

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

IN THE MATTER OF NorthWestern)	REGULATORY DIVISION
Energy's 2012-2013 Electricity Supply)	
Tracker)	DOCKET NO. D2013.5.33
)	ORDER NO. 7283h
IN THE MATTER OF NorthWestern)	
Energy's 2013-2014 Electricity Supply)	DOCKET NO. D2014.5.46
Tracker)	ORDER NO. 7283h

CONCURRING OPINION OF COMMISSIONER TRAVIS KAVULLA

After this case was finally submitted for the Commission's consideration, NorthWestern made public representations expressing disappointment that this Commission seemed poised to disallow the replacement-power costs associated with the Colstrip outage "when no other state utility commission has found the utility was imprudent."¹

One of the dissenters, meanwhile, published an opinion column in a Montana newspaper, apparently taking a cue from NorthWestern's communication on this subject, in which he claimed that the three commissioners signing this order "were the only commissioners of the four states (14 commissioners total) in the Northwest to deny these recovery costs."²

The first of these statements is misleading. The second is altogether untrue.

Let me first make clear that I regard this advocacy as improper. It appears nowhere in briefing, and it did not arise at hearing. Yet, the issue has been raised, albeit *ex parte*, and I believe it is useful to respond. To some degree I regret that the Order itself does not.

Let's begin with the claim that no other utility commission in the Pacific Northwest had refused to pass along the costs of the Colstrip Unit 4 outage to customers. This is inaccurate.

¹ Available online: <http://www.northwesternenergy.com/our-company/media-center/news-archive/news-archive-item/2016/03/29/Montana-Public-Service-Commission-Decision-Results-in-Supply-Cost-Disallowance-for-NorthWestern-Energy> (accessed May 12, 2016)

² Kirk Bushman, "Fighting for Inexpensive, Reliable Power," *Billings Gazette* (May 10, 2016). The column also relies on argument from an investor memo which was submitted outside the record by NorthWestern to Commission staff, and then to commissioners, in making its argument for allowing the pass-through of Colstrip outage costs to consumers. I am pleased that the Order relies exclusively on information within the record.

Pacific Power, which owns a share of Colstrip Unit 4, identified \$9 to \$12 million in replacement power costs resulting from the outage and requested “deferral accounting treatment for the replacement power costs, and for recovery of the deferred costs in base rates.”³ The Washington Utilities and Transportation Commission (WUTC) denied the petition, meaning that the utility and not consumers bore the cost of this outage.⁴

Likewise, in the case of Avista, the WUTC issued an order acknowledging that unexpectedly high power costs, in part owing from the Colstrip outage, had pushed the company’s costs above the historic baseline, which is embedded in rates. Of the slightly more than \$5 million in excess expense, more than \$4.5 million was ordered to be “absorbed by the Company,” while the remaining sum, only about 10 percent of the total, was passed along as a surcharge to customers.⁵

In other words, the dissenter is simply incorrect. Other utility commissions in the region have issued orders that unequivocally “deny these recovery costs,” as he puts it.

As to NorthWestern’s more nuanced claim—that no other utility commission had found “imprudence” to justify its decision—that claim may be accurate, but misses the point. Costs in other jurisdictions are often absorbed by a utility, or shared between shareholders and customers, even without a finding of imprudence. NorthWestern, on the other hand, avails itself of Montana’s generous tracker statute, which requires the Commission to pass along, dollar for dollar, all replacement-power costs of the outage, *so long as* they are prudently incurred—and *even if*, NorthWestern argues, there are potential other sources of offsetting revenue gains, such as labor-cost savings that result from the outage and which do not flow through to customers.⁶ This law confers importance to the prudence review because, unlike the regulatory framework that Avista is subject to, this Commission cannot simply rely on a cost-sharing mechanism as a check on the utility’s incentives in management and procurement, or as a vehicle to promote just and reasonable rates. In Montana, that work is left to the prudence review.

It is clear from the other states’ proceedings that intervenors would have been likely to challenge the prudence of the Colstrip outage, but did not because it was clear that the cost-

³ WUTC Docket UE-140762, Order 08 (March 25, 2015), at ¶254.

⁴ *Id.* at ¶263.

⁵ WUTC Docket UE-140540, Order 01 (July 10, 2014), at ¶16.

⁶ Post-Hearing Brief of NorthWestern Energy, (Nov. 24, 2015), pp. 13, 21.

sharing mechanisms of those jurisdictions would cause those utilities to absorb at least some, and occasionally all, of the costs of those outages regardless.

For instance, Portland General Electric, another Colstrip co-owner, reported that its variable net power expenses for the year 2013 were within the \$30 million “deadband, sharing mechanism” of historic annual costs, which meant that the company would receive no adjustment in rates to make up a loss or refund an amount up to that level. The Oregon Public Utility Commission (OPUC) concluded, “Given the amount of the reported variance (\$11 million) and the value of the deadband (\$30 million), the parties reasonably concluded that any issues they might raise would not likely be material in terms of effectuating a rate change.”⁷ In other words, that company, like Avista in Washington, was made to absorb the costs of the Colstrip outage, and no finding on prudence was even necessary.

Idaho appears to be the sole jurisdiction in the four-state region where these replacement-power costs *were* entirely recovered from consumers. That proceeding unfolded quickly, with the utility making a filing on July 30, 2014, the Idaho Public Utilities Commission (IPUC) noticing the application on Aug. 15 with a comment deadline of Sept. 15, and then on Sept. 30, 2014, the IPUC issued its order. That proceeding, in other words, left parties only one month to file comments—not testimony—and does not appear to have afforded any time for discovery or even an evidentiary hearing. It left only 15 days for the IPUC to issue an order on the matter. The circumstances of Idaho’s review of this matter and those of the Montana Commission are not comparable.

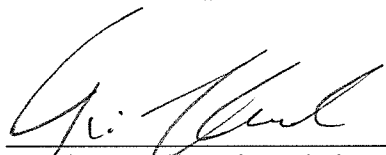
The Montana Commission, like all administrative agencies, is bound by the evidentiary record before us—not the one that exists in some other jurisdiction. It is beside the point for NorthWestern to imagine having a less well developed evidentiary record that includes “no evidence of imprudence,” when in fact the more well-developed record of this proceeding does include ample evidence of imprudence. Indeed, both dissenters have to reach to ignore the evidence of imprudence within the record, and to give NorthWestern an extraordinary benefit of the doubt as regards its burden of proof.

Each jurisdiction may have its different laws. But most utility regulatory statutes encourage a utility commission to ensure that a regulated utility has skin in the game for the performance of its assets in some way, shape, or form. Most utilities in this region are subject to

⁷ OPUC Docket UE 291, Order 14-345 (Oct. 3, 2014) at pp. 2-3.

a cost-sharing mechanism that renders moot a more in-depth prudence review. As we do not have such a mechanism in Montana, the relative importance of the prudence review is greater, and it is that review which gives meaning to the underlying objective of Montana law that rates be just and reasonable, and that only those costs that would be incurred in achieving adequate utility performance should be passed along to consumers. Montana law, and this Order, work this through their focus on prudence. NorthWestern, as is explained in the body of the Order, failed to act reasonably to mitigate the risk of an outage, and otherwise failed to demonstrate that the costs resulting from that outage were prudently incurred.

Therefore, I respectfully CONCUR with the Order,

A handwritten signature in black ink, appearing to read "Travis Kavutla", written over a horizontal line.

Travis Kavutla, Vice Chairman