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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**

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## INTRODUCTION

The substantial evidence in this docket demonstrates that NorthWestern Energy (“NorthWestern”) prudently incurred costs resulting from the 2013 outage at Colstrip Unit 4. This evidence shows that NorthWestern’s decisions were consistent with a reasonable utility manager given what NorthWestern knew or should have known at the time of the outage. What did NorthWestern know? NorthWestern knew that:

- Outage insurance was not cost-effective over time;
- No other owner of Colstrip Unit 4 at the time of the outage had outage insurance;
- Very few insurance companies provided this one-off type of insurance given the risk involved for the insurance companies;
- Because of that risk, premiums were very expensive; and
- Rates paid by utility customers must be just and reasonable, and if insurance premiums were excessive, rates would not meet this standard.

Additional evidence in the docket substantiates this knowledge. Mr. Fred Lyon testified that public utilities do not purchase outage insurance or inquire about such insurance given that it is known to be uneconomical. Mr. Michael Barnes’ analysis also validates NorthWestern’s beliefs.

In attempt to negate the substantial evidence demonstrating prudence, intervenors make arguments suggesting NorthWestern should have known about certain problems – problems that it could manage by investigating outage insurance. Additionally, intervenors argue that NorthWestern had a claim against Siemens Energy Inc. (“Siemens”) and should have given a lawsuit more thought prior to asking for recovery in rates. Intervenors, however, do not support these arguments with any evidence. The Montana Public Service Commission (“Commission”) must reject unsubstantiated arguments because they cannot be the basis for a decision, and, more importantly, the evidence in the docket contradicts them.

First, there was no risk that NorthWestern should have managed. The evidence rejects those risks identified by the intervenors which they claim needed management. The evidence proves that

- Thinning Alkophos insulation was not a known risk in the industry;
- The operating history of Colstrip Unit 4 did not forewarn NorthWestern of a future outages concerning the generator core; and
- Operation of Colstrip Unit 4 by a merchant utility that is also an owner was not a risk.

Second, lack of a lawsuit against either the operator or original equipment manufacturer does not mean NorthWestern was imprudent. Nor was failure to think about the possibility of such a lawsuit prior to seeking recovery in rates an imprudent decision. The evidentiary record tells a different story than that portrayed by intervenors in this case. Contrary to the arguments of intervenors' attorneys, NorthWestern had no cause of action against Siemens. Even so, the Commission is without jurisdiction to decide whether NorthWestern had a viable claim against Siemens.

The overwhelming evidence in this case verifies NorthWestern's prudence. As such, the Commission must permit NorthWestern to recover costs associated with the 2013 outage at Colstrip Unit 4 in rates. To rule otherwise is contrary to the law.

### **ARGUMENT**

#### **I. A REASONABLE UTILITY MANAGER WOULD HAVE MADE THE SAME DECISIONS AS NORTHWESTERN UNDER THE CIRCUMSTANCES, AND THEREFORE, NORTHWESTERN PROPERLY MANAGED ITS RISK.**

Public utilities do not purchase outage insurance and do not inquire about the procurement of such insurance because they know it is not cost-effective. Mr. Lyon testified: "A telephone call or similar inquiry to obtain information already known to discuss insurance not usually purchased would have been elevating form over substance." Exhibit NWE-37, p. 16: 1-3.

NorthWestern knew this fact about outage insurance. Tr., pp. 259-260. This knowledge was consistent with the industry. NorthWestern's position on outage insurance was also consistent with that of the other owners of Colstrip Unit 4, who did not have outage insurance at the time of the outage. *See* Response to Data Requests MEIC-39 and MEIC-047(c) and (d). There is no evidence in the docket that NorthWestern did the opposite of the industry. Instead, the evidence proves that NorthWestern, by not procuring or even evaluating outage insurance, acted in the same manner as the industry.

The relevant law, as discussed in NorthWestern's Opening Post-Hearing Brief ("Opening Brief"), provides that prudence depends on what NorthWestern knew or should have known at the time. *See* Opening Brief, p. 14. Both intervenors agree with this statement regarding the law. MEIC/Sierra Club Brief, p. 11 ("Accordingly, in determining whether NorthWestern is entitled to recover its electricity supply costs, the Commission evaluates ... based on the 'information and circumstances that were known or should have been known at the time by NWE's management[.]'" (citing *In re NorthWestern*, Docket No. D2002.11.140, Order No. 6468c, ¶ 44 (July 3, 2003)) and MCC Brief, p. 12 ("The analysis of whether management acted prudently is viewed under the circumstances at the time the decision was made ...."). Like NorthWestern, the Montana Consumer Counsel ("MCC") cites to *New England Power Co.*, 31 FERC ¶ 61047 (1985) where the Federal Energy Regulatory Commission ("FERC") described prudence decisions as decisions "a reasonable utility management... would have made, in good faith, under the same circumstances, and at the relevant point in time." *Id.*, at ¶ 61084 (emphasis added). Because what NorthWestern did was consistent with what the industry does regarding outage insurance, NorthWestern's actions were that of a reasonable utility manager. Given what NorthWestern knew about such insurance, its actions were reasonable and prudent.

No party presented evidence that outage insurance was cost-effective or that public utilities evaluate such insurance. Tr., pp. 341-342 and 372. Instead of presenting such evidence to contest NorthWestern's evidence, intervenors reason that NorthWestern failed to manage the risk of an outage properly because utility management did not consider outage insurance prior to the outage. The Montana Environmental Information Center/Sierra Club ("MEIC/Sierra Club") focuses on the issues with the Alkophos insulation and the prior history of Colstrip Unit 4 as support for this position. MEIC/Sierra Club Brief, pp. 15-19. It also asserts that Mr. Lyon, one of NorthWestern's witnesses on outage insurance, is contradicted by his own testimony. *Id.*, p. 21-24. The MCC asserts that because the facility is operated by another entity NorthWestern should have evaluated outage insurance. MCC Brief, p. 13. Finally, the MEIC/Sierra Club attempts to equate this outage with the outage that occurred at Dave Gates Generating Station ("DGGS") in 2012. As discussed below, the Commission must reject these assertions. Intervenors' allegations, in addition to being refuted by the evidence, fail to recognize that outage insurance is not cost-effective, and thus, is not a reasonable manner of managing risk.

**A. THE INDUSTRY DOES NOT BELIEVE THAT ALKOPHOS INSULATION ISSUES WERE A RISK.**

As discussed in NorthWestern's Opening Brief, after the routine maintenance at Colstrip Unit 4 in May and June of 2013, the unit tripped offline due to melting in the core. PPL Montana hired Mr. Ronald Halpern and Mr. Robert Ward to determine the cause of this forced outage. Their investigation concluded that "[t]he cause of the failure was most likely inadequate interlaminar insulation permitting shorting between laminations caused during the prior outage by rotor insertion, skid pan damage or air gap baffle installation." Exhibit NWE-38, internal Exhibit\_\_ (RAH-4), p. 1.

MEIC/Sierra Club argues that NorthWestern should have known about potential issues with the interlaminar Alkophos insulation, and given this knowledge, NorthWestern should have

evaluated outage insurance to manage the risk. It claims that issues with the Alkophos insulation are “known in the industry.” MEIC/Sierra Club Brief, p. 16. MEIC/Sierra Club fails to present any evidence to support this argument.<sup>1</sup> More importantly, the evidence in this case directly contradicts this argument.<sup>2</sup> Mr. Halpern testified that issues with Alkophos insulation is “not an industry-known problem. Utilities don’t know about it. [Siemens/Westinghouse] didn’t send out an advisory [about it].” Tr., p. 180: 9-11. He also testified, “[h]undreds of generators have been running for many years with this [insulation] design ... CU4 ran for almost 30 years with this insulation without any problems.” Exhibit NWE-38, p. 10: 16-18. Furthermore, he testified that utilities, including NorthWestern, would certainly not have known about the issue. Tr., p. 161: 4-17.

In an attempt to overcome this evidence, which directly contradicts its argument, MEIC/Sierra Club claims that NorthWestern should have known about a possible issue with the insulation because of an argument made by an attorney for NorthWestern when refuting arguments advanced by the MCC in the docket regarding NorthWestern’s request to rate base Colstrip Unit 4. It asserts that in order to make this argument, “[p]resumably NorthWestern undertook some investigation” which investigation should have discovered the issue with the Alkophos insulation. MEIC/Sierra Club Brief, p. 17. First, again, MEIC/Sierra Club has not presented any evidence or pointed to any evidence in the record to support this argument. It is merely assuming that the Colstrip Unit 4 due diligence investigation could discover this issue. The Commission must ignore unsubstantiated assumptions, especially when the evidence confirms that utilities would not have known about this issue.

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<sup>1</sup> MEIC/Sierra Club’s witness, Mr. Schlissel never testified that issues with the Alkophos insulation are “known in the industry.”

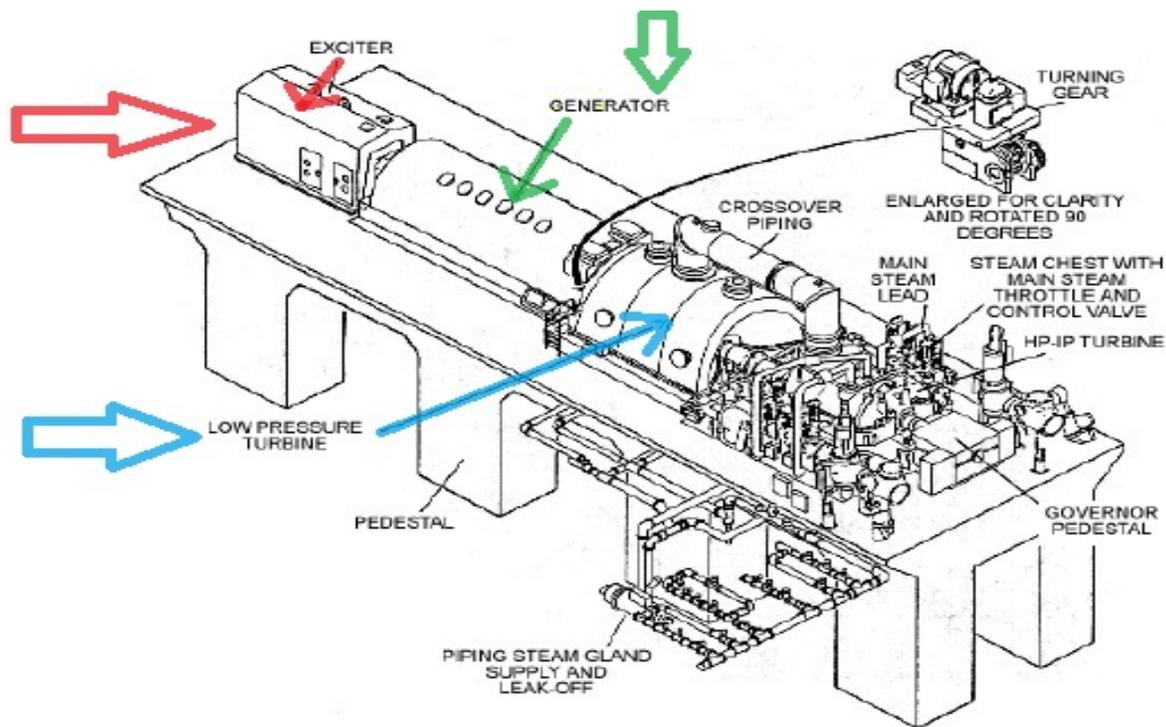
<sup>2</sup> Astonishingly, MEIC/Sierra Club cites to the very evidence that contradicts its position. *See* MEIC/Sierra Club, p. 17.

Even if a due diligence investigation had discovered that Alkophos insulation can be thin or non-existent in spots on the laminations, the evidence shows that a utility would likely not do anything differently because of this information. Mr. Halpern testified that Siemens/Westinghouse did not issue an advisory warning the industry about potential consequences concerning the Alkophos insulation. Tr., p. 180: 11. Mr. Halpern further testified that a generator with Alkophos insulation has never had a significant failure due to this issue. Tr., p. 181: 8-10. Mr. Halpern and Mr. Ward combined have over 100 years of experience working on generators. They believed that this failure was unforeseeable and had never happened before. Tr., p. 181: 11-21 and 195: 24 -196: 2. Thus, NorthWestern had no obligation to manage a risk of which neither it nor the industry was aware. The evidence establishes that NorthWestern did not know, and had no reason to know, that Alkophos insulation might pose a risk. Therefore, NorthWestern's actions and decisions in this case were prudent – its decisions were that of a reasonable utility manager.

**B. THE OPERATING HISTORY OF COLSTRIP UNIT 4 WOULD NOT LEAD A REASONABLE UTILITY MANAGER TO CONSIDER OUTAGE INSURANCE.**

MEIC/Sierra Club argues that preliminary statements made by insurance brokers show that the 2009 outage should have been an indicator that Colstrip Unit 4 had a “greater risk of future outages” and that “it is logical that damage to equipment that is the same age as the generator ... would give rise to questions about the risk of future damage to the generator itself.” MEIC/Sierra Club Brief, p. 19. The evidence contradicts these baseless assumptions. First, the evidence shows that damage to parts of the turbine do not give rise to the possibility that the generator would have issues in the future. Second, it shows that the preliminary statements from the insurance brokers were misunderstandings, which were cleared up prior to the issuance of any quote.

The prior Colstrip Unit 4 outages would not cause a reasonable utility manager to expect the 2013 outage. Prior to the 2013 Colstrip Unit 4 outage, the generator core had not had any significant issues. Mr. Ward testified, “[n]one of [the] prior outages would indicate a risk of a generator core failure like the one experienced in 2013. None of these incidents have any bearing on the core [Alkophos] insulation.” Exhibit NWE-39, p. 8: 1-3. He further testified that the 2009 outage concerned “turbine rotor problems [which] had nothing to do with the stator core or any other component of the generator.” *Id.*, p. 8: 6-7. For illustrative purposes, below is a basic diagram of a steam turbine generator similar to Colstrip Unit 4. The different colors in this diagram highlight the areas that were involved in three of the forced outages discussed in Mr. Ward’s testimony. Red indicates the area involved in the 1987 outage. Blue indicates the area involved in the 2009 outage. Green indicates the area involved in the 2013 outage. As seen in the diagram each area is mechanically connected, but “they’re different pieces of equipment, so one has nothing to do with issues at the other.” Tr., p. 285: 16-17.



The evidence shows that the 2013 outage involving the generator core “was rare...NorthWestern could not have foreseen or prevented it.” Exhibit NWE-38, p. 13: 13-15; *see also* Exhibit NWE-39, p. 9: 13-16 (“Core failures of Westinghouse generators have been very rare. There have only been a handful of catastrophic-type failures with large generators manufactured between 1976 and 1997, and none of these core failures were similar to the 2013 incident of the CU4.”).

The MEIC/Sierra Club also argues that the insurance company believed that future outages were more likely. The evidence, however, refutes this argument. The evidence demonstrates that the insurance brokers misunderstood the prior events at Colstrip Unit 4, and once this misunderstanding was corrected, the premium was lowered. In late June/early July of 2014, the insurance broker and underwriters, as is customary in that industry, were looking for more information regarding “the issues with the stator, and rotor, and the blade tree that cracked.” Response to Data Request MEIC-072c, Attachment 2304714. Mr. Barnes testified that the insurance broker’s statement to one of NorthWestern’s risk analysts “was a mischaracterization of the problems that had occurred previously.” Tr., p. 286: 19-20. He explained, “there was no issue with the stator and rotor. He’s asking about the 2009 outage, and that was an issue with a blade tree and had nothing to do with the generator. He didn’t know that.” Tr., p. 234: 3-6. Mr. Barnes went onto testify that once NorthWestern provided further information to correct this misunderstanding, the premium was reflective of this fact. Tr., p. 286: 21-22. In an email between Chad Wilde, one of NorthWestern’s risk analysts, and Donna Haeder, the director of that department, Mr. Wilde states that “[w]e have quotes for [redacted] Colstrip – Premium has dropped almost 50% due to – additional data we provided....” Response to Data Request MEIC-072c, Attachment 2304636.

Thus, the evidence clearly demonstrates that it is illogical and unreasonable to conclude that because one unrelated piece of equipment had an outage, that the generator would subsequently also have an outage. The evidence unambiguously establishes that the prior outages at Colstrip Unit 4 would not lead a reasonable utility manager to conclude that a catastrophic failure like the one in 2013 was likely to occur. Given that fact, there was no known risk to be managed. Thus, NorthWestern was prudent in not considering outage insurance prior to the 2013 outage.

**C. MR. LYON’S TESTIMONY DOES NOT PROVIDE THAT INDEPENDENT POWER PRODUCERS PROCURE OUTAGE INSURANCE BECAUSE IT IS COST-EFFECTIVE.**

Mr. Lyon, an attorney who has specialized in construction law and contracts with a focus, since 1977, on the electric utility industry and its procurement practices, testified that public utilities do not purchase outage insurance for fossil fuel facilities. Exhibit NWE-37, p. 14. Mr. Lyon contrasted public utilities’ election not to purchase outage insurance with independent power producers (“IPPs”) that own fossil fuel facilities. The point of this testimony was to show that there are situations where IPPs purchase outage insurance, but public utilities that own fossil fuel facilities do not. *Id.* Public utilities do not purchase outage insurance because they are regulated and, thus, are required to provide power at costs that result in just and reasonable rates. Tr., p. 106: 3-4.

The MEIC/Sierra Club attempts to discredit Mr. Lyon’s testimony with unsubstantiated claims and assumptions. First, it claims that IPPs procure outage insurance because they find it to be cost-effective. MEIC/Sierra Club Response Brief, p. 24. There is no evidence to support this claim. The only evidence in this docket regarding procurement of outage insurance by IPPs came from Mr. Lyon, who did not testify that IPPs purchase outage insurance because it is cost-effective. He testified: “[u]nlike investor-owned utilities, IPPs are more likely to be thinly

capitalized and also with less access to replacement power sources. Moreover, because they are unregulated, IPPs can incorporate the cost of insurance into their rates depending upon market conditions.” Exhibit NWE-37, p. 14. Nor did the intervenors’ witnesses in this case, Mr. David Schlissel on behalf of the MEIC/Sierra Club and Dr. John Wilson on behalf of the MCC, testify that IPPs purchase outage insurance because it is cost-effective. In fact, Mr. Schlissel and Dr. Wilson provided no testimony whatsoever regarding the cost-effectiveness of outage insurance irrespective of whether the entity procuring such insurance was a public utility or an IPP. *See* NorthWestern Opening Brief, p. 18.

MEIC/Sierra Club takes the position that outage insurance should be procured no matter the cost. It argues that insurance is meant “to protect against uncertain events, including events that have a low probability but may impose large costs if they do occur.” MEIC/Sierra Club, p. 16. There is no mention of costs for outage insurance in its argument. It compares outage insurance to that of a homeowner who purchases homeowner’s insurance. This analogy fails to recognize that insurance companies who offer homeowner’s insurance are able to keep premiums low because many other homeowners purchase such insurance, which allows the insurance company to spread its risk and make a profit. As Mr. Barnes testified, outage insurance is “purely a risk deal.” Tr., p. 248: 6. Not many insurance companies offer outage insurance and those that do require sizable premiums because there is not a large pool of entities paying similar premiums for such “one-off insurance.” Tr., pp. 247: 4 – 248: 11. If homeowner’s insurance were one-off insurance as is outage insurance, one can only surmise that the premiums would be higher and homeowners would be less likely to purchase it.

Next, MEIC/Sierra Club argues that IPPs are more likely to purchase outage insurance because regulated utilities are “confident” that “captive ratepayers” will be forced to pay for

outages. MEIC/Sierra Club Response Brief, p. 22. First, this argument is clearly false given the law that governs this very docket. The law permits public utilities to adjust the rates its customers pay if, and only if, electricity costs incurred by the utility are prudent. Utilities would have cause to be “confident” if they were guaranteed an automatic pass through of costs to customers. That is not the case here and so it is unreasonable to assert that utilities like NorthWestern are “confident” regulatory commissions will force customers to pay these costs. Second, there is no evidence to support this contention. No party presented evidence that public utilities know that their customers will be forced to pay and so they do not purchase outage insurance. Instead, the evidence demonstrates the exact opposite. The evidence shows that public utilities do not purchase outage insurance because they know that it “is not a cost-effective mechanism likely to protect the interests of their ratepayers in low-cost power.” Tr., p. 106: 2-4. If outage insurance is not cost-effective, public utilities will not be able to pass the cost of it on to their customers.

Along similar lines, MEIC/Sierra Club also suggests that Mr. Lyon “ignores that regulated utilities are generally better capitalized because they are required to be and have a stable sources [sic] of funding from captive ratepayers.” MEIC/Sierra Club Response Brief, p. 22. This point is irrelevant. Again, Mr. Lyon’s testimony regarding IPPs was meant to show that some owners of power facilities do purchase outage insurance, but that public utilities do not because they “have a different risk assessment” than IPPs and therefore cannot as easily pass on the costs to their customers. Tr., p. 105: 24-25. The evidence shows that public utilities do not purchase outage insurance because within the industry, utilities know that it is not cost-effective, and since public utilities are regulated, they are required to provide power to customers at just and reasonable rates. If costs associated with providing power are excessive, rates are not just

and reasonable and the costs cannot be passed on to customers. IPPs face the exact opposite situation. They are unregulated and do not have an obligation to serve like a public utility. Thus, they are not concerned with whether the power they procure is at the lowest cost, cost-effective, or a reasonable cost. An IPP with a willing buyer of its power incorporates the cost of any such insurance into the price. If a buyer is not willing to pay a price that incorporates the full cost of outage insurance, the IPP either walks away from the deal or agrees to receive a lower profit from the sale of the power. Tr., pp. 105: 16 – 106: 4.

Finally, MEIC/Sierra Club suggests that Mr. Lyon’s testimony about his participation in negotiations with risk managers regarding insurance options is hearsay<sup>3</sup> and it focuses on the fact that he only had these types of conversations occasionally. MEIC/Sierra Club Response Brief, p. 23. What the MEIC/Sierra Club ignores is that these conversations occurred only “occasionally” because of the widespread knowledge that inquiring about outage insurance is a meaningless endeavor. The evidence in the docket demonstrates that since public utilities know that outage insurance is not cost-effective, there is no need to evaluate the procurement of such insurance.

All that the intervenors have provided in this case regarding outage insurance and its cost-effectiveness for public utilities is argument from their attorneys. They did not provide any evidence to support their conjecture, and an attorney’s argument is not evidence. *Delaware v. K-Decorators, Inc.*, 1999 MT 13, ¶ 51, 293 Mont. 97, 973 P.2d 818 (“Statements of counsel...are not evidence.”); *accord, McKenzie v. Scheeler*, 285 Mont. 500, 508, 949 P.2d 1168, 1173 (1991). As such, the Commission cannot consider this or any other unsubstantiated argument when making its decision in this case. The Commission’s decision “must be based exclusively on the evidence.” § 2-4-623(2), MCA. The Commission must reject MEIC/Sierra Club’s attempt to spin

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<sup>3</sup> For the sake of argument, even if this testimony was hearsay, no party objected to its admission. As such, it is evidence in the record that the Commission can consider when making its decision.

the evidence to discredit Mr. Lyon's testimony. Its arguments are simply efforts to confuse the evidence that Mr. Lyon provided in this docket.

**D. THERE IS NO EVIDENCE THAT COLSTRIP UNIT 4 WAS IMPROPERLY MANAGED BECAUSE NORTHWESTERN WAS NOT THE OPERATOR.**

The MCC alleges that NorthWestern should have considered outage insurance prior to the 2013 outage because it was not the operator of the plant. MCC Brief, p. 13. It equates this arrangement to those identified by Mr. Lyon concerning IPPs and the reasons why they purchase outage insurance, i.e., condition of their financing and inadequate capital typically devoted to operating and maintaining a facility. *Id.* Interestingly, the MCC then goes on to argue that Mr. Lyon's testimony establishes that NorthWestern's ownership of Colstrip Unit 4 "has the same risk profile as an investor owned utility." *Id.* This nonsensical argument does not establish that NorthWestern failed to manage a risk properly. There is no evidence to support the MCC's position, and the evidence, in fact, demonstrates the opposite.

First, the uncontroverted evidence establishes that the operator of the plant did not improperly manage the facility. The Root Cause Analysis ("RCA"),<sup>4</sup> attached to the Prefiled Rebuttal Testimony of Mr. Halpern, provides that

PPL did everything according to standard industry practice such as hiring the OEM (Siemens) to perform the maintenance, performing El Cid testing on the core, operating their unit according to industry practice, (since **there was no indication of mis-operation** [sic]), and protecting the unit with adequate relay protection. Nothing they did or could have done, could have prevented this failure.

*See* Exhibit NWE-38, internal Exhibit\_\_(RAH-4) – public version (emphasis added).

Second, PPL Montana, now Talen Energy ("Talen"), must answer to the other owners regarding the operation of the plant, which includes the establishment of a budget. The

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<sup>4</sup> The MCC claims that NorthWestern did not read the RCA. MCC Brief, p. 12. The evidence refutes this claim. Mr. Barnes testimony indicates that he read the RCA. Tr., p. 205: 15 – 207: 15.

Ownership and Operating Agreement requires the operator to “construct, operate, and maintain” the facility “in accordance with Prudent Utility Practice” as defined in the agreement. *See* Response to Data Request MCC-019, CD Attachment, p. 7. Thus, although Talen is a merchant utility, i.e., an IPP, all other owners of Colstrip Unit 4 are investor-owned utilities. They have significant self-interest at stake to ensure that the operator properly manages the facility because they rely on the plant’s prudent operation to provide power to their customers. As part of this interest, they participate in the budgeting process for the plant. Tr., p. 271: 9-12. Given these contractual obligations and the relationships with the other owners, Talen could not unilaterally decide to devote fewer resources to the management of the plant. Therefore, that situation is not similar to the IPPs discussed by Mr. Lyon.

Finally, there is no evidence that facilities operated by a merchant utility are so inherently more risky so that a reasonable utility manager would consider outage insurance. There is no evidence to substantiate the MCC’s jump in logic to make this assertion. No basis for why an IPP might purchase outage insurance provides support that NorthWestern failed to manage risk properly as suggested by the MCC. As discussed extensively in both this Brief as well as in the Opening Brief, investor-owned utilities, like NorthWestern, know that outage insurance is not cost-effective and so they do not purchase it. No evidence in this docket demonstrates that NorthWestern should have been aware of a risk that it then improperly managed because it did not evaluate outage insurance – insurance that it knew was not economical. Given this fact, NorthWestern’s actions and decisions regarding the 2013 outage were prudent, and therefore, the Commission must allow the costs associated with providing replacement power during the outage to be recovered in rates.

**E. THE COMMISSION’S FINDINGS REGARDING THE DGGS OUTAGE ARE INAPPLICABLE TO THE FACTS OF THIS CASE.**

MEIC/Sierra Club endeavors to associate the outage at Colstrip Unit 4 with the outage at DGGS in 2012. It argues that because of the “poor operating history” and “inability to seek consequential damages[,]” the outage at Colstrip Unit 4 is similar to the DGGS outage.

MEIC/Sierra Club Brief, p. 20. These outages are not similar except for the fact that both involved a contractual provision excluding consequential damages, which the evidence shows is customary in the industry. *See* Opening Brief, p. 7. In Docket No. D2012.5.49, the Commission concluded that NorthWestern could not recover replacement regulation costs associated with the DGGS outage because NorthWestern failed to manage risk properly by not considering outage insurance prior to the outage in light of the fact that DGGS was “a one-of-a-kind power plant” and therefore NorthWestern was imprudent. Order No. 7219h, ¶¶ 37-39, 115.<sup>5</sup>

The DGGS and Colstrip Unit 4 outages are not comparable in this regard. Colstrip Unit 4 is not a “one-of-a-kind plant.” It is a coal-fired facility comparable to many other facilities in the United States and has been in service since 1985. Exhibit NWE-38, internal Exhibit\_\_ (RAH-4), p. 3. The MCC’s witness, Dr. Wilson, agrees that Colstrip Unit 4 and DGGS are not similar plants. Tr., p. 351: 21-22. There is no evidence that the facts involved in the DGGS outage should have provided NorthWestern with the “situational awareness” alleged by MEIC/Sierra Club. Since Colstrip Unit 4 was not a “one-of-a-kind plant,” there is no evidence to suggest that NorthWestern knew or should have known that a plant that had operated “for almost 30 years with this [design] without any problems” would require a reasonable utility manager to inquire about outage insurance to properly manage risk. Exhibit NWE-38, p. 10: 18.

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<sup>5</sup> NorthWestern has appealed this decision. An active appeal is currently before the Montana Supreme Court. Docket No. DA-15-0612.

**F. MR. BARNES' ANALYSIS OF OUTAGE INSURANCE, WHICH ANALYSIS IS APPROPRIATE IN THIS CASE, SHOWS THAT CUSTOMERS WOULD NOT HAVE BENEFITED FROM ITS PURCHASE.**

MEIC/Sierra Club argues that Mr. Barnes' analysis of the outage insurance quotes received by NorthWestern "demonstrates that ratepayers would have benefited from outage insurance." MEIC/Sierra Club Brief, p. 25. It asserts that any year prior to 2009 should not be considered in such analysis and thus the appropriate period is 2009 to 2014. *Id.* This argument fails to recognize that the facts of this case would not have led a reasonable utility manager to purchase or consider outage insurance in 2009. As discussed extensively above, NorthWestern did not know nor should it have known about any risk or had any reason to consider outage insurance in 2009 when it asked the Commission to rate base Colstrip Unit 4. *Supra*, pp. 5-10. Given that fact, 2009 would not be an appropriate year to start any analysis.

If, for the sake of argument, the outage in the summer of 2009 should have warned NorthWestern of future risks, and if outage insurance was known to be economical and therefore should have been considered to manage risk appropriately, any subsequent purchase of insurance would not have occurred until the next calendar year. Tr., p. 249: 7-8 ("They [insurance companies] offer outage insurance for a calendar year."). Under that hypothetical scenario, the appropriate year to start any analysis would have been 2010 and evidence demonstrates that outage insurance would not have benefitted NorthWestern's customers because the premiums would have exceeded any payments received due to outages. Exhibit NWE-40, internal Exhibit\_\_(MJB-2).

Both intervenors assert that Mr. Barnes' analysis is an inappropriate *post-hoc* analysis of outage insurance. *See* MEIC/Sierra Club Brief, p. 25 and MCC Brief, p. 12. NorthWestern agrees that it did this analysis after the 2013 outage. However, NorthWestern provided it in this case to demonstrate that NorthWestern's prior beliefs regarding outage insurance were correct. The

Commission determines the prudence of a utility's actions based on what the utility knew or should have been known at the time the costs were incurred. *See* Opening Brief, pp. 13-14 (citing Commission Order No. 6921c, ¶ 100, Consolidated Docket Nos. D2008.5.45/D2009.5.62 (May 20, 2010)). The uncontested evidence establishes that when the 2013 outage occurred, NorthWestern knew the following about outage insurance:

1. No other owner of Colstrip Unit 4 had such insurance;
2. Outage insurance was widely understood not to be a cost-effective product; and
3. That few insurance companies offered the insurance because of the risk that they would lose money and premiums were substantial in light of that risk.

*See supra*, pp. 3-4 and 11. NorthWestern's knowledge concerning outage insurance is confirmed by Mr. Lyon's testimony, i.e., public utilities do not purchase outage insurance for fossil fuel facilities and they do not inquire about it because it is known not to be cost-effective. *Supra*, pp. 10-14. Like Mr. Lyon's testimony, Mr. Barnes' analysis also confirms that NorthWestern's understanding of outage insurance at the time the outage occurred was accurate, and its approach was reasonable and appropriate.

## **II. THE ABSENCE OF A LAWSUIT AGAINST TALEN OR SIEMENS DOES NOT ESTABLISH NORTHWESTERN WAS IMPRUDENT**

Both the MEIC/Sierra Club and the MCC continue to argue in their post hearing briefs that the Commission should hold that the replacement power costs were imprudently incurred because NorthWestern did not pursue litigation against Talen, the operator of Colstrip Unit 4, or Siemens, who did the maintenance work on Colstrip Unit 4 immediately before the plant outage. Their arguments are devoid of factual content, logic, and legal authority. In effect, they argue that the Commission can avoid its statutory duty to reflect NorthWestern's electric power supply costs in rates through a Commission authored determination that NorthWestern must first pursue litigation against Talen or Siemens for damages. Alternatively, they argue that the Commission

should deem NorthWestern imprudent because it did not think enough about suing Talen or Siemens before making a rate filing required by Commission order and practice.

**A. THE EVIDENTIARY RECORD.**

The arguments of the MEIC/Sierra Club and MCC have no real factual support in the record. The outage at Colstrip Unit 4 was an extremely unusual event, an unprecedented, one-of-a-kind, occurrence that had never happened in the industry:

This particular case on Colstrip has never happened before. Damage to the core happens infrequently. Of the thousands of generators out there, core damage is a very infrequent occurrence. Combined with the interlaminar insulation problem, it's never happened before.

Tr., pp. 168: 22 – 169: 2. The event was so unusual that Mr. Halpern, one of the two authors of the RCA for the outage at Colstrip Unit 4, testified at hearing:

Q. (Gerhart) Well, let me phrase it this way: You have a conclusion to the Root Cause Analysis which says that, in your opinion, PPL could not have done anything to prevent the outage, correct?

A. (Halpern) That's right. The same applies to Siemens, by the way.

Q. So was it - - - that was going to be my question. So was your intent in that conclusion to cover both PPL and Siemens?

A. Yes.

Tr., p. 145: 1-10.

Experienced and capable lawyers know that the fact something bad happened does not mean somebody is liable for damages and a lawsuit should be filed. A belief to the contrary essentially equates the civil justice system to an extortion racket. There were numerous sophisticated parties impacted by the forced outage at Colstrip Unit 4: six joint owners and FM Global, the casualty insurer that provided property insurance for the unit. Not one of them filed a lawsuit over the outage. Exhibit NWE-40, p. 4. Unlike the joint owners of Colstrip Unit 4, FM Global was not contractually precluded from seeking recovery against Siemens, as the \$26.5 million repair bill for the unit was direct damages, not consequential damages.

There was only one experienced litigator providing expert testimony to the Commission in this case – Mr. Jim Goetz. He unequivocally testified:

It is my opinion that no such case [a damages action against Siemens] should be filed and, if filed, it would be unsuccessful....Thus, the question of whether, and to what extent, NorthWestern previously looked at seeking a recovery from Siemens is hardly material. There is (and was) no viable claim.

Exhibit NWE-36, pp. 7-9.

**B. THE MOST RECENT POSITIONS OF THE MEIC/SIERRA CLUB AND THE MCC ARE LITTLE MORE THAN UNSUPPORTED ARGUMENTS OF LEGAL COUNSEL.**

Both MEIC/Sierra Club's witness Mr. Schlissel and MCC's witness Dr. Wilson committed the cardinal sins of offering opinions on subjects they knew next to nothing about, and without knowledge of critical facts relative to the opinions they offered. Mr. Schlissel, although he has a law degree, is a consultant, not a litigator. Tr., p. 359-64. Dr. Wilson is an economist. The two of them, after looking at the RCA, opined that NorthWestern should consider litigation against Siemens before including the replacement power costs in the electric supply cost tracking adjustment. Dr. Wilson went further and suggested that NorthWestern should also consider litigation against the plant operator, Talen. They offered their opinions without knowing that Paragraph 20 of the Ownership and Operation Agreement for Colstrip Units 3 and 4 releases the plant operator (Talen) from liability for consequential damages, such as replacement power costs. They offered their opinions without knowing that the maintenance work done by Siemens on Colstrip Unit 4 was performed under a contract that similarly excluded claims against Siemens for consequential damages. They did not even know that document existed when they offered their opinions. Moreover, their use of the RCA to support their opinions was so at odds with the information actually contained in that analysis that the two authors of the RCA, Mr. Halpern and Mr. Ward, agreed to testify for NorthWestern in this case, even though they had no prior connection to NorthWestern. Tr., p. 145.

When NorthWestern filed its rebuttal case, the merits of the Intervenors' arguments that NorthWestern should consider litigation against Talen or Siemens evaporated. Recognizing the shortcomings of their own witnesses, legal counsel for MEIC/Sierra Club and the MCC have used their post hearing briefs to create new theories of imprudence, none supported by record evidence. For example, the MCC now argues that the Ownership and Operating Agreement for Colstrip Unit 3 and 4 is in and of itself imprudent. MCC Brief, pp. 5-10. MEIC/Sierra Club now argues it was not really saying that NorthWestern should sue Siemens, but it was imprudent for NorthWestern not to at least ask Siemens for money. MEIC/Sierra Club Brief, pp. 29-30. Both the MEIC/Sierra Club and the MCC now argue in their briefs that NorthWestern has tort claims against Talen and Siemens. MEIC/Sierra Club Brief, p. 28-29; MCC Brief, p. 9-10

The unsupported arguments of legal counsel in post-hearing briefs are not a permissible basis upon which the Commission can render a decision in this case. *McKenzie v. Scheeler*, 285 Mont. 500, 508, 949 P. 2d. 1168, 1173 (1991). The Commission should recognize them for what they are: belated attempts to cover for the inadequacies of their own witnesses.

**C. THE COMMISSION CANNOT DETERMINE THAT NORTHWESTERN HAD A VIABLE TORT CLAIM AGAINST SIEMENS.**

Citing *Jim's Excavating Service v. HKM Associates*, 265 Mont. 494, 504, 878 P.2d. 248 (2010), the MCC argues:

Given this clear precedent in Montana, NWE was obligated to protect its ratepayers and seek compensation from Siemens as the party responsible for the outage rather than turning to its ratepayers first.

MCC Brief, p. 10. Legal counsel for the MCC is now arguing in its post-hearing brief that NorthWestern was obligated to sue Siemens. The MCC's expert witness, Dr. Wilson, expressly disavowed he was actually advocating litigation in this case. Tr., p. 346: 13-22. Moreover, the MEIC/Sierra Club, in its post-hearing brief, argued: "NorthWestern creates a straw man in

claiming that Intervenors argue that it was imprudent for the company ‘not to sue Siemens for the cost of replacement power.’” MEIC/Sierra Club Brief, p. 27.

*Jim’s Excavating Service* does not hold that NorthWestern has a tort claim against Siemens. The case held that a lack of contractual privity between parties does not bar an independent tort claim – if one exists. *Jim’s Excavating Service*, 265 Mont. at 254. The complex determination of whether a compensable tort has occurred is one squarely vested in the judicial branch of government. The Legislature has expressly prohibited the Commission from trying to exercise judicial powers – such as determining whether a compensable tort has occurred. § 69-3-103(1), MCA.

Moreover, in this case, Siemens performed the work under a contract that expressly excluded liability for consequential damages under either a breach of contract, or an alleged tort:

**BOTH PARTIES EXPRESSLY AGREE THAT NEITHER PARTY NOR ITS SUPPLIERS WILL UNDER ANY CIRCUMSTANCE BE LIABLE UNDER ANY THEORY OF RECOVERY, WHETHER BASED IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), UNDER WARRANTY, OR OTHERWISE, FOR: ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL LOSS OR DAMAGE WHATSOEVER;**

Exhibit NWE-36, internal Exhibit\_\_ (JHG-1) (emphasis supplied). This provision of the contract acted as a release of Siemens from tort liability. The MCC vigorously argues in another part of its post-hearing brief that Talen was acting as the agent of NorthWestern. MCC Brief, p. 9. That is true, and as NorthWestern’s agent, Talen’s release of Siemens from tort liability was as binding upon NorthWestern as it was upon Talen. That is one of many reasons why Mr. Goetz testified, under oath: “There is (and was) no viable claim [against Siemens].” Exhibit NWE-36, p. 9: 2-3.

**D. THERE IS NEITHER LOGIC NOR LEGAL SUPPORT FOR THE ARGUMENT OF THE MEIC/SIERRA CLUB AND THE MCC.**

Nothing NorthWestern did, or did not do, caused the forced outage at Colstrip Unit 4. Both the MEIC/Sierra Club and the MCC have gone to great lengths in this proceeding to lay blame for the forced outage upon the routine maintenance work performed on the unit by Siemens. NorthWestern did not select Siemens to do the maintenance work. It did not have the power to do so, as the Ownership and Operating Agreement for Colstrip Units 3 and 4 allocated that responsibility to Talen, the plant operator. As noted by the MCC in its brief, the Ownership and Operating Agreement was executed in 1981, four years before Colstrip Unit 4 was constructed, and more than twenty years before NorthWestern acquired its fractional interest in Colstrip Unit 4. MCC Brief, p. 5. It is literally impossible for the MEIC/Sierra Club and the MCC to find a NorthWestern act of commission, or omission, which preceded the forced outage at Colstrip Unit 4, and can be logically deemed an imprudent act rendering the replacement power costs unrecoverable under § 69-8-210, MCA.

Once the forced outage at Colstrip Unit 4 occurred, NorthWestern was obligated as a public utility to purchase replacement power to meet the needs of its customers. It could not pay for that power in the market place with a promise to get the money from Talen or Siemens. Predictably and understandably, the market demanded real money in return for supplying real replacement power. MEIC/Sierra Club and the MCC cannot seriously contend it was imprudent for NorthWestern to pay real money for real replacement power after the forced outage occurred. Instead, the MEIC/Sierra Club and the MCC unreasonably contend those payments later became imprudent because NorthWestern did not later sue, or think enough about suing, Talen or Siemens. Their arguments defy logic. The existence or non-existence of possible legal claims

against Talen or Siemens does not determine if the replacement power costs were prudently incurred electricity supply costs.

The MEIC/Sierra Club and the MCC are making an equity argument – it would be unfair for the Commission to follow the law in this case because NorthWestern did not file a lawsuit against Talen or Siemens. The Commission’s duty under § 69-8-210(1), MCA, to allow NorthWestern to recover its prudently incurred electricity supply costs, is not conditioned upon the MEIC/Sierra Club’s or the MCC’s view of the equities of the case. Their argument that NorthWestern was imprudent because it did not sue Talen or Siemens, or think enough about suing Talen or Siemens, defies logic, and has no legal support.

**E. NORTHWESTERN’S ACTIONS MEET THE PRUDENCE STANDARD SUGGESTED BY THE MCC.**

The MCC argues that the standard for measuring the prudence of NorthWestern’s actions, after the forced outage at Colstrip Unit 4 occurred, should be that of a capable utility executive in a similar situation. MCC Brief, p. 8. NorthWestern met that standard in this case. There are six joint owners of Colstrip Unit 4; five of them regulated public utilities. Not one of them has filed suit against Talen or Siemens to recover their replacement power costs. Ex. NWE-40, p. 4.

**III. NORTHWESTERN’S APPLICATIONS IN THIS MATTER ARE CONSISTENT WITH THE LAW.**

As requested by the Commission staff, NorthWestern addressed certain legal issues in its Opening Brief, including the issue of which party has the burden of proof in electricity supply tracker dockets.<sup>6</sup> The law on this matter is clear: Prudence determinations concerning costs

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<sup>6</sup> Review of the MEIC/Sierra Club’s Brief on the legal issues shows that it has misconstrued NorthWestern’s argument regarding prudence and the burden of proof. It claims that NorthWestern’s argument regarding its estimate of replacement power costs being prudently incurred because no party challenged the estimate “would lead to absurd results” because no party could examine the utility’s actions that resulted in the costs. MEIC/Sierra Club Brief, p. 10. NorthWestern’s argument never proposed that the Commission had to approve costs without reviewing the filing. Instead, the parties in such cases are free to review the filing and ask discovery regarding what caused the

incurred by a utility do not require the utility to establish prudence in its initial filing. Costs incurred by the utility are presumed prudent until a party challenges that presumption, which then requires the utility to present sufficient evidence to overcome the challenge. The MCC concedes that utilities are entitled to such a presumption. MCC Brief, p. 6.

The MEIC/Sierra Club does not agree with this legal presumption. In an attempt to refute NorthWestern's arguments, it makes a conclusory statement that the United States Supreme Court case of *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U.S. 63, 72, 55 S.Ct. 316 (1935), cited to by NorthWestern in support of this position, is not controlling in this case. MEIC/Sierra Club Brief, p. 12. This premise is flawed. United States Supreme Court decisions are binding authority on the states when such decisions are interpreting federal law. *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 220-21, 51 S.Ct. 453 (1931). In *West Ohio Gas Co.*, the United States Supreme Court reviewed a state commission decision that was based on state law but the utility alleged the decision was a violation of the Fourteenth Amendment. *West Ohio Gas*, 294 U.S. at 67. Fundamental to the United States Supreme Court's decision in *West Ohio Gas* is its decision in *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 43 S.Ct. 675 (1923). In *Bluefield Waterworks*, the United States Supreme Court held that rates that do not yield a reasonable return on the property devoted to public service are a violation of the Fourteenth Amendment of the United States Constitution. *Bluefield Waterworks*, 262 U.S. at 692-93. Thus, arguably rates are not just and reasonable if costs are imprudent. Similarly, the Commission has cited to *Bluefield Waterworks*

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costs that the utility is requesting to be recovered. If a party then files testimony challenging the prudence of that request, then NorthWestern must rebut with sufficient evidence to show that the costs were prudently incurred. In this case, no party challenged the estimate NorthWestern derived for the amount of replacement power it needed to purchase because of the 2013 outage. *See* NorthWestern's Opening Brief, pp. 16-17. Given that fact, the estimate is presumed prudent. Unlike the estimate, the intervenors did challenge the events that led up to the outage. Because of that challenge, NorthWestern appropriately responded with evidence to rebut that challenge.

as support of its decisions to approve rates as fair and reasonable. Therefore, even though there is a state law requiring rates charged by utilities to be just and reasonable, federal law requires that such rates not violate the Fourteenth Amendment. *West Ohio Gas* stands for that exact proposition and therefore is applicable to the facts of this case.

MEIC/Sierra Club also asserts that Commission administrative rules make clear that utilities have the initial burden of proof. MEIC/Sierra Club Brief, p. 11 (citing ARM 38.5.182, 38.5.8213, 38.5.8220). The Commission administrative rules fail however to address the presumption issue. In support of its argument, the MEIC/Sierra Club points to rate increase proceedings pursuant to the Federal Power Act (“FPA”) before FERC. MEIC/Sierra Club Brief, p. 12. This argument fails to recognize that even though the FPA imposes such a burden on the utility, there is still 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).

Even more detrimental to the MEIC/Sierra Club’s argument is the fact that the FERC administrative rules for such proceedings are similar to the Commission’s rules regarding the burden of proof and FERC nevertheless still applies the presumption previously discussed. 18 C.F.R. § 35.13(e)(3) provides that

[a]ny utility that files a rate increase shall be prepared to go forward at a hearing on reasonable notice on the data submitted under this section, **to sustain the burden of proof** under the Federal Power Act of establishing that the rate increase is just and reasonable and not unduly discriminatory or preferential or otherwise unlawful within the meaning of the Act.

(Emphasis added). FERC has applied the presumption notwithstanding the rule to ensure that the cases are “manageable.” *Iroquois Gas Transmission System, L.P.*, 87 FERC ¶ 61,295, 62,168 (1999).

NorthWestern has the burden of proof if and only if certain costs are sufficiently challenged by a party. NorthWestern's Applications in this case were sufficient and contained the appropriate amount of information. Notwithstanding NorthWestern's compliance, the MEIC/Sierra Club, which argues non-compliance, asks the Commission to penalize NorthWestern for non-compliance and causing delays. MEIC/Sierra Club Brief, pp. 30-33.<sup>7</sup> It claims that the Commission should reduce NorthWestern's recovery in this case or assess a monetary fine on NorthWestern. *Id.*, at p. 33. The MEIC/Sierra Club request has no basis in fact or law. First, as discussed above as well as in the Opening Brief, NorthWestern's Applications were not deficient given the applicable law. However, if such Applications were believed to be deficient as alleged, the Commission must reject the filings within 30 days. ARM 38.5.184. It did not do this. Nor did any party claim that NorthWestern's filings were deficient prior to the hearing. The MEIC/Sierra Club only now raises this issue because of the Commission's staff requests after the conclusion of the hearing.<sup>8</sup> No penalty is warranted in this case.

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<sup>7</sup> MEIC/Sierra Club claims that NorthWestern caused costly delays in this proceeding because Siemens had to intervene to seek a protective order for the RCA. MEIC/Sierra Club Brief, p. 32. NorthWestern does not dispute that Siemens' intervention caused delays in the proceeding, but does dispute that such delays resulted in substantial costs for the parties. Also, since the proceeding was delayed, the intervenors were entitled to additional discovery on all issues just not the RCA. For what it is worth, NorthWestern had a legal obligation to not publicly disclose Siemens' information; however, NorthWestern was not in a position to seek a protective order on Siemens' behalf. NorthWestern repeatedly contacted Siemens' counsel given the pending Commission proceeding. NorthWestern could not rightfully or legally breach a contract simply to keep a Commission proceeding on track especially when there is no statutory deadline in which the Commission must act.

<sup>8</sup> On November 3, 2015, the Commission staff emailed the attorneys of record in this docket and requested that the parties consider addressing certain legal issues in their post-hearing briefs. MEIC/Sierra Club's Brief at page 18 has briefly discussed an issue that NorthWestern opposes. Commission staff asked the parties to address the following issue: "Whether NWE has met its burden of proof in general, particularly with respect to the lack of a witness from the operator of the Colstrip facility, and the lack of an expert on interlaminar insulation." First, based on a review of the hearing transcript, this issue appears to be an issue improperly raised by a Commissioner, not Commission staff. Tr., pp. 195, 272 and 280. Second, as phrased, this request does not present a legal issue, but requires a factual determination and also wrongly assumes that NorthWestern has the initial burden of proof. Finally, this issue could have been raised by a party as an issue, but no party did. Similarly, the Commission could have used the additional issue procedure to raise this as an issue, but it did not. For the Commission staff, who is not a party to these proceedings, to raise an issue not raised by a party after a hearing is inappropriate and against the law. § 2-4-612, MCA; *see also* Montana Constitution, Article II, Section 17.

If contrary to the law, the Commission determines that NorthWestern's Applications were deficient and it should have produced certain information in its initial filing, there is no legal basis to penalize NorthWestern. The Legislature created the Commission. § 69-1-102, MCA. Thus, the Commission has only those powers specifically conferred upon it by the Legislature. *Montana Power Co. v. Public Service Commission*, 206 Mont. 359, 376, 671 P.2d 604, 613 (1983). The Commission cannot exercise authority not provided to it by statute. *Great Northern Utilities Co. v. Public Service Commission*, 88 Mont. 180, 203, 293 P. 294, 298 (1930). Section 69-3-209, MCA, provides that a utility may be assessed a penalty only in certain circumstances. None of the circumstances applies to this case. NorthWestern has not violated any provision of Title 69, Chapter 3.<sup>9</sup> It did not engage in a prohibited act nor fail or refuse to perform a duty, or fail to place in operation a rate. Finally, and most importantly, NorthWestern has not refused to obey any lawful requirement or order. Again, NorthWestern's Applications are consistent with the law. MEIC/Sierra Club's allegation that the Commission has previously cautioned NorthWestern for incomplete applications is not applicable to this case. MEIC/Sierra Club Brief, pp. 31-32. The order cited to by the MEIC/Sierra Club had to do with a request to rate base an electricity supply asset. That case did not involve a prudency determination, as is the case here. For these reasons, the Commission must deny the request to fine NorthWestern because such a fine is not warranted in this case and the Commission lacks authority without court authorization.

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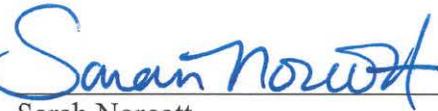
<sup>9</sup> It should be noted that if the Commission did find that NorthWestern had violated the law, the Commission would need to present such arguments to a district court and report all violations to the attorney general. See § 69-3-110(1), MCA.

## CONCLUSION

The intervenors are asking the Commission to ignore substantial evidence in this case despite failing to produce any evidence to support their arguments. The Commission must reject this request. NorthWestern, knowing what it did, did not purchase outage insurance for Colstrip Unit 4 nor did it need to evaluate such insurance. NorthWestern did not need to, nor could it, sue another party before asking for recovery. NorthWestern's decisions were prudent. Substantial evidence supports this conclusion. For these reasons as well as those discussed in this Brief and NorthWestern's Opening Brief, the Commission must issue a final order approving NorthWestern's Applications in this case.

Respectfully submitted this 15<sup>th</sup> day of January 2016.

NORTHWESTERN ENERGY

By:   
Sarah Norcott

Attorney for NorthWestern Energy

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of NorthWestern Energy's Reply Brief 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: January 15, 2016



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