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

IN THE MATTER OF the Montana Public Service ) REGULATORY DIVISION  
Commission's Review of Rates to Recover )  
NorthWestern Energy's Electricity Supply Costs ) DOCKET NO. 2017.5.39

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**NorthWestern Energy's Motion to Strike and Memorandum in Support**

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NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") moves the Montana Public Service Commission ("Commission") for an order striking from the administrative record the document identified as the Pre-filed Direct Testimony of Martin Wilde on behalf of WINData, LLC. Not only was this document filed after the deadline for filing testimony, this document is not testimony, since Mr. Wilde died weeks before the November 28, 2017 date on the document.

Recently, in Order No. 7084q in Docket No. D2010.2.14, the Commission addressed the issue of whether a decedent's prefiled testimony was admissible. In that case, a live witness had submitted prefiled testimony and subsequently died before the hearing. NorthWestern did not

have an opportunity to cross-examine the witness. After considering the Montana Rules of Evidence and applicable case law, specifically the “Confrontation Clause,” the Commission determined that since NorthWestern did not have an opportunity to cross-examine the witness, it was unconstitutional to admit the testimony into the evidentiary record. The Commission found that the testimony was hearsay and that no hearsay exceptions applied that would allow admission of the testimony.

If faced with the same set of facts regarding the admissibility of a decedent’s prefiled testimony, the Commission should again rule that it would be unconstitutional to admit the testimony into the evidentiary record. In this case, however, the Commission must go a step further and strike the “testimony” from the administrative record. This Commission action is necessary because the witness in this case, Mr. Wilde, died before the “testimony” was filed and the “testimony” was dated more than two weeks after his death. Mr. Wilde died on November 11, 2017. WINData filed a document, dated November 28, 2017, identified as the prefiled testimony of Mr. Wilde. It was impossible for Mr. Wilde to draft testimony dated November 28, 2017, since he was deceased at the time.

Consequently, the document filed on behalf of WINData is merely that – a document. Testimony is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *State v. Mizenko*, 2006 MT 11, ¶ 11, 330 Mont. 299, 304, 127 P.3d 458, 461. Because Mr. Wilde was not living as of the date on the document, November 28, 2017, he was incapable of making a declaration or affirmation. The document is not signed and Mr. Wilde cannot attest to whether it is his testimony or not.<sup>1</sup> It would be ridiculously absurd for the

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<sup>1</sup> Again, it would be impossible for Mr. Wilde to sign a document dated weeks after his death.

Commission to allow an unsigned document described as testimony from a deceased person into the administrative record.

The procedural schedule provided WINData the opportunity to file testimony by November 27, 2017. WINData failed to meet that deadline. The Commission has no choice but to strike the document from the administrative record.

Respectfully submitted this 8th day of December 2017.


NORTHWESTERN ENERGY

By: Ann B. Hill  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of NorthWestern Energy's Motion to Strike and Memorandum in Support in Docket No. D2017.5.39 has been hand delivered to the Montana Public Service Commission and the Montana Consumer Counsel this date. It has also been e-filed with the Montana Public Service Commission, emailed to counsel of record, and served upon the remainder of the service list by postage prepaid via first class mail as follows:

Date: December 8, 2017

  
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