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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 REPLY BRIEF IN SUPPORT OF THE MOTION  
FOR RECONSIDERATION OF FINAL ORDER No. 7283H**

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Pursuant to the Notice of Commission Action issued on June 9, 2016, NorthWestern Energy (“NorthWestern”) submits this *Reply Brief in Support of the Motion for Reconsideration of Final Order No. 7283h* (“Reply”) to the Montana Public Service Commission (“Commission”). On June 10, 2016, the Montana Environmental Information Center and Sierra Club (“MEIC/Sierra Club”) filed a response brief urging the Commission to deny NorthWestern’s *Motion for Reconsideration of Final Order No. 7283h* (“Motion”). The Commission must reject the advocacy from the MEIC/Sierra Club. It failed to discredit NorthWestern’s Motion and failed to show that the Commission’s decision to deny recovery of the Colstrip Unit 4 (“CU4”) replacement power costs is legally permissible. The MEIC/Sierra Club asserts that NorthWestern misstated the law and mischaracterized Final Order No. 7283h (“Final Order”). MEIC/Sierra Club Response, p. 5. NorthWestern refutes these inaccurate assertions. In fact, as shown below, the MEIC/Sierra Club is the party that has misstated and inappropriately expanded upon the law.

Neither the MEIC/Sierra Club nor the Montana Consumer Counsel (“MCC”)<sup>1</sup> have challenged NorthWestern’s arguments regarding the Commission’s decision with respect to the modeling costs disallowed in the Final Order. The Commission should consider the lack of response as “an admission by [the parties] that the [Motion is] well-taken.” *Maberry v. Gueths*, 238 Mont. 304, 309, 777 P.2d 1285, 1289 (1989).

NorthWestern’s Motion raises legitimate legal issues with the Final Order that the Commission must reconsider. Failure of the Commission to reevaluate its decisions regarding the recovery of CU4 replacement power costs and modeling costs would result in an order that

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<sup>1</sup> On June 10, 2016, the MCC filed comments in response to NorthWestern’s Motion. The MCC’s comments fail to provide any legal authority to refute NorthWestern’s arguments raised in the Motion. Therefore, in this Reply, NorthWestern does not specifically address these comments.

violates the law, the Montana Administrative Procedure Act (“MAPA”), and the United States and Montana Constitutions. This is reversible error. NorthWestern urges the Commission to grant the Motion and find that recovery of these costs is permissible under the facts and law that apply to this case.

### ARGUMENT

#### I. **SIMILAR FACTS BUT A DIFFERENT RESULT WITH NO EXPLANATION EQUALS AN ARBITRARY AND CAPRICIOUS DECISION.**

This simple equation applies in this case. The year is 2009. CU4 experienced a long, unplanned outage. NorthWestern’s actions did not cause the outage. NorthWestern included replacement power costs in the 2008/2009 electric tracker docket.<sup>2</sup> NorthWestern’s filing only briefly mentions the outage, the reason, and the impact on NorthWestern’s portfolio and supply needs. The Commission permitted NorthWestern to recover these costs in rates as prudently incurred costs. The Commission did not find that NorthWestern failed to meet its burden of proof. The Commission did not find that NorthWestern was imprudent because it failed to mitigate a risk. The Commission did not find that NorthWestern was imprudent because it failed to evaluate outage insurance prior to the outage.

Fast-forward four years to 2013. CU4 experienced a long, unplanned outage. NorthWestern’s actions did not cause the outage. NorthWestern included replacement power costs in the 2013/2014 electric tracker docket filed in May 2014. NorthWestern’s filing only briefly mentions the outage, the cause, and the impact to NorthWestern’s portfolio and supply

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<sup>2</sup> Given the July 2008 to June 2009 tracker year compared to the April to October 2009 CU4 outage, replacement power costs were also included in the 2009/2010 tracker filing (“2010 docket”). The parties and Commission were reminded of this fact during the pendency of the 2010 docket. *See* Response to Data Request MCC-007 in Docket No. D2010.5.50. In fact, at the hearing for the 2010 docket, there was testimony about the outage and necessary power purchases because of outages. *See* Transcript of the January 10 and 11, 2011 hearing, pp. 80: 2 – 82: 9 The Commission’s decision in that case was no different from the decision in the 2009 docket: Costs were deemed prudent and recoverable in rates. Order No. 7093c, p. 18, ¶ 1.

needs. This time, however, the Commission denies recovery of the replacement power costs. The Commission finds that NorthWestern failed to meet its burden of proof because it did not present certain witnesses, evaluate alternative recovery mechanisms, or adequately address the outage in its application. Final Order, ¶¶ 65-73. The Commission finds that NorthWestern was imprudent because it failed to mitigate a risk. *Id.*, ¶¶ 58-64. The Commission finds that NorthWestern was imprudent because it failed to evaluate outage insurance prior to the outage. *Id.* at ¶ 63.

Here, we have similar facts but different results with no explanation for such difference. This is a superlative example of an arbitrary and capricious decision by an administrative agency. The Montana Supreme Court has explicitly held “that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure.” *Waste Management Partners of Bozeman, Ltd. v. Montana Dept. of Public Service Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997) (citing *Atchison Topeka and Santa Fe Railroad Co. v. Board of Trade*, 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed2d 350 (1973)). Even if the agency record contains substantial evidence, a decision that fails to conform to prior precedent is arbitrary and capricious. See *Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516, 520, 488 N.E.2d 1223, 1227 (1985) (“Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made”). In this case, however, there is not even substantial evidence to support the Commission’s decision.

Failure to address inconsistency in decisions is a “departure from the essential requirement of reasoned decision making.” *Columbia Broadcasting System v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971). The Court of Appeals for the District of Columbia held that a decision by the Department of Interior (“Department”) regarding calculation of royalties paid to

the Jicarilla Apache Nation Indian tribe was arbitrary and capricious because the Department failed to address “a decision reaching a contrary result on similar facts[.]” *Jicarilla Apache Nation v. U.S. Dept. of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010).

The MEIC/Sierra Club argues that the Commission’s decision is not arbitrary and capricious because an agency may change course without explanation. MEIC/Sierra Club Response, p. 4. It asserts that a decision is only arbitrary and capricious if an administrative agency changes a policy without an explanation, and that the Commission never adopted a policy in the 2009 CU4 outage decision. *Id.* This argument is legally and factually erroneous.

First, the well-established case law on this issue requires an administrative agency to follow its own precedent. If the agency does not follow precedent when similar facts are present in a subsequent case, it must explain why it has not done so. In this case, there are similar facts to the 2009 case: There was an unplanned outage at CU4 that resulted in replacement power costs; NorthWestern was not the cause of the outage; and NorthWestern included the replacement power costs in the relevant electric tracker docket(s). The Commission issued a final decision that is contrary to its prior decision without explanation. This is not reasoned decision-making, nor is this fair to the affected parties. As aptly noted by U.S. Supreme Court Justice Brennan when comparing an agency’s guidance and decisions to criminal matters, an agency’s “interpretations and opinions” provide guidance to affected persons, and “to the extent that the [guidance] deprived [an affected person] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution.” *U.S. v. Pennsylvania Indus. Chemical Corp.*, 411 U.S. 655, 674, 93 S.Ct. 1804, 1816-17 (1973).

Similarly, in the case cited by the MEIC/Sierra Club as support of its argument, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 518, 129 S.Ct. 1800, 1813 (2009), the United States Supreme Court held that “the agency’s decision not to impose any forfeiture or other sanction [on the affected parties] precludes any argument that it is arbitrarily punishing parties without notice of the potential consequences of their action.” Unlike the Federal Communications Commission, the Commission here has changed course, and this change in course negatively affects and financially punishes NorthWestern. NorthWestern was not aware prior to the 2013 outage that the Commission would find that because NorthWestern did not investigate outage insurance it failed to mitigate a risk and was therefore imprudent. NorthWestern also had no knowledge that a brief discussion of the outage in its filing meant it failed to meet its burden of proof. The Commission has inappropriately now done an about-face regarding its previous decisions.

Finally, the MEIC/Sierra Club’s argument is also factually incorrect. If despite all of NorthWestern’s arguments, the Commission accepts the MEIC/Sierra Club’s position on this issue that the Commission is only required to explain a change in policy, the Commission, in this case, has departed from its prior policy. Until this docket, NorthWestern had no knowledge that when determining prudence, the Commission would ignore well-established case law that a utility’s actions are presumed prudent until challenged. In fact, as noted by the MEIC/Sierra Club at page 4 of its Response, in the 2009 CU4 outage electric tracker docket, no party to that proceeding argued that NorthWestern was imprudent. The Commission allowed the costs in rates as prudently incurred. Given that decision, it is reasonable for a party to assume that the Commission acknowledged the presumption of prudence and would similarly acknowledge that presumption in a future docket. For the Commission to ignore the law and now assert that

NorthWestern's actions are not presumed prudent and to fault NorthWestern for not presenting what it believes is sufficient information in the filing are actions that signal a change in policy. Moreover, this apparent change in policy occurred without notice to NorthWestern and after it had filed this docket. NorthWestern had no opportunity or notice prior to making its filing in order to adjust its conduct to comply with the new "policy." The Commission did not explain this change nor did it provide notice to NorthWestern. Therefore, it has violated "traditional notions of fairness."

Given the prior CU4 outage and the fact that the Commission found replacement power costs related to that outage recoverable as prudently incurred costs, it is impermissible for the Commission now to find NorthWestern imprudent in a case with similar facts. It is worth repeating that to now find NorthWestern failed to mitigate a risk because it did not evaluate outage insurance shows that the Commission in this docket required NorthWestern to hit a moving target that it had no reasonable opportunity to hit given its prior experiences with outages at Colstrip and recovery of replacement power costs. For these reasons, the Final Order is arbitrary and capricious and the Commission must reverse its finding that NorthWestern was imprudent.

**II. IGNORING UNCONTROVERTED EVIDENCE COUPLED WITH MAKING "RANDOM, UNREASONABLE, OR SEEMINGLY UNMOTIVATED" DECISIONS ALSO EQUALS AN ARBITRARY AND CAPRICIOUS DECISION.**

Like with the last equation, this simple equation also transpired in this case. The Final Order is random and unreasonable because the Commission improperly ignores uncontroverted substantial, credible evidence that supports NorthWestern's request to recover its replacement power costs. The MEIC/Sierra Club argues that the Commission did not ignore evidence, but rightfully weighed the evidence against other conflicting evidence and then properly rejected NorthWestern's evidence. In support of this argument, the MEIC/Sierra Club cites to several

cases. MEIC/Sierra Club Response, pp. 5-6. As described below, the MEIC/Sierra Club has either misstated the law or incorrectly characterized the law as applied to this case.

First, it cites *Goodwin v. Elm Orlu Mining Co.*, 83 Mont. 152, 269 P. 403, 406 (1928). MEIC/Sierra Club Response, p. 5 Interestingly, NorthWestern also cited this case. NorthWestern cited this case for the proposition that the Commission may not legally disregard uncontroverted credible evidence. Motion, p. 4. Unfortunately, in its cite, the MEIC/Sierra Club only includes selected text and fails to convey accurately the holding of the court in that case. It asserts that the case only requires the Commission to “*consider* uncontroverted credible evidence” and that it does not require “an agency [to] accept a party’s conclusions about the legal implications of such evidence.” MEIC/Sierra Club Response, p. 5 (emphasis in original). This misstates the court’s holding in *Goodwin* and NorthWestern’s arguments regarding the applicability of that case to this evidence. The only relevant part of the court’s holding applicable to an agency’s actions is the first part of the sentence which explicitly states that “the [agency], as a trier of fact, **may not disregard uncontroverted credible evidence** in making its findings.” *Goodwin*, 269 P. at 406 (emphasis added). The text cited by MEIC/Sierra Club applies to the reviewing court, not the agency. Specifically, that text provides what a court is required to do when reviewing an agency’s decision. It does not relate to or control the agency’s actions with respect to evidence presented in the underlying case. Thus, based on *Goodwin* as well as the other cases cited by NorthWestern in its Motion, the Commission must reconsider its decision as the Final Order improperly disregards uncontroverted credible evidence.

The MEIC/Sierra Club also cites two other cases to support its claim that the Commission properly analyzed the evidence and did not ignore evidence presented by NorthWestern.

MEIC/Sierra Club Response, p. 6. It cites *Weakley v. Cook*, 126 Mont. 332, 249 P.2d 926 (1952)

and *Christofferson v. City of Great Falls*, 2003 MT 189, 316 Mont. 469, 74 P.3d 1021. *Id.*

Similar to its cite of *Goodwin*, the MEIC/Sierra Club fails to identify key factual differences in those cases as compared to this case. The MEIC/Sierra Club argues that the Commission is free to examine the evidence and determine what weight it will give to that evidence, including how much weight to give expert testimony. *Id.*

First, the evidence presented in those two cases was substantially different from what the parties presented here. In *Weakley*, the parties presented expert testimony from seven different doctors on whether the accident caused the death of the decedent. 126 Mont. at p. 335-36. The Supreme Court notes that the “expert testimony of the doctors of medicine in the record is lengthy and in conflict.” *Id.* In *Christofferson*, two competing expert witnesses presented differing opinions. 2003 MT at ¶ 12. In both cases, the Montana Supreme Court indicated that it was proper for the trier of fact to weigh expert testimony and evidence to determine which evidence should prevail. According to Black’s Law Dictionary, “weight of evidence” means “the persuasiveness of some evidence **in comparison** with other evidence.” Black’s Law Dictionary, 1731 (9th ed. 2009) (emphasis added). Here, the record lacks conflicting testimony and evidence so there is nothing to weigh. For example, the Commission rejects testimony from Mr. Fred Lyon that investor-owned utilities (“IOUs”) do not purchase outage insurance despite the fact that there is no contrary evidence, either documentary or from other expert witnesses. Neither the MEIC/Sierra Club’s expert, nor the MCC’s experts, presented testimony that IOUs purchased or investigated outage insurance. As noted above, the Commission cannot summarily disregard this evidence.

Second, the MEIC/Sierra Club attempts to distract the Commission’s attention from the fact that there is no conflicting testimony by arguing that NorthWestern “misrepresents” Mr.

Lyon's testimony. MEIC/Sierra Club Response, p. 6. This claim is patently false. Mr. Lyon's testimony at hearing very clearly states that his "experience has been with an investor-owned utility that [outage] insurance on a fossil fuel plant is not a cost-effective mechanism..." and that "they don't make the inquiry because they understand that it is expensive, and it is not going – replete with deductibles and exclusions." Tr., pp. 106: 1-3 and 108: 17-19. Again, no party presented evidence that IOUs purchase outage insurance for fossil fuel plants or believe such insurance is cost-effective or that they inquire about such matters. Given the complete absence of contrary evidence, there is nothing for the Commission to "weigh" Mr. Lyon's testimony against. Additionally, as noted in NorthWestern's Motion, witness testimony under the law is presumed truthful. Motion, p. 12; *see* § 26-1-302, MCA. There is nothing in the record to overcome this presumption.

Mr. Lyon's testimony provided evidence and support regarding what a typical utility would do with respect to outage insurance. No party presented contradictory evidence. Therefore, since NorthWestern's actions are consistent with what a "typical utility" would do, its actions must be deemed prudent. The Commission attempts to end run this evidence by stating Mr. Lyon was discussing the "political-economic incentives of two different businesses." Final Order, ¶ 62. Essentially, the Commission's circumvention of this testimony suits its desire for a certain result in this case. Ultimately, the Commission fails to see the forest for the trees. This failure is an error that the Commission must reconsider.

Similar to the last example, the MEIC/Sierra Club presents other red herrings to distract the Commission from NorthWestern's legally valid arguments. For example, the MEIC/Sierra Club asserts that "the Commission considered [the evidence NorthWestern claims it ignored] but found that other evidence outweighed it." MEIC/Sierra Club Response, p. 8. Specifically, it

states that the Commission did not find Mr. Halpern to be untruthful when he testified that it was not industry standard to perform a second El Cid test after the rotor was reinserted in the generator, but that the testimony was “‘not persuasive’ in light of other evidence in the record.” *Id.*, p. 9 (citation omitted). The Commission, however, never identifies the “other evidence.” Instead, the Commission simply asserts that it “affords little weight to claims that not doing a four-hour-long test to prevent tens of millions of dollars in damage is an industry standard.” Final Order, ¶ 54.

First, there is no guarantee that a second El Cid test would have prevented this outage or changed the outcome.

Q.[Commissioner Koopman] Hi, Mr. Ward. Thanks for being here. Just a quick follow-up. I was interested that the time it takes for an El Cid test is only roughly four hours, in your estimation. That’s not a whole lot of time, and ultimately sounds like not a whole lot of investment of cost. **Do you feel that there is a chance that if another El Cid test was done before the air gap baffles were reinstalled that it might have averted this outage in this case?**

A. [Mr. Ward] I don’t think so.

Tr., p. 197: 17 – 198: 1. (Emphasis added). Second, the evidence establishes that a second El Cid test is not industry standard. Just because the Commission believes that it should be industry standard to do a second El Cid test given the potential for high costs does change the fact that it is not, nor does it negate the evidence that it is not. The Commission’s reliance on supposed unidentified “other evidence” and on its personal opinions of what should be industry standard are not legally valid reasons to reject uncontroverted credible evidence.

The MEIC/Sierra Club continues down the path of struggling to refute NorthWestern’s arguments by pointing to language from the Final Order to show that the Commission considered NorthWestern’s evidence. MEIC/Sierra Club Response, pp. 7-9. These attempted refutations are thwarted by the fact that when all evidence is viewed in its entirety, the Commission’s decision

is quintessentially random and unreasonable, illogical, and based on clearly erroneous findings of fact. The law requires agency findings of fact to be supported with substantial evidence.

*Montana Power Co. v. Environmental Protection Agency*, 429 F.Supp 683, 695 (D.Mont. 1977).

Failure to conform to this legal requirement results in a reversible decision on appeal. Such findings are considered “clearly erroneous” when viewed in connection with “the reliable, probative, and substantial evidence on the whole record.” § 2-4-704(2)(a)(v), MCA.

For example, the MEIC/Sierra Club argues that the Commission noted the low risk of such an outage occurring, but that the waiver of consequential damages nevertheless substantiated the existence of a significant risk. It then states that NorthWestern was imprudent for failing to mitigate this significant risk despite the low likelihood of occurrence. MEIC/Sierra Club Response, p. 9. As the evidence shows, waiver of consequential damages is standard in the industry. Tr., p. 119: 24 – 120: 17. In this case, the fact that the Siemens contract contained a waiver of consequential damages proves nothing with respect to this specific outage or the chance that it may occur. Such a provision exists in every similar contract.

The Commission asserts that risk in this case “is an amalgam [blend] of probability and cost.” Final Order, ¶ 52. Given the Commission’s line of reasoning, every outage is a significant risk if sizable costs are incurred, even if the experts say there is a very low probability that such an outage will occur. Thus, presumably if this outage had only resulted in costs totaling \$100,000, the Commission would find that the risk was low because the costs were relatively insignificant and there was no need to mitigate such risk. This is twisted logic. If there is a low probability of occurrence, costs are a much less relevant part of the equation. For example, if there is a 1 in a 1,000,000 chance of occurrence, but the resulting cost would be \$5 million, it is unlikely that the typical response would be to engage in an atypical activity to mitigate the

impacts of that potential occurrence. If people did engage in such atypical activity, it would no longer be atypical. The Commission's spinning of the evidence here is arbitrary and capricious. NorthWestern's actions were consistent with those of a typical utility (waiver of consequential damages, no investigation or purchase of outage insurance). The evidence shows the probability of this outage occurring was low. NorthWestern's actions must be deemed prudent. To find otherwise is clearly erroneous.

Finally, the MEIC/Sierra Club attempts to refute NorthWestern's argument that the Commission improperly rejected expert witness testimony because NorthWestern did not provide documentation to support such testimony. MEIC/Sierra Club Response, p. 10. To justify its argument, it cites *In re Marriage of Foreman*, 1999 MT 89, 294 Mont. 181, 979 P.2d 193. *Id.* The MEIC/Sierra Club's reliance on this case is improper as it again mischaracterizes the court's holding and attempts to mislead the Commission as to what the rules of evidence permit and require. In the *Marriage of Foreman*, the district court rejected testimony from a lay witness because he did not provide documentation to prove his testimony. In the divorce proceeding, the husband testified that a specific piece of land was valued at a certain price. *Foreman*, 1999 MT at ¶35. The Supreme Court noted that the district court properly rejected this testimony because the husband, as a lay witness, "failed to prove the value of that transfer." *Id.*, 1999 MT at ¶ 37. The law does not permit lay witnesses to provide opinions on such matters. Mont. R. Evid. 701. In this case, all witnesses who testified before the Commission were expert witnesses who were legally permitted to provide opinions; their opinions do not need to be supported with documentation. The MEIC/Sierra Club fails to identify any legal authority that requires otherwise.

### **III. BURDEN OF PROOF IN PRUDENCE MATTERS EQUALS A PRESUMPTION IN FAVOR OF THE UTILITY.**

The Commission's failure to recognize the well-established case law regarding who has the burden of proof in prudence challenges, and specifically, that a utility is entitled to a presumption of prudence, is a clear violation of MAPA because it is an incorrect conclusion of law. The MCC conceded that utilities are entitled to such a presumption in its post-hearing brief. MCC Post-hearing Brief, p. 6. The MEIC/Sierra Club, however, still wrongly advocates that NorthWestern is not entitled to the presumption.

The MEIC/Sierra Club similarly has not presented any new arguments on this point and rehashes arguments from its post-hearing brief. NorthWestern again notes that both the statute and administrative rules cited by the MEIC/Sierra Club as support for the Commission's conclusion of law on this issue do not deal specifically with the burden of proof in prudence determinations. Interestingly, in a footnote, the MEIC/Sierra Club asserts that NorthWestern's argument that Federal Energy Regulatory Commission ("FERC") cases control fails because "the burden of proof in FERC proceedings does not differ from the standard in Montana law...." MEIC/Sierra Club Response, p. 2. This very argument confirms NorthWestern's position: There is a different burden of proof for prudence matters.

As pointed out by the MEIC/Sierra Club, the federal statute provides that the utility has the burden of proof in cases involving rate increases and must demonstrate that proposed rates are just and reasonable. 16 U.S.C. § 824(d). Well-established case law, however, provides that in prudence matters the utility's expenditures are presumed prudent until costs are challenged. Once challenged, the burden shifts back to the utility who must prove that the costs were prudently incurred. *West Ohio Gas Co. v. Public Utilities Commission*, 294 U.S. 63, 72, 55 S.Ct. 316, 321 (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, 43 S.Ct. 544, 547 (1923)). NorthWestern does not dispute that Montana case law provides that an applicant generally has the burden of proof in most cases, but asserts that, specifically, in prudency determinations, the utility does not have the burden of proof until a party challenges a cost.

Despite the federal statute noted above, which is similar to the statute relied upon by the Commission in the Final Order, there remains a presumption of prudence in favor of the utility in such proceedings. *Anaheim, Riverside, Banning, Colton, and Azusa, Cal. v. FERC*, 669 F.2d 799, 809 (D.C. Cir. 1981). FERC has applied the presumption, notwithstanding the statute and FERC rules, to ensure that the cases are “manageable.” *Iroquois Gas Transmission System, L.P.*, 87 FERC ¶ 61,295, 62,168 (1999). For these reasons, the Commission must reconsider its conclusion of law that the utility has the initial burden of proof in prudence determinations. Failure to reconsider this matter is a violation of MAPA, § 2-4-704(2), MCA.

### **CONCLUSION**

Unfortunately, it is not NorthWestern that “aims at the wrong target” but NorthWestern who is targeted by inconsistent treatment and an unsupported decision. The Commission’s desired result in this case cannot stand as it is legally deficient for the many reasons discussed above and in NorthWestern’s Motion. NorthWestern requests that, given these facts and circumstances, the Commission reconsider its findings to deny recovery of the replacement power and modeling costs and issue a decision consistent with that reconsideration.

Respectfully submitted this 24<sup>th</sup> day of June 2016.

NORTHWESTERN ENERGY

By:   
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of NorthWestern Energy's Reply Brief in Support of The Motion for 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: June 24, 2016



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