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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
2012-2013 Electricity Supply Tracker

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

REGULATORY DIVISION

Docket Nos. D2013.5.33, D2014.5.46

**MONTANA ENVIRONMENTAL INFORMATION CENTER AND SIERRA CLUB'S
RESPONSE TO NORTHWESTERN ENERGY'S OBJECTION TO INTRODUCTION
OF DATA REQUESTS INTO EVIDENCE**

INTRODUCTION

This case involves NorthWestern's attempt to charge its customers for electricity supply costs that are higher than expected. The charges are caused by a number of extraordinary factors, but relevant to participation in this docket by Montana Environmental Information Center and Sierra Club (collectively, "MEIC"), the charges are attributed to a 7-month outage of Colstrip Unit 4 that was caused by the combination of defective equipment and the work of a third party contractor during the course of routine maintenance on plant equipment.

As stated in MEIC's prehearing memorandum, the issues contested by MEIC in this proceeding are:

- 1) Whether NorthWestern prudently incurred replacement power costs during the extended Unit 4 outage, in light of NorthWestern Energy's failure to mitigate or disclose risks associated with a potential outage; and
- 2) Whether costs associated with the Colstrip Unit 4 extended outage should be borne by ratepayers, in light of NorthWestern Energy's failure to evaluate potential liability for such costs by third parties.

These issues go to the heart of whether the electricity supply costs incurred by NorthWestern to serve customers for the period covered by this tracker docket were prudently incurred.

In support of its arguments on these contested issues, MEIC's prehearing memorandum identified a number of NorthWestern's responses to data requests that MEIC intends to introduce into the evidentiary record. All of those responses are relevant and admissible in this proceeding because they pertain to the replacement power costs that NorthWestern seeks to recover in this proceeding. Specifically, all of the discovery responses listed in MEIC's prehearing memorandum are relevant to the causes, costs, and mitigation of risks associated with the Colstrip Unit 4 outage.

ARGUMENT

I. NORTHWESTERN'S OBJECTION TO THE INTRODUCTION OF ALL DISCOVERY RESPONSES WOULD RESULT IN THE WHOLESAL EXCLUSION OF EVIDENCE.

A. NorthWestern's Formulaic Objections Are Not Sufficient Grounds For Excluding Discovery Responses That Are Otherwise Admissible.

NorthWestern objects to the "mass introduction of discovery responses into evidence in this proceeding" on grounds that such evidence will be admitted without regard to the relevance of the responses to contested issues. NWE Obj. at 3. This objection is misguided. As NorthWestern states,

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 that it would be without the evidence.

Mont. R. Evid. 401 (emphasis added). Applying this liberal standard, Commission staff has previously found that in proceedings before the Commission, "the evidentiary record would not be adequate or sufficient without the introduction of data requests and responses related to any issue addressed in the pre-filed testimony (including testimony filed with the initial application and supplemental testimony)," and therefore have requested counsel for parties "to introduce at

hearing data requests and responses filed in this proceeding that relate to any issue addressed by a party in pre-filed testimony.” In the Matter of NorthWestern Energy’s 2011-2012 Electricity Supply Tracker, Dkt. No. D2012.5.49, Notice of Commission Action (May 31, 2013).

While NorthWestern generally asserts that not all data request responses are relevant, NorthWestern offers no specific argument with respect to any of the responses. Instead, as an exhibit to its brief, NorthWestern provided a table identifying every data request to which it apparently objects and offered a single line providing the generic grounds for each objection. For each of the data requests identified in MEIC’s prehearing memorandum and appearing in NorthWestern’s exhibit (and therefore apparently subject to NorthWestern’s objection), NorthWestern states only that each “does not prove or disprove a fact of consequence at issue in proceeding.” See NWE Obj., Exh. 1.¹

NorthWestern’s formulaic and cursory relevance objections do no comport with the requirement that “[t]he grounds for objecting to an interrogatory must be stated with specificity.” Mont. R. Civ. P. 33(b)(4). Because NorthWestern has failed to argue specific grounds on which the Commission can base its relevance evaluation, NorthWestern’s motion should be denied. See First Sav. Bank, F.S.B. v. U.S. Bancorp, 117 F. Supp. 2d 1078, 1082 (D. Kan. 2000) (The party filing a motion to exclude evidence “has the burden of demonstrating that the evidence is inadmissible on any relevant ground. The court may deny a motion in limine when it ‘lacks the necessary specificity with respect to the evidence to be excluded.’”) (citation omitted) (quoting National Union v. L.E. Myers Co. Group, 937 F. Supp. 276, 287 (S.D.N.Y.1996)); see also

¹ NorthWestern’s Exhibit does not indicate any objection to the following data request responses that MEIC identified in its Prehearing Memorandum: PSC-009, 51, 55, 64; MEIC-009, 28, 39, 40, 44-48, 50-51, 60-66, 69-72, 75-78, 80, 90; MCC-015, 18, 118, 141, 142.

Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 358 (D. Md. 2008) (“boilerplate objections . . . are improper unless based on particularized facts.”).

Moreover, all of the data requests identified in MEIC’s prehearing memorandum to which NorthWestern objects are relevant to this proceeding, as explained below.

- **MEIC-005 and 11** both pertain to calculations of replacement power costs attributable to the Colstrip Unit 4 outage. While NorthWestern did not attempt to calculate replacement power costs in its initial application, such costs are fundamental to the amount NorthWestern may be entitled to recover from ratepayers, as recognized in the June 18, 2014 dissenting opinion by Commissioner Travis Kavulla in these consolidated dockets.
- The Commission previously overruled NorthWestern’s objection to **MEIC-025**. Nov. 26, 2014 Notice of Commission Action at 2 (“On November 25, 2014, the Commission . . . and overruled its [NorthWestern’s] objection to MEIC-025.”).
- Similarly, the Commission previously overruled NorthWestern’s objection to **MEIC-026** as to Colstrip Units 3 and 4. *Id.* (“With respect to MEIC-024 and MEIC-026, the Commission sustained NorthWestern’s objections to providing information about Colstrip Units 1 and 2, but overruled its objections to providing information about Units 3 and/or 4.”).
- **MEIC-043** and **MCC-056** both asked about statements in the pre-filed testimony of Kevin Markovich about the benefits of the Colstrip Unit 4 outage for ratepayers, and therefore are relevant to issues address in pre-filed testimony.
- **MEIC-048** asked about NorthWestern’s communications with the authors of the root cause analysis for the outage, both of whom subsequently filed rebuttal testimony.
- **MEIC-049** asked who paid for the Root Cause Analysis, which contains the result of the investigation into the cause of the Colstrip Unit 4 extended outage. The Root Cause Analysis is relevant to whether NorthWestern prudently incurred replacement power costs, because it contains information that bears on whether NorthWestern could have avoided or mitigated the risk of the outage and the need for replacement power costs. Who paid for the Root Cause Analysis is relevant to evaluating the document’s conclusions.
- **MEIC-053** asks for instances in which the Root Cause Analysis identifies the generator overhaul conducted by Siemens as a cause of the extended outage at Colstrip Unit 4. The cause of the extended outage is relevant to whether replacement power costs from the outage were prudently incurred.
- **MEIC-073** and **74** asked for details about NorthWestern’s evaluation of outage insurance. This Commission already has found such information relevant to the

Company's prudence in occurring replacement power costs associated with forced outages. See In the Matter of NorthWestern Energy's 2011-2012 Electricity Supply Tracker, Dkt. No. D2012.5.49, ORDER NO. 7219h (Oct. 28, 2013).

- **MEIC-079, 81, 82, and 90** all ask for information about the events that caused the Colstrip Unit 4 outage and whether NorthWestern or its contract could have done anything to prevent them. MEIC-079, 81, and 82 specifically ask questions in response to Mr. Halpern's rebuttal testimony that "NorthWestern could not have foreseen or prevented it [the generator failure]." See Rebuttal Testimony of Ronald A. Halpern at 13. NorthWestern's responses accordingly are relevant to issues address in pre-filed testimony and the underlying issue of NorthWestern's prudence in this proceeding.
- **MEIC-083** asks NorthWestern witness Mr. Ward questions about statements he made on page 9 of his rebuttal testimony. NorthWestern cannot credibly claim that the issues raised by its own witness are irrelevant.
- **MEIC-084** asks NorthWestern witness Mr. Ward whether he is aware of coal units that entered into service in 2009 and have experienced a forced outage rate as high as Colstrip Unit 4 has experienced from 2009-2014. In 2009, NorthWestern represented to the Commission that Colstrip Unit 4 was new or better than new. Whether Colstrip Unit 4 has lived up to those claims, and whether NorthWestern misrepresented the condition of Colstrip Unit 4, are relevant to whether the replacement power costs resulting from the Unit 4 outage were prudently incurred.
- **PSC-059 and 60** both pertain to NorthWestern's knowledge of the inadequacy of interlaminar insulation installed at Colstrip Unit 4. As summarized by NorthWestern's rebuttal witness Ronald A. Halpern, "the most likely scenario that caused the failure at CU4 was inadequate interlaminar insulation combined with damage from" another event associated with work performed during the Unit overhaul. See Rebuttal Testimony of Ronald A. Halpern at 7. Accordingly, NorthWestern's responses to PSC-059 and 60 are relevant to the prudence of NorthWestern in incurring replacement power costs associated with the outage.
- **MCC-024** asks for "a copy of the supply arrangements between NWE and owners of other units at Colstrip that limit the impact of the outage." Actions that NorthWestern took to mitigate the electricity supply costs incurred as a result of the outage are plainly relevant to whether the supply costs were prudently incurred. Moreover, NorthWestern itself has discussed the reciprocal sharing agreement in its rebuttal testimony. See Rebuttal Testimony of Michael Barnes at 5.
- **MCC-056** asks NorthWestern witness Kevin Markovich to explain statements he made on page 10 of his prefiled direct testimony. NorthWestern cannot credibly object to the relevance of issues raised by its own witness in his direct testimony.

Whether or not NorthWestern believes the issues addressed by the discovery responses listed above are “of consequence” in this proceeding, they relate directly to NorthWestern’s pre-filed direct and rebuttal testimony and the testimony offered by intervenors in this case. More fundamentally, the causes, costs, and mitigation of risks related to the Colstrip Unit 4 outage—which are the subject of the data request responses that MEIC intends to introduce into the evidentiary record for this proceeding—all are central to the question of whether NorthWestern acted prudently in incurring those costs. Accordingly, NorthWestern’s generic relevance objections to MEIC’s intended evidentiary submissions should be overruled and the responses should be admitted to ensure the Commission has a complete record upon which to rule on the merits of the contested issues in this proceeding.

B. Admitting NorthWestern’s Own Discovery Responses Into Evidence Is Consistent With Due Process.

NorthWestern argues that admitting its own discovery responses into evidence is somehow inconsistent with NorthWestern’s “fair hearing and due process rights.” NWE Obj. at 4. NorthWestern does not cite a single Commission Order or court ruling in support of this argument. Moreover, the argument simply makes no sense.

It appears that NorthWestern is arguing that the admission into evidence of NorthWestern’s own discovery responses deprives NorthWestern of its purported “statutory and due process right to respond to that ‘evidence,’ through discovery and rebuttal testimony.” NWE Obj. at 4. But the evidence in question consists of NorthWestern’s own discovery responses. NorthWestern is thus arguing that when it responds to a discovery request, it must be given the opportunity to issue discovery against itself and submit rebuttal to its own discovery response as a condition of admitting the discovery response into evidence. This argument is as meritless and it is bizarre.

NorthWestern also appears to suggest that “all other parties” are denied the right to submit discovery and rebuttal regarding a discovery response admitted into evidence. NWE Obj. at 4. Despite NorthWestern’s professed concern for the rights of all other parties, no party besides NorthWestern has objected to admitting NorthWestern’s discovery responses into evidence. NorthWestern has no legal right to assert an objection on behalf of a third party. Moreover, it is simply untrue that other parties lack an opportunity to respond to discovery responses admitted into evidence. All of the parties had multiple rounds of discovery, which included the opportunity to inquire about prior responses to discovery requests.

II. NORTHWESTERN’S OBJECTION TO THE SPECIFIC DISCOVERY RESPONSES LISTED BY MEIC FINDS NO SUPPORT IN THE RULES OF EVIDENCE.

NorthWestern raises two distinct objections to the discovery responses MEIC seeks to introduce into evidence. First, NorthWestern claims it previously objected to seven of the discovery requests. NWE Obj. at 5. Second, NorthWestern suggests that the discovery responses cannot be admitted unless they were incorporated into prefiled testimony or are used during cross examination. Neither objection has merit, as explained below.

A. NorthWestern Waived All Objections To The Discovery Responses That It Answered.

NorthWestern’s objection to the introduction of seven discovery responses rests upon the mistaken proposition that because it previously objected to, but answered, those requests, the answers are not admissible. See NWE Obj. at 5 (“NorthWestern has already objected during discovery, on grounds of relevance, to seven of the underlying discovery requests.”).

NorthWestern objected to MEIC Data Requests 25, 26, 28, 44, 50, 64, and 72. However, NorthWestern nonetheless provided responses to these data requests, while claiming that the answers were provided “without waiving said objection.” While Montana courts do not appear

to have addressed this issue, multiple federal courts have held that answering a discovery request does in fact waive any objections to the admissibility of the part of the request that is answered.

“Even though the practice has become common here and elsewhere, courts have found that whenever an answer accompanies an objection, the objection is deemed waived, and the answer, if responsive, stands.” Sewell v. D’Alessandro & Woodyard, Inc., No. 07-CV-343, 2011 WL 1232347, at *2 (M.D. Fla. Mar. 30, 2011). Courts in multiple jurisdictions have reached this conclusion. See, e.g., Norton v. Assisted Living Concepts, Inc., 786 F. Supp. 2d 1173, 1178 (E.D. Tex. 2011) (“The court finds that because Norton responded to the interrogatories, he waived his objections to them.”); Mann v. Island Resorts Dev., Inc., No. 08-CV297/RS/EMT, 2009 WL 6409113, at *3 (N.D. Fla. Feb. 27, 2009) (“This court cannot logically conclude that the objection survives the answer.”); Consumer Electronics Ass’n v. Compras & Buys Magazine, Inc., No. 08-21085-CIV, 2008 WL 4327253, at *3 (S.D. Fla. Sept. 18, 2008) (“The Parties shall not recite a formulaic objection followed by an answer to the request.”); Meese v. Eaton Mfg. Co., 35 F.R.D. 162, 166 (N.D. Ohio 1964) (“Whenever an answer accompanies an objection, the objection is deemed waived and the answer, if responsive, stands.”); see also Wright, Miller & Marcus, Federal Practice and Procedure: Civil § 2173 (stating “[a] voluntary answer to an interrogatory is also a waiver of the objection.”).

By answering MEIC’s data requests, NorthWestern waived its objections to those requests. Accordingly, NorthWestern’s responses to MEIC Data Requests 25, 26, 28, 44, 50, 64, and 72 must be admitted into evidence.

B. The Rules of Evidence Contain No Requirement That A Discovery Response Be Incorporated Into Prefiled Testimony Or Used During Cross Examination In Order To Be Admissible.

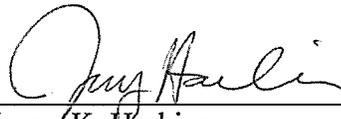
NorthWestern argues that “there is no purpose to be served” by introducing into evidence discovery responses that have not been incorporated into prefiled testimony or will not be used during cross examination. NWE Obj. at 5. However, NorthWestern’s subjective belief about the usefulness of a discovery response is not the standard for admissibility. Moreover, the rules of evidence contain no requirement that a discovery response be incorporated into prefiled testimony or used during cross examination in order to be admissible. As NorthWestern acknowledges, NWE Obj. at 2, the Montana Rules of Evidence apply to this proceeding—not rules that NorthWestern invents.

Under the Montana Rules of Evidence, an item is admissible if it meets several requirements. First and foremost, the evidence must be “relevant.” Mont. R. Evid. 401. While an item must meet other criteria to be admissible, the Montana Rules of Evidence simply do not state that a discovery response must be incorporated into prefiled testimony or used during cross examination to be admissible. NorthWestern cites no legal authority for this argument, because none exists. See NWE Obj. at 5. The Commission should reject NorthWestern’s invitation to invent requirements that are not in the Rules.

Nor do the Rules of Evidence specify that admissibility hinges on whether NorthWestern, believes that the item a party wishes to introduce will serve a “purpose.” The Rules of Evidence do not assign to NorthWestern the role of gatekeeper; NorthWestern has no authority to screen evidence based on its view of the purposes for which other parties will use evidence. The Rules of Evidence deem NorthWestern’s belief about the usefulness of an item to be legally irrelevant, as there is no requirement that an item be deemed useful by an opposing party in order to be

admissible. Furthermore, as explained previously, supra pages 4-5, each discovery response listed in MEIC's prehearing memorandum serves the purpose of addressing a relevant issue in this proceeding.

Respectfully submitted on this 30th day of September, 2015,



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*On behalf of Petitioners Montana Environmental
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2015, I served the foregoing "Montana Environmental Information Center and Sierra Club's Response to NorthWestern Energy's Objection to Introduction of Data Requests into Evidence" by first-class mail, postage prepaid, to the following:

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