Montana Public Service Commission

Brad Johnson - Chairman
District 5

August 22, 2017

Honorable Mary McNally
Chair, Energy and Telecommunications Interim Committee
P.O 201706
Helena, MT 59620-1706

Dear Chair McNally:

We write to you today to express our concerns regarding representations that NorthWestern Energy's Director of Government Relations, David Hoffman, made to the Energy and Telecommunication Interim Committee during its July 31 meeting. This letter corrects inaccuracies in Mr. Hoffman's comments, and responds to NorthWestern Energy's suggestions regarding statutory reform of the Commission.

NorthWestern's Financial Performance is Sound

Mr. Hoffman suggested recent Commission actions are impairing NorthWestern's financial performance. Despite Mr. Hoffman's rhetoric, shares in NorthWestern Corporation (NWE) have more than doubled in price over the last six years and its stock price remains near record levels. At the same time, the company's board of directors has continuously approved increases to its quarterly dividend payments to shareholders. Simply put, the numbers speak for themselves and plainly contradict Mr. Hoffman. Attachment A and B to this letter depict the performance of NWE over the last several years.

There are a number of reasons for NorthWestern's rising stock price over the last several years. One of the most important is NorthWestern's re-purchase of large power plants. The financial effect of this is a greater profit for each kilowatt-hour NorthWestern supplies to customers, because profit in utility regulation is primarily a function of the utility's capital investment. The company does not earn a return on expenses such as labor or purchased power; it does earn a return when it buys or builds a power plant. However, now that NorthWestern is a more mature

1701 Prospect Avenue • P.O. Box 202601 • Helena, Montana 59620-2601
Phone: 406-444-6169 • Fax: 406-444-7618 • Email: bjohnson@mt.gov

utility, 12 years removed from the repeal of deregulation, it is reasonable to expect that its growth would slow.

All things being equal, NorthWestern's strong financial performance is a welcome fact. However, the utility's stock price is not the barometer of whether the Commission is doing a good job or a bad one. The Commission is charged to balance the interests of the company's consumers and its shareholders. For example, the company's stock may rise on news that the costs of poor management decisions have been passed along by the Commission to NorthWestern customers. But that does not mean that this would be the right decision. The Commission takes an approach to regulation that leads us to base our decisions on the evidentiary record of a given proceeding.

The Commission is not Pursuing a Policy of Deregulation

In testimony before ETIC, and in editorials across Montana's major newspapers, NorthWestern has compared the Commission's recent decisions in dockets D2016.5.39[1] and D2016.12.103[2] to the policy of deregulation. This characterization is not accurate. It diminishes the significance of that period in history, and it distracts legislators from substantive issues.

Deregulation, sometimes called restructuring, is the policy of permitting consumers to choose their own supplier, and forbidding the incumbent regulated utility from owning generating assets. Rather than having an energy supply rate established by the Commission, competitive retail suppliers sell to consumers at whatever price the market will bear. The incumbent utility, meanwhile, functions primarily as a "poles-and-wires" company and, for customers who have not switched to a competitive supplier, as a "default" supplier which relies on the open market

---

[1] *In the Matter of NorthWestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase*, Dkt. D2016.5.39, Order 7500c (July 21, 2017) available online at: http://www.psc.mt.gov/Docs/ElectronicDocuments/DocketList.asp (Accessed August 16, 2017)

[2] *In the Matter of the Petition of MTSUN, LLC to Set Terms and Conditions for Qualifying Small Power Production Facility Pursuant to M.C.A. § 69-3-603,* Dkt. 2016.12.103, Order 7535a (July 21, 2017) available online at: http://www.psc.mt.gov/Docs/ElectronicDocuments/getDocumentsInfo.asp?docketId=11885&do=false

for all its remaining customers' needs. That is deregulation, and nothing about it describes the current situation in which NorthWestern, the Commission, and Montana consumers exist.

NorthWestern today owns enough generation to supply roughly 68 percent of its load. It has a captive set of customers from which it is legally permitted to recover the cost of these purchases. Far from advocating deregulation, the Commission is exercising caution about how the remaining one-third of NorthWestern's customers supply needs should be filled. Much like an individual's stock portfolio, a utility's portfolio of energy supply probably should have a balance of longer and shorter term arrangements, as well as a diverse mix of fuels. NorthWestern, meanwhile, appears to be arguing that it should own everything and anything, exclusively on long-term arrangements, and should rely entirely on gas-fired generation for its future needs.

The Commission wants to take a more cautious approach before consumers are locked into long-term arrangements the state's policymakers may later regret. Interestingly, the only consumers who do have a legal choice in where to buy electricity—a handful of large customers including Montana's refineries and cement plants—have relied on short-term contracts and have shown no interest in taking service from NorthWestern, notwithstanding the utility's representations that its customers benefit from the "price stability" offered by a portfolio weighted to long-term arrangements. The Commission's recent orders[3] would require energy supply arrangements for NorthWestern Energy to be justified in comparison to a 10-year projection of forward market prices.

NorthWestern has not Disclosed to Legislators Its Advocacy for the Policy It Now Opposes

Curiously, NorthWestern supported shorter contracts for renewable Qualifying Facility (QF) resources and praised the Commission's decision as recently as late July, with a company executive writing in an op-ed, "the PSC acted in the best interests of our customers with its actions regarding setting a fair and competitive price for solar power."[4] Mr. Hoffman told ETIC

---

[3] Order 7500c; Order 7535a

[4] John Hines, "PSC made the right decision on solar prices," *Helena Independent Record* (July 25, 2017), available online at: http://helenair.com/opinion/columnists/psc-made-the-right-decision-on-solar-prices/article_c10c7274-ec48-5390-bbb0-27a4f7ee7d0b.html (accessed Aug. 16, 2017).

precisely the opposite. It is disconcerting that NorthWestern fundamentally changes its position, depending on the circumstances and the audience to which it is speaking.

In making its decision, the Commission listened closely to what all parties had to say. In testimony submitted to the Commission, NorthWestern witness Bleau LaFave testified that long-term, 25-year QF contracts impose undue forecast risk on customers, advocating for a shorter term of 10 years.[5] A Montana Consumer Counsel economist, Jamie Stamatson, provided similar testimony, proposing a term of no more than 6 years.[6] The Commission agreed with those parties, and found that the market-forecast risk that these witnesses identified applied equally to utility-owned generation, as well as QFs. Only when the Commission applied NorthWestern's recommendation to NorthWestern itself did the company take a 180-degree turn, and begin to oppose the Commission's decision.

NorthWestern's Position is Inconsistent with Montana Law and Adverse to Customer Interests

NorthWestern now claims that the Commission's decision violates the Electric Utility Industry Generation Reintegration Act of 2007, which was enacted through House Bill 25. Nowhere does the law guarantee NorthWestern a franchise to build or buy power plants equal to the entire needs of their customer base. Indeed, the law explicitly provides that NorthWestern can meet its needs through the procurement of "electricity supply resources" which include not only utility-owned power plants but "contracts for electric capacity and generation" as well as several other instruments such as demand response from customers. Mont. Code Ann. § 69-8-419(1)(c), 69-8-103(9).

Additionally, the Commission has documented its concerns that NorthWestern's energy supply planning process is not fulfilling its statutory mandate to "conduct an efficient electricity supply

---

[5] Add'l Issues Test. Bleau LaFave at 3:18, Dkt. D2016.5.39 (Nov. 9, 2016), available online at: http://psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/D2016-5-39IN16110948801TE.PDF (accessed August 16, 2017).

[6] Add'l Issues Test. Jaime Stamatson at 4:12, Dkt. D2016.5.39 (Nov. 9, 2016), available online at: http://psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/D2016-5-39IN16110945293TE.PDF (accessed August, 16, 2017).

resource planning and procurement process that evaluates the full range of cost-effective electricity supply and demand-side management options." Mont. Code Ann. § 69-8-419(2). The Commission recently issued extensive comments in this regard, prior to issuing the orders in question at the last ETIC meeting.[7] The law clearly stands for the proposition that the utility may own generation, but only to the extent that it contributes to a diverse portfolio that minimizes long-term costs and risks for customers. The Commission is implementing the Legislature's policy through its actions.

It is also important to note that the Commission's ruling is in line with the thinking of other utility regulators and utilities in the Western United States. Avista Corporation, headquartered in Spokane, Wash., recently signed a 10-year agreement, with a hydro operator, with deliveries set to begin in 2021.[8] The Oregon Public Utilities Commission, meanwhile, recently rejected Portland General Electric's (PGE) long-term resource acquisition strategy and instead "approved of PGE issuing a [request for proposals] for short- to medium-term resources."[9] PGE, like Avista, has entered into a 10-year contract for hydro capacity. Far from being an outlier, the Montana Commission is following best practices that are typical in the region.

NorthWestern's Proposals for Legislation are Either Anti-Consumer or Redundant

NorthWestern's dissatisfaction with the Commission's cautious approach to its build-out plans have led the company to advocate for harmful, anti-consumer changes to the statutory framework governing the Commission.

---

[7] The Commission is required by law to document its concerns with NorthWestern's planning process. *See* Mont. Code Ann. § 69-8-420. *Comments of The Mont. Pub. Serv. Comm. On NorthWestern Energy's Resource Procurement Plan*, Dkt. N2015.11.91 (Feb. 2, 2017), available online at: http://psc.mt.gov/Docs/ElectronicDocuments/pdfFiles/N20151191Comments.pdf (accessed Aug. 16, 2017).

[8] Kimberlee Craig, "Two new power contracts will add $40 million to PUD bottom line," Chelan County P.U.D, (Aug. 8, 2017), available online at: https://www.chelanpud.org/about-us/newsroom/news/2017/08/08/two-new-power-contracts-will-add-$40-million-to-pud-bottom-line (accessed Aug. 16, 2017).

[9] "OPUC Rejects Renewables, Capacity RFPs Proposed in PGE IRP," *Clearing Up* (No. 1812, Aug. 11, 2017), p. 10.

In a follow-up communication transmitted to ETIC on Aug. 2, 2017, Mr. Hoffman made four recommendations. Each of them should be rejected.

1. Reinforce the policy of HB 25 and re-regulation which allowed and encouraged re-creation of a vertically-integrated utility and regulatory treatment of utility-owned generation; reject the PSC concept of symmetry.

It is difficult to understand why NorthWestern believes, as a matter of policy, that it should have a right to exclude others from developing power generation and selling it to a utility under contract. Most of the new investment in power generation in Montana has come from third parties, not NorthWestern. If the legislature adopted this as a policy, it would likely destroy the remaining Independent Power Producer community and lead to less energy investment in Montana over time. The current policy provides for robust planning and procurement designed to supply the consumer with a balanced portfolio. If a third party can provide energy supply for lowest cost and lower risk than NorthWestern itself, it is not reasonable to introduce a statutory bias in favor of NorthWestern.

2. Require a legislative audit of the PSC every four years, including consultation with stakeholders

The Commission's activities are already subject to comprehensive financial and compliance audits in accordance with Mont. Code Ann. § 5-13-304. In addition, the Commission, unlike many agencies in the executive branch, is led by five elected commissioners. The ultimate audit is their election or defeat at the ballot box.

3. Mont. Code Ann. § 69-1-110 [Conduct of Commission business] Require Commission compliance with the Montana code of judicial conduct in its quasi-judicial role.

The Commission is already subject to a code of ethics, statutorily codified in Chapter 2 of Title 2, Standards of Conduct. The Commission also follows the requirements which every agency must follow, which are spelled out in the Montana Administrative Procedures Act, codified in Chapter 4 of Title 2.

Important protections already exist for NorthWestern if it feels the Commission is not acting within its statutory role. Specifically, it may appeal any Commission decision to the state's

district courts and then to the Supreme Court. NorthWestern has often used this remedy, filing six lawsuits in the last four years.[10] Of those six lawsuits, three were decided in favor of the Commission, one was withdrawn by NorthWestern, and two are still pending. Given this track record, it is difficult to understand what perceived abuses Mr. Hoffman's radical restructuring of the Commission would correct.[11]

NorthWestern's criticisms also overlook that public service commissioners are not judges—and are not meant to be. As NorthWestern observes, our role is *quasi*-judicial. It borrows from judicial practice. For instance, *ex parte* communications are prohibited and our decisions in contested cases must be based on record evidence. Mont. Code Ann. §§ 2-4-613, 2-4-623(2). But we are also expected to be pro-active, to investigate when we see something going amiss, and to inspect the company's books and records regularly; our governing title in Montana code is replete with statutes that provide for the Commission or commissioners to undertake things which judges would not. Mont. Code Ann. §§ 69-3-202 (Records of public utilities), 69-3-324 (Initiation of action by commission itself). The Montana Bar recognized this distinction when it specifically excluded quasi-judicial officials when the codes of conduct were put into place. There is an abundant literature on this topic, which explains the historical differences between Commissions and courts.[12]

---

[10] *NorthWestern Corp. v. Mont. Pub. Serv. Comm'n,* ADV-2015-459 (Mont. 1st Jud. Dist. Ct. Jul. 24, 2015); *NorthWestern Corp. v. Mont. Pub. Serv. Comm'n,* DV-13-399 (Mont. 2nd Jud. Dist. Ct. Dec. 20, 2013); *Havre Pipeline Corp. v. Mont. Pub. Serv. Comm'n*, DV 2016-4 (Mont. 7th Jud. Dist. Ct. Apr. 12, 2016); NorthWestern Corp. v. Mont. Pub. Serv. Comm'n, CDV 2013-37 (Mont. 1st Jud. Dist. Ct. Jan. 18, 2013); *NorthWestern Corp. v. Mont. Pub. Serv. Comm'n,* DV-16-1236 (Mont. 13th Jud. Dist. Ct. Sept. 14, 2016; *NorthWestern Corp. v. Mont. Pub. Serv. Comm'n,* DDV 2016-495 (Mont. 1st Jud. Dist. Ct. Jun. 15, 2016);

[11] There may be institutional problems that exist in the litigated practice of utility regulation. Since NorthWestern's legal staff is included within the rates that customers pay, customers are essentially paying to litigate against their own interests. The company appears to bear few, if any, costs of unsuccessful litigation. In light of NorthWestern's history of unsuccessful court challenges, it may be useful for the legislature to subject the company to additional checks and balances. The legislature may want to consider enacting a statute to direct the Commission to disallow the costs of litigation when NorthWestern does not prevail in a lawsuit, so that frivolous litigation is discouraged.

[12] See Scott Hempling, "Commissions Are Not Courts; Regulators Are Not Judges," *Preside or Lead? The Attributes and Actions of Effective Regulators*, available at the Commission's library or online at http://www.scotthemplinglaw.com/preside-or-lead.

4. Require the Commission to use hearing examiners from Department of Justice Agency Legal Service in investigative or discovery activities in any matter.

Finally, Mr. Hoffman's suggestion to require the use of DOJ hearing examiners in contested case proceedings is needlessly bureaucratic and counterproductive. MAPA specifically provides that "a hearing examiner must be assigned with due regard to the expertise required for the particular matter." Mont. Code Ann. § 2-4-611(1). This is for good reason. As ETIC members are aware, utility regulation is a highly technical subject, and DOJ attorneys would be poorly equipped to understand it compared with the Commission's own attorneys, who advise the commissioner chairing a hearing and who draft orders for the Commission's review. Additionally, having an intermediate hearing examiner would create more bureaucracy, as the examiner's rulings would be appealable to the Commission and then to the district court. Adopting this cumbersome process would be a very bad idea.

The Commission looks forward to working with ETIC. As we did when we addressed you on July 31, we encourage you to read the Commission's orders carefully before passing judgment on our decisions. We also encourage you to treat Mr. Hoffman's claims with an appropriate measure of skepticism. NorthWestern is a formal party to the Commission's contested cases. As NorthWestern is aware, the Commission must judge cases based on record evidence; anything outside of that record may not be considered by law. Mont. Code Ann. § 2-4-623(2). Paradoxically, even while NorthWestern urges the Commission to behave judicially, it is attempting to undermine the foundations of the quasi-judicial protections that MAPA provides, injecting outside political pressure into our decision-making process. This is improper, and the Commission respectfully requests that ETIC allow our reconsideration process to unfold in accordance with law. Every party except for the Montana Consumer Counsel has asked the Commission to reconsider its recent orders, and we are closely examining the 180 pages of filings that have been made.

Respectfully,

BRAD JOHNSON, Chairman

TRAVIS KAVULLA, Vice Chairman

Enclosures

CC: ETIC Committee Members
Montana Public Service Commissioners
Bob Rowe, CEO, NorthWestern Energy
David Hoffman, Director of Government Relations, NorthWestern Energy
Trevor Graffe, ETIC Lead Staff

Attachment A.

NorthWestern Energy Stock Price

Source: Yahoo Finance

Attachment B.

NorthWestern Energy Dividend History

NorthWestern Energy
Delivering a Bright Future

Emergency? 24/7 Service // (888) 467-2669 (MT) (800) 245-6977 (SD/NE)

Dividend History

PAYMENT DATE	RECORD DATE	AMOUNT
2016		
March 31	March 15	50 cents
June 30	June 15	50 cents
September 30	September 15	50 cents
December 31	December 15	

2015		
March 31	March 13	48 cents
June 30	June 15	48 cents
September 30	September 15	48 cents
December 31	December 15	48 cents

2014		
March 31	March 14	40 cents
June 30	June 13	40 cents
September 30	September 15	40 cents
December 31	December 15	40 cents

2013		
March 31	March 15	38 cents
June 30	June 14	38 cents
September 30	September 14	38 cents
December 31	December 13	38 cents

2012		
March 31	March 15	37 cents
June 30	June 15	37 cents
September 30	September 14	37 cents

December 31	December 14	37 cents

2011		
March 31	March 15	36 cents
June 30	June 15	36 cents
September 30	September 15	36 cents
December 31	December 15	36 cents

2010		
March 31	March 15	34 cents

June 30	June 15	34 cents
September 30	September 15	34 cents
December 31	December 15	34 cents

2009		
March 31	March 15	33.5 cents
June 30	June 15	33.5 cents
September 30	September 15	33.5 cents
December 31	December 15	33.5 cents

Source: http://www.northwesternenergy.com/our-company/investor-relations/dividend-history