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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 Commission's Review of Rates to Recover NorthWestern Energy's Electricity Supply Costs	REGULATORY DIVISION DOCKET NO. D2017.5.39
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**OPPOSITION TO NORTHWESTERN'S
MOTION TO STRIKE TESTIMONY OF MARTIN H. WILDE**

WINData opposes NorthWestern's motion to strike the pre-filed direct testimony of Martin H. Wilde. NorthWestern's objection is based on two arguments: 1) there is no foundation for the testimony; and 2) the testimony was filed on November 28, 2017 and the deadline for intervenor testimony was due November 27, 2017. Striking Mr. Wilde's pre-filed direct testimony violates WINData's due process rights and prematurely addresses a question of admissibility.

Facts

1. Intervenor testimony was due on November 27, 2017. WINData had a pending motion to stay the proceedings in this docket due to the death of Mr. Wilde. The Commission denied WINData's motion to stay on November 28, 2017. In response to that action by the Commission, on November 28, 2017, WINData filed the final

version of Mr. Wilde's pre-filed direct testimony as drafted by Mr. Wilde.

2. On Tuesday, November 10, at approximately 5:30 p.m., Martin Wilde sent revisions to his testimony to counsel. Mr. Wilde was in a fatal accident the morning of November 11, 2017. The final version of the testimony prepared by Mr. Wilde was submitted to the Commission as Mr. Wilde's prefiled direct testimony.
3. NorthWestern's argument is predicated on its statement that "it was impossible for Mr. Wilde to draft testimony dated November 28, 2017, since he was deceased at the time." As NorthWestern itself is aware witnesses generally do not draft and file testimony in a single day. Mr. Wilde's testimony was drafted by Mr. Wilde prior to his death, as this Commission and NorthWestern are aware of based upon WINData's supporting briefs in its motion to stay this docket.
4. WINData is entitled to have a substitute witness sponsor the testimony of Mr. Wilde, a process NorthWestern has utilized numerous times in varying dockets.
5. As of December 18, 2017 the Commission has identified additional issues in this docket and is contemplating an extension of two months for this docket to be resolved.

Argument

Taking NorthWestern's arguments in reverse order, Mr. Wilde's testimony as drafted by Mr. Wilde was submitted to the Commission the same day the Commission denied WINData's motion to continue, and within twenty-four hours of the rescheduled deadline for intervenor testimony. NorthWestern has sent data requests on that testimony to WINData. There is no reasonable basis to strike Mr. Wilde's testimony as one day late under these circumstances. To do so would be a violation of due process considering the events that took place.

Regarding NorthWestern's argument to strike testimony upon which it has served data requests, Mr. Wilde's estate will make decisions as to how the litigation continues. NorthWestern is familiar with the process where witnesses are substituted for previous witnesses who submitted prefiled direct testimony and sponsor the testimony as if it were the new witnesses' own. It utilizes this procedure itself. Montana Rule of Civil Procedure 25 provides for the substitution of parties and continuance of proceedings upon the death of a party. In the context of a criminal case, the Montana Supreme Court held that abatement of a case ab initio upon death of a party is "an inappropriate resolution of a case" and reversible error. See *State v. Benn*, 2012 MT 33 ¶ 8, 274 P.3d 47, 364 Mont. 153 (Mont. 2012). Striking Mr. Wilde's testimony at the outset without allowing WINData the opportunity to present a sponsor of the testimony violates due process, is inconsistent with NorthWestern's and the Commission's history of allowing substitution of witnesses, and has the effect of abating WINData's participation in this docket.

NorthWestern cites Commission Order 7084q in Docket No. D2010.2.14 as support for its request to strike Mr. Wilde's testimony from the administrative record. In that Order, the Commission excluded testimony from Mr. Simon from the evidentiary record, based on an analysis that may or may not withstand challenge, and that was also, by the Commission's own acknowledgement, predicated on a dearth of Montana case law. The Commission explicitly included the testimony in the administrative record. Order No. 7084q, para. 33.

Mr. Wilde's death should not result in a complete trampling of due process to excise WINData from this docket. NorthWestern has opposed WINData's participation from the outset, but there is simply no legal basis upon which Mr. Wilde's testimony may be stricken from the administrative record. Questions as to foundation and admissibility are for a later date and are

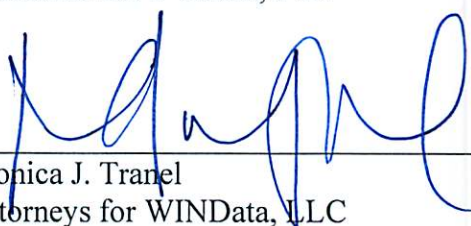
premature now. NorthWestern and other parties' will have an opportunity to cross-examine the sponsor of Mr. Wilde's testimony and address issues of foundation. Striking Mr. Wilde's testimony prematurely from the administrative record, while data requests on that testimony are pending from NorthWestern, and before WINData has had an opportunity to tender a witness to sponsor the testimony for inclusion in the evidentiary record, would have the result of abating WINData's participation in this docket ab initio simply because of the death of Mr. Wilde. Such a decision would be reversible error. NorthWestern failed to cite or distinguish the Montana Supreme Court's controlling precedent on this question in its motion.

Conclusion

NorthWestern's motion should be denied and WINData's participation in this docket must be allowed to continue. Abating WINData's participation ab initio would be reversible error.

DATED this 18th day of December, 2017.

TRANEL LAW FIRM, P.C.



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CERTIFICATE OF SERVICE

I certify that on the 18th day of December, 2017, a true and accurate copy of the foregoing was electronically filed with the Montana Public Service Commission and duly served upon the parties listed below by depositing the same, postage prepaid, in the Unites States mail to:

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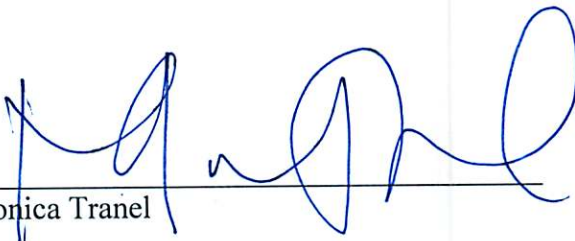
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