

SARAH NORCOTT
NorthWestern Energy
208 N. Montana, Suite 205
Helena, Montana 59601
Tel. (406) 443-8996
Fax (406) 443-8979
sarah.norcott@northwestern.com

JOHN ALKE
NorthWestern Energy
208 N. Montana, Suite 205
Helena, Montana 59601
Tel. (406) 444-8183
Fax (406) 443-8979
john.alke@northwestern.com

Attorneys for NorthWestern Energy

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Petition of) REGULATORY DIVISION
Greycliff Wind Prime, LLC to Set Contract)
Terms and Conditions for a Qualifying) DOCKET NO. D2015.8.64
Small Power Production Facility)

**NorthWestern Energy’s Reply in Support of its Objections to
Data Requests Served on November 25, 2015**

NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern”) provides this reply in support of its Objections to Data Requests Served on November 25, 2015 (“Objections”). On December 30, 2015, Greycliff Wind Prime, LLC (“Greycliff”) filed a Response to NorthWestern’s Objections (“Response”).¹ The Montana Public Service

¹ Greycliff’s Response was combined with a Motion in Limine to Exclude Use of the PowerSimm Model. NorthWestern, in a separate pleading, has responded to Greycliff’s Motion in Limine.

Commission (“Commission”) should sustain NorthWestern’s objections based on the arguments below as well as those in the Objections filed previously.

ARGUMENT

I. GREYCLIFF’S RESPONSE IS NOT TIMELY.

Per Procedural Order No. 7436 (“Procedural Order”), ¶ 13, a response must be filed no later than seven calendar days from service of a motion. Greycliff’s Response fails to comply with the Procedural Order. On December 7, 2015, NorthWestern timely filed its Objections to certain discovery requests. Greycliff filed its Response twenty-three days later on December 30, 2015. Additionally, prior to the expiration of the seven-day period, Greycliff did not contact counsel for the parties asking for an extension of the response deadline. Since Greycliff did not file its Response within the required seven-day period, the Commission should enforce the requirements of its Procedural Order and reject the arguments made by Greycliff in the Response.

II. GREYCLIFF IS NOT ENTITLED TO RESPOND TO NORTHWESTERN’S OBJECTIONS TO COMMISSION DISCOVERY REQUESTS.

Greycliff responded to objections NorthWestern made to Commission discovery requests. Greycliff Response pp. 10-17. Greycliff is not entitled to argue in support of Commission discovery questions; there is no legal support for this. Greycliff’s response to these objections is inappropriate and the Commission must disregard it.

Procedurally, in this case, Greycliff and the Commission staff were each able to ask discovery questions regarding NorthWestern’s prefiled testimony. The discovery deadline was November 25, 2015. Both the Commission staff and Greycliff served discovery questions on NorthWestern on the deadline. The Commission discovery questions that NorthWestern objected to were not questions also posed by Greycliff. Notwithstanding that fact, Greycliff now tries to

argue that the information is important and the Commission should overrule NorthWestern's objections. If Greycliff believed that the information requested by the Commission was important, it should have asked those questions of NorthWestern by the required deadline. Greycliff cannot now argue in support of questions that it failed to ask. This is an inappropriate use of discovery. In making its decision regarding NorthWestern's Objections, the Commission cannot consider Greycliff's arguments regarding Data Requests PSC-020b, PSC-024, and PSC-025.

III. Reply to Objections regarding Greycliff discovery

NorthWestern provides the following arguments in support of its objections to portions of Data Requests GWP-006 and GWP-007. NorthWestern also objected to portions of GWP-010 on the same grounds as GWP-006 as the two questions were identical. Objection, pp. 4-5. Since Greycliff has agreed to withdraw GWP-010,² NorthWestern has not provided a reply in support of its objection to GWP-010. However, if the Commission refuses to grant the requested withdrawal, it should consider the arguments provided in support of objections to GWP-006 below when deciding NorthWestern's objection to GWP-010.

A. GWP-006

In support of its discovery questions, Greycliff asserts that because the Montana Rules of Civil Procedure are "modeled on the federal rules, resort to federal court jurisprudence is appropriate." Response, p. 7. This argument fails in this case given the applicable Rules of Civil Procedure. First, in support of its argument, Greycliff cites a non-published decision from the Montana Supreme Court. *In re Marriage of Cox*, 2015 MT 134N, 379 Mont. 535, 353 P.3d 506. As is unambiguously stated at the beginning of the Court's decision in that case, "this case is

² Response, p. 10.

decided by unpublished opinion and shall not be cited and does not serve as precedent.” *In re Marriage of Cox*, 2015 MT at ¶ 1. Additionally, even if it was a citable opinion, the matter at issue in that case involved Rule 11 of the Montana Rules of Civil Procedure, which the Montana Supreme Court recognized mirrored the federal rule and so it was appropriate to look at federal decisions involving interpretation of the rule. *Id.*, at ¶ 12. In this case, the applicable Montana Rule of Civil Procedure is Rule 26(b)(2)(C)(iii). In Montana, this specific subpart of the rule is no longer identical to the Federal Rules of Procedure; this subpart of the rule was amended on April 29, 2015, effective December 1, 2015. Given the amendment, any prior federal jurisprudence regarding the Federal Rule of Civil Procedure is no longer applicable to the Montana rule because they do not mirror each other. For these reasons, the Commission should reject Greycliff’s legal citations made in support of its position on NorthWestern’s Objections.

Turning to the substance of its Response, Greycliff asserts that NorthWestern should be required to produce the hourly generation information requested in discovery because it is not burdensome to NorthWestern and Greycliff is entitled to all hourly data and calculations used in NorthWestern’s avoided cost analysis. Response, p. 9. First, contrary to Greycliff’s assertion, production of the hourly data is burdensome. This information is not on NorthWestern’s system as alleged by Greycliff. It is located in the PowerSimm model at Ascend Analytics’ (“Ascend”) facilities, and it is estimated that it would take an Ascend representative close to a week to extract the hourly information from PowerSimm given the voluminous nature of the data. Per NorthWestern’s licensing agreement with Ascend, at an hourly rate of between \$200 and \$300, the cost of exporting all the hourly information is between \$8,000 and \$12,000. Secondly, and possibly more importantly, the reason this hourly data is still located in the PowerSimm model is that NorthWestern did not consider it when calculating the avoided cost rate for Greycliff.

NorthWestern exported the stochastically modeled monthly simulation results and used these outputs for the calculations of the avoided cost rate. NorthWestern has provided the monthly information in response to discovery. Greycliff criticizes NorthWestern for asserting that Greycliff would receive little benefit from the hourly information. Response, p. 8.

NorthWestern's conclusion is reasonable in light of the fact that NorthWestern did not need such granular data to compute the avoided cost rate. The monthly information was sufficient. Given the burdensome nature of the request and the fact that NorthWestern did not use the hourly information to calculate the avoided cost, the Commission should find that NorthWestern is not required to produce an estimated 100 million data points of information as it would impose undue expense and unreasonable burden on NorthWestern.

B. GWP-007

In response to NorthWestern's objection to GWP-007, Greycliff refers to its arguments regarding and response to NorthWestern's objection concerning GWP-006. In support of its objections to GWP-007, NorthWestern refers the Commission to its reply to GWP-006 above.

IV. Reply to Objections regarding Commission discovery

If the Commission rejects NorthWestern's argument above concerning Greycliff's inability to respond to objections regarding Commission discovery, NorthWestern replies in support of each objection to Commission discovery as follows:

A. PSC-020

In discovery, the Commission requested NorthWestern to calculate an avoided cost rate for Greycliff with the assumption that it was still a 20 MW project. *See* PSC-020b. NorthWestern objected to this request arguing that the resulting information would not lead to admissible evidence because Greycliff is no longer a 20 MW project and an avoided cost rate for a project

that size is not reasonably calculated to lead to discovery of admissible evidence. Objections, p. 5.

Even though Greycliff did not request an avoided cost rate for a 20 MW project, probably because that rate would be irrelevant to a project that is 26 MW, Greycliff now argues that the information is relevant because it is meant “to test the reliability, accuracy, and assumptions used by [NorthWestern] in calculating Greycliff’s avoided cost rate using PowerSimm.” Response, p. 13. It goes on to assert that “[i]f the rate is substantially different than that which [NorthWestern] now proposes, questions about the validity, reliability and accuracy of [NorthWestern’s] avoided cost calculations will arise and further lines of inquiry developed [sic].” *Id.* What Greycliff’s argument fails to acknowledge is that a rate for a 20 MW project is clearly going to be different from the rate for a 26 MW project. The main reason for this difference is the estimated generation output for the project, i.e., larger facility equals more generation. Greycliff provided the estimated generation output for a 26 MW project to NorthWestern. *See* Greycliff’s Response to Data Request NWE-013. As noted in NorthWestern’s prefiled testimony, “Greycliff’s avoided cost rate is dependent on when it estimates that it will be producing electricity and when that electricity is delivered to NorthWestern’s supply portfolio.” Prefiled Response Testimony of Luke P. Hansen, p. 4: 10-12. This information is the only information that would be different in a separate model run for a project that is 20 MW. Since it was Greycliff that provided this information, performing another model run for a 20 MW project will not “test the validity, reliability, accuracy, and assumptions” of NorthWestern as these were Greycliff’s assumptions.

Greycliff also argues, “The rules of civil procedure are premised upon a policy of liberal and broad discovery.” Response, p. 11 (citing *Patterson v. State*, 2002 MT 97, ¶ 15, 309 Mont. 381, 46 P.3d 642). This policy, however, does not negate the fact that discovery can be limited.

The Montana Rules of Civil Procedure specifically provide for limitations. Montana Rule of Civil Procedure 26(b)(2) provides that

Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically-Stored Information. A party need not provide discovery of electronically-stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Discovery must still be relevant to the claims at issue in the case.

Greycliff attacks NorthWestern's citation to *Henricksen v. State*, 2004 MT 20, 319 Mont. 307, 84 P.3d 38, and argues that it is inapplicable here because that case involved an appeal of a district court's discovery ruling. Response, pp. 11-12. The Commission should disregard this argument because it is irrelevant. Like the district court, the Commission is tasked with resolving discovery disputes. The point of the reference to the *Henricksen* case was to show that the Montana Supreme Court has upheld district court decisions that limited discovery to only relevant matters. Ultimately, regarding the claimant's financial documents, school transcript, and

personnel records, the Montana Supreme Court found that it was not an error for the district court to deny the State's request for production because the information was irrelevant to the claims at issue. *Henricksen*, 2004 MT at ¶ 44 ("The requested documents have no bearing on these [claimant's mental and emotional states] legitimate issues."). For these reasons, the Commission must not disregard the *Henricksen* case.

As noted in NorthWestern's Objections, avoided cost calculations are specific to the resource that NorthWestern must acquire in lieu of another owned or contracted-for resource. Neither federal nor state law requires avoided cost calculations to be based on alternatively sized similar projects. For these reasons, producing an avoided cost rate for a project that is not at issue in this case will not lead to discoverable information about the project that is at issue, and therefore, such an avoided cost rate is irrelevant. The Commission should sustain NorthWestern's objection to PSC-020.

B. PSC-024

i) PSC-024a

In PSC-024a, the Commission asked NorthWestern to re-run the discounted cash flow analysis ("DCF"), which it had first performed in the hydroelectric docket, with the forecast for energy and carbon prices used in this docket. NorthWestern objected to this request because the information sought was irrelevant. Objections, p. 7. Taking what NorthWestern paid for these facilities under then-current market conditions and comparing that to what NorthWestern might have paid in a fictional transaction under current market conditions will not change the result of the hydroelectric docket or the avoided cost calculation in this case.

Again, even though Greycliff did not ask NorthWestern to produce the information requested in PSC-024a, it now argues that the information is relevant and should be produced.

Response, pp. 14-15. It asserts that the question, similar to the question in PSC-020b, is meant to test NorthWestern's assumptions in this proceeding and that "[i]f there is substantial deviation in the projected avoided costs for Greycliff and a valuation of the hydroelectric facilities, it will tell the Commission something about the inputs, outputs, data selection, methodology and approach" of NorthWestern in this case. *Id.* Greycliff's argument, again, fails to recognize that of course there will be differences between the hydroelectric DCF analysis and the avoided cost calculation in this case. These are two distinct analyses performed for different purposes. A DCF analysis compared to an avoided cost calculation like the one performed in this case would be an "apples to oranges" comparison.

Greycliff also makes the untenable assertion that "[NorthWestern's] argument that the hydroelectric facilities are no longer avoidable is a red herring." Response, p. 14. The fact is that the hydroelectric facilities are part of NorthWestern's portfolio. Asking NorthWestern to change certain inputs in an analysis for a transaction that has already been approved will not lead to admissible discovery on the appropriate price to pay Greycliff for energy and capacity. For these reasons, the Commission should sustain NorthWestern's objection to PSC-024a.

ii) PSC-024b

Similar to PSC-024a, in PSC-024b, the Commission asked NorthWestern to re-run the Greycliff avoided cost calculation by substituting the forecast for energy and carbon prices with those used in the hydroelectric docket. NorthWestern objected to the request arguing that it sought irrelevant information because avoided cost calculations are prospective calculations and must be based on current information. Objections, p. 7. Greycliff claims that the information is relevant because it is meant "to test the results" of NorthWestern's modeling. Response, p. 15. Performing such an analysis will not test the results of NorthWestern's modeling. Clearly, the

avoided cost will be different because prices have declined substantially since NorthWestern's acquisition of the hydroelectric facilities. NorthWestern could substitute any number of figures in the model, and obviously, the model would produce different results. Substituting current information with irrelevant, stale information will not result in meaningful testing of NorthWestern's model. This inquiry will not result in discovery of admissible evidence, and therefore, the Commission should sustain NorthWestern's objection.

C. PSC-025

In PSC-025, the Commission asked for information regarding whether NorthWestern's owned and contracted-for resources were sufficient to meet customer needs before the acquisition of the hydroelectric facilities or what those needs were during certain hours of the day prior to the acquisition of hydroelectric facilities. NorthWestern objected to the request as irrelevant because it has no bearing on the legitimate issues involved in this docket. Objections, p. 9. Greycliff reasserts the arguments it made in response to objections regarding PSC-020 and PSC-024, claiming that the question was appropriate to test the "manner and method" NorthWestern used to calculate its avoided cost. Because Greycliff raised no new arguments in the response to the objection to PSC-025, NorthWestern refers the Commission to its arguments *supra* and in its Objections for support. The Commission should sustain the objection to PSC-025 as the information sought will not lead to the discovery of admissible evidence.

CONCLUSION

After considering the above arguments as well as those made in NorthWestern's Objections, NorthWestern respectfully requests that the Commission sustain the objections to GWP-006, GWP-007, GWP-010, PSC-020, PSC-024, and PSC-025.

RESPECTFULLY SUBMITTED this 19th day of January 2016.

NORTHWESTERN ENERGY

By: 
Sarah Norcott
John Alke

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that NorthWestern Energy's Reply in Support of its Objections to Data Requests Served on November 25, 2015 has been hand delivered to the Montana Public Service Commission and to the Montana Consumer Counsel this date. It has also been e-filed on the PSC website, emailed to counsel of record, and mailed to the remainder of the service list as follows:

Will Rosquist
MT Public Service Commission
Box 202601
Helena, MT 59620-2601

Monica Tranel
Montana Consumer Counsel
111 N. Last Chance Gulch Ste 1B
P.O. Box 201703
Helena, MT 59620-1703

Michael J. Uda
Uda Law Firm, P.C.
7 Sixth Street West
Power Block West, 4H
Helena, MT 59601

Patrick Pelstring
National Renewable Solutions
328 Barry Avenue, Ste. 100
Wayzata, MN 55391

Sarah Norcott
NorthWestern Energy
208 N. Montana Ave Suite 205
Helena, MT 59601

John Alke
NorthWestern Energy
208 N. Montana Ave Suite 205
Helena, MT 59601

Joe Schwartzenberger
NorthWestern Energy
11 E. Park Street
Butte, MT 59701

Pam LeProwse
NorthWestern Energy
11 E. Park Street
Butte, MT 59701

Date: January 19, 2016


Pam LeProwse
Administrative Assistant
Regulatory Affairs