

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 NO. D2013.5.33
IN THE MATTER OF NorthWestern Energy's 2013-2014 Electricity Supply Tracker)))	DOCKET NO. D2014.5.46 ORDER NO. 7283g

ORDER

PROCEDURAL HISTORY

1. NorthWestern Corporation, doing business as NorthWestern Energy (NorthWestern), filed its 2012-2013 Electricity Supply Tracker on May 31, 2013. The Montana Public Service Commission (Commission) granted *Interim Order 7283* on June 18, and issued a *Notice of Application and Intervention Deadline* on June 19, 2013. NorthWestern filed its 2013-2014 Electricity Supply Tracker on May 29, 2014. *See Notice of Commn. Action*, Dkt. D2013.5.33 (May 12, 2014) (consolidating the trackers). The Commission issued a *Notice of Application and Intervention Deadline* on May 31, and *Interim Order 7283a* on June 17, 2014.
2. The Human Resource Council District XI, Montana Consumer Counsel (MCC), Montana Environmental Information Center, Natural Resources Defense Council, and Sierra Club are parties to this proceeding.
3. On May 8, 2015, the MCC filed *Direct Testimony of George L. Donkin* and *Direct Testimony of John W. Wilson*. Mr. Donkin recommended “that the Commission direct NorthWestern to terminate its off-system electricity supply cost hedging strategies and activities,” and also “disallow as imprudently incurred costs any net hedging losses that may result from any new hedging deals entered into after November 18, 2014.” *Direct Test. of George L. Donkin* pp. 18-20 (May 8, 2015). In response to a question “regarding claimed lost revenues,” Dr. Wilson recommended limiting “any out-of-test-year revenue adjustments . . . to

traditional fuel and purchased power costs,” assuming such adjustments “are to be retained.” Wilson Direct Test. p. 33 (May 8, 2015) (“the Commission should attempt to avoid, as much as possible, all single issue out-of-test-year rate adjustments”).

4. On May 29, 2015, NorthWestern filed a *Motion to Strike the Direct Testimonies of John W. Wilson and George L. Donkin* (Motion to Strike) and an *Alternative Motion to Postpone the Procedural Schedule*. NorthWestern specifically moved to strike “those portions of the direct testimony of John W. Wilson that discuss the . . . recovery of lost revenues,” and all of Mr. Donkin’s Direct Testimony. Mot. to Strike p. 2. According to NorthWestern, “these testimonies must be struck because they are not relevant to the matters involved in this consolidated tracker docket, are precluded by the doctrine of collateral estoppel, or allowing them to remain is an inefficient use of resources.” *Id.* Alternatively, NorthWestern sought to postpone subsequent deadlines in this proceeding “until the Commission issues a final order in [Docket D2014.6.53]. . . .” *Id.* at p. 11.

5. On June 9, MCC filed a *Response to NorthWestern’s Motion to Strike Testimony*, in which it argued, in part, “The fact that parallel proceedings have been opened regarding [lost revenues] and hedging does not preclude the Commission from considering and disallowing costs related to those programs in this docket.” MCC Response Br. p. 1.

6. On June 15, 2015, NorthWestern filed a *Reply to the MCC’s Response to the Motion to Strike Testimony*, in which it argued, in part, that “it is not pertinent” or “appropriate” for Dr. Wilson to repeat arguments made in other dockets, that he “does not assert the lost revenues included in this consolidated docket were imprudently incurred,” that Mr. Donkin “has presented no new facts to support” ending off-system hedging transactions, and that “[c]ollateral estoppel bars the MCC from raising the issue.” Reply Br. p. 3.

FINDINGS OF FACT

7. As NorthWestern observed, “This consolidated docket involves NorthWestern’s request to track certain electricity supply costs incurred during two tracker years,” specifically, “electricity supply costs incurred from July 1, 2012 to June 30, 2014.” *See* Mot. to Strike at p. 2. NorthWestern’s request for recovery includes the lost revenues and off-system hedging transaction costs incurred during that timeframe. *Id.* NorthWestern also seeks approval to

recover these costs on an interim basis from July 1, 2014 through June 30, 2015. *See e.g.* Direct Test. of Joseph S. Janhunen, Ex. 6, p. 3 (May 29, 2014).

Recovery of Lost Revenues

8. With respect to lost revenues, the Commission has recognized “that prior orders have established a precedent of full recovery of lost revenues associated with verified savings,” but has also provided “notice to NorthWestern that it is skeptical of the *status quo* regarding lost revenue recovery.” Or. 7219h, Dkt. D2012.5.49, ¶ 78 (Oct. 22, 2013). Specifically:

The Commission is troubled by the magnitude and complexity of the [second evaluation of demand-side management savings], and by the administrative cost associated with overseeing the process of determining realized savings. The Commission recognizes that [NWE’s] expectation of lost revenue recovery is embedded in its cost estimates in this case, as well as in Docket D2013.5.33. The Commission observes that the policy of allowing lost revenue recovery for USB programs appears particularly questionable given that such programs are required by law.

Regarding lost revenues associated with electric supply DSM program savings, the Commission observes that frequent rate cases will largely mitigate the impact of lost revenues due to energy efficiency programs on [NWE’s] usage-dependent recovery of capital asset costs. . . .

Although the Commission has concluded in past orders that lost revenues that reflect ‘actual costs’ are ‘electricity supply costs,’ it will revisit and may reassess this conclusion in future proceedings.

Id. at ¶¶ 78-79, 118; Or. 7219i, Dkt. D2012.5.49, ¶ 15 (May 13, 2014).

9. In April 2014, NorthWestern and the Commission agreed to address “the lost revenue policy issue for both electric and natural gas efficiency programs” in a separate proceeding. Unopposed Mot. for Approval of Settle. Agreement, Cause No. DV-13-399, Ex. A (2d Jud. Dist. Apr. 23, 2014); *see* Dkt. D2014.6.53.

10. Distinct from the “policy issue” concerning lost revenues, however, is the issue of “whether the Commission should allow expenses attributed to [lost revenues] in this proceeding.” Response Br. at p. 4. Because these issues are distinct, allowing Dr. Wilson’s testimony in this proceeding is not necessarily inefficient, and does not justify postponing the procedural schedule in this matter. *Infra* ¶¶ 15-16. The fact that this case involves other contested issues is also a reason to preserve the existing schedule. *See* Direct Test. of David A. Schlissel, Dkt. D2013.5.33 (May 8, 2015).

Off-System Hedging Transactions

11. NorthWestern request for recovery in this proceeding includes the costs of off-system hedging transactions. Order 7219h stated:

The Commission is disquieted by the hedging losses, but will not direct NorthWestern to discontinue its off-system fixed priced hedging transactions *at this time*.

MCC's advocacy . . . has made clear the need for a review of NorthWestern's fixed price hedging strategy. The Commission is persuaded that NorthWestern transacts with less incentive to avoid hedging losses than its hedging counterparties. The Commission will open a docket within 90 days of this Order to investigate possible mechanisms to better align the goals of rate stability and risk mitigation with the goal of providing service at the lowest-long term total cost. In the meantime, the prudence of hedging losses will continue to be a potential issue in annual electricity tracker dockets.

Or. 7219h at ¶ 88-89 (emphasis added); *see* Dkt. N2014.1.11.

12. The Commission agrees with the MCC: "The fact that the Commission did not order [NorthWestern] to stop its hedging practices in the prior tracker docket does not foreclose the Commission from ordering it to stop its hedging practices in this docket." Response Br. at pp. 4-5 ("the Commission's explicitly stated concerns confirm the fact that hedging issues have not been resolved."); *infra* ¶¶ 15-19.

CONCLUSIONS OF LAW

13. The Commission has full power of supervision, regulation, and control of public utilities. Mont. Code Ann. § 69-3-201 (2014). NorthWestern is a "public utility" subject to regulation by the Commission. *Id.* at § 69-3-101.

14. This proceeding is the "electricity cost recovery mechanism that allows NorthWestern to fully recover prudently incurred electricity supply costs, subject to the provisions of 69-8-419, 69-8-420, and [C]ommission rules." *Id.* at § 69-8-210(1). "Electricity supply costs" are "the actual costs incurred in providing electricity supply service through power purchase agreements, demand-side management, and energy efficiency programs," including costs "directly related to the purchase of electricity and the management and provision of power purchase agreements." *Id.* at § 69-8-103(8).

15. In a "contested case" under the Montana Administrative Procedures Act, "Opportunity shall be afforded all parties to respond and present evidence and argument on all

issues involved.” *Id.* at § 2-4-612(1). In this proceeding, NorthWestern proposes “ratemaking” to account, in part, for lost revenues and off-system hedging transactions. *Id.* at § 2-4-102(4). The MCC is entitled to “an opportunity to be heard” and “to rebut the request for recovery of those expenses.” Response Br. at p. 4.

16. “Except as otherwise provided by statute relating directly to an agency,” the Commission is “bound by common law and statutory rules of evidence.” *Id.* at § 2-4-612. According to the Rules of Evidence, “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Mont. R. Evid. 401. In this action, NorthWestern asserts that certain lost revenues and off-system hedging costs are recoverable through rates. Clearly, the existence of such costs is a fact of consequence to the determination of this case. The MCC’s testimony is relevant because it addresses costs that NorthWestern is seeking to recover in this proceeding.

17. Collateral estoppel “prevents relitigation of determinative facts which were actually or necessarily decided in a prior action.” *Dowell v. Mont. Dept. of Health & Human Serv.*, 2006 MT 55, ¶ 34, 331 Mont. 305. Montana courts ask four questions to determine whether collateral estoppel bars an issue:

1. Was the issue decided in the prior adjudication identical to the issue raised in the action in question?
2. Was there a final judgment on the merits in the prior adjudication?
3. Was the party against whom preclusion is now asserted a party or in privity with a party to the prior adjudication?
4. Was the party against whom preclusion is now asserted afforded a full and fair opportunity to litigate the issue which may be barred?

McDaniel v. State, 2009 MT 159, ¶ 28, 350 Mont. 422.

18. The Commission agrees that NorthWestern’s “argument fails the first necessary element.” Response Br. at p. 5. The issue presented in this case – whether the Commission should *now* order NorthWestern to terminate off-system hedging transactions – is not “identical” to any issue that was “actually or necessarily decided in a prior action.” *Dowell*, ¶ 34. Almost two years ago, the Commission declined to order NorthWestern to terminate its off-system hedging transactions. Or. 7219h at ¶ 88. Much has changed since that time. *See* Or. 7232k, Dkt. D2013.12.85 (Sept. 25, 2014); *see also* NorthWestern Reply Br., Dkt. D2013.5.33, p. 4

(June 15, 2015) (conceding at least one “real ‘changed circumstance’”). Whether the Commission should order NorthWestern to terminate hedging *at this time* is a discrete issue that has not been actually or necessarily decided.

19. NorthWestern’s collateral estoppel argument also fails the second element, which requires a final judgment on the merits in the prior adjudication. In its previous Order, the Commission specifically found a “need for [further] review of NorthWestern’s fixed price hedging strategy,” and observed that “the prudence of hedging losses will continue to be a potential issue in annual electricity tracker dockets.” Or. 7219h at ¶¶ 88-89. The stated need for further review of such transactions, which “continue to be a potential issue,” does not indicate a final judgment on the merits. *Id.* Since the first two elements of collateral estoppel are not met, this doctrine does not preclude Mr. Donkin’s Direct Testimony.

ORDER

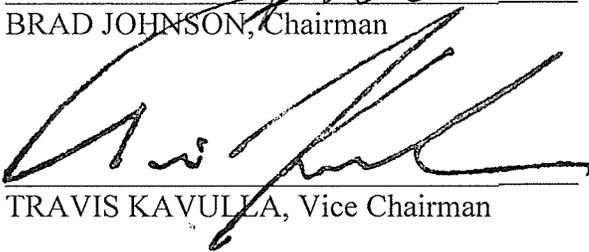
IT IS HEREBY ORDERED THAT:

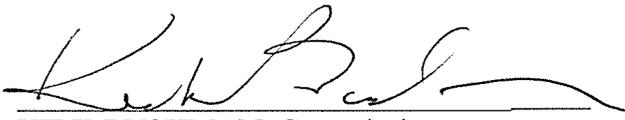
20. NorthWestern’s Motion to Strike is DENIED; and
21. NorthWestern’s *Alternative Motion to Postpone the Procedural Schedule* is DENIED.

DONE AND DATED in Helena, Montana on this 23th day of June, 2015, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION


BRAD JOHNSON, Chairman


TRAVIS KAVULLA, Vice Chairman


KIRK BUSHMAN, Commissioner


ROGER KOOPMAN, Commissioner


BOB LAKE, Commissioner

ATTEST:


Aleisha Solem
Commission Secretary

(SEAL)

