respect to fossil-fuel-fired plants owned by IOUs, Mr. Lyon says only that “utilities *typically* do not consider such policies to be cost effective.” *Id.* at 14 (emphasis added). Mr. Lyon went on to testify that “independent power produces (‘IPPs’) are more likely to purchase such insurance.” *Id.*

The Commission considered Mr. Lyon’s testimony and concluded that the difference Mr. Lyon described between IOUs and IPPs is due to the fact that “a regulated utility is often larger and can attempt to avail itself of its monopoly position . . . to make up the lost revenue [from an outage].” Order ¶ 62. Weighing the evidence, the Commission concluded that Mr. Lyon’s “analysis is not persuasive as to whether outage insurance should be investigated and sometimes purchased to ameliorate the underlying risk of plant outage. It speaks only to the political-economic incentives of two different businesses.” *Id.* In sum, the Commission considered Mr. Lyon’s testimony and properly “determine[d] the weight to be given to [the] expert’s testimony.” *Christofferson v. City of Great Falls*, 316 Mont. 469, 74 P.3d 1021, 1025 (Mont. 2003).

NorthWestern inaccurately asserts that there was uncontroverted evidence that Colstrip was in good shape and thus there was no need for NorthWestern to have considered obtaining

outage insurance. NorthWestern Br. at 5-6. But MEIC directly contradicted NorthWestern's spurious claims of Colstrip's "good performance." MEIC witness David Schlissel testified to the series of major outages at Colstrip Unit 4, including a fractured generator rotor in 2000, a cooling water leak that soaked the generator in 2001, and a prolonged outage in 2009 due to problems with the turbine. Direct Testimony of David Schlissel at 18-19. Furthermore, discovery responses from NorthWestern indicated that Colstrip Unit 4 has been available to generate electricity 12.5% less of the time than Colstrip Unit 3. NWE Resp. to MEIC-75(d). The history of major outages at Colstrip Unit 4, and the fact that Unit 4 was available less than Unit 3, are precisely the facts that should have led a prudent utility to investigate outage insurance for Colstrip Unit 4. While NorthWestern may choose to ignore this unfavorable evidence in the record, there is no merit to NorthWestern's claim that the Commission ignored uncontroverted evidence of Colstrip's "good performance."

Similarly baseless is NorthWestern's assertion that the Commission ignored evidence that the cause of the 2013 had never before occurred. NorthWestern Br. at 5. The Commission directly considered testimony that the probability of the outage occurring was "very, very low." Order ¶ 51. The Commission weighed this evidence together with evidence of the significant consequences of an outage, the known risks of damage from rotor-out inspection, and NorthWestern's failure to conduct a quick, cheap test that could have prevented the outage. *Id.* ¶¶ 52-57. In short, the Commission did not ignore NorthWestern's evidence. Weighing all the evidence in the record, the Commission found that other evidence in the record showed that NorthWestern acted imprudently.

NorthWestern fares no better with its bulleted list of additional evidence the Commission supposedly ignored. *See* NorthWestern Br. at 5-6. The Commission considered NorthWestern's

claim that outage insurance is not cost-effective, that other owners did not have such insurance, that there were few providers of outage insurance, and that such insurance was expensive. The Commission considered this evidence but found that other evidence outweighed it. In particular, the Commission found that NorthWestern's after-the-fact analysis of outage insurance showed that outage insurance would have been cost-effective during the time period that Colstrip Unit 4 has been in rate base. Order at ¶ 61 (citing Ex. NEW-40, internal exhibit MJB-2). By obtaining outage insurance quotes from an insurer, and then calculating that the payouts from outage insurance would have exceeded the premiums, NorthWestern disproved its own arguments that outage insurance would not have been cost-effective. *See id.* Far from ignoring NorthWestern's evidence, the Commission based its finding of imprudence in part on NorthWestern's own evidence. *See* Order ¶ 61.

B. The Commission Provided Detailed, Rational Reasons for Concluding that Other Evidence in the Record was More Persuasive than Evidence Submitted by NorthWestern.

The Commission properly determined based on the record evidence that “the incremental replacement power costs necessitated by the outage were not prudently incurred.” Order ¶ 48. In arguing that the Commission's decision was “unlawful, unjust or unreasonable,” Admin. R. Mont.38.2.4806, NorthWestern plucks Commission statements out of context and fails to address the core findings which led the Commission to conclude that the replacement power costs were not prudently incurred.

NorthWestern claims that the Commission inappropriately rejected Ronald Halpern's testimony that it is not industry standard to perform an El Cid test after reinsertion of the rotor. NorthWestern Br. at 9, 12. NorthWestern asserts that the Commission improperly rejected this testimony on grounds that Mr. Halpern's statement was not based on supporting evidence,

notwithstanding a legal presumption that allegedly requires the Commission to accept Mr. Halpern's testimony. NorthWestern Br. at 12.

NorthWestern aims at the wrong target. The Commission did not reject Mr. Halpern's testimony; instead, it found NorthWestern's actions imprudent notwithstanding Mr. Halpern's testimony. Based on the record, the Commission found that although NorthWestern stated the probability of an outage was very low, the risk of a rotor-out inspection damaging the generator core were well known in the industry. *See* Order ¶ 52. Furthermore, NorthWestern knew the consequences of an outage would be significant, as evidenced by the fact that several contracts excluded consequential damages in the event that an outage occurred. *Id.* The Commission further found that a NorthWestern witness testified that an El Cid test could be completed in roughly four hours. *Id.* ¶ 50. Given the conclusions of the Root Cause Analysis, the Commission concluded that had NorthWestern performed an El Cid test after rotor reinsertion, the El Cid test would likely have identified damage to the core—thus preventing the outage. *Id.* ¶ 55. Finally, the Commission found that after the outage, Talen modified its procedures to include an El Cid test after rotor reinsertion, which is evidence that it is feasible and reasonable to perform an El Cid test after rotor reinsertion. *Id.* ¶ 54.

In sum, the Commission never found that Mr. Halpern was untruthful. Indeed, the Commission never expressly disagreed that it was industry standard to not perform an El Cid test after reinsertion of the rotor. Instead, the Commission found that NorthWestern's testimony about industry standards "is not persuasive" in light of other evidence in the record. Order ¶ 54; *see also id.* ("In light of these facts, the Commission affords little weight to claims that not doing a four-hour long test to prevent millions of dollars in damage is an industry standard.").

As the finder of fact, the Commission is entitled to decide the weight to be given to expert testimony, and the Commission properly found that other evidence was more persuasive than Mr. Halpern's testimony about industry standards. *See Weakley*, 126 Mont. 332, 336-37, 249 P.2d 926, 928 ("The law makes no distinction in weighing evidence between expert testimony and evidence of other character. It is for the trier of the facts to determine the weight to be given to any evidence."); *see also State v. Stout*, 356 Mont. 468, 237 P.3d 37, 44 (Mont. 2010) ("[E]xpert testimony should be given the weight it deserves, and may be entirely rejected if the reasons given to support it are unsound.").

NorthWestern also alleges that the Commission dismissed evidence from Michael Barnes that other Colstrip co-owners did not have outage insurance. NorthWestern Br. at 12. To begin, the Commission has the authority to give little weight to expert testimony if such testimony is not supported by documentary evidence. *See In re Marriage of Foreman*, 294 Mont. 181, 194, 979 P.2d 193, 201 (Mont. 1999) ("No documentary evidence was submitted however to support this testimony nor was any credible evidence submitted to the Court as to the value of these specific five acres."). More importantly, the Commission did not "dismiss" evidence from Mr. Barnes. The Commission properly accorded greater weight to other evidence in the record it found more persuasive on the issue of whether NorthWestern acted prudently. "It is for the trier of the facts to determine the weight to be given to any evidence," and NorthWestern has failed to even challenge the Commission's detailed reasons for giving greater weight to evidence it found more persuasive than the evidence NorthWestern submitted. *Weakley*, 126 Mont. 332, 336-37, 249 P.2d 926, 928.

IV. THE COMMISSION PROPERLY FOUND THAT NORTHWESTERN FAILED TO MEET ITS BURDEN TO DEMONSTRATE PRUDENCE

The Commission lawfully and reasonably decided that NorthWestern failed to meet its burden to demonstrate that it “prudently managed and mitigated plant outage risk on behalf of customers and that it thoroughly documented management decision-making,” Order ¶ 73, in light of NorthWestern’s failure to document steps to mitigate the risk of the forced outage or consider or evaluate opportunities for reimbursement of replacement power costs by Siemens. Contrary to NorthWestern’s claim, NorthWestern Br. at 13-14, the requirement in ARM 38.5.8201(3) that a utility “demonstrate to the commission and stakeholders the prudence of supply-related costs” fully supports the Commission’s finding.

The Commission properly rejected NorthWestern’s argument that it cannot be held responsible for the operation of Colstrip Unit 4. *See* NorthWestern Br. at 15-16. NorthWestern may properly rely on Talen, the plant operator, or Siemens, a third-party vendor, to undertake day-to-day operations and maintenance of the plant. However, as the Commission observed, “it is NorthWestern that is accountable under statutory and Commission requirements regarding the prudent operation and maintenance of CU4, which includes taking proper steps to mitigate outage risks.” Order ¶ 67. If NorthWestern could discharge its obligations simply by outsourcing operation and maintenance of the facility to entities that are not subject to the Commission’s oversight, then the Commission would have no ability to “disallow rate recovery for the costs that result from the failure of a public utility to reasonably manage, dispatch, operate, maintain, or administer electricity supply resources in a manner consistent with 69-3-201, 69-8-419, and commission rules.” MCA § 69-8-421(9). Because NorthWestern’s position would lead to this impermissible result, it must be rejected.

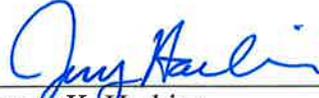
NorthWestern's further claim that it a third-party's imprudence cannot be imputed to a utility misses the point. *See* NorthWestern Br. at 15. The primary question in this proceeding is whether *NorthWestern* took reasonable and prudent steps to mitigate the risks of the outage through its oversight of Colstrip Unit 4 operation and maintenance. *See* Order ¶ 68. Where NorthWestern conceded that it exercised minimal oversight of the plant maintenance event that led to the outage and subsequent outage-related work, *id.* ¶ 67 (citing Hr'g. Tr. 273:22-274:3 and 274:12-14), even while other owners exercised greater oversight, *id.* ¶ 68 (citing DR MEIC-35 (Nov. 26, 2014), Attach. 1, p. 13 and Hr'g. Tr. 277:5-280:2), the Commission properly found that NorthWestern did not meet this standard.

The Commission's findings were also proper with respect to NorthWestern's failure to evaluate alternative recovery mechanisms. As NorthWestern observes, ARM 38.5.8201(3) does not establish a bright line rule that "a utility must consider all possible recovery mechanisms prior to asking for recovery of electricity supply costs in rates." NorthWestern Br. at 14. However, the rule does establish NorthWestern's burden to demonstrate prudence. Here, based on the uncontroverted record evidence, the Commission found that "NorthWestern did not evaluate alternative ways of recovering replacement power costs before filing its application to recover those costs from customers." Order, ¶ 73. Further, "[t]here is no evidence to show that NorthWestern even went so far as to engage Siemens in initial conversation on the possibility of a negotiated cost-sharing agreement, short of legal action." *Id.* Because the Commission's findings were supported by the record evidence, they were not "unlawful, unjust or unreasonable." ARM 38.2.4806.

CONCLUSION

For the foregoing reasons, MEIC respectfully requests that the Commission deny NorthWestern's motion for reconsideration.

Respectfully submitted on this 10th day of June, 2016,



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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2016, I served the foregoing "Response of Montana Environmental Information Center and Sierra Club to NorthWestern Energy's Motion for Reconsideration" by first-class mail, postage prepaid, to the following:

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