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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/Credits, 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 MOTION TO STRIKE THE  
DIRECT TESTIMONIES OF JOHN W. WILSON AND GEORGE L. DONKIN  
FILED ON BEHALF OF THE MONTANA CONSUMER COUNSEL and  
ALTERNATIVE MOTION TO POSTPONE THE PROCEDURAL SCHEDULE**

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NorthWestern Corporation doing business as NorthWestern Energy (“NorthWestern”) submits this *Motion to Strike the Direct Testimonies of John W. Wilson and George L. Donkin filed on behalf of the Montana Consumer Counsel* (“Motion”) and *Alternative Motion to Postpone the Procedural Schedule* (“Alternative Motion”). NorthWestern moves the Montana Public Service Commission (“Commission”) for an order striking those portions of the direct testimony of John W. Wilson that discuss the lost revenue adjustment mechanism (“LRAM”) and recovery of lost revenues – specifically pages 18 – 30 and 32 – 34. Additionally, NorthWestern moves the Commission for an order striking the direct testimony of George L. Donkin. As is discussed in more detail below, 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.

#### **Procedural Background**

This consolidated docket involves NorthWestern’s request to track certain electricity supply costs incurred during two tracker years.<sup>1</sup> Specifically, the docket pertains to electricity supply costs incurred from July 1, 2012 to June 30, 2014, which costs include lost revenues. Pursuant to the current procedural schedule in this docket, the Montana Consumer Counsel (“MCC”) filed testimony in response to NorthWestern’s application. On behalf of the MCC, John W. Wilson filed direct testimony (“Wilson Testimony”) advocating that the Commission should not permit NorthWestern to recover lost revenues in dockets such as these tracker dockets. Wilson Testimony, p. 33.

Additionally, these electric tracker dockets include tracking of the purchased power needed to supply load. This procurement is “primarily guided” by the hedging strategy found in

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<sup>1</sup> The Commission consolidated NorthWestern’s 2013 Electricity Supply Tracker docket with its 2014 Electricity Supply Tracker docket. See Notice of Commission Action issued May 12, 2014.

the then most recent electricity supply procurement plan filed with the Commission. 2013 Prefiled Direct Testimony of Kevin J. Markovich, p. 15. For this consolidated docket, that plan is the 2011 Electricity Supply Resource Procurement Plan. *Id.*; *see also* 2014 Prefiled Direct Testimony of Kevin J. Markovich, p. 12. NorthWestern's hedging strategy utilizes a combination of two procedures: (1) physical purchase of fixed-price energy in Montana; and (2) fixed-price purchases at Mid-Columbia ("Mid-C") and sale of energy at Mid-C at either index-price or spot market. George L. Donkin filed response testimony on behalf of the MCC again recommending that the Commission order NorthWestern to stop entering into off-system electricity supply cost hedging transactions. Direct Testimony of George L. Donkin ("Donkin Testimony"), p. 18. The Donkin Testimony also recommended that "the Commission disallow as imprudently incurred costs any net hedging losses that may result from any new hedging deals entered into after November 18, 2014. *Id.*, p. 20. Pursuant to Amended Procedural Order No. 7283f, ¶ 17, NorthWestern files this Motion.

### Argument

**1. The Commission must strike the testimony as it is inadmissible irrelevant testimony.**

This is a contested docket subject to the provisions of the Montana Administrative Procedure Act. *See generally* § 2-4-711, MCA. As such, the Commission is bound by the common law and statutory rules of evidence. § 2-4-612(2), MCA; *see also* ARM 38.2.4201. In order to provide due process to the parties, the Commission has established a process in contested dockets whereby the procedural schedule establishes deadlines for the parties to file written testimony and exhibits and to serve and respond to discovery on the filed testimony and exhibits. At the hearing, the written testimony and exhibits are moved into the record by the party that filed them through a series of questions to the witness, who is under oath. Given the

fact that the written testimony and exhibits are moved into the evidentiary record at a Commission hearing, the rules of evidence apply to these documents.

The Montana Rules of Evidence (“M. R. Evid.”), Rule 401 provides that “[r]elevant 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.” Thus, evidence that is not relevant is inadmissible. M. R. Evid. 402; *see also Dahlin v. Holmquist*, 235 Mont. 17, 20, 766 P.2d 239, 241 (1988). The appropriate test to determine relevancy is whether the evidence “will have any value, as determined by logic and experience, in proving the proposition for which it is offered.” *Sunburst School District No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 211, 338 Mont. 259, 165 P.3d 1079 (citing *State v. Hamilton*, 2002 MT 263, ¶ 20, 312 Mont. 249, 59 P.3d 387; *Werre v. David*, 275 Mont. 376, 389, 913 P.2d 625, 633 (1996)). Additionally, the test for determining whether evidence is relevant and thus admissible presents a more stringent standard than the test for determining relevant discovery. *Preston v. Montana Eighteenth Judicial Dist. Court, Gallatin County*, 282 Mont. 200, 209, 936 P.2d 814, 819 (1997) (citing *Drabik v. Stanley-Bostitch, Inc.*, 796 F.Supp. 1271 (W.D. Mo. 1992)).

The Wilson Testimony is not relevant to this consolidated docket. Electricity supply costs are “the actual costs incurred in providing electricity supply service through power purchase agreements, demand-side management, and energy efficiency programs.” § 69-8-103(8), MCA. The Commission has determined that lost revenues are “actual costs” permitted to be tracked. *See In the Matter of the Application of NorthWestern Energy’s Electric Default Supply Tracker Filing*, Docket Nos. D2003.6.77 and D2004.6.90, Final Order Nos. 6496f and 6574e, COL ¶ 6, p. 56 (December 16, 2005) (“The lost revenue is an actual cost of providing default supply service.”); *see also In the Matter of NorthWestern Energy’s Application for Approval of Electric*

*Supply Deferred Cost Account Balance and Projected Electric Supply Cost*, Docket Nos. D2006.5.66 and D2007.5.46, Final Order No. 6836c, COL ¶ 5, p. 62 (June 24, 2008).

Pursuant to law, the Commission established a mechanism to allow a public utility “to fully recover prudently incurred electricity supply costs.” § 69-8-210(1), MCA. If challenged,<sup>2</sup> determining if costs were prudently incurred requires a review of what the utility knew at the time a decision was made. *See In re New England Power Co.*, 31 FERC ¶ 61,047, ¶ 61,084 (1985) (reviewing case law and enunciating test) (affirmed in *Violet v. F.E.R.C.*, 800 F.2d 280 (1<sup>st</sup> Cir. 1986)); *In re Long Island Lighting Company* 71 P.U.R.4<sup>th</sup> 262, 267 (N.Y. P.U.C. 1985) (“in evaluating prudence, we must ask whether the company acted reasonably under all the circumstances at the time”); *In re Southern California Edison Co.*, 116 P.U.R.4<sup>th</sup> 365, 374 (Cal. P.U.C. 1990) (a prudent act results from “the exercise of reasonable judgment in light of facts known or which should have been known at the time the decision was made”). Thus, the tracker mechanism established by this Commission is a docket primarily to review costs incurred in the past in order to determine if they were prudently incurred.

In this consolidated docket, as it has done for the last 11 years, NorthWestern included estimated lost revenues<sup>3</sup> from July 2012 to June 2014 associated with reduced transmission and distribution throughput and the fixed cost portion of the revenue requirements for Colstrip Unit 4 (“CU4”), Dave Gates Generating Station, and Spion Kop. *See* the 2013 Prefiled Direct Testimony of William M. Thomas, pp. 27-29 and the 2014 Prefiled Direct Testimony of William M. Thomas, pp. 31-32. As is discussed above, only prudently incurred costs are permitted to be

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<sup>2</sup> Costs are presumed to be prudent unless and until they are challenged. *See West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 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.”); *see also In re New England Power Co.*, 31 FERC ¶ 61,047, 61,082 (1985).

<sup>3</sup> Estimated lost revenues are allowed in rates on an interim basis until they are “trued-up” by an independent evaluation to determine actual savings at which time they will be deemed final. *In the Matter of the Application of NorthWestern Energy’s Electric Default Supply Tracker Filing*, Docket Nos. D2003.6.77 and D2004.6.90, Final Order Nos. 6496f and 6574e, ¶ 157 (December 16, 2005).

recovered in rates. The MCC asserts that “the Commission should attempt to avoid, as much as possible, all single issue out-of-test-year rate adjustments and, instead, base [NorthWestern’s] rate and revenue adjustments on balanced and comprehensive revenue and cost of service reviews in reasonably frequent general rate cases.” Wilson Testimony, p. 33. To support this argument, the MCC argues that NorthWestern’s request to recover lost revenues, for example associated with CU4, results in “revenue increments above the Commission’s determined test year cost of service revenue requirement.” *Id.*

The MCC’s recommendation in this case seeks a policy change as to how the Commission handles recovery of lost revenues. Since NorthWestern relied on Commission precedent established a decade ago that permits lost revenues to be tracked and NorthWestern seeks to recover lost revenues during the relevant tracker years in this docket, the MCC’s testimony is not relevant to the determination that the Commission must make in this case: were lost revenues incurred from July 2012 to June 2014 prudently incurred electricity supply costs. By Commission orders, NorthWestern is permitted to track lost revenues. By law, NorthWestern is permitted to recover electricity supply costs. The MCC desires to change this. Its recommendation concerns policy changes on a going forward basis, while tracker dockets are primarily retrospective prudence reviews. It is therefore irrelevant testimony in this consolidated docket. As such, the Commission must strike the Wilson Testimony on lost revenues.

Like the Wilson Testimony, the Donkin Testimony must be struck because is not relevant to this consolidated docket. One of the recommendations from the MCC is that “any net hedging losses” that may result from any new hedging deals entered into after November 18, 2014, be disallowed as imprudent by the Commission. Donkin Testimony, p. 20. NorthWestern officially acquired the hydroelectric facilities from PPL Montana on November 18, 2014. The review period for the costs involved in this docket is July 2012 to June 2014. Impacts of any hedging

deals entered into by NorthWestern after November 18, 2014, will be reviewed for prudence as part of the processing in the electric tracker docket filed today, May 29, 2015, covering the period July 2014 to June 2015. Therefore, the costs that the MCC wants the Commission to deem imprudent could not have been incurred during the historical review period covered by this consolidated docket. This testimony is irrelevant to a prudence determination and must be struck.

Additionally, the Donkin Testimony is recommending a policy change in that the Commission should order NorthWestern to stop entering into certain hedging transactions. Donkin Testimony, p. 18. As noted in the testimony, the MCC made this same argument in the previously adjudicated electric tracker docket, Docket No. D2012.5.49. In that docket, the Commission refused to order NorthWestern to stop entering into the hedging transactions that the MCC alleged resulted in substantial losses to customers. *See* Order No. 7219h, ¶ 88 (“The Commission...will not direct NorthWestern to discontinue its off-system fixed priced hedging transactions at this time.”). The Commission did express some concerns regarding this matter and indicated that it would open a docket “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.” *Id.*, ¶ 89.

On January 24, 2014, the Commission opened that docket. *See* Notice of Investigation and Request for Comments, Docket No. N2014.1.11 (“Hedging Investigation Docket”). The Commission requested parties to file comments by a date certain. In lieu of filing comments, the MCC asked the Commission to stay the proceedings until after the Commission decided whether NorthWestern would be permitted to acquire the hydroelectric facilities as its response is “logically dependent upon the factual question of whether or not NorthWestern’s purchase of PPL’s hydroelectric supplies is approved.” MCC’s Motion to Stay Proceedings (“Motion to Stay”), p. 4, filed in Docket No. N2014.1.11 (March 20, 2014). While NorthWestern’s

acquisition of the hydroelectric facilities has been completed, the Hedging Investigation Docket's schedule has not been reset, but the docket remains open.

The policy change that the MCC is recommending again in this consolidated docket has already been reviewed and rejected by the Commission in the prior electric tracker docket. The Commission did open a separate proceeding to review and 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 cost. Any comments that the MCC has with respect to the issue identified by the Commission in Order No. 7219h should be addressed in N2011.1.11. It should not be permitted to attempt to make the same arguments again in this docket. The matter has been decided. As such, the testimony filed in this docket recommending the same action from the Commission is irrelevant and must be struck as the matter has been adjudicated.

**2. The doctrine of collateral estoppel requires that the Commission strike the Donkin Testimony.**

Furthermore, the doctrine of collateral estoppel prevents the MCC from raising this issue again in this consolidated docket. Montana courts have defined collateral estoppel as a mechanism that will "bar a party from re-litigating an issue that already has been litigated and decided in a prior suit." *Rooney v. City of Cut Bank*, 2012 MT 149, ¶ 17, 365 Mont. 375, 286 P.3d 241. A four-part test has been established to determine whether a claim is barred by collateral estoppel:

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, 208 P.3d 817. In order for collateral estoppel to apply, all four steps must be established. *Id.* Of the four steps, the “most crucial” step is the first step (identical issues). *Haines Pipeline Construction, Inc. v. Montana Power Co.*, 265 Mont. 282, 288, 876 P.2d 632, 636 (1994). In order to determine if the issues presented in the two cases are identical, “the pleadings, evidence and circumstances surrounding the two actions” must be compared. *Holtman v. 4-G’s Plumbing & Heating, Inc.*, 264 Mont. 432, 439, 872 P.2d 318, 322 (1994). This doctrine is applicable to administrative agencies. *Dowell v. Montana Dept. of Public Health & Human Services*, 2006 MT 55, ¶ 36, 331 Mont. 305, 132 P.3d 520.

Here, all four elements are satisfied. The MCC raised the same issue in Docket No. D2012.5.49.<sup>4</sup> As discussed above, the Commission decided the issue in that docket. In that docket, the MCC made a recommendation and the Commission rejected that recommendation (see page 7 above). The MCC was a party in Docket No. D2012.5.49 and was afforded a full and fair opportunity to litigate the issue in that case. There, the MCC submitted testimony into the evidentiary record on the issue, testified to the issue at hearing and the issue was discussed in post-hearing briefing to the Commission. Finally, the Commission’s decision in Docket No. D2012.5.49 regarding the hedging recommendations from the MCC is a final order on that issue.<sup>5</sup> Since all four elements are satisfied, the MCC is barred from raising this issue again in a subsequent electric tracker docket. Given that fact, the Commission must strike this testimony.

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<sup>4</sup> The MCC admits this fact in the Donkin Testimony. Donkin responds to the question “In Docket D2012.5.49, you recommended that the Commission direct NorthWestern to terminate its off-system electricity supply cost hedging strategies and activities. Is that still your recommendation in this proceeding?” by stating that “[y]es, for the same reasons I gave in Docket D2012.5.49.” Donkin Testimony, p. 18.

<sup>5</sup> Order No. 7219h is still pending appeal before the Second Judicial District, but NorthWestern did not appeal the Commission’s decision regarding the hedging issue to the district court.

**3. The Commission must strike the testimony identified as the probative value of such testimony is outweighed by other considerations.**

If the Commission disagrees and believes that the MCC's testimony is relevant to this consolidated docket and that the MCC is not collaterally estopped from raising the issue discussed above, it should nonetheless strike the testimony as its probative value is substantially outweighed by allowing it to remain given other pending dockets before the Commission. M. R. Evid. 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, . . . or by considerations of . . . waste of time . . . ." First, the Wilson Testimony is appropriate, relevant testimony in the LRAM docket opened by the Commission in 2014. *See* Docket No. D2014.6.53, Notice of Contested Case and Intervention Deadline issued on June 16, 2014, p. 4 ("the Commission agreed to address 'the lost revenue policy issue for both electric and natural gas efficiency programs' in a separate proceeding.") (citation omitted). The MCC is a party in the LRAM docket. In fact, the MCC makes the same arguments and recommendations discussed above in that docket; in some instances the testimony is verbatim. *See* Direct Testimony of John Wilson, pp. 18-22 and 25. NorthWestern, as well as other parties, has responded to these arguments in that docket. To require NorthWestern, the other parties, and the Commission to expend time and resources addressing or rebutting these arguments again in this docket is inefficient, a waste of time, and lacks administrative economy.

Under the current procedural schedule, rebuttal and cross-intervenor testimony in this consolidated docket is due on July 17, 2015. A hearing in the LRAM docket is noticed to commence on June 9, 2015. Assuming that there will be post-hearing briefing in the LRAM docket, a final order is unlikely to be issued prior to the deadline to file rebuttal and cross-intervenor testimony in this consolidated docket. Thus, unless the Wilson Testimony is stricken,

parties will expend resources filing testimony and responding to discovery to rebut/address an issue that is clearly being addressed in a separate docket. Given this fact, the value of allowing the Wilson Testimony to remain in this docket is clearly outweighed by the costs.

The same rationale applies to the Donkin Testimony. The Commission opened the Hedging Investigation Docket asking parties to comment on possible ways that the goals of rate stability and risk mitigation could be aligned with the goal of providing service at the lowest long-term cost. The MCC's comments on that issue should be filed in Docket No. N2014.1.11. That is the docket that the Commission identified to handle this matter going forward. The Commission should issue a revised procedural schedule and bring Docket No. N2014.1.11 to conclusion. The MCC should be ordered to comply with that procedure and should not be permitted to circumvent the Commission's directive simply because it has not acted on the MCC's Motion to Stay. Allowing the Donkin Testimony in this docket will more than likely confuse the issue and will result in a waste of resources. Thus, like the Wilson Testimony, the Donkin Testimony's value is clearly outweighed by the costs and must be struck.

**Alternative Motion to Postpone the Procedural Schedule to  
Address the Wilson Testimony**

If the Commission disagrees with NorthWestern that the Wilson testimony discussed in the Motion is irrelevant or that its value to this consolidated docket is outweighed by considerations such as waste of resources, NorthWestern alternatively moves that (1) the Commission postpone any deadlines for rebuttal testimony regarding the Wilson Testimony and those portions that address lost revenue policy matters until the Commission issues a final order in the LRAM docket, and (2) if the LRAM docket fully resolve the matter, the Commission then order the Wilson Testimony in this consolidated docket be struck.

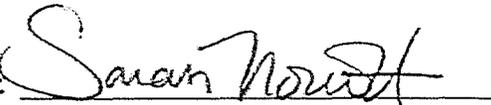
Conclusion

The Wilson Testimony is not relevant testimony in this consolidated docket. It does not have any value regarding the prudence question to be answered in this consolidated docket. When determining prudence, the Commission looks backwards in a tracker docket. The recommendations in the Wilson Testimony are forward-looking policy changes, which legally cannot affect lost revenues already incurred given NorthWestern's reliance on law and an established Commission policy. Even if relevant, the Wilson Testimony is already being addressed in a separate proceeding and allowing it to remain in this docket has little to no probative value to this consolidated docket.

The Donkin Testimony is also irrelevant because the issue has been litigated and certain recommendations found therein do not apply to the historical time periods in this case. The MCC is also prevented from raising the concerns found in the Donkin Testimony in this consolidated docket because of the doctrine of collateral estoppel. For these reasons, NorthWestern requests that the Commission strike the portions of the Wilson Testimony that discusses lost revenues and strike in its entirety the Donkin Testimony.

Respectfully submitted this 29<sup>th</sup> day of May, 2015.

NORTHWESTERN ENERGY

By: 

Sarah Norcott

John Alke

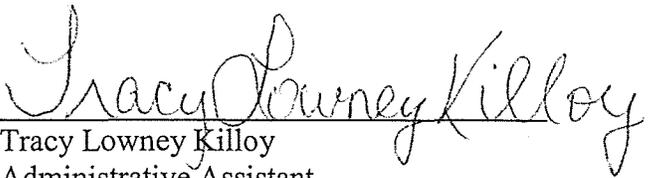
Al Brogan

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CERTIFICATE OF SERVICE

I hereby certify that a copy of NorthWestern Energy's Motion to Strike the Direct Testimonies of John W. Wilson and George L. Donkin filed on behalf of The Montana Consumer Counsel and Alternative Motion to Postpone the Procedural Schedule in Docket Nos. D2013.5.33/D2014.5.46 has been hand delivered to the Montana Public Service Commission and to the Montana Consumer Counsel this date. It has been e-filed on the PSC website, emailed to counsel of record, and served on the most recent service list by mailing a copy thereof by first class mail, postage prepaid.

Date: May 29, 2015

  
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